Posting of workers in the framework of an ongoing process of reform

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1. *Preliminary remarks on the topic*

In a context characterized by the globalization of economic activities, the displacement of production factors beyond national borders and, with them, labour mobility, has long been conceived as one of the main strategic factors of competitiveness. Specifically, the temporary posting of workers within the framework of transnational provision of services constitutes one of the most common manifestations of transnational labour mobility, although it differs from traditional migratory movements in its shorter duration and in its greater specialization. Faced with the traditional migratory phenomena linked to the search for work and, therefore, with *mobility for employment*, in transnational services, workers are the protagonists of *mobility in employment*, at the request and under the direction of the employer.[1]

Although at a moderate rate, growth is constant year after year in the temporary posting of workers within the European Union. Notwithstanding the difficulty of measuring the volume of postings, given the scarcity of statistical sources that address this phenomenon as a specific work modali-

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[1] A. GUAMÁN HERNÁNDEZ, *De nuevo sobre la ley aplicable en los supuestos de desplazamiento temporal de trabajadores: el caso Laval*, in *Revista Relaciones Laborales*, 2008, 15.

ty,[2] it has been estimated that the number of posted workers reached 1.9 million in 2018, while in 2019 the figure increased to 3.06 million.[3]

When companies choose to post workers in order to provide services in countries other than their own establishment, they take advantage, through the exercise of freedom to provide services, of the differences between the social standards established in the Member States of the Union. The phenomenon entails the danger of the so-called social dumping, since the level of applicable labour conditions differs among the different national systems. And it should not be forgotten that each labour market has its own specificities, which generates a dispersion of the regulatory frameworks of the employment contract due to differentials in activity, employment and unemployment rates between markets,[4] to which the divergences regulations in terms of working conditions (notably the minimum wage) are added and, with it, labour costs that vary from one country to another. These divergences can lead to unfair competition practices between companies and, at the same time, generate situations of discrimination between local workers and those who are posted. Likewise, the heterogeneity is notorious (intensified in turn with the enlargement of the Union to the Eastern countries in 2004) in terms of labour taxation and social contributions.[5] Certain companies thus make use of the existing imbalances among the labour costs of the different States, seeking precisely to reduce those they must face.

In the context of this type of transnational posting, the worker provides services in a State other than the one in which the company to which the worker is contractually bound is established. The introduction of this international element in the employment contract incorporates the problem of determining whether the posted worker is subject to the labour regulations of the State of origin, that of the host State, or a combination of both. Article 8 of Regulation 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I Regulation) establishes that the individual employment contract is governed by the law chosen by the parties and, in the absence of choice, by the law of the

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[2] RIESCO SANZ, GARCÍA LÓPEZ, MAIRA VIDAL, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, Albacete, 2018, 27 ff.

[3] FRIES-TERSCH, JONES, SIÖLAND, *Annual Report on Intra-EU Labour Mobility 2020*, Luxembourg, 2021, 20 ff.

[4] J.M. GÓMEZ MUÑOZ, *La libre circulación de trabajadores: retrospectiva y evoluciones en el contexto europeo actual*, in J. GORELLI HERNÁNDEZ (coord.), *Libre circulación de trabajadores en la Unión Europea. Treinta años en la Unión*, Sevilla, 2017, 24 ff.

[5] RIESCO SANZ, GARCÍA LÓPEZ, MAIRA VIDAL, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, cit., 50 ff.

country in which the worker habitually performs his work, without the rule considering that the country of habitual performance of the work changes when the worker temporarily performs the work in another country. Therefore, the change of applicable law due to a change in the usual place of work only occurs if the posting is permanent. In cases where the applicable law cannot be determined, the contract must be governed by the law of the country where the establishment through which the worker was hired is located. All this unless, from the set of circumstances, it appears that the contract has closer ties with a different country, in which case the law of that other country will apply.

The application of the rules of the country of origin of the service provider favours the relocation of the corporate headquarters of companies in countries with lower social standards of protection, regardless of where the services are provided, while it leads to worse treatment of national service providers if they are subject to requirements that non-nationals escape.[6] And it is that, if the legislation of the State in which the company that posts the workers is established is applied, there is a risk of generating a comparative grievance in relation to the most beneficial conditions applicable to local workers of the host State, implying unfair competition between companies as the original company benefits from existing labour differences. Hence, the European regulatory framework has long opted for modulating the criterion established in the Rome I Regulation, as will be seen later.

2. *The posting of workers and the freedom to provide services in the European Union*

Within the scope of the EU, a whole common regulatory heritage has been developed aimed at guaranteeing both fair conditions of competition for companies and due respect for the rights of workers. The application of such rules presupposes the existence of a temporary posting of workers in the framework of a transnational provision of services. There are three essential constituent elements of said object of regulation: the maintenance of the labour legal relationship between the posting employer and the posted worker throughout the time of the posting, the temporary limited nature of the posting, as well as the close link between the work of the posted worker and the industrial, commer-

[6] A. ESTEVE SEGARRA, *Un balance de la jurisprudencia del Tribunal de Justicia de la Unión Europea en materia de libertad de prestación de servicios y dumping social*, in *Revista de Información Laboral*, 2015, 6.

cial or professional services that the employer of the Member State of origin provides to the recipient located in the State of posting.[7] The Judgment of the CJEU of 1 December 2020, *Federatie Nederlandse Vakbeweging*, C-815/18, insists precisely on the requirement of "sufficient connection" of the performance of the work with the territory of the Member State.

The employment relationship between the company of the State of establishment, provider of the service, and the worker must be maintained during the posting period. Otherwise, that is, if the worker were to depend on another company in the host State, the legal basis for mobility would be identified with the free movement of workers and not with the free provision of services. However, European regulations do not establish whether the contractual relationship must have a specific prior duration or specific characteristics. In the absence of precision in this regard, it is understood to include both those labour contracts prior to the posting and those made *ex novo* with the purpose of posting the worker to carry out the transnational provision of services.[8] What is relevant, for these purposes, in relation to the time and place of execution is that the employment contract is prior to the posting and that it has been concluded in a State other than that of the recipient of the benefit.

