



COMPARATIVE ANALYSIS OF ROMANIAN AND EU LEGISLATIVE FRAMEWORK REGARDING EUROPEAN MOBILITY OF WORKERS

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Abstract

Through this research we aim to identify the main similarities and differences regarding the approaching of the international mobility of worker concept. The importance of this research derives from the fact that workers' mobility is a concept that has taken a new meaning in the business globalization era. We often see employees which must provide various job or specific activities into different places than those from home area. These changes, most of the time, take place across borders, and has a major impact on the workers who have agreed to change their workplace and on the organization in terms of the cost of the mobility process. In this context, the paper brings into discussion a wide range of approaches from the perspective of academics and practitioners regarding the European mobility of workers concept, on one hand, and the triple (legal, accounting and especially fiscal) impact that may have an erroneous interpretation of this concept, on the other hand. The results of the research are useful to both practitioners and future research in this field because, after identifying the many interpretations of this concept, we hope, first of all, to clarify the essence of European mobility terminology.

Keyword: international mobility of workers, european labor mobility, posted workers, delegation, legal framework.

JEL Classification: O15, J62

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I. Introduction

More and more discussions have been taking place in recent years regarding the mobility of workers from one Member State to another. There have been Member States who have officially expressed their wish that on their labor market should not be posted workers from another European states (for example according an article published on <https://www.gandul.info>, Emmanuel Macron, the president of France, in his official visit to Romania (2017), expressed his dissatisfaction regarding the presence of the posted workers on France labor market). These discussions are based on the fear that jobs, in developed countries, will be occupied by workers from less developed country, posted and paid with a lower salary than the salary level from labor market in their Member State of posting.

Also, the structural re-establishment of the European Union, when United Kingdom will no longer be member of European Union, and the failure to resolve labor mobility issues on time, cause rapid changes in European Union regarding the movement of workers. Such change is, for example, the legal framework changes in the transnational posting of workers by adopting Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71 / EC concerning the posting of workers in the framework of the provision of services with deadline for implementation by Member States 30 July 2020. Through this directive European Union wants to eliminate the fear of developed European countries regarding posted workers from other countries and to reduce or even eliminate abuses of employers who have posted employee, especially regarding the remuneration of posted workers.

Population mobility, in general and the mobility of workers in particular, is according Rață & Hlaciuc (2018), a social phenomenon due the economic and individual interests of each person and is supported, at the European Union level, by a fundamental principle, namely freedom of circulation. The basis for this principle was made in 1968 by the signing of the Treaty of Rome (which is taken over by Article 45 of the Treaty on the Functioning of the European Union) and was further developed by the secondary legislation of the European Union and the case-law of the Court of Justice.

Given the scale of the phenomenon at the European Union level and the need to limit worker mobility between developing countries and the developed ones in such way as to ensure the provision of services in fair competition, it is very important to conceptually delimit the term „worker mobility” and to know the national and European legislation governing this phenomenon as well as the social and economic effects of



worker mobility.

Delegation and posting are forms of labor mobility manifestation, but within the synergy between the European Union and national legislative framework, can arise confusion in the interpretation of these concepts, which alters legislative development and have a negative effect on taxation and accurately accounting for the remuneration of employee which are posted. Thus, the present research aims to identify the numerous interpretations of these concepts and to clarify, first of all, from the terminological point of view, the essence of these types of mobility.

Changes in the digital era have an overwhelming impact on workers, labor market policy and on the overall labour mobility. Economic entities need to identify human resource strategies in order to adapt to changes, to adopt flexible work and social security programs so as to ensure adequate social security and in the same time exploit the potential of new labor market for increasing opportunities in terms of human resources.

All these aspects, which highlight the actuality of the research, as well as the confusion that arises between the analyzed concepts (delegation versus detachment, detachment and posted workers) justifies once again the need for scientific and practical analysis in the subject of labor mobility, especially in the light of delegation and the posting of workers in the European Union.

