

European Commission

Directorate-General Employment, Social Affairs and Inclusion

Rue de la Loi 200
1049 Brussels
Belgium

25th of September 2017

Official Complaint of the Union of Construction and Woodworkers Austria to the European Commission regarding the threats to social standards in the Austrian construction industry as well as the insufficient security for posted workers in matters relating to social law.

Suggestion for further harmonizing regulations concerning labour law and social security law for posting workers abroad.

The Union of Construction and Woodworkers Austria (UCWA) is a Craft Union and member of the Austrian Trade Union Federation and represents workers in the construction industry, stone and ceramics industry and the wood industry. The present complaint is referring to the construction industry focussing on the delivery of services by posting companies with an emphasis on the scope of the Austrian Holiday and Severance Act (AHSA). Some labour-law entitlements (especially holiday regulations, bad weather compensation and interim payments) of the industry are managed by a cross-company social fund, the Construction Worker Holiday and Severance Fund (CWSH). The AHSA is applicable to all (blue-collar) workers (not white-collar employees) in the fields of building construction and civil engineering as well as auxiliary building and ancillary building trade. It has been estimated that between 60% to 80% of all posting of workers to Austria fall within this field. The following material refers to that field.

1. Development since the Opening of the Labour Market in May 2011

After the accession of new member states on May 1 2004 Austria made use of a transition period of several years. On May 1 2011 the full unrestricted movement of workers and services kicked into action (Note: For Romania and Bulgaria who joined January 2007, the labour market was opened in January 2014).

- This opening of the labour market and the associated free movement of people lead to a steep rise in the number of workers from Eastern European neighbouring countries that started to work in Austrian construction companies. In June 2017 out of a total of 135.446 workers in the Austrian construction industry, 30.793 workers came from

other European Union member states and 15.339 workers from third-party countries (especially former Yugoslavia and Turkey).

- Of the 30.793 workers from other EU member states, 3112 were from Germany and basically all other workers came from 'new' member states (e.g. Poland 7924, Hungary 4901 and Romania 4001).

2. Based on Freedom of Services the posting of workers by companies from other European Union member states rose until June 2017 to 564 posting companies and 5216 posted workers (the rise was at first relatively steep from May 2011 onwards and while the number of posted workers has remained quite stable since 2014 the posting duration has risen).

Postings subject to supplement	First half-year 2015	First half-year 2016	First half-year 2017
Total of invoiced days	437.448	513.125	522.690

3. Posting Directive, Social Fund Procedure and Wage Control

Austria implemented the 1996 Posting Directive through the so called Labour Contract Adaptation Act. This Act guarantees that posted workers are in matters of labour law entitled to the same legal or collective agreement payment that comparable workers receive by comparable employers at the same place of work.

In September 2005 it was agreed that posted workers to whom the AHSAs apply are to be included in the holiday regulations of the AHSAs. Thus, since September 2005 all companies that post workers to Austria have to pay contributions to the CWHS and posted workers acquire holiday entitlements against the CWHS. During the first years of this regulation relatively few companies – mostly from the 'old' EU member states (mainly from Germany) and from Liechtenstein -, paid contributions to the CWHS.

Starting in May 2011, the time of the opening of the labour market for new member states, a quite comprehensive system of payment control was implemented. Domestic and foreign companies are vetted regarding the correct payment of their workers by financial police and social security institutions. Breaching of payment regulations, the so called 'underpayment', incurs an administrative penalty.

For the jurisdiction of the AHSAs it was agreed that the observation of regulations against wage and social dumping can also be policed by the CWHS. This means that the CWHS who employs its own inspectors can audit construction sites and the proper observation of payment regulations by domestic and posting companies as well as file complaints with the relevant administrative authorities.

The results of the construction site audits by the CWHS give a good overview regarding the observation or failure to observe payment regulations on Austrian construction sites. To illustrate this, some data of the first half-year of 2017 is presented here. During this time 3075 construction sites were audited by CWHS inspectors. 3365 domestic companies and 12.371 workers of these companies were checked. 40 companies and 115 workers with suspected cases of underpayment were reported (which constitutes 1.2% of companies and 0.9% of workers). During the same period 816 posting companies and 3706 workers of these companies were audited. In 360 companies and for 1518 workers suspected cases of underpayment were reported (adding up to 44.1% of all companies and 41.0% of all workers).

This situation has been the same over the past few years which means that the proportion of companies practising underpayment does not reduce.