On the other hand, displacement in the legal sense cannot do without physical mobility. Hence, those transnational provisions of services that are not accompanied by mobility of workers are outside the scope of application of the European regulation on the matter.[9] Such would be the case, more and more frequent, in which the provision of services is undertaken through new technologies. Teleworking would be a paradigmatic example in this regard, since it allows the development of transnational provision of services, although since it involves no real geographical mobility, it falls outside the scope of application of European regulations.

Regarding the temporary nature of the posting, article 2.1 of Directive 96/71/EC defines "posted worker" as one who, for a *limited period*, carries out his work in the territory of a Member State other than the one in whose territory the worker usually works. Transposing said precept, the Act 45/1999, of 29 November, on the posting of workers in the framework of a transnational pro-

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[7] F.J. Gómez Abelleira, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, in *Cuadernos de Derecho Transnacional*, vol. 10, iss. 1, 2018, 215 ff.

[8] The Judgment of the Court of Justice of the European Union, 21 October 2004, C-445/03, *Commission v Luxembourg*, concluded that requiring the workers to have been, for at least six months prior to the deployment, in a relationship with their undertaking of origin through a contract of employment is incompatible with European Union Law.

[9] Court of Justice of the European Union, 18 September 2014, C-549/13, *Bundesdruckerei*.

vision of services, understands by posting that made to Spain by the companies included in the scope of application of this Law for a limited period of time (article 2.1.1º). The temporality of the displacement (which coincides with that of the provision of services) is configured, thus, as an essential case of the application of the European regulatory framework. However, no time criterion is introduced (as the "Coordination Regulation" does[10]). In fact, the same adjective temporary is conspicuous by its absence when referring to posting, without prejudice to references in the recitals of the Directive. Like this, the Spanish transposition rule refrains from completing the definition by incorporating a specific time reference that would help to specify what is meant by "limited period of time". The European system rules out, that is clear, definitive postings as the object of application of the corresponding regulation (not in vain, in the declaration prior to the posting, the foreseeable duration must be stated, with the estimated dates of the start and end of the posting according to article 1.a.iv. of Directive 2014/67/EU), but without specifying the time limits of mobility.

The key to the issue lies, therefore, in considering the provision of services in another Member State as a causal element for the posting of the worker and his return to the State of establishment to continue with his work activity. As the Court of Justice of the European Union has pointed out, in the framework of a provision of services by their company, "such workers return to their country of origin after the completion of their work".[11] This in turn connects with the temporality criterion handled in the Rome I Regulation, according to which, "as regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad" (Whereas 36).

In the same sense, Directive 2014/67/EU includes, among the elements to consider when determining whether a posted worker temporarily carries out the work in a Member State other than the one in which the worker normally works, the return of the posted worker or the forecast that the worker will return to work in the Member State from which the worker is posted, once the work has been completed or the services for which the worker was posted have been provided (article 4.3.d.). Therefore, what is relevant is not that the worker returns in order to continue providing services for the same employer

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[10] Article 12.1 of Regulation (EC) n. 883/2004 of the European Parliament and of the Council of 29 April 2004, on the coordination of social security systems, refers to a maximum duration of 24 months.

[11] Court of Justice of the European Union, 27 March 1990, C-113/89, *Rush Portuguesa v Office national d'immigration*.

that has posted him, but that he returns to continue working as part of the labour market of the country of origin. And it is that the Directive does not contemplate posting as an episode of a broader employment relationship, but rather treats the worker as temporarily posted from their usual labour market.[12]

3. *The regulation of the temporary posting of workers in Directive 96/71/EC*

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, was the first European standard to address the phenomenon in question. Its objective was none other than to preserve "a climate of fair competition and measures guaranteeing respect for the rights of workers", to express it in the terms used by the Directive itself (Recital 5). It is applicable to companies established in a Member State that, within the framework of a transnational provision of services, post workers to the territory of another Member State through any of the following transnational measures:

– companies that post a worker on their own account and under their direction, within the framework of a contract concluded between the company of origin and the recipient of the provision of services that operates in said Member State, to the territory of a Member State;

– companies that post a worker to the territory of a Member State, in an establishment or in a company that belongs to the group;

– companies that, in their capacity as temporary employment agencies or placement agencies, post a worker to a user company that is established or carries out its activity in the territory of a Member State.

Spain, within the framework of a minimum transposition, limits itself to reproducing those cases in Act 45/1999, of 29 November, on the posting of workers in the framework of a transnational provision of services. Given the absence of a common concept of employee, the definition is at the expense of the internal regulations of the State in which the worker is posted. This follows from article 2 of Directive 96/71/EC which, after stating that "posted worker" shall mean any worker who, for a limited period, carries out his work in the territory of a Member State other than the one in whose territory he ha-

[12] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 225-226.

bitually works, maintains that the concept of worker is that which is applicable under the law of the Member State in whose territory the worker is posted. Nor does Directive 2014/67/EU add anything relevant in this regard, which limits itself to recalling that the Member States must be guided, among other elements, by the facts related to the performance of the work, the subordination and the remuneration of the worker, regardless of how the relationship is characterized in the agreements, contractual or otherwise, that the parties have agreed to (article 4.5). The reference to the national legislation that undertakes the European norm does not stop posing problems, rather than solving the main one for these purposes: the issue of false self-employment. And it is enough that an employee, who carries out an activity in a certain Member State, is converted by his employer into a self-employed worker in said country so that the employer is exempted from the obligations incumbent on him in application of the Directive in the Member State to which the worker has been posted.[13]

One of the main virtues that Directive 96/71/EC incorporated consisted in the application of what has been called a hard core of mandatory minimum protection provisions, that is, the obligation to guarantee the working conditions in force in the host State for posted workers, regardless of the legislation applicable to the employment relationship. Specifically, the conditions to be respected in the first version of the Directive concerned the following matters: a) maximum work periods as well as minimum rest periods; b) the minimum length of paid annual leave; c) the amounts of the minimum wage, including those increased by overtime; d) labour supply conditions, in particular by temporary employment agencies; e) health, safety and hygiene at work; f) protective measures applicable to the working and employment conditions of pregnant women or women who have recently given birth, as well as children and young people; g) equal treatment between men and women and other provisions on non-discrimination.

