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Immigration, Free Movement of Workers and Service-provision.

How Effective Are the Transitional Agreements after the Eastern Enlargements?

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Immigration, Free Movement of Workers and Service-provision.

"The Europe I am dreaming about is not a Europe made of markets, States, regions or cities. It is a Europe of the people, citizens, of the men and women." (Card. C.M. Martini)

Introduction

Not too many people in Bulgaria and Romania were actually thinking about the New Year that came as the clock struck midnight on the 31st of December 2006. The two countries had something else to celebrate: starting from then, they would be the latest additions to the European Union. However, during the run-up to the accession moment, between implementing 80.000 pages of EU aquis and meeting the other requirements for EU membership, both countries found themselves amid discussions about some of the anxieties of the Old Member States related to the Eastern Enlargement: the (free) movement of people. At a time when the problem of migration takes centre stage in European debates, the accession of Romania and Bulgaria touched some sensitive cords in the politics of Old Europe.

Given the big income gap between the Old and the New Member States, there has been a growing concern among EU 15 that the Eastern Countries might have a set of negative effects on their labour markets. Because of the worries of the Old EU of being overwhelmed with immigrants from the poor States moving westwards in search of work placements, the Accession Treaties of both Romania and Bulgaria have a transitional clause. This provision allows the Old Member States to restrict the free movement of workers for a maximum of seven years (under a 2+3+2 scheme). This is the same procedure that took place in 2004, in light of the first Eastern enlargement, when twelve of the fifteen Member States (except the UK, Ireland and Sweden) imposed restrictions to the free movement of employees for eight out of the ten accessing countries (except for Cyprus and Malta). I can think as an explanation the fact that better performing economies with a low level of unemployment and a steady GDP growth constitute a favourable environment for the assimilation of new economic migrants (European Commission, 2004).
Still, it is worth noting that although the UK and Ireland had an "open border" policy for Eastern migrant workers, it did impose restriction on the workers' access to the British social welfare system (Heinz & Ward-Warmedinger, 2006: 13 and Boeri & Brucker: 2005: 637). The British Government requires two years of continuous work for the migrants to get access to a range of public services and social security benefits (Kvist, 2004: 310). These measures are established in order to address fears of "social tourism" (Ibidem, 306). This represents the situation where people migrate in order to have access to social benefits (because of the big differences in social policy systems). Social tourism could lead to tensions in the social security system of the host country.

Those who fear a high rate of migration from the East use as a benchmark the German reunification at the end of the Cold War. During ten years after reunification, 7% of the population of East Germany moved westwards, despite high level of regional help invested there (The Economist, 2004: 42).
On the other hand, the advocates of the free movement of workers cite the experience of the accession of Spain and Portugal to the EU in 1986 when no outflow of Spanish and Portuguese invaded the EU lob markets. However, we must take into account the fact that when Spain and Portugal joined the EU, their standard of living was by far more comparable to the EU average than the one we have today between the East and the West. The GDP per capita of Spain, Portugal and Ireland was around 60-70 % of EU average prior to their accession (Larosière, De, 2003: 6) while in the Central and Eastern Countries there was on an average

less than 50% of EU 15 average prior to the first Eastern enlargement (European Commission, 2006a: 2).

So, when Bulgaria and Romania joined the EU in January 2007, once again, political anxieties regarding the probable scale of immigrants from the two countries took precedence over one of the four freedoms enshrined in the EC Treaty.

Indeed, the free movement of workers is a basic EU right. And indeed, this freedom may seem problematic when we consider that Romania has a GDP per capita of 28% of EU 15 average (European Commission, 2006a: 2). Given such a big income gap, one would think that workers in these countries have a high incentive to leave their homes and look for work in the wealthier part of the EU. But, as we now know, the fears of the mass immigration that preceded the first Eastern Enlargement did not materialize. The countries that did not impose restrictions to the free movement of workers from the 2004 enlargement did not experience flows of workers higher than those who imposed transitional arrangements (European Commission, 2006b: 9). The neo-classical economic theory explanation to this is the fact that migrational flows are driven by the supply and demands movements of the free market economy. However, in our specific case, this may not be as relevant as it seems to be at firsthand.

