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The Revision of the posted workers directive: how can it be taken further?

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In spite of the adoption of an enforcement Directive in May 2014 that was designed to improve counter fraud measures the posting of workers has become emblematic in a Europe that is now synonymous to social dumping, and which no longer guarantees the fair conditions of competition. With this the European Commission presented a draft revision in March 2016 targeting the initial directive of 1996[1]. Because there was no consensus at the Council and European Parliament, the text has still not been adopted. The next few weeks are to be decisive in this regard. Beyond the draft targeted revision that has to be consolidated the European Commission has put forward several initiatives over the last few months to enhance the rights of posted workers and to prevent the misappropriation of the original measure, whether this involves road hauliers and the coordination of social security systems; the introduction of dedicated Agency for mobile work within the European Union has also been suggested.

1. THE EUROPEAN COMMISSION'S DRAFT TARGETED REVISION

Twenty years after the adoption of the directive on posted workers, the Commission has put forward a targeted revision of the instrument designed to take on board the impact of the increase in use of this practice and eradicate its adverse effects. This new text is the continuation of the enforcement directive adopted in May 2014 that was designed to counter fraud[2].

The Commission's proposal focuses on the principle of equal wages in the same place of work. It targets four areas: wages, the duration of the posting, subcontracting chains and the use of temping agencies. It aims to prevent unfair competition by increasing posting costs.

Regarding pay, the 1996 directive provided that minimum wage rates of the host country would apply to the posted worker, except if the law of the country of establishment was more favourable. Taking up the jurisprudence of the EU Court of Justice (ECJ)[3], the Commission hopes to replace the idea of "minimum wage rate" by "remuneration". This would integrate all aspects made obligatory by the law, the regulation, universally applicable

collective agreements, those generally affecting business in a sector, as well as those concluded by the most representative national social partners. It will be obligatory for the constitutive elements of remuneration to be published on a single official national internet site provided for by the 2014 enforcement directive[4].

The Commission proposes capping the duration of the posting to 24 months, i.e. the period selected under the 2004 regulation regarding the coordination of social security systems. The period of 2 years is said to be planned or effective. It effectively applies from the first day that it is clear that the posting will last more than 24 months. The period is not individualised: if the posted workers undertaking the same task in the same place are replaced, the sum of the periods of posting for that particular work are taken in account if they extend beyond 6 months. Finally the labour law applies as soon as the posted worker has undertaken several assignments in the same State and that the sum of the length of these extends beyond 24 months.

Using the ECJ's decision of November 2015 as its support[5], the Commission is proposing that a Member State be able to set the same remuneration rules as those that bind the main contracting party

1. See Sébastien Richard, *The Revision of the Directive on Posted Workers*, Robert Schuman Foundation – European Issues n°406, 10th October 2016.

2. See Sébastien Richard, *The implementing directive on posted workers: what next?* Robert Schuman Foundation – European Issues n°383, 29th February 2016.

3. ECJ Decision of 12th February 2015, case C-396/13, *Sähköalojen ammattiliittoryy contre Elektrobudowa Spółka Akcyjna*.

4. This site is designed for service providers, for them to understand the labour law applicable within each Member State.

5. ECJ decision 17th November 2015 *RegioPost GmbH & Co. KG contre Stadt Landau in der Pfalz*.

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to the entire subcontracting chain. If the national law provides that the contracting party can only subcontract to businesses that respect the agreement in terms of remuneration, the host State can apply the same rule to the subcontractor from another Member State, whatever his place in the subcontracting chain. The measure is not limited to public procurement but can also apply to private contractual relationships.

Ultimately the Commission wants to ensure the fair treatment of local temporary workers and posted workers sent by a temping agency from another Member State. Twelve Member States do not apply this principle at present[6]. The most favourable legislation should also be the rule for posted workers in a company bound by non-universally applicable collective agreements.

The Commission's project, which is ambitious, is lacking in parts in terms of guaranteeing effective counter fraud measures.

The wages provided for in some limited agreements should indeed be applied to posted workers. The application of the rules in terms of remuneration must be applied to the entire subcontracting chain and be obligatory and non-facultative as provided by the Commission's project. Specifications should be given if this chain of businesses whose collective agreements are not the same. The reference to decent housing conditions should be integrated into the main core of the laws applicable to posted workers.