The objective is to achieve, based on the application of part of the *lex loci labouris*, a certain standardization of the working conditions applicable to local and posted workers who provide services in the same State and to avoid situations of unfair competition between this and the establishment State.

The Directive does not harmonize the material content of these mandatory minimum protection standards, although it is true that it provides certain information in this regard.[14] Therefore, a considerable margin of decision is

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[13] J.M. Serrano García, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, in *Revista Española de Derecho del Trabajo*, 2016, 190.

[14] Court of Justice of the European Union, 2 February 2015, C-396/13, *Sähköalojen ammattiliitto*.

preserved for the Member States when defining them. The rule does expressly clarify that the notion of minimum wage amounts will be defined by the legislation and/or the national use of the Member State in whose territory the worker is posted,[15] specifying that the supplements corresponding to the posting form part of the minimum wage to the extent that they are not paid as reimbursement for the expenses actually incurred as a result of the displacement, such as travel, accommodation or maintenance expenses (article 3.7). The fact that the definition of the constituent elements of the minimum wage (as well as the method of calculation and the criteria selected for it) depends on the corresponding national law, provided that said definition does not impede the freedom to provide services among Member States,[16] explains the important work that the CJEU was forced to undertake in this regard.

The Directive articulated an exceptional regime insofar as it prevents the normal operation of the Rome I Regulation, because if the posting is covered by it, the applicable law turns out to be that of the country of origin (without the provisions of article 8 of the Regulation being applicable), limiting the State of destination to requiring the application of a few minimum imperatives of article 3 of Directive.[17] The European standard thus equates the posted worker with the local worker in terms of these minimum working conditions in force in the country of destination, breaking the rule of the country of origin of the service provider. The recognition of such minimum protection has as a consequence, when the level of protection derived from the working conditions granted to posted workers in the Member State of origin, in relation to the matters covered by Directive 96/71/EC, is lower than the minimum level of protection recognized in the host Member State, that these workers can enjoy better working conditions in the latter State. In any case, it should be borne in mind that, in accordance with the Directive, its provisions "shall not prevent application of terms and conditions of employment which are more favourable to workers" (article 3.7). Then, by comparing the conditions applicable in the Member State of origin and those in force in the host

[15] Spain incorporated the broadest version of the salary allowed in the framework of the Directive through article 4 of Law 45/1999, of 29 November, on the posting of workers within the framework of a transnational provision of services. As specified in the precept, the minimum amount of salary is understood to be that constituted, in annual computation and without discounting taxes, payments on account and Social Security contributions payable by the worker, for the base salary and supplements, salaries, extraordinary bonuses and, where appropriate, the remuneration corresponding to overtime and complementary hours and night work.

[16] Court of Justice of the European Union, 7 November 2013, C-522/12, *Isbir*.

[17] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 230 ff.

Member State, those of the latter must be taken into account and respected when they are more favourable.

Despite this provision, in addition to the non-exhaustive nature of the list contained in article 3.1 of the Directive, Community jurisprudence closed the door to any claim to reinforce or expand the matters included in that hard core of (paradoxically) "minimum" protection provisions. In a defence of the freedom to provide services stronger than of the promotion of social rights, the CJEU ruled out in different pronouncements that the host States could make the provision of services in their territory subject to the fulfilment of working conditions that were more beyond the terms of the Directive. Thus, the CJEU ended up converting into a maximum rule what should be interpreted as a minimum rule. So, when article 3.7 of the Directive declares not to prevent the application of more favourable working conditions for workers, it must be understood that essentially they will have to come from the legislation of the State of origin or from decisions of the employers themselves, but that they cannot normally be imposed by the host State.[18] The underlying problem is that, despite the fact that the European Commission has always focused on the adoption of the different regulations on the posting of workers within the framework of the social dimension of the European Union, in Directive 96/71/EC the economic aspect prevails over the social, since it is based on the norms of the treaties on the free provision of services and not on those on the protection of workers.[19]

4. *Enforcement and implementation of European Union Law*

Although Directive 96/71/EC represented a first step forward of great importance in the construction of a regulatory framework specifically dedicated to the posting of workers, it did not resolve all the problems. Moreover, it would not be long before the need to complete the shortcomings and gaps in the European standard was detected in order to work more insistently in the fight against fraud that manifested itself in very different versions. In addition, the restriction that, in the field of interpretation, the CJEU had implemented in its various rulings, fundamentally in relation to the control capacity of the host States regarding the conditions in which the posted workers

[18] C.L. ALFONSO MELLADO, *Desplazamientos de trabajadores en el ámbito europeo y garantías salariales (a propósito de la STJUE de 12 de febrero de 2015)*, in *Trabajo y Derecho*, 2015, 5.

[19] J.F. LOUSADA AROCHENA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: el estado de la cuestión*, in *Ciudad del Trabajo*, 2018, 2, 87 ff.

provided services in their territory. Likewise, the European Commission itself would be more attentive to preserving the economic freedom of companies and combating the administrative overload that the imposition of notification requirements, registration of movements and other control measures could entail for them.[20]

It was therefore necessary to *reinforce* the application of Directive 96/71/EC in order to improve the control, information, administrative cooperation between Member States and the cross-border enforcement of penalties and fines imposed. The *Monti Report* pointed out this need,[21] as was the Resolution of the European Parliament, of 22 October 2008, on the challenges for collective agreements in the European Union, which also highlighted the convenience of a review, although appealing the achievement of the necessary balance between the freedom to provide services (as the cornerstone of the European project) and the fundamental rights and social objectives established in the Treaties, as well as the right available to public and trade union partners to guarantee non-discrimination, equal treatment and improvement of living and working conditions.

Finally opting for a new guarantee Directive and not for the modification of the provisions of the existing one, Directive 2014/67/EU of the European Parliament and of the Council, of May 2014, regarding the guarantee of compliance was approved of Directive 96/71/EC, on the posting of workers carried out in the framework of a provision of services, and which modifies Regulation (EU) n. 1024/2012 regarding administrative cooperation through the Internal Market Information System ("IMI Regulation"). The rule thus responded to the need to consolidate effective instruments to combat fraudulent situations that continued to be detected.