What happens with people who want to migrate, when restrictions are imposed to their movement across the EU? Do they stay home and give up their wish to pursue economic activities in another country (which might be vital for their welfare)? Or on the contrary, they look for alternatives, for "loopholes" in the system, even taking risks by going (deeper) underground?

Indeed, it is an acknowledged fact in the academic and non-academic literature that the restrictions imposed on the nationals of CEE have encouraged them to search for alternative forms of pursuing economic activities (Ibidem, 5). Cash-in jobs, posting workers, self-employment and claims of self-employment are the common ways under which Eastern immigrants take up work in the West. And besides this being a case of evading of the rule of law and taxation, some of these workers submit themselves to exploitation by their employers, by undercutting the minimum wage level and the working conditions. And this may have an effect on the local (domestic) workforce by creating an incentive for a "race to the bottom" in terms of wages and conditions of work.

Aims and Structure of the essay

The aim of this paper is to asses the effectiveness of the transitional measured imposed on the countries of Central and Eastern Europe as a consequence of the last two enlargements.

How did the transitional arrangements affect the possibility of workers form Romania and Bulgaria to have a working placement in the EU 15?

I set as a starting point for this assessment the proposal of the European Commission for a Directive on Services in the Internal Market (commonly known as the Bolkestein Directive). I chose this proposal because its adoption by the Commission stirred a lot of passions in the EU regarding cheap labour coming from the East subsequent to the 2004 enlargement. It seems to me like the proposed Bolkestein Directive was perceived as a "Pandora's Box" of service liberalization, a gateway to an invasion of desperate, cheap, Eastern workers that would disturb the "European Social Model". Unfortunately, one of the "evils" that came out of this "Pandora's Box" was the xenophobic rhetoric around the "Polish Plumber", a symbol of Eastern cheap labour.

Firstly, we will take a look at how services are provided cross-border in the European Union.

Secondly, I will link the findings of chapter one to the proposed Services Directive, in particular to the disputed "country of origin principle".

Thirdly, there will be some conclusions and recommendations.

For the completion of this project I have used governmental, legal, academic and non-academic sources. The research methodology is a qualitative one. I also used some quantitative data in order to underline the qualitative findings.

1. Free movement of services and the free movement of workers

The aim of the Commission's proposal for a Services Directive was to set a general legal framework that would reduce the present barriers to the cross-border provision of services within the European Union. The content of this Directive would have implications on the current national and European legal instruments that regulate the exercise of many service activities.
Its objective is to eliminate the current obstacles to (1) *freedom of establishment* for service providers and to the (2) *free movement of services*.
Regarding the latter scope of the Proposed Directive, the Commission introduced the "country of origin" principle[1]. According to this principle, a service provider would be subjected only to the law of the country in which he is established (the country of its origin) and not the host country (where he would be offering his services). Member States may not restrict services from a provider established in another Member State.
Given fact that trade in services is estimated to account for 70% of the European Union's GDP and jobs (Copenhagen Economics, 2005: 9), it is easy to understand why such a Proposal is a key element towards achieving some of the goals set for 2010 by the Lisbon Agenda (economic growth and an increase in the number jobs). However, the Directive, under the form under which it has been proposed (in particular with the country of origin principle), has triggered a lot of social resistance and a "fierce" European-wide debate.

A central element to the freedom to provide services is that, unlike the movement of goods in the internal market, it usually involves *people*, namely *employees* that "carry" the provision of a service and are employed by the service provider. Therefore, practically speaking, the free movement of services shares a lot of similarities with the free movement of workers.
In this respect, Article 50 of the EC Treaty states that: "...the person providing the service may ... temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by the State on its own nationals" (Foster, 2005: 13).
But the proposed Directive that I have mentioned above has as a subject for regulation the free movement of services, not workers. But let us take a look at the modalities that services can be provided across borders (CEPS, 2005):
1) an incorporated enterprise can send a *worker*
2) *a person* can set up shop in another country
3) *a person* can provide a cross-border service without taking establishment abroad
Thus services are provided by persons and this cannot be ignored when discussing the Service Directive. Furthermore, as I will try to show, this would make the restrictions set upon Romania and Bulgaria in their respective Accession Acts be less effective. Let us consider each particular case.

