



Report of the conference Promoting Decent Work, Better Compliance and Enforcement 8-9 February 2016, Amsterdam, the Netherlands

The 2016 Netherlands presidency of the EU organized an expert-conference 'Promoting Decent Work, Better Compliance and Enforcement'. The conference aimed to address practical issues relating to the protection of posted workers as well as the cross-border aspects of undeclared work.

Although the focus of the conference was implementation, compliance and enforcement, attention has also been given to policies and legal frameworks.

The conference was attended by more than three hundred participants from the 28 EU member states and the 4 EFTA countries. Together these participants represented the three main stakeholders: government organizations and both sides of industry.

The program of the conference had three distinctive parts.

- A relatively short plenary opening session with political scene setting on the national and EU-levels, facts and figures and a debate between social partners.
- A Knowledge Market, where participants could share information and best practices in seventeen break-out sessions.
- Seven workshops where participants could debate on development of compliance and enforcement.ⁱ

Opening session

Lodewijk Asscher, Deputy Prime Minister and Minister of Social Affairs and Employment, emphasized in his opening speech the need to fight for decent work in order to secure free movement of workers and the public support for this major asset of the EU. Cooperation between enforcers of the law is important in this respect. The Platform against Undeclared Work is a good example of the type of cooperation that the EU needs. Equal pay for equal work in the same place is important for preventing a race to the bottom on labour conditions.

Michel Servoz, DG Employment, Social Affairs and inclusion of the European Commission, mentioned the many challenges that EU labour markets have to face. The effects of the financial crisis, the refugee crisis and the divergence of economies call for a reaction. The European Commission will present a Pillar of Social Rights that will deal with questions of new forms of work and life balance. Consultation on this pillar will be launched.

The Labour Mobility Package will contain new proposals for posting, aimed at equal pay for equal work and also proposals on the coordination of social security. One of these proposals will address the duration of posting. The proposals will complement the existing legal framework.



The relative position of mobile work in the EU was presented by **David Foden** (Eurofound). Though small in numbers, mobile work has significant influence in certain sectors, especially in the construction sector. Posted work is important also symbolically, as a visible appearance of one of the assets of the EU that is highlighted too little.

Posting of workers offers challenges for decent work. Research by Eurofound shows that the cross-border aspect in the majority of EU-countries is not the most important issue but that the national issues centre around compliance and different forms of contracting. **David Foden** concluded that a broad set of measures is needed to tackle the complex problem of compliance, both at the national and at the EU level.

Professor **Maciej Duszczek** (University of Warsaw) discussed the flows of migrant and posted workers from the Central European countries after the enlargement of the EU in 2004. The initial wave was much larger than expected but the situation changed rapidly afterwards. Poland for example has become an important receiving country, with over 500.000 workers from the Ukraine. He warned that migrant and posted workers are too often associated with social dumping. However, the two should not be equated automatically. The situation of migrant and posted workers is improving. Member states find ways of coping with the issue of enforcement of employees rights, including wages. Failure to do so should not become an argument to restrict the posting of workers under the freedom to provide services.

Representatives of both sides of industry discussed the role of social partners. They agreed about the importance of cooperation between social partners and Labour Inspectorates for the promoting of decent work. **Werner Buelen** (European Federation of Building and Woodworkers, EFBWW) remarked that therefore member states should recognise the role of social partners. **Maxime Verhagen** (European Construction Industry Federation, FIEC) noted the importance of the involvement of the social partners in order to identify pragmatic solutions. He asked that emphasis be placed on the implementation of the Enforcement directive instead of revising the existing Posting directive. **Catelene Passchier** (Dutch Trade Union Federation, FNV) stated that unions should stand up for equal treatment of workers in order to realize equal pay for the same work. **Liina Carr** (European Trade Union Confederation, ETUC) expressed the willingness of trade unions to cooperate with Labour Inspectorates to contribute to ensure workers rights. **Mario van Mierlo** (BusinessEurope) mentioned the necessity of cross-border cooperation together with better regulation. The platform against Undeclared Work could boost this cross-border cooperation and the exchange of information between inspectorates.



Knowledge Market

Bart Tommelein, the Belgian Secretary of State for the fight against social Fraud, stated that the principle of free movement of services and workers can only retain its legitimacy and remain supported by the European citizens if the rules are being well enforced and abuses are being addressed. In Belgium the government, workers and employers organisation draw up joint action plans. Combating Fraud, however, hinges critically on regional and **European cooperation** to be effective and efficient. With regard to regional cooperation, he pointed to the initiative by the three Benelux countries, Belgium, the Netherlands and Luxembourg, who struck an agreement with concrete measures such as the sharing of databases, harmonising procedures and joint controls.

