

DISCREPANCIES BETWEEN EUROPEAN AND EU MEMBER STATES' LEGISLATION: THE CASE OF DELEGATION AND DETACHMENT

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ABSTRACT:

THIS ARTICLE DOES NOT SIMPLY SUGGEST A SHORT DESCRIPTION OF THE EUROPEAN LEGISLATION AND THAT OF THE EU MEMBER STATES REGARDING THE RIGHTS OF DELEGATION AND DETACHMENT, BUT IT ALSO TAKES INTO CONSIDERATION AN OVERVIEW OF THESE RIGHTS FOR THE CITIZENS OF THE EUROPEAN UNION IN A GLOBAL CONTEXT. STARTING FROM THE GENERAL LEGISLATIVE FRAMEWORK OF THE EUROPEAN UNION (WHICH FOCUSES MORE ON SOCIAL ASPECTS) AND REFERRING TO PARTICULAR NOTIONS FROM THE SOCIAL AND ESPECIALLY FINANCIAL FIELD FOUND IN THE EU MEMBER STATES' LEGISLATION (STILL NOT HARMONIZED), THE AUTHORS OF THIS ARTICLE AIM TO HIGHLIGHT SOME DYSFUNCTIONALITIES THAT OCCUR IN THIS AREA DURING FISCAL INSPECTIONS. SUCH DISCREPANCIES HAVE AS A NEGATIVE EFFECT CERTAIN FISCAL DISADVANTAGES FOR ECONOMIC SOCIETIES (FROM DIFFERENT EU MEMBER STATES), AND ESPECIALLY FOR THE EMPLOYEE (THE PERSON THAT HOLDS A WORK CONTRACT AND IS DELEGATED/DETACHED FROM ONE EU MEMBER STATE TO ANOTHER). IN THE CASE OF ROMANIAN EMPLOYEES DELEGATED OR DETACHED IN ANOTHER EU MEMBER STATE, THE SOCIAL AND FINANCIAL ASPECTS INCLUDE A SERIES OF DISCREPANCIES THAT AFFECT BOTH THE INDIVIDUAL'S ACTIVITY AND THE FINANCIAL SYSTEM IN ITS ENTIRETY. THE MAJORITY OF THESE DISCREPANCIES RESULT FROM THE MANNER IN WHICH THE NATIONAL (AND EUROPEAN) LEGISLATION IS INTERPRETED BY THOSE WHO CONDUCT AN INTERNAL OR EXTERNAL FISCAL INSPECTION.

KEY WORDS: FISCAL INSPECTION, ACCOUNTING EXPERT, DELEGATION, DETACHMENT, DOUBLE TAXATION.

INTRODUCTION

According to the Romanian Fiscal Procedure Code (published in 2003 and amended in 2007)³, a fiscal inspection refers on one hand to verifying the legality and compliance of fiscal declarations (tax returns), the correctness and accuracy in complying with the obligations by the tax payers, and on the other to the compliance with the provisions of the fiscal and accounting legislations, checking and determining the tax basis, identifying the

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³ The Fiscal Procedure Code of Romania (published in 2003 and amended in 2007), 11.

differences in liabilities to be paid and the related accessories. There are various aspects that need to be taken into account when conducting an internal or external fiscal inspection on an economic entity, but a special emphasis must be put, however, on the field of interest and the place where the activity is conducted. This is important as a special situation emerges in the case of commercial entities that deal with a cross border field of activity because at least two legislative systems must be taken into account: that of the state of residence and that of the state where the work is conducted. In such cases, the cross border character of the society's activities implies action of detachment and delegation, and therefore, an accounting investigation (whether internal or external) must refer first to the European legislation applicable overall, and then also to the specific norms applicable within a certain state. In order to avoid the double taxation of an employee or employer in terms of social security contributions and income taxes, some attention must be given to the principle of 'lex loci laboris' (i.e. the legislation of the country where the activity takes place) and the manner in which this is applied and taken into consideration in the fiscal documents of an economic society.

