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*Joanna Ryszka**

"SOCIAL DUMPING" AND "LETTERBOX COMPANIES" – INTERDEPENDENT OR MUTUALLY EXCLUSIVE CONCEPTS IN EUROPEAN UNION LAW?

Abstract:
This article investigates two interesting phenomena which exist within the framework of the European Union (EU) integration process, i.e. "social dumping" and "letterbox companies". Taking into account recent EU legislative changes and commentaries in the available legal literature, it contends that the EU's institutions and its Member States are aware of some negative effects that these phenomena may have for attaining one of the EU's basic aims, that of a "highly competitive social market economy", as provided in Article 3(3) (ex 2, as amended) of the Treaty on the European Union. The EU should be understood as being not only focused on the implementation of the Internal Market freedoms, but also the protection of social rights. "Social dumping", and to a certain extent also "letterbox companies", reduce the level of this protection. Posting of workers is a good example of an EU integration area where "social dumping" and "letterbox companies" occur on a quite large scale and create some real practical problems. If we can clearly understand the concepts underlying these phenomena and their possible relationships, it would be easier to find a solution to reduce their negative effect on the protection of social rights. This article researches these issues and presents possible solutions to problems they give rise to.

Keywords: EU Internal Market freedoms, letterbox companies, minimum wages, posting of workers, social dumping

INTRODUCTION

Economic integration within the context of the EU was originally focused on creating a common market with free movement of goods, persons, services and capital. Social issues did not receive much attention in this context. There was however a danger that

* Assistant professor, Chair of International and European Union Law, Faculty of Law and Administration, University of Opole, Poland (jryszka@uni.opole.pl). The research for this paper has been supported financially by the Polish National Science Centre (decision no. 2015/17/B/HS5/00419).

"social dumping" could occur, whereby Member States "with inferior employment conditions gained an unfair advantage in the common market."[1] "Social dumping" is regarded as an abusive practice within the framework of today's EU Internal Market, by which some countries, or companies in some countries, in order to gain a competitive advantage, undercut or evade existing labour and social standards. Sometimes such abusive practices are initiated by "letterbox companies", which do not carry out a real economic activity in a Member State of registration, and therefore evade its regulations on labour law, tax law or social security systems.[2] Such undertakings clearly use the difference in these regulations as a competitive element, which at first sight may seem to be normal in a market economy. However, if such activities are not controlled, this can lead to deterioration in the level of protection of social rights and to so-called "social dumping". The question arises: who should be responsible for carrying out such controls – the "host" or "home" Member State, or maybe both of them? It can be argued that effective control will certainly require action on the part of both of the above-mentioned states. One can assume – or at least try to suggest – that such an effective control would decrease the occurrence of "letterbox companies" in the Internal Market, and that as a result labour and social standards would not be evaded and "social dumping" would cease to exist. But perhaps this argument should be put in a different way: If differences in social standards between Member States did exist, "social dumping" would also not occur. So there would be no reason to set up "letterbox companies" in order to evade labour and social standards.

Does this mean that "social dumping" and "letterbox companies" are two interdependent and interrelated concepts in EU law? "Social dumping" can have two aspects. One is connected with the so-called "race to the bottom" and regulatory competition between Member States, and the second concerns the competition between employees taking place within each Member State's regulatory framework.[3] Member States may, however, choose not to relax their labour standards, thus avoiding any such race to the bottom. Significant differences in labour and social standards can, in effect, lead to a situation whereby host-state companies will not depend on local workers, but rather on posted workers, which may put pressure on the wage scale and working conditions in this state. Thus one should begin by trying to answer the question whether the causes of "social dumping" really have their roots in a weak national enforcement of EU labour law,[4] or with weak control over the activities of "letterbox companies".

[1] R. Hyman, *Trade Unions, Lisbon and Europe 2020: From Dream to Nightmare*, 28(1) The International Journal of Comparative Labour Law and Industrial Relations 5 (2012), p. 20.

[2] With respect to the current scale of those two phenomena, compare for example: *Commission Staff Document: Impact Assessment, Revision of the legislative framework concerning the posting of workers in the context of the provision of services*, SWD (2012)63; and *Report from the Commission to the European Parliament and the Council on the State of the Union Road Transport Market*, COM(2014) 222 final.

[3] H. Verschueren, *The European Internal Market and the Competition Between Workers,* 6(2) European Labour Law Journal 128 (2015), p. 134.

[4] ETUC, *Free movement, yes! Social dumping, no! Workers in Europe are suffering from social dumping,* 2015, available at: http://www.etuc.org/sites/www.etuc.org/files/publication/files/flyer_social_dumping_en_06.pdf (accessed 30 May 2017).

In this article three issues will be discussed. Firstly, the problem with definitions of "social dumping" and "letterbox companies" under EU law will be set out and possible sources of confusion will be analyzed. Secondly, one specific area of the EU integration has been chosen to illustrate the kinds of practical problems those phenomena create. Attention will be focused on the posting of workers, where "social dumping" and "letterbox companies" occur on quite a large scale and bring about some real practical problems. Thirdly, the most important EU legal activities in the field are set out, the main aim of which is to prevent and counter "social dumping" and "letterbox companies". A thorough knowledge of these issues, both from the theoretical and practical points of view, allows for identification of the possible linkages between them. Finally, in the conclusions some considerations are presented in order to determine whether we can treat these phenomena as interdependent and interrelated, or as mutually exclusive, and whether this is relevant to the process of is prevention, i.e. does combating one of them help fight against the other?

1. WHAT A "LETTERBOX COMPANY" MEANS FOR THE EU INTERNAL MARKET PARTICIPANTS

In order to determine what should be understood by the term "letterbox company" it is necessary to analyze the notion of "establishment" in the EU Internal Market, which is important for answering the question whether "letterbox companies" are covered by the freedom of establishment provisions. This section will demonstrate that if a company wants to be protected by the provisions of the freedom of establishment clause it must provide a real and genuine activity in one of the EU Member States. Hence it is necessary to define a "letterbox company" in order to determine if its activities are covered by EU law on the Internal Market.

1.1. The concept of a "letterbox company" – is there a legal definition?

At the outset it must be stressed that there is no legal definition *per se* of a "letterbox company". In the legal literature we can find that "letterbox company" is a company which carries out very little or no activity in the place where it is registered, and is often associated with activities that are, if not criminal, then at least dubious.[5] Recital 37 of the preamble of the European Parliament and the Council Directive 2006/123/EC on services in the Internal Market[6] states only that "a mere letterbox company does not constitute an establishment." From the EU institutional perspective, the European Commission understands "letterbox companies" as "companies established in a Mem-

[5] K.E. Sørensen, *The fight against letterbox companies in the Internal Market*, 52(1) Common Market Law Review 85 (2015), p. 87; P. Paschalidis, *Freedom of Establishment and Private International Law for Corporations*, Oxford University Press, Oxford: 2011, pp. 2-41.