In this sense, one of the main contributions of the Directive concerned the global evaluation of the factual elements considered necessary to verify whether a person falls within the definition of worker or whether there is a real posting. And it is that one of the key problems that the displacements affected by Directive 96/71/EC have always raised is that related to the "reality" of the same.[22] In order to determine whether a company actually carries out substantive activities that are not purely administrative or internal management, i.e. that there is a clear connection between the posting of the worker and the transnational provision of services, the competent authorities

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[20] RIESCO SANZ, GARCÍA LÓPEZ, MAIRA VIDAL, *Desplazamiento de trabajadores en la Unión Europea. El caso del transporte por carretera*, cit., 42 ff.

[21] REPORT TO THE PRESIDENT OF THE EUROPEAN COMMISSION, *A new Strategy for the single market. At the service of Europe's economy and society,* 9 May 2010.

[22] F.J. GÓMEZ ABELLEIRA, *Desplazamiento transnacional laboral genuino y ley aplicable al contrato de trabajo*, cit., 214 ff.

have to assess the elements characterizing the activities carried out by the company in the Member State of establishment and, where necessary, in the host Member State.

Thinking particularly about the fight against letterbox companies, the European standard tries to facilitate the task of verifying if the company posting workers responds to a real activity or, on the contrary, constitutes a fictitious company in order to post workers to other States where labour costs are higher; if it participates, in short, in transnational labour force recruitment mechanisms at a lower cost. The elements proposed for such valuation may include, in particular, the following: a) the place where the company has its registered office and administrative headquarters, occupies office space, pays its taxes and Social Security contributions and, if applicable, holds a professional license or is registered with the relevant chambers of commerce or professional associations in accordance with national regulations; b) the place where posted workers are hired and the place from which they are posted; c) the Law applicable to the contracts entered into by the company with its workers, on the one hand, and with its clients, on the other; d) the place where the company carries out its fundamental business activity and where it employs administrative personnel; e) the number of contracts entered into or the volume of business obtained in the Member State of establishment, taking into account the specific situation of newly created companies (without introducing any criteria to limit this number or volume).

On the other hand, Directive 2014/67/EU incorporates a list (equally non-exhaustive) with the characteristic elements of the work and the situation of the worker that can be examined when determining whether the worker temporarily provides services in a Member State other than the one in which you normally work: a) if the work is carried out for a limited period in another Member State; b) the start date of the posting; c) if the posting is made to a Member State other than the one in which or from which the posted worker usually carries out his work, in accordance with the Rome I Regulation or the Rome Convention; d) if the posted worker returns or is expected to return to work in the Member State from which he is posted, after the work or services for which he was posted have been completed; e) the nature of the activities; f) whether the employer provides or reimburses the travel, board or lodging of the displaced worker and, if so, in what form it is provided or the method of reimbursement; g) the previous periods in which the post has been held by the same or by another posted worker.

The aforementioned budgets, endowed with greater or lesser effectiveness, are incorporated without alterations in the Spanish internal regulations, including the non-exhaustive nature of the list in which they are collected. In any case, such elements cannot be considered in isolation in the corresponding global evaluation, without requiring that all the elements concur in each case

of displacement. Then, if one or more of them do not occur, the possibility of the situation being considered displacement cannot be automatically excluded. In this sense, the assessment of the factual elements in question must be adapted to each particular case and take into account the peculiarities of the situation. In the event of a fraudulent situation in which, despite the simulation, there is no "real" displacement, the regulations of the place of execution of the work shall be applied.

Improving access to information was another of the strengths of Directive 2014/67/EU, in order to complement the brief regulation contained in Directive 96/71/EC. For obvious reasons, access to correct information is essential for the legal certainty of companies and the effectiveness of the protection of the rights of posted workers. They need to know the applicable conditions in order to be able to detect possible irregularities. At the same time, only through effective access for employers to information on their rights and obligations in the fields of labour mobility and the freedom to provide services, will they be able to benefit from the full potential of the internal market.

The objective is none other than to provide information on the working conditions referred to in article 3 of Directive 96/71/EC, and applicable by service providers, of clarity, transparency, intelligibility and accessibility, while providing contact centres or other competent national authorities (article 4 of Directive 96/71/EC) the effective development of its activities. Hence, the European standard mandates the adoption of appropriate measures to ensure that such information is disclosed free of charge and publicly, remotely and by electronic means. Member States should clearly indicate, on a single official website at national level and by other appropriate means, in a detailed and accessible format, which conditions of employment or which provisions of national law apply to workers displaced persons in its territory (without the Spanish transposition regulations detailing characteristics regarding the information that must be provided on the web portal).

The official Spanish website not only offers the corresponding information in our official language, but also in English, French, German, Portuguese, Italian, Romanian, Polish and Bulgarian, reproducing the most relevant provisions on the matter, as well as a link to search engines for collective agreements. As an additional guarantee, the links to the portals of the different social partners are indicated.[23]

Likewise, the express reference introduced by Directive 2014/67/EU to subcontracting chains is relevant. Despite its optional character (article 12

[23] Available in *https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm.*

states that the Member States "may" adopt national measures in this regard) confirmed in Whereas 36, which refers to an "introduction on a voluntary basis", and the fact that the Spanish legal system already had the provisions incorporated in Directive 2014/67/EU (article 42 of the Workers' Statute), the regulation that it includes in this regard is no less an advance. Specifically, the Directive establishes the responsibility of the contractor with respect to any pending net remuneration corresponding to the amounts of the minimum wage or the contributions owed to common funds or institutions of the social partners. The flexibility of the provision extends to the very modality of liability, which can be articulated as subsidiary or joint and several (it indicates that the contractor may be held liable "in addition to or in place of the employer"). As a reminder, Directive 2018/957 provides that Member States must take appropriate measures, in accordance with article 12 of Directive 2014/67/EU, to guarantee responsibility in matters of subcontracting (Whereas 25).

In any case, it is remarkable that the European standard renounces limiting the subcontracting chain and, however, does impose limits on the responsibilities themselves.[24] And it is that Directive 2014/67/EU refers to measures aimed at making the contractor responsible for which the employer is a "direct subcontractor", without therefore extending said responsibility to the other levels of the chain. It also limits this liability to the rights of workers acquired within the framework of the contractual relationship between the contractor and the subcontractor, without prejudice to the Member States being able to establish stricter rules on the scope and extent of liability in subcontracting and, therefore, extend the period of responsibility.