A) A company can send its workers in another Member State

The legal framework regarding the worker sent by an enterprise is currently regulated by the "Posting of Workers Directive".
The Directive defines a "posted worker" as a "worker who, for a limited period, carries out his work in the territory of a Member State, other than the State in

[1] Proposal for a Directive of the European Parliament and of the Council on services in the internal market COM/2004/0002 final - COD 2004/0001, Summary (4)

which he normally works."[1] Directive 96/71/EC says that the service provider that posts workers to another Member State, has to comply with the minimum rules established by the law of the State where the work is carried out[2], such as: maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, health, safety, hygiene at work and provisions on non-discrimination. The posted workers that this Directive protects are both, highly skilled and unskilled workers, irrespective on the length of time they are sent abroad[3].
Thus, the aim of the Posted Workers Directive is to balance the two issues that I have been discussing above, the provision of a service and the protection of the workers themselves, by offering them a minimum level of employment conditions. However, until 1996 when this Directive was adopted, this was not the case. Until then, the EU legislation used to make a clear distinction between the movement of services and the movement of workers. The Member States, recognized that in some very particular cases (like when a new machine was needed to be installed or a new branch needed a specialized manager), the person was indeed part of the service, thus, this very specialized key personnel could be sent abroad under the umbrella of the free movement of services (Houwerzijl, 2006: 180-181). However, the other workers from a Member State who would not be "key personnel" would be posted in another Member State under the free movement of workers principle. But, as I mentioned above, the Posted Workers Directive of 1996 places under the umbrella of service-provision all kinds of personnel, both low and highly skilled. So what happened that made this change possible?
The reason for this shift lays in the ECJ decision of 1990 in the *Rush Portuguesa* Case[4]. When this case was brought to the ECJ, Portugal was a new EU Member State and its nationals were subject to the same restrictions as faced today by the nationals of the Eastern Member States (no free movement of workers). Rush Portuguesa is a construction company from Portugal that was awarded a contract for the construction of a railway in France. For this purpose, Rush Portuguesa brought its own employees from Portugal. But the Portuguese people could not exercise their free movement of workers right, due to the transitional measures agreed upon in their Accession Act. Thus, they were considered third country nationals who required a visa and a work permit in order to work in the Old Member States. The French immigration office was the only authorised body to emit visas for third country nationals seeking to work in France. As I explained above, the free movement of services was permitted among the Old and the New States, and it was separated from the free movement of workers. The Immigration Office in France asked Rush Portuguesa to pay for the visas that should have been issued to its Portuguese workers. As Rush Portuguesa refused, the case was eventually brought in front of the Court in Versailles who asked the ECJ for a preliminary ruling.
Rush Portuguesa sustained that it had the freedom to provide services within the Community and invoked that "the provisions of Articles 59 and 60 of the EEC Treaty precluded the application of national legislation having the effect of prohibiting its staff from working in France."[5] The French Immigration Office sustained "that the freedom to provide services did not extend to all the employees of the provider of services, since such persons remained subject to the arrangements applicable to workers from non-member countries under the transitional provisions laid down in the Act of Accession as regards freedom of

