The Free Movement of Workers between Eastern and Western Europe

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Oh, East is East and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment Seat;
But there is neither East nor West, Border, nor Breed, nor Birth,
When two strong men stand face to face, though they come from the ends of the earth!

Rudyard Kipling, The Ballad of East and West (1889)

1. Introduction

The economy of the European Union is based on the ideal of a free market which is corrected for social reasons. In this sense it consists of welfare states that protect their citizens to a relatively high level against the social risks that the free market provides.

The pillars of the economic integration in the European Union are the four so called basic freedoms: the free movement of goods, persons, services and capital, anchored in the Treaty on the Functioning of the European Union.[1] Though principally aiming at establishing a single economic market, the free movement of persons and services are closely connected to labour law. An important goal of labour law across Europe is the protection of workers against the excesses of the functioning of the free market. But: the free market is organised at European level, while the labour law in the European Union is mainly organised on the national level.[2] There is no comprehensive system of European Labour/Employment Law. The existing European Labour Law is restricted to the measures that are considered necessary to solve problems of cross-border work and to prevent that the European economic integration would lead to so-called 'social dumping', that is

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[1] C. Barnard (2012), *The Substantive Law of the EU. The Four Freedoms*, Oxford: OUP (3rd edition).

[2] See about this and tensions between EU level internal market policies and national level labour regulation: T. Hervey (2000), 'Social Solidarity: A Buttress Against Internal Market Law?', in J. Shaw (ed.), *Social Law and Policy in an evolving European Union*. Oxford: Hart Publishing, 31-47.

the levelling down of labour standards as a result of internationalisation of the economy.[3] This has led to a fragmented system of European Labour Law that is complementary to the national systems.[4] In spite of the growing corpus of European legislation and case-law in the social field, national social partners as well as governments often resist to social measures at European level, because they fear interference with their national labour relations with their own characteristics, based on national social history and culturally determined traditions.

Altogether, this constitutes the so-called 'European social model': a system that strongly differs from the social models of countries on other continents.[5] It provides for a generally highly protective system for workers, but also for a complicated system of checks and balances between the governments and the social partners within the Member States as well as in relationship with the other Member States and the European Union.

Since a group of Central and Eastern European countries entered the European Union in 2004 and 2007, the free movement of workers as one of the basic pillars of European integration has given rise to frictions between the governments of Western European Member States and those of the newly acceded Member States.[6]

In this contribution, dedicated to prof. Prugberger, a steady and true friend of me who has dedicated so much of his never ceasing energy to promote the scientific contacts between Eastern and Western Europeans, I will reflect on this sad development. For this purpose, I will firstly discuss the reasons why the free movement of workers has led to frictions (Section 2). After discussing the national solutions to tackle this problem, especially in the Netherlands (3), the focus will turn to the European solutions found so far (4) and those discussed for the future (5).

2. The problems with the free movement of workers

After the collapse of Communist Rule in Central and Eastern Europe in 1989, the countries of this part of Europe transformed themselves into democratic states with market oriented economies. The transition went very fast and the countries aimed to enter as soon as possible the institutions that symbolise the integration in the 'Western block': the Council of Europe that supports human rights and

[3] See elaborately about social dumping: D. Vaughan-Whitehead (2003), *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model.* New York: Edward Elgar.

[4] *Cf.* C. Barnard (2012), *EU Employment Law*, Oxford: OUP (3rd edition).

[5] *E.g.* P. Copeland and B.P. ter Haar (2010), 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy', *European Law Journal* 16(3), 273 - 291.

[6] *E.g.* J. Kvist (2004), 'Does EU Enlargement Start a Race to the Bottom? Strategic Interaction among EU Member States in Social Policy', *Journal of European Social Policy* 14:3, 301-318; and J. Donaghey and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal* 37:6, 652-666.

democracy, the European Union that settles strong economic ties and the North Atlantic Treaty Organisation that organises military solidarity. An important step was the accession of ten new members to the European Union in 2004, followed by two others in 2007.

The extension of the European Union from 15 to 27 Members in a relatively short period implied an important change in the size and the functioning of the organisation. Previous extensions had a more modest scale: small groups of countries entered the Union after a long period of preparation. And even more important: the level of economic development was usually less different. The European Union has taken some years to integrate relatively poorer countries like Spain, Portugal and Greece, taking time to give them economic support to promote their integration. Other new member states, the United Kingdom, Denmark and Sweden, had been much richer once they became member. However, political reasons made the speedy entrance urgent: the freedom that the Central and Eastern European countries had reached should be consolidated and Western Europe wanted to welcome them in 'the European family' as soon as possible after so many years of frustrating isolation and division of the continent. The economic differences were enormous: an average hour of work costs an employer €40 in Denmark and €39 in Belgium, but only €3.80 in Bulgaria, €4.60 in Romania and €8.40 in Poland, according to Eurostat data for 2014.