The reinforcement of administrative cooperation between the Member States constitutes another of the workhorses of the field of posting of workers, in the search for the maximum possible guarantee in compliance with European regulations. Directive 2014/67/EU articulates this cooperation through the sending of reasoned requests for information from the competent authorities through the Internal Market Information System, as well as the response to them and the verification and inspection related to the displacements. It also includes the possible investigation of non-compliance or abuse of the applicable regulations on the posting of workers, the sending and notification of documents and the notification of decisions that impose sanctions and fines.

The truth is that factors such as language, ignorance of the national regulations of the country of destination, the problem of letter-box companies or un-

[24] J.M. SERRANO GARCÍA, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, cit.

declared work, add great complexity to the control of these movements and the follow-up of the compliance with European regulations. This was not resolved by Directive 96/71/EC, which remains silent and therefore refrains from introducing provisions in this regard. Not surprisingly, the judgments of the CJEU of 7 October 2010, *Dos Santos Palhota and others*, C-515/08, and of 3 December 2014, *De Clercq and others*, C-315/13, reflected the problem well which implies the wide margin of decision that was left to the Member States, always within the framework of respect for the Treaties of the European Union. Specifically, the CJEU recalls in both judgments that Directive 96/71/EC seeks to coordinate the material national provisions relating to the working and employment conditions of posted workers, regardless of the ancillary administrative regulations intended to allow the verification of the observance of said conditions, on which it does not include specific measures. Therefore, it concludes that the Member States are free to define those control measures, while respecting the Treaty and the general principles of Union law.[25]

With the purpose of amending these regulatory deficiencies, Directive 2014/67/EU provides that the Member States may only impose the administrative requirements and control measures that are necessary to guarantee the effective supervision of compliance with the obligations contemplated in this Directive and Directive 96/71/EC (article 9.1). Although the list of possible measures contained in the European standard is not exhaustive, it should be borne in mind that the incorporation of other administrative requirements and control mechanisms is subject to the condition that they are justified and proportionate and, in any case, to the appearance of situations or new elements that allow us to suppose the insufficiency or inefficiency of the requirements stipulated in the Directive. In particular, it proposes various measures that can be imposed by the Member States.

The European standard refers to the obligation of the service provider established in another Member State to present a simple declaration to the responsible competent national authorities, at the latest when the provision of services begins,[26] in the language or one of the official languages of the host

[25] Court of Justice of the European Union, 12 September 2019, C-64/18. *Maksimovic*.

[26] The Spanish transposition Act requires the communication of the posting "before it begins" (article 5.1 of Act 45/1999). Thus, the requirement that the declaration shall be made within a certain period (for example, a few hours or a few days) before the posting goes beyond what is expressly authorized under the Directive. See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU)

Member State, or in one or more other languages accepted by it, containing the relevant information necessary to enable physical checks at the workplace. Specifically, this information includes: the identity of the service provider, the anticipated number of clearly identifiable posted workers, the person who liaises with the competent authorities of the host Member State and the person who acts as a representative, the foreseeable duration and the expected dates of the start and end of the posting, the address of the place of work and the nature of the services that justify the posting.

This declaration makes it possible to specify the terms of the posting, which helps to facilitate the supervision of applicable working conditions and the detection of possible fraudulent conduct, as well as to guarantee better monitoring and control according to the sector or type of company. Act 45/1999 dispenses with specifying a procedure or deadlines if the case, not necessarily implausible, of changes in the information presented in the prior declaration arises. However, it does decide to extend the regulation of the Directive and impose another requirement in the event that the company posting workers to Spain is a temporary employment company. In such a case, the notification of posting must also include both the accreditation that meets the requirements demanded by the legislation of its State of establishment to place workers at the disposal of another user company, as well as the indication of the temporary needs of the user company that they try to satisfy with the contract for making available.

Among the control measures that the Directive allows the Member States to impose, it is also worth mentioning the obligation to keep, make available or keep copies in paper or electronic format of the employment contract, the pay slips, the files with the schedules that indicate the beginning, end and duration of daily work and proof of payment of wages, or copies of equivalent documents, during the posting period, in an accessible and clearly identified place in its territory, such as the place of work, at the construction site or, in the case of mobile workers in the transport sector, the base of operations or the vehicle in which the service is provided. The Spanish transposition regulations add to this documentation the corresponding accreditation of the authorization to work of third-country nationals in accordance with the legislation of the State of establishment (article 6.2.d. of Act 45/1999). Once the posting is completed, said Act requires employers to deliver the aforementioned documents when they are required by the Labour and Social Security Inspectorate, materializing the possibility that the Directive opened in letter c) of article 9.1, although it does not specify a specific period. Likewise, written notification is provided for by employers to the Labour Author-

1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation").

ity in relation to damage to the health of displaced workers that may have occurred on the occasion of or as a consequence of the work carried out in Spain. Also following the provisions of letter d) of the precept, the Spanish standard requires the translation of the documentation. Specifically, it must be submitted translated into Spanish or in a co-official language of the territory where the services are to be provided.

Directive 2014/67/EU completes the list of possible measures to be imposed by the Member States by referring to the obligation to designate a person to serve as liaison with the competent authorities of the host Member State in which the services are provided and to send and receive documents or notifications, if necessary; as well as the obligation to appoint a contact person to act as a representative through whom the relevant social partners can seek to engage the service provider in collective bargaining in the host Member State during the period in which the services are provided. This person does not have to be present in the host Member State, but must be available upon reasonable and justified request.

5. *The latest reform on the matter: an assessment of the strengths and weaknesses*

Good proof that Directive 2014/67/EU did not provide the solution to all the shortcomings that were attributed to the 1996 standard is that, even before its entry into force, the need to carry out not so much a reinforcement of the movement control mechanisms, but a reform of some of the essential contents of Directive 96/71/EC.[27] Thus, just one year after its approval, the European Commission launched an initiative aimed at assessing the virtues of a reform of the 1996 Directive in order to address the problems that the later Directive was not capable of solving or had left slopes. We could consider some of these problems to be endemic, in the sense that they have always existed and have not been fully resolved, while others would have arisen as a result of new realities brought about by the passage of more than twenty years between the first Directive and the most recent to date.