[6] [2006] OJ L 376.

ber State for tax purposes, where they do not carry out their administrative functions or commercial activities (…)."[7] As we can see, the main and common element in these definitions is the lack of "actual pursuit of an economic activity" in the state of incorporation. The Court of Justice of the European Union (CJEU) seems to understand "brass-plate companies" as companies which lack any "real connection with the State of formation".[8] In the context of cases on taxes the CJEU refers to "wholly artificial arrangements" aimed at circumventing the application of the legislation of the Member State concerned.[9] The "wholly artificial arrangement" means companies with no "real connection with the state of formation", that is, a company "not carrying out any business in the territory of the Member State in which its registered office is situated",[10] characterized by a "fictitious presence".[11]

Taking into account the above-mentioned considerations a "letterbox company" is a company formed in accordance with the law of the Member State where it has its registered office, central administration, or principal place of business, but without carrying out any economic activity in the place where it is registered. So it seems that its activity is not forbidden by EU law unless its activities take the form of abusive practices. It should therefore be underlined that although not forbidden, "letterbox company" activities are generally doubtful as to their morality and compliance with the spirit of the relevant legal rules, for example tax or social regulations.

1.2. The notion of "establishment" in EU law

Freedom of establishment is provided for in Article 49 of the Treaty on the Functioning of the European Union (TFEU) (ex 43, as amended), but there is no legal definition of the concept of "establishment". Therefore, we have to use the CJEU case law to understand the notion. The CJEU has emphasized that the concept of establishment should involve "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period."[12] The CJEU further stated that the concept of establishment should be understood as allowing EU natural and legal persons to participate "on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community (…)."[13] As we can see,

[7] Report from the Commission, *supra* note 2, point 16.

[8] Case C-167/01 *Inspire Art* [2003] ECR I-10155, points 95-96, 102 and 137-139.

[9] Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, point 51; Case C-311/08 *Societe de Gestion Industrielle* [2010] ECR I-00487, points 65-66.

[10] Case C-341/04 *Eurofood* [2006] ECR I-3813, point 35.

[11] Case C-73/06 *Planzer Luxembourg* [2007] ECR I-5655, points 62-63.

[12] Case C-221/89 *Factortame II* [1991] ECR I-3105, point 20. However, it has been stressed that the situation of letterbox companies is different than that resulting from the Factortame case, because it refers to the pursuit of an economic activity in another member state for an indefinite period (presumably, therefore, the host state). Letterbox companies concern rather companies that do conduct an economic activity in another Member State, and the problem is they conduct no activity in their home state.

[13] Case C-55/94 *Gebhard* [1995] ECR I-4165, point 25.

the concept of establishment is generally characterized by the following features: cross border, permanence, and actual pursuit of an economic activity. The CJEU argued further that actual establishment should be understood as meaning that the company should have not only its own premises, but also some level of staff and equipment, as well as commercial activity connected with the establishment.[14] It is worth noting that in the road transport sector 'an effective and stable establishment' also means premises in which companies keep core business documents, as well as premises, where they have at their disposal vehicles registered in conformity with the legislation of that Member State.[15]

To find out which companies are covered by Article 49 TFEU (ex 43, as amended) it is necessary to refer also to Article 54 TFEU (ex 48, as amended), which states that in order to benefit from the freedom of establishment, "companies or firms" have to be formed in accordance with the law of a Member State and have their registered office, central administration, or principal place of business within the Union. Article 49 TFEU (ex 43, as amended) contemplates two forms of establishment. The first one, called "primary establishment" is understand as the right to set up and manage an undertaking in another Member State. The second one, called "secondary establishment", means the right to set up agencies, branches or subsidiaries by nationals of one Member State in the territory of another Member State.[16] Some practical problems arise when a company wishing to open a branch in another Member State is not commercially active in the State in which it was formed, but instead plans to be active in the Member State in which its branch is to be located. The main question in such cases is whether such a company is still covered by the Treaty provisions on the freedom of establishment. Another issue is connected with the question of a host Member State's powers to register such companies. We can mention here such famous cases as C-212/97 *Centros* or C-167/*01 Inspire Art*.[17] In *Centros*, the CJEU had to answer the question whether a refusal to register a branch of a private limited company registered in the UK, where it did not trade (its intention was to trade in Denmark), was an obstacle to the exercise of the freedom of establishment. According to Danish authorities the sole purpose of the company's formation was to circumvent the application of Danish national law governing the formation of private limited companies, and therefore it constituted abuse of the freedom of establishment. The CJEU held that it is immaterial that the company was formed in one Member State only for the purpose of establishing itself in a second Member State where its business is to be conducted. The fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse, even if that company conducts

[14] Case C-196/04 *Cadbury Schweppes* [2006] ECR 7995, point 67.

[15] Article 5 of Regulation 1071/2009 of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator, [2009] OJ L 300.

[16] C. Barnard, *The Substantive Law of the EU. The Four Freedoms,* Oxford University Press, New York: 2013, p. 307.

[17] Respectively: [1999] ECR I-1459; [2003] ECR I-10155.

its activities entirely or mainly in the second State.[18] The CJEU stated that the host Member State is not allowed to deny a registration, but is able to exercise supervision over companies that are providing economic activities on their territory.[19] The host Member State is not therefore allowed to refuse registration of a company's branch just because this company does not conduct any business in another Member State in which it has its registered office. In *Inspire Art,* the Dutch authorities did not refuse to register a company's branch that was formed in the UK, but they did however require this branch to record its description in the Dutch commercial register as a "formally foreign company". Dutch law imposed further conditions on such "formally foreign companies" such as, for example, the minimum share capital and directors' liability.[20] This was treated by the CJEU as an unjustified barrier to the freedom of establishment.[21] The issue of setting up a secondary establishment has caused same practical problems connected with the genuine activities of companies in the state of incorporation. If those companies are acting with a view to circumvent legal, social, or fiscal regulations and the existence of abuse or fraudulent conduct can be proved, such companies are denied the right to benefit from the provisions on freedom of establishment.[22] Such a conduct can be dangerous not only for the functioning of the Internal Market as such, but also for its social dimension. When companies' activities concern the circumvention of social conditions, this can lead to deterioration in the protection of worker's rights. It can therefore become one of the premises of, or reasons for, the occurrence of "social dumping" in the Internal Marker, which will be discussed further in this article. This article also indicates specific interrelations between "social dumping" and "letterbox companies", which should prove that they are not mutually exclusive concepts. The question of the scope of protection of Article 49 TFEU (ex 43, as amended) has been also discussed by the CJEU in case C-210/06 *Cartesio*, and in the more recent judgment in case C-378/10 *VALE*.[23] They are, however, quite different in nature than *Centros* and *Inspire Art,* because they did not concern secondary establishment but a cross-border conversion.[24] The CJEU stated that in order to be covered and protected by the freedom of es-