The optimism that the European Union would be able to absorb the large number of new Member States with a backlog in economic development in relatively short time, was fed by the prosperous economic situation in the first years of the new century. The sky seemed the limit in those years of large economic growth. Nevertheless, most countries judged it necessary to use the negotiated transition period of five years during which they could uphold the introduction of the free movement of persons with the new Member States, in order to accommodate the transition. But in the optimistic atmosphere of those days, some countries, like the United Kingdom, eager to embrace the new Members States as soon as possible, abstained from this possibility.

However, in 2008 the European Union became part of a worldwide economic crisis. Besides this, the European monetary Union, another optimistic project that was moved ahead in 2001 with the introduction of the Euro as common currency in a dozen of Member States, came in a crisis because of the failure of some countries to pay their debts and to comply with the requirements for participation in the monetary union.

The two developments met each other in a bad tide: while many workers from Central and Eastern European countries went to Western European countries in order to make use of the newly acquired right to free movement, aiming to find work and advance their incomes, the Western European countries underwent an economic downfall that caused an increased unemployment. Many citizens in the Western countries, sometimes encouraged by politicians, tied the loose of control on immigration within the European Union narrowly to the rise of unemployment in their country.

In August 2013, the Dutch Employment Minister Asscher published an article with David Goodhart in British and Dutch newspapers on what they saw as some of the negative consequences of the free movement of workers within the European Union.[7] The article uses weighty words like 'Code Orange', which is a term in use in the Netherlands for high alert in case of flood danger. In this article, they mention the right to live and work in other European Union countries as one of the founding ideas in the 1957 Treaty of Rome, one that was rarely taken advantage of until the mid-2000s: in 2000 only about 0.1 per cent of European Union citizens moved to another European Union country. They observe that this situation changed after 2004, when new Member States in Central and Eastern Europe joined the European Union. The effect, especially in the United Kingdom (that along with Ireland and Sweden, immediately allowed their citizens access to employment) was rather dramatic with about 1.5 million people arriving in the United Kingdom from those countries in the following six years. Since 2011, all the other Member States of the European Union have opened up too, with further significant flows from Central and Eastern Europe, into countries including Germany and the Netherlands.

In retrospect, Asscher and Goodhart argue that not enough thought was given to the scale of the flows. Up until the mid-2000s, very few people took advantage of free movement because the economic levels of different European Union countries were similar. Yet with the accession of the Central and Eastern European countries in the mid-2000s, a bloc of countries joined the European Union (with a combined population of around 80 million) with a per capita income of only around a quarter of the richer Member States of the European Union. This has created a big incentive to move, at least temporarily, especially for those in lower-skilled jobs.

Further along in their article, the authors claim that this development had a disruptive effect on some of the poorer and less well-educated citizens in the richer European Union countries like the United Kingdom and the Netherlands. They are competing against people with much lower wage expectations. They mention that, in the United Kingdom, about 20 per cent of all low-skilled workers are born outside the country and certain low-wage sectors, such as hospitality and food manufacturing, are heavily dominated by people from poorer European Union countries. In the Netherlands, workers from Central and Eastern Europe make up 12 per cent of all employees in agriculture and horticulture. Then they come to their proposals: 'We need a new settlement which is fair both to the people of the sending countries and the receiving ones. And we need to stamp out abuse. Workers from poorer European Union countries are sometimes taken advantage of by unscrupulous employers who win a competitive advantage over those who play

[7] L. Asscher & D. Goodhart, 'So Much Migration Puts Europe's Dykes in Danger of Bursting', *Independent,* 18 August 2013, available at: <www.independent.co.uk/voices/comment/so-much-migration-puts-europes-dykes-in-danger-of-bursting-8772630.html> (last accessed on 19 February 2017); L. Asscher & D. Goodhart, 'Code Oranje voor vrij werkverkeer binnen EU', *De Volkskrant,* 17 August 2013.

by the rules. Too often workers receive low wages, work long hours and sometimes pay high rents for terrible accommodation.'

When we analyse this opinion, we can distinguish several aspects of the problem. In the first place, the principle of free movement of workers can lead to a displacement of local workers. This is as such inherent to the principle of a free labour market. If someone can earn more in another European Union Member State, he or she is free to travel to that country and to accept the job. It is primarily the success of the European Union that this has become possible. The cause of the problem that is signalled is basically that countries that are far less developed economically, a result of years of bad (communist) governance, are accepted as new Member States of the European Union. This part of the problem can only be redressed in two ways. One way is to only accept new Member States that have reached the average level of the economy of the existing Member States. The other solution is a restriction of the free movement of workers. In the past, the solution has been that the free movement of workers was postponed during a transitional period. Maybe, this transitional period should in this case (with the knowledge of today) have been made longer, not have been fixed in advance, or made dependent of the first solution: as soon as a consistently comparable economic level is reached, borders open up. It is explainable, that that would have been discouraging for the new Member States, but maybe this could have been explained and probably they should have felt being forced to accept it.