The objective of the latter is not far from that of Directive 96/71/EC, insofar as it continues to strike a balance between the need to promote the free provision of services and guarantee fair conditions of competition, on the one hand, and the protection of the rights of posted workers, on the other. Alt-

[27] M.P. VELÁZQUEZ FERNÁNDEZ, *Los desplazamientos transnacionales de las personas trabajadoras: novedades y desafíos de la transposición de la Directiva 2018/957/UE al ordenamiento jurídico español*, in *Revista de Trabajo y Seguridad Social. CEF*, 2021, 461-462, 76-77.

hough Directive 2018/957 addresses this task through more ambitious provisions and more incisive techniques aimed at making elements that were once ambiguous or vitiated by legal loopholes effective.

A good part of its content had already been anticipated in our legal system, since Act 45/1999 contemplated the application to posted workers of all the constitutive elements of remuneration and of the basic working conditions provided for in the agreements sectorial groups of the host State in all branches of activity (and not only in the construction sector), or the application of the principle of equal remuneration and other essential working conditions among workers assigned by temporary employment agencies of another Member State and the workers of the Spanish user companies. Perhaps that is why Spain took time to transpose the European standard to the internal legal system (as it already did with respect to Directive 2014/67/EU), finally through Royal Decree-Law 7/2021, of 27 April, of Transposition of European Union Directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, posting of workers in the provision of transnational services and defence of consumers (articles 11-14). The rule introduces modifications in Act 14/1994, of 1 June, by which temporary employment agencies are regulated; Act 23/2015, of 21 July, Organizing the Labour and Social Security Inspection System; and Royal Legislative Decree 5/2000, of 4 August, on Infractions and Sanctions in the Social Order.

Directive 2018/957 considerably increases the degree of protection for posted workers. And it does so by expanding, through a non-aseptic mention ("on the basis of equality of treatment"), the catalogue of working conditions that apply to posted workers in accordance with the legislation of the State of provision of services. Specifically, the list of matters that contained the "hard core" of minimum protection provisions includes both the housing conditions of workers, when the employer provides them to workers who are outside their usual place of work, as well as supplements or reimbursements for travel, accommodation and subsistence expenses incurred by posted workers, when they must travel to and from their usual place of work in the host Member State or when they are temporarily sent by their employer from that Member State usual place of work to another.

Likewise, addressing an issue that had been neglected in Directive 2014/67 /EU (despite the judicial pronouncements in this regard[28]), the 2018 Directive modifies the provisions related to salary and does so by dispensing with this term to use the term "remuneration". If prior to the reform, article 3 of Directive 96/71/EC alluded to the amounts of the minimum wage among the working

[28] Court of Justice of the European Union, 14 April 2005, C-341/02, *Commission v Germany*; 7 November 2013, C-522/12, *Isbir*; 2 February 2015, C-396/13, *Sähköalojen ammattiliitto.*

conditions to be equated, the precept now refers to remuneration, also including, as it did before, the corresponding increase for overtime. For the purposes of the European standard, the concept of remuneration is determined by the national legislation or practices of the Member State in whose territory the worker is posted and includes all the constituent elements of remuneration that are mandatory by virtue of legal, regulatory or administrative provisions, or of the collective agreements or arbitration awards that, in that Member State, have been declared universally applicable or in any other way of application.

Specific supplements for displacement must be considered part of the remuneration to the extent that they are not paid as a reimbursement of the expenses actually incurred as a result of the displacement, such as travel, accommodation or maintenance expenses. In the event that the working conditions applicable to the employment relationship do not indicate whether the elements of the supplement for displacement are paid as reimbursement for expenses actually incurred as a result of the displacement or as part of the remuneration and, where appropriate, what those items are, the entire add-on is considered to be paid as expense reimbursement.

But the extension that the 2018 reform stars is not only material but also formal, since the limitations that Directive 96/71/EC articulated in terms of the legal instruments in which working conditions were recognized are also overcome. The previous version of the 1996 Directive referred to the working and employment conditions established in the legal, regulatory or administrative provisions, as well as in the collective agreements or arbitration awards declared of general application in force in the host State (provided that they refer to the activities in the field of construction mentioned in the Annex to the standard). Directive 2018/957, in its vocation to extend the degree of protection, adds to the latter the collective agreements or awards that "otherwise apply" and without circumscribing them to the construction sector. For clarification purposes, the European standard clarifies that, "in the absence of or in addition to" a declaration system of universal application of collective agreements or arbitration awards, the Member States may rely on those that are universally applicable in all similar companies belonging to the profession or sector in question and corresponding to their territorial scope of application, or in the collective agreements concluded by the most representative organizations of the social partners at national level and that are widely applied throughout the national territory.

The 2018 rule thus enters into an issue on which Directive 2014/67/EU had not ruled and which continued to pose problems,[29] especially in the field of

[29] This issue was already evident on the subject of the Judgment of the Court of Justice of the European Union, 3 April 2008 C-346/06, *Rüffert*.

remuneration, given that there are countries where the minimum wage is not regulated by a heteronomous norm, but it is necessary to comply with the provisions of the collective agreements, which are not always considered *erga omnes* and, therefore, were not covered by the previous regime.[30] Therefore, this regulatory change allows the application of working conditions established in existing collective agreements in the country of provision of services, regardless of whether or not it has a universal declaration system. In any case, it is worth pointing out that the reform could have been more complete if, as Directive 96/71/EC did, which specified what should be understood by collective agreements or arbitration awards declared to be of general application, even to lack of a system of declaration of general application of collective agreements or arbitration awards (article 3.8), it would have done the same with the new category that it incorporates.

