

Enforcement cooperation at EU level: up to the European Labour Authority

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Free movement: an economic miracle leading to a social graveyard? The benefits of free movement under pressure due to social dumping and social fraud ...



Fraud is a catch-all term
but fraud is not error is not abuse
(of law/rights)

How to combat social dumping? Legal and practical issues

- Social inspection services:
 - specific competences
 - specific knowledge
 - specific tools
- Some issues:
 - Inadequate information, cooperation, enforcement? Cross-border cooperation and information exchange is often too slow, too time-consuming, whereas fraudsters react fast
 - Who is who?
 - compatibility of concepts (legal interoperability)
 - compatibility of tools (semantic interoperability)
 - legal compatibility: in some Member States contributions +/- tax:
 - different institutions falling under different government departments

An important issue: cooperation through the exchange of information

- need for exchange of information and international transfers of data
- But often issues due to data protection and privacy legislation
- An underestimated problem? See case law of CJEU Smaranda Bara and others (C-201/14)
- An example: new provisions in the Coordination Regulations: but several issues remain and attention is required

The search for solutions...

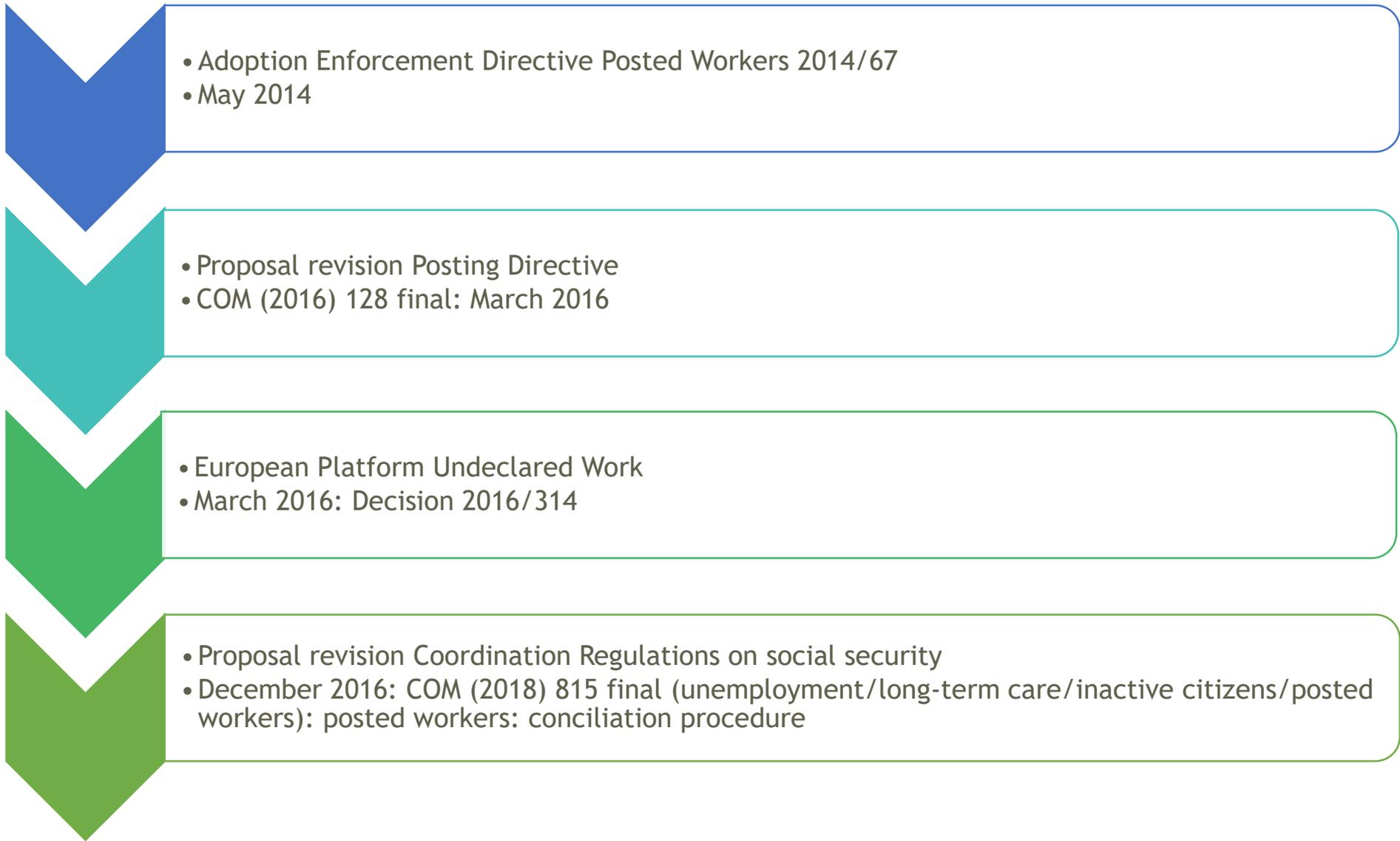
The difficult balance between national control measures and the acceptability under European law