[18] Case C-212/97 *Centros*, points 17-18.
[19] *Ibidem*, point 39.
[20] Case C-167/01 *Inspire Art*, points 22-33.
[21] *Ibidem,* points 104-105 and 135-140.
[22] *Ibidem,* point 134.
[23] Respectively: [2008] ECR I-9641, published in the electronic ECR.
[24] Practical problems connected with the transfer of a company's head office to another Member State can also be seen in such CJEU cases as: 81/87 *Daily Mail* [1998] ECR I-5483; C-208/00 *Überseering* [2002] ECR I-9919 or C-371/10 National Grid Indus [2011] ECR I-12273. *See also*: P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, New York: 2008, p. 807; S. Weatherill, *Cases & Materials on EU Law,* Oxford University Press, New York: 2012, p. 394; E. Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40(3) Common Market Law Review 661 (2003); P. Dyrberg, *Full free movement of companies in the European Community at last?,* 28 European Law Review 528 (2003); O. Mörsdorf, *The Legal Mobility of Companies within the European Union through Cross Border Conversion*, 49(2) Common Market Law Review 629 (2012); T. Biermeyer, *Shaping the Space of Cross-border Conversions in the EU*, 50(2) Common Market Law Review 571 (2013).

tablishment, the re-incorporation of a company must be connected with the intention of having an establishment in the host Member State.[25] As we will see, there will be no establishment and therefore no protection under Article 49 TFEU (ex 43, as amended) if a company is formed without any activities in the relevant Member State.[26]

2. WHAT "SOCIAL DUMPING" MEANS FOR THE EU INTERNAL MARKET PARTICIPANTS

In order to find out whether "letterbox companies" and "social dumping" are interrelated or mutually exclusive, we need to also look at the concept of the latter. This section discusses the different definitions of "social dumping" that can be found in the legal literature and in EU institutions' legal acts, in order to find out if they are similar or if they differ from each other. Separate attention is devoted to the overall pattern of EU integration, e.g. the principle of mutual recognition and its potential impact on "social dumping". The question is whether the application of mutual recognition in the area of social or labour law is possible, and if it could lead to "social dumping". This section will also consider whether the EU enlargement process may be associated with some concerns connected with the occurrence of "social dumping". Particular attention will be devoted to specific factors that can influence the occurrence of this negative phenomenon.

2.1. The concept of "social dumping"

It must be stated at the outset that there is no legal definition of "social dumping" in EU law. The European Commission understands "social dumping" as "the gaining of unfair competitive advantage within the Community through unacceptably low social standards."[27] The European Parliament understands "social dumping" as "a situation where foreign service providers can charge less than local service providers because their labour standards are lower."[28]

If we look for a definition in the legal literature, the one from M. Bernaciak is worth quoting. She defines "social dumping" as a "practice undertaken by self-interested market participants of undermining or evading existing social regulations with the aim of gaining a competitive advantage."[29] She also sees it as "a strategy geared towards the lowering of wage or social standards for the sake of enhanced competitiveness, prompted by companies and indirectly involving their employees and/or home or host

[25] Case C-210/06 *Cartesio,* point 109; case C-378/10 *VALE*, points 34-35.

[26] Sørensen, *supra* note 5, p. 93.

[27] *The European Commission Green Paper on European Social Policy*, COM(93) 551 final, point 6.

[28] *Posting of workers – part of the expected Labour Mobility Package,* European Parliamentary Research Service, September 2015, point 9, available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/558784/EPRS_BRI(2015)558784_EN.pdf (accessed 30 May 2017).

[29] M. Bernaciak, *Social dumping and the EU integration process,* ETUI Working Paper, 2014/6, p. 5.

country governments, and has negative implications in the social sphere."[30] It must be pointed out that according to this meaning the notion of "social dumping" relates also to the issue known as the "race to the bottom".[31] It may occur when in an area of free movement, one or more Member States unilaterally lower its/their social standards in an attempt to attract business from other states. This situation should be thus seen as a form of state policy, and not as a strategy of a single company.[32] According to J. Cremers "social dumping is an ideal way to save money, as it allows lowering of social security costs and avoidance of taxes. It means no employee costs for the original employer, no health and safety services, no wage indexation (…) and no trade union involvement."[33] This of course will only be the case if those standards are abandoned altogether, rather than just lowered. T. Krings points out that "especially in times of economic crisis, it may be tempting for firms to resort to dumping practices in order to save on costs. Such strategy would, however, be quite (…) detrimental to (…) long-term economic development."[34] It has to be stressed that such a strategy is very likely to be detrimental to workers' social rights as well. "Social dumping" can lead, for example, to growing unemployment, company bankruptcies, lowering of wages and working conditions in the host country, as well as the erosion of social standards in both the home and host countries.[35]

As we can see, "social dumping" can be understand as a form of state policy, but this is not the only possibility. It can also take the form of a strategy of a single company to take advantage of differentials in the social, labour or tax fields just to become more competitive. We have to bear in mind, however, that competitiveness is also one of the principles of the Internal Market, and it is quite natural "that rational profit-maximizing firms search for efficiency and lower costs at all times."[36] It is worth noting that "social dumping" should also be understand as practices/actions which are undermining the level of protection of the host Member States' workers, even if they are not

[30] M. Bernaciak, *Social dumping: political catchphrase or threat to labour standards?*, ETUI Working Paper, 2012/6, p. 6.

[31] C. Barnard, *Social Dumping Revisited: Some Lessons from Delaware* (Lecture at the ECSA's Sixth Biennial International Conference, 2-5 June 1999, Pittsburgh, USA), available at: http:/aei.pitt.edu/id/eprint/2222 (accessed 30 May 2017).

