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"Medication worse than the illness itself, or the future of posting workers in view of the draft of the new enforcement directive"

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The new spirit of the enforcement directive

I am an entrepreneur. This is why I will try and present the point of view of entrepreneurs.

I will start with our frustrations. They are important, as we all feel them in the context of the European Parliament's works on the new enforcement directive regarding the posting of workers in connection with providing services. I am using the term "new directive" consciously, as in my opinion, the draft of the enforcement directive proposed by the European Commission goes beyond the provisions of the basic directive, completely altering its "spirit".

For us, Polish entrepreneurs, the free market is a playing field on which we function in accordance with the set rules. For me, the internal market means that if I go the nearest grocery, I can buy French wine there. On the other hand, if a French planter is looking for temporary workers to pick grapes, he may employ the services of my job agency as freely as I can purchase his product in a Cracow store. Without excessive barriers or discrimination. For me, such a situation is obvious and fair.

For us, Polish entrepreneurs offering services on the internal market, posting workers is a fundamental tool. We cannot function without it. Before the conference, I was trying to think whether there are services that may be provided without posting workers. I'm sure ther are. Remote translation services that can be offered via e-mail are an example. However, most of the services require the physical presence of the worker at the place of the job. Even programming services always end up with implementation at the client's office.

The truth is that without posting workers practically no enterprises will be able provide their services on the internal market. And we would like to make use of this tool, in the same way we want to buy French wine, Dutch flowers or Finnish butter.

As an economist, I feel obligated to add that the flowers, wines and butter that I have just mentioned are examples of limited resources that are exclusive to particular Member States. The Dutch have the flowers, the French have wine and cheese, and Poland has good, qualified workers. Each country has different limited resources that it offers on the internal market. It is fair if the Member States can offer them on equal terms and without discrimination. If the internal market functions in this way, it produces benefits and leads to the development of all of the European Union countries.

Reading the basic directive (96/71/EC), I felt that it was very positive and pro-developmental. It does impose certain limitations on workers' mobility, but its "spirit" and intentions can be seen is the verbs that are

used in its wording: **"facilitating the use of freedom"**, **"overcoming difficulties"**, "**stimulating economic interpenetration**", **"avoiding problems"** or **"propagating mobility of workers and the unemployed"**.

Let me quote a fragment from the basic directive:

> *"The objective of posting workers is for the employers, employees and institutions to **avoid** the **problems and difficulties** that would arise as a result of applying a general rule."*

The idea of posting workers is to minimise the number of problems! Not only for us, entrepreneurs, but also for social security institutions and, most of all, for the workers themselves. Naturally, posting workers is an exception to a general rule. However, this exception is very important for us, as it determines our existence on the internal market.

The spirit of the enforcement directive, formally just specifying the basic directive in more detail, is a completely new, different spirit. It is expressed through verbs such as "**combat**", "**discourage**", "**disallow**", "**prevent**", "**scare off**", predominant in its wording. Reading the draft prepared by the European Commission, one has a distinctive feeling that the crisis completely changed the priorities and political feelings in Europe. These verbs show the real intention of this directive. For us, Polish entrepreneurs, this intention is frightening.

Pathology, or the new definition of posting workers

I have the impression that in the consciousness of many politicians, trade unions and social security institutions, a new, unofficially alternative definition of posting workers has started to function:

> *"Posting workers is a **pathology** consisting in enterprises taking advantage of legal gaps to **go around regulations and abuse**, resulting in the **violation** of workers' rights and **unfair** competition on the internal market."*

As a Polish entrepreneur, I ask myself: is this our fault? Our, meaning small and micro enterprises that dominate in Poland? I think not. The rulings of the European Court of Justice quoted as the reason for starting the fight against pathology in posting workers did not concern small and micro enterprises.

If you look for well-known cases of violating the rights of posted workers, it turns out that the substantial majority of these cases involved illegally employed workers or workers posted by contact-point companies established in Poland by medium and large foreign companies. It is difficult to find abuse on the part of Polish companies posting workers.

Will those guilty of be punished?

Abuse takes place, it is a fact. Let us examine a case that took place in 2012. It happened in Essen, Germany and regarded sub-contracting in the construction sector. 50 workers posted from Poland had to sleep in night shelters because the Polish employer abandoned them without paying them. It turned out that the "Polish" employer was a German construction company that owned the "Polish" company posting workers and, at the same time, the client to which the workers were posted. It was a classic example of a contact-point company, stigmatised in the regulations currently in force.

Another case took place in Denmark, where three out of every four employees killed on construction sites last year were Polish. In one of the cases, the Danish employer allowed for an ambulance to be called only after the victims were changed into non-working clothes so that there was no evidence of the accident happening at work. The workers were self-employed independent entrepreneurs contracted by a Danish

employer.

