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## ROMANIAN PERSPECTIVES AND CHALLENGES IN POSTING OF WORKERS DIRECTIVES

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### Abstract

In the context of transnational services provision, on the framework of COM(2016)128, the Posting of Workers Directive 1996/71/EU and 2018/957 lay down the legislation applicable to the employment relationships as a specific instrument of free movement of persons while achieving the internal market [Directive 1995/71/EU (1), (2) and (3)]. The transnational services are increasingly provided, based on the posting workers mechanism. This mechanism is a particular case of labour mobility where the employees work under the (an EU) source labour market rules, but carrying out services in (an EU) host country, on a temporary basis and without integration on the labour market's host country. The EU's states heterogeneity among the level of labour protection standards demands under the Directive 1996/71/EU the minim rights and working conditions guarantee. The need to develop the internal market further while both business and workers have to contribute to EU increase economy competitiveness under the decent work agenda, demands new progress in the posting of workers. In this context, we analyse the main characteristics of the current situation and some challenges requested by an administrative management of the posting workers in Romania. Conclusion emphasises the priority of better exploiting the administrative sources of the posting workers as official statistical sources for better measurement and monitoring, a part of the *Internal Market Information System* (EU- IMI System).

**Keywords:** posted workers, transnational services provision, internal market, administrative management

**JEL Classification:** J61, J83, F16, M16, M55

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### Introduction

In the context of transnational services provision, on the framework of COM(2016)128, the Posting of Workers Directive 1996/71/EU lay down the legislation applicable to the employment relationships as a specific instrument of free movement of persons while achieving the internal market [Directive 1995/71/EU (1), (2) and (3)]. The Enforcement Directive 2014/67/EU brings supplementary clarifications and a better monitoring framework of transnational posting of workers brought by the on the enforcement of Directive 96/71/EC and amending **Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System** ('the IMI Regulation').

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**The Enforcement Directive 2014/67/EU** “aims to strengthen the practical application addressing fraud, circumvention of rules and exchange of information between the Member States” **demanding a new legislative framework** at the national level, compulsory since 18 June 2016. The need to further develop the internal market while both business and workers have to contribute to EU increase economy competitively under the decent work agenda demands new progress in the posting of workers. Since 8th of March 2016, the EU Commission launched a large debate on the revision of the rules on posting of workers, next to current rules to adopt new ones, mainly “foresees that posted workers are subject to equal pay and working conditions as local workers”.

Another direction of discussion, for posted workers domain, is subordinated to the decent work agenda applied in production chains. The transnational production chains are shaped by the **globalisation and developments in technology and demographics**, looking for guarantee a minimum basis of rights but “also to tailor development to values and principles of action and governance which combine economic competitiveness with social justice.” (COM 2006 249 final, p.2-3) The concept and value of **decent work** are incorporated by the Community acquis, in the fields of *employment, social policy and equal opportunities* (ILO, 2008, p.3). The community acquis next to ILO standards is implemented at national level by “labour administration and inspection, trade union freedom, collective bargaining and minimum standards regarding social security”. (COM 2006 249 final, p.4)

#### **Challenges resulting from the implementation of the Directive 1996/71/EU at EU level**

Richard (2014, p1) points that the posted workers start since 1974 as a regulation of social law in host countries. In 1996 the Directive 71 covers for EU15 countries with a homogenous labour cost. The initial heterogeneity regarding labour cost from the third EU enlargement wave – when Spain and Portugal in 1986 join EU, was increasing more and more and accentuate this gap when Central and Eastern Europe Countries joined (closing with the 6th wave was of entering Romania and Bulgaria). Posting of workers started to be accompanied with “fraud and social dumping and even modern slavery”. Fraud manifests in a large scale of actions, from “deductions for housing and transport costs, unpaid wages, lack of social protection, the hazardous nature of the work undertaken, unsatisfactory lodgings”, not declaring the posted workers to the responsible institution from the host countries, fake posting of workers when declaring “phantom” address location in low cost countries, and, at limit, points to “modern slavery” referring the case of Romanian agricultural workers housed in Calabria” (Richard, 2014, p5).

