

National inspective bodies' practices, transnational cooperation instruments, and violations of the European framework about transnational posting within the mechanical industry

The Spanish Experience



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Most frequent violations on posting of workers

- **LETTER BOX COMPANIES**

- A company which has complied only with the bare essentials for organisation and registration in a particular country but the actual commercial activities are carried out in another country (OECD). Frequent in the Construction Industry

- **ILLEGAL SUPPLY OF WORKERS**

- Fake or bogus subcontracting or fictitious subsidiaries. Frequent in Road Transport and other activities, including subcontracting in Mechanical Industry
- ECJ, Case AFMB (2020): The employer is the undertaking which has actual authority over that workers, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that worker has concluded an employment contract and which is formally named in that contract as being the employer of that worker.

- **TRANSNATIONAL TRAFFIC OF WORKERS**

- Companies that apparently are set up in a country in order to transfer mobile workers from one country to another. It happens in some sectors such as Mechanical Industry

A case study on illegal supply or labour lending in the Mechanical Industry

- A Spanish employer (without a significant previous activity in Spain) hired untrained workers who lived in Spain and were citizens from third countries in order to be posted to Belgium.
- PDA1 forms were granted by the Spanish Social Security to all the workers involved
- When they got there, he distributed them in three different companies of mechanical industry. He didn't manage or organise their tasks in those companies (labour lending)
- Workers performed very poorly, companies weren't satisfied with their work and didn't pay for their services to the Spanish employer
- The Spanish employer didn't pay salaries to the workers and didn't pay social security contributions to the Spanish Social Security
- Two months later workers returned to Spain by their own means

Possible legal actions on Labour Law

- **Before the Inspectorate:**

- The employer could be prosecuted in Belgium and Spain for not paying wages
- In fact, he was prosecuted in Spain with a heavy administrative fine but he was insolvent
- When the Belgian Inspectorate received an IMI inquiry by the Spanish Inspectorate, the employer had already left Belgium and there was no actions

- **Before the Courts:**

- Belgian contractors may be sued by the workers in Belgium as real employers or joint liability. However, workers had no means to sue them in Belgium
- The employer was sued in Spain by the workers. The employer was insolvent and had no assets. Belgian contractors couldn't be sued in Spain. The public fund to cover insolvency of employers partially covered the debt

Possible legal actions on Social Security

- **In Spain**

- The employer should not have obtained the PDA1 in Spain.
- The Spanish Authorities might withdraw the workers from the Spanish Social Security System and communicate the Belgian Authorities that they should be insured in Belgium

- **In Belgium**

- Belgian authorities might not insure the posted workers in its social security System because the employer is insolvent and wouldn't pay contributions

- **Possible outcome**

- Workers would remain unprotected without social security benefits in any country
- Employer would be exempt from Spanish and Belgian Social security debts
- Contractors would remain unpunished in any case

A case Study of Transnational Traffic of Workers in the Mechanical Industry

- A Portuguese citizen set up a company in Spain. He has no assets in Spain and his address is a lawyer's office.
- He usually hired Portuguese workers (theoretically in Spain) in order to post them to other European countries. He also hired Portuguese workers as self-employed who remained uninsured in Portugal and Spain.
- The employer registered them in the Spanish Social Security System and workers obtained the PDA1 one month after their registration. The employer didn't pay never Spanish Social Security contributions
- In Italy, the Labour Inspectorate visited a workplace and asked PDA1 forms of the workers and request information via IMI to the Spanish and Portuguese Inspectorates with no result
- Afterwards, a tripartite joint collaboration among the three Inspectorates was able to discover the facts. IMI doesn't allow multilateral collaboration

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