Bratislave, March 14th, 2017

1. **Presentation concerning the obligations of companies posting their workers abroad**

**(2)** Good morning everyone. The speakers who have preceded me, have exhibited exhaustively the rules that in the various national laws are governing the posting of foreign workers. I will speak very briefly about rules of the Italian legislation relating to posting to the EU countries and in particular I will mention:

* Legislative aspects;
* Social security aspects;
* Tax aspects.

First of all, let me make a brief introduction to highlight the difference that emerges in the Italian doctrine and jurisprudence between:

* **TRASFERTA (assignment)**
* **TRASFERIMENTO (relocation)**
* **DISTACCO (posting)**

**(3)** The term "**trasferta**", i.e. assignment, refers to a temporary change of the place where the job performance takes place. The term "**trasferimento**", i.e. relocation, means the definitive change of the place of the job performance.

The “**distacco**”, i.e. posting, occurs where an employer, to meet **its own interest**, **temporarily** makes one or more workers available to another employer, for the performance of a specific work activity.

**(4)** The relevant Italian legislation is in art. 30 of Legislative Decree n. 276/2003 and in art. 2 of Legislative Decree. N. 72/2000 implementing the Directive 96/71 / EC and in Decree 10 September 2003, n. 276 with which introduced the discipline of **labor administration.**

The elements that characterize the posting, and making it legitimate for the Italian legal system are:

1. The interest of the employer towards the posting. The Italian Ministry of Labour clarified that the interest shall be **specific, relevant, concrete and lasting throughout the whole posting period;**
2. The existence and the maintenance of a **relevant connection** between the employer and the employee, which means that the original employer shall remain responsible for the economic and legal treatment of the employee during the whole posting period;
3. **The temporary nature of the posting, which shall be considered as non- definitive**. The requirement of temporariness is submitted to the existence of the interest of the original employer, as that is the first requirement to justify the posting. Temporariness has to be considered as non-definitiveness and not as a short period of time.

**(5)** Most of the rights and obligations usually held by a company towards the worker, and vice versa by the employee towards the posting company, remains during the posting period:

**The posting undertaking** remains the holder of the employment relationship, supports the compensation obligations, contributions and insurance, maintains title of holiday management, exercises disciplinary power, performs any act that involves changes to the employment relationship, exercises trade union rights as ordinary operations;

**The Company abroad** ( the host company / the user undertaking)exercises the right to give instructions on the execution of the work, expresses possible needs on the period of vacation; it can inform the original employer on the reasons that may determine the start of a disciplinary procedure against the posted worker;

**The posted worker**, refers to the posting employer for obligations related to the employment relationship, is subject to the disciplinary authority of the original posting employer and to the directives of the party abroad, expresses his needs on the period of vacation; exercises his trade union rights with respect to the organizational situation of the original employer.

 **(6)** It is also always the posting undertaking to have to disburse the wages (as well as social insurance contributions and expenses) to the employee, while it will be up to the company abroad, the reimbursement related to these labor costs. The cost of labor, if it doesn’t provide for any additional increase and if there is a valid and effective working relationship between the posted worker and the posting undertaking, is considered for VAT purposes "outside the scope of VAT. (Art. 8 paragraph 3 Italian Law 67/1988) "

Reimbursement however will be due to the posting undertaking, only if provided for in the *posting contract*.

**(7)** Concerning the posting agreement, stipulated between the posting undertaking and the party abroad benefiting from the working activity rendered, it should specifically state:

* Reasons of the posting;
* Interests under the posting;

 **(8)** The signature of the contract between undertakings, so called *Staff Secondment Agreement,* becomes relevant also in relation to deductibility of labour costs, particularly in order to define the way it has been carried and how it should be reinvoiced. We underline the following details to be included in the agreement:

* Working terms and conditions of the posted employees;
* Specific description of the competences of the posted worker, required by the receiving undertaking to satisfy its operational/organizational needs;
* Description of the effective composition of the reinvoiced costs (wage, social security contributions, possible additional wages and so on);
* A description of the manner through which determine the costs invoiced (cost allocation method, the frequency of re-invoicing, etc.);
* Possible cost-sharing agreement.