The interest for this instrument of labour mobility was also powered by other reasons, linked to demographic, economic, competitiveness reasons like:

- the increasing presence of “**labour shortage in certain sectors**”, especially in developed countries with aged population;
- the increasing demand for skilled persons for a temporary duration – offering the advantage of diminishing the migration of population;
- **accelerating the recruiting** of Human resources and decreasing its costs;
- represents a mean to “counter unemployment” in some states (Richard, 2014, p4);
- the need to “create an environment which is conducive to national and foreign investment **in the creation of jobs at local level**; improve governance, including the social dialogue; identify shortcomings with regard to decent work; establish a legal and regulatory framework to protect workers and ensure equality between men and women; establish viable systems of social protection, education and lifelong learning; ensure legal certainty for businesses; reduce corruption and establish fair rules for competition. Promoting decent work in this way is also a need felt by (COM 2006 249 final, p.4)”
- De Wispelaere and Pacolet (2016, p.9 ) identify as overall economic value and impact of posting, next to stimulate intra-EU labour mobility and competition the posting

workers as a tool to ”increase the household income of the posted workers, a tool to support adjustment shocks and also a tool to create social convergence”.

Directive 2014/67/EU is the EU Commission response to the Belgium complaint about unequal competition base by the case of the German abattoirs. (Richard, 2014, p5).

### Next steps to be take in consideration

Tacu (2015, p.624) emphasise that the phenomenon of “Posting of workers” is a very complex endeavour, placed at “the intersection of at least three levels of conflict: **economic versus social, national versus European and developed versus emerging**. On the other hand, the theme of transnational posting of workers defined by theoretical concepts belonging to several scientific domains, from human resources management and labour relations, continuing with the European and national law and ending with labour macroeconomics, business internationalisation and workers mobility”. This complexity is accentuated by “the influence networks, linguistic characteristics, mobility-migration traditions, and types of geographic proximity”. (Tacu, 2015, p.628).

Padersini and Pellini (2010, p. 33) advise to careful “assessment of the potential impact of the Directive on posting of workers – firstly, **regarding the impact on the national labour regulations and industrial relations systems** and secondly regarding **the impact on the balance between economic freedoms and fundamental social rights**. The specificity of the EU idea is not to establish a definite hierarchy for solving the two potential dichotomies of national versus European, and economic versus social, but rather to find a progressive combination between these different poles”. (Padersini, Pallini, 2010)

Voos & Maack (2016, p 64) concludes that there is still the need to:

- “provide greater clarity regarding the dual objectives of the PWD with regards to fair treatment of service providers and workers' protection;
- combat not only major forms of abusive practice but also unfair competition and unequal treatment of posted workers;
- simplify regulation and provide better information to both the workers and employers involved in posting;
- respect national systems of industrial relations, as well as the autonomy of social partners to regulate in the field of labour law and employment terms and conditions”.

All these challenges demand a ”need to identify complex models capable of synthesising mechanisms involved in this variety of European mobility management of human resources”. (Tacu, 2015, p.624). Modelling needs indicators and data as inputs, measured comparatively at EU level, in the framework of the EU 1996/71 Directive.

### Methodology and measurement

The main data source for estimating the posted workers at EU level is based on Portable documents A1 (PD A1). Portable Documents A1 (PD A1) is ”a formal statement on the applicable social security legislation” according to Article 12 of Regulation (EC) No 883/2004.

Portable Documents A1 (PD A1) –as administrative source presents some limits. The A1 measurement of posted workers fails to estimate these “real” numbers because:

- There are methodological differences given by the administrative instrument used to measure the posted workers. The social security objective stated by the Regulation (EC) No 883/2004 cover a larger categories typologies than the Directive 1996/71/EU. The Regulation looks at the in employment person in general, including the self-employed persons while the directive excluded it, covering only the employed persons (under temporary dependent contract);
- The geographical area where the services are provided by the posted workers could be larger, beyond the borders of 2 states, covering simultaneously more than 2 host

countries: “workers active in two or more Member States may fall under the terms and conditions of the Posting of Workers Directive, and thus be considered as 'posted workers'.” (Pacolet et.al., 2016, p.9)

