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Transposition of the 'enforcement' directive into Belgian law

CONTRIBUTOR Gautier Busschaert*

Introduction

The Act of 11 December 2016 containing miscellaneous provisions concerning the posting of workers (the 'Act'), entered into force on 30 December 2016, transposing EU Directive 2014/67 of 15 May 2014 (the 'Directive') on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services into Belgian law, after a delay of more than six months.

Directive 96/71/EC (the 'Posting of Workers Directive'), which was transposed into Belgian law by an Act of 5 March 2002, provides that even if posted workers remain subject to the law of their country of origin, some mandatory rules about the conditions of work and remuneration deriving from the host country apply as well (e.g. maximum work periods and minimum rest periods, minimum paid annual leave, etc.).

Over the years, various practical difficulties came to the attention of EU institutions that adopted the Directive and so their aim was to strengthen enforcement of the Posting of Workers Directive and further guarantee the rights of posted workers, whilst avoiding social dumping.

This article briefly describes the main measures adopted by Belgium in transposing the Directive into national law.

No prejudice to workers posted abroad if they make a claim against their employer

While most provisions of the Act provide rules to protect workers posted from another Member State into Belgian territory, Articles 3 and 4 are intended to protect workers posted from Belgium to another Member State of the EEA or to Switzerland. The Act provides that these workers may not suffer any prejudice at the hands of their employers if they initiate an administrative or judicial procedure against them in order to enforce their rights under the Posting of Workers Directive. According to the preparatory works of the Act, if a worker suffers any prejudice, he or she can file a claim for damages in the jurisdiction concerned.

Definition of key concepts

The Belgian law follows Articles 4.2 and 4.3 of the Directive to the letter in defining the key concepts: 'posted worker' and 'employer'.

A posted worker is a worker performing temporary activities in Belgium, and either working habitually in one or more countries other than Belgium or is hired in a country other than Belgium.

In order to assess whether a worker is a 'posted worker' working temporarily in Belgium, the same list of criteria as provided in the Directive has been set out in the Act (e.g. the activities are performed in Belgium temporarily, the same job used to be done in Belgium by the same or a different posted worker, the posting started on such and such a date, etc.).

The law does not set a time limit after which the activities of the posted worker stop being considered temporary. However, the preparatory works of the Act, based on Recital 12 of the Directive, make it clear that if there is no certificate clarifying which social security legislation applies, based on Regulation (EC) No 883/2004, this may indicate that there is no temporary posting to another Member State. The preparatory works implicitly refer to the 24-month time-limit provided in this Regulation as a possible criterion for assessing whether a posting is temporary.

* Gautier Busschaert is a lawyer at Van Olmen & Wynant in Brussels.

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Further, an 'employer' is a private individual or a legal entity employing posted workers in Belgium, whose business performs substantial activities (as opposed to activities related to internal or administrative management) in a Member State other than Belgium. The Act sets out the same list of criteria as the Directive to determine whether an employer is performing substantial activities in another Member State (including the place of recruitment, the main site of commercial activity, the law applicable to contracts with workers and clients, etc.).

These two lists of criteria are non-exhaustive and new criteria may be added by Royal Decree, which may be useful if unforeseen issues arise, but so far, no Royal Decree has been adopted for that purpose.

Protection of posted workers

The Act stipulates that the social inspectorate may require the production of certain social documents related to posted workers. The law requires that a contact person ('personne de liaison') should be appointed to liaise with the social inspectorate, prior to employing posted workers in Belgium. According to the preparatory works of the Act, this person can be the employer, a worker or a third party and he or she is not obliged to reside in Belgium.

However, it is not yet clear how the identity of the contact person should be communicated to the authorities. The Ministry of Labour says that a Royal Decree will provide that the name of the contact person should be communicated through the Limosa Declaration – which is a declaration that all employers must file prior to posting workers to Belgium.

According to the Act, the social inspectorate may request the delivery of the following information/documents, up to a year after the end of the employment of a posted worker in Belgium:
- a copy of the employment contract or equivalent document;
- information relating to the currency used to pay the posted worker, the benefits to which he or she is entitled because of the posting and the conditions for repatriation;
- timesheets showing the beginning, end and duration of the posted worker's daily working time;
- proof of payment of remuneration;
- pay slips.

These documents may be delivered on paper or electronically.

The social inspectorate may also ask for translations of the documents in any of the national languages (French, Dutch or German) or in English.

Finally, the Belgian legislator has given the Government the prerogative to issue a Royal Decree listing the documents that may be requested by the social inspectors and to determine the situations in which employers are exempt from providing these documents, particularly if the duration of the contract is short or for a particular, delimited project.

Joint liability in the construction sector

The Directive allows national legislators to put in place a system for subcontracting liability for the payment of net remuneration and/or contributions payable to funds jointly managed by the social partners. The system should at least cover the direct relationship between the contractor and its subcontractor. Member States may, however, impose stricter measures and, for example, extend their system of joint liability to the client of the general contractor.

For the construction industry, the setting up of such a system of subcontracting liability is compulsory.

In Belgium, the Act provides for a joint liability mechanism for the direct co-contractor (contractor or client) for the payment of remuneration in the construction sector. By extending the system to clients of general contractors, Belgium imposes stricter measures than the Directive. However, joint liability does not apply to clients in their private capacity.

This new system coexists with the existing 'general regime' of joint liability for remuneration that applies to all sectors, including the construction sector. The general system requires notification by the social inspectorate and is limited in time, whereas the system set out in the Act applies immediately and is not time-limited.

Member States may, in accordance with the Directive, limit the liability of the contractor if a due diligence exercise has been done. The requirements for the due diligence should include control measures to ensure compliance with the rules on posting workers.

A client/contractor who has solicited the services of a contractor/subcontractor in the construction sector is jointly responsible for paying the workers unless it and its co-contractor sign a written statement in which the contractor/subcontractor certifies that the workers will be paid and that they have been made aware of the webpage of the Public Federal Service for Employment relating to pay. This written statement lifts the liability of the client/contractor without actually guaranteeing that effective monitoring takes place. It can easily be inserted into any contract between a client/contractor and a contractor/subcontractor.

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However, the law reins in this broad exemption from liability in the following way: if the client/contractor is made aware that workers are not being paid properly, it becomes liable to pay future remuneration from 14 working days after being informed.

It should be noted that this system applies to all workers in the construction industry, not only to posted workers, even though it is questionable whether it was really useful to extend it to all workers, given that a general system of liability already covers that industry.

Finally, the Act states that workers may be represented by labour organisations to help them claim remuneration based the joint liability system described above. This applies to both Belgian and posted workers – which is, once again, surprising considering that EU law should not apply to purely internal situations.

Criminal and administrative sanctions

New provisions have been added to the Social Penal Code to help enforce cross-border criminal and administrative sanctions. In addition, certain new sanctions have been added to the Social Penal Code. These apply to cases of non-compliance with the Act, such as failure to pay remuneration based on the joint liability system, failure to provide certain social documents and failure to provide the name of the relevant contact person to the authorities.

In case of breach, the employer or its direct co-contractor may be liable to pay a criminal fine of from € 400 to € 4,000 or an administrative fine of from € 200 to € 2,000 per worker.

Concluding remarks

Belgium has transposed the Directive in certain respects, as has been seen. But in some others, it has not done so, as it considers that national law already complies with the requirements of the Directive. This is the case, for example, with the recent measures it took to improve access to information. It is also the case with the 'Limosa' system of prior declaration for posted workers – which is permitted by the Directive and was accepted by the European Court of Justice in its *De Clercq* judgment of 3 December 2014 (C-315/13).

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