A second point is the fact that people make use of the free movement 'who have lower wage expectations'. Basically, it is not clear what the authors mean by this suggestion. Maybe the idea is that for those workers the frame of reference is home, not the local situation of the receiving country. But it is not clear if they still would accept lower wages if they were aware of the standards in the countries where they move to or are being posted.[8] Both the United Kingdom and the Netherlands have collective agreements as well as statutory minimum wages. If the goal is to prevent unfair competition between national citizens and employees attracted from new Member States , it seems to be up to the local government and social partners to take care of enforcement of these instruments. However, one could argue that an influx of a large group of employees that is willing to accept lower wages could influence the bargaining position of unions, but that is an element of the free market. You cannot have your cake and eat it.

The third element in the discussion that has to be distinguished is the abuse of the weak economic position of foreign workers with low skills. Employers who do not live by the law can attract foreign workers to do the work under unlawful conditions. This is most of all a matter of enforcement or adaption of national legislation. Abuse of labour legislation can take many forms. If a local employer does not follow the national legislation, it is primarily up to the national government to take steps to redress this. The same goes for the social partners in relation to collective agreements. This is basically not a problem on the European level. In the Netherlands, for instance, the Labour Inspectorate budget may be too

[8] Transparancy of these standards is also an important prerequisite for effective application of the Posted Workers directive.

low to intensively monitor the vulnerable sectors. However, in the light of this development, it would be wise to intensify the activities of this inspectorate in order to monitor the obedience of legislation in the field of health and safety, working hours and payment of minimum wage.

3. National Solutions

As noted above, part of the solution for the negative side effects of the free movement of workers could be found in a better enforcement of national regulations. Minister Asscher has taken some measures to do this in the Netherlands. He has raised penalties for violations of labour regulation, appointed inspectors specialised in fraud with temporary employment agencies and improved the enforcement of statutory minimum wage and collective agreements. The most important achievement in this respect was the enactment of the Labour Market Fraud (Bogus Schemes) Act that entered into force on 1 July 2015.[9]

According to the ministry's official website, this act allows employees to claim outstanding wages not only from employers but also from their clients. The Social Affairs and Employment Inspectorate publishes the names of companies that do not follow the rules for minimum wages. The ministry gives the following explanation of the notion of sham employment arrangements. Employers sometimes use sham employment arrangements to avoid paying minimum wages and collectively agreed wages. This puts employees at a disadvantage. Some examples are:

- money for meals, accommodation or health insurance is deducted from the minimum wage;
- fines for talking too loudly while working are deducted from the minimum wage;
- a large amount in expense allowances is paid out as wages.

The Labour Market Fraud (Bogus Schemes) Act prohibits these arrangements as from 1 January 2016.

The reason to tackle sham employment arrangements is that they result in:

- unfair competition between companies caused by cheap labour;
- evasion of social insurance contributions by employers who underpay;
- displacement of Dutch workers by cheap foreign labour.

On 1 July 2015, the first set of measures came into force under the Act. The following summary is given by the website of the ministry:

- *Employers and clients are both liable for paying wages*
  Employees can now also hold their employer's clients liable for paying the wages they are entitled to. In the past, only the employer was liable. So employees now have more options for claiming outstanding wages.

[9] *Wet aanpak schijnconstructies*, *Staatsblad* 2015, 233. On the ministry's official website the title of the Act is translated as 'Act on Measures against Sham Employment Arrangements'.

- *Monitoring employment practices and publishing names of companies*
  The Social Affairs and Employment Inspectorate checks whether employers are following the rules for minimum wages and collectively agreed wages. Companies that break the rules may receive a fine or penalty. The inspectorate also publishes the names of all companies that have been inspected. This includes companies that fail to follow the rules.
- *Exchanging information on employers*
  If the Social Affairs and Employment Inspectorate suspects that an employer is not complying with a collective agreement, it informs employer and employee organisations. These organisations can then take action.
- *Establishing employee identity*
  At the request of the Social Affairs and Employment Inspectorate, all employers must establish the identity of their employees and pass this information on to the inspectorate. They are given 48 hours to do so.

On 1 January 2016, the second set of measures came into force under the Labour Market Fraud (Bogus Schemes) Act. The following summary is given by the website of the ministry:

- *Employers pay full minimum wage*
  All arrangements by which employers pay less than the minimum wage will be prohibited. This includes wrongly deducting meal expenses or insurance contributions from a person's wage.
- *Clear payslip*
  Employers must ensure that payslips are easy to understand for their staff. They must also clearly explain all the amounts on the payslip. The Social Affairs and Employment Inspectorate can fine an employer if a payslip is incorrect.
- *Minimum wage paid through bank*
  Employers are no longer allowed to pay minimum wages in cash. However, if an employee earns more than the minimum wage, the additional amount may be paid out in cash.

