The free provision of services, combined with the free establishment of corporate entities, has led to an increasing mobility of firms, which post workers temporary to another Member State. And the free movement of workers has accelerated the labour mobility of workers from countries with low-pay and/or high unemployment to countries with more attractive working conditions and pay. In recent years, this mobility has rapidly increased. In 2013, some 7 million EU citizens were working and/or residing in another EU country, around 1.1 million were living in one country but working in another (frontier or cross-border workers) and around 1.2 million were posted each year to another country.[2] In the documentation that was prepared for the proposed European Labour Authority in 2018, the European Commission uses the figure of in total 17 million citizens living or working in another EU Member State.[3]

## 3. Labour mobility in Europe - socio-economic developments

In the first sections, it was noted that the elaboration of a flanking social policy, which should and could mitigate unintended side-effects of the Single Market, got stuck after the conclusion of the action program of the early 1990s. The successive European Commissions were more obsessed by deregulation and simplification, the Member States blocked in the Council any further initiative with the argument that social policy was a national competence and the European Parliament was too weak to take the lead. As a consequence, the regulatory and legislative frame for the tackling of abuses of cross-border mobility lagged seriously behind the socio-economic reality. The flanking social policy that was developed in the early 1990s in a European Community with 12, later on 15 Member States, had no answer to at least three important developments in the following decades. In this frame, we just briefly touch upon these three developments.

### 3.1. The massive growth of outsourcing and externalisation of labour.

During the successive economic crises (early 1990, followed by the IT-bubble and a crash in 2000), it became very clear that the globalisation and liberalisation of the European market had a serious impact, not only on the 'global' players and corporations, but also on all other market actors. The paradigm for corporate strategy in these turbulent years of boom and bust changed from the

[2] Press release European Commission 2014: http://europa.eu/rapid/press-release_MEMO-14-541_en.htm
[3] Press release European Commission 2018: http://europa.eu/rapid/press-release_MEMO-18-1622_en.htm

'economy of scale' into market activities characterised by 'slim and lean' operators. In the construction sector, for instance, this was the period in which the dominant contractors changed their policy into a policy of 'management contracting' (Cremers, 2009). Large segments of the operational work and the execution were outsourced, and important parts of the recruitment were externalised. By doing so, the social risks were transferred to entities lower down the chain that had no other specialisation than the recruitment of cheap labour.

As a result of this outsourcing and externalisation of recruitment, the pricing and allocation of labour was no longer governed by the regulatory frame that applied to direct labour. For construction, this led to fragmented production chains headed by large transnational construction firms that engaged a great number of smaller firms as well as individuals to perform particular tasks within a dependency chain. In other industries a similar situation emerged, with fragmented supply chains involving a myriad of complex multi-tiered contracting and subcontracting relationships (Miller, 2009).

In the construction segment active in the area of public works, the liberalisation of public procurement with a strong focus on cost reduction, even at the expense of the quality and societal effects of the tendered works, contributed to this process of outsourcing and subcontracting. It often resulted in a transfer of the social risks lower down the chain of subcontracting and in minimising the labour costs through abnormally low tendering. By 2013, the European social partners in construction, the employers' organisation FIEC and the European trade union federation EFBWW, signalled in a joint position that the widespread practice of awarding public contracts on the basis of the 'lowest price' and of accepting 'Abnormally Low Tenders' were at the source of various forms of unfair competition and social fraud.[4]

### 3.2. The flexibilisation of labour contracts and the return of the 'day labourer'.

The primacy of the principles of economic freedom and the easing of the mobility of business transformed the organisation of production and services and intensified the pressure on wage costs. This had a substantial impact on the recruitment practices used. The traditional model of undertakings with skilled and unskilled workers contributing their labour under the supervision and disciplinary control of an employer was no longer the standard one. Cost reduction strategies which led to

[4] See the joint statement: http://www.fiec.eu/en/cust/documentview.aspx?UID=d504f8ca-44c7-4c78-8c75-1df9487663c9

extensive outsourcing, downsizing, subcontracting, the use of agencies for the supply of labour, and the widespread practice of bogus self-employment, created a new, Europe-wide playground for types of contracts that do not fit in the traditional model. In some sectors with a cyclical production process, the 'day labourer' has returned. The direct labour relationship with the main (user) undertaking is broken. The substitute, formed by temporary work agencies, labour brokers and middlemen, subcontractors only specialised in supplying labour, operate with flexible, temporary, short-time contracts. This fits in the ideology of the 'new' employee, an 'individual worker' operating flexible and mobile on the labour market.