- The number of PD A1 is larger than the number of individual persons working as posted workers. Pacolet et.al.(2016, p.10) estimates that that, on average, each person has been posted 1.9 times during the observed period (2015) respectively 54% of the total numbers of PDs A1 and in the case of posted workers active in more than 2 states “on average, each person received some 1.2 PDs A1 during reference year”, respectively 84% of the total numbers of PDs A1 express the individual persons working as posted workers;
- the number of posted workers **had been underestimated**, as a consequence of fraud practices, some companies do not fill the documents in the host country and do not declare the posted workers ” Richard, 2014, p2);
- There are initiated pilot projects at EU level in view to consolidating the administrative capacity to increase informational transparency and better access to information and data characterising posted workers. A recent example is the Project: “VP/2016/006/0037 EU Post-Lab: Developing experiences of administrative cooperation and enhanced access to information in the framework of the posting of workers”. This project aims to ”support administrative cooperation and information exchange at a transnational level between paritarian social funds of the construction sector, and to pave the way for a gradual enlargement of information shared and of the bodies involved thanks to the creation of a network of stakeholders in 10 EU countries and Turkey”.

The complexity of the phenomenon of posting workers **is not described by the official statistics**. Posting of workers is phenomenon with increasing practice, and on the internal market background presents the huge potential to become: “**European model for mobility of Human Resources**” (Tacu, 2015). The highly interdisciplinary character of this phenomenon requests innovative solutions to be found from the national administrative systems, but functionally connected to the **Internal Market Information System**.

### **Dimensions of the posting workers in Romania and EU**

În 2015 at EU area for all Member States (MS) were reported over 2 million PDs A1 from which 2.3% were PDs A1 issued by Romania as a sending country, counting 46.8 thousand PDs A. In structure for all MS 66.9% were reported for posted employed persons, 5.4% for posted self-employed persons, 25% for PDs A1 for person active in one or more states and 2.1% for other situations. Romania’s profile is different in the structure by posting workers, almost all PDs A1 are reported 98.4% for posted employed persons, 1.4% PDs A1 for person active in one or more states and 2.1% for other situations. Another difference is given by the share of PDs A1 in total employment – Romania’s level is only 0.6% while the average of all MS is 10.9%.

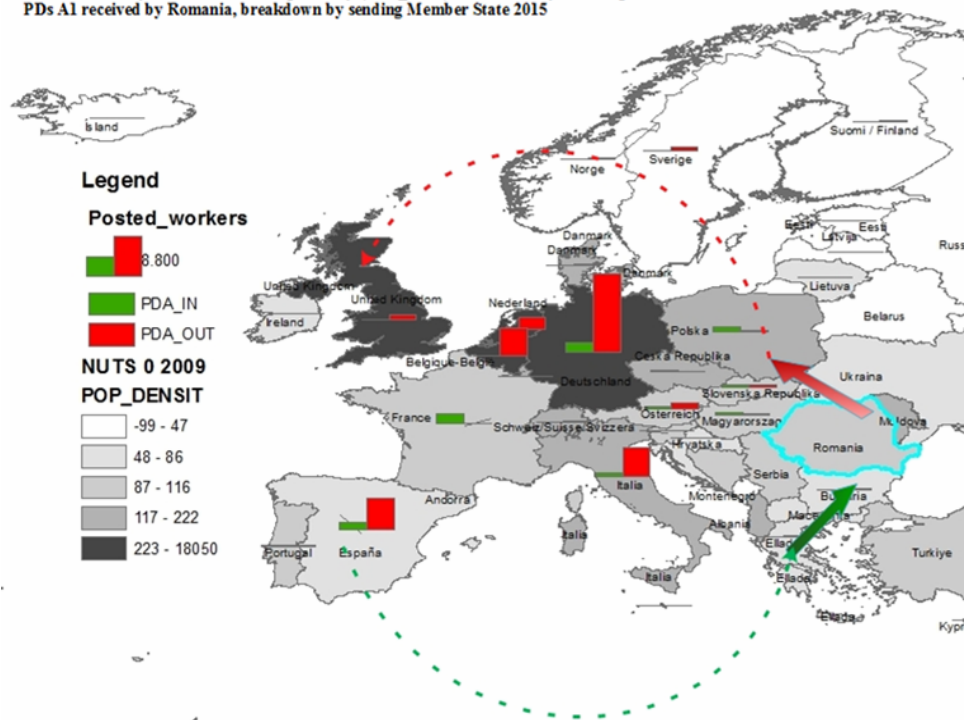
During 2010-2015 the evolution of sending and receiving PDsA1 for posted workers (employed and self-employed) from all MS indicates a continuous increasing, with 41.3% growth rate. The number of PDs A1 (employed and self-employed persons) for all MS is 1.5mil in 2015, registering a positive modification with 0.47 mil formulas. In 2015 compared to 2014 this tendency of growing slowing down at 2.8% growth rate.

