

Editorial: Mobility of services and posting of workers in the enlarged Europe – challenges for labour market regulation

The increasing mobility of services and posting of workers between the new Member States and the old EU/EEA Member States after 1 May 2004 has stirred controversial debates about the impact of enlargement on labour market conditions and regulations in Europe. The transformation of the EU from a club of countries with fairly elaborate labour and welfare regimes to an arena for 'globalisation in one continent' implies a significant shift in the conditions for national labour market governance. With a nominal East-West wage gap between 1:10 and 1:5, the growing cross-border mobility of service providers, hiring firms and posted workers has caused fiercer regime competition and challenged established notions of fair competition and equality. Accentuated by the referendums over the EU Constitution, by the proposed EU Services Directive, and by highly charged, transnational labour disputes – the *Laval-Vaxholm*, *Irish Ferries* and *Viking* cases – these dynamics have triggered political mobilisation and disagreement about the relationship between free movement, social regulation and basic rights in the single market. The rights of posted workers – that is, workers sent by their employer to undertake work in another Member State in the context of a temporary service contract – have thus, partly thanks to the 'Polish Plumber', become an issue crystallising virtually the whole range of conflicting interests, principles and political ideas in the European project. In this special issue of *Transfer* we are proud to offer articles from leading specialists in the field, analysing the regulatory frameworks, trends, experiences and responses related to the proliferation in the posting of workers in the enlarged Europe. Unfortunately, we have no articles on posting in the new Member States, or from a sender perspective, but we hope to remedy this bias in future issues of *Transfer*.

Migration has always been an inherent part of humans' search for subsistence, better living conditions, protection and emancipation. In our era of globalisation, the flows of people on the move are growing, almost regardless of legal restrictions and policing. For decades Ireland was the country with the most pronounced emigration in Europe; today the influx of labour migrants is, as pointed out in Gerald Flynn's article, an indispensable but controversial condition for the continuing economic growth of the country. Economic migration has become an element of social reality, which even politicians will have to realise is here to stay. The issue is not simply whether to remove or retain controls but how to govern migration in coherent and appropriate ways. In the coming decades, the ageing and shrinking workforce and fiercer competition over labour in Europe is likely to accentuate this challenge. Viable responses are hard to envisage without closer coordination of labour migration policies in Europe.

Free movement is one of the basic rights and freedoms enshrined in the project of European integration. For the citizens of the new eastern Member States (EU 8), who for decades were denied the possibility to move freely, the repealing of barriers to labour mobility was one of the main advantages of EU membership. But, contrary to the initial promises, all the 'old' Member States (EU 15), except Sweden, the UK and Ireland, chose to apply transitional arrangements (TAs) postponing the free movement of workers from the EU 8. For the free movement of services and posting

of workers no transitional arrangements apply. During the first two years after enlargement, the inflows of individual labour migrants have in most western countries been very modest. The most popular destinations have been the UK (approximately 340 000 registered entries) and Ireland (approximately 130 000), but Germany is still the largest recipient, hosting through bilateral schemes around 500 000 seasonal workers annually. By contrast, Sweden, with free movement, has received very low numbers, while the booming economies of Iceland and Norway without free movement have attracted sizeable flows of especially Polish migrants – underscoring the fact that labour migration is highly demand-sensitive and network-driven.

The asymmetry between restricted movement of labour and free movement of services has, as shown in the articles on the French, Nordic and German experiences, strengthened the demand for posted and self-employed labour from the new Member States, spurring also circumvention and dubious labour practices through fictitious posting. While the impact of the TAs on the total mobility of labour seems limited – as indicated by Nordic developments – the TAs have clearly influenced the channels and forms of migration. Finland therefore decided, through a tripartite pact, to repeal the transitional arrangements and enact new measures to prevent social dumping associated with service mobility and posting. Portugal, Spain, Greece and Iceland are following the same path, while others are lessening their restrictions. The Dutch government has signalled that it intends to phase out the transitional arrangements from 2007, as soon as it obtains parliamentary approval. An unintended consequence of the old Member States' attempt to protect national labour markets has been an increase in outsourcing, temporary work and a flourishing secondary market for services and posted labour. Many western governments and social partners have thus fertilised a growing transnational market for manpower-subcontracting with ample opportunities for speculation in social dumping, evasion of taxes/social security and illicit work. While middlemen and user companies can reap swift profits, the posted workers have – as described in Bruno Lefebvre's ethnographic study in the French region of St. Nazaire – often no other option than to accept the insecure conditions offered to them at the bottom end of transnational production chains. Marcus Kahmann's article on the posting of workers in the German construction industry draws attention to the asymmetric power relationship between the posted worker, his/her employer, and the contracting firm, often making posted workers vulnerable to pressure to accept inferior conditions. The consequence of 'voice' is often the immediate return home and loss of work, income and money paid to the hiring agent.