With regard to the logical limitation of the duration of the posting to 24 months, this has to be seen within the framework of a wider period of reference in order to prevent the measure being circumvented. Moreover the lack of any consideration for postings under 6 months in the calculation of accumulated periods in the event of the replacement of workers, weakens the scope of the cap.

Beyond the targeted Revision of the directive in itself, the issue of posted workers is also addressed in two of the Commission's legislative initiatives:

- The revision of the coordination regulation governing social security systems

- The "Europe in Movement" package;

2. THE REVISION OF THE REGULATION COORDINATING SOCIAL SECURITY SYSTEMS.

The text does not challenge the posted worker's affiliation to the social security system of the country of establishment[7]. This affiliation can justify the continuing gap between the cost of a local worker and of one who is posted[8].

Presented by the Commission in December 2016 the draft revision of the security social systems coordination regulations includes a chapter devoted to posting[9]. The text insists on the need for Member States to have instruments with which to check posted workers' social security status. The Commission proposes the introduction of clearer cooperation measures between national inspection authorities to improve response to potentially unfair or abusive practices. Hence, it aims to strengthen the obligations on the part of the institutions which deliver the portable A1 document, which indicates the legislation in terms of social security applicable to the posted worker. For them this means guaranteeing the accuracy of the details that are included in this confirmation. The Commission sets out clear deadlines for the exchange of information between the national authorities. Finally, the revision should help towards facilitating the exchange of information from one country to another and their social security institutions and the labour inspectorate services, the immigration services and the tax administrations of the Member States, to ensure the respect of all legal obligations in terms of employment, healthcare, security, immigration and taxation.

Designed to counter secondment fraud, the Commission's initiative deserves praise and support. The choice of implementation acts to define the A1 form delivery procedure, but also its withdrawal, when its exactness and its validity are challenged in the host Member State, are cause for thought. The implementation acts as defined in article 291 TFEU, are justified by the need for uniform implementing conditions. According to article 291, the first responsibility in terms of the application of the

6. Austria, Cyprus, Croatia, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Portugal, Slovakia and Slovenia.

7. See Elisabeth MORIN-CHARTIER, "What impact on freedom of movement on the systems of social security in the European Union?" Robert Schuman Foundation - European Issues n°429, 10 April 2017.

8. According to the Commission as part of the new measure the monthly wage cost of a Polish worker posted to France in the building sector might rise from 1,587 to 1 960 €, with the cost of a French worker remaining the highest given the difference in social charges (2 146 €). See the Impact Analysis regarding the review of the directive on posted workers - SWD(2016)52

9. Draft regulation modifying the regulation (CE) n° 883/2004 on the coordination of the social security systems (CE) n° 987/2009 establishing the means for the regulation's implementation (CE) n°883/2004 (COM (2016) 815 final).

Union's law is that of the Member States. However, if uniform implementing conditions are necessary, the Commission has to employ its executive competence. Stepping up the fight to counter fraud does mean in depth debate at the Council however – which prevents the adoption procedure of the implementing acts – and at the same time gives the Member States a certain amount of freedom. The ECJ acknowledges in a decision given in 2014^[10] that this degree of discretion could be in line with the Treaties. Indeed Belgian law obliges those benefiting from a service provided by posted workers to control, whether the employer of the posted workers has declared them with the social security before the service is provided and also, if necessary, to obtain from the said workers, also before the start of any work, their identity details, as well as that of their employer and to communicate these to the competent authorities. When asked about the conformity of these measures with the principle of free provision of services the Court deemed that a restriction is possible if there is an overriding reason related to the public interest that is not already safeguarded, and which is specific in terms of guaranteeing the achievement of the goal that it is pursuing and that the restrictive measure is proportionate. A kind of flexibility can therefore be given to the Member States regarding the use of this form. The Commission's proposal does however bring this option into question^[11].

The issue is all the more vital since the A1 declarations legalise posting to a certain degree. More than just a hypothetical harmonisation of labour costs, if it is successful, it seems vital to take a serious look at the use of posting forms, otherwise the 2014 enforcement directive and the 1996 directive revision would be made inoperative. Germany and France have already taken the lead in this area as they announced on 3rd October 2016 the introduction of a database to collate information about the A1 forms that have been issued. The project that is bilateral for the time being could be extended across the whole of the EU. In the face of many cases of fraud it seems vital to make this form secure, by adding the photograph of the holder for example. The said form should also be sent prior to posting, even if the ECJ's jurisprudence sets no deadline for the delivery of a certificate. The document should

also be cancelled if there is a serious doubt about the reality of the posted worker's affiliation to the social security system of the country of establishment.

