Labour Mobility Initiative

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COMMENTS TO THE STUDY "EU SOCIAL AND LABOUR RIGHTS AND EU INTERNAL MARKET LAW"

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Introductory remarks

The assumption that in order to prevent social and labour rights of the posted workers, the freedom of service must be limited is false on both theoretical and empirical grounds. The Study seems to be based on that false assumption.

After a thorough reading of the Study, it is but impossible to be under strong impression, that according to authors social and labour rights stand in strong opposition with the internal market freedoms. The term **"tension"** is used (155 times) by the authors to describe the relation between labour rights and market freedoms. At few instances, the term "**conflict**" is used. We perceive such approach as outdated, destructive, irresponsible and dangerous for social dialogue. As we've declared on numerous occasions, we strongly believe that social/labour rights on one hand and market freedoms – on the other, are not contradicting but **complementary values**.

We acknowledge there is a tension between (generalizing) posting member states and receiving member states. It is however a political and economic tension or conflict of who would employ the skilled workers with high working ethos, performing good jobs for a decent wage. It is no longer the conflict (nor tension) between workers' rights against employers' rights.

Problems may and will occur when those workers' rights on one hand or market freedoms on the other hand, are being abused by the actors. And we would like to stress that it matters not if they are abused by employers, trade unions, political actors or administrative bodies. We believe that it is not the constant perfection of laws, especially on the EU level, that guarantees the complementary nature of the values, but monitoring and better execution of already existing laws. We recommend that more emphasis is put on the cooperation between administrative bodies and on easy access to full information for both workers and employers as to the law applicable (e.g. on the single national website required by art. 5 of Enforcement Directive). Three most destructive abuses in the area of work mobility and service mobility

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freedoms are letterbox and ghost companies, bogus self-employment and illegal employment. **None of these issues is dealt with in the Study**. We are afraid that imposing "equal pay" principle for posted workers as set in the Study will lead to more illegal employment and bogus self-employment.

Using the very words from the Abstract of the study: *"On the basis of the current Treaties and the CFREU, the constitutionally conditioned Internal Market emerges as a way to overcome the perception that social and labour rights limit Internal Market law"*. We would add: *"...and vice versa: Internal market law does not limit social and labour rights. And that is because they complement each other."*

As it is further expressed on p. 26 of the Study, *"employers' freedom to provide services and to change their place of establishment frequently are construed in such a way that they conflict with equal treatment rights of workers moving to other Member States, as well as with rights to fair and just working conditions for all workers"*. Nonetheless, there is **no evidence presented in the study, that posted workers are treated unequally or work in unjust conditions.** In our opinion to blame the very legal construction of the two mentioned freedoms for unequal treatment and for unjust working conditions is too far reaching conclusion. Despite the promise, that *"the study will expose"* this mechanism, it further contains **no evidence to support that**, but runs to proposals which, if applied, would limit or eliminate free movement of services within the Internal Market. Not only would it not strengthen the social and labour rights but would inevitably **lead posted workers to lose their jobs**. We are afraid that the proposed changes in law aim at turning temporary posting of the best qualified specialists into permanent migration thereof.

We believe, that the law is well constructed, and the incidents of abuses or unjust working conditions are rare and easy to eliminate with the provisions implemented by Member States as a result of Enforcement Directive. It goes without saying that if approximately 1,3 mln workers are posted every year to another country as a result of freedom to deliver services, and only few cases of rights abuses are reported, you can draw two mutually excluding conclusions. Either the law is ill-constructed and these few cases are only a tip of an iceberg, or the law is well constructed and the EU policy should focus on promoting best practices and enforcing controls in case of abuse of laws. Whichever is the right conclusion it is not recommendable to change the law without the proof there is an iceberg. If the policy makers start experimenting only on the basis of the assumption that the first conclusion is true, and in fact it is not, the result will hinter work mobility. There will be more barriers to free movement of services and less jobs. The very dangerous side effect will be lower external competitiveness of the EU market in the global economy.

The Study lacks any attempt to assess the influence of posting of workers on both local labour markets and economic growth in the receiving countries. It is based on a false assumption that temporary posted workers take the local jobs. Such view is equally wrong to the claims that men take away jobs form women or older workers from the younger ones. Labour market is not just a number of vacancies against the number of job seekers. In a growing economy it is an ever growing market. There will always be room for another worker (job place).

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Detailed comments to the Study

In our comments we will focus on the parts of the Study devoted to posted workers. The Study makes a diagnosis that current EU law is construed in the way that it guarantees equal ground for businesses (but not for workers). Art. 56 of the TFEU states that *restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*

The prohibition on imposing (additional) restrictions does not mean that local and foreign service providers are operating on the same grounds. The grounds are far from equal for businesses. Foreign service providers have numerous costs which local service providers don't have to cover: notification of postings, applying for A1 documents, translation of employment related documents in case of control, not to mention the cost of travel, lodging and food of posted workers. These costs are not deductible from the salaries of the posted workers, and they should not be (!). Nevertheless they influence the final cost of the service, and competitiveness of the service provider. Art. 3 (7) of the directive on posting of workers states that *Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.*

Additional costs for the service provider related to the fact that the service is delivered on the territory of another Member State could be divided into two groups – connected with the remuneration of the posted worker (e.g. per diem allowances) and other (e.g. notification, A1, translation). If posted workers were guaranteed the same, i.e. average wage instead of minimum terms of pay, the service would no longer be competitive. This is the shortest way to freeze service mobility with a small exception of services where there is no local provider.

