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Posting of workers and social dumping

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To clarify the scope of my intervention, I would like to specify that I will not deal with the problem of fraudulent posting, that is the abusive use of posting (and therefore of the "Enforcement" Directive 2014/67). I will rather address the EU rules and principles regulating "genuine" posting, and, in particular, how these rules and principles make wage dumping possible and allow companies to exploit the huge labour costs' imbalances within the single market (it is sufficient to point out that the minimum wage in Luxembourg is 2000 Euro, in Germany and France about 1500, in all eastern countries less than 500 euros, in Romania 322 euros and in Bulgaria 235 euros). The problem lies with workers posted in order to carry out a transnational (private or public) contract because, for workers posted by agencies established in other Member States, EU law recognizes equal treatment with national workers.

As it is well known, transnational posting is governed by Directive 96/71 (PWD), which is the subject of a Commission proposal for revision of 9 March 2016 (COM(2016)128). However, the PWD is legally based on the principles on free movement of services laid down by the TFEU as interpreted by the Court of Justice (ECJ), which, as such, are unescapable and inevitable even for the future European legislator. On the basis of those principles - since the Rush Portuguesa judgment of 1990- the ECJ made it clear that a worker posted in a Member State (MS) by an undertaking established in another MS cannot claim the rights guaranteed by the principle of freedom of movement of workers (ex art.45 Treaty on the functioning of the EU), i.e. the guarantee of equal treatment with the workers of the host State, inasmuch as the posting is carried out in the framework of the freedom to provide services, which can be invoked by the undertaking (ex Article 56 TFEU). Indeed, the equality of treatment with national workers can be qualified as an obstacle to the exercise of this freedom, if it implies an increase in labour costs because of the greater burdens provided for by the legislation and collective bargaining agreements of the State where posting is executed.

According to the same principles of the single market, the ECJ admits that the host State can, anyway impose upon foreign companies the respect of domestic labour law rules if this is justified by "overriding reasons of public interest " (the so-called "overriding mandatory provisions ", as defined in the Rome I Regulation on the law applicable to contracts) and provided that this is done in compliance with the principle of non-discrimination and the principle of proportionality.

Consequently, the possibility of effectively tackling social dumping is subject to both the principle of non-discrimination, according to which foreign undertakings cannot be subject to obligations which do not relate to national undertakings and the principle of proportionality, which provides for the admissibility of limits to economic liberties only by means of measures strictly necessary to pursue the legitimate aims of public interest.

However, the principle of proportionality offers a criterion of judgment which is far from being certain and predictable and its application in EU law can lead to the most varied results depending on the discretion of the interpreter (the Court of Justice) and the political choices of the European legislator, that this principle translates into rules of secondary law.

In fact, it was a political decision to translate the principle of proportionality into the provisions of PWD.In particular, according to Article 3, paragraph 1, which lists the minimum standards of protection that foreign undertakings must comply with in the host MS; among them, "*minimum rates of pay* (MRP), *including overtime rates*". The ability of companies to exploit wage dumping obviously depends on the meaning given to such notion.

As proof of the intrinsic elasticity of the principle of proportionality, the Court of Justice over the years has changed its approach in relation to the meaning given to MRP. In the Laval and Rüffert judgments, the Court appeared to have denied the possibility of including in the MRP elements of the remuneration which are above the basic wage set at national level either by collective agreement or by law. While in ESA/Ammattilitto judgment (C-396/13) of 12 February 2015 (concerning a posting of Polish workers in Finland) - without expressly denying the Laval ruling – the ECJ has recognized the freedom of MSs to identify the constituent elements of the minimum wage and has highlighted the fact that, under the PWD itself, the concept of MRP is to be defined by the national law and/or practice of the host Member State. The Court thus admitted that a State may impose a particular structure of collective agreement on foreign undertakings, that is different wage levels as provided for in the sectorial collective bargaining and not a single standard minimum national wage . Moreover, in the notion of MRP not only the basic components are included (in Italy, "*minimi tabellari*"), but other elements functional to guarantee the "worker's social protection" may be included, as, in the case at stake, a daily allowance for the posting, a compensation for daily travel time, as well as holiday pay.