This topic has been studied by consulting a large number of representative scientific articles in the field - about 45 articles published in specialized journals from the United States, Great Britain, Belgium, or Romania - as well as national and European legislative framework regarding European mobility of workers.

II. Literature review on international mobility

Until 19th century, there are a few information about labor mobility or international mobility of workers. An overview of this phenomenon can be achieved, however, on the basis of parochial recordings, but also as a result of studying the civilian population registers. Mobility of workers can be noticed long before the development of modern industrial economies. For example, young people were employed to work in agriculture on various farms from United Kingdom, a phenomenon encountered during the 17th and 18th centuries, and, at the end of each year, they were moved to other farms. Although many workers circulated according to the harvest, but it was often only temporary labor movement, workers return to their native villages after a long period of time.



Significant and permanent movements have been driven by the movement of rural workers to cities or by transnational labor mobility (for example: Irish people in the United Kingdom or Belgians in France). This population mobility has a significant impact on Europe's urban and industrial development.

According Vasile & Zaman (2005), mobility of workers represents the people ability to react and adapt to the challenges of the social and economic environment and to their dynamics.

The Romanian legislative framework refers, at article 20, to the "mobility clause" and states in article 25 that by this clause the parties of the individual employment contract determine that, given the specificity work, the labour does not take place in a stable place of work (see https://en.wikipedia.org/wiki/Labor_mobility).

Mobility of workers in general represents the geographical and occupational movement of workers, and in the case of a movement of workers from the home country to other countries we speak about international mobility of workers.

Long & Ferrie (2003) define workers' mobility as a change in the location of workers both from the point of view of physical space (geographical mobility) and from the point of view of the workplace (professional mobility), but without mentioning if these changes take place within the same economic entity or between different entities.

Green et al. (2009), in the study on worker's mobility, *Study on worker's mobility. Short-term international assignments*. Short-term mobility associate the mobility with the mission concept that represent a relocation of work from one country to another for a short period of time, usually less than one year. The use of this concept is justified by the fact that in practice workers are transferred from one country to another within the same company (which implies mobility within or outside the European Union) and this movement, in fact, represents in acceptance of the authors, a temporary international missions. The reasons why workers accept to change their job position are diverse: higher financial income, improved professional and linguistic skills, experience accumulation, etc.

A form of territorial or geographical mobility is worker/labor migration. We are talking about the phenomenon of labor migration when a person moves from one location to another, from one country to another, accompanied by a change of residence. As can be deduced from the above definition, the main and determining feature of migration is "home change or residence change". This criterion delimits the migration phenomenon of other forms of mobility.

However, the mobility of workers is a form of labor movement that does not



substitute, nor can it be assimilated to the movement or migration of persons or workers, and gives substance to these two forms of movement.

Often, international mobility refers to employees at headquarters sent across to the borders to ensure company's development and intensification of its activity in that state.

As can be seen, the concept of mobility is defined and understood differently, which creates confusion in interpreting the term.

III. Tipology of mobility

There are numerous classifications of workers mobility, namely:

- territorial, sectoral, professional, occupational, ascending, descending mobility;
- territorial, professional, entry/exit mobility (in the employing or general labor market), temporary/permanent and voluntary/forced mobility (see www.brcci.eu/wp-content/uploads/2018/01/Report-VISA-RO.pdf);
- smart mobility;
- remote work;
- active or passive mobility.

This classification can also be supplemented by mobility of workers, within an organization or intragroup, by changing the job from one country to another, for a fixed period of time, to provide services. This kind of mobility is the main aspect of this research, given the fact that in recent years the European Union is increasingly confronted with the transnational placement of employees.

Other type of mobility is active mobility which according to Țacu (2017) is characterized by the existence of the individual initiative and action of the European citizen in order to find a job because he does not find at home, or because he wants a higher level of well-being. Even though its course in the community space is achieved through a labor mediation agent, the main characteristic of this form of mobility is that the motivational foundation belongs to the workers.