Free movement of services is assumed to be beneficial for the European economies and normally also for the posted workers themselves. By finding better paid work abroad, they can improve their lot. Unfortunately, reality is, as shown in Lefebvre's study, too often one of broken promises, social risk and sometimes life-damaging accidents. For workers in the host country, posting is associated with ambiguity. In the short term, the hiring of posted workers on more flexible and less costly conditions may for core workers in the individual company improve competitiveness and help win contracts, thus securing jobs and preventing relocation. In the longer term – and for workers in the branch as a whole – distorted cost competition, outsourcing and undercutting may lead to reduced employment and training, and downward pressures on working conditions. The risk of a 'race to the bottom' in the most affected branches, such as transport and construction, is underscored in

Flynn's report from Ireland – 'Mobile worker disputes jolt Ireland's social partnership model' and in Lefebvre's report from French shipbuilding. The efforts of the German construction union (IG BAU) to support foreign workers and protect domestic workers and agreements, do, as shown by Kahmann, illuminate the dilemmas the growth in service mobility and posting are posing to trade unions. These dilemmas also face the employer camp, where the tension between individual company interests and the quest for collective action to secure a level playing field is again coming to the fore. While employer federations in construction and other less mobile service sectors tend to support proper host country regulation of wages and competition, employers in mobile manufacturing often maintain that subcontracting of low-cost workers is the only alternative to eastward relocation, putting local shop-stewards in an awkward position. In his article on 'Free movement of services and equal treatment of workers: the case of construction', Jan Cremers, the former general-secretary of the European Federation of Building and Woodworkers (EFBWW) and one of the architects of Directive 96/71/EC (The Posted Workers Directive), reviews 'ten years after' the background and principles of the Directive. With the objective of drawing the line between free movement and the principles of equal treatment, the host country principle was adopted. Yet, from his recent research in construction the clear message is that narrow and patchy national implementation – typically lack of notification, monitoring and enforcement, principal contractors' liability, requirement of a lasting employment relationship with the subcontractor, and weak supervision by the European Commission – seriously impair the effectiveness of the Posted Workers Directive. Instead of limiting host country controls, as provided for by Bolkestein's draft Services Directive, a European initiative to ensure proper enforcement is called for.

Differences over interpretation of the Posted Workers Directive and the relationship between free movement, basic social rights and national industrial relations regimes is the common theme of the article by Kerstin Ahlberg, Niklas Bruun and Jonas Malmberg on 'The *Vaxholm* case from a Swedish and European perspective', that by Thomas Blanke on the *Viking* case, and Massimo Pallini's article on 'Posted workers: Italian regulation and dilemmas'. Ahlberg *et al.* argue that the EU has no competence to intervene in the Swedish regime of collective bargaining and industrial action – a view apparently shared by most old Member States and the Commission's Legal Service – and predict that the outcome of the *Laval-Vaxholm* case in the ECJ will not endanger the Swedish model. They do, however, suggest that Sweden might consider certain adjustments in its labour law, ensuring that industrial action is undertaken in a non-discriminatory manner.