Some comments have to be made on this information from the ministry. Making the 'client' liable for payment of wages is far more complicated than the short summary above suggests. If there is a chain of contractors, it is sometimes difficult to hold the responsible party liable for underpaying. Under traditional civil law, only the direct contracting party is usually liable. However, it is not unusual in modern labour relations for the contracting partners to be in a 'chain' of subcontractors. The Act now allows the employee to not only hold the formal employer liable for underpaying, but also the promoter behind the formal employer. However, a chain of clients may be much longer. The employee is not allowed to choose the most directly responsible client. He can only hold other parties liable (further back in the chain) if it turns out to be impossible to hold the two closest parties liable. This may take a long time. As a result, the Act will only provide marginal progress in the chances of the employee holding some party liable for underpayment.[10]

[10] In the *Wolff & Müller* case, the EUCJ allowed a much stricter liability scheme, as is applicable in Germany: Case C-60/03 *Wolff & Müller* ECLI:EU:C:2004:610.

The background of the duty to pay the minimum wages via the bank may need some explanation. The idea is that this obligation will make it easier for workers or the Labour Inspectorate to identify whether or not the minimum wage is being paid. The result is that if part of the minimum wage has been paid in cash, the employer's obligation has not been fulfilled. The parliamentary history of the Act is not clear about the status of the money paid in cash. One could say that, with these actions, the possibilities of enforcing labour rights under national law have not yet been exhausted. In the Netherlands, for instance, an often-heard criticism is that the Labour Inspectorate has been downsized under previous governments, which makes it difficult to enforce labour standards. The Member States of the European Union have very different systems for enforcing labour law and can learn more from one another experiences.[11]

The conclusion of this paragraph is that national measures to enforce labour legislation are strengthened, though not all possibilities are exhausted. And not all problems can be solved by improving enforcement on the national level.

4. European Solutions

The European approach of abuse of labour rights in the context of cross-border work has mainly been focussed on the position of workers from low-wage countries whose employers use the freedom of services to let them work temporarily in a foreign country below the conditions that are common in the country where the work is performed. Private international law determines the applicability of national labour protective rules. In the absence of a choice of law made by the contracting parties, the applicable conflict rule will lead to the *habitual place of work* or the place where the employee is engaged as determining factor, which leads to the application of the *law of the country of origin*.[12]

The awareness of a tension between the economic freedoms of the European Union and social rights of employees had already grown since the 1990s.[13] This issue has been highlighted by the Judgment of the European Court of Justice in the *Rush Portuguesa* case. In this case, a Portuguese construction firm worked in France and was fined by the authorities because it failed to pay a required 'special contribution'. The European Court decided that it is not allowed to subject the exercise of the freedom of services with special conditions, such as the use of local personnel, the requirement of a special work permit or the payment of a fee to the

[11] *See* for a detailed study of the enforcement methods in Germany, the Netherlands and Sweden: M. Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, Wolters Kluwer, Deventer, 2015.

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177/6.

[13] Simon Deakin, 'The Lisbon Treaty, the *Viking* and *Laval* Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy', *in* N. Bruun, K. Lörcher & Isabell Schömann (Eds.), *The Lisbon Treaty and Social Europe*, Hart Publishing, Oxford & Portland, Oregon 2012, pp. 19-43; M.S Houwerzijl& T. Wilkinson, 'The Effects of EU Law on the Social and Economic Goals of Europe 2020: A Decision Theoretic Approach to Wage Liability', *German Law Journal,* Vol. 10*,* 2013, p. 1983.

national immigration office. But it also stated that European Union 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, no matter which country the employer is established in.[14]

This judgment of the ECJ triggered the Posting of Workers Directive of 1996. The Directive makes the host Member State's hard core of protective employment rules applicable to workers posted from abroad. This includes specifically the minimum wage and the minimum paid annual holidays.[15] In this respect, the *principle of the place of work* prevails, and to this extent, the principle of equal pay for equal work is realised. The protection of workers will take away the employer's competitive advantage, but is also criticised as leading to protectionism.[16]

The discussion has been further fired by the judgments of the European Court of Justice in the *Laval* and *Rüffert* cases. In the *Laval* case, a Latvian construction firm sent its employees to a Swedish daughter company to let them do construction work in Sweden against salaries at Latvian level, much beneath that of the Swedish collective agreement for that branch. The Swedish union picketed the worksite in order to prevent that. The Court of Justice of the European Union held that the freedom of services as well as the Posting of Workers Directive preclude a trade union from attempting, by means of collective action in the form of a blockade of sites, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement with terms that lay down more favourable conditions than those resulting from the relevant legislative provisions.[17]

