

Economic freedoms in the EU and social dumping

Jan Cremers - Law School/UvT

Political background

- EEC started as an economic project
- Flanking social policy developed as part of the action plan related to Delors White paper
- In 2000 the Charter with fundamental rights for workers has been formalised. However, still no binding character
- Lisbon Treaty provides general aim (single market not the main aim but should serve social progress)
- Outgoing Commission has not implemented this notion; poorest social record since decennia

Social dumping 1

No unified definition - describes in general a practice of employers that use cheaper labour

- The EC: 'where foreign service providers can undercut local service providers because their labour standards are lower'.
- CEPR (1998): where labour standards do not comply with minimum requirements adopted by the home country

Social dumping 2

- Vaughan-Whitehead (ILO): two definitions: narrow – respect or non-respect of the law; broad – unfair competition
- ETUC: when businesses abuse free movement in the single market to undercut or evade existing labour standards and regulations
- ETUI: undermining or evading existing social regulations.

Forms of circumvention of workers' rights

- Cross-border recruitment via (temporary) agencies.
- Sham self-employment.
- Shift to other industries (regime shopping).
- Manipulation with free establishment (letter-box companies) and country of residence.
- Breaches of labour standards (working time, minimum wage, pay not in line with skill level, absurd deductions).

Primacy of economic freedoms

1. Freedom of establishment
2. Free provision of services

Side-effects and social risks?

1. Freedom of establishment

The emphasis in the area of company law is:

- Deregulation of the business environment
- Introduction of competitive legal pluralism
- Facilitating the entrance to entrepreneurship
- Lowering of the criteria of establishment (f.i. capital)
- Efforts to ease the mandatory rules (f.i. registered office and head office in the same country in the case of the SE)
- Infringement of cases that identified 'barriers' for the free establishment

2. Free service provision

The emphasis so far has been:

- Take away barriers for foreign service providers
- Host country competence to control regularity is and has been limited
- ‘proportionality’ test - social rights and labour standards assessed as administrative burden
- No uniform definition of a worker: for instance, workers posted in the frame of the free service provision can be self-employed for their (coordination of) social security, workers for their labour conditions

Consequences

No serious analysis what this all means for:

- Creditors
- Workers
- Distortion of competition

In a cross-border context:

- Risks of tax evasion
- Circumvention of social security
- Employment relations blurred
- Threat for workers participation
- Non-respect for labour standards
- Fake ownership and evasion of liability

Some findings

- ❑ Deregulation of company law and freedom of establishment created breeding ground for cross-border fraud and distortion of competition
- ❑ Outsourcing and the chain of (labour-only) subcontracting, agencies, letterbox-companies
- ❑ National compromises on the difference between a commercial contract (for the provision of services) and a labour contract no longer a guarantee for protection of workers rights
- ❑ The circumvention is shaped according to the national regulatory frame

Practical experiences

Transport

Building

Foodprocessing

Automotive

Agriculture

The old situation

NL undertaking



NL worker



Labour contract



The use of cross-border intermediates

Limited abroad

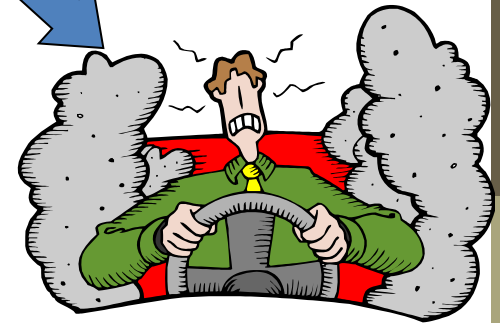
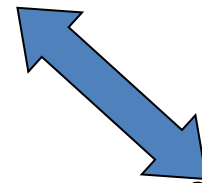


NL undertaking



Invoice

Labour contract



NL resident

Construction

2011: Irish company with Polish workers (dumpster drivers)

2013: Polish company with the same Polish workers after nearly 2 years of posting

No construction activity in Poland

Salary below belgian minimum and no payment of overtime



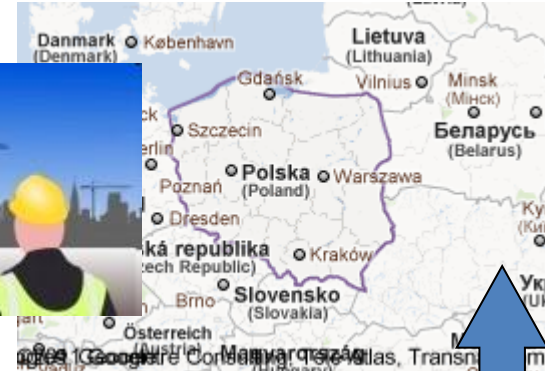
Food processing

Slovakian company with workers in slaughterhouse (meat processing and cleaning)
No compliance with belgian minimum wage, no overtime paid.
Invoice price below normal belgian level
No activities in Slovakia only administrative work



Agency work with fake posting

Polish workers



Service contract
Bouygues TP- Atlanco



Labour contract

Conclusions

- National policy unable to cope with disguise of employment relationship as a result of cross-border provision of services.
- Determination of existence of employment relationship no longer an exclusive national concern, but a transnational responsibility.
- Workers' mobility asks for instruments to protect these employees against circumvention of basic rights in the host countries.
- Necessary to establish a basic, effective, legal EU distinction between employed and self-employed.
- Address difference between fraudulent practice and true commercial business relationship.

Recommendations

- The respect for the regulatory framework (of labour standards and working conditions) in the country where work is pursued has to be restored.
- Stronger legislation on ‘genuine’ undertakings.
- Written evidence, in the form of labour contracts and company registration, should be obligatory to make it possible to divide between genuine and sham cross-border labour recruitment.
- Cross border mobility based on EU regulations must be complemented by recognised legal provisions to guarantee effective transnational sanctions, remedy or redress.