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Freedom of Services in the European Union

Labour and Social Security Law: The Bolkestein Initiative

Editor

Roger Blanpain

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FOREWORD

This bulletin contains the papers which were presented at the European Forum on Freedom of Services and Labour and Social Security, which was held under the auspices of the Society for International and Social Cooperation and the Royal Flemish Academy for Sciences in Brussels, Belgium on 16-17 June 2005. The programme was as follows:

The Proposed Directive on Services. An Overview
Drs. Wouter Gekiere, KU Leuven, Belgium

The Proposed Directive on Services and Labour Law
Prof. Niklas Bruun, University of Stockholm, Sweden

The Rome Convention on the Law Applicable to Contractual Obligations and Labour Law (1980)
Prof. Willy van Eeckhoutte, University of Ghent, Belgium

The Posting Directive, 96/71, Content and Implementation
Dr. Mijke Houwerzijl, University of Tilburg, the Netherlands

Posting of Workers and Social Security
Prof. Frans Pennings, University of Tilburg, the Netherlands

Free Movement of Workers and Equal Treatment
Prof. Chris Engels, KU Leuven, Belgium

The Country of Origin Principle and Labour Law, including the *Acquis Communautaire*
Prof. Manfred Weiss, University of Frankfurt, Germany
Prof. Alan C. Neal, University of Warwick, United Kingdom

Problems of Surveillance and Control of Labour Standards
Prof. Andrzej Swiatkowski, University of Krakow, Poland
Prof. Michele Colucci, University of Salerno, Italy

Recognition, Prior Declarations, Employment Documents and Representatives
Prof. Frank Hendrickx, KU Leuven, Belgium
Prof. Jacques Rojot, University of Paris, France

FORUM – PANEL DISCUSSION

Mr. Ronnie Graham, European Court of Justice
Mrs. Anne Van Lancker, European Parliament
Mr. Arnout De Koster, VBO
Mrs. Catelene Passchier, ETUC
Mr. Jan Denys, Randstad
Mr. Jan Wouters, University of Leuven

A CRUCIAL MOMENT

The forum came at a very topical and interesting moment, namely after the two referenda which were held on the European Constitution, which amounted to two times a resounding NO, in France as well as in the Netherlands. After these referenda, Europeans have to ask themselves whether we have to reconsider the European project again:

- What Europe we should stand for;
- What the Member States should do and
- What about the role of the social partners?

One has to reflect, it was said, on the "social Europe" we want. The overall framework is open again for discussion. Where to go and what to do?

FREEDOM OF SERVICES

Due to the Bolkestein initiative, aimed at speeding up the market for services, that specific fundamental freedom is itself the subject of a very heated debate.

No one really discusses that we have to foster the market of services in order to increase economic growth and the number of jobs: services already account for 70% of EU jobs! A more open market promises more employment. No doubt.

Freedom of services, however, is nothing new. It is one of the four fundamental freedoms, which are enshrined in the Treaty on the European Community since 1957: freedom without discrimination and restrictions is provided for in Article 49 TEC. There is abundant case law of the European Court of Justice accepting that Member States can impose their own labour law system and generally binding collective agreements, provided these requirements are proportional and necessary.

So where is the problem?

POINTS TO BE DISCUSSED

The fact is that the sweeping approach of Commissioner Bolkestein, especially at the exact moment of the widening of the EU with ten new Member States and increased globalisation, forced us to look again at the balance between fair competition in the market on the one hand and adequate social protection of workers on the other hand. Points of discussion include:

- The notion of service, including the meaning of the so-called "definite period";
- The sectors, which should be included or excluded. Does it really matter if the temporary work agency sector would be excluded from the Services Directive, since it still falls under the scope of Article 49 EC?
- The applicable labour law and social security standards;
- Acceptable administrative conditions;
- Required documents and languages;
- Control: by the country of origin or the country of work?
- Collaboration between Member States and social partners;
- How to deal with Directive 96/71, leave it or amend it? Exclude it from the scope of the Services Directive?
- Do national systems have to adapt in order to provide, e.g., the possibility of extension of collective agreements in countries where this is not the case?
- How to effectively control and eliminate the black market, illegal work, at home and from abroad?
- What about the self-employed, coming from low wage countries?

The purpose of the European Forum was to discuss these questions in an open and academic way.

This happened in an unprecedented manner.

AN OPEN ACADEMIC DISCUSSION

Numerous questions ware tackled:

- The legal basis for the Services Directive was questioned;
- What are services of public interest? Should they be excluded from the scope of the Services Directive?
- What is the difference between the principles of mutual recognition and country of origin?
- Is there a European concept of labour law?
- The role of the Court of Justice;
- Rome I[1] and Directive 96/71;

1 Applicable law in case of contracts.

- Choice of applicable law? At which moment?
- European labour inspectors, their freedom to move;
- The lack of cooperation between Member States;
- The problem of the 21 languages;
- How to define sectors?