[32] C. Barnard, *Regulating Competitive Federalism in the European Union? The case of EU Social Policy,* in: M. Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hard Publishing, Oxford-Portland: 2000, p. 57; B. Bercusson, *The Lisbon Treaty and Social Europe*, ERA Forum, 2009/10, p. 103; T. Krings, *Varieties of social dumping in an open labour market: The Irish experience of large-scale immigration and the regulation of employment standards,* ETUI Policy Brief. European Economic, Employment and Social Policy, 2014/6, p. 1; K. Maslauskaitė, *Social competition in the EU. Myths and realities*, Studies & Reports, 2013/6, p. 20.

[33] J. Cremers, *Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping,* ETUI Policy Brief. European Economic, Employment and Social Policy, 2014/5, p. 3.

[34] Krings, *supra* note 32, p. 4.

[35] Bernaciak, *supra* note 30, pp. 22 and 24.

[36] Maslauskaitė, *supra* note 32, p. 325.

connected with unfair (economic) competition.[37] The question therefore concerns the extent to which such competition should be allowed to persist, and how much of a minimum "floor" should be in place to protect social rights. "Social dumping" seems to occur when companies' advantages result from such adverse practices as, for example, circumventing labour taxation, providing poorer working conditions, or paying lower wages.[38] Taking into account that such adverse practices could also be used by "letter-box companies" we should not treat such companies and "social dumping" as mutually exclusive. We can rather observe here a specific interrelationship.

2.2. "Social dumping" and application of the principle of mutual recognition

The main idea underlying the principle of mutual recognition is that "one can pursue market integration, while respecting 'diversity' amongst the participating countries."[39] This was set out by the CJEU, within the framework of the free movement of goods, in case C-120/78 *Cassis de Dijon*.[40] More recently, this principle has been also established in the field of free movement of services.[41] The case law of the CJEU indicates that mutual recognition reduces the scope of application of the host state legislation and strengthens the importance of home state legislation.[42] One can get the an impression that applying mutual recognition in the area of social law can lead to "social dumping". If a posted worker has his or her social rights protected in his or her home state, the host state's legislation must be applied only to the level of the minimum working conditions of the home state, as provided in Article 3(1) of the European Parliament and Council Directive 96/71/EC concerning the posting of workers in the context of the provision of services.[43]

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[37] T. Van Peijpe, *Collective Labour Law after Viking, Laval, Rüffert, and Commission v. Luxembourg,* 25(2) The International Journal of Comparative Labour Law and Industrial Relations 81 (2009), p. 103.

[38] Maslauskaitė, *supra* note 32, p. 46.

[39] J. Pelkmans, *Mutual Recognition: economic and regulatory logic in goods and services,* Bruges European Economics Research Papers, 2012/24, p. 2; Ch. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford University Press, New York: 2013, p. 33.

[40] Case C-120/78 *Cassis de Dijon* [1979] ECR 649, point 14.

[41] For example: Case C-355/98 *Commission v. Belgium* [2000] ECR I-1221, point 37; or case C-288/89 *Mediawet* [1991] ECR I-4007, point 13. *See also*: M. Horspool, M. Humphreys, *European Union Law*, Oxford University Press, New York: 2014, p. 277.

[42] Case C-445/03 *Commission v. Luxembourg* [2004] ECR I-10191, point 21; case C-244/04, *Commission v. Germany* [2006] ECR I-00885, point 31; and case C-168/04 *Commission v. Austria* [2006] ECR I-09041, point 37.

[43] [1997] OJ 1997 L 18. Those terms and conditions entail: a) maximum work periods and minimum rest periods; b) minimum paid annual holidays; c) the minimum rates of pay, including overtime rates; (this point does not apply to supplementary occupational retirement pension schemes); d) the conditions of hiring-out of workers, in particular the supply of workers by undertakings providing temporary employment; e) health, safety and hygiene at work; f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children, and of young people; g) equality of treatment between men and women and other provisions on non-discrimination. A quite strict interpretation of its application has been provided by the CJEU, for example, in case C-346/06, *Rüffert* [2008] ECR I-1989, point 33, and in case C-319/06 *European Commission v. Luxemburg* [2008] ECR I-4323, points 31-32.

If however there are no such regulations and the home state social standards are poorer than those of the host state, this could lead to a situation whereby those standards would be pushed to the lowest common denominator. The protection of workers from the host country would therefore be weakened. Such lower social standards could encourage the activities of such "letterbox companies", which would be interested in reducing labour costs by hiring workers whose level of social protection is weak. These workers would thus become victims of such "letterbox companies", because the protection of their labour and social rights could be reduced. Its activities could therefore further "social dumping:, that is, the practice of undermining or evading existing social regulations with the aim of gaining a competitive advantage. This situation indicates that 'social dumping' and 'letterbox companies' are not mutually exclusive and can be interrelated to each other. We may here recall the thesis of the CJEU's judgment in C-49/98 *Finalarte,* that the application of the host state regulations will be permitted when it provides an additional protection conferring a real benefit, which significantly adds to workers' social protection.[44] The question is, however, what the scope of this 'additional protection' should be? Should the host Member State be able to apply all of its labour regulations if it would "significantly add to workers' social protection"? This would probably prevent "social dumping", because the standards of social protection of the host and home country will be at a comparable level. On the other hand, one of the most important differences between "migrant worker" and "posted worker" could be affected, that is the scope of labour law regulation applied to them. Migrant workers are subject to the labour law regulations of the host Member State in the same way as its citizens. This is because Article 45 TFEU non-discrimination principle is applied to them. Posted workers are mainly subject to the home-country labour law regulations, apart from host state's minimum working conditions referred to in Article 3(1) of Directive 96/71/EC. So not all labour regulations are to be applied, even if this would be more beneficial for the posted workers.[45] The situation would seem to be different if the above mentioned provision were modified according to the principle "equal pay for equal work in the same place", as proposed by the European Commission.[46] However it also seems that even if this principle were applied, there would still be a difference in the scope of application of the home and host states' national provisions with respect to "migrant workers" and "posted workers". According to Article 12(1) of the European Parliament and Council Regulation No 883/2004 on the coordination of social security

[44] Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others*, points 45 and 53. For a more recent case, *see* C-396/13 *Sähköalojenammattiliitto*, point 45.

[45] Article 3(1) of the Directive 96/71/EC has been interpreted by the CJEU as a ceiling rather than the floor in, for example, the *Rüffert* case ("that provision cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection", Rec. 33). *Cf also* Van Peijpe, *supra* note 37, p. 99.

[46] Proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, submitted on 8 March 2016.

systems,[47] posted workers continue to be subject to the legislation of the home Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he or she is not sent to replace another person.