Yves Calvez (France), **Joanna Velho Amorim** (Portugal) and **José Ignacio Martín Fernández** (Spain) presented, as another example of regional cooperation, the **cooperation** between their countries with respect to the protection of workers' rights. The cooperation started with centralized bilateral meetings to get a better understanding of each other working methods and competences and to tackle obstacles like different legal frameworks. Their work together also encompasses joint inspections. With regard to the legitimacy of the exchange of information they suggested to make use of an European instrument in the first place, but if that is not sufficient to seek a solution at the national or bilateral level.

In a session on the exchange of information on posting situations between inspectorates that was led by **Daniel Xireau** (France), **Marie-Hélène Anselme** (France) explained the use of the **IMI-system**. It facilitates the exchange of information by offering a legal basis and a secure environment. The session highlighted that many challenges remain in using the IMI-system, such as the many different partners involved, the differences in legal framework in the member states and the differences in competences of the inspectorates. **Dariusz Górski** (Poland) illustrated the use of the IMI-system by the Polish National Labour Inspectorate. Although the IMI-system can be useful, the conducted proceedings sometimes take a long time and often the information given is too general to bring the investigation further.

Gary Taylor (European Commission) explained the development of the system for Electronic Exchange of Social Security Information (**EESSI**). The purpose of EESSI is to exchange information between social security bodies within the EU. This will strengthen the protection of social security rights of EU-citizens who are mobile across the EU. In the future, the EESSI system will make it easier for Labour Inspectorates to get information on social security rights of posted workers.

Adequate **registration of workers** can be an important instrument to prevent undeclared work and to promote decent work. **Claes Rydin** (Sweden) and **Lars Alback** (Finland) showed the use of an ID-



card in the construction sector in Sweden and Finland. The use of the ID-card is voluntary. The IT-system links the worker, the employer and the construction site and offers a reliable identification of the worker. The system can also provide information to the employer, such as information on workers' certificates and training.

Ingrid Verbeeck (Belgium) explained the **Limosa reporting system** in Belgium. All foreign posted employees and self-employed persons must report their activities in Limosa in advance. Employers are fined when their employees are not registered in Limosa. Since the introduction of the system, the number of declared persons has increased to 600.000 in 2015 and the system is an important instrument to reduce undeclared work.

The **implementation of the Enforcement directive** in France was reported by **Yves Calvez** (France). To address the growing complexity of situations with posted workers and undeclared work a number of legal measures was introduced. One of them was the partial implementation of the Enforcement directive before the implementation deadline of June 2016. Companies that post workers in France must have a representative in France for the whole period of posting and documents must be in French for inspection purposes. Also a professional ID-card for the construction sector was introduced.

José Ignacio Martín Fernández (Spain) explained the comprehensive approach in the **fight against undeclared work and social security fraud** in Spain. The legal framework of labour law and social security law was reconsidered as well as the enforcement system. Penalties related to crimes against workers' rights were increased. Organizational measures in government organizations were taken that resulted in the creation of a special group within the Labour and Social Security Inspectorate to fight undeclared work. Also measures were taken with regard to the collaboration between the different institutions like the Ministry of Employment and Social Security, other ministries, courts and the Public Prosecutors' office. Social awareness was raised by distributing leaflets and a dedicated reporting tool by e-mail against social fraud was created that proved to be very useful.

The approach in the UK to tackle fraud and error was explained by **Ashley Sawyer**. Actions taken by the Department for Work and Pensions (DWP) resulted in a reduction of 60% in benefit fraud in the last six years. The strategy is focused on preventing fraud and error entering the system in the first place. Other elements of the strategy are strengthening of sanctions for those caught and deterring others from considering the same course of action by publicising harsh punishments and the high likelihood of being caught. In the future more use will be made of information from different sources for risk analysis.



Professor **Karin Buhmann** (Denmark) explained the concepts of ‘hard law’ and ‘soft law’ and gave an overview of smart mixed approaches from which lessons can be learned for the European Decent Work Agenda. When taking a smart-mix approach authorities should make sure that norms are established together with social partners and civil society organizations and that rules contain incentives for companies. It is especially important to involve those stakeholders that have the most problems with the rules.