The *Viking* case concerns union action to hinder reflagging of the Finnish passenger ferry Rosella. This case may, in the view of Blanke, have an even more significant impact than the *Laval-Vaxholm* case. The Court of Appeal in London recently referred questions on the case to the ECJ for clarification of EC law. It seems highly questionable whether basic rights enshrined in the Treaty, like the right to industrial action, can be constrained by the principles of free movement in the single market. Blanke might provoke those viewing the EU as a plain neoliberal conspiracy, suggesting as he does that basic social rights and regulations through Treaty revisions and extensive case-law have obtained such a position in EU law – virtually constituting a fifth freedom – that they cannot credibly be trumped by single market rules on free movement and establishment. Nonetheless, the deliberate strategy of

the company Irish Ferries to replace Irish employees with contracted low-cost agency workers has threatened to disrupt the longstanding Irish tradition of social partnership, and triggered broad social and political mobilisation. There is no doubt that, by strategic use of subcontracting to circumvent national rules and collective agreements, employers can rapidly destabilise national industrial relations institutions.

Such insight apparently did not influence the Commission's original proposal for the Services Directive. In the view of Wolfgang Kowalsky, who played a central role in the ETUC's engagement with the Directive, the original Bolkestein proposal represented a remarkable shift in the regulatory approach of the Commission. In the article 'The Services Directive: the legislative process clears the first hurdle', Kowalsky points out that the invention of the 'country of origin' principle – found nowhere else, except in international shipping – was at odds with political sense and former EU strategies for market integration. Rather than developing a common framework, the Bolkestein proposal might have fragmented the single market for services into 28 (EU plus EEA) overlapping and competing jurisdictions, creating an unprecedented bazaar for regime-shopping. However, the proposal quickly turned into a political boomerang, triggering probably the most effective instance of transnational political-democratic mobilisation in the Community's history. During the process the European Parliament (EP) demonstrated its potential for exercising power, and for the first time the ETUC unions managed to build alliances with broad political forces at EU level as well as in key Member States and succeed in rewriting a central piece of EU economic regulation. Whether this event will prove an exception – facilitated by the weakening of the European elites after the constitutional crisis – or points towards a democratic deepening of the EU decision-making process, remains to be seen.

It is certain, however, that the Directive in no way ensures posted workers decent and equal treatment. Enhanced service mobility in a context of growing social inequality and further enlargement requires a viable European regime for monitoring, control and enforcement of the Posted Workers Directive. European trade unions have, according to Cremers, ignored for too long the problems of posted workers. Jon Erik Dølvik and Line Eldring accordingly point out that even the most robust national unions and industrial relations systems, like those in the Nordic countries, may need new means of minimum wage regulation, by agreement and/or by law, to ensure comprehensive coverage and proper conditions for temporary guest workers. National experience and debates concerning minimum wage policies are briefly reviewed by Thorsten Schulten.

Whatever laws and regulations are in place, a common message of the contributions is that decent governance of posting depends on the trade unions' autonomous capacity to reach out and include posted workers in their overall strategies. Conversely, if trade unions lose the capacity to regulate competition in the labour market, their autonomous power will also erode. In this respect, Kahmann's report on IG BAU's initiative to establish a transnational Migrant Workers Union (MWU) attracts attention. The MWU is not yet really up and running, but the response from other national trade unions, who seem to prefer organising migrant workers in their own ranks – hitherto with modest success – has so far been wary. Whether the host country principle, the country of origin, or joint European approaches should guide

union strategies in this field is a matter for further discussion. While the answer is not to be found in demarcation disputes, which too often have stalled union organising – the solution presumably lies in building trust and practical cooperation.

Given the ambivalent relations between host country labour and posted workers, striking the right balance between support and inclusion, on the one hand, and protection and policing of domestic conditions, on the other, is demanding. Yet, in contrast to those who tend to believe that a simple answer is at hand, it is encouraging to note that the enlargement of the labour market has revitalised the debate about core industrial relations issues in several European countries. The predominant response seems to be internal re-regulation and closer interplay between statutory and negotiated means of labour market governance. In Sweden, the main confederations have even signed a framework agreement offering foreign subcontractors temporary incorporation in the national regime of collective agreements. Whether such initiatives will prove sufficient to tame the impact of market forces on the ground is uncertain, but thus far the external liberalisation has given impetus to tripartite national cooperation about enhancing ordered relations in the labour market in many countries. The Polish plumber's role in the French referendum may perhaps in the longer run prove a turning point for European posted workers.

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