The study claims that lack of equal pay of the posted workers makes them subject of precarious employment practices (p.11). That would certainly be the case for migrant workers who change their place of residence in search of job on the basis of free movement of workers, but not for the posted workers. It is due to temporary nature of their work, connected to contracted service of their employer. There are still differences in purchasing power of money and living expenses across the EU. Let us assume that posted workers from a Member States with a lower economic development level earn only minimum wage in a host Member State of a higher economic level. Such minimum remuneration is 2-3 times higher than posted worker would have earned for the same job performed in their home Member State (if there was a job there). On top of that the cost of living in a home Member Sate is lower. Thus posted workers bare higher cost of living only when they are working and temporarily living abroad. Vast part of these higher costs are covered by their employer or paid as allowances on top of the regular remuneration. After service is completed, posted workers come back to their home country where the cost of living is lower. Compared to local workers (who were not posted) they have significantly higher income.

These differences will exist until higher level of approximation of economic development is achieved across the EU.

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The Study confuses the economic aim – which is leveling up labour rights (esp. wages) with the means to achieve it. We are all very much in favor of equal pay for equal work irrespectively of the place. The problem is that introducing such regime as an administrative requirement will **lead to the opposite effect**. High income countries will remain high income countries, and low income countries will stay where they are. This will strengthen the two speed Europe and hinter the social cohesion of the EU. Workers in rich countries will earn even more, and workers in poorer countries will keep earning less. This will cause even stronger incentive for the companies in high wage Member States to move their operations to countries where the earnings are lower and that is indeed… social dumping, which we are trying to limit. The Study touches this issue on p. 21, suggesting that the free movement of workers is the protective measure against company moving its operations to another Member State. According to the Authors, free movement of workers allows them to follow their company and to work in another Member State. Giving as an example climate conditions, the Study ignores two most popular reasons for moving operations to another country: favorable tax system and low labour cost. If a worker follows his/her company, he/she will be earning less, according to the principle of equal pay for equal work in the same place.

The clearly observable trend is that companies move from high cost countries to low cost countries, and the workers move from low income countries to high income countries, which leads to deeper economic differences and works against social and economic cohesion.

We believe that posting of workers in the framework of freedom to deliver services based on minimum terms of pay (art. 3 POW dir.) prevents qualified workers from permanent migration, letting them earn higher income than at their home country. Calling their working conditions (esp. wages) precarious is an abuse. Furthermore, we are convinced, that introducing the equal pay for equal work at the same place principle will increase the cost of service providers beyond the level of competitiveness. Posting of workers will only be economically possible between two Member States of similar wage levels.

The Study points out that the *"precarious employment conditions are concentrated in certain occupations and sectors, rather than spread throughout the economy. As a result even relatively small numbers of incoming precarious workers may disrupt employment conditions locally"* (p. 11). It is not clear what kind of disruption the Authors have in mind. Is it lower standards of working conditions, lower wages of local workers, or perhaps taking away the jobs of the local workers? In our opinion there is no evidence that any of these disruptions take place in the receiving Member States. In fact there is positive effect of higher competitiveness in the local service sector. There is no signals of local workers losing jobs or earning less. Instead local comparable services are delivered at a higher quality and speed than if there were no competing service providers from other Member States.

Under current social security coordination rules posted workers remain insured in the system of their employer's establishment. It is logical consequence of temporary nature of posting of workers. To avoid administrative complications and to protect the insured worker against fragmentation of insurance periods

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into many different systems Art. 12 (Reg. 883/2004) confines them to the system they already belong to. The postulate to cover the posted worker with the social security system of *lex loci laboris* is not in itself wrong, under one condition, that we would have a perfectly working pan-European system of information of all insurance records of all EU citizens. On top of that there is a problem with waiting periods or minimum insurance record before a claim for a benefit can be made. Abolishing those minimum periods would foster social tourism across EU. Under current conditions, the coordination principles work in favor of insured posted worker.

Conclusion

In conclusion, proposing "equal pay for equal work in the same place" (for posted workers) as a regulatory measure is either based on **economic ignorance** or on malicious intentions of keeping the low income countries at their low income level and the high income countries at their higher level. This will result in faster materializing the concept of two speed Europe, which form the perspective of the new members of the EU could only be called a form of new colonialism. Approximation of earnings, preferably by levelling them up across entire internal market should be the goal of the social cohesion policy of the European Union. Yet imposing equal pay for equal work in the same place on service providers from other Member States not only jeopardizes freedom to deliver services, but makes this goal impossible to achieve. In the market economy (as well as in the social market economy) introducing equal pay for equal work in the same place is a denial of the fundamental right to work.

Instead the concept of "fair pay for every work" should be promoted. And in the context of wage levels **fair does not mean equal**, and **equal does not mean fair**.

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The study "EU Social and Labour Rights and EU Internal Market Law" is available under:
http://www.europarl.europa.eu/meetdocs/2014_2019/documents/empl/dv/ipol_stu(2015)563457_/ipol_stu(2015)563457_en.pdf