Fernando Pereira (European Commission) revealed some possible issues for a targeted review of the Posting Directive. This targeted review is part of the Labour Mobility Package as indicated in the Commission’s work program 2016. Issues under considerations are how to implement the principle of equal pay for equal work in the context of cross-border provision of services, how to better take into consideration the different systems of industrial relations, how to ensure the temporary nature of posting and the need to introduce some clarifications (temporary agency workers, road transport).

Tom Deleu (Belgium), **Urszula Kozłowska** (Poland), **Kristel Plangi** (Estonia) and **Bettina Wagner** (Germany) presented examples of **campaigns to provide information** to posted and migrant workers. A challenge is that mobile workers are often more interested in what they are supposed to earn than in their rights. Several lessons can be learned from these campaigns. It is important to use a strong message. One must be creative in actively bringing the information to the worker by making use of churches, schools, shops and other places and communities where mobile workers meet. It requires long-term action to build up a communication network and a sustainable campaign.

On the basis of numerous examples taken from the national legislation of the member states and the legislation of the EU, ILO and other international organizations, **Davide Venturi** (Italy) showed that there are many **definitions** of “undeclared work” and other forms of fraud and abuse. His central thesis was that to develop effective cross-border enforcement it is necessary to develop a common understanding and definition of undeclared work and not to consider this as a national issue.

Alice Hamilton (EU Fundamental Rights Agency, FRA) presented a study carried out by the FRA on the **exploitation** of foreign workers. The study showed that foreign workers are at risk of being exploited even when they are legally posted in a country. This was illustrated by an example of a couple that worked for 5 months during 15 hours a day and got only paid for 5 weeks of work. Nevertheless there were no legal offences in their posting contract that was made up in their home country. This example was a clear case of abusing the system and regulations for posted workers.



Workshops

Professor **Yves Jorens** (Belgium) showed in his workshop **The fight for decent work: the multidisciplinary approach and the need for cooperation** that the developments in social fraud call for a multidisciplinary approach and more cooperation between enforcers. Social fraud is getting more organized and often contain cross-border elements. At the same time fraudsters in the social security field often commit other forms of fraud like income tax fraud or VAT fraud. Therefore the walls between these authorities need to come down both at the national level as at the EU level. An integrated and multidisciplinary approach is the only way to prevent and stop this kind of fraud effectively and to safeguard the principle of fair competition and workers' rights. Intelligent use of existing data by data-mining and data-matching can contribute significantly to the prevention and detection of fraud. At the same time the cross-border data-exchange is one of the greatest weaknesses in the EU cross-border cooperation. Yves Jorens pointed at the weaknesses of existing measures and initiatives. At the bilateral level agreements between member states are often questionable with regard to data-protection regulations and the legality of evidence obtained will not always stand in administrative and court procedures. EU initiatives too often fall short for lack of a multidisciplinary approach or because the EU lacks competence.

Bruno de Pauw (Belgium) started the workshop **Monitoring compliance of social security and labour law** with a short introduction of the differences and similarities of social security law and labour law. Participants discussed whether they thought the European rules relating to social security are still adapted to today's reality. A majority of participants felt this was not the case. Difficulties mentioned by participants were that some member states do not apply the rules as stringent as others, that the rules were almost the same as 50 years ago whereas society has changed dramatically and that these rules give ample opportunity for employers to circumvent them. Bruno de Pauw concluded that the main principle, i.e. the legislation of the state of employment must be applied with exceptions for posted workers and simultaneous activities in different member states, is still suitable for today's reality. However the specific rules governing posting are not. For example the length of the posting period and the period of interruption that allows for a new period of posting to start. Also the rules for self-employed should be more practical. The concept of working on different territories has become too complicated and needs to be revised. In summary, the basic principle is still adequate but the practical elaboration needs to be revised.

A second issues discussed by participants was the binding effect of A1 declarations. In this case Bruno de Pauw concluded that it is not the binding effect that makes it difficult for enforcers, but the lack of a good procedure to enter into a withdrawal procedure with the issuing institutions. Shifting the burden of proof can be a solution: after a reasoned request the issuing institutions should have



to proof that there is a real posting situation and if proof can not be provided, the A1 declaration should be withdrawn. The present dialogue and conciliation procedure is too heavy to check the 1.7 million A1 declarations issued every year. In summary, the binding effect of the A1 declaration is needed for the system to work, but it has gone too far.