Taking into account the above-mentioned considerations, application of the mutual recognition principle in the framework of social and labour law can lead to "social dumping", unless we are talking about posted workers and minimum working conditions under Article 3(1) of Directive 96/71/EC. This however would not be the case if the host Member State will be able to apply its social and labour law if it "significantly adds to workers' social protection". As we can see, different approaches should be taken into account in any discussion of "social dumping" and "letterbox companies". Not only is it important that the above-mentioned companies are "searching for competitiveness", but so too is the scope of national power to pursue socio-economic goals in the shaping of labour relationships.

3. DOES THE EU ENLARGEMENT PROCESS HAVE AN INFLUENCE ON THE OCCURRENCE OF "SOCIAL DUMPING" AND "LETTERBOX COMPANIES"?

It should be emphasized that the EU enlargement process may be associated with some concerns connected with instances of "social dumping". This is mainly related to the fact that candidate countries are usually characterized by a lower level of economic development than the Member States. This can lead to quite large differences between the national labour laws and social security systems of the respective states. This was also the case in the extensive EU enlargement involving the accession of Central and Eastern European Countries (CEECs). The Introduction of transitional periods as a result of this enlargement, restricting the access of the candidate countries' workforce to the labour markets of the then-fifteen Member States, can be treated as one of the manifestations of a fear of "social dumping" in the EU. Those transitional periods constituted a kind of temptation to circumvent these regulations through the use of the posting of workers in the framework of provision of services.[48] In order to avoid fears of "social dumping", the minimum working conditions had to be applied to those workers, as provided in Article 3(1) of the Directive 96/71/EC.

Natural differences in the level of economic development between "new" and "old" Member States translate generally into differences in the amount of remuneration. A further levelling of salaries in Member States should, however, be the result of the

[47] [2004] OJ 2004 L 166.

[48] It is worth mentioning that following the enlargement of the EU in 2004, the institution of posted workers has gained in importance, which has aroused much concern in terms of wage competition among 'the then fifteen'. J.E. Dølvik, J. Visser, *Free movement, equal treatment and worker's rights: can the European Union solve its trilemma of fundamental principles?,* 40(6) Industrial Relations Journal 491 (2009), pp. 492 and 497.

EU's gradual economic development. Scientific research indicates that the CEECs have achieved a great deal of progress in terms of GDP growth and the "Europeanisation of national labour laws". At the same time, they have lost their competitive advantage as relocation choices for firms in search of lower labour costs. Some of the new Member States have not only lost their status as a cheap labour destination, but have also become more expensive than, for example, the UK, Ireland, or Luxembourg. This is mainly because of the "low amounts of taxes and social security contributions withheld".[49]

The 2004 enlargement process can provide a clearcut date upon which to consider whether the level of wages influences the actual organisation of business in the EU. The point is that lower wage levels may be an indicator of "social dumping" and thus in some way encourage the setting up of "letterbox companies". To determine whether this is the case one must take into account statistics on how easy it is to start a business in such countries. The question arises: Is it possible that there could be a dumping of labour standards without any consequent impact on company law standards? This can be ascertained by checking the procedure for starting a business in host Member States with low wages and comparing it with other Member States. In the first place we should analyze the level of minimum national wages in the EU.[50] EU Member States can be divided into three groups based on the level of their minimum wage (Denmark, Italy, Cyprus, Austria, Finland and Sweden are the excepted, as they do not establish a minimum wage). The first group includes countries whose minimum wages were lower than EUR 500 a month (Bulgaria, Romania, Lithuania, Hungary, the Czech Republic, Latvia, Slovakia, Croatia, Estonia and Poland). The second group is comprised of five EU Member States (Portugal, Greece, Malta, Spain and Slovenia) with an intermediate level of minimum wages, defined as between EUR 500 to EUR 1,000 per month. The third group, which includes seven EU Member States (France, Germany, Belgium, the Netherlands, the United Kingdom, Ireland and Luxembourg), have a national minimum wage of EUR 1,000 or more per month.[51] We can compare this data with that available from Word Bank Groups' ranking on Starting Business 2016, which covers analysis of the procedures, time, cost and paid-in minimum capital when opening a business in 185 countries of the world.[52] The higher the rank, the easier it is to set up company in the country.

[49] Maslauskaitė, *supra* note 32, pp. 28 and 53.

[50] According to Article 3(1g) of the Directive 96/71/EC "(…) the concept of minimum rates of pay (…) is defined by the national law and/or practice of the Member State to whose territory the worker is posted', 'but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States." *See also* C-396/13 *Sähköalojenammattiliittory*, point 34.

[51] Available at: http://www.ec.europa.eu/eurostat/statisticsexplained/index.php/Minimum_wage_statistic (accessed 30 May 2017).

[52] Available at: http://www.doingbusiness.org/rankings (accessed 10 May 2016).

Table 1. Level of wages and the actual organisation of business in the EU[53]

The level of minimum wages				Ease in setting up a company
Lack of minimum wage	**Lower than EUR 500 a month**	**From EUR 500 to less than EUR 1.000 a month**	**EUR 1.000 or more per month**	
	Lithuania			8
		Portugal		13
	Estonia			15
Sweden				16
			The United Kingdom"	17
		Slovenia		18
			Belgium	20
			Ireland	25
Latvia				27
			The Netherlands	28
Denmark				29
			France	32
Finland				33
	Romania			45
Italy				50
	Bulgaria			52
		Greece		54
	Hungary			55
Cyprus				64
	Slovakia			68
			Luxembourg	80
		Spain		82
	Croatia			83
	Poland			85
	Czech			92
Austria				106
			Germany	107
		Malta		132

* On 23 June 2016 a referendum was held, to decide whether the UK should leave or remain in the European Union. Leave won by 52% to 48%. The referendum turnout was 71.8%, with more than 30 million people voting. According to Article 50 TFEU the EU and the Great Britain have two years to conclude an agreement for its withdrawal, taking account of the framework for its future relationship with the Union.

[53] Own study based on data available on the websites listed *supra* in notes 51 and 52.

As we can see, only two Member States from the first group (Lithuania and Estonia) are higher in rank than those in which the national minimum wage was EUR 1,000 or more per month. This can suggest that lower wages do not influence changes in the law in order to make setting up a company easier, and do not influence the actual organisation of business in host Member States with low wages. It can also suggest that while the level of wages is an important indicator of "social dumping", it does not however any consequent impact on company law structures. This should, however, not be understood to mean that the level of wages is not necessarily relevant for setting up "letterbox companies". Instead, it should rather indicate that EU Member States with low wages do not have legislation which would facilitate the establishment of a business on their territory.