Issues concerning the verification and standardisation of the A1 certificates have formed the core of the first exchanges of opinion in the European Parliament. An initial draft report is due to be presented by the end of 2017 for a vote by the European Parliament's "employment" committee next spring. The final adoption of this might come before the summer 2018.

Beyond the Commission's text it would be interesting to note the follow-up given to one of the proposals set out by the French President on 26th September^[12]. Without challenging the principle of affiliation to the social security system of the country of establishment, Emmanuel Macron is advocating the alignment of social contributions on the level of those levied in the host country. Collection would be undertaken in the host country on the basis of rates applied there. The difference in the contributions levied and that returned to the States of establishment would be placed in a solidarity fund that would benefit the poorer countries to help with their social convergence. This option would help bridge the gap between the cost of a posted worker and that of one employed locally. It would also strengthen supervision in terms of the reality of the posting, since social contribution fraud is often the direct extension of labour law fraud.

3. THE IMPLEMENTATION OF POSTING STANDARDS TO INTERNATIONAL ROAD HAULAGE

The legislative package "Europe in Movement" was presented on 31st May last. It aims both to modernise European mobility and transport to help the sector remain competitive whilst guaranteeing a transition towards clean energy and digitisation. The Commission hopes to reduce red tape for businesses, counter illegal work and offer employees satisfactory working conditions and rest periods, particularly in the sector of road haulage. Hence it proposes to review the conditions necessary to undertake the profession of haulier, and access to the international road haulage

¹⁰. ECJ decision of 3rd December 2014 Edgard Jan De Clercq e.a.

¹¹. The French Senate challenged the compatibility of the Commission's proposal with the principle of subsidiarity: <http://www.senat.fr/leg/tas16-102.html>

¹². "Initiative for Europe: a sovereign, united, democratic Europe", speech delivered at the Sorbonne, Paris, 26 Sept 2017.

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market and hauliers' working hours[13]. Moreover it provides for the modification of a 2006 directive targeting social legislation on road haulage activities in order to take greater account of European legislation regarding posted workers[14].

The application of the rules set out for posted workers to lorry drivers is offset by the associated liberalisation of cabotage operations. After an international transport operation and within a 5 day time span – in contrast to 7 at present – the driver will be able to undertake as many deliveries as he wishes, in contrast to three within the present rules[15]. He would just have to be able to prove the date of his last international transport operation to check that he has respected the maximum duration of cabotage provided for in the text. In exchange the social standards of the host country would then have to apply, whatever the frequency and duration of the cabotage operations undertaken by the driver. At the same time they would have to apply to international haulage operations as soon as this is equal to or over three days. The Commission wants to oblige drivers to spend at least one period of rest at home every four weeks. It is also suggesting the ban on weekly rest periods in the cabin. This would have to be taken in a suitable lodgings equipped with all of the necessary amenities. The lodgings would have to be provided for or paid by the employer[16].

Moreover the Commission is planning a list of administrative requirements and supervisory measures for the Member States: posting declaration including the ID of the road haulier, the contact details of the transport manager, the planned number of posted drivers and their IDs, the planned duration of the posting, the registration plates of the vehicles used, the type of transport service (freight, people, international or cabotage). The driver would also be obliged to keep and provide in paper or digital form, a copy of the posting declaration and proof of the transport operation taking place in the host Member State (electronic consignment slip (e-CMR)) as well as a copy of his work contract either in English or the language of the host Member State and a copy of his pay slips over the past two months. Tachograph recordings as well as the Member State codes in which

the international haulage operations have taken place and the cabotage operations must also be available to the inspectors.

The "Europe in Movement" package also provides for the strengthening of the fight against so-called letterbox companies. The list of rooms that a business has to have in a specific location an inspection, likewise work and commercial contracts has been extended. The business will also have to have staff in the State where it is established. The aim is also to step up requirements to enable a haulier to be "honourable" and "of good reputation" and thereby be allowed to enter the market. Companies will have to respect the country's tax rules, and legislation in terms of posting and contractual obligations.

