The free movement of workers in Europe
Outstanding problems

The free movement of workers in Europe
Outstanding problems

I. Introduction

Ever since the Treaty of Rome was signed, European citizens have had the right to go to work in other member states of the European Community. The first legal foundations for this were laid down back in 1968. These legal foundations now apply to all citizens from the countries in the European Economic Area (with the exception of Switzerland). As the plans for creating the internal market were drawn up, accompanied by the dismantling of internal frontiers in Europe, the mobility of workers and free movement in general came to occupy a more central position in the socio-economic approach of the European institutions. In the meantime, we have come to see that by no means all the thinking on this subject was sound.

The opening up of the markets in Europe also brought with it some unexpected side effects. The risks of social dumping or environmental dumping emerged, while the relocation of production and competition waged in the sphere of taxation and social security have become commonplace. In this article I shall give a brief rundown of the issues involved in the free movement of workers which still require a solution. This rundown is not exhaustive and more detailed study and research is required.

I shall not be considering a number of other aspects of free movement here, such as:
- problems concerning the reunification of families,
- rights and obligations concerning employment agencies and unemployment,
- recognition of vocational training certificates, diplomas and other qualifications,
- tax questions or related rights and obligations.

The European Commission has on a number of occasions in recent years been forced to acknowledge that the expectations of the mid-eighties about mobility in Europe have not been realised, or only to a very modest degree. Less than 2% of the European working population is working in a country other than the country of origin. Figures for annual mobility are even lower. EU estimates refer to 600 000 workers who are working outside their home country. This mobility appears to be confined to middle management and other middle-ranking or senior executives, on the one hand, and to workers in the construction sector, on the other. This article covers the last-mentioned group.

II. Three key aspects

a. Social security

For more than 25 years, Regulation 1408/71 has governed the coordination of agreements on social security in Europe. The European Commission recently put forward a proposal for a root-and-branch revision of this regulation. This move was mainly prompted by the fact that the regulation has constantly grown in size as the result of numerous amendments and additions. The aim was, and remains, to achieve mutual coordination, not harmonisation, of social security regimes across the EU member states in order to regulate matters of cross-border concern.

The intention was further, and remains, to guarantee the social security of migrating workers and their relatives. The basic premise of this coordination principle is that, where migration takes place, only one social security regime applies. In general, the principle of the country of employment is taken to apply. This means that workers who become established elsewhere in Europe have the right to be treated as if they were citizens of the country of establishment.

There are a number of exceptions to the country of employment principle, the chief of which concerning workers sent to work in another member state for a specified period - on a posting. The argument in the past was that the costs and administrative burden outweighed the benefits of incorporating workers posted to another country for a short period in totally different social security systems. Indeed, very few rights can be derived from such short periods of employment.

b. Pay and conditions of employment

On the question of pay and conditions of employment, a legal vacuum prevailed for a long time. The country of employment principle applied in full to individual workers who went to work in a country other than their country of origin on their own initiative. The right of access to the labour market of another member state automatically implied the right to equal treatment with respect to terms and conditions of pay and employment. This type of work carried out across borders is of course the least problematic situation.

Where a lack of clarity existed in particular was in the case of posting - workers sent to work abroad for temporary periods. In some countries (such as Belgium), clear national laws existed in this area or, to be more precise, a combination of laws and collective agreements declared to be generally binding which must also be observed by foreign employers with respect to their posted workers. In other countries, the legal machinery for making the country of employment principle apply in this area as well was lacking until the mid-nineties.

Furthermore, there was still no legal framework at European level for obtaining the necessary international legal recognition for the various national provisions. As a result of persistent strong pressure by the organisations affiliated to the European Federation of Building and Woodworkers, with the support of the ETUC, in 1996 Directive 96/71 came into force, whereby the country of employment principle applies in the case of posting where this is laid down in national legislation or collective agreements. The scope of application of this Directive is for the time being confined to the construction sector, however; a broad definition of construction is used in the Directive.

c. Visas, residence and work permits

A number of directives and regulations have been drawn up with the object of promoting free movement of workers in general by sweeping away the restrictions on travel, establishment and residence. The legal provisions developed since 1968 (including Directive 68/630 and Regulation 1612/68) will shortly be adapted to the case law which has developed in the intervening period. One major stumbling block for some time now has been the freedom of movement of non-EU citizens. The European Commission has also come up with new proposals in this connection. The principle currently being upheld is that persons working within the EU must enjoy free movement, whatever their country of origin.