Already at an earlier stage, with the important shift from manufacture to services as the largest economic sector (services constitute nowadays 70% of the European economy) and the emergence of temporary agencies, it became clear that the workers' voice through the trade union movement had serious difficulties in keeping pace with these developments. In some countries, trade unions started to defend the rights of workers in non-standard employment relationships and succeeded in a certain regulation of the more flexible segments of the labour market, resulting in collective agreements and labour legislation for the temporary agency sector and initiatives to protect the labour and social rights of self-employed (Countouris & De Stefano, 2019). However, membership in these segments stay very low, and as a consequence, the implementation of a more stable workers' voice at plant or firm level do not come off the ground. The lowest echelon of temporary agency workers, to a large extent labour migrant, does not figure in official workers' statistics or are simply ignored because of the temporary character of their work. These workers are invisible and unrepresented.

### 3.3. The enlargement of the European Union.

It was already noted that the basic principles for the Single Market stem from a period and time in which it was inconceivable that the European Union would enlarge with countries from the still existing *Comecon*-bloc. The main reference for the European commission in the modelling of the flanking social dimension was the labour market and industrial relation system that the 'old' Member States had in common and this policy making was not interrupted by the earlier enlargement to 15 Member States (as Sweden, Austria and Finland came in). However, within a period of 15 years after the publication of the *Cecchini*-reports that forecasted the future of a more unified European

Community (published in 1987/1988[5]), an unprecedented enlargement took place. This led to a European Union with 28 Member States, characterised by a broad and divergent spectrum of industrial relations and socio-economic traditions. Even in the early 1990s, after the fall of the wall, the reference did not change. This can be illustrated by the first 'non-papers' that circulated early 1990 as consultative documents for the regulation of the posting of workers issue, in what later became the Posting of Workers Directive (PWD). The non-paper assumes that the free movement of services, capital, goods and persons will increase considerably with the completion of the Single Market. Non-respect of labour standards in host countries, where workers are temporary posted to, can easily lead to distortion of competition, next to disadvantages for the workers concerned. In order to avoid this, undertakings providing cross-border services with posted workers should respect: the application of national legislation on public order and respect for generally binding collective agreements.[6] And the first public drafts of the PWD stated that Community law 'does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State' (European Commission, 1991).

The socio-economic reality in the CEE-countries that joined the EU after 2004 was completely different. For more than one reason, the two basic pillars of the social dimension were underdeveloped in the new Member States. Labour legislation had to be build up from the scratch (in former times, the *Comecon*-countries always ratified ILO-standards, but transposition and implementation into national legislation was lacking) and social partnership hardly existed. As the social dimension of the Single Market was concluded in the early 1990s, it was not foreseeable what the consequences of the 2004 enlargement would be, with a high proportion of new Member States that hardly could offered commitment to collective bargaining as a means of labour standards regulation. As a consequence, it proved very complicated to accommodate in EU law disparities in wages and working conditions among the Member States of the EU, exacerbated by the accession of new Member States. And as a consequence, the risk was born that national social models based on

[5] See http://aei.pitt.edu/3813/1/3813.pdf

[6] *Proposal for a Community instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a sub-contracting undertaking*, European Commission (March 1990, unpublished, author's archive).

the lawfulness of collective regulations (and action) could be overruled by the direct effect of EU law in situations related to economic freedoms with a cross-border element (Bercusson, 2007).

The enlargement led to a huge reservoir of labour, with workers coming from countries with a tradition of low labour standards and low pay. Combined with the externalisation and flexibilisation, this served as a breeding ground for the recruitment of cheap labour at a size that was hard to imagine as the Single market was created.[7] Even during the economic crisis, with growing unemployment, the cross-border recruitment increased, and, certainly at the beginning of the recovery at the expense of local jobseekers. There is no systematic research available in this regard, but for instance, a report dedicated to the construction sector in Belgium reveals that intra-EU posting to Belgium has mainly become manifest in the construction sector. In 2015, intra-EU posting accounted for one third of employment in the Belgian construction sector. While the number of employed local workers decreased by 7% between 2011 and 2015, the percentage share of intra-EU posting of total employment in the construction sector increased by 19 percentage points between 2011 and 2015 (De Wispelaere e Pacolet, 2017).

## 4. Control and enforcement of genuine mobility

Freedom of establishment and the free provision of services provide an unrestricted entrance to national labour markets. The creation of the Single Market has given primacy to economic freedoms binding across the EU, while the control (and enforcement) of labour legislation and working conditions is based on a mandate that usually ends at national borders. This led to evident inconsistency with the established principle of free movement of workers. Workers moving to other Member States are entitled to equal treatment. In several publications it is noted that, as soon as a transnational dimension is introduced into labour market relations, compliance control is hampered. The regulatory frame for fair labour mobility is settled, on the one hand, by the legislator, and on the other hand by the partners in collective bargaining. In some Member States, the social partners have installed sectoral or interprofessional compliance and counselling institutions with a mandate to act if there is an industrial dispute or in the case of irregularities. These joint bodies, often composed of representatives of management and labour, have the task of preventing, solving and settling disputes.