In the workshop **Letterbox companies and circumvention practices** led by **Jan Cremers**, ways to tackle malpractices of letterbox companies were discussed. On the basis of several researches and practical experiences **Katrin McGauran** (Germany) showed that there exists a clear link between letterbox companies and malpractices like non compliance of collective labour agreements, evasion of taxes and social contributions and labour exploitation. **Hilaire Willems** (Belgium) presented the approach of letterbox companies in Belgium. In many cases the request for information about the company, like economic activity in the country of origin, or the retrieval of the payroll administration by IMI-system proved to be effective.

The discussion with participants of the workshop showed that there still remain major obstacles in the approach of letterbox companies, both at the national level and at the international level. One of these obstacles are the different competences of the Labour Inspectorates. Some Inspectorates are competent both in the field of labour law and in the field social security law while others are only competent in the field of labour law. Also the lack of information exchange between the different authorities, like social security and tax authorities, labour inspectorates and transport authorities, is an important impediment to a successful approach of letterbox companies.

The workshop on the **European Platform to tackle undeclared work** started with an overview by **Isabelle Biletta** (Eurofound) of the background of undeclared work. Undeclared work is a topic all over Europe. However, the trend since 2003 seems to be that undeclared work is decreasing as a percentage of the GDP. A major challenge with undeclared work is the organization of employment. Labour relations tend to become more and more complex and there are long chains of liability. This increases the possibilities for undeclared work. Posting of workers is a clear example of this. The complexities increase in cross-border situations.

Carita Rammus (European Commission) described the process leading to the Platform, and the position of the Platform in the European context. It was felt that existing platforms, like the SLIC, were not adequately equipped to deal with difficult questions concerning cross-border issues. A specialized platform could serve this objective better by improving the knowledge on undeclared work, analysing the effectiveness of national measures and creating tools for better cooperation between EU member states.

Participants of the workshop brought forward a wide variety of tasks the Platform should perform. Some participants stressed the necessity of first creating a better focus in the tasks of the platform



and more clarity about the legal framework for the activities of the platform. Others pleaded for a more 'hands on' approach and stressed the need to undertake operational activities, to start pilots with cross-border cooperation and data exchange, with the explicit aim of showing the practical added value of the Platform in cross-border situations as quickly as possible.

Georgi Pirinski (European Parliament) concluded on the basis of the discussion that there were three main tasks for the Platform.

- The Platform should seek to get a common and better understanding of the fight against undeclared work.
- The Platform should try to better define what is behind its mission and what its added value on EU-level should be.
- Subsequently the Platform should define a number of action points. It should define its products and perceptible effects, and aim for an ongoing kind of openness around its activities.

Ferando Pereira (European Commission) gave in the workshop **Implementation challenges of the Enforcement directive**, an overview of the issues discussed in the expert group on the implementation of the Enforcement directive. The directive must be transposed before 18 June 2016. So far only France has notified a partial implementation.

Participants discussed about issues relating to the implementation. They concluded for instance that Labour Inspectorates could require the presentation of an A1 form although article 9 of the Enforcement directive contains no reference to the A1 form. There is another legal base, Regulation 883 on the coordination of social security, to require the presentation of the A1-form. Participants also concluded that after the implementation of the Enforcement directive considerable differences will remain between member states with regard to the deadline companies have to keep their documents for inspection purposes. Nevertheless most participants were of the opinion that the establishment of this deadline should remain a competence of the member states in order to safeguard alignment with other provisions in a member state. The question whether it is possible to apply the labour law of the host member state in case of fraud or abuse of the posting directive, proved to difficult. Participants eventually concluded that in the very large majority of case it should be possible to apply the host member states' legislation but due note should be taken of the Rome I regulation. That means that in some cases the labour law of the sending member state could be applicable.

Mijke Houwerzijl (Netherlands) discussed with the participants of the workshop **The hard core of labour conditions** about the possible features of a targeted revision of article 3 of the posting directive. After discussion she concluded the following.

- The length of the posting duration should be limited.



- Enumeration of the separate elements of the hard core of labour conditions in an Annex to the directive would be too rigid while there is a need for flexibility.
- Since Laval, an emerging trend in the rulings of the Court of Justice seems to be to attach more importance to the social protection of the posted workers.
- Member-states are to a great extent free to establish the “minimum rate of pay”. However, this may cause a lot of intransparency for employers.
- The minimum rates of pay, the minimum paid annual holidays, the maximum work periods and minimum rest periods are the real hard-core elements of labour conditions. However these element should be defined more clearly in a revised directive.
- The introduction in the Posting directive of the principle of equal treatment should be considered. The directive on temporary work agencies could serve as an example.
- The member-states should not be obliged to enforce the labour conditions of the collective labour agreements but may leave this to the social partners. The posting directive has to respect the different cultural traditions of the member-states.
- Special attention should be paid to labour law systems that do not have a mechanism to apply collective labour agreements to all workers in a sector. This concerns among others Germany and the Nordic countries.