[1] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Article 2
[2] Ibidem, Article 3
[3] Ibidem, Article 2
[4] Case C-113/89, Judgment of the Court of 27 March 1990, Rush Portuguesa Ldª v Office national d'immigration
[5] Ibidem, Paragraph 4

movement for workers."[1] The French Immigration office requested pecuniary damage to be paid by Rush Portuguesa, for the value of the work permits that should have been requested for the workers.
In its ruling, the ECJ said that the principle of the free movement of workers involved by France did not apply in that case as "such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State".[2] Thus, the Court ruled that "an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own labour force … for the duration of the works in question. In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese work-force."[3]
Hence, the Rush Portuguesa Case made it possible for an employer to post in another member State both key personnel and un-skilled workers. The Directive on the Posted Workers took the Rush Portuguesa decision further and identified three posting possibilities[4]:
(a) a contract between service provider and the party for whom the services are intended, with an employment relationship between the provider and the worker during the period of posting (subcontracting);
(b) post workers to an establishment owned by the provider in the territory of another Member State
(c) a placement agency can hire out a worker to a provider operating in the territory of a Member State, with an employment relationship between the work agency and the worker during the period of posting.

Thus, under the Posting of Workers Directive, the employment law of the host country applies to a set of terms and conditions for the workers who provide a service cross-border (are posted to another Member State).
However, if the workers are posted in the construction sector, the company that posts them abroad is also bound to the Collective Labour Agreements that are declared to be generally binding in the country of posting: "The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings …"[5]

Still, we have to take into consideration that there are cross-border situations where the Posting of Workers Directive does not apply (Sociaal Economische Raad, 2005: 17). In those circumstances, the choice of law that is to apply to a posted worker is defined by the Rome Convention[6]. Article 3 "Freedom of choice" states that "a contract shall be governed by the law chosen by the parties". Moreover, Article 6 (2a) says that a contract of employment shall be governed by "the law of the country in which the employee habitually carries out his work" or (2b) "if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated". The worker is protected by Article 6 (1) which says that "the choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him".

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[1] Ibidem
[2] Ibidem, Paragraph 15
[3] Ibidem, Paragraph 19
[4] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Article 1(3)
[5] Ibidem, Annex; the second indent of Art 3(1) reads: "by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex"
[6] 1980 Rome Convention on the law applicable to contractual obligations

B) A person can set up shop in another country
In this case, the "freedom of establishment" applies. The freedom of establishment is set out in Article 43 of the EC Treaty: "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited ... Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings" (Foster, 2005: 11). Furthermore, Article 49 of the EC Treaty regarding the freedom to provide cross-border services states that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended" (Ibidem, 13).
Thus, under the freedom of establishment, any self-employed individual can move anywhere in the Union in order to establish his or her business. According to the jurisprudence of the ECJ, the freedom of establishment means that a person who wishes to establish himself abroad has to fulfil the requirements of the law of host country. These have to be the same as established for the nationals of the host country[1].
The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others[2] case, says that "the concept of establishment within the meaning of Article 52 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period"[3].
The right of establishment is granted both to legal persons and to natural persons who are nationals of another Member State of the Community. "Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up."[4]
Furthermore, the authorization procedure for the establishment in another Member state "must be easy of access to interested parties, and should not, in particular, be dependent on the payment of excessive administration fees."[5]

C) A person can provide a cross-border service without taking establishment abroad
So far, the ECJ has taken the home state rules as applicable in some of its judgments in the context of cross-borders provision of services, under Article 49 of the EC Treaty[6].
In the case of *Alpine Investments BV v Minister van Financiën*, the ECJ ruled that "...Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established."[7]
In *Commission of the European Communities v French Republic,* the Court ruled out that "the freedom to provide services may be relied on not only by nationals of Member States established in a Member State other than that of the recipient of the services but also by an undertaking against the State in which it is