III. Some categories

1. Workers who are EU citizens

The situation of EU workers centring on the three aspects which we referred to earlier is in theory totally clear-cut.

- In the case of definitive migration for work purposes, the country of employment principle applies to social security ("lex loci"). The same principle also applies to temporary work in a country other than the land of establishment, except where recourse is made to the exemption contained in Regulation 1408/71 ("posting"). Exemptions are deemed to be applied for in the country of origin. Forms E 101 and E 102 must be submitted in order to obtain an exemption from paying social security contributions in the country of employment. The maximum duration of posting is 12 months, with the option of an extension for up to an additional 12 months.
- For pay and conditions of employment in the case of definitive migration for work purposes the country of employment principle also applies; discrimination on grounds of nationality is prohibited.
  Posting - work carried out temporarily in another member state - is covered by the provisions of European Directive 96/71. What these provisions boil down to is that the country of employment principle applies to a hard core of conditions of pay and employment, provided that they are laid down in law or collective agreements. But the transposal of this directive into national law does not necessarily result in the same situation in all European countries. It depends very much on the strength of the national legislation and national collective agreements and whether and to what extent these provisions have to be observed (what matters come under "ordre public"?).
- As a consequence of previously-adopted European laws on the free movement of workers, in principle no further national requirements are permitted in the sphere of work and residence permits for EU workers.

2. Workers from third countries

Workers from third countries are understood to be those who do not have EU nationality, divided in those already working in the EU (2.1) or those for whom an application is pending to be able and authorised to work in the EU (2.2).

2.1 Workers from third countries already legally present and working in the EU.

- For social security purposes, where these workers are working in an EU country other than the "normal" country of employment, they are deemed to be in a comparable situation to EU workers. The recently proposed revisions to Regulation 1408/71 in this area aim to incorporate third-country nationals already working in the EU, and therefore already insured in a system of one of the EU member states, into the existing coordination arrangements.
- For conditions of employment, treatment on a par with EU workers also applies.
- The treatment of third-country workers in the case of posting, as regards the additional requirements that can be applied by the countries of temporary employment, is the subject of a new proposal by the European Commission (COM-1999-3). The proposal is based on the premise that workers from third countries, once working within the EU borders, can no longer be subject to additional requirements concerning visas, residence and work permits if they carry out temporary employment assignments in another EU country.

2.2 Workers from third countries not yet working in the EU

- The situation for this category of workers is not yet sufficiently clear. Definitive permission (e.g. on grounds of an economic need in an EU country) leads to work migration with the application of the country of employment principle to social security. Temporary permission without incorporation in the social security system of the EU member state concerned (e.g. on the basis of bilateral agreements between an EU member state and a third country) can create exemption situations in the sphere of social security which give rise both to unjustified unequal treatment and to a distortion of competition.
- The posting directive states explicitly with respect to the conditions of pay and employment of third-country workers who come to work in the EU on a temporary basis that "Undertakings established in a non-member state must not be given more favourable treatment than undertakings established in a member state." (article 1.4, Directive 96/71).
- For third-country workers, access to the national territory of an EU member state, residence and the right to work remains a national matter.
  In recent months the question of national sovereignty in this area has been a focus of debate, partly in the wake of the crisis in the Balkans. It seems inevitable that a common policy on work migration from third countries to the EU will have to be devised for the future.

3. Self-employed workers

There is no clear and decisive definition in the EU of the legal position and work status of self-employed workers. All European countries evidently have a large group of self-employed workers who do not themselves employ workers and who carry out a self-employed, liberal profession. We are not concerned with this group here.

More problematic is the position of workers who are defined in one member state as being self-employed, when in fact their work and the associated work relationship, according to the definitions applying in another EU country, come entirely under the definition of an employment contract. In the context of cross-border working this means that the self-employed status can be abused in order to circumvent the rules in force (relating to social security, working time, pay and other conditions of employment, safety, and contributions to collective benefits). The European Court of Justice is currently dealing with a number of issues raised in this area.

Focusing on the three aspects of cross-border working referred to earlier, it is necessary to draw a distinction between self-employed EU citizens (3.1), self-employed workers from third countries already legally resident in the EU (3.2) and self-employed from third countries who wish to migrate to the EU.