**(9)** It is also recommended the drafting of the so-called **letter of understanding**, which is delivered to the posted worker by the posting employer (in addition to the employment contract), which normally indicates:

* Place and duration of the posting;
* Possible extensions of the posting;
* Withdrawal or early revocation of the posting;
* Economic treatment;
* The expenses, room and board, fringe benefits and other additional remuneration;
* Appliable social security provisions.

**(10)** Taking the latter point, we're now facing the **issue of social security aspects** related to the posting. It should first be remembered that the social security system that is applied to the worker is the one of the country of the posting company (INPS in the case of Italian undertaking). Since 2010 a new EU provision has also introduced the so-called "**A1 Form** " form through which, with a duration of 24 months, the posted worker may be protected from the point of view of social security to all European countries and in those under special conventions.

**(11)** As regards to the fiscal aspects, provided the general principle that people generally have to pay tax on income in the place where that income has been originated, Article. 2 paragraph 2 of the Italian Income Tax Code provides that “**are to be considered residents the individuals who for most of the tax period (** *i.e for at least 183 days- 184 for years bisestyles* **) are recorded at registers of the residing population, and who in the territory of the State have the domicile or residence in accordance with the Italian Civil Code”.**

A first requirement is objective, and is that related to the cancellation from the Registry of the Municipality of residence in Italy and registration of the person at the Register of Italian Residents Abroad (AIRE). Such registration is in itself considered by the Italian jurisprudence as not decisive itself to exclude the domicile or residence in the Italian State;

**(12)** a second requirement, qualitative, concerns the concepts of domicile and residence, established by the Italian Civil Code. Article. 43 c.1, defines ***domicile*** the main place of business and economic interests (but also moral, family and affective interests) and the following paragraph 2 defines the ***residence*** the place where a person has his habitual home and demonstrates his intention to live permanently (compared to the style of the person's life and the structure of its social relations). For the existence of the requirement of habitualness, is not necessary the continuity and finality. It is enough for the individual who stays outside of the Italian state, to keep in the Italian territory his house, to return there whenever he can, and to show the intention to keep there the center of his family and social relationships. These requirements are alternative and not concurrent: it is therefore sufficient only one of them to prove residence in Italy.

**(13)** The objective requirement is easy to be demonstrated, qualitative ones are more complex to prove since they depend on subjective situations.

The Italian tax authorities carries an investigation activity aimed at finding the evidence of actual place of residence of the Italians living abroad, concerning:

a) family and affective ties and attachment to Italy;

b) economic interests in Italy ;

c) intention to live in Italy, also in the future, as can be deduced from the facts and conclusive acts or by public statements;

d) the long stay in Italian locations (shown by the return from trips abroad);

e) participation in social and sporting events in Italy (fashion shows, concerts, sport games etc.).

**(14)** In relation to double taxation, art. 15 § 1 of the double taxation convention between Italy and Slovakia, sets out the principle that taxation should take place in the country of production of income.

The principle is derogated under Art. 15 § 2, which provides for the exclusive taxation in the country of residence of the employee, upon the occurrence of the following concurrent conditions:

* The recipient is present in the other State for a period or periods not exceeding 183 days in a 12 month period that begins and ends in the fiscal year concerned;
* the remuneration is paid by or on behalf of, an employer who is not resident in the other State;
* the burden of remuneration is not borne by a P.E. (permanent establishment) or by a fixed base which the employer has in the other state.

Finally, it should be remembered that only in the event that the posted worker holds this tax residence in Italy, the posting undertaking must operate deductions at source relating to IRPEF;

**(15)** Thank you for your kind attention.