

**VI European
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Mobility
Congress**

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Ladies and Gentlemen,

Welcome to Kraków! Welcome to the 6th European Labour Mobility Congress! I am very pleased that you are here with us today!

Many years ago, a dream appeared in our heads. These were the times when Central and Eastern European exporters of services resembled a bit a herd of antelopes attacked by lions. They were running ahead, and when they saw a lion, they turned back and started to run in the opposite direction. They did not think about the reasons why they had been attacked or how to defend themselves. They were just trying to survive by running the fastest they could, hoping that the lion would get someone else.

That is why we decided to organise an event that would gather in one place the representatives of all groups interested in the issues of work mobility. And I must say that it was not an easy task, as the politics keeps creating divisions between us.

This is the reason why the European Labour Mobility Congress is an important event, because it unites. It unites the representatives of employees and employers. It unites entrepreneurs and academics. It unites representatives from more and less affluent Member States.

We, gathered here today, Ladies and Gentlemen, are not interested in politics. What we are interested in is solving everyday problems. The problems of both workers employed in companies and the ones who run these companies. But also of politicians creating legal regulations and officials whose task is to enforce these regulations on daily basis.

I am really proud to say that it is thanks to you that the Congress is one of the most important expert debates in Europe concerning work mobility, and in particular the posting of workers.

And this is the subject very important to Poland, because Poland is the largest exporter of services in Europe, and export is a source of prosperity. **We can say that services are Polish speciality on the Single Market. And a Member State that has no competitive advantages or cannot defend these it actually has, is doomed to being an underdeveloped economic colony.** Unfortunately, when it comes to goods and capital, European market is truly common, but in terms of services, we can say that it is not really the case. Because, if a company from one Member State wants to deliver services in another Member State, it will meet numerous obstacles.

The activity of the Labour Mobility Initiative is aimed at making the political dispute over the posting of workers between western and eastern Europeans, liberals and socialists, employers and employees, centre and peripheries of the Single Market, not being just slogans, stereotypes and emotions. We are trying not to forget in the heat of the political disputes about what is the most important... That is why we are trying to understand those who want to tighten up current regulations on posting of workers, arguing that they fail to solve problems and create unfairness. For example, French, Belgian or Austrian politicians consider it deeply unfair that the companies from the EU-15 countries can easily open subsidiaries in Central and Eastern European Member States, and then subcontract to them the provision of services they previously performed themselves. For example, in France, before the Court of Cassation, recently there was a case in which French social security institution tried to invalidate the PD A1 forms issued by the Slovak institution to Slovak drivers, posted by a Slovak company together with its vehicles to a French company, which, as it turned out later, was the owner of the Slovak company. There was a situation in which in the Slovak subsidiary there were employed 50 people and in the French parent company - only 3 people.

Okay, this may be frustrating. Maybe it is worth doing something about it? Especially that this type **subsidiaries, serving only as posting platforms, usually have a high propensity to risk, and therefore, sooner or later, they start to violate the law.** And when they are caught doing it, the accusation appears that “Polish companies play unfair”, and “Polish Social Insurance Institution (ZUS) issues A1 to everyone who asks”. The truth is that, these are not Polish companies, and ZUS does not have legal tools not to issue A1 forms to these companies. Moreover, standard A1 form was designed in such unfortunate manner that on the first and second page, there is all data, and on the third page - only the signature of the institution certifying it. This allows criminals to easily falsify them by replacing the last page, and thus making the employees, who received such form, erroneously believe that they were posted legally and their social security contributions are paid.

And so, if letterbox companies are a problem provoking common sense of unfairness, we were expecting that in the new draft regulations on coordination of social security systems, there would appear some new tools allowing it to be prevented. You can imagine how surprised we were when it turned out that there is no such a thing in the draft! Instead, it included the propositions: reducing the maximum posting period for workers and amendment to the Art. 13, the one that allows people working in several member states to remain in the social security system of the state they live in. According to the new wording of the Art. 13 proposed by the European Parliament’s rapporteur, for example: a Polish driver travelling from Poland to Spain will have to be insured in Germany or France, depending on in which country... there will be bigger traffic jams on the highways. Moreover, the applicable legislation can only be established *post factum*, counting working hours in every state, in individual weeks. The following question should be asked: Will this solve any problem? Any... for employees, employers, officials? Will such regulation restore the sense of fairness?

