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Cremers, Jan; Sakellaropoulos, Theodorus

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Pending problems and promising practices. The application of Directive 96/71/EG

Jan Cremers
Amsterdam Institute of Advanced Labor Studies,
Law Faculty, Amsterdam University

I HAVE WORKED IN THIS AREA SINCE the late 1980s in different responsibilities. At that moment, as the first ideas of the so called posting of workers were formulated, I was a trade union leader at the European level. In the late 1980s we were – in fact – discussing in the European Commission and the European Parliament the introduction of what was called "the social clause" in public fulfillments, on the tendering of public works. The basic idea of the social clause in that period -adopted by the majority of the European Parliament- was that if a foreign company comes with its workers to do a temporary job in the framework of the business services, then the "social clause" should guarantee that the regulatory framework in the company where the worker is received is respected. In fact in late 1988, early 1989 we did not succeed because the European Council of Ministers watered down that "social clause".

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European trade unions together with the experiences on several constructing sites put the main argument to discuss with the cabinet of Jacques Delors in that period; i.e., that an instrument was needed in order to respect the Regulations in the host country in case of posting. And when we talk about construction sites in that period, it is interesting to know that –for instance- when we went to the sites of the Olympic villages in Barcelona we found out that together with the Spanish trade unions that, although they were working towards a collective agreement that was generally applicable all over Spain for the very first time after Franco, some of the foreign companies did not respect that, and they had no legal instrument to force them to respect these rules. And we had the same experience in Brussels on the construction site of the Council of Ministers. The Belgian unions went at the site and said that according to the Belgian law you have to respect not only the labor legislation but also the collective agreement. And they found out that they did not respect it.

So, there was a lot of very practical experience that finally led to what later on became this Directive. In fact, Delors took it on board in the action programme related to the Charter of Fundamental Rights of Workers and that was in fact the origin of the Directive. And I say this because it was far much earlier than even the fall of the wall and what happened later on. So it was not an east-west construct, it was a construct that was basically, in fact founded building blocks in notions that were already formulated inside the ILO, where it was always said, "if you go to Rome do as the Romans do", meaning that if you go to another

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country, then respect the rules that apply. That was the starting point for posting.

If you also look at the early stages of the European Community, the notion of free movement was already very early there and one of the very first Regulations formulated was to secure the social security of people that move across the borders: that is the basic principle of the coordination of social security. It was in fact also formulated in the lex loci labori. It means that if I, as an individual, come to Greece to work I will work under the Greek rules with one exception, and that is posting; very early on it was said that if someone goes somewhere else on behalf of his/her employer, then it makes sense that he/she stays in social security of the home country if he/she is relocated temporarily in order to provide service on behalf of his/her employer. And in that situation, if someone comes for only three months then it makes sense that he/she stays on the social security of his/her home country.

So, basically we were confronted with a few dimensions. On the one hand, we had the social security coordination where posting was defined, but very specifically related to people in services and on the other hand we had the situation where, if you look all over Europe, the working conditions were not settled in a safe manner. We had some countries where the working conditions were settled through the collective agreements that were generally binding. In the Netherlands we had collective agreements that were generally binding but in the definition of the worker it said that posted workers are not workers according to these collective agreements, so they

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were excluded from the application. And so we had a situation where, on the one hand, we had to create something at European level, while on the other hand we had to repair the national regulatory framework. And that is what happened in the early 1990s for instance in the Dutch situation, where they included the posted workers. In Germany that was the start for the introduction of a legal minimum wage. And then of course we have the Nordic situation, where collective agreements are de facto so to say respected because there is a high discipline on both sides, on the trade union and the employer side, but there is no de jure, no binding by law.

Posting was therefore formulated in that context and I have to repeat: there are three important elements in that notion of posting. One is that it is temporary, while a labor contract of the worker with his/her company in the country where he is coming from must be already active. In fact, in that notion it also says that if the company that is coming from another country is active in that country and in this area so, it should be a genuine company. Finally, the third element is that it is only for the temporary provision of services.