This article suggests an analysis on the phenomenon of detachment and delegation, respectively by referring to a succinct comparison between European legislation and that of the EU member states' in order to point out some dysfunctions that occur especially in conducting fiscal audits. Due to the fact that both detachment and delegation are activities that have a cross border character, there are some gaps in what the different legislations provide and how it is interpreted in specific situations by those involved. In our research, we have therefore studied the literature written in this field, as well as the rules governing international detachment and delegation published at the national and international level. We have used a combined approach that involved a qualitative analysis of legal documents, a comparison between findings of fiscal inspection in the case of detachment and delegation, as well as a synthesis in drawing conclusions and presenting some solutions.

DISCREPANCIES BETWEEN EUROPEAN AND EU MEMBER STATES' LEGISLATION. CASE STUDIES: DETACHMENT AND DELEGATION

The free movement of people for work related reasons is part of one of the pillars of the European Communities, and therefore a considerable interest was given at the level of the European Union to the coordination of the national social security systems in order to protect both employees and employers and to avoid grave fiscal issues within companies and member states' economies. In this field, the two important normative documents that apply today and that are used as a basis in regulating the movement of people at the European level are: *Regulation (EC) No. 883/2004 of the European Parliament and the Council on the coordination of social security systems*⁴ (drawing on the previous Regulation (EC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community), and the *Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for Implementing Regulation (EC) No. 883/2004 on the coordination of social security systems*⁵ respectively. These documents are used in order to clarify the rights and

⁴ Regulation (EC) No. 883/2004 of the European Parliament and the Council on the coordination of social security systems, *Official Journal of the European Union* 166 (30.4.2004): 1. (corrigendum *Official Journal of the European Union* 200 (7.6.2004): 1).

⁵ Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for Implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, *Official Journal of the European Union* 284 (30.10.2009) 1.

duties an employee and employer have in the country of residence and in the country of work detachment.

However, despite the elaboration and implementation of such regulations, there are still certain aspects that require further legislative explanation or leave a narrow space for subjective interpretation in what cross border activities are concerned. There are also some principles that must be respected regardless of the workplace where an employee is posted⁶, especially the principles of non-discrimination and equal treatment. In order to avoid double taxation on behalf of a tax payer (individual worker or commercial entity), a good coordination of the national social security systems is recommended, based on four main principles: only one legislation applicable; equality of treatment; aggregation of the insurance, residence, or work periods; and export of work benefits.⁷

In what the EU legislation is concerned, a person conducting a paid work (employed or self-employed) can therefore be subjected to the social security system of only one member state, generally the state where this person concludes a work contract and conducts its main activities (i.e. where the society that employs the person has its headquarters), if not otherwise provided.⁸ Regulation (EC) no. 883/2004 provides in Articles 12-13 and Regulation (EC) no. 978/2009 provide in Articles 6 and 14⁹, respectively, the clarification to which state's legislation a worker employed in one state and then subsequently posted in another member state, is subjected to. However, the expression 'where the worker conducts a substantial part of his/her activity' leave space to a considerable margin of interpretation as it creates confusion regarding which legislation applies, that of the state of residence of the society's headquarters or that of the state where the employee is posted. In order to solve the problems that occur in such a situation, certain arrangements can be made between employers and use the A1 certificate to clarify to which state the posted employee pays social contributions. Another aspect that creates divergence is that of the transport and accommodation allowances paid by an employer to a worker posted in another state and how are these expenses entered in the accounting documents of the economic entity because they can be interpreted differently during a fiscal inspection.