Romania’s indicates a dependence of economic cycles and a huge imbalance between sending and receiving posted workers. During 2010-2015 the growing rate of PDs A1 for Romania as a sending country registered 57.7% the rate of growth, higher with 16.4pp than the rate for all MS but this rate downfall at -18% for the 2014-2015 period. Romania as a receiving country registered 13.4% the rate of growth, lower with 27.9pp than the rate for all MS but this rate accelerating at 10.2% for the 2014-2015 period, higher with 7.4pp than the rate for all MS as receiving country.

The unbalance between sending and receiving posted workers is also reflected by the following ratios:

- The share of Romania’s received PDs A1 in total receiving MS is 0.9% in 2010, decreasing with 0.2pp in 2015 at 0.7%.
- Romania’s share of receiving to sending PDs A1 for posted workers was 31.8% in 2010, decreasing with 9pp at 22.8% in 2015.
- In 2015 differ the number of posted and self-employed persons regarding sending/issued or receiving. The Romanians that works abroad as posted workers are mainly (99.9%) employed persons while the foreign citizens that work as posted workers in Romania are 96.4% employed persons and 3.6% self-employed persons. At the average, for all MS the share of self-employed person that work as posted workers is more than double, respectively 7.8%.

**PDs A1 issued by Romania as sending country (PDA\_OUT) breakdown by receiving Member State, and PDs A1 received by Romania, breakdown by sending Member State 2015**



**Fig. no. 1 Romania sending and receiving workers**

Source: Map made by authors in Arc Gis 10.2 Desktop, ESRI Ro shapefile, data from Administrative data PD A1 Questionnaire 2016, cited from (Pacolet et.al., 2016, p.18) (Source data: [migr\_pop1ctz], Eurostat data).

The number of PDs A1 for posted workers in 2015 for Romania and MS, breakdown by economic activity indicates:

- The main sector Romanians are working abroad as posted workers is agriculture, registering 13.7% share of all PDs A1.
  - The second important presence of Romanians working as posted workers abroad is transport and storage+ information and communication with an 11.3% share in total PDs A1 issued by all MSM;
  - The third sector by importance is Industry (B-F) with 5.9% the share of Romanians PDs A1 issued by Romania, respectively with a share of 4.8% in construction in total MS;
- The main sectors of PDs A1 for foreigners working as posted workers in Romania are:

- Finance and Insurance; Real estate; professional, scientific and technical activities; Administrative and support service activities NACE K, L, M and N with a share of 0.6% in total PDs A1 issues by all MS;
- Wholesale and retail trade NACE G and Education, health and social work, arts and other services NACE P, Q, R and S, in both groups with a 0.5% share in total PDs A1 issued by all MS;
- posted workers are 79% in industry (B-F), 3.4% in agriculture. Comparing with the average structure for all MS is visible the structural difference positive with 12.9% for industry and with 2.2% in agriculture;
- Regarding receiving posted workers, foreign citizens indicates a positive difference in structure in temporary employment agency NACE N with 1.8pp.

PDs A1 issued for Romania as sending country (PDA\_OUT) and receiving from Member States(PDA\_IN), (Fig no.1) indicates that the posting workers model is not based on geographical proximity. Romanian posted workers the main receiver is Germany with 17.6 thousand PDsA1, Spain with 7 thousand PDsA1, Italy with 6.5 thousand PDsA1, Belgium with 6.2 thousand PDsA1. The main sender countries to Romania for foreigner posted workers are Germany with 2.3 thousand PDsA1, France with thousands PDsA1 and Spain with 1.8 thousand PDsA1.