In the Spanish case, the application priority of the company agreement contemplated in the Workers' Statute may cause problems when determining the instrument applicable to posted workers. And it is that, taking into account that article 3.4 of Act 45/1999 provides for the application of the working conditions provided for in the sectorial collective agreements, it could be the case that, in the same company, the local workers were subject to the conditions provided for in the company agreement and the posted to those regulated by the sectorial agreement. With which, the principle of equal treatment so often extolled in Directive 2018/957 would be called into question, by applying different conditions to workers who provide services in the same company. At the same time, there would be reasons to question whether this differentiation in the applicable instrument could imply a restriction on the free provision of services by companies that post workers to our country. At least, the CJEU reached this conclusion when it asserted that the fact that a national employer may, through the conclusion of a company collective agreement, pay a lower minimum wage than that established in a collective agreement, declared of general application, while an employer established in another Member State cannot do the same, it constitutes an unjustified restriction on the freedom to provide services.[31]

The temporal aspect in the concept of posting is another of the extremes addressed in the reform of the 1996 Directive. It is true that Directive 2014/67/EU had tried to define temporality more precisely, assuming that it constitutes a determining element for the application of the legal regime provided for in the European regulatory framework. But the efforts were not en-

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[30] J.M. SERRANO GARCÍA, *Los nuevos requisitos para el desplazamiento de trabajadores ¿Evitan los abusos en esta materia? Propuestas para una Ley*, cit.

[31] Court of Justice of the European Union, 24 January 2002, C-164/99, *Portugaia Construções.*

tirely successful and Directive 2018/957 delves into this issue. Bearing in mind that, in a good part of the cases, postings have a long duration, the regulation introduces the long-term posting worker as a new legal category.[32] It is a matter of alleviating one of the main deficiencies that the legal regime of the transnational posting of workers dragged on since Directive 96/71/EC refrained from introducing both minimum or maximum references in the temporality of the posting, as well as control mechanisms in the extensions of the same. Thus, abusive situations were witnessed that escaped the application of the most guaranteeing rules of the host State.

Since the last reform on the matter, when the effective period of posting exceeds twelve months (susceptible of being extended for another six if there is a reasoned notification),[33] all the working conditions that are established apply to posted workers in the host Member State. The implementation of the concept of long-term posting implies, through a specific legal regime, practically complete equality in terms of working conditions between local workers in the host State and those posted there. Excepted from this comparison, in any case, are the procedures, formalities and conditions for entering into and terminating the employment contract, including non-competition clauses, as well as supplementary retirement schemes.

However, if a company replaces a posted worker with another posted worker who performs the same job in the same place, it is understood that the posting has the cumulative duration of the posting periods of each of the posted workers. The concept of "the same task at the same place" is determined taking into account, among other things, the nature of the service provided, the work performed and the address or addresses of the place of work. Directive 2014/67/EU already alluded to the substitution of posted workers precisely in the enumeration of the elements to be taken into consideration to determine the temporary nature of the work provided in a Member State other than that of establishment. Specifically, the European rule calls for taking into account the previous periods in which the position has been held by the same or by another (posted) worker, although the absence of provision on the limit to the duration of the posting clouded the effectiveness of this forecast.

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[32] N. MARCHAL ESCALONA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado*, in *Revista de Derecho Comunitario Europeo*, 2019, 62, 96-98.

[33] The Spanish transposition introduces a transitory rule in relation to the temporary posting limit, so that said limit is applicable to workers who are posted to Spain after the entry into force of Royal Decree-Law 7/2021, as of 29 April 2021. For workers who were already posted in Spain at the time of its entry into force, this maximum term would apply once six months have elapsed since it.

On the other hand, protection is extended in relation to workers posted by temporary employment agencies. The Directive urges them to guarantee the working conditions that apply, in accordance with article 5 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008, regarding work through temporary employment agencies, to workers assigned by said temporary employment agencies established in the Member State where they are located. Then Directive 2018/957 makes the option articulated in the 2008 Directive a mandate to be imposed in all Member States.[34]

Likewise, the 2018 reform introduced a specific regulation of the cases of "chain posting" of temporary agency workers, that is, those cases in which the workers who have been made available to a user company by a temporary employment company are sent to the territory of another Member State in the framework of a transnational provision of services. In order to guarantee the effective protection of these workers, the current version of Directive 96/71/EC provides that the user company must inform the temporary work agency about posted workers temporarily working in the territory of a different Member State from the one in which they usually work for the temporary work agency or for the user company, in order to allow the employer to apply the working conditions that are most favourable to the posted worker.

Transposing these provisions, Act 14/1994, after the reform carried out by Royal Decree-Law 7/2021, urges Spanish user companies that temporarily send workers assigned to them by Spanish temporary employment companies to another State member, to indicate in the provision contract the estimated start and end dates of the posting, either at the time of signing it or through an addendum to it in the event of a sudden need to make the shipment, as well as to report on the start of the assignment to the temporary work agency with enough time before it so that it can communicate the posting to the other State to which the worker is sent. In the same way, the user companies established in other States of the Union that temporarily send the workers assigned by the temporary employment agencies to Spain to carry out a job within the framework of a transnational provision of services, must inform the temporary employment agency about the start of the posting with enough time for said company to communicate the displacement to the Spanish authorities. These cases of chain postings also have their impact in the field of the previous posting declaration. And it is that, in such cases, the

[34] N. MARCHAL ESCALONA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: hacia un marco normativo europeo más seguro, justo y especializado*, cit., 100 ff.

communication must also include the identification of the foreign user company that sends the worker to Spain, as well as the determination of the provision of services that he is going to develop.

The control measures are also reinforced with the 2018 reform. If in its previous version, Directive 96/71/EC simply alluded to the adoption of appropriate measures by the Member States in the event of non-compliance with the standard European Union, who were entrusted in particular to ensure that workers or their representatives had adequate procedures to comply with the obligations established in the Directive, the current wording of article 5 of Directive 96/71/EC affects the joint responsibility of the States involved in the posting of the worker. Specifically, both the State of origin and the host State are responsible for monitoring and executing the obligations contemplated in said Directive and in Directive 2014/67/EU, as well as adopting the appropriate measures in the event of non-compliance. In addition, when after an overall assessment carried out by a Member State it is found that a company is creating, unduly or fraudulently, the impression that a worker's situation falls within the scope of Directive 96/71/EC, that Member State is called upon to ensure that the worker benefits from the applicable legislation and practices.