For a succinct clarification of the terms used in our study, we must present what the national and European legislation understand by the concepts of detachment and delegation. Detachment refers to 'the act by which the workplace is changed temporary, by the disposition of the employer, to another employer, in order to execute some works in his interest'.¹⁰ Delegation represents 'the temporary exercise by an employee, by the disposition of the employer, of certain undertakings or tasks according to his work competences, outside of his workplace'.¹¹ Both actions concern the field of free movement of persons and involve therefore at least two different states when an employee from one member state of the EU ('posting state') is sent to work in another member state ('state of employment'), and this

⁶ Yves Jorens, Simon Roberts (eds.), *Analysis of selected concepts of the regulatory framework and practical consequences of the social security coordination* (Ghent: Ghent University, 2010), 11.

⁷ International Labour Office, *Coordination of Social Security Systems in the European Union. An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009 / Coordonarea sistemelor de securitate socială în Uniunea Europeană. Raport explicativ asupra Regulamentului (CE) nr. 883/2004 și al Regulamentului (CE) său de implementare nr. 987/2009* (Budapest, 2010), 2.

⁸ Jan Cremers, *Coordination of national social security in the EU*, AIAS Working Paper 10-89 (Amsterdam: University of Amsterdam, March 2010), 14-15.

⁹ Regulation (EC) No. 883/2004; Regulation (EC) No. 987/2009.

¹⁰ Romanian Law no. 53/2003, Art. 45.

¹¹ Romanian Law no. 53/2003, Art. 43.

person is therefore referred to as a ‘posted worker’.¹² From the EU’s perspective, this ‘posted worker’ can be subjected to a single social security system, of the posting state or of the state of employment, depending of the legal documents concluded before.

In order to exemplify some discrepancies that emerge from different interpretations of the same legislation coming from different fiscal agents, we can use some case studies for the situation of detachment and delegation of workers. The examples suggested are based on real situations found in the Romanian fiscal environment, but the details are modified in our research due to the requirements of professional confidentiality. In both case studies, the problems that arise are similar and come from lack of a clear and coherent legislation at the national and European level.

For our analysis on the case of detachment of workers we suggest an economic entity from the field of meat processing, with a fiscal headquarter registered in Romania and that on the basis of a work contract sends employees in Germany for a specific duration of time to fulfil the same activities. In this field, regulations are quite limited and confusing in formulation, leaving space for interpretation and application. The employee sent abroad is paid a monthly base wage in accordance with the Individual Work Contract for which payrolls had been drawn and the afferent fiscal obligations (income tax, social contributions, etc.) were calculated, declared, and paid; and an amount in Euro that covers travel and accommodation expenses, as well as a detachment allowance in accordance with the detachment contract and the collective work contract that applies here. The society involved had also obtained the A1 certificate concerning applicable legislation regarding social security that attests the fact that the personnel sent abroad has no obligation to pay contributions in another state (done in order to avoid double taxation for both the employer and the employee). However, during a fiscal inspection conducted at the respective economic society, the authorized personnel from the Authorities of Fiscal Inspection found it impossible to establish a fiscal situation, creating thus a problem (that it cannot solve) that they name a “Fiscal Issue” and that they submit to the National Agency for Fiscal Administration (ANAF) in order to be solved. But the opinion formulated by fiscal experts (both internal and external) hired by the society to assist with the fiscal inspection based on the right to receive specialised assistance¹³ contradicted the findings of the fiscal inspectors. The society had used their right for specialised assistance during a fiscal inspection¹⁴ that can verify or contradict the opinion formulated.

There are some important aspects reported by the fiscal inspection that were clarified and contradicted by the fiscal experts in the case we presented, mostly relating to a different interpretation of the applicable legislation: a rigid reading on the part of the fiscal inspectors as opposed to a flexible and justifiable interpretation from the fiscal experts. The majority of the problems reported are connected to the amounts paid to the employees sent abroad in the virtue of detachment obligations.

Firstly, the fiscal inspectors did not considered that sums paid to the employees sent abroad could be considered detachment allowances since their activity in Germany was the same as that from Romania and therefore it did not fall within the conditions provided by Article 1 of the Government Decision no. 518/1995.¹⁵ The fiscal experts clarified however,

¹² European Commission, *Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland* (Bruxelles: 2013), 7.