Biletta and Torres, 2016 indicates as key features for Romania's state of play of transposition of Directive 2014/67 to improve enforcement of European regulations as regards posting of workers (mid-2016):

- “- Strengthening of the administrative cooperation; obligation to use the IMI system
- Increasing roles for the Labour inspectors: put information at the disposal of service providers, checks, frame of complaints
- Criteria and control measures to be fulfilled by service providers in RO for adequate control
- Liability of subcontracting chains
- Trans-border application of administrative penalties/fines”.

Following the adoption of the L16/2017, the Ministry of Labour and Social Justice will elaborate the **methodological norms and** the specific procedure for the posting of employees in the framework of the provision of transnational services on Romanian territory for its implementation, which shall be approved by a Government decision (according to ART 55. L 16/2017). At the date of entry into force of the Government Decision provided for in Art. 55 the Government Decision no. 104/2007, published in the Official Gazette of Romania, Part I, no. 111 of February 14, 2007, shall be abrogated.

According to the new legislative framework, the information management regarding posting workers in Romania is assured by the Ministry of Labour and Social Justice and Labour Inspection. These institutions assures the updating the information provided in the country card on the transnational posting of employees on Romanian territory, annually or whenever necessary.” [ART 28. L 16/2017 (7)]; are the national authorities providing general information to posted workers and businesses about national legislation and practice applicable to them in respect of their rights and obligations in Romania. [ART 28. L 16/2017 (8)]; Assures the information access in a clear way publishing on the Labour Inspection the following minimum information [ART 28. 3), L 16/2017]; The Labour Inspectorate is the competent authority with liaison office tasks that ensures the fulfilment of the administrative cooperation obligation with the competent authorities of the Member States or the Swiss Confederation (Art. 14 L16 / 2017). The National Supervisory Authority for the Processing of Personal Data (Art 18 L16 / 2017) participates in the administrative cooperation.

National Agency for Fiscal Administration (ANAF) is the competent national authority with the attribute of cross-border recovery of amounts resulting from the application of administrative, financial sanctions and fines (Chapter IV, L16 / 2017). ANAF, as the demanding authority, executes the Labor Inspection decision, informs the controlled enterprise and/or the requesting member state, the licensed authority on the request for recovery of an amount resulting from administrative financial penalties, as well as relevant documents, as the case may be, according to the Romanian legislation.

### Conclusions

The most important receiving countries for Romanian Posted workers are also the destination countries from Romania's migration in 2015: Italy with 1,131,839 Romanians (1<sup>st</sup> place), Spain with 708,389 Romanians (2<sup>nd</sup> place) and Germany with 345,753 Romanians (3<sup>rd</sup> place)

Romania's posting worker future challenges as we identify based on the present study

The main sender countries to Romania for foreigner posted workers are Germany with 2.3 thousand, France and Spain with 1.8 thousand PDsA1.

The increasing importance of the posting workers as a European mobility tool request special attention at all levels: European, national and local. Next to EU level challenges for Romania, there are some challenges at the national level: Law 16/2017 implementation, monitoring, measuring and measures applying in a transnational framework. The Romanian labour force mobility, in general, requests a special attention for Romania. The specific case of posted workers mobility in the context of free services adds some new insights to the problem of free movement of labour demanding information: national level (with authorities, institution, ministries, firms, and workers), other states developing administrative cooperation. Both cases demand special management based on moderns informational systems. The Posting of Workers Directive 1996/71/EU opens a large front to work for administration in view to identify the best indicators and assuring continuous data measuring, administrative database building as the only way in which is possible to provide input data flows for the human resources management. The Ministry of Labor and Social Justice, Labour Inspection, ANAF, The National Supervisory Authority for Personal Data Processing, needs to be coordinated and connect to IMI. This process request to build an National Informational Sistem very complex in both dimension – internal and external, still unsolved by the L344/2006 as signaled by Milieu (2009) concerning the transposition of the administrative cooperation and on making the information on the terms and conditions of employment, Biletta and Torres (2016) signaled the challenge regarding the "Liability of subcontracting chains" monitoring.

We consider as the main priority the better exploiting the administrative sources of the posting workers as official statistical sources for better measurement and monitoring, a part of the *Internal Market Information System* (EU- IMI System).

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