[1] Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Paragraph 33
[2] Case C-221/89 The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others.
[3] Ibidem, Paragraph 20
[4] Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Paragraph 23
[5] Case C-19/92 Dieter Kraus v Land Baden-Württemberg, Paragraph 39
[6] "… restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."
[7] Case C-384/93 Alpine Investments BV v Minister van Financiën, Paragraph 22

established where the services are provided to recipients established in another Member State".[1] Furthermore, in the judgment of same case, the Court made reference to other jurisprudence on the matter such as: "see judgment in Case C-18/93 Corsica Ferries Italia [1994] ECR I-0000, paragraph 30, and more generally whenever a provider of services offers services in a Member State other than the one in which he is established (see judgment in Case C-154/89 Commission v France [1991] ECR I-659, paragraphs 9 and 10, and the abovementioned Peralta judgment, at paragraph 41."[2]
Furthermore, the Community has also adopted some pieces of legislation that provide for some services to be provided according to the home State rules. Such instruments are: Council Directive 89/552/EEC concerning the pursuit of television broadcasting activities[3], Council Directive 77/780/EEC relating to the taking up and pursuit of the business of credit institutions[4], Council Directive 93/22/EEC on investment services in the securities field[5].
However, I would like to note the functionality that guides the above-mentioned instruments. It is easy to understand why such services as television broadcasting and banking services would be guided by the home-law principle.
Thus, the Proposed Services Directive would enforce the country of origin principle and go further than the above-mentioned sector-specific Directives. This principle would have provided for the service providers to be governed by their home rules which "fall within the coordinated field"[6] with some derogations set out in Article 17 of the Proposal.

2. Why Would the Country of Origin Principle Be a Problem?

The Netherlands Bureau for Economic Policy Analysis assessed the implications of the implementation of the Service Directive in the European Union. Their study showed that "GDP could be raised by 0.3 to 0.7 percent and consumption by 0.5 to 1.2 percent in the European Union as a whole" (de Bruijn, Kox, Lejour, 2006: 9). But they state that the "results could only be realized if the Services Directive is implemented including the country of origin principle" (Ibidem, 10). And, without the principle, the welfare effects of the induced trade growth would be lower: "GDP could rise by 0.2 to 0.4 percent and consumption by 0.3 to 0.7 per cent in the EU as a whole" (Ibidem).
The European Parliament amended in its first reading the Commission's Draft Proposal of the Services Directive. The original text has been rewritten in order to find a compromise and pacify all parties involved in the debate over the "country of origin" principle. In the end, this principle has been watered out of the text of the Directive and has been replaced by "freedom to provide services"[7].
With this change made, the Services Directive should not affect the above-mentioned European Labour Law. So, the relevant rules on working time, minimum wages, holidays, right to strike are those in force in the country where the service is being provided. Thus, service-providers have to deal separately

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[1] Case C-381/93 Commission of the European Communities v French Republic, Paragraph 14
[2] Ibidem
[3] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities
[4] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions
[5] Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field
[6] Proposal for a Directive of the European Parliament and of the Council on services in the internal market COM/2004/0002 final - COD 2004/0001, Chapter III, Article 16
[7] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 16

with each of the laws that are in force in each of the countries they wish to provide their services.
So what was all the excitement around the "country of origin" principle about? After all, Europe is entering the post-industrial era, and this "de-industrialization" is indeed painful to some of the European working force. The proposed Directive is said to be able to increase net employment with up to 600 000 jobs in the whole European Union (Copenhagen Economics, 2005: 8).
The Commission's Proposal for a Services Directive contained some derogations from the country of origin principle, among which are also the matters covered by the Posting of Workers Directive.[1] Thus, if a Romanian company posts its workers in the Netherlands for a definite period of time, even with the Services Directive in effect as proposed by the Commission, the Romanian workers would have to be paid the minimum wages established by the Dutch law.
However, excluding from the Proposal those aspects of the country of origin that are regulated by the Posting of Workers Directive is not sufficient enough for the proposed Services Directive to be neutral in respect to the European Employment Law (Sociaal Economische Raad, 2005: 17). As I said above, the Rome Convention is part of the European Employment Law; however, those aspects that are covered by it are not mentioned in the Proposal for a Services Directive. If a worker is posted to a Member State but he does not normally work in the country of origin of the service provider, then the above-mentioned Rome Convention would still allow for the rules of the host country to apply. But under the country of origin principle this would not happen as the law of the country of the service provider would be in effect.
Thus, the country of origin principle would cause tension on the EU labour market. On one hand, we would have those workers that are protected under the Posting of Services Directive, and on the other we would have a group that is not offered the same protection. This means that there would be two categories of workers: the ones that provide services under the posting of workers directive and another one, to whom the country of origin would apply. Thus, a Romanian hairdresser would offer her services the Netherlands, while not being bound by Dutch labor law and other local regulations, provided her stay is short enough. But if a Romanian migrant works as a hairdresser for a Dutch employer, she would be subject to the employment law of the Netherlands, thus to equal treatment with the Dutch nationals. Hence, the country of origin principle of the proposed Services Directive allows different principles to apply to workers doing the same work in the same place.
Moreover, the principle which guides the Commission's Proposal for the free movement of services might be in conflict with the principles of the free movement of workers. Workers that move freely within the EU are not to be discriminated according to their nationality. But if we take as a guiding principle the country of origin, this might result in indirect discrimination based on nationality of the employees.