In the *Rüffert* case, the legislation of the German State Niedersachsen had required the contracting authority to designate as contractors for public works contracts only contractors that, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement. The court decided that a Member State is not entitled to impose on companies established in other Member States a rate of pay provided for by a collective agreement in force at the place where the services concerned are performed and not declared to be of general application.[18]

In these cases, it became clear that the right to strike could not be used to force foreign employers to obey the domestic collective agreements. Member States are also not allowed to enforce the application of collective agreements by

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[14] Judgment of 27 March 1990 in *Case C-113/89, Rush Portuguesa Limitada v. Office National d'Immigration (Rush Portugesa)*, [1990] ECR I-1417.

[15] 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, OJ 1997 L 18/1.

[16] K. Riesenhuber, *European Employment Law: A Systematic Exposition*, Intersentia, Cambridge, 2012, p. 197.

[17] Judgment of 18 December 2007 in *Case C-341/05, Laval un Partneri v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundetsavd. 1, Byggettan, Svenska Elektrikerförbundet (Laval)*, [2007] ECR I-11767.

[18] Judgment of 3 April 2008 in *Case C-346/06, Dirk Rüffert v. Land Niedersachsen (Rüffert)*, [2008] ECR I-1989.

tender requirements. In both cases, it must be noted that legislation or collective agreements that extended law to the whole branch can be enforced. The problem mainly occurs in countries like Sweden where collective agreements are traditionally obeyed within the customs of the system of collective labour relations rather than by public law. The decisions of the European Court of Justice may force these countries to introduce a system of public enforcement of collective agreements in order to maintain their standards, only because of European law. This is one of the reasons why the decisions of the Court are complex to understand. They are severely criticised, especially in labour circles, though they do not prevent the existence of labour protection, only require public law to facilitate this. As such the European integration forces to some form of harmonisation of the national labour law systems.

The reaction on the continuing problems of enforcing collective agreements, especially in the construction sector, has led to the adoption of the *Enforcement Directive*.[19] This Directive aims to promote a better enforcement of the Posting of Workers Directive. According to the official announcement of the European Commission, the Enforcement Directive will help to ensure that these rules are better applied in practice, especially in some sectors such as construction and road haulage, where for example so-called 'letter box' companies (without any real economic activity in their 'home' country) use false 'posting' to circumvent national rules on social security and labour conditions. It will also improve the protection of posted workers' rights by preventing fraud, especially in subcontracting chains where posted workers' rights are sometimes not respected.

In particular, according to the European Commission, the Enforcement Directive:

- increases the *awareness* of workers and companies about their rights and obligations as regards the terms and conditions of employment;
- *improves cooperation between national authorities* in charge of posting (obligation to respond to requests for assistance from competent authorities of other Member States – a two working day time limit to respond to urgent requests for information and a 25 working day time limit for non-urgent requests);
- clarifies *the definition of posting* so as to increase legal certainty for posted workers and service providers, while at the same time tackling 'letter-box' companies that use posting to circumvent the law;
- defines Member States' responsibilities to *verify compliance* with the rules laid down in the 1996 Directive (Member States designate specific enforcement authorities responsible for verifying compliance; and where service providers are established, Member States need to take necessary supervisory and enforcement measures).

[19] Directive 2014/67/EU of the European Parliament and the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ 2014 L 159/11.

5. The Brexit

In the discussion on the position of the United Kingdom within the European Union, lack of control on immigration was a major issue.

Originally, the British government asked for 'a new settlement for the United Kingdom in a reformed European Union'. This is the title of a letter David Cameron sent on 10 November 2015 to Donald Tusk, the president of the European Council, in which he formulated his concrete ideas. Under the general term 'flexibility', the British prime minister presented four proposals for reform. Besides economic governance, competitiveness, and sovereignty, the fourth item was immigration.
Under this heading, Mr Cameron argued that the pressures that free movement can bring were presently too great. The issue was one of scale and speed. Britain's population was expanding and it was not sustainable. It has taken many steps to control immigration from outside the European Union. But it needed to be able to exert greater control on arrivals from inside the European Union too. The current very high level of population flows from within the European Union into the United Kingdom were unplanned and were much higher than forecast – far higher than anything the European Union's founding fathers ever envisaged. He felt that we need to ensure that when new countries are admitted to the European Union in the future, free movement will not apply to those new members until their economies have converged to become much closer to those of existing Member States.