Passive mobility is a form of mobility manifestation characterized by the existence of an employment relationship between the worker and the economic entity that is maintained throughout the period in which the employee is posted on the territory of another Member State. The fundamental feature of this type of mobility is that the initiative belongs to the employer, thus by posting its own employees in the community space the economic entity should be able to carry out its international operations.

Under the circumstances of the formation of European Union and the



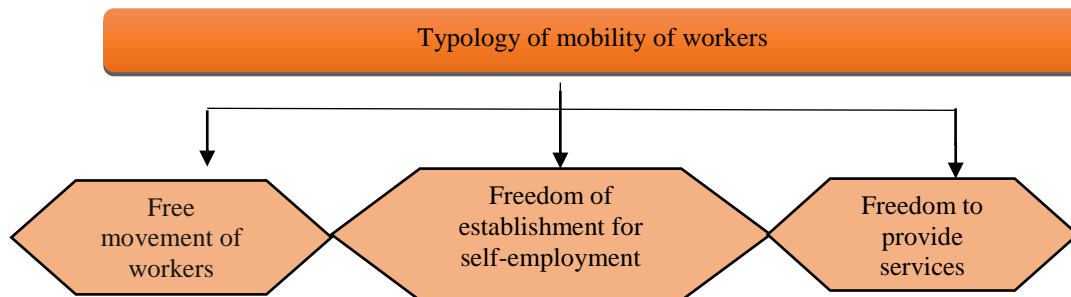
substantiation of the principle of freedom of movement, the labor force movement from developing countries with a lower living standard to the Western countries, where the level of salaries is high, was a foreseeable process.

Workers' mobility is achieved by changing the economic entity from the home country to another entity from the host country, by creating and developing new businesses or by changing the place and/or workplace but within the same organization.

The last one form of workers' mobility is a phenomenon with which the European Union is increasingly confronted in the last period and perhaps because developed countries have contracted, stimulated by a lower labor cost, various services in the countries with lower living standards from EU.

After signing the contracts, the big companies also sent employees in other country to work, which gave rise to a phenomenon with a large scale: transnational mobility in European Union. This form of mobility has many personal, legal and economic consequences. In the light of the provisions of the Treaty on European Union, worker mobility is reflected distinctly, depending on the nature of the activity performed, as follows:

Figure 1 -Typology of person mobility in light of art. 45, art. 49 and art. 56 of the Treaty on European Union (consolidated version)



Source: own elaboration using data from <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:12012E/TXT&from=ro>

Thus, as can be seen from the above figure, from a legal point of view, a distinction must be made between free movement of workers, freedom of establishment for self-employment and freedom to provide services. Article 45 of the Treaty on European Union states that workers have the right to move freely within the European Union, to enter and remain in the territory of a Member State, to engage with respecting



the legislation of that State and the Commission Regulations European Parliament regarding the right of residence. If this article refers to those who give up the employer in his country for seeking a company from the European Union, article 49 refers to those persons who wish to become entrepreneurs in another Member State. Thus, the Treaty on European Union prohibits any restriction on establishment in a Member State other than the country of origin, subject to the law of the country of establishment.

Under article 56, the European Union offers equal treatment for workers who temporarily work in another Member State with nationals of the State in which the activity is carried out. This article makes a reference to the cross-border posting of workers.

Depending on the place of work, mobility of workers can take the following forms:

Table 1 - The mobility of workers regime according to the place of work and the place of residence

Specification	Place of work is same with residence work	Place of work is not the same with residence work
Romanian worker in an entity from Romania	-	Detached worker
Romanian worker in an entity from other country	Migrant	Frontier worker
Independent worker	Place of establishment	Provision of EU services
Romanian worker in an entity (transnational service provider) from Romania	-	Posted worker

Source: processed after PAIS no. 1, Free movement of persons and services: Implications for Romania and the negotiation process, IER, 2004, p. 16 and art. 2, Law no. 16/2017 regarding the posting of employees in the framework of the transnational provision of services

Depending on the way in which labor mobility is achieved (table no. 1), the persons involved in this process can be classified as detached/posted persons (when working in an economic entity in the country of origin, but the job is in another state), a migrant worker or a frontier worker.