We can therefore observe that the enlargement could indeed create some fears of "social dumping", which is generally caused by differences between the level of economic development of Member States. This seems, however, be a problem only until such time as the new Member States achieve progress in terms of GDP growth and the Europeanisation of national labour laws. The studies mentioned above indicate that the level of wages as such does not influence the actual organisation of business in Member States. This means that not only is the level of wages important for an entrepreneur in deciding to open a company in another Member State, but also the complexity of procedures in opening a company or the taxes that should be paid. Lower wages seem not to influence changes in law in order to make setting up a company easier, nor for example, to encourage the creation of "letterbox companies" just for hiring workers and posting them to another Member State. It should also be underlined that in 2014 there were 1.92 million posted workers in the EU, and the number of these workers increased by 44.4% between 2010 and 2014. Among the Member States sending the highest number of posted workers we can mention Poland, Germany and France. From the other side, the Member States receiving the highest total number of posted workers are Germany, France, and Belgium.[54] Hence the level of wages does not seem to be so important in the intensity of the posting of workers. Two of the three Member States with the highest total number of posted workers, as mentioned above, have a national minimum wage of EUR 1,000 or more per month.

4. "LETTERBOX COMPANIES", "SOCIAL DUMPING" AND THE POSTING OF WORKERS

Both "social dumping" and "letterbox companies" are particularly encountered, in the area of EU integration, with respect to the posting of workers. It should be noted that those two phenomena in this area of integration are in some situations interrelated, as will be shown in this section. Based on these considerations, some possible solutions

[54] European Commission, *Posted workers in the EU*, press release IP/16/466.

to prevent and combat the occurrence of "letterbox companies" and "social dumping" are presented. It will be stressed that the legal activities of EU institutions in this area often refer to both of these issues simultaneously, which can lead to an assumption that they are interrelated.

4.1. Some examples of potential interrelationships between "social dumping" and "letterbox companies"

To understand the problem of "letterbox companies" and "social dumping" we should look at the examples presented by J. Cremers, one of which is described below. The reason why this example has been chosen is to show how difficult the legal situation of an employee working for such a "letterbox company" can be. The example concerns "a truck driver who was fired by his employer (…); a week later he received a confirmation from the Cypriot intermediary that he was no longer needed. The confirmation letter was typed on stationery of another 'letterbox company' based in Luxembourg, posted with a Dutch stamp, using a Belgian standard form to notify him of his dismissal."[55] One can see that for such an employee it is not easy to derive his employment rights based on the *lex loci laboris* principle, unless his contract specified the applicable law of the agreement. The posting of workers within a framework of free provision of services is an exception to this principle, because such posted workers are mainly subject to the legal regime of the home-country. As has been mentioned above, the host-country's labour regulations apply to them only with respect to the minimum terms and conditions of employment, as provided in Article 3(1) of Directive 96/71/EC. The problem occurs if the employer – a service provider – has no real activities in a Member State it claims to be established in. It seems that in this situation such an employer should apply in full the legislation of the Member State where the workers have been posted.[56] This is because such a host Member States is in reality the place where a company's genuine activities are provided. Owing to the weak oversight of compliance with the minimum standards of labour law applicable to posted workers, many companies exploited the differences in wage levels between Member States.[57] We can imagine that as a kind of response to these "social dumping practices", companies from countries with high labour costs established a company in a country with low labour costs for the express purpose of employing and delegating employees to the parent company. This can be seen in the following example: "Registered and operating in the German construction sphere, company X SERVICE GmbH executes in Germany a contract to build a school. As part of the

[55] Cremers, *supra* note, 33, p. 2 and 4.

[56] Sørensen, *supra* note 5, p. 97.

[57] The need to strengthen the monitoring of compliance with Directive 96/71/EC, and measures in the event of failure to comply, has been pointed out by the European Commission in its *Communication - Guidance on the posting of workers in the framework of the provision of services*, COM(2006) 159 final, 10-11; and in its *Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services*, [2008] OJ C 85. Currently the issue is regulated by the directive 2014/67, discussed in point 3.2 of this article.

contract, the services of a subcontractor X SERVICE POLAND SP. z o.o. are engaged, to whom it commissions various construction work. The register of the companies shows that the owner and management board member of both companies is one and the same person."[58] As we can see here, there is a real possibility of both such adverse circumstances, i.e. "letterbox companies" and "social dumping", in the posting of workers simultaneously in a sector. Lower social standards in one Member State can encourage setting up "letterbox companies" for the sole purpose of posting workers and therefore gaining competitive advantages in another Member State. The level of protection of workers' social rights is presumably reduced and "social dumping" becomes a reality.

4.2. Possible solutions to prevent and combat cases of "letterbox companies" and "social dumping"

As mentioned above, by providing minimum working conditions applicable to posted workers, Directive 96/71/EC was aimed, among other things, at preventing "social dumping". According to the European Commission the minimum standards should be treated as "a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness."[59] It has to be underlined that the minimum wage in the host Member State is one of those conditions that should take into account in applying the principle of proportionality, which requires that some conditions to be met. The CJEU lists Among those conditions the duration of the provision of services, their predictability, and whether the employees have actually been sent to work in the host Member State, or continue to be attached to the operational base of their employer in the Member State in which it is established.[60] For example, there have been some doubts whether the German Minimum Wage Law (GMWL), which entered into force on 1 January 2015, meets those conditions. It established a minimum rate of 8.5 euro per hour for all employees in Germany. This provision in particular affected other Member States' undertakings providing transport services. On 19 May 2015 the European Commission decided to launch an infringement procedure against Germany, concerning the application of the GMWL to the transport sector.[61] Whilst fully supporting the intro-

58 S. Schwarz, *Zapobieganie obchodzeniu przepisów o delegowaniu przez spółki-skrzynki pocztowe w projekcie dyrektywy wdrożeniowej w zakresie delegowania* (Preventing circumvention of the rules on posting by letterbox companies in the draft of the implementation of the directive on the posting of workers), available at: http://www.inicjatywa.eu/wp-content/uploads/2013/06/Opinia-na-temat-definicji-sp%C3%B3%C5%82ek-skrzynek-pocztowych-Inicjatywa-Mobilno%C5%9Bci-Pracy2.pdf (accessed 30 May 2017); *The posting of workers in the framework of the provision of services*, Opinion of the Committee of the Regions, point 8 (2013/C 17/12).

59 *The European Commission White Paper on European Social Policy – A Way Forward for the Union*, point 19, COM(94) 333 final.