6. *Conclusions*

The need for regulation and effective collaboration between the Member States is explained by the constant growth (although at a slight rate, as indicated) of this type of labour mobility. But it is not only a quantitative question, or it should not only be. The persistence of dysfunctions in the framework of the posting of workers, motivated by the very insecurity that permeates the scenario in which the companies operate, generally without equal conditions of competition, as well as by the vulnerability of the posted workers, who are frequently exposed to situations of abuse or fraud, justifies the convenience of continuing to consolidate and advance in the articulation of an effective regulatory and cooperative framework.

The permanent normative review shows that the trans-nationalization of labour relations does not stop giving rise to conflicts, whether in terms of interpretation or application. Also the very context in which EU legislation is called to govern has changed considerably over the years. Notably, the successive enlargements of the European Union and the incorporation of countries with different standards (generally lower) than the other Member States highlighted the need to update the regulation of those that have been traditional workhorses in the field of movement of workers: working condi-

tions, control instruments and administrative cooperation between the Member States involved. In any case, the gestation of the 2018 Directive materializes the confrontation between those countries traditionally of origin of posted workers and those other recipients of such displacements. The former understand that the application of the principle of "equal pay for equal work" violates the free provision of services as the basis of the single European market, given that salary differences can represent a competitive advantage for service providers. The appeals filed by Hungary and Poland against the European standard would well illustrate the aforementioned confrontation.

The suspicion that it is an unfinished regulation (perhaps endless), in the sense that it is exposed to continuous revisions and proposals for improvement, is confirmed in Directive 2018/957 itself. This urges the Commission to examine the application and compliance with the standard and to propose, where appropriate, the necessary modifications. Likewise, the Directive entrusts the EU institution with assessing the adoption of new measures to guarantee fair conditions of competition and protect workers in the event of subcontracting or road transport activity.

The Spanish transposition of the most recent Directive has not been ambitious, which is hardly reprehensible if one takes into account that our legal system already had incorporated a large part of the provisions set forth in Directive 2018/957. Specifically, issues such as the application of the principle of equal pay and other working conditions between workers assigned by temporary employment agencies from another Member State and workers from Spanish user companies, or the application of all the constituent elements of the mandatory remuneration and working conditions provided for in the sectorial collective agreements for posted workers who provide services in any branch of activity, and not only in the construction sector, were already contemplated in our domestic law.

However, the regulatory development required by Act 45/1999 since its reform in 2017 in various aspects related to the posting of workers is still pending. Thus, issues such as posting declarations and the creation of a central registry of such declarations (article 5 and sixth additional provision),[35] the notification of employers to the Labour Authority regarding damages to the health of posted workers that occur on the occasion of or as a consequence of the work carried out in Spain (article 6.4), as well as mutual recognition and assis-

[35] Spain does not have a centralized database of posting declarations. See M.P. VELÁZQUEZ FERNÁNDEZ, *Los desplazamientos transnacionales de las personas trabajadoras: novedades y desafíos de la transposición de la Directiva 2018/957/UE al ordenamiento jurídico español*, cit., 93 ff.

tance in the notification and cross-border execution of administrative sanctions derived from non-compliance with the regulations on the posting of workers (seventh additional provision) remain to be specified. This delay in the regulatory development, while hindering the effectiveness of control in compliance with the regulations in this regard, is one of the causes to which the absence of centralized information on the temporary posting of workers is attributed.

On the other hand, it should be pointed out that many of the problems associated with the phenomenon of temporary posting of workers frequently have their origin, not so much in the transnational nature of the provision of services, but in their abusive or fraudulent use. In fact, no minor challenges are still pending that defy the useful effect of the regulatory framework articulated in this regard, which does not seem to finish facing them effectively. One such challenge is represented by the so-called mailbox companies. These, far from developing real and effective activities in the country of establishment, are created with no other objective than that of formally hiring workers there. Taking into account that it is usually the State where the least social contributions are paid and where wages are lowest, the use of these companies tries to avoid the full application of the working conditions of the host State. Along with letterbox companies, the persistence of fraudulent situations continues to pose challenges, such as the false self-employed workers, who try to avoid the application of Directive 96/71/EC and, with it, the working conditions in accordance with the *lex loci laboris* principle;[36] as well as other abuses that take advantage of the very complexity of triangular labour relations in an international context.

The concern for these situations of regulatory transgression and fraud has not ceased to be present in the European legislator despite the fact that, as has just been pointed out, the efforts for the moment have not been as fruitful as would have been desirable. Not surprisingly, Directive 2018/957 expressly mentions the transnational cases of undeclared work and fictitious self-employment related to the posting of workers among the matters subject to cooperation and assistance between the authorities of the different Member States. Likewise, it should not be forgotten that supporting the Member States in the fight against undeclared work is precisely one of the functions of the European Labour Authority and that, internally, Spain has a Special Coordination Unit for the Fight against Transnational Labour Fraud, integrated into the Labour and Social Security Inspection through its affiliation to the National Office for the Fight against Fraud. This Unit allows for better

[36] J.F. LOUSADA AROCHENA, *El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: el estado de la cuestión*, cit., 89 ff.

coordination of all the actions of this body within the scope of the European Labour Authority and cooperation actions with other bodies within the same scope.

Finally, the discrepancy between the labour approach and that of Social Security itself also presents problems in the treatment of this issue. Posted workers remain subject to the Social Security legislation of the country of origin during the posting, provided that the foreseeable duration of the posting does not exceed twenty-four months and that they have not been sent to the country of provision of services to replace other displaced workers (article 12.1 of Regulation 883/2004), even when said workers have not been sent by the same employer.[37] For this purpose, the institution of the State of origin must issue the A1 certificate, which certifies the maintenance of the insurance relationship with the Social Security of that State. This form is binding for the Social Security institutions and jurisdictional bodies of the other Member States, as long as it is not withdrawn or invalidated by the issuing State. The application of the legislation of the State of origin contrasts with the one that corresponds to apply from the labour point of view. In accordance with article 3 of the 1996 Directive, posted workers are subject to the working conditions mentioned in the precept in accordance with the provisions of the legislation of the host State. This divergence in the determination of the applicable Law according to one matter or another ends up further complicating the solution of those situations in which the application of labour and Social Security legislation must converge.

[37] Court of Justice of the European Union, 6 September 2018, C-527/16, *Alpenrind and Others*.