“Achilles’ heel to monitoring the compliance with and the enforcement of the European legislation is cross-border cooperation between competent administrations and stakeholders and, in the wake of this, the cross-border exchange of information”

How to combat social dumping?

- Need for international collaboration
- Actually in 2 systems: However with a different perspective!
 - *Labour Law*: Posting Directive 98/71 and Enforcement Directive 2014/67: same measures and IMI: fraud is seen as an issue
 - *Social security law*: Regulation 883/2004 ESSI: fraud is lacking:
- See however some regional collaboration (Benelux)

The reaction from the European Commission





Current framework of collaboration within the field of social security law

Good administration and cooperation: necessary for combatting fraud

- Different characteristics:
 - communication of relevant information
 - good administrative assistance
 - direct communication
 - accepting documents based on language
 - mutual exchange of information between insured and competent institution
 - avoidance of interpretation difficulties
 - provide information within reasonable periods

Collaboration within social security

- EESSI (not really instrument against fraud) (see recent proposal COM (2016) 815 final on A1 form. See further)
 - regulations are not conceived as specialised instruments to counter fraud and abuse: exchange of information is very often activated when the problem appears and is discovered
 - need for more exchange of information ex officio

Fraud under the EU Regulations

- Certain evolution:
 - mentioning of fraud in recital of Reg.: ensure more effective recovery
 - new proposal: definition of fraud and legal base for data exchange
 - Implies data transfer (... also with other labour and tax officer ...)
CSSTM will have to work out rules!
 - Transfers are subject to protection and privacy and exchange of personal data

Reaction Commission: proposal COM (2016) 815 final

- Conciliation procedure
 - more uniform procedure in questionnaire
 - strengthening of conciliation and dialogue procedure (strict time limits, 25 days ... See Enforcement Directive); but no sanction
 - is loyal duty to cooperate infringed? Damage? Or no valid and binding effect

To the better application of the posting rules: the adoption of the Enforcement Directive

Administrative cooperation: several principles

- Replying to reasoned requests
- Sending and service of documents
- Information obligation of service providers
- Time limit
- Rules for cooperation: responsibility of MS of establishment for monitoring the working conditions does not end during the posting period and shall continue to monitor, control and take the necessary supervisory or enforcement measures
- Principle of equivalent access with regard to particular registers
- Ex officio obligation to inform
- Practical implementation via an electronic system: IMI

To a better enforcement and collaboration: some further evolutions

- Better follow-up of mechanisms of cooperation in the fight against social dumping?
 - the establishment of a platform for the prevention and deterrence of undeclared work: Decision 2016/314: in particular encouraging cooperation through
 - exchanging best practices and information
 - developing expertise and analysis
 - encouraging and facilitating innovative approaches to effective and efficient cross-border cooperation and evaluating experiences
 - contributing to understanding matters relating to undeclared work

To a better enforcement and collaboration: some further evolutions

- Or a new Posting Directive?
 - Idea to revise Posting Directive 96/71
 - ‘old’ versus ‘new’ MS
 - yellow card: subsidiarity principle
 - See Mobility Package, COM (2016) 128 final: some adaptations: long-term posting; remuneration and system of joint and several liability

The European Labour Authority: the final piece?