Mr Cameron also wanted to crack down on the abuse of free movement, and notes wide support in discussion with colleagues on this point. In this respect, he mentioned tougher and longer re-entry bans for fraudsters and people who collude in sham marriages. It meant addressing the fact that it is easier for an European Union citizen to bring a non-European Union spouse to Britain than it is for a British citizen to do the same. It meant stronger powers to deport criminals and stop them from coming back, as well as preventing entry in the first place.
He finally expressed the need to go further to reduce the numbers of persons coming to the United Kingdom. He wanted to reduce the flow of people coming from within the European Union by reducing the draw out that Britain's welfare system can exert crossing Europe. So he proposed that people coming to Britain from the European Union should live in the United Kingdom and contribute for four years before they qualify for in-work benefits or social housing. And that the practice of sending child benefits overseas should be ended.[20] Since, the way to change treaties would be long and difficult, the demands were relatively comprehensive and clearly designed to be able to comply with in short time.[21]

[20] Many of these proposals on immigration were already raised in Cameron's EU migration speech of 28 November 2014, available at: <www.bbc.com/news/uk-politics-30250299> (last accessed on 1 February 2016).

[21] Damien Chalmers argues that many of the prime minister's individual reform proposals could either be achieved by changing EU legislation or domestic law. *See* D. Chalmers, 'What Are the Legal Implications of David Cameron's Demands for EU Migration Reforms?', *Open Europe London*,

By developing his immigration point, Mr Cameron tackled a completely different aspect of the free movement of workers than Mr Asscher did. His target was not so much the abuse of free movement by employers harming employees, as is the case in Mr Asscher's proposals, but rather the use of free movement by citizens from other European Union countries contrary to the direct interests of the United Kingdom. Nevertheless, although brought primarily as serving the specific interests of the United Kingdom, he touches on problems of a kind that more countries have to deal with.

A European Council study on foreign relations regarding the position of ten Member States towards the British proposals showed that these proposals were strongly opposed by the two involved central and eastern European countries, namely Poland and Bulgaria. But other countries, too, were not keen on the proposals. In France, the equality among European citizens is considered important. Germany opposes any limitation of the free movement of persons. In some countries, it is not so much an issue (Denmark, Italy). Some countries thought the British could strengthen the internal rules on their own (Ireland, Sweden) and others were not against a discussion, but did not want to introduce discrimination between British and other nationals (the Netherlands, Spain).[22]

The other Member States were not very keen on allowing the United Kingdom to reduce the rights of their citizens who made use of the free movement of persons. However, it was remarkable that the Polish government hinted early January 2016 that it could accept reductions in welfare entitlements of Polish citizens abroad as trade-off for a stronger NATO presence on their territory in order to prevent possible Russian aggression.

The result of the negotiations between the United Kingdom and the other Member States of the Unions was that the leaders of the other 27 member nations agreed on 19 February 2016 to a deal that would see – among others - a seven-year term for the emergency brake to restrict European Union migrants in the United Kingdom claiming in-work benefits.

This was not a very impressive concession, because it only partially and temporarily relieved the British from their obligations. In fact, the deal would partly repair the mistake of the United Kingdom not to apply the seven years' transition period in 2004/2007 for the introduction of the free movement of workers in relation to new Member States. Instead, the United Kingdom now received the option that new migrants could be excluded from certain benefits during a period of seven year.

Eventually, it turned out that the deal was not enough to prevent the British people to choose for the Brexit-option during the national referendum of 23 June 2016. The result is that the British will now negotiate with the other Member States on the terms of leaving the European Union. Since the immigration issue

December 2014 , available at: <http://openeurope.org.uk/intelligence/immigration-and-justice/legal-implications-david-camerons-proposed-reforms-eu-migration/> (last accessed on 1 February 2016).

[22] M. Leonard, 'Britain in the EU Renegotiation Scorecard', *European Council on Foreign RelationsLondon,* September 2015, available at: <www.ecfr.eu/page/-/Britain_in_the_EU-Scorecard.pdf> (last accessed on 1 February 2016).

has been dominant in discussions, the choice of the British Government to strive for a 'hard Brexit' is logical: the free movement of persons is one of the four basic freedoms of the internal market. In the view of the other Member States it cannot be isolated from the other freedoms. By result, participation in the internal market will not be allowed without accepting the free movement of persons. The positions of both parties also exclude a future membership of the United Kingdom of the European Economic Area as well as far-reaching bilateral agreements as are concluded between the European Union and Switzerland. The result will be that the situation of those who so far enjoyed the free movement of persons between the United Kingdom and other Member States will have to be negotiated. In the future, these rights will not be granted any longer to citizens of both sides. This means a drawback in job opportunities, also for the citizens of Central and Eastern European countries.

The historic decision of the people of the United Kingdom to leave the European Union was clearly heavily influenced by the sense that the British government should regain its full sovereignty in immigration issues. It may be seen as a sign that the European Union underestimated the problems that may result from a too speedy full integration of too many new Member States with a lower economic development, especially in difficult economic circumstances. And with the knowledge of today, it could be considered whether the other Member States should have been better off when they would have been more full-heartedly prepared to make concessions and more generous in this respect to the British in order to keep them within the Union.

