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MINISTERIE VAN SOCIALE ZAKEN EN WERKGELEGENHEID

Luxembourg, June 18th, 2015

Subject:
Posting of Workers Directive

Ms Marianne Thyssen
Commissioner for Employment, Social
Affairs, Skills and Labour Mobility
European Commission
Rue de la Loi 200
B-1049 Brussels

Dear Commissioner Thyssen,

We highly welcome the initiative of the European Commission to start a 'targeted review' of the Posting of Workers Directive in a context of preventing social dumping and abuse of the free movement of services. At this stage, content and focus of this exercise are not yet clear and we thereby take the opportunity to give you our views. It is our conviction that the 'review' should pave the way for a modernisation of the Posting of Workers Directive. If we want to give real meaning to applying the principle 'equal pay for equal work in the same place' on our labour markets, it is our conviction that the posting directive on working conditions in Europe needs to be modernised.

Cross-border mobility of labour in the EU is a success story. Our economies and societies as well as individual EU-citizens profit from this. It is based on EU core values deserving our full and continuing support, covering the right of 'free movement of workers' and the right of companies to post workers in another EU Member State in the framework of 'free movement of services'. We believe that the principle of equal pay for equal work in the same place should apply, within the framework of these rights.

Posting as a new business model

The character of posting has been evolving in recent years. We fear that services of a temporary nature without presence on the domestic labour market may in some cases have transformed into services of semi-permanent nature with a real, and lasting presence on the domestic labour market. We are strongly in favour of fair intra-European competition. However, currently employers of posted workers may enjoy an unfair advantage vis-a-vis employers in the host country.

Employers may design and apply attractive posting arrangements which could engage cross-border workers on a limited set of working conditions. This is because only the 'hard core' of terms of employment in a host state (i.e. 'a nucleus of mandatory rules') are applicable to them. Additionally, posted workers could remain insured for social security (883/2004/EU). In situations where the posting provision in the Regulation is not applicable, the provision on pursuit of activities in two or more Member States is used in a similar way. This may imply less social protection to posted workers and a substantial cost advantage to posting and contracting companies. In this way, the current system may be used to reduce the costs of labour and to gain a competitive edge in the market.



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Another issue is that of the improper or abusive use of the current Posting of Workers Directive. There are many examples of complex legal and fiscal *ad hoc* vehicles that lead to abuses of the 1996 Directive's provisions. A more accurate and harmonised interpretation of some items included in the Posting of Workers Directive might help preventing these abuses.

Populists may try to exploit the issue of social dumping and unequal treatment to undermine the legitimacy of the principle of free movement. We do not want to see this EU pillar damaged through dwindling popular support. This could ultimately undermine the legitimacy of the EU. We should strive to achieve good working conditions for all workers to prevent this from happening.

In our view, fair competition is important to both cross-border workers and cross-border employers as well as to regular workers and employers in the host Member States. Free movement should function in the interest of all European citizens. We believe that the golden rule of free movement should be: 'equal pay for equal work in the same place'. While respecting the free movement of workers and services workers who are not habitually working in the host member state should be entitled to application of the same remuneration provisions as local workers. This in order to guarantee decent work and proper labour standards, as well as preventing abuse of the free movement of services. Implementation of the principle of equal pay for equal work in the same work place requires the application of equal pay provisions to all workers that are carrying out work in a Member State, regardless of whether or not they are employed in the context of posting. This would also take away the incentive to circumvent posting provisions, inter alia through letter box companies or other sham arrangements, because the principle of equal pay would apply regardless of the existence of a posting situation. Also important is to address the issue of equal treatment of posted workers with respect to social contribution payments. We need to discuss the effects of situations where the contribution rates for posted workers are assessed at lower rates than for workers who worked the whole time in the same Member state which thus might become an unintended competition advantage. This would confer unfair advantages on the domestic service industry of the posting state. At the same time, this unequal treatment of posted workers with respect to social contribution payments might lead to equally lower benefits and or pension rights of posted workers. If this were to happen, it would mean a discrimination of persons who are being posted in the framework of free movement of services.

As such, the Posting of Workers Directive can be considered a proper instrument to regulate postings. It promotes free movement of services and offers contractors the possibility to use posted workers on a temporary basis. When the directive was introduced, a balance was sought between the principle of free movement of services and the social protection of posted workers. Subsequent ECJ rulings, however - guided by the principle of facilitating 'free movement of services' - have led to a situation that the directive now seems to regulate a maximum level of working conditions instead of a minimum level.

Enforcement

The EU Enforcement Directive in the framework of posting (2014/67/EU) is an important step forward to a better enforcement of provisions of the Posting of Workers Directive. Implementing the Enforcement Directive will contribute to transparency, information exchange between Member States and less abuse of stipulations of the present Posting of Workers Directive. It will undoubtedly contribute to a fair European labour market. But it does not alter the fact that the Posting of Workers Directive in its present form does not sufficiently address the principle of equal pay for equal work in the same place. Therefore, we wish to emphasize the need to modernise the current EU rules on posting.