In both of these cases there was no fault of the Polish companies offering cross-border services. And the contact-point companies? By definition, they are established by companies from the hosting countries. This is confirmed in the opinion of the Committee of the Regions, which lists large international corporations establishing platforms for posting workers from countries with lower work costs as one of the major pathologies.

My question is: Will Polish companies offering cross-border services become the victims of the fight against abuse carried out by large companies from the hosting countries? This would be very unfair, not only for the 15,000 Polish companies that may go bankrupt and 300,000 posted workers that will most likely lose their jobs, but also for the future of the Polish economy that is highly dependent on export.

Parties interested in fighting for fair delegation

There are a number of groups of interests involved in posting workers. I will present them on the example of France.

The first group comprises **service enterprises from the hosting countries**. They are represented by organisations such as PRISME (Professionnels de l'intérim, services et métiers de l'emploi). This is an institution grouping French job agencies that has been lobbying for years for limiting the access of foreign job agencies to the French market, also by means of limiting the posting of workers. Why does this institution present such an approach? Because it represents the interests of its members who are fighting the competition for clients and the market. They are fully entitled to do so.

French **trade unions** also represent the interests of their members. And they are very afraid of an influx of a cheap labour force from the East that, in their opinion, will take their jobs. From this short-sighted point of view, posting workers is an exclusively harmful issue for them.

Institutions of control also play an important role. I listened to a speech by one labour inspector who, during a meeting of the Committee on the Internal Market and Consumer Protection, said that if he meets posted workers during an inspection, he is frustrated with the fact that he has to write a letter to an institution of the sending country and withhold the inspection until he has received a response. He would like to operate more flexibly and to be able to determine right away if the enterprise that posted the workers meets the conditions for doing so (for instance, if it operates normally in the sending country) without the necessity of waiting for the results of the inspection carried out by the relevant institution of the sending country. This inspector has the right to seek for the scope of his rights to be expanded. But if this scope is actually expanded, how can we be sure that he will not abuse his rights? Personally, I have serious doubts about this.

In my opinion, the problem is that particular groups of interests – trade unions, employers' organisations, institutions of control – loudly formulate and fight for their interests. The problem surfaces when politicians start to implement these demands unilaterally. The game is on not only about the rights of workers and fair competition, but primarily about sale markets and clients.

Primum non nocere

I would now like to discuss the provisions of the enforcement directive that, in my opinion, are the most dangerous for entrepreneurs. For this purpose, I have prepared additional materials which I have entitled "A recipe for a medication worse than the illness itself". This illustration symbolically presents the things we are most afraid of in connection with the draft of the directive.

Please remember that the reason behind adopting the enforcement directive was the necessity of guaranteeing that the rights of the posted workers are observed. I think that there may be a logical error here, as guarantee means 100% complete certainty. Therefore the only guarantee of the rights of posted workers not being violated is the lack of posted workers. In every other case there will always be a certain proportion of workers that will become the victims of their rights being violated.

I believe that all of the provisions of the enforcement directive proposed by the Commission will result in the better protection of the workers' rights. However, the cost will be disproportionally high burdens and risks for the enterprises posting workers. Still, what is most dangerous is the COMBINED use of the proposed solutions.

Referring to the medication symbolism, it seems that the European Commission decided to combat, at all cost, the illness of the observance of the rights of posted workers not being guaranteed. To this end, it decided to use all of the available means jointly, in spite of a high probability that the use of one or two of the components would be enough. However, the Commission wants to use all of them preventatively. The question is, is the patient going to survive this therapy? For the authors of the directive, this seems to be less important.

The first mixture

Disproportionate risk for cross-border service providers and their clients

Ingredients:

1. Open list of posting criteria (Article 3)
2. Open list of national control measures (Article 9)
3. Joint and several liability (Article 12)

Side effects:

For enterprises posting workers and their clients, putting these provisions together means no rules of the game at all. As a result, a local labour inspector carrying out an inspection in the hosting country will make a decision whether the posting is legal or not on the basis of an open list of approximate criteria he will individually adapt to the particular case.

Let us add joint and several liability to the concoction – provisions enabling any institution towards which the delegating company failed to perform its financial obligations to demand that these obligations be performed directly by the client from the hosting country.

Therefore the local inspector may issue a decision based on his subjective opinion following from any premises that, in his opinion, show that the workers have not been posted. And since there is no posting, the contributions, for instance in France, will have to be paid – the French social security institution will request the Polish posting company to pay these contributions. The Polish company will most likely file for bankruptcy, which will result in the French institution requesting the client to pay the contributions, and the client will file for bankruptcy, as well. Will such situations happen often? No, because clients, aware of the huge and immeasurable risk, will simply not employ the services of foreign enterprises.