¹³ Ioana Maria Costea, *Inspekția fiscală: reglementări, doctrină, jurisprudență [Fiscal Inspection: Regulations, Doctrine, Law]* (Bucharest: Ed. C.H. Beck, 2009), 74.

¹⁴ The Fiscal Procedure Code, Art. 106.

¹⁵ Government Decision no. 518/1995 regarding certain rights and duties of the Romanian personnel sent abroad for undertaking temporary missions (with subsequent completions and modifications), Art. 1: The provisions of this decision apply to the personnel sent abroad to carry out temporary missions that can

that the employees are entitled to benefits as provided in the Individual Work Contract and to the Detachment Contract, which comprise a specific monthly wage, allowance for covering accommodation and transportation, and a detachment allowance. They refer also, as legal basis for their argument, to Article 17 from the same Government Decision no. 518/1995¹⁶, which details the conditions and situation of such economic societies in the case of detachment.

Secondly, the fiscal inspectors refer to the articles from the Romanian Law no. 53/2003 concerning the Labour Code which provide the conditions needed for a movement of workers to be considered detachment: the employee can be sent abroad for a maximum period of 120 days; the detachment allowance must cover subsistence, daily expenses, the cost of transportation within the area of work; the monthly wage paid to the worker abroad respects the norms and pay grade of the German state (i.e. amount/hour of work). In this sense, the fiscal inspectors considered that the economic society did not fulfil these conditions in the detachment of workers to Germany, as the duration of detachment abroad surpassed 120 days and the employees were paid besides the detachment allowance an amount for covering transportation and accommodation. The fiscal experts, however, referred to the same Law no. 53/2003 in order to clarify that the conditions for detachment are fulfilled and that the national legislation provides for the payment of all those benefits. Articles 46¹⁷ and 47¹⁸ of the above mentioned law clarifies the conditions under which the duration of detachment can be prolonged, the financial benefits to which a detached employee is entitled for the duration of his/her stay abroad ('paid transport and accommodation expenses', 'a detachment allowance'), the employee's right to choose the most favourable conditions whether they are provided by the employer who sends him or the employer who receives him. In addition, the fiscal experts use the Romanian Law no.

represent: a) official visits, negotiations, consultations, or the conclusion of conventions, agreements, and other such understandings; b) participation in fairs and expositions; market prospecting; economic and technical-scientific cooperation; contracting and other actions derived from executing trade agreements; etc.

¹⁶ Government Decision no. 518/1995, Art. 17: (1) It is recommended that economic agents, other than the ones mentioned in Art. 16, Par. (1), as well as philanthropic institutions, associations, and others, apply the provisions of this decision accordingly. (2) in the situation in which the legal businesses mentioned in Par. (1) give supplementary benefits, the expenses made in this sense, that are taken into account when calculating the deductible returns, cannot surpass the ones entitled to the personnel, in the limits and conditions established by this decision.

¹⁷ Romanian Law no. 53/2003, Art. 46: (1) The detachment can be disposed on a time period of maximum a year. (2) Exceptionally, the detachment period can be extended from objective reasons that impose the presence of the employee at the employer where the detachment was disposed, with the written agreement of both parts, every six months. (3) The employee can refuse the detachment disposed by his employer only exceptionally and for strong personal reasons. (4) The detached employee has the right to be paid transport and accommodation expenses, as well as a detachment allowance, in the conditions provided by the law or the collective work contract applicable.

¹⁸ Romanian Law no. 53/2003, Art. 47: (1) The rights entitled to the detached employee are granted by the employer where the detachment was disposed. (2) On the duration of the detachment, the employee benefits from the rights that are most favourable to him, either the rights granted by the employer who disposed the detachment, or the rights granted by the employer where he is detached. (3) The employer that disposes the detachment has the obligation to take all the necessary measures so that the employer where the detachment was disposed completely and timely fulfils all of his obligations towards the detached employee. (4) If the employer where the detachment was disposed does not completely and timely fulfil all of his obligations towards the detached employee, these are to be fulfilled by the employer who disposed the detachment. (5) In the case when there is a divergence between the two employers or none of the two fulfils their obligations according to Par. (1) and (2), the detached employee has the right to return to his workplace at the employer that had detached him, to sue any of the two employers, and request the enforcement of the unfulfilled obligations.