The European Labour Authority: objectives

- (a) facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services
- (b) support cooperation between Member States in the cross-border enforcement of relevant Union law, including facilitating joint inspections
- (c) mediate and facilitate a solution in cases of cross-border disputes between national authorities or labour market disruptions

The European Labour Authority: the debate?

- (a) Support option? EU would expand and coordinate existing activities or programmes or extension to other sectors: light option
- (b) Operational option? Adding operational tasks and active support to national bodies who retain their competences (set up support tools)
- (c) Supervisory option? Integrating EU-level functions not yet foreseen (out-of-court dispute settlements/pilot codes/on own initiative launch inspections)

The European labour Authority: a fundamental change?

Tasks	Current EU Instruments	Role	ELA
Information for individuals and business	EURES Your Europe Dir. 2014/67	Information exchange	Operational support through coordination and enhancement of information through more targeted information/inter-connection (sector-specific)/streamlining information/ managing EURES/
Cooperation/exchange of information between national authorities	IMI EESSI European Register of Road Transport Undertakings Dir. 2014/67	Information exchange	Operational support through more centralised support for IT tools for information exchange and more comprehensive oversight and recommendations on synergies and follow-up actions/identify recurrent patterns of mobility and fraud
Support to joint inspections	Voluntary under UDW platform or certain projects/bil.agreements	Information exchange with very limited operational and technical support	Operational support but at the request of a MS through pro-active proposals for joint inspections, streamlining procedures, monitoring and follow-up/logistical and technical support

The European labour Authority: a fundamental change?

Tasks	Current EU Instruments	Role	ELA
Capacity building	UDW platform projects	Information exchange	Operational and supervisory support through common guidelines for inspections/training material, awareness-raising campaigns, exchange of staff and best practices
Analysis and risk assessment			Operational support through analysis, risk assessment and in-depth studies, peer review
Mediation between national authorities	EU Coordination Reg. (conciliation board)	Information exchange	Operational and supervisory support through facilities to launch at request of MS or on own initiative of out-of-court mediation role
Facilitating cooperation in cross-border labour disruptions			Operational support but at request of national authorities, through set-up of ad-hoc support facilitating cooperation in case of large-scale restructuring or cross-border events

The European Labour Authority: the impact on other instruments

- Take over the work from Technical Committee on Free Movement of Workers
- Take over the work of Committee of Experts on Posting of Workers
- Replace the European Platform against Undeclared Work
- The social security regulations: replace the Audit Board, the Technical Commission for Data Processing and also the Conciliation Board

A side-step

Current framework of collaboration:
what can we learn from other domains of law?

Cooperation, enforcement and recovery in the field of
Title V TFEU (judicial and police cooperation in criminal
matters)

Important principles in the field of judicial cooperation in criminal matters and police cooperation

- Mutual recognition and mutual assistance:
 - should strengthen cooperation between Member States but also to enhance the protection of individual rights
- Principle of equivalent access:
 - Member States have to ensure that procedures and conditions applied to cross-border exchanges of information are not stricter than the ones applied to national level

- Principle of availability:
 - information that is available to law enforcement authorities in one Member State should also be made accessible to law enforcement authorities in other Member States

Possible elements of cooperation and assistance

- Joint teams and participation of officials in other Member States
- Setting up central European data repositories
- Mutual information requirements - pull or push?
- Grounds for refusal/grounds for non-recognition

- Institutionalised networks and national contact points
- Sending of documents
- Time limits
- Expenses incurred

Some other smaller steps

Some other smaller steps

- need for further initiatives: an ad-hoc instrument in the field of social security law
- Push mechanisms?
- Cooperation with other institutional arrangements of cooperation, or European networks / institutions
- European institution?
- Attention for privacy and data protection
- List of social security offences as criminal offences?
- European data repository

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