To sum up, combining joint and several liability with an open list of control measures and posting criteria will effectively block the posting of workers. Obviously, theoretically it will still be possible, but in practice, both the companies wishing to send its workers to other countries and, primarily, the existing and potential clients of such companies will reject this possibility.

The second proposed mixture

Depriving cross-border service providers of competitiveness

Ingredients:

1. Complex procedure for applying for A1 forms (Decision No. A2, currently applicable)
2. Obligation to designate a contact person to negotiate with trade unions (Article 9)
3. Translation and storing of documentation in the hosting country (Article 9)

Side effects:

Combining the long and complex procedure of applying for A1 forms (which confirm that a worker has been covered with social security in the sending country) with additional obligations will result in the companies ceasing, in my opinion, to be competitive.

Let us look at the example of a small welding company from Cracow that received requests for carrying out specialist, very urgent welding works for clients in France, Sweden, Germany and Portugal. In accordance with the provisions referred to above, this company, in order to be able to carry out these contracts, first has to complete very complex applications for the Polish Social Insurance Institutions (ZUS) to issue A1 forms. If it can manage to go through this procedure, it will face the necessity of translating company documentation into four languages and employing the services of lawyers-negotiators in the four countries. Looking at the wording of the provisions, as proposed by the European Commission, it seems that the intention of their authors is to make the owner of the welding company rent four offices where these negotiators will stay guarding the documentation kept there.

Two simple questions come to mind here:

- Will the price our welding company will be able to propose for its services still be competitive when compared with the offers of local companies?
- The jobs are very urgent and every day counts. How fast will our welding company be able to start the jobs in view of the above obligations?

In fact, the above provisions will give an advantage to the enterprises posting workers that already have their offices in the target countries – this means the large international companies and contact-point companies the new directive was supposed to combat. I find it completely incomprehensible why the European Commission, not only against its own declarations, does not combat unfair practices on the market of posting workers, but encourages and facilitates them by promoting contact-point companies.

The final, third mixture

Discrimination of cross-border service providers

Ingredients:

1. Open list of posting criteria (Article 3)
2. Open list of national control measures (Article 9)
3. Imposed joint and several liability (Article 12)

Side effects:

This mixture is a shocking concentrate of discrimination. The imposed joint and several liability means that the posted worker bears the risk of joint and several liability even if such a mechanism is not used with respect to other workers and their employers in the country he was posted to!

Let us imagine that our Cracow-based welding company would like to bid in a tender for a large contract in the Czech Republic, where there are no provisions on collective liability with respect to domestic companies. What, then, are the chances of our welding company winning the contract when, compared to its competitors, it is discriminated against in almost all possible areas? This, obviously, is a rhetorical question we all know the answer to.

I would like to present the consequences of introducing an open list of national control measures on my own example. If an inspector of the Polish labour inspectorate comes to my company, I will meet him at the company office. There, I can talk with him and take part in the inspection procedure. I know the Polish law – I have the infrastructure, resources and lawyers that advise me in such situations. If an inspector comes to a company in Sundsvall in northern Sweden, where two welders posted by my company work, my possibilities of defending myself and taking part in the inspection procedure are much more limited, provided they even exist at all. Therefore a closed list of control measures is necessary to protect enterprises posting workers against discrimination.

The fundamental value of work mobility

Listening to the statements by the members of the Committee on the Internal Market and Consumer Protection (IMCO) and the Employment Committee (EMPL), one may be sure that they do not intend on discriminating against or hurt companies posting workers that act fair. The problem is that it will not be them who will then implement the provisions they propose – this will be done by a local labour inspector in a small town in southern France who does not see the macroeconomic dependencies and is not familiar with the lofty ideas of promoting work mobility. This man, equipped with huge powers, will use the law in the name of the ideals he identifies himself with, economic patriotism in particular. He will try and protect "us", the locals, and make it difficult for "them", the foreigners. We, entrepreneurs, are most afraid of this kind of abuse.

In my opinion, the right of Polish enterprises to freely provide services on the internal market is the key asset Poland got from its accession to the EU. We must defend this value at all cost. I am sure that if the enforcement directive comes into force in the shape proposed by the European Commission, trade unions and some parliamentary groups may deprive Poland of this value for ever.

Polish entrepreneurs support the efforts to guarantee the rights of posted workers. However, we do not support the provisions that in the name of protecting this value will:

- **Deprive companies posting workers of competitiveness** by means of imposing disproportionate financial and administrative burdens on them,
- **Cause legal uncertainty** that will increase the risk of operating a business and discourage clients from employing the services of companies from other Member States,
- **Open a gate for abuse** and administrative practices on the part of hosting country institutions,
- **Contribute to the development of the grey market** that creates favourable conditions for human trafficking and modern-day slavery.

I believe that freedom of establishment and freedom to provide services, which are one of the ideological fundamentals of the European Union, will be preserved, continuing to contribute to the economic development of Europe.