60 Case C-165/98 *Mazzeloni* [2001] ECR I-02189, p. 38.

61 European Commission, Press release: *Transport: Commission launches infringement case on the application of the German Minimum Wage law to the transport sector*, available at" http://www.europa.eu/rapid/press-release_IP-15-5003_en.htm (accessed 30 May 2017).

duction of a minimum wage in Germany, the Commission stressed that the application of German measures to transit and certain international transport operations could not be justified, as it creates disproportionate administrative barriers which prevent the Internal Market from functioning properly.[62] It seems that according to the principle of proportionality Germany can implement the minimum wage, but not to everybody while in Germany. This would, for example, be the case of transit, where we can hardly talk about the provision of services in Germany.[63]

Owing to the lack of suitable cooperation between host and home country administrations (as provided by Directive 96/71/EU), further legislative steps have been taken to prevent and counter "social dumping" and "letterbox companies".[64] These took the form of Directive 2014/67/EU of the European Parliament and of the Council on 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.[65] Article 4(2) of the Directive provides a definition of a "genuine posting", It indicates that in order to determine whether an undertaking genuinely performs substantial activities, these activities should constitute more than just purely internal management and/or administrative activities,[66] and any such assessment should take into account such factual elements as, for example, the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions, or the place where the undertaking performs its substantial business activity. As we can see the main approach of those provisions is to "reconnect" service providers with the country in which their operations are most closely connected. If the problem of "letterbox companies" were to be solved by this "reconnection", national controls should be systematic and effective. Absent

[62] J. Barcz, *The German Minimum Wage Act (MiLoG) and international transport in the light of EU law*, Expert Opinion Prepared at the Request of the Employers Association: Transport & Logistics Poland (2015), available at: http://tlp.org.pl/wp-content/uploads/2015/07/barcz_ekspertyza_wersja-zewnetrzna_ENG1.pdf (accessed 30 May 2017).

[63] The European Commission has recently decided to start an infringement procedure also against France. On 16 June 2016 it sent a letter of formal notice to France owing to the consequences of the application of its minimum wage legislation in the road transport sector (European Commission, *Press release*', IP/16/2101).

[64] *ETUC position on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,* Brussels, 14-15 March 2006, available at: http://www.etuc.org/documents/etuc-position-implementation-directive-9671ec-concerning-posting-workers-framework (accessed 30 May 2017).

[65] [2004] OJ L 159.

[66] It is worth noting that "purely internal management activities", in connection with checking whether companies are genuine undertakings, has already been alluded to in EU regulations concerning the coordination of social security systems. Article 14(2) of the the European Parliament and of the Council Regulation No 987/2009 laying down the procedure for implementing Reg. (EC) No 883/2004 on the coordination of social security systems ([2009] OJ L 284) states that, when it comes to the posting of workers to another Member State by an employer "which normally carries out its activities" in its Member State, it should be understood that this employer "ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterizing the activities carried out by the undertaking in question."

this, the situation would not seem to improve. It should be noted that in order to combat "letterbox companies" it is very important that not only home-state, but also the host-state is capable of checking if the company posting their workers is a genuine undertaking pursuing economic operations in its country of incorporation.[67] This can be done, for example, by identification of the natural or legal person who is responsible for posting workers and stands behind a potential "letterbox company".[68] According to recital 42 of Directive 2014/67/EU, they can bear responsibility for the infringement of Directive 96/71/EC, because Member States "should investigate the matter further in order to establish the identity of the natural or legal person responsible for the posting." We can see here, however, that they only should take appropriate actions, not that they *must*, which is a shortcoming of this provision. The other circumstance which could discourage host countries from carrying out effective controls could lay in the Commission's fairly restrictive approach to the fight against the "administrative burdens" to the realization of the Internal Market freedoms. It is quite active in initiating infringement procedures in the event that Member States create restrictions or barriers to those freedoms.[69] It could therefore be stated that without good intentions on the part of both host- and home country to provide effective controls, the situation seems hardly able to be changed. We may however look for another possible solution, and consider for example the establishment of European labour inspectors, whose task could be the identification of and keeping a register of "letterbox companies".[70]

The problem of "social dumping" was also the subject of discussion by the CJEU in its judgments concerning the tension between social rights and the freedom to provide services (including freedom of establishment), especially the Court's famous judgments in *Laval*, *Rüffert*, and *Luxembourg*.[71] All of them concerned working standards, together with remuneration and the national labour legislation applicable to posted workers. J. Cremers rightly points out that "the primacy accorded to the freedom to provide services and the freedom of establishment actually encourages 'social dumping', because the Internal Market directly interferes with national regulatory frames and the lex loci laboris principle".[72] Also the European Trade Union Confederation (ETUC) has expressed concerns about the above-mentioned judgments, which in its opinion have created major social unrest. On the other hand, employer's organizations expressed the opinion that these rulings have not affected the relationship between fundamental social rights and Internal Market freedoms, "not making either of them subordinate to

[67] Cremers, *supra* note 33, p. 2-3. *See also* provisions of Chapter III of Directive 2014/67/EU.

[68] Sørensen, *supra* note 5, p. 144.

[69] *Report from the Commission. Monitoring the application of European Union law 2015 Annual Report*, COM(2016) 463 final.

[70] *European Parliament resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe*, point 40, P7_TA-PROV(2014)0012).

[71] Respectively: case C-341/05 *Laval* [2007] ECR I-11767; case C-346/06 *Rüffert* [2008] ECR I-01989; case C-319/06 *European Commission v. Luxemburg* [2008] ECR I-4323.