On the other hand, the MRP does not include reimbursements for travel, boarding and lodging expenses and in general the "*allowances and supplements* [paid to the worker posted by his employer] *to compensate for a surplus of work or working hours under special conditions* (as already stated in the Commission v Germany and Isbir judgments). Thus, these items cannot be taken into account in comparing the wage actually paid to the posted worker by his employer and the wage owed on the basis of the law of the host State.

The Ammattilitto judgment seems to ensure that MSs have the opportunity to defend themselves against wage dumping, but that is not the case. Not only because the ECJ reiterates that MS's freedom to identify the content of MRP is not absolute, but always subject to the proportionality principle, but especially because what is legitimate for Finland is not necessarily legitimate for other MSs.

The considerable differences among MSs industrial relations systems raise many legal issues, from which depends to what extend it is possible to contrast wage dumping within

the EU. To address these legal knots, it is necessary (again) to discuss the principles of non-discrimination and proportionality.

The main problems arise, above all, when collective agreements are not universally binding, which is always the case in those countries that (as opposed to Finland) do not know mechanisms to guarantee erga omnes effect. Indeed, if a collective agreement of a given sector is not generally binding, the principle of non-discrimination prevents it from extending it exclusively to foreign companies, which, as a consequence, remain bound only by the law .

In order to address this problem, PWD provides that a State may also refer to collective agreements which, *de facto*, are respected by all national undertakings (in accordance with Article 3 (8)), but in many systems this is quite difficult to prove (almost a *probatio diabolica*) and certainly causes great uncertainty in determining the MRP in the different national systems.

In Italy, e.g. with the recent circular No. 1/2017 (Explanatory Note to Legislative Decree No.136 /16), the National Labour Inspectorate (a Ministry of Labor Office) listed a number of elements of the remuneration fixed by the sectorial collective agreements (CCNL), on the basis of the case law of the Supreme Court (Corte di Cassazione). According to such case law, the CCNL represents a binding parameter for all companies as to the content of the right to fair pay established by Art.36 of the Constitution (even for those companies that do not apply the relevant CCNL). However, it is not certain that the elements listed by the Ministry are all included within the constitutional notion of "fair pay", also because even the case law of the Supreme Court is not univocal and sometimes derogations for national companies are allowed. And yet, even by adhering to the Ministry's interpretation, equality of treatment is not guaranteed, because the notion of "fair pay" does not include all elements of the remuneration provided for by the CCNL.

On the other hand, full equality of treatment is precluded by the fact that the concept of MRP is defined at national level (or by law or by sector contracts) and do not include the components of the remuneration set by decentralized collective agreements (territorial or business).

On the contrary, because of the decentralized collective bargaining the application of the minimum rates set at national level is at risk (even if fixed by erga omnes collective agreements), in case derogation is allowed at decentralized level. As the ECJ clearly stated in the Portugaia judgment of 2002, "*the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services*".

Other problems stem from a restrictive interpretation of the principle of proportionality which, in the Rüffert judgment, led the Court to rigidly interpret Article 3, par. 8 of the PWD and deny the possibility of referring to the collective agreements *de facto* applied in

MSs where there are mechanisms to ensure erga omnes effect, even when those mechanisms have not been used. This is the reason why in Germany - where not all collective agreements are declared generally binding - many Lander have set a statutory minimum wage to be applied to posted workers in public contracts.

The German case also points to a further problem, which is also linked to the principle of proportionality, i.e. the issue of the effects of the statutory minimum wage on the application of PWD. The risk is to consider such statutory minimum wage the MRP under PWD, and consequently considers "disproportionate" the imposition of the wages fixed by collective agreements, if higher. This risk stems from the principles set out in the Laval and Rüffert judgments and does not appear to me to be ruled out either by the ESA ruling (because in Finland not only collective agreements are generally binding, but there is no universal statutory minimum wage) nor by the subsequent Regiopost judgment (C-115/14) of 17.11.2015 (again relating to a law of a German Land) where the Court justified the obligation to comply with the minimum wage in public contracts only if this is set by a statute and not by collective agreements, which are not generally binding and provided that no national provision provides for a lower wage; that is, without subverting the *Rüffert rule*.