Another thing that we have to asses when discussing the country of origin principle is the market flexibility in Western Europe. Indeed, if faced with an inflow of "hairdressers" from the East, there would be a class of workers in the Old Member States who would be harmed by the cheaper Eastern competition and could not relocate to other labour activities. Perhaps this can be an explanation to why the Bolkestein Directive triggered such a big debate in French politics (all the way to the "no" in the referendum for the EU Constitution): in France there is a higher level of labour market regulation. On the other hand, the relatively deregulated countries such as the UK supported the directive in its initial form.

[1] as mentioned in Article 17 (5) of the Proposal for a Services Directive

At the time when this Directive was proposed by the Commission (in 2004), the first Eastern Enlargement was about to take place. Thus, the discussion regarding the Directive turned into a heated debate over the possibility of "social dumping". The country of origin principle was seen as an encouragement for companies to establish themselves in Member States with lower tax rates, environmental requirements protection of workers, leading thus to a "race to the bottom" in quality standards.

Another form of "social dumping" which is particularly important for our case occurs when labour enters a country under the form of a factor of production. This takes place when migrant workers establish themselves in the EU15 as "self-employed" or "entrepreneurs". So, the debate over the Commission's "country of origin" proposal existed due to the emergence of a large number of people who define themselves as "self-employed" when in fact they are "fake self-employed". Indeed, self-employed persons from the New member States facing temporary restrictions to the movement of employees would not be banned. It is agreed so in their respective Accession Treaties[1].

So, persons who have a incentive to work in a Member State of the EU 15 succeed to evade the national definitions of "worker" and "employee" and establish themselves as self-employed, pursuing under this umbrella various working activities.

We know that in a highly competitive world, the battle for market domination takes place at the production level, where companies strive to achieve the lower costs possible. There is an increased externalization of company functions, by outsourcing those activities that can be achieved more cost-effective with resources from outside the company. Furthermore, the social benefits that come with the traditional employer-employee relationship increase the wage costs for the employers. Thus, employers have strong incentives to conclude contracts with a big number of so-called self-employed persons from the New Member States who would accept to work for lower fees than the nationals of the host country. As regards social benefits, these persons have to take care of themselves in case of sickness, unemployment or retirement. In a number of industries, such as construction, horeca, transportation, this "unconventional" form of employment is more and more practiced: in 2005, self-employment accounted for 16% of total employment in EU 25 across the non-financial business economy (Eurostat, 2006).

We also have to take into consideration the fact that persons from the New Member States that whish to incorporate themselves as self-employed in EU 15, have to go through a costly and complicated procedure (the Proposal for a Services Directive aimed also at the authorisation simplification in order to eliminate the obstacles to the freedom of establishment). This is why only persons with an incentive that is strong enough go through all the trouble in establishing themselves abroad. In this case again, the Services Directive intervenes through its "freedom of establishment" principle, according to which the process for incorporation will be made easier and faster.

But, under the country of origin principle, self-employed persons established in the New Member States would be able to compete for work across EU 15.