The challenges offered by new forms of employment were discussed in the workshop **New world of work: legal certainty and enforcement challenges**. Irene Mandl (Eurofound) introduced the topic by presenting recent research on the incidence of new forms of employment across-EU member states. There is an increase in the diversity of forms of employment, mainly driven by the need for flexibility. New forms of employment are for example casual work, employee sharing, ICT-based mobile work and crowd employment.

Muriel Guin (European Commission) stressed that changes in the world of work ask for an adequate reaction that leaves scope for sufficient flexibility to promote innovative businesses and job creation and at the same time supports social protection for workers. Meeting these challenges does not necessarily require new or adapted legislation. The ambition of the European Commission is to create an EU Pillar of Social Rights by setting benchmarks in order to stimulate upward social convergence. New forms of work will also have consequences for enforcement. The new EU Platform against undeclared work is a welcome initiative where these developments can be discussed. At the same time, it should not be forgotten that the majority of employment is still ruled by standard contracts, which pose enough challenges on their own.

The ensuing discussion concentrated on the balance between security and flexibility. On the one hand it was argued that flexibility is needed in today’s world in order to remain competitive, whilst on the other hand the ‘bad forms’ of flexible labour arrangements are quite often low quality jobs,



which can have adverse effects for the individual and for society as a whole. Issues mentioned in this regard were the sustainability of social security system, the rising number of workers that do not build up pension rights and the consequences for life long learning.

Chairman's summary

The chair of the conference, **Koos Richelle**, remarked that the subject of the conference enjoyed great interest from all over Europe. He noted that the announcement by the European Commission that the presentation of a labour mobility package may be expected in the coming weeks or months, provoked lively debates. On the one hand there were expressions of impatience. On the other hand one could hear serious doubts being expressed on the political feasibility of re-negotiating or re-opening the original Posting of Workers Directive (1996) and the Regulation 883 on the coordination of social security. It is not that such a review would be inopportune per se, but opinions on the number and content of necessary revisions vary widely and deeply within the EU.

However, the urgency to improve compliance with and the enforcement of existing legal rules was widely felt by participants. Sustainable solutions can only be found:

- If there is cross-border cooperation, preferably in a multilateral setting to prevent re-inventing the wheel or creating different wheels.
- If there is involvement of all stakeholders: state-organs and social partners. When we speak about state-organs we should not only think of labour inspectorates but of all relevant actors, e.g. the Transport authorities or the Tax-department.
- If all stakeholders are adequately equipped to play their role in full (mandate, staff numbers, training, capacity building).
- If there is investment in prevention, not only in detection and punishment
- If 21st century ways of real time online availability and exchange of quality-data can be guaranteed. There are some promising developments but full deployment and use might still take years.
- If there is a willingness to at least coordinate registration systems like Limosa.
- If abuse is tackled in an intelligent way: tackling one form of abuse may give rise to other forms. The complexity of the problem demands a broad mindset and a well-filled toolkit to tackle complexity, both on the national and the EU-levels.

From the discussions during the conference it is clear that there is still much work to be done and there are positive signals to report.



- Social partners in the construction-sector on the EU-level have been able to reach an agreement on the way to address the posting-issue. This might be an example and an encouragement for other sectors.
- There are examples of increased efficiency and effectiveness through a more focussed use of scarce inspection capacity by profiling groups of citizens or companies that are most prone to commit fraud.
- There are examples where an integrated approach is used to fight undeclared work and social fraud, where labour inspectors get direct access to the social security data-base.

Koos Richelle concluded that it is clearly important to continue with the exchange information about plans and developments. In that respect there are high expectations of the Platform for Undeclared Work. In some of the meetings it was noted that the Platform has some tough nuts to crack in terms of defining key notions and detailing operational issues. But this all should not prevent the Platform from becoming a powerful and practical instrument, contributing to concrete and immediate action.

Richelle concluded by asking participants to bear two things in mind: “There may be free movement of goods, services and workers, there is no free movement for inspectors” and “International cooperation takes a lot of time, setting up a letterbox company takes half an hour”.

ⁱ All presentations can be found on: <http://www.inspectieszw.nl/decentwork/>