[7] To just give one figure: the size of the total workforce stemming from Central and Eastern Europe in Germany multiplied with five in the period 2010 to 2018, from 257,000 to 1,308,000 workers (Bundesagentur für Arbeit, 2018).

But also in this area the competences end at the national border and administrative sanctions are difficult to execute in a cross-border context.

In a series of research projects, I assessed the practical functioning of control and enforcement mechanisms related to genuine labour mobility and posting of workers (Cremers, 2018a, 2081b). The findings turned out to be representative for experiences of the compliance and enforcement offices and the labour inspectorate. The notion that fraudulent use of labour mobility is often shaped as a circumvention of the national regulatory frame of pay, social security, and labour standards in the host state was confirmed. This circumvention took place via cross-border recruitment via (temporary) agencies, sham self-employment in cases where differences between a commercial contract (for the provision of services) and a labour contract were blurred, fake posting because control was (and is) inadequate or easily bypassed, shift to other industries (regime shopping), manipulation with the free establishment (fictitious companies and arrangements) and country of residence. Moreover, directly related to posting, the abuse of entitlements that are guaranteed by the posting rules (working time, minimum wage, pay scaling not in line with skill level, absurd deductions) could be signalled. In a long-term cooperation project, managed by the French labour inspectorate organisation INTEFP, the problems with compliance, the lack of cooperation, notably in this area, the difficulties to trace circumvention in cross-border situations and the weakness of the existing sanctioning mechanism were confirmed. One key joint frustration for the competent institutions, and in fact for all stakeholders, is the difficulty to bring cases of breaches to a righteous end.[8]

## 5. Consequences for labour-intensive sectors such as construction

In labour-intensive industries such as construction, manufacturing, shipbuilding, transport and logistics, but also in all kinds of services, the use of a foreign (artificial) entity in a cross-border context can lead to the introduction of questionable forms of labour recruitment, with blurred labour relations, the circumvention of social security payments and tax evasion. The recruited mobile labour, whether through the direct use of the free movement of workers or through the provision of services with worker being posted, than becomes a commodity. The focus on labour cost reduction methods leads to savings on direct wage costs resulting from partial or non-compliance with collectively

[8] INTEFP's mission is the training of the labour inspectorate, as enshrined in the French law (decree 2005-1555, December 2005). INTEFP also has the task to initiate national and international partnerships among the inspectorate. For a project synthesis: http://www.eurodetachement-travail.eu/datas/files/EUR/synthesegenerale_2013EN.pdf

agreed wage and working conditions, underpayment, too low wage scaling (with, as a consequence, a mismatch of qualification and pay level), non-compliance with agreed wage harmonisation between industries (for instance, the equal pay principle for agency workers), too long working hours, non-payment of overtime and other pay-related bonuses and unreasonable deductions. But also other circumvention has been observed, ranging from wage-related financial/fiscal obligations, undeclared pay of part of the wage components and allowances, manipulation of the obligatory social security payments in a home and/or host country, the search for cheaper conventional frames (non-binding agreements) and regime-shopping (with collective agreements that have a softer regime of employers' contributions), circumvention of (mandatory) employer contributions to industry-wide provisions and funds (vocational training, OSH or other social policy/protection funds), to the flagging-out or the conversion of agency work into service provision (no 'wage related costs', only 'invoices').

Recruiters enter the market often under the pretext of the cross-border provision of services, although de facto the only core business of the supplier is labour recruitment. In the cited Belgian report, the authors reported that the main method is subcontracting via posting rather than a foreign firm that (has won and) performs construction activities for a Belgian client based on a commercial contract (De Wispelaere & Pacolet, 2017). The recruitment of foreign workers serves to meet labour shortages and to find workers for repetitive, low-paid and dirty work. This is in fact work that has to be carried out based on the application of the equal treatment of workers under the rights-based free movement of workers. However, the pretext of service provision helps to keep the wages in some labour-intensive sectors low. The incubators of this method know very well that control is impeded, that the reference to posting leads to time-consuming research (verification of registration, contracts and pay slips, checking of the genuine character of A1-forms and of the legality of firms and agencies), also because consultation of colleagues abroad is needed, and that competences to tackle breaches effectively are missing. In short, invoking cross-border provision of services with posting workers provides in those situations a fine alibi to hamper or even to end investigations.