Did the Bolkestein initiative come at a bad moment? For France this seemed to be the case, given globalisation, the widening of the EU and the deterioration of the French model at that particular moment. The definitions of the Services Directive were too wide: thus, the notion of services, of sectors (social, education, health to be excluded), the notion of authorisation; the country of origin principle was too general, the uncertainties of the laws of other Member States a real problem.

The notion of public order was too extensive. There would be a concurrent application of various legal systems. What about the role of the organisers of providers of services? The complexity of the control was underlined, as well as the absence of cooperation between Member States; why should one not harmonise more before proceeding with a service initiative?

Other proposals, emanating from an EP reporter, favoured a sectoral approach, concerning social policies; these should be excluded from the Services Directive and the Directive be limited to purely commercial sectors. The country of origin principle should be shelved. More harmonisation was an explicit goal in order to create a level playing field. Labour law and collective agreements, including rules on industrial warfare of the work-land, should be the rule. Movement of people in the framework of services should be covered by Rome I and Rome II.[2] Temporary work should be excluded and subject to a proper legal European instrument, the same for services of general interest.

An employers' representative was of the opinion that the Bolkestein initiative was too much, too late and would lead to abuses. Problems arise with the country of origin principle, the scope and the authorisations (they should remain in case of temporary work, security agents and construction).

Also a trade union representative was of the opinion that Bolkestein was too big a step. The proposal came at the wrong moment, was presented in the wrong way, just before enlargement. Social aspects were ignored. There was simply no reply to social questions, raised by the unions. A more careful approach was pleaded for, more mutual help. The country of origin principle should be dropped in favour of the principle of mutual recognition. The country of destination should come first: labour law and collective agreements, including industrial action, should be fully respected. Directive 96/71 was considered to be too narrow and too limited. Rome I and Rome II were considered to be too complicated. More European labour law was necessary. Temporary work agencies should be dealt with separately.

2 Applicable law in case of non-contractual obligations.

A spokesman for the temporary work sector pleaded for a grand step forward regarding freedom of services, thus avoiding a standstill for decades. Free movement should be bolstered. Temporary work creates jobs: seven million workers are engaged in temporary work in the EU on a yearly basis. Obstacles to free movement of services should be lifted. The bigger temporary work agencies, situated in the various Member States, were willing to work together to see the appropriate laws and conditions applied in case of transnational temporary work. Control by the country in which the work is done should be effective. The temporary sector does not want to be excluded from the Services Directive, but included as a normal sector of activity. A generalised system of licences was pleaded for, as well as a more positive attitude.

Finally, a global picture was presented, including the WTO and GATT, explaining the 4 ways of supplying services, especially mode 4, concerning the individual providers of services and the restrictions imposed on their movement (requirement of nationality, residence, maximum number and the like).

In short, an excellent forum. Again, my repeated thanks to the Royal Flemish Academy, the participants and the colleagues, whose papers illustrate the importance of the subject and the depth of the discussion.

A special word of thanks for Ronnie Graham, who helped by rewriting some of the papers.

Roger Blanpain

Honorary President of the International Society for Labour and Social Security Law,

Professor at the Universities of Leuven and Limburg (Belgium) and Tilburg (The Netherlands)

POST SCRIPTUM

European Parliament: Report Anne Van Lancker

On 13 July 2005, the Employment Committee of the European Parliament voted with a large majority (23 votes in favour, 6 against and 9 abstentions), in favour of nearly all the amendments of Ms Van Lancker, Belgian Member of the Committee.

A large majority deleted the provisions limiting the possibilities for Member States to monitor and enforce regulations with regard to cross-border posting of workers, reversed the country of origin principle so that it would not apply unless a minimum level of harmonisation was achieved, and decided that the Directive should not apply to a range of sectors with universal or public service obligations.

Most importantly, labour law and collective agreements were excluded from the scope of the Directive. The Directive on posting of workers of 1996 retains complete preference over the Services Directive. Labour and working conditions of the country in which the work is done need to be respected; it is also the country in which the work is done, which will control whether labour and working conditions of posted workers are respected.

Under the EP's procedure, the Employment Committee has the lead on employment related aspects of the Services Directive: worker protection, employment law, collective agreements and social security.

The report of Ms Van Lancker will be discussed by the Plenary of the European Parliament, at the end of October 2005.

R.B.

31 August 2005

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