The practice of posting workers is increasing in Europe. Often a reference is made to registration of so-called A1 declarations. The number of A1 declarations for posted workers doubled between 2007 and 2013 (from 670.000 to 1.340.000). But A1 declarations are not a very reliable



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indicator. There is a considerable gap between A1 registration data and real numbers of postings in Member States. It is very likely that the real number of postings is much higher, up to as much as three times the amount of A1 declarations.

Suggestions

We suggest the Commission to consider widening the scope and amending provisions regarding the working and social conditions that are applicable to posted workers. This in order to cater for the principle of equal pay for equal work according to applicable laws and collective agreements in the country where the work is performed, within the framework of the free movement of workers and services.

With regard to the Posting of Workers Directive, such amendments should not trigger a reduction in the posting provisions and in the existing level of protection, but on the contrary promote more equal treatment and thereby may when necessary improve the working conditions of posted workers. If all legal conditions are met posting of workers will remain possible under application of the social security rules of the posting state.

In this context, the Commission might also consider adding a legal base to the Posting of Workers Directive. It could be further analysed if anchoring the directive also in Treaty articles with social objectives would provide more guidance to the ECJ that this directive is not just meant to facilitate free movement but also to provide social and labour protection to cross-border workers. It could also be further analysed if articles 151 and 153 TFEU would be suitable. In order to allow for an effective implementation of the principle of equal pay for equal work in the same place it should be recognised that Member states may apply their provisions on remuneration to all workers active on their territory, regardless of the existence of a posting situation, be it genuine or bogus.

Presently, the duration of a posting period is not specified. The directive states that postings are of a temporary nature. There is no indication when these workers have in fact joined the labour market of the host state and should no longer be covered by the laws of the country of origin. Lack of clarity at this point in the directive concerning the posting of workers may pose a risk of abuse of the freedom of movement of services if postings were to be used primarily as an instrument in reducing labour costs and substituting regular workers instead of promoting fair competition. It could be further analysed how the temporary nature of posting can be confirmed and its duration effectively controlled. Bearing this in mind, we invite the Commission to consider advantages and disadvantages of specifying the temporary nature of postings.

The scope and nature of the directive concerning the posting of workers and the EU regulation on co-ordination of social security are clearly different. Nevertheless, we invite the Commission to mainstream this exercise with an analysis of the posting issue in the EU Regulation on co-ordination of social security (883/2004/EU). In particular, it could be further analysed if co-ordination between the lacking time limits of posting in the Posting of Workers Directive on the one hand and the existing limits provided in Regulation 883/2004/EU might be effective in preventing practices based on frequently repeated and or extended periods of posting meant at circumventing its temporary character.

A better co-ordination between the Posting of Workers Directive and the regulation applicable to road transport could be considered so as to ensure a more appropriate application of the posting provision in this specific activity.

Procedures regarding A1 declarations are a source of problems. We welcome the ongoing review of the procedures in order to make them more efficient, transparent and more fair. We are favouring a procedure that is no longer based on one-sidedness but on co-operation between the Member States concerned. In addition to this, A1 declarations should contain verifiable information. Then, also the role of the receiving Member State will be enhanced, as it will have the real possibility to verify the legality of the posting as well as determine the applicable provisions if the posting company fails to submit an A1 declaration.



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It is important that in all Member States equal treatment for persons is guaranteed when assessing social insurance contributions for posted workers. For persons who normally pursue activities in two or more Member States. Regulation 883/2004 already explicitly provides that, for the purposes of the legislation determined in accordance with these provisions, these persons shall be treated 'as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the Member State concerned'. This applies all the more to a posted worker who normally carries out his or her activities in a posting state but also pursues an activity on behalf of his or her employer in a host state and never leaves the legislation of the posting state. In order to guarantee a uniform application of the rules on social security co-ordination and thus avoid situations which might lead to unintended competition advantages, the concept of 'income', with regard to the co-ordination rules, needs to be further discussed. For instance, it needs to be clarified whether an income earned in a host state may be considered as foreign income which a posting Member State may disregard when assessing the social security contributions; such income could be considered a 'normal' domestic income to which the relevant legislation of the posting state should be applied without any deduction.

In addition, we consider useful to improve cross-border co-operation between inspection services and to investigate if an electronic exchange of information and data between relevant inspection services would be possible and have the desired effect in this regard. Lastly, we think it is important to initiate a study of the self-employed in Europe in order to find out whether bogus self-employment is a frequent matter in the EU.


We call upon the Commission to take note of our views regarding the Posting of Workers Directive. We would appreciate if our requests could be taken into account in the process of preparing a 'targeted review' of the Posting of Workers Directive.

Finally, we want to invite all Member States to take part in a constructive discussion in order to guarantee free movement of services and the protection of workers' rights.

Kind regards,



Mr Rudolf Hundstorfer,
Minister of Labour, Social Affairs and Consumer Protection



Mr Kris Peeters,
Vice Prime Minister and Minister of Employment, Economy and Consumer Affairs, in charge of
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Mr François Rebsamen,
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Mr Nicolas Schmit,
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Mr Lodewijk Asscher,
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