3.1 Self-employed who are EU citizens

- For this category, in the event that they work across borders within Europe, Regulation 1408/71 applies. This means that the country of employment principle applies to social security. However, in the case of temporary work abroad, similar to ordinary workers, use can be made of the exemption provision of the Regulation (old article 14). The question here, evidently, is whether a simple private insurance in the home country at that time is sufficient for the exemption to be admissible. For the time being, the answer to this question is in the affirmative. The period of temporary work may not exceed 12 months.

- For conditions of pay and employment, nothing has been established in practice. In some areas, such as safety legislation, a number of European countries also have obligations applying to the self-employed. However, the impression remains that self-employed working temporarily in another country are operating "free as birds". This obviously causes problems once their work falls entirely under the definition of an employment contract in the country of employment. The posting directive does not apply; the question is, however, the extent to which this directive, and in particular article 2.2 ("the definition of a worker is that which applies in the law of the member state to whose territory the worker is posted"), can be further extended and applied.
- This category is not subject to any permits; free movement is fully applicable and discrimination on grounds of nationality is prohibited.

3.2 Self-employed from third countries who are working legally in the EU

- Where this category of self-employed go to another member state to provide cross-border services for a temporary period, the provisions of Regulation 1408/71 apply (including the exemption) in the area of social security.
  In the proposals put forward recently by the European Commission in this area (COM-1999-3), the existence of an insurance policy which covers sickness or work accidents provides sufficient grounds for the self-employed to be exempted from joining the social security system of the country of employment.
- The situation for pay and conditions of employment is identical to that for category 3. l.
- At present, self-employed from third countries who are working legally in the EU are still subject to the national requirements and provisions relating to visas, work and residence permits. The European Commission wants to make this policy more flexible in this area in the member states by introducing an EC service provision card (proposal COM-1999-3 referred to above). A valid card issued in a member state means that the obligation to have a visa no longer applies and neither must an additional work or residence permit be applied for. These last proposals are still under discussion in the EP and the Council of Ministers.

3.3 Self-employed from third countries who wish to migrate to the EU

The situation for this group is totally unclear as the policy on allowing employees and the self-employed to enter a country for work purposes from outside the EU is a national matter. In many cases, the legal position of this category where they are given temporary permission to work in the EU is comparable to the situation of category 3.1 workers. It is clear that the coordination principles in the social security field are not tenable for this category.

4. Frontier workers

Frontier workers are those who travel across frontiers on a daily basis from their place of residence in one EU member state to their workplace in another EU member state.

The legal position of frontier workers has led to problems in a whole range of areas; the workers have been at risk of double payments, from not being covered by the full range of social security and health care benefits, whilst tax and such matters have continually given rise to confusion. Most agreements on cross-frontier work have taken the form of bilateral agreements between member states.

- Generally speaking, frontier workers are incorporated in the social security system of the country of employment; with exemptions from paying contributions for some elements of the system. Depending on the situation in the country of employment, the range of rights

which results can substantially differ from that applying in the country of residence. A constantly rising number of legal proceedings are being. conducted on this front.
- For pay and conditions of employment, it is the country of employment principle which applies. In principle, unequal treatment in this area is unlawful.
- For frontier workers in the EU, no additional requirements concerning visas or permits apply.

The question arises, clearly, as to what happens when this frontier work is carried out on a temporary basis. Does the social security exemption or the country of employment principle apply in that case? In practice, the worker in such situations continues to belong to the social security system of the country of origin where he lives. But what will happen with the conditions of pay and employment will partly depend on the transposition of Directive 96/71 into national law.

5. Those not covered in the above categories

The above 4 categories are not exhaustive in covering every situation of cross-border work. We still have not considered the seasonal workers, the labour market position of refugees and/or asylum seekers and cross-border work via temporary employment undertakings or placement agencies. We do not have the space here to look at these categories in more detail. But there is some movement in this area in various EU member states; for example, concerning the issuing of temporary work permits to refugees or the conditions of pay and employment for those working for temporary employment undertakings or placement agencies. This area requires further study.

Before formulating some final conclusions in the last section (V), in the section below (IV) we shall consider some of the unintended side effects of the European legislation.

