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Isabelle Weykmans, November 2 2015*

Equal pay for equal work in the same place!

Introduction

The free movement of persons and services within the EU is one of the major achievements of European integration. The mobility of workers and services is generally a good thing for employees and employers and gives Europe's economy a competitive advantage. Directive 96/71/EC concerning the posting of workers was adopted on 16 December 1996 with the aim to guarantee free competition and the rights of posted workers. Now, some 20 years later, EU expansion, numerous decisions by the European Court of Justice and the courts of the Member States, as well as experience and the negative developments seen in various sectors, such as the construction sector and the transport sectors, show that this directive is no longer able to meet needs. Social dumping and social theft are now an everyday phenomenon in the EU and the principle of equal work, equal rights at the same place is no longer possible. For me, as a firm liberal and European, I cannot and will not accept that employers and employees have to suffer from this unfair and at times fraudulent competition in Europe which is sometimes tolerated. Today's economic reality and the inconsistent enforcement of the Directive concerning the posting of workers are contrary to all of the fundamental principles of the Union and of liberal philosophy.

With this publication, I would like to first highlight the shortcomings, provide some examples and attempt to briefly outline the problem. This will show that what we are dealing with is not a classical labour conflict, but instead that the fundamental principles of the Union are at risk and that the support of EU citizens for the EU is dwindling increasingly. Finally, taking Belgium and the Benelux as an example, I want to show how we can address this matter and what a European solution should look like.

Stock-taking

The aim of the Directive concerning the posting of workers is to guarantee a minimum level of protection for temporarily posted workers while at the same time observing the provision contained in

Article 56 of the Treaty on the Functioning of the European Union regarding the free movement of services. In practice, this means that every employer is obliged to apply the minimum criteria of the country to which the employee is posted. The minimum criteria must be defined for each sector in legal texts and collective agreements. They determine working hours rules, holiday time rules, minimum wage, etc.

Even with the few, admittedly good, adjustments which have been made by the European legislator, such as the prior checking in the country of origin or the expansion of the employer's responsibility, today's situation remains unsatisfactory and, despite everything, paves the way for social dumping and social fraud.

What does this mean in practice?

There are still legal loopholes.

The directive concerning the posting of workers stipulates that the employer's costs must, however, be paid in the country of origin subject to such country's terms and conditions. This leads to a distortion of competition and, put briefly, means a clear disadvantage for those countries that have a healthy and strong social security network. Furthermore, the country of origin is responsible for adherence to the directive and also for prior checking. There are enormous differences to be found here when it comes to the quality and effectiveness of public authorities and this, once again, puts the other European countries at a disadvantage. The collective agreements in the construction sector, for instance, not only provide for legal claims but also for compensation measures which employers can grant when maximum working hours are temporarily exceeded. If the posted employee exceeds the maximum working hours without receiving any compensation, this too is a distortion of competition.

The fact that there are no provisions for the self-employed nor any penal provisions and sanctions is another legal loophole.

A further example of the inconsistency of the direc-

tive is the discretionary interpretation of its language.

In an expert report initiated by the European Commission, the Commission criticizes a law from 2012 which permits the Belgian inspection services and courts who detect social fraud to suspend the certificate that enables, for instance, the employer from the country of origin to post his employee. The Commission is of the opinion that this is not in line with the directive concerning the posting of workers. Instead, it believes that only the country of origin can do so. But this is not what happens in practice. Belgium sees this matter differently and is certainly of the opinion that it can work against social fraud on its own territory. The case is underway.

Concrete fraudulent practices:

- The minimum wage is not paid, especially in the cleaning, transport and construction sectors.
- Fictitious companies are set up in other European countries so that employees can be posted at a low wage.
- Brief but regular stays by the posted employee.
- Fake self-employed individuals are hired because they are not subject to the directive.

Some figures from Belgium's National Social Security Office:

The number of foreign or posted employees rose by 20% between 2012 and 2014. The comparison of employees who are posted from Belgium and those who come to Belgium shows a negative result amounting to -88%. In Poland, this figure totals +1389%. This does not include those who are not registered, i.e. illegal workers as well as "self-employed" workers who know nothing about minimum wages. 10% of self-employed workers today are not from Belgium.

The sectors affected are calling attention to the fact that the social fraud practices and competition distortion are having a strong impact on the employment situation in Belgium. Jobs in the transport sector have declined by 4,000 since 2008 and more than 12,000 jobs were lost in the construction sector over the past two and a half years.

This list of examples is endless. The result is that small and medium-sized enterprises are suffering from what is at times unfair competition and that employees, especially from the countries of origin, sometimes have to suffer inhumane conditions.

Belgium's answer and that of the Benelux countries

For some years now, the Belgian state has been very active and is attempting to resolutely fight social fraud by improving Belgian laws, spending more on inspection services and through targeted activities in co-operation with the sectors hardest hit. But these measures, however, only address the tip of the iceberg. Belgium is a pioneer in technological solutions based on joint databases which are used primarily by public agencies and authorities in order to better co-ordinate inspection work. Belgium has good networks with public authorities in other European Member States and co-operates closely with professional and industrial associations. A so-called action plan was adopted last year by the federal government.

On 13 February 2014, Belgium together with the Benelux partners also agreed to assume a leading role in Europe in the fight against social fraud. The idea here is to offer and use the system for electronic recording of worker mobility across borders (LIMOSA) and the experience gained with it, and to offer this to the Benelux and the EU and to expand the system further. Furthermore, sanctions across borders are also to be improved. A European system is also envisaged which would make it possible to trace and verify social security contribution payments in the interest of employees in all EU countries.

Conclusion

Belgium is calling upon the European Commission to make use of or to introduce the above, but also to get to the root of the problem, i.e. to adapt the directive concerning the posting of workers in order to combat social fraud and social dumping and to hence protect the fundamental values of the EU, to strengthen Europe's economy, to protect the rights of European workers and to step up its activities, especially here, in order to improve its image. In mid-June 2015, Belgium's Minister for Labour, together with his colleagues from the Netherlands, Luxembourg, Germany, France, Austria, Sweden and Denmark demanded that the European Commission revise the current directive. A maximum stay period is to be defined for posted workers, the concept of equal work for equal pay is to be applied, and greater co-operation between inspection services is to be achieved through a joint technological solution at European level. The Commissioner in

charge has stated that the directive is to be adapted.

It's high time!

In addition to the challenges currently facing our monetary union, it will be the matter of healthy economic development that will put the EU to the test. After all, without economic success, our society will not be able to develop our society further. If we are to efficiently deploy the strengths of the Union on the global economic market, then we will have to put an end to this vicious circle.

And even if the current situation appears to be "helpful" for some individuals, in the medium-term and from a global perspective it will be disastrous for Europe. We have to act in the interest of healthy social and economic development for our Union which serves the interests of its citizens.

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