[72] Cremers, *supra* note 33, p. 1.

the other", based on use of the principle of proportionality.[73] This difference of opinion between the social partners is also seen in the context of the current deliberations on the revision of Directive 96/71/EC, led by the European Commission working on a Mobility Package. One part of the deliberations concerns discussions on a "targeted review" of Directive 96/71/EC in the context of preventing "social dumping" and abuse of the free movement of services.[74] We can see a division of opinion between the Member States and social partners over a suggestion concerning revision of the "posting of workers" principles. On the one hand we have nine Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia) and Business Europe who think that introduction of the principle of "equal pay for equal work in the same place" would be incompatible with a genuine Internal Market, in which sustainable economic development is driven by efficient, innovative, and competitive enterprises in a market underpinned by robust regulatory arrangements. They consider accusations about the occurrence of "social dumping" unfounded, because companies from those countries do not provide services by posted workers below their costs. Full implementation of *lex loci labori* would then mean, in their opinion, the definitive end of posting in the EU.[75] On the other side we can mention seven Member States (Luxembourg, Belgium, France, Germany, Nederland, Sweden, Austria) and the ETUC. They strongly advocate a change of Directive 96/71/EC in order to introduce the principle of "equal pay for equal work in the same place", which they think would, in addition to preventing "social dumping", also "take away the incentive to circumvent posting provisions, inter alia through 'letterbox companies', because the principle of equal pay would apply regardless of the existence of the posting situation".[76] Taking into account the current discussion over the Directive 96/71/EC review and the suggestions of particular Member States as to which direction changes should take, one can propose a kind of a mixed solution. A minimum wage system seems to be a good measure to

[73] *ETUC response to ECJ judgments Viking and Laval. Resolution adopted by the ETUC Executive Committee*, available at: http://www.etuc.org/sites/www.etuc.org/files/ETUC_Viking_Laval_-_resolution_07038_2.pdf (accessed 30 May 2017).

[74] Proposal of a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, submitted on 8 March 2016. On 10 May 2016 national parliaments exercised their powers under Article 5(4) TFEU and its Protocol (2) on the application of the principles of subsidiarity and proportionality, and gave the Commission a so-cold "yellow card". On 20 July 2016 the European Commission decided that the posting proposal does not breach the subsidiarity principle (*European Commission-Press Release. Posting of workers: Commission discusses concerns of national Parliaments*, IP/16/2546).

[75] *Letter to the European Commission on the position of nine Ministers of the Member States opposed to the revision of the basic directive on the posting of workers*, available at: http://www.inicjatywa.eu/wp-content/uploads/2015/11/STANOWISKO-Stanowisko-ministrów-9.-państw-członkowskich-sprzeciwiające-się-rewizji-dyrektywy-podstawowej-o-delegowaniu-pracowników.pdf (accessed 30 May 2017).

[76] *Letter to the European Commission on the position of seven Ministers of the Member States opposed to the revision of the basic directive on the posting of workers*, available at: http://www.zmpd.pl/aktualnosci_pliki/f-GLOWNY-921-1126-6673.pismo_7_ministrow.pdf (accessed 30 May 2017).

counter "social dumping", but appropriate steps should be taken to enhance access to information on its application in each Member State, and there should be cooperation between the suitable authorities of Member States, especially labour inspectors. Effective information about working conditions and adequate supervision of compliance with them would seem not only to serve the protection of employees' rights, but would also facilitate the freedom to provide services under the terms provided in Treaty provisions.

CONCLUSIONS

Posting of workers is the sphere of EU integration within which the interrelationship between "social dumping" and "letterbox companies" operations can be best observed. On one hand, when work is to be performed in the host Member State it must be ensured that appropriate working conditions are maintained in order not to hinder competition between companies and weaken the protection of workers' rights. On the other hand, when services are to be provided by foreign companies in the host Member State they should not be allowed to avoid its national tax, labour or social rules. That means that the service provider posting his workers to the host Member States must be a real company, actually engaged in economic/business activity in its country of incorporation.

"Letterbox companies" and "social dumping" should be treated as interdependent and interrelated, rather than mutually exclusive, concepts in EU law. The operations of "letterbox companies" may in fact be initiated in response to the occurrence of "social dumping". In the first stage, companies from countries with low labour costs post their workers to countries with high labour costs, which implicates "social dumping". In the second stage, companies from countries with high labour costs establish a company in a country with low labour costs, only to employ and delegate employees to the parent company, which implicates the operation of "letterbox companies".

Even if there are no legal definitions of "social dumping" or "letterbox companies" in the EU legal order, it is not true that the EU remains passive about their existence. There are many legal instruments (especially Directive 96/71/EC and Directive 2014/67/EU) and initiatives of EU institutions indicating an interest in resolving this problem (for example, the European platform of labour inspectors). Effective labour inspection, especially in the sphere of posting of workers, can undoubtedly be one of the measures suitable for combating 'social dumping' and "letterbox companies".

The Prevention and countering of "social dumping" and "letterbox companies" appears to be a matter of concern for both interested sides of industry, i.e. both workers (employees) and entrepreneurs (acting as employers). The former can feel that their rights are threatened, and the latter can feel that fair business competitiveness is endangered. When workers see their working conditions deteriorating they may lose motivation and begin to work less productively. On the other hand, their reduced productiv-

ity can lead to a reduced business results for their employer-entrepreneur. It should be stressed that not only posted workers are affected by the negative consequences of "social dumping" and "letterbox companies". A large number of poorly-paid employees may indeed lead to a situation whereby host-state companies will not depend on local workers and may put pressure on the wages and working conditions in their state.[77] This is why countering "social dumping" and "letterbox companies" on the EU level is also of great interest to social partners, especially those representing the interests of employees within the framework of the ETUC, which provides EU institutions with many suggestions and recommendations, the main aim of which is to strengthen the social dimension of the Internal Market. As an example we can mention the ETUC's demands for a directive setting minimum standards for labour inspection at the EU level, based on relevant International Labour Organization Conventions and Recommendations, and/or the coordination of collective bargaining in the case of trans-border situations.[78]

The increased use of "letterbox companies: began as a result of the *Centros* case and continued through the most extensive EU enlargement in 2004, and up until 2007-2008. From this time forward, however, this trend seems to have diminished, which was essentially due to reforms of national company laws.[79] Another reason for this change could be the EU institutions' increased awareness of the existence of "letterbox companies" and subsequent legal measures taken to prevent this problem. It is also interesting that all of these measures were generally aimed at simultaneously preventing and combating both "social dumping" and "letterbox companies", which could be seen as a premise to treat those concepts as interdependent and interrelated. It seems possible that if a suitable way can be found to prevent "social dumping", the incidence of "letterbox companies" will also be lower. One of the reasons for establishing these companies will disappear, unless of course the main reason for such a "letterbox company" is to benefit from differential tax rates, in which case measures counteracting "social dumping" are unlikely to have much effect.

[77] S. Tans, *Case Report on Laval, 18 December 2007 (Case C-341/05) and Viking, 11 December 2007 (Case C-438/05),* 10 European Journal of Migration and Law 249 (2008), p. 251; Bernaciak, *supra* note 29, pp. 5, 12 and 22.

[78] *ETUC action program 2015-2019', point 150 and 306*, available at: http://www.etuc.org/sites/www.etuc.org/files/other/files/20151007_action_programme_en-consolidated_0.pdf (accessed 30 May 2017).

[79] Sørensen, *supra* note 5, p. 94.