## 6. Recent developments and outlook

The signalled irregularities were confirmed by the European commission in its documents that underpinned the proposal to create a European Labour Authority (European Commission, 2018). President Juncker announced in September 2017 plans for an authority (ELA) that had to ensure in a fair, simple and effective way the enforcement of EU rules on labour mobility. The Commission's

proposal, formulated in March 2018, dealt with the mismatch between the legal theory and the practice of compliance and enforcement of social rights. The draft Regulation, which was published together with an impact assessment and a synopsis report summarising the outcomes of a stakeholder consultation, states that the objective is to help strengthen fairness and trust in the Single Market. To that effect, the ELA should support the Member States and the Commission in strengthening access to information about rights and obligations in cross-border labour mobility situations and in facilitating the solution of cross-border labour market disputes or irregularities. The Commission recognises the fact that in several industries, first of all labour-intensive industries such as construction, manufacturing, shipbuilding, transport and logistics compliance control is hampered, as soon as a transnational dimension is introduced on local labour markets. The Commission's assessment of the enforcement practices confirms most of the signalled shortcomings in the relevant research. National compliance arrangements that protect workers' interests are neither equipped nor adapted to the enforcement challenges in the Single Market. The assessment pinpoints insufficient capacity of national authorities to organise cooperation with authorities across borders, although this is essential for effective and efficient handling of cross-border issues. Moreover, the assessment signals weak or absent mechanisms for joint cross-border enforcement or mediation activities. In essence and indirectly, the assessment illustrates that the (operational implementation of the) EU and national acquis have not kept pace with the development of the Single Market.

It is too early for a review of the functioning of the ELA; a compromise between the European Council and the European Parliament was concluded in the spring of 2019 and its start is planned for the autumn of 2019. But some question marks, partly based on the text of the compromise, can already be formulated. In order to strengthen the legal capacity of the national enforcement bodies in joint and EU-wide investigations in cases of infringements or irregularities related to cross-border labour mobility, it is necessary to broaden up their competence with other parts of the Union acquis, such as control of the 'genuine' character of the service provider. Special attention should be given to dubious subcontracting practices. Social partners report in several studies the appearance of artificial legal corporate entities, like letterbox companies, that are created for the sole purpose of subcontracting work to one or more countries. The workers most often work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. Therefore, the planned combined tasks relating to cross-border labour mobility and the coordination of social security should be complemented with legislative areas not yet covered, such as the tackling

of artificial arrangements (i.e. letterbox companies) and the transnational cooperation and fight against fraudulent service providers.

The ELA must work towards an effective and dissuasive sanctioning policy, comparable to existing EU-wide sanctions in other areas. It is in fact a missed opportunity that the ELA Regulation does not lay down the main rules for an EU-wide fining policy and for procedures for properly sanctioning in case of violation of the law. Effective measures are needed in order to promote genuine operations and prevent abuses. Fake entities should be refused the entrance to the market (such as withdrawal of licenses and certificates or the exclusion from public procurement bids). The ultimate sanction should be a suspension or cessation of fraudulent activities, with an EU-wide effect in order to avoid non-genuine actors starting all over again in other constituencies.

Competences to decide on and to control compliance with the regulatory framework of pay, working conditions, as enshrined in collective agreements and labour legislation, should be more allocated to the country of employment. This asks for a reestablishment of the *lex loci laboris* principle. Free movement of workers will only stay upright if this free movement takes place grounded on the principle of equal treatment in the territory where work is carried out. The competence to check the reliability of documents, which underpin the cross-border activity and, if necessary, to withdraw these documents in high risk sectors, must become a competence that can be performed EU-wide by compliance and enforcement authorities in both the sending and the receiving country.

**References**

BERCUSSON, Brian (2007), "The Trade Union Movement and the European Union: Judgement Day", *European Law Journal* 13 (3), pp. 279-308.

BUNDESAGENTUR FÜR ARBEIT (2018), *Migrations-Monitor Arbeitsmarkt - Eckwerte* (Monatszahlen).

COMMITTEE FOR THE STUDY OF ECONOMIC AND MONETARY UNION (1989), *Report on Economic and Monetary Union*, Brussels, European Commission,

COUNTOURIS, Nicola, DE STEFANO, Valerio (2019) *New trade union strategies for new forms of employment.* Brussels, ETUC.

CREMERS, Jan (2011), *In search of cheap labour in Europe. Working and living conditions of posted workers*, Brussels/Utrecht, International Books, CLR-Studies 6.

CREMERS, Jan (2018a), *The European Labour Authority and Enhanced Enforcement*, Policy Department for Economic, Scientific and Quality of Life Policies, European parliament, Brussels.

CREMERS, Jan (2018b), *Posting of workers in practice: INT-AR Paper 8*, Web publication/site, Tilburg, Tilburg Law School.

DE WISPELAERE, Frederic, PACOLET, Jozef (2017), *The size and impact of intra-EU posting on the Belgian economy*, Louvain, HIVA.

EUROPEAN COMMISSION (2018), *Impact Assessment - Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority*, Commission Staff Working Document, Brussels.

EUROPEAN COMMISSION (1991), *Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services*, COM, 91, 230 final-SYN 346.

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