It is important to highlight the difference between a migrant worker and a detached worker. If, in the case of posted workers, they leave the territory of a Member State on their own initiative and engage in an economic entity from another Member State, in the case of posted workers, they are represented by employees sent by the economic entity with whom they have employment relationships, in another Member State for the purpose of carrying out missions and services, and upon their completion



they return to their home country without remaining on the labor market in the host State.

IV. Detachment, delegation and posting workers – forms of European Union mobility of workers

Detachment, in general terms, represents according to the Romanian Explanatory Dictionary (see dexonline.ro), the movement of an employee, temporarily and in the interest of service, from one unit to another or from one locality to another, while delegation means to convey to someone the right to act as a representative of a person or an institution. The definition given by the Romanian Explanatory Dictionary maintains the same form since 1984.

The concepts of "delegation" and "detachment" have been found since 1950 in the Romanian legal norms, by publishing in the Official Bulletin no. 50 of 8 June 1950 of the Law no. 3 Labor Code (article 17). From an etymological point of view, the verb "detach" comes from the French "détacher", which defines a form of civil servant mobility. In English, the term used for a delegation is a "posted worker", which defines a form of temporary geographic mobility of workers within the same economic entity - the employer.

The legislative framework from Romania used, alongside these two concepts, the concept of transfer of worker, a concept that meant the change of the job in the interest of the service in another locality, as well as the worker moved within the same unit, but in another locality. Also, in Chapter 15 of Law no. 3/1950 Labor Code, the legislator also provides for temporary work obligations, for which, in exceptional circumstances, citizens were called for a fixed period of time (young people under 16, women over 45 years of age, pregnant or breastfeeding, or those with children under 8, men over 50 years of age, people with incapacity for work, or invalids from work or war were exempt).

In the light of Law no. 10/1972 Labor Code, the mobility of workers takes the following forms: the delegation, posting and temporal transfer to work in another place than that provided in the individual labor contract.

At present, the Romanian legislator, in Law 53/2003, the Labor Code, makes a clear distinction between the delegation and the posting workers. Thus, at article no. 43 the legislative framework defines the delegation as the temporary exercise, by employer's disposal, of the work or duties outside the place of employment, while the posting workers is the temporary change of the place of employment, by the employer's disposal, to another employer for the purpose of performing works in his/her interest. The nature of



the work may be changed in the case of posting, but only with the written consent of the employee or only exceptionally, without his consent, in the following situations: force majeure, disciplinary sanction or employee protection measure.

If in Law no. 3/1950 The Labor Code made a clear distinction between posting and delegation, regarding to the period of job change, and made it possible for a delegation to become posting (when the delegation exceeds 60 days, it becomes posting), after the normative acts in the field have been modified, this temporal delimitation has been eliminated.

It should be noted that, through this last regulation, the legislator includes the third aspect of European mobility, namely the temporal shift to another job under the concept of posting and the transfer is no longer regulated. However, a new concept is introduced, namely: the mobility clause, which implies the employee's anticipated agreement for changing the workplace where he will work, which will have as a consequence the frequent delegation or even the frequent posting.