571/2003 concerning the Fiscal Code¹⁹ (and its subsequent amendments) in order to corroborate the economic society's right to offer to the workers sent abroad all the financial benefits of detachment. Not only these aspects are provided by the national legislation, but they were subsequently discussed in the specialised literature²⁰ that upheld the right for an employer to pay amount relating to transportation, accommodation, or subsistence, alongside a detachment allowance.

Thirdly, the fiscal inspectors concluded that on the duration of the staff's detachment in Germany with the purpose of supplying service, the amounts paid to the staff could not be treated as detachment allowances according to the Collective Work Contract concluded by the employees because it stated that if the detachment is longer than 30 consecutive days, an allowance equal to 50% of the daily base wage is paid instead of the daily allowance. However, the fiscal experts hired by the economic society used the same Collective Work Contract to demonstrate that it was only partially used in the argumentation, as there are articles that detail the fact that detached employees retain their financial rights during their deployment abroad. Also, what the fiscal inspectors did not mention, but the fiscal experts highlighted is that there is no collective contract in the economic domain to regulate the activity in the field of meat processing.

All the above mentioned problems encountered during a fiscal inspection emerged from a rigid, abridged, and one-sided interpretation of the national legislation. The fiscal experts referred to the same national legislation but considered it as a whole, taking into account all articles that dealt with the situation of detachment. These two different opinions in the same matter proved that there still is confusion and variety in interpretation of the legal basis and the results are disadvantageous for the economic entities and the economy as a whole.

In the case of the delegation of persons for economic activities, the problems found during fiscal inspections are similar, as they relate also to the manner in which the applicable legislation is interpreted and to the manner in which financial benefits given to the employee are seen. For a short comparison, we suggest an economic society in the field of constructions, with a fiscal headquarter registered in Romania and that on the basis of a work contract sends workers in Germany for a specific duration of time to fulfil the same type of activities as those for which they were contracted at home. The worker sent abroad is paid a monthly base wage in accordance with the Individual Work Contract for which payrolls had been drawn and the afferent fiscal obligations (income tax, social contributions, etc.) were calculated, declared, and paid; and an amount in Euro that covers travel and accommodation expenses, as well as a delegation allowance in accordance with the delegation contract and the collective work contract that applies here. The economic society had also obtained the A1 certificate concerning applicable legislation regarding social security proving that the personnel sent abroad has no obligation to pay contributions in another state. During a fiscal

¹⁹ Romanian Law no. 571/2003 concerning the Fiscal Code, Art. 55, Par. 4, Letter g: 4) The following sums are not included in the wages and are not taxable in the sense of income tax: [...] g) the sums received by the employees for covering transport and accommodation expenses, the subsistence received on the duration of delegation and detachment in another place, in the country or abroad, in the interest of their work. Are exempted from this provisions the sums granted by legal persons without a patrimonial purpose and by other entities that do not pay return taxes over the limit of 2.5 times the subsistence granted to the employees from public institutions.

²⁰ Gabriel Biriş, *Despre fiscalitate şi competitivitate principii, probleme, soluţii [On Fiscality and Competitiveness: Principles, Problems, Solutions]* (Bucharest: Ed. Universul Juridic, 2012), 95-96; Gabriel Biriş, Dragoş Pătroi, *Controverse actuale în fiscalitate. Comentarii şi soluţii [The Financial Audit. National Normative Remarks]* (Bucharest: Ed. C.H. Beck, 2011), 23-24.

inspection, there were some problems pointed out, stemming from an abridged and one-sided interpretations of the regulations and conditions.