6. Present discussions within the European Union

While early 2016 the Member States were working on the transposition of the Enforcement Directive into their national law, the discussion on the issue did not stop. Especially the limited reach of the Posting of Workers Directive (that only guarantees the minimum wage) was still in debate. Unions promoted the extension of the principle to equal pay for equal work in general, which includes the concept that the whole range of wages, at least the full content of collective agreements, should be based on the principle of the place of work.

In May 2014, Minister Asscher wrote a second article in the same newspaper in which he had published his 'Code Orange' article with David Goodhart. He admitted that it was thought that in his earlier article he was picking on Bulgarians, Poles, and Romanians. He now wrote that was not the case. In his view, he was not attacking migrant workers, but defended them. He was not promoting measures to stop people, but measures that stop abuses. It is in everybody's interest to fight exploitation and to promote fair work for a decent wage. His proposal is to oblige employers to not only provide equal pay for equal work, but to also level other working conditions. The more the working conditions of posted workers resemble those of other employees, the fairer the competition is on the labour market. He also proposed putting an end to 'letter box companies' that only move to another

country on paper so that they can continue their operations in the home country with lower labour costs. Chain responsibility should be extended from the construction sector to others, in particular agriculture and transport. For domestic transport, equal wage should be paid, no matter who drives the truck. His reasoning is that those who want to maintain the advantages of free movement – and that is what he wants – will have to attack unfair competition and improper replacement with tough and clear measures. Cross-border abuses cannot be dealt with by countries on their own. European Union Member States must combine their knowledge and forces.[23]

Acting as president in the first half year of 2016, Mr Asscher put his proposals on the agenda of the Social Council. His intention was: 'to combat unfair competition on terms of employment and promoting a level playing field is one of the most important issues during the Dutch presidency.'[24] During some years, he had seemed to stand alone in calling for changes to the Posted Workers Directive. But on 18 June 2015, he had sent his ideas in a letter co-signed by colleague ministers of six other countries[25] to Employment Commissioner Marianne Thyssen. The seven governments wanted to see fair rules on posted workers in the EU.

These ministers argued that the character of posting has been evolving in recent years. They fear that services of a temporary nature without presence on the domestic labour market may in some cases have transformed into services of semi-permanent nature with a real and lasting presence on the domestic labour market. The current system may be used to reduce the costs of labour and to gain a competitive edge in the market. The seven ministers suggest that widening the scope and amending provisions regarding the working and social conditions that are applicable to posted workers should be considered.

They also advocated equal pay for equal work in the same place. 'The free movement of workers must go hand in hand with better protection of workers,' Mr Asscher said. He hoped that the Commissioner would act swiftly to adopt the Directive.

However, a reaction came in a letter from nine ministers from Central and Eastern European countries.[26] In light of the recent adoption of the Enforcement Directive, they saw a revision of the Posted Worker Directive as premature. Besides, they feared the undermining of fundamental principles of the European Union, including freedom of services. They also warned that the social security rights of posted workers could be endangered. It is obvious that they were also defending the presently advantageous position of service providers from their

[23] L. Asscher, 'Stop oneerlijke concurrentie en verdringing', *De Volkskrant,* 9 May 2014, available at: <www.volkskrant.nl/opinie/asscher-stop-oneerlijke-concurrentie-en-verdringing~a3651775/> (last accessed on 19 February 2017).

[24] Letter from the Minister of Social Affairs and Employment to the Dutch House of Representatives (1 October 2015), *Kamerstukken II* 2015/16, 17 050, no. 522, p. 5.

[25] The letter was signed by the Labour ministers of Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden.

[26] This letter was signed by the Labour ministers of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

countries in the competition for work in countries with higher labour costs. The two positions were conflicting and remained that in the following stage.

On 8 May 2016, the Commission proposed a reform of the Posting of Workers Directive. According to the Commission, there are 1.9 million posted workers in the EU, representing 0.7 percent of total EU employment. Half of them go to three countries: Germany, France and Belgium. Poland is the largest sender of posted workers in the EU, followed by Germany and France.

The proposal was initially brought to a halt by a so-called *yellow card procedure* by 11 Parliaments, mainly from Central and Eastern European countries.[27] This means that the countries claim that the proposal is contrary to the principle of subsidiarity (i.e. decision-making at the lowest possible level). Polish labour minister *Elzbieta Rafalska* told the website EU Observer that national parliaments were concerned not only about subsidiarity but also that plans could harm the competitiveness of Polish workers on the internal market. Five other Parliaments saw no contradiction with the principle of subsidiarity.

The Commission reconsidered the proposal, but Commissioner Mrs. Thyssen saw no violation of subsidiarity rules.