With this being the case, should the country of origin principle apply, the Old Member States fear that it would lead to an afflux of fake self-employed persons, who would indeed succeed to circumvent the transitional restrictions set in the face of the free movement of workers from the New to the Old Member States. This would be indeed possible because there is no official definition in the national legislations to what actually self-employment is, only some official guidance (European Commission, 2006c: 11 and Sociaal Economische Raad, 2005: 131-132). In many job areas, a person can be both employed and self-employed, as construction workers, freelancers, electricians, plumbers etc.

[1] See for instance Romania's Accession Treaty, in particular the "List referred to in Article 20 of the Protocol: transitional measures, Romania" in OJ L 157 pg. 138

The threat that is perceived to come from the CEE States with poor social dialogue, inferior working conditions as low wages is very much embedded in the ECJ – pending dispute between the Latvian construction company *Laval un Partneri with the Swedish trade union Byggnads*[1]. This case goes to the heart of the above-mentioned debate over the Services Directive and the preservation of the "European Social Model". The dispute between the two parties rose form the conditions offered to Latvian construction workers on a construction site in Sweden. The Latvian company won in 2004 the bid to refurbish a school in the city of Vaxholm, Sweden (ETUC, 2005:1). The company brought its own labour force from Latvia, paying them Sek 80 per hour (accommodation, transportation, three meals a day included). Swedish workers would receive Sek 130–145 per hour under the construction industry collective agreement (Woolfson & Sommers, 2006: 54). In the contract concluded with the city of Vaxholm, Laval agreed to enter into a collective agreement with the Swedish Trade Union Byggnads (ETUC, 2005: 2). Byggnads argued that Laval should pay its workers the collectively bargained fee for Swedish workers and thus the terms of the Swedish national agreement should apply[2]. Laval argued that the minimum wage was not imposed across Sweden while their workers were not members of that particular trade union (EU Observer, 2007). The Union members began a blockade of the Laval job site in Vaxholm, forcing Laval to leave. This led to its bankruptcy. In the case pending upon the Court in Luxembourg, Laval is accusing Byggnads to have caused its bankruptcy.

This case took a Latvian-Swedish political dimension. The Commission's Proposal for the Services Directive had its role in "fuelling" the tensions between the Latvian and the Swedish parties involved in the dispute. The Latvian authorities were invoking in their defence that the Swedish Trade Union was ignoring the EU rules on the free movement of services and placed barriers to free competition and the free provision of services in the EU internal market (Woolfson & Sommers, 2006: 56).

If we take again into consideration the Court judgement of the Rush Portuguesa case, we see that the ECJ stated in Paragraph 18 that "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory". As we have seen above, this principle has been further developed in the Posting of Workers Directive. However, the country of origin principle would challenge the possibility for the Swedish national labour standards to be implemented and defended. As a result, Woolfson & Sommers (2006: 62, quoting the publication EU Observer) say that the Swedish government threatened to withdraw its previous political support for the draft Services Directive.

The Laval dispute is also entangled with the temporary provisions set for the workers from a New Member State. Even if posted workers are not considered to exercise the "free movement" freedom, "job-taking" is still perceived by the host country: some of the protesters in Vaxholm literally shouted "Latvians go home!" (EU Observer, 2007).

This case reflects the thin line between the provision of a service and the (hidden) movement of labour. Could it also be that Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet is also a practical example of a "race to the bottom?" The decision of the ECJ is due by the end of this year (EU Observer, 2007).

[1] Case C-341/05 Reference for a preliminary ruling from the Arbetsdomstolen by order of that court of 15 September 2005 in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet

[2] In the transposition into Swedish law of the Posting of Workers Directive no rules were set concerning the minimum wages. Swedish trade unions seek to guarantee minimum wages exclusively through collective bargaining. If necessary, such collective agreements are defended through industrial action in order to prevent social dumping (Woolfson & Sommers, 2006: 58)

3. Conclusions and Recommendations

I am wondering whether it is possible for the European Community, the way we have it today with its 27 members, to develop a framework that would regulate the cross-border provision of services in such a way that it would totally liberalise the service sector, without leading to social and political altercations (such as the case of the Laval dispute). As we have seen above, the absolute liberalisation of services would have "spill-over" effects in the free movement of workers domain. So this leads me to say that as long as we have the economic and social differences that exist today between the east and the west, a total integration of services would be hampered.