The main similarities and differences between these two concepts, according to Law 53/2003 Labor Code, are:

Table 2- Similarities and differences between delegation and posting in the light of Law 53/2003 Labor Code

Type of change	Posting	Delegating
1. Changing the place of work	Unilaterally, by the employer (art. 43, alin. 1 and art. 45)	
2. Function and other rights, according to the individual labor contract	They are maintained throughout the delegation / posting period	
3. Period of workplace change	Temporarily (art. 43 and art. 45)	
4. Obligatory character for the employee	Yes	No (art. 46, alin. 3)
5. Change of employer	No (art. 43)	Yes (art. 45)
6. Payment of wages	Employer delegating	Employer to whom the employee is posted (art. 47, alin. 1)
7. Suspension of employment contract	No	Yes (art. 52)
8. Period of posting/delegation	Maximum 60 days, with the possibility of extending for successive periods of maximum 60 days, only with the agreement of the employee (art. 44, alin. 1)	Maximum one year, with the possibility of extending from six to six months, only with the agreement of the employee (art. 46, alin. 1 and 2)



Law no. 16/2017 concerning the posting of employees in the framework of the provision of transnational services defines, in article 2, paragraph c, the employee posted from the territory of Romania as the employee (of an employer established in Romania, who normally works in Romania) who is sent to work, for a limited period, in a Member State other than Romania. It is worth noting that this law makes the difference between the posted worker from Romania to another country and the transnational posting with involving the situation in which an enterprise established in a Member State or in the territory of the Switzerland in the framework of the provision of transnational services, posts on the territory of another Member State employees with whom employment relationships have been established.

As can be seen, historically point of view, in Romania, posting and delegation initially supposedly changed the job at national level. However, as international exchanges have become more and more frequent, Romania has become member of the European Union and the principle of freedom of movement has been promoted to develop the phenomenon of international mobility, where an employer has had to delegate or to post an employee to another employer in another country.

A very important aspect to be emphasized is the meaning of the posted worker's expression in the light of Directive 96/71 / EC, which states in Article 2 that a posted worker is a worker who, for a limited period, carries on work in the territory of a Member State other than that in which he normally works. In order to reduce or eliminate as far as possible frauds and abuses in European Union, it issued a directive supplementing Directive 96/71 / EC, namely: Directive 2014/67 / EU of the European Parliament and of the Council of 15 May 2014 on compliance the application of Directive 96/71 / EC on the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System, published in the Official Journal of the European Union no. L 159/11 of 28 May 2014.

Due to the increasing size of posting workers within the European Union as well as the need to increase accountability of national authorities and the need to strike a balance between promoting the freedom to provide services and protecting the rights of posted workers, it was adopted the 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 of the European Union services.



V. Conclusion

In conclusion, synonymous between the concepts of "delegation" and "displacement" can be retained, even if, in the case of the mobility clause, not all worker movements are also delegations. According to the legislation presented in this paper it is very important that the posting regulated by Law 53/2003 Labor Code should not be confused with that provided by Directive 96/71/EC, which may be assimilated to the delegation, according Romanian normative framework. It is precisely that this situation gives rise to the need for a deeper analysis of the concept of posting so that any confusion that may arise, both legally and economically, should be eliminated.

The posting of employees on the European Union territory is the context in which the present research aims to identify its multiple meanings, on the 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 Romania status as European Union Member State, the slightest consequence of confusion with the substantive legal notions alters any legislative development that needs a solid foundation.

The concept of posting studied, in the light of Law 53/2003 Labor Code, is not applicable beyond the borders of our country, so it cannot be a national legal basis for Romanian employers who send their employees to other Member States. This makes practically incompatible the concept of posting at national level with that defined by Directive 96/71 EC and the main consequence of this incompatibility implies the erroneous understanding of posting with which the Romanian employer goes to his "European path". Taking into consideration the present posture of Romania, as a one of the state of origin for posting of employees to the Community Space, I believe that the understanding and consolidation of the landmarks in the national environment will ensure the increase the employer capacity to obtain the success sought outside the national borders.

Thus, using the concepts of international, european or transnational mobility is justified by the fact that it is not right to use, always, the delegation or posting concept. When we speak about mobility of workers in the community space, Law 53/2003 Labor Code and Law 227/2015 on the Fiscal Code, as subsequently amended and supplemented, can be applied tangentially and only if we corroborate them with the European legal framework, in the sense that, of course, the European legal framework has priority.



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