I have assessed the implementation of the Directives two times: once it was in 2002/03 when we analyzed the implementation of the Directive in several member states, while just recently we finalized a study on the disparity between theory and praxis in this field. The study formulated in 2003, led to some recommendations and conclusions that were later on also picked up by

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social partners. One very remarkable thing we found was that posting was no longer a political issue, it had slowly disappeared. It is very funny if you have worked hard during a period of eight years to get the Directive in 1996 and then at the end of the 1990s all of a sudden it looked as if it was no longer an item. It became again an item shortly before the enlargement in 1997 but in that period the Directive had been implemented in the national law, so it was not an item. And the result was also that the implementation and transposition into national law was in several countries just a copy paste issue. There was almost no control about the application of the Directive. There was also almost no cooperation between member states and there was hardly any important information available for foreign companies which had workers in the different member states, except some information that was available through the social partners and some industries like the construction. So, in fact the outcome of that implementation was quite poor.

We have now produced a new study which is also a book called "In search of cheap labor in Europe" and which comes up with some new findings, highlights some promising practices, some pending problems and recommendations. When one looks at the new findings then one of the things that has in some countries improved is that there is more bilateral cooperation; for instance the Spanish and the Portuguese labor inspectorates now cooperate and that is based on the fact that they have found out that whether there is a crisis or a boom there is a structural component in Spanish

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labor market for Portuguese specialists coming in, also in the lower echelons of the labor market and therefore the labor inspectorates say that we have to cooperate more in order to divide clearly between genuine posted and bogus, abuse of the rules. There are some countries also that have improved their registration. Belgium has a system with e-registration of posting companies, Austrians have formulated a new legislation package that makes it possible to monitor who is coming in to work. The Germans have in fact a private good system directly related to their social security in order to guarantee that people are treated decent and fair. So, there are some situations where we can say that there has been improvement. However, this whole process of control and legislation is also frustrated by several cases that went to the European Court of Justice. And some countries have concluded that for them the legislation is no longer possible. I don't think that they have reached the right conclusion, but there are countries like the UK, like the Netherlands and Finland where there is no legislation.

A second pending problem is the aspect of sanctioning in advanced national contexts. And this could lead to a new conference if I really would formulate it the way it is in the broader sense, but to make it simple we found out in our case studies that most of the sanctions related to the application of the posting rule are of an administrative character. And sanctions of an administrative character disappear in the garbage bin in another country and that is the practical -in fact- experience that all experts reported. So, one of the aspects is that the free provision of

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services that is based on EU law should -at least in my opinion- be complemented also with an EU system of sanctioning. And another aspect of that sanctioning is that workers who are confronted with breaches of the EU rules should also have the possibility to go to the local court. And if this cross border activity that is based on EU law, if this has to be real European Regulation then it also means that there should be collective access to the justice system at the place where the work is done.

In order to be brief I want to just give you four basic forms of posting that we have found. What we have found -in fact- all over Europe in this research is that there are four types of recruitment that have a relationship with posting. One is the very traditional one, the genuine normal posting that is in fact based on a division of labor, a simple division of labor and it is normal, it is acceptable, there is nothing wrong with it, people are treated well. I always use the example that if someone is building somewhere, then I know that one of the subcontractors will be Austrian because they have the best expertise and the highest "know how", but these workers are well paid and we do not have to worry about them. We have seen that in the past and we know that this can take place and that is the normal, acceptable normal.

The second type of posting which has increased in the recent period, is posting as a way of calculating what is the cheapest. Well, if I look at my own work force and if I can find a foreign agency that brings in work force from a country where social security is lower, then this can create an advantage. People stay

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in the home country foe social security, while in the host country they are just paid in the minimum wage according to the posting rules and we respect all the other things. And that is a kind of cheap recruitment that has increased over the last year and it was not meant, it is an unintended effect of the posting rules.

The third category is where posting is officially still applied, so people have this formula E101 or A1 for their social security, but for the rest all the rules are broken.

And the fourth category and that is the very special one has to do with the fact that in meantime some bogus gang masters know that if you say that your workers are posted then you can obstruct the law mechanism. So, if there is a control on a site and some of the workers are posted, if you want to see the labor contract or commercial contract you have to go to the country of origin and that can take up to three months or more. So a lot of this is fake. We have found some cases where people try to find out addresses in the home country and through google earth they found that it was a fake house, it did not exist.

If you want to tackle the abuses, you have to be aware of the fact that the categories two, three, and four are not the same. Four is illegal, undeclared work and you have to tackle it through a completely different mechanism. Category three is about the breach of rules, and there you have to create instruments for workers to go to court. So it is a completely different situation. And this is in fact the debate that we actually have with European institutes.

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