Regarding the effectiveness of the transitional agreements, I must say that I consider them to be incomplete.

The maximum of seven years transition targets only workers who want to be employed by a company in the EU 15. All the other groups gained the right to reside in the Old Member States immediately upon accessing to the EU. This would be those posted abroad by Romanian or Bulgarian national companies, self-employed wishing to establish themselves there or self-employed persons in Romania or Bulgaria posting themselves throughout the EU.

Self-employment represents *de jure* service-provision. But as we have seen above, self-employment form the new Member-States represents *de facto* movement of labour. This is possible, as I have showed above, due to gaps in legislation, and this makes those who pursue this path, *immigrants form within the European Union*. Or, as Hungarian ex-Prime Minister Viktor Orban said, if millions of people who live within the EU were denied free movement across the continent, the EU would end with two populations, one of first-class and one of second-class citizens (Jileva, 2002: 695).

But let us also take a look at the reverse of the coin. "Textil Fliegel" is a laundry company in Gryfino, North-Western Poland. Every day, the company receives sacks of dirty laundry from horeca establishments in Berlin. Within 24 hours, the immaculate laundry is back in the rooms of Berlin's top hotels.

The drive of this business is the dozens of Polish women, "patiently folding towels and bathrobes and checking each piece of linen for the slightest imperfection" (BBC, 2006). The point I am trying to make with this example is that if workers form the East do not have the possibility to exercise the free movement of workers right, companies in Western Europe will relocate in the East, where the cheap labour is. The practice is referred to by analysts as "social dumping", but I do not agree entirely. I call it "jobs that people in Western Europe do not really stay in line for". Mr. Pat Cox said that "if we were to send all the immigrants home, the Irish service sector and construction industry would collapse" (Euractiv, 2007). Thus, if the cheap manpower does not come to the West to fill in for the labour shortage in certain domains, those companies would be forced to relocate in the East. After all, it is not just Romania and Bulgaria that have joined the EU; it is also the EU expanding eastwards. It is a two way street.

What does all of the above mean for Croatia, Turkey, Macedonia, hence for subsequent EU enlargements? We have seen how loopholes can be and are used by those who want to circumvent the transitional arrangements and work in the Old Member States. Transitional arrangements neither reduce the migration potential from the East to the West, nor do they lessen the migration pressure that still exists between the two regions. As long as there will be a certain income gap between the Old and the New Member States, there will be an East-West immigration flow.

An answer could be the option that the UK and Ireland took after the first eastern enlargement, thus opening markets but not welfare benefits. But wouldn't that create two categories of employees in those Member States that choose this option? Furthermore, restricting welfare benefits would not discourage those who

want to work in the Old Member States (as we have seen from the high number of eastern workers that moved to the UK after the first enlargement and the fact that the UK and Ireland decided to close their markets for workers from the second eastern enlargement).

What if the EU 15 would open their labour markets *immediately, but gradually*? Quotas could be established by each member state depending on their market needs. The working permits should be reduced to simple formalities insofar as to keep track of the quota-usage.

Why do I think that it is desirable for the restrictions to be replaced by an immediate and gradual opening of the labour markets?

Labour market quotas would help monitor the actual number of foreign workers pursuing labour activities in the EU 15. They can be expanded or restricted on a yearly basis. This system would reduce the immigration pressure form the new accessing countries and would help project potential future immigration flows. Nonetheless, this system would make the people from the new Member States feel directly the benefits and freedoms of enlargement. They would be able to exercise their "free movement" right and their incentive to look for "loopholes" would decrease.

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