In our Initiative, we even prepared a solution to the problem of letterbox companies. Namely, **we proposed additional criterion, in accordance with which, letterbox**

companies are considered companies the activity of which is solely or predominantly based on the posting of workers to the companies with which they are connected by capital or people. It seems to me that such criterion would be easy to apply in practice and would solve many problems. Unfortunately, to our surprise, it did not arouse any interest of any of the parties to the dispute. And it is a shame... because we could see how deep and emotional is the aversion of politicians from some Member States towards the posted workers and their employers, for example, thanks to the case judged by the Court of Justice of the European Union. It was made by the small Slovene company Čepelnik, which undertook to renovate a private house in Austria for around 12,000 EUR. The company was attacked by the Austrian financial police, who accused it of: lack of translation of the payroll to German language and submission of two declarations after the deadline. It was punished for this. The penalty amounted to 7,000 EUR. And when it refused to pay, the police ordered the client of the company to withhold payments for it and to transfer the money to cover the unpaid penalty. Austria defended itself before the Court arguing that the financial police acted in defence of the public interest, and the repressive control was motivated by the suspicion of committing an offence based on the fact that the company... was from Slovenia. This case shows that member states, in the name of fighting against what they feel to be unfair, are ready to violate the UE law by themselves - in order to "restore fairness". So, it is worth asking a question: are they successful in it?

In order to answer it, I will mention the case of the transnational criminal network we started to investigate last year. The network was recruiting employees in Poland. Formally for the accounting office in Great Britain that registered them there as entrepreneurs. Then, another entity - formally acting as a client - contracted these people work in France and Belgium. Employees (in fact, already entrepreneurs) were receiving false A1 forms and were informed that they are workers posted from Poland. The scale of the entire operation was thousands of people working on construction sites and in agriculture. Last year, we were informed that Polish inspection finally "got them". Which was not easy, as formally they were only

recruiting in Poland, which is not forbidden by law. A couple of days ago we found out that this network resumed its activity under a different name. It is worth emphasising that *modus operandi* of the activity of the network is based on the scam method invented several years ago by the Irish company Atlanco Rimec. The Atlanco Rimec case shocked French public opinion and led the country to a great war against the posting of workers, where the first bloody battle was the Enforcement Directive 2014/67/EU.

Meanwhile, today, **under the nose of the French labour inspectorate, known for its repressive controls and tendency to violate the EU law in the name of fighting against social dumping and armed with the ability to penalize up to half a million Euro, there are operating, with impunity and on a large scale, businesses using the same, known for over a decade, method of fraud.** What is important, the term of the posting of workers is used here only as a camouflage masking the illegal activity, the purpose of which is to "remove" an employee from the scope of the labour law and not to pay social security contributions and tax.

The French war against the posting of workers led to the situation, in which today it is less risky to send workers to work illegally, than to post them there legally and for example: be late with submitting declaration to the local labour inspectorate. The declaration that - when we thoroughly think about it - constitutes a completely disproportionate administrative burden causing the labour inspectors to, in many cases, sit behind their desks and wait for the submission of new declarations, in order to impose then a fine for any mistake, typo, or even worse, exceeding the deadline for submission, instead of actively searching for the cases of violating the rights of cross-border workers. And these fines are of course, of the maximum amount, because social dumping cannot be tolerated.

I hope I convinced you that the EU law currently lacks the provisions that would allow for effective detection of abuses against the rights of cross-border workers. But there are also cases in which it is not the lack of regulations but existing regulations that are the source of problems and sense of unfairness.

The flagship example is the provision commonly known as the “non-replacement condition” - the provision was designed in such a way that it punishes posted workers by removing them from the social security system of the state they live in for the fact that their employer (and according to some people, any employer) posted other person to the same place earlier.

Other example is the regulation imposing the obligation “for the worker to be subject to the legislation of a Member State for at least a month before posting”. For many years, this regulation was understood completely incorrectly as an obligation to cover a worker with social security during at least a month before posting. In practice, this meant that if someone had been a student or unemployed person, unfortunately they could not be posted just after being employed. No one ever wondered what was the purpose of this provision. Which problem would it solve? No one did it, because of the common belief that numerous EU regulations exist only to simply... make it more difficult for employers to post workers. **This is obviously deeply unfair, if the purpose of the regulations is not to solve problems, but to create them in order to discourage companies from making use of the economic freedoms guaranteed to them.**

Our struggle against the absurd interpretation of this provision was difficult, since ZUS was citing the judgements of the Polish Supreme Court and the opinion of the Ministry, and the Ministry - the opinion of the European Commission. When we found out that before the CJEU is pending a case concerning this subject, we immediately contacted the lawyers of the complaining party - Bulgarian company, to which the Bulgarian competent institution had refused the issuance of the A1 form for the worker living in Bulgaria, but who immediately prior to posting had not been subject to social security. We transferred them our arguments and the case was successfully won, and the sense of fairness restored. Maybe we do not know whether it happened thanks to our arguments, but this does not change the fact that this was one of the nicest moments in our work. Because, one day we were legal charlatans, and on the next day it turned out that we were even right.

