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JOINT POSITION

Towards a level playing field in the European construction sector Joint proposals of the EU sectoral social partners EFBWW and FIEC

A. Introduction

Over the past decade, the labour market and economic framework in which the construction sector is operating have changed dramatically. Some of these changes, such as, for example, the greening of the economy and of jobs or the effects of the financial and economic crisis, are common to many other sectors.

However, because of its specificities, the construction sector is also facing further strong concerns that are undermining its competitiveness and its long term sustainability, by affecting both companies and workers. Construction is a highly labour-intensive industry and, contrary to the other industries, the « final product », i.e. buildings, bridges, roads, etc. cannot be moved and therefore the mobility of companies and workers within the Internal Market plays a crucial role.

The financial and economic crisis significantly increased the competitive pressure on companies and thereby focussing the competition on the « lowest price » rather than on innovation, expertise and quality criteria. This situation, combined with imperfections and uncertainties in the legal framework has led to an increase in unfair forms of competition and social fraud.

In the long term, this is a lose-lose model : companies are no longer able to compete with each other on equal terms, workers' rights are trampled, consumers get lower quality products and governments lose billions of euro annually in revenue (through un-paid social security contributions and taxation).

In the light of these developments, the European social partners of the construction industry (EFBWW and FIEC) have decided to submit to the European Commission a list of practical proposals, which, if implemented, could effectively lead to a level playing field in the sector.

Such proposals are listed and explained in the following pages and EFBWW and FIEC are willing to provide their expertise for their practical implementation.

B. Joint proposals of the EU sectoral social partners of the construction industry to the European Commission

1) Ensuring an effective and efficient implementation of the « Enforcement » Directive (2014/67/EC)

One of the roles of the European Commission is to ensure the timely and proper implementation of the EU legislation in the various Member States. In this respect it provides useful guidance to them, under various forms. However, the specificities of the various sectors concerned imply that the social partners can also provide an important added value to the process thanks to their practical knowledge and expertise. Unfortunately, as regards the implementation of the « Enforcement of Posting » Directive (2014/67/EC), according to the information received from our affiliates in the various countries, only very few of them have been involved so far by the concerned national authorities in such implementation process.

The implementation of the provisions defined in Art.9 of the « Enforcement » Directive on « Administrative requirements and control measures » are of significant importance for EFBWW and FIEC, in particular as regards the fact that Member States can, under some conditions, impose « *other administrative requirements and control measures in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient* ».

EFBWW and FIEC therefore ask the European Commission to:

- Explicitly recognise, as underlined by the case law of the European Court of Justice, that the fight against social fraud is an “overriding reason of public interest” and that Member States can take the necessary measures in this respect, in accordance with their national traditions and structures.
- Play a more balanced role in ensuring a correct implementation and application of the « Enforcement » Directive (2014/67/EC), with the direct involvement of the national social partners in the implementation phase of the Directive.
- Facilitate and promote, with the appropriate technical and financial support, the development of bilateral or multi-lateral actions/collaborations (for ex. for more strict and efficient controls in the country of origin) between the concerned stakeholders

2) Improving the practical application of the « Social security » Regulation (883/2004)

The temporary cross-border service provision and the difficulties in undertaking efficient controls in a highly complex and mobile sector such as construction imply that these controls are even more important in order to avoid social fraud and abuses, which have a significant negative impact amongst others on the national social security systems. At the EU level systems have been put in place in order to facilitate the exchange of information between administrations (for ex. the EESSI - Electronic Exchange of Social Security Information – or the IMI – Internal Market Information system) but these need to be further developed and improved.

In this framework, the correct use of the A1 forms and of the status of self-employed are key factors.

At European level, it is absolutely vital to introduce a watertight monitoring system to prove that social security contributions for the workers concerned are being correctly and fully paid in their country of origin.

The current A1 forms are inadequate and facilitate fraudulent practices. According to European case law, the legal validity of an A1 declaration cannot be questioned by a receiving Member State and this is highly problematic in cases of frauds committed, as such frauds would thereby be committed under cover of the legitimate A1 declarations issued.

In the context of temporary cross-border posting, the employment status of an employee or self-employed person is determined in the country of origin and is a key factor in calculating social security contributions. However, a Member State can only amend the employment status for the purpose of determining the employment conditions but not for the social security contributions.

The forthcoming assessment of the « Social security » Regulation (883/2004) offers a unique opportunity to address some of the above mentioned concerns.

EFBWW and FIEC therefore ask the European Commission to:

- Reduce the period of validity of the A1 forms, for example to 6 months, in order to be able to check more regularly the reality behind them.
- Improve the reliability of the A1 forms (for ex. by adding the picture and a unique identification of the worker, the identity of the employer).
- Allow the national authorities of the host countries to reclassify the A1 form, based on a rebuttable presumption that the A1 form could not reflect the reality of "posting".
- Study and develop a system for improving the traceability of the activities of a worker performed outside his/her « country of origin » (amongst others in order to be able to better determine the « habitual place of work »).
- Consider the setting up of a derogation option to the main country-of-origin principle foreseen in the current "Social security" Regulation (i.e. payment of social security contributions in the "country of origin"). Such a derogation would allow the possibility of setting up a mechanism were the due social security contributions are collected within the host countries by the national authorities and afterwards transferred to the national authorities of the sending countries. This mechanism should be connected to the prior notification of "posting". The member states should be able to agree such a derogation via bilateral agreements.¹

3) New tools to improve the control of workers and companies

In order to create more transparency of the workplaces and improve rapid check and controls, it would be very useful if all worker and companies would have a unique European registration number. The unique social security and business number should allow a quick identification (such as the current IBAN) and national databases must be interconnected with each other.

a) Towards a uniform European business register

At the moment, a company can be set up in any Member State and provide its services in any other country. The companies are constituted and registered entirely within the rules of the country where they are established while they can carry out their business abroad. The registration of a company takes place at national or regional/local level.