These issues are not solved by the Commission's proposal for revision of PWD, which contains important signs of progress, in particular as regards wage dumping. The Commission proposes replacing the notion of MRP with the wider and more comprehensive notion of "remuneration", but without amending Article 3 para. 8 on which depends the application of collective agreements. In this way, the Commission adheres to the principles of the ESA judgment; But it does not solve the problems that this judgment leaves open. The legislative process is in progress, and the European Parliament could approve amendments that allow the States to decide on both the content of the remuneration and the collective agreements to be applied to posted workers (at least, this is proposed by the Social Affairs Committee draft report of 2 December 2016). Obviously, the ETUC proposes amendments that go in the same sense, and it seeks to restore the minimum character of the PWD explicitly recognizing the principle of "more favourable treatment" for posted workers. However, the problem of compliance with the principle of non-discrimination remains unsolved with reference to collective agreements lacking general effects. A problem that might be addressed by allowing MSs to refer to sectorial and territorial collective agreements respected by most national companies (eg at least 80% or 70%); Or by providing for compliance with average wages applied by undertakings in a particular sector or territory.

With regard to the consequences of the decentralization of collective bargaining, there is a clear contradiction between the rules on posting and the policies promoted by the EU institutions within the economic governance. Since the MSs are invited by the Commission and the Council (when not by the ECB and the IMF) to decentralize collective bargaining, weakening and, in some cases, even overcoming the national level of (sectorial) collective bargaining. That is (one might say), they are invited to deviate from the "Finnish" bargaining model, which – according to the Court and the Commission itself - makes it possible to effectively tackle wage dumping. In the grip of schizophrenia, European

institutions, on the one hand, point to MSs that, in order to defend themselves against wage dumping without violating the principle of non-discrimination, have to promote a centralized system of collective bargaining and erga omnes collective agreements; on the other, the same institutions urge the States to improve decentralization, giving more room to plant collective agreements, possibly replacing the National (sectorial) collective agreements with statutory minimum standards. Which means, in fact, to deprive MSs of tools to counter wage dumping, favouring downward competition between MSs.

Therefore, it is not enough to address EU law, by amending the PWD, if the national collective bargaining systems are then dismantled, thus allowing dumping also within the Member States. Any strategy of defence against wage dumping at the supranational level (as stated by the ECJ itself) is grounded upon the defence of the role of collective agreements at national level; which naturally implies overcoming the austerity policies.

The contradiction between the principles on which European integration should be based become even sharper by considering that (in the famous Laval judgment) the Court denied the possibility for the trade unions of the host State to freely bargain with the foreign undertaking, as collective actions would be detrimental to the company's economic freedom. In this way, the Court precluded any possibility of obtaining effective equal treatment through the conclusion of company collective agreements with the posting employer.

In order to overcome the *Laval doctrine*, it is therefore necessary to include in the reformed PWD the explicit recognition that national workers and trade unions have the right to collective bargaining and to strike against employers established in other MSs. This would not imply questioning the functioning of the single market, nor to surrender to "protectionist" temptations, but only to interpret (more correctly) the rules founding the single market. The possibility for undertakings to invoke the freedom to provide services against a trade union - namely to limit the exercise of collective autonomy - is not provided for by the Treaty, but is the result of a questionable "extensive" interpretation of art. 56 TFEU by the Court of Justice. According to the ECJ this norm would have a "horizontal direct effect", which means it could be invoked also in relations between private parties. This interpretation, moreover, is not only incompatible with the respect of the international standards on the right to strike (as the European Committee of Social Rights affirms) but it is also in contradiction with the will to strengthen transnational collective bargaining, which the Commission itself has been putting forward for years.

What said so far, on the several profiles on posting, the adoption of rules to effectively counteract wage dumping depends solely on the will of the European institutions to move in this direction, and not by hypothetical system constraints. The real problem is that the will of the European institutions reflects that of the national governments, so also the solution to these problems ultimately depends on the political and social equilibrium that in the next future will take shape in the various MSs.