But, referring to the anticipation of the judgements of the CJEU. You have certainly heard that Poland appealed against the revised Directive on Posting of Workers. In the Initiative, **we are convinced that maybe not the entire directive, but surely one of its provisions, evidently violates the Treaty. What I have in mind is the “limitation of the cumulative time of posting to 12 months with the possibility of extension to 18 months”**. Why? Because the only permitted by the Treaty purpose for which the free movement of services can be limited, is the protection of workers justified by the public interest. At the same time, such limitation cannot have economic purpose. Meanwhile, the Directive introduces the principle saying that that even a worker posted for couple of days can be covered by the provisions of the host state, which is contrary to their interests, so it does not protect them. But it has economic purpose - it is aimed at discouraging the employer from continuing to provide services. What is interesting, is the fact that the violation of the Treaty would not be so obvious, if during the legislative work the fuse proposed by the Commission had not been removed; and this fuse was removed as a result of the actions of politicians who wanted to obstruct legal posting of workers as much as possible. And they exaggerated a little bit.

So the question is as follows: **how to solve problems effectively and how to restore the sense of fairness? Well, first of all it is necessary to have knowledge. Because when you have power, and you do not have knowledge, it is really easy to hurt someone.** Or even to hurt yourself. This was the case of Hungary, or, lately, Romania, where the laws were passed that unintentionally made it very difficult for local employers and their employees to make use of the benefits of Single Market. Well, the punch came not from where everyone was expecting it. Fortunately, Polish regulations in this regard are better, although, for example, in the case of posting of workers to some states catches Polish employee in the trap consisting in the fact that: either they violate Polish regulations, or the regulations of the state to which the worker is posted. Ladies and Gentlemen, the knowledge really is the most important. Because, if we know that **the number of A1 forms issued by the competent institutions of the old EU-15 is almost the same as the**

number of A1 forms issued by the competent institutions of the new EU-13, we will stop believing that posting is used to send cheap labour force from East to West. If we know that even **7% of A1 forms from Art. 12 is issued to self-employed people**, we will not be surprised that some posted people ignore labour law with impunity and we will not, in order to solve this problem, seek to tighten up the provisions of the directive on posting of workers, which is not applicable to self-employed people. After all, we will not live in the belief that mainly employment agencies post workers, if we know that, for example, in Poland only **1.3% of A1 forms are issued for the employment agencies**. We have this and many other valuable data thanks to the reports of professor Jozef Pacolet and Frederic De Wispelaere from the HIVA institute - last year winners of our Labor Mobilis honorary award.

Politics based on slogans, misperceptions and emotions has one more disadvantage that I would like to mention. When we met once one of social democratic MEPs from Scandinavia, her assistant welcomed us with the words "during her studies, she lived next to Polish construction workers, so she supports the tightening up of the regulations on posting of workers". This kind of **stereotypes from distant past cause that in the disputes concerning the wording of the new directive or regulation, the politicians forget that also artists, engineers, nurses, elderly carers and scientists are posted**. During today's Frederic De Wispelaere panel we will find out whether the employers and employees in these forgotten sectors are convinced that regulations governing the posting of workers give them the sense of fairness and solve their problems.

Knowledge is also an effective weapon with which should be equipped the employers who often experience the protectionist reactions of the control institutions of some host Member States. This year we organised especially for them the Expert Village, and on the second day, we invited the best lawyers to conduct practical workshops.

Ladies and Gentlemen, times are changing. We will encounter a lot of new. And everyone is afraid of the new. Only politicians who passed new regulations can breath a sigh of relief. But do cross-border workers, employers and officials as well? I think that they are taking a deep breath to survive the wave of changes and not to be drowned in it.

Will it be better? Will it be simpler? Will it be fairer? Will cross-border workers know where are they going and on what conditions exactly? Will the ZUS officials be able to determine the applicable legislation, in accordance with clear rules that will be fair and will serve a purpose? Will decent employers, benefiting from the freedom to provide services guaranteed by the Treaty, be able to stop feeling like frauds using loopholes in the EU regulations? Will the new law start eventually to make life difficult not for them, but for those who violate the rights of workers? These are questions that we will be trying to look for answers today.

Finally, I hope that I convinced at least some of you, **that the problems related to work mobility cannot be solved and a sense of fairness cannot be restored based on misperceptions and emotions, because this type of actions give the opposite effects, since they consist only in systematic tightening up of the regulations** the problem with which is not that they are not strict enough, but that no one understands them and that is why they are easy to circumvent. And this provokes further escalation of tensions and the sense of unfairness, which is manifested, *inter alia*, in repressive labour inspections, the victims of which are not criminals, but usually honest employers and their employees. And this makes this vicious circle spin and distances us from the goal everyone expects.

Of course, protecting the freedom to provide services is in the best interest of Poland. But in order to this protection to be effective, it should be smart and far-sighted. And not just to be limited to be opposed against new directives and regulations, but it should consist in disseminating facts about the posting of workers and building a true positive perception of Polish services in Europe. Because regardless of how

much we will disagree with it, misperceptions and emotions will always have an impact on decisions taken by the EU politicians.

Dear friends, I consider the 6th European Labour Mobility Congress open. I wish you interesting discussions. Constructive meetings in the Expert Village. Having fun at the banquet in the evening. And during tomorrow workshops - only specific and valuable knowledge. Thank you very much.

Stefan Schwarz

President of the Labour Mobility Initiative