In a cross-border context the controls about the company registration details, such as its owners, activities, etc. can be extremely complicated and even when the information is available verifying whether or not they actually correspond with the reality can be problematic. This could result in the specific problem of "ghost or letterbox companies", which are established and dismantled in the blink of an eye. The current checks enabled by the IMI system can yield useful information. However, to work quickly and efficiently, it is very important that there is an adequate level of transparency from the outset, in particular in a cross-border context.

¹ The Swedish member of FIEC "Sveriges Byggindustrier – BI » disagrees with this proposal

To create more transparency about companies in the European Union, all companies should have a unique European business register number that makes them easier to identify and provides complete transparency concerning at least: (a) the company's founders, (b) the company's legal representatives, (c) the company's address, (d) the paid-up initial capital, (e) the company's business, (f) the VAT number, (g) the necessary attestations and certificates and (h) the number of workers. This information must be fully available at all times and properly verified for authenticity.

The data must be kept in a register, accessible to the national authorities, which contains standardised information.

b) Towards a uniform European social security ID number for all workers

Within the framework of the Social Security Regulation 883/2004, there is scope for creating a uniform social security number for every worker in the European Union. Such a uniform system, coupled with a transparent database containing properly verified data, would make it easier for inspection services to check whether and how a worker in a particular country is insured. It is extremely important that the data included is true and accurate.

To create more transparency around workers in the European Union, all workers should have a social security number that makes them easier to identify and provides complete transparency concerning at least: (a) the full identity of the worker, (b) the full identity of their employer, (c) the worker's employment status, (d) an overview of all social security contributions actually paid and their specifications, (e) the necessary attestations and certificates and (e) in case of "posting" a copy of the original "A1 certificate". This data must be fully accessible at all times and properly verified for authenticity in the country of origin.

The data must be included in a register accessible to all inspection services, which contains standardised information.

4) Other issues of common concern

a) Determining a maximum duration for « Posting » ?

The « Posting of workers » Directive defines a « posted worker » as « *a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works* » without specifying a maximum duration. This situation is an open door for abuses. An indication about such a limit is provided in the « Social security » Regulation (883/2004), i.e. a maximum of 2 years, but it does not correspond to the reality of « posting » where the duration is in most cases much shorter.

EFBWW and FIEC have had discussions regarding the possibility of determining a maximum duration for « Posting », for example by aligning it with the duration of a specific worksite or with the taxation rules and consider that the issue of the duration of the temporary nature of « Posting » needs to be addressed at EU-level.

b) EU module for « preliminary declaration » (on a voluntary basis) for « posting »

Since the very first discussions about « posting » EFBWW and FIEC considered that a « preliminary declaration » was a crucial instrument needed by the authorities in the « host country » for undertaking efficient controls.

Such an instrument figures amongst the control measures mentioned in the « Enforcement » Directive (Art.9) that Member States may decide to apply.

EFBWW and FIEC consider that within the current IMI system, the European Commission could include a module containing a «prior declaration» in the event of « posting ». This would enable every company to indicate, for each « posting »:

- 1) the place of employment
- 2) the nature of the activity
- 3) the address of accommodation of the workers
- 4) the start and end date of the posting
- 5) the address of the workplace(s)
- 6) the full identity of the sending company
- 7) the full identify person responsible within the host country and the country of employment
- 8) the number of employed posted workers
- 9) the full identify of the employed posted workers and their employment relationship
- 10) the identification of the direct contractor

The European Commission could offer such a harmonised EU module to be used by the Member States on a voluntary basis.

c) Temporary agencies

The evidence on the field shows that a large share of forms of cross-border social fraud in « posting » occurs within a triangular relationship of companies, where temporary employment agencies simply supply workers and have no core business in the sector concerned (labour supply only companies). Such practices are strictly regulated or even forbidden in some Member States, but their control is extremely difficult as they are often based on schemes which are at the border of what is legal and what is illegal. Temporary agency work is currently covered by the « Posting » Directive, but also by Directive 2008/104/EC on « temporary agency work ».

Under the latter Directive, temporary agency workers are entitled, during every assignment with a user undertaking and from the first day of the assignment, to general working and employment conditions that are at least equal to those that would apply if they had been recruited directly by that undertaking to perform the same job. This is not necessarily the case when temporary agency workers are covered by the « Posting » Directive.

EFBWW and FIEC therefore consider that there is a need for a better legal clarity regarding the position of temporary agency workers in the framework of « posting ».

EFBWW and FIEC therefore ask the European Commission to assess:

- The possibilities of defining a maximum duration of « posting ».²
- The elaboration of a EU harmonised module for « preliminary declaration » for « posting », to be used by Member States on a voluntary basis.
- How to provide legal clarity as regards the position of temporary agency workers in the framework of « posting ».

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Created in 1905, FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players",

The EFBWW is the European trade Union Federation for the construction, wood, furniture and forestry sector. The EFBWW represents blue and white collar workers from 76 national trade unions in 34 countries

² The Swedish member of FIEC "Sveriges Byggindustrier – BI » disagrees with this proposal