IV What are the outstanding problems?

Reading between the lines of the above paragraphs it is already possible to understand the areas in which problems arise. They can be roughly divided into problems to do with the absence of decisive legislation (1), problems stemming from an absence of control or from incorrect application - whether or not intentional- of the rules (2) and finally, problems arising from the unintended side effects of the provisions developed (3).

In the past, the affiliated organisations of the EFBWW have regularly called for attention to be paid to these problems. Proposals have been made for improvements and/or solutions to the problems concerned. We shall confine ourselves here to giving just a few examples as it is not possible to set out an exhaustive review of all the problems which can arise.

1) After the adoption of the posting directive, as well as the necessary steps to transpose it into national law, a number of questions remained unanswered in the legal sphere:
   - a legal framework for subcontracting;
   - linked to this, definite rules governing what is known as chain responsibility;
   - a conclusive European definition of the concept of self-employment that clearly distinguishes between the liberal professions and other forms of legitimate self-employment, on the one hand, and the bogus self-employed status, on the other;

- in the future, the fact that the deadlines applying for Regulation 1408/71 and Directive 96/71 differ could possibly lead to friction. The posting directive makes provision for exemption from application of the country of employment principle to terms and conditions of pay and employment for one month (after consultation with the social partners). The Regulation, meanwhile, provides for an exemption in social security matters of one year;
- there is no agreement at European level on the precise dividing line between provisions which must be considered as coming under social security and arrangements that can be considered as the outcome of part of collective bargaining. In particular, in the debate on supplementary pensions (in some countries regarded as deferred pay and therefore forming part of terms of employment) there seem to be differences of interpretation in this area.
  The question, then, is whether the Regulation (i.e. possible exemption) or the Directive (country of employment principle) applies.

2) The absence of controls and incorrect application of the rules is an oft-repeated complaint in our sectors; in most cases this concerns:
- registration of posted workers in both the country of residence and the country of employment. We know from practice that this registration is often not carried out or only insufficiently; this has been confirmed by an internal study by the European Commission;
- the origin and the bona fide character of the forms required. Forms E101 and E102 regularly appear to have been photocopied and not to come from the competent authorities;
- checks on the deduction of social contributions (and therefore on compliance with the coordination principles of Regulation 1408/71) are not conducted systematically;
- although a number of references are made in European legislation in this area to the need for the competent authorities in the member state to cooperate (some texts refer to cooperation between government bodies and others even to acting as if implementing their own laws), this cooperation is only very thin on the ground.

3) Side effects and creative attempts to evade regulations often go hand in hand:
- our experience has shown that posting is in some cases not based on an actual employment contract in the country of origin, but exists only on paper.
  In such cases, the employment contract has only been drawn up and signed with the object of being able to post the worker and exploit the exemptions which (may) be associated with a posting.
- a variation of this is the setting up of mailbox firms or other bogus arrangements in an EU country with a low level of social security. Few if any checks on the existence of these firms are made in the country of establishment and it is no easy task to do so from the country of employment.
- self-employment as a means of getting around obligations and rules; for some years the phenomenon of bogus self-employed status in the UK has been notorious, allowing a host of rules (on working times, safety laws, pay, etc.) to be circumvented.
- another possibility for getting out of the obligations to emerge in recent years is the so-called flight from collective agreements; firms operating in the construction industry no longer call themselves construction firms. Particularly in the case of cross-border postings, this can lead to situations in which rules are evaded and whether or not collective agreements apply is called into question.

V. *Conclusions*

In this note, we have sought to give an overall picture of the current situation in the European Union with respect to free movement of workers. From the foregoing, it can be concluded that this free movement is falling far short of meeting the objective of equal treatment of workers which is frequently referred to in the European treaties.

The organisations affiliated to the EFBWW have in the past always argued for as consistent as possible an application of the country of employment principle. This plea is reiterated at the end of this note. Exceptions to the country of employment principle are only acceptable where there are important reasons in favour. Such exemptions must have conditions attached and be subject to checks.

In the case of cross-border postings, the social partners of the countries concerned are the most appropriate parties for adopting rules and judging the relevance of the agreements in force.

Furthermore, the national and European authorities need to ensure that their legislative and executive tasks are better adapted to the situation created by the introduction of free movement in Europe.

Jan Cremers, 1 September 1999