The non-observance of posting, payment and other legal regulations often can take on mafia-like dimensions as a recent case shows that was uncovered by the financial police after three years of investigations. A criminal group of perpetrators from former Yugoslavia had employed about 755 workers in an international network of more than 30 bogus firms. Through illegal price fixing, tax and social security payment evasion the preliminary estimated financial loss amounts to more than 55 Mio Euro. Six men were arrested. “The posting of workers from low-wage countries like Bulgaria, Romania, the Czech Republic, Hungary and Slovakia registered with domestic bogus firms was pretended. [...] Investigations into social fraud further showed that these workers had not social security in their home countries or presented forged documents. [...] These men worked for very low wages on several construction sites, slept under inhumane circumstances or directly on the construction site”, reports the Federal Ministry of Finances the dramatic surrounding circumstances.

The critique of the population regarding cross-border mobility of workers is on the rise due to ongoing and systemic wage dumping. People expect the European Union to finally implement measures for fair competition.

The description of this situation is not a formal part of this complaint but should serve to illustrate the problem social partners and the concerned institutions are facing. Currently valid regulations require a minimum wage, allow for the auditing of the paid wage and provide for administrative penalties if legal requirements are not observed. The enforcement of imposed penalties in the country of origin of the posting companies still needs to improve, but given the Enforcement Directive of 2016 and an improved co-operation with the authorities of new member states this should soon be possible.

4. Open Issues and Proposed Solutions

The enforcement of the principle of “equal pay for equal work on the same place of work” faces still some practical challenges which can not be solved in the country of work performance (in this case Austria). According to the provisions of Regulation 883/2004 regarding the co-ordination of social security systems the posted worker generally remains in the social security system of his or her country of origin. This means that the great majority of posted workers remains in the social security system of his or her home country since the posting lasts significantly less than two years, according to data collected by the CWHS.

CWHS – Analysis of the Duration of Postings 2016		
Posting Duration	Number of Workers	Percentage
Up to 90 days	9391	68.92
91 – 183 days	2297	16.86
184 – 365 day	1636	12.01
Between 366 days and 2 years	301	2.21

TOTAL	13.625	100.00
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The undifferentiated implementation of this regulation and its practical execution respectively is criticized in the following. It is thus criticized that the current approach to import posted workers only after 2 years of work into the social security system of the state he or she is posted to, is in contradiction with the object and purpose of Regulation 883/2004.

- Posted workers remain in the social security system of their home country for 2 years. This might be justified regarding the different contribution percentage by the cost structures of health and pension insurance schemes based on demographic circumstances. No justification might be found though for the fact that the level of assessment base for social security contributions is in reality not calculated from the higher wages earned during the posting period (Example: If a worker receives wages of EUR 1000.- per month in the country of his/her origin, social security contribution is based on this income; if he/she receives wages of EUR 2000.- per month while being posted, these higher wages should be used as the base to calculate the contribution). The adjustment of the assessment base for social security contributions to the minimum wages of the host member state serves without doubt to protect the workers' rights as only this will guarantee that his/her social benefits (e.g. sick pay, unemployment benefits or pensions) will be positively influenced by the higher wages earned during the posting period. Even if the adjustment of social security assessment base was intended by the European Overriding Mandatory Provision, it is currently not explicitly regulated in Regulation 883/2004 and is currently in principle and in practice not applied. This on the one hand constitutes a discrimination of affected posted workers and on the other hand leads to unfair competition between affected companies.
- The practical implementation of the principle could be facilitated by an improvement of the co-operation of authorities. In cases where the posting firm does not base its social security contributions on the higher wages, the institution collecting social security contributions could gather information in the member state of work performance.
- The Posting Directive as well as Regulation 883/2004 are based on the theory that workers first work in their home country, is then posted abroad for a certain period and then returns back to work in his home country. In practice workers that work as posted workers in Austria often switch between employment contracts with their posting firm and employment contracts with Austrian firms.
- Another challenging factor is the fact that workers are registered by the posting company with the social insurance institution of the country of their origin only directly at the beginning of their working contract abroad. It is not a rare occurrence in Austria that posting firms start operations with workers that are citizens of other member states or even third countries.
- The establishment of mandatory minimum employment period before workers can be posted (e.g. 3 months) would be of significance in relation to Regulation 883/2004. This could reduce the widespread practice of employing workers in a member state exclusively with the intention of posting them to another member state. These workers are currently considered posted workers and thus have their social security in the country of origin. This problem is widely recognized and viewed critically in the

affected member states. In this context we would like to point to the German-French initiative to make amends to Regulation 883/2004 in the framework of the current negotiations. This amendment aims at a mandatory minimum employment period of three months before workers can be posted as well as a stop to directly successive so called “chain postings”.

We ask for an examination of the problems described. Additional data can be provided to all points upon request.

Attachment: Overview of main newspaper articles relating to the “construction mafia”, 2017 September 27 – 30 (German)