According to her statement, posting of workers is a cross-border issue by nature. Any posting activity has effects in at least two Member States. The rules on posting necessarily create rights and obligations between persons in different Member States – that is, between an employer in the Member State of origin and a worker who temporarily resides in another Member State. Individual action by national governments would fragment the internal market – the opposite of what we want to achieve. Therefore, the rules are best set at Union level. And this, by the way, is not new, we have European rules on posting in place since about 20 years. The proposal does not interfere with Member State competences on wage setting. It simply proposes that what applies to locals, also applies to posted workers.[28] Now it is up to the Council to decide on the issue.

The Western European countries have expensive welfare states that are under pressure from the economic crisis of the last decade. Their populations are keen to defend their welfare benefits, though they have already had to accept major cuts because of economic stagnation. In this atmosphere, the flow of people from Central and Eastern Europe to Western Europe after the accession of their countries to the European Union in 2004 is followed critically. Though the foreign workers came in order to improve their working conditions, their presence has also led to a higher consumption of social benefits by them. It is easier for governments in Western Europe to sell to the public a cut in welfare benefits for these new immigrants (who usually do not vote in their elections) than cuts that hit their indigenous population. One must however realise that the problem is relatively

[27] In 2012, the first yellow card procedure was triggered in reference to the Commission's proposal for a Council Regulation on exercising the right to take collective action within the context of the freedom of establishment, and the freedom to provide services (the "Monti II proposal"). In fact, this also dealt with a conflict between economic freedoms and labour rights.

[28] Speech 16/2598 of Mrs. Thyssen of 20 July 2016, to be found on http://europa.eu/rapid/press-release_SPEECH-16-2598_en.htm (lately checked on 19 February 2017).

small, because it is restricted to those workers who are posted in other Member States during two years at most. Workers who are employed by employers established in the specific Member State are already covered by domestic law. The problem is mainly related to the companies established in new Member States that are using the freedom of services to post workers temporarily in another Member State. They make use of their lower national labour standards to compete with local companies. The issue is whether this is a fair competition and whether this fits into the European social model that protects wage levels of employees against hardship of the free market by setting minimum standards in national legislation and collective agreements.

The governments of Central and Eastern European countries have reason to defend the interest of their citizens, also when they work abroad. A cut in social security expenditures in the western countries at the cost of Eastern European immigrants will give them the feeling that – even 10 years after acquiring European Union membership and in spite of working sometimes under difficult conditions in a foreign country - they are still not fully respected as European Union citizens. However, the principle of equal pay for equal work is also a general principle of labour law: recognised already in the Universal Declaration of Human rights of the United Nations of 1948[29] and also in the Social Covenant of the United Nations and with regard to specific groups in treaties and directives of the European Union.[30] By opposing the application of the principle of equal pay for equal work, the governments try to make use of advantages of the freedom of services for their national service providers. But at the same time, they do not protect the interests of their citizens working abroad in being not discriminated in pay issues. By supporting the proposed directive, they would stand up for their national citizens in order to be treated equally with national citizens, which is also one of the principles of European integration.[31] Another one is the improvement of working conditions as a goal of European social policy.[32] The choice to prefer more employment abroad for their citizens above equal payment with Western workers may be on the short term attractive, in the long run it could strengthen their position as 'under class workers' in the Western part of Europe.

[29]Declaration proclaimed by the United Nations General Assembly in Paris on 10 December 1948,Resolution 217 A, Article 23 section 2: "Everyone, without any discrimination, has the right to equal pay for equal work."

[30] In the Treaty of Rome of 1957, that established the European Economic Community equal pay for men and women was among the very few social provisions. Today, unequal payment is forbidden in respect to various criteria, among which race, chronic diseases, age, fixed-term work and temporary agency work,

[31] Besides, at least for a temporary period, the sending Member States would benefit from higher social security contributions and income taxes, up until the EU rules take over. Taxes after 183 days and social security after 24 months. Based on a pro rata principle, probably more pension contributions would be paid as well.

[32] Article 151 Treaty on the Functioning of the European Union.

7. Conclusion

The conclusion of this contribution is that the decision of the United Kingdom to leave the European Union as well as the discussion on a revision of the Posted Workers Directive are touching on a division within Europe between the interests in the application of the principle of free movement of workers of the Western Member States of the European Union on one side and the Central and Eastern European Member States on the other side. By a more close study, these interests are more difficult to define and in the end all countries have a common interest in continuing their cooperation and providing welfare for all citizens. Both sides have to deal with their different levels of economic development and social welfare spending. It will take time to reduce these differences. In the meantime, it is important that politicians and citizens of both sides show respect for each other's interests and do not forget the underlying principles of European as well as Labour Law.[33]

[33] The European Social Pillar is a more recent initiative to reconfirm these principles.