Firstly, like in the case of detachment presented above, one of the main issues the fiscal inspectors found regarded the monthly wage paid to the posted worker while in Germany, as they considered it did not correspond with the provisions of the Individual Work Contract concluded in Romania. However, the fiscal experts hired by the economic society argued that the workers are entitled to the financial benefits they received as monthly wage referring to the national legislation (Article 17 from the Government Decision no. 518/1995²¹).

Secondly, an important issued considered by the fiscal inspectors was that of the benefits paid during delegation abroad: an amount covering transportation and accommodation, as well as a delegation allowance. As in the case of detachment above, the fiscal inspectors considered that the economic society did not respect the legal provisions by paying its posted workers all these delegation benefits. The main problems pointed here by the fiscal inspectors were that the activity performed by the posted workers was the same as in Romania and that the duration of posting surpasses that provided in the national legislation (i.e. 60 calendar days) in Article 44 of Law No. 53/2003.²² However, the fiscal experts argued on the basis of the same Article 44, Paragraphs (1) and (2)²³ that the economic society did not infringe the legal provisions relating to the delegation of workers in Germany, as they respected the conditions provided: the delegation was prolonged for a period over the initial 60 calendar days with the agreement of both employees and employer and the financial benefits paid to the employee while abroad are those specified.

Taking the two cases presented above, concerning the detachment and delegation of workers from one state (Romania) to another (Germany) within the space of the European Union, several dysfunctionalities of the financial systems emerge. Most of these issues are related to the different perspectives formulated by fiscal inspectors, on one hand, and the internal or external fiscal experts, on the other hand, when interpreting the same national and European legislation.

CONCLUSION

Taking into account the data presented in the two case studies, some conclusions can be formulated about the functionality of the Romanian fiscal system when analysing situation involving the cross border movement of workers. Such situations are however a considerable part of the economy as a whole by the financial input and output they generate, but also due to the normative issues they create as the applicable social security legislation must clarify to which state a posted employee must pay contributions.

One observation that can be made starting from the two cases presented above is that during the fiscal inspections, the relevant applicable European legislation is overlooked, although dealing with a cross border situation of worker mobility. Since both Regulation (EC) no. 883/2004 and Regulation (EC) no. 978/2009 specify the status of a posted worker and that the workers are subjected to the social security legislation of only one member state,

²¹ See note 16.

²² Romanian Law no. 53/2003, Art. 44: (1) The delegation can be disposed for a period of maximum 60 calendar days in 12 months and it can be prolonged for successive periods of maximum 60 calendar days, only with the agreement of the employee. The employee's refusal to prolong the delegation cannot represent a reason for his/her disciplinary sanction.

²³ Romanian Law no. 53/2003, Art. 44: (2) The delegated employee has the right to be paid transport and accommodation expenses, as well as a delegation allowance, in the conditions provided by the law or the collective work contract applicable.

therefore providing the conditions of posting and the financial benefits they are entitled to during the duration of it, the national fiscal inspectors refer only to the Romanian legislation and do not reference the European norms applicable.

Another important observation to be made concerns the manner in which the national legislation is interpreted during a fiscal inspection. The abridged, and quite rigid, manner in which the fiscal inspectors interpret the appropriate national regulations in the field leave space to debate, whereas the internal and external fiscal experts refer to the entire legislation as a whole, clarifying how some provisions were translated in practice. Also the latter refer also to the European regulation in existence in order to confirm their findings and the manner in which they have understood the national provisions.

A last observation concerns the need for clarifications and completions in the national legislative system in order to avoid and eliminate the different interpretations that are possible in the present when conducting an internal or external audit. Such clarifications will avoid the occurrence of several interpretations for the same fiscal issue and will allow for more fluency of the fiscal system. Also, they will not leave space for the possibility of double taxation or double payment for an employee or an employer. Since today the cross border mobility of persons is an important aspect of the socio-human environment, the requirements for a coherent and clearly defined legislation in all field have increased considerable.

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