Cooperation between Member States is also set out. National registers will have to include the registration plates of the vehicles owned by the company, the number of employees, all assets and liabilities as well as the capital and turnover for the last two financial years. Requests for information from one State to another must be justified. If the request is justified the State that receives it will have 25 days to undertake the necessary inspections and respond.

The Commission's project should help counter social dumping better and so guarantee highly mobile workers – such as lorry drivers – with equal pay for the same work in the same workplace. However, as pointed out by the French Senate in July, the European standard put forward is below that provided for by French law. Indeed, as part of an international haulage operation the minimum wage applies from the first day of entry into France[17]. The Senate also questions the strengthening of supervision. The measure provides for a closed list of supervisory measures and administrative requirements. This solution is different from the one selected as part of the enforcement directive on posted workers adopted in 2014. On the request of several Member States (Germany, Belgium, Spain, Finland, France and the Netherlands), it was decided that there would be an open list of control measures[18]. This enables the control authorities to be as responsive as possible to increasingly complex fraud mechanisms.

- 13.** Draft regulation COM (2017) 277 final.
- 14.** Draft directive COM (2017) 278 final
- 15.** See *Le droit en route ? Le dumping social dans les transports européens, report n°450 (2013-2014)* by Mr *Éric Bocquet*, on behalf of the European Affairs Committee at the Senate
- 16.** This measure matches the request made by France and 8 other Member States (Germany, Austria, Belgium, Denmark, Italy, Luxembourg, Sweden and Norway), which joined forces in a truckers' alliance, set up on 31st January 2017 and which voted in support of a dematerialisation of transport documents, convergence of sanctions targeting the weekly rest period spent in the cabin and an improvement in the Member States' coordination from the point of view of inspection.
- 17.** Opinion of the European Affairs Committee at the Senate on the social chapter of the Europe in Movement package 27th July 2017.
- 18.** Article 9 of the 2014/67/UE directive of 15th May 2014

Like the draft revision of the 1996 directive the European Commission's proposal is not popular amongst all Member States. The Visegrad Group (Hungary, Poland, Slovakia and the Czech Republic) and also Portugal and Romania are rejecting any type of assimilation of lorry drivers with the idea of them being posted workers. The Commission's initial intention to reach a general guideline on the text by December next seems compromised.

4. ONGOING NEGOTIATIONS: CAN THE STALEMATE BE OVERCOME?

From the very start the draft revision of the 1996 directive has embodied clear opposition within the Council between States that support a revision of the text – like France – and those – mainly from the east of the continent – who are refusing any type of amendment to the existing measures. The Commission's proposal is deemed contrary to the free provision of services. These countries, particularly the four from the Visegrad Group, deem that a new text cannot be adopted as long as the enforcement directive of May 2014 that aims to strengthen controls has not been transposed in all Member States. This initial rejection of the text was extended in a reasoned opinion concluding the non-respect of the subsidiarity principle drafted by the national parliaments of 11 Member States^[19]. The argument was rejected by the Commission on 20th July 2016.

A first compromise was presented to the Council in March 2017. It led to an agreement over the definition of collective agreements and temporary agency workers. Progress regarding the subcontracting chain was also achieved. No progress however was made regarding issues covering remuneration. The Commission wanted the definition of remuneration to be specified and that this should integrate seniority bonuses, bonuses linked to working conditions (geographic factors), work and holiday bonuses and those covering dirty, heavy or dangerous work. Conversely Hungary, Latvia, the Czech Republic and Romania do not support the remuneration of the host country to apply as of the first day, and Slovenia only wants identical pay after a period of months, whose number still has to be defined.

A new compromise text was put forward on 31st May. It converges with the Commission's positions on the application of local remuneration rules and the maximum duration of the posting. The time for transposition is set at three years instead of two. The text did not receive the support of the countries of Central and Eastern Europe, with the notable exception of Bulgaria. Other States – Austria, Belgium, Cyprus, Luxembourg, the Netherlands, Slovenia and Sweden all gave their support to the compromise. It remains that France, backed by Germany, now wants to go further than the Commission.

The election of Emmanuel Macron in France did in effect contribute towards a hardening of the French position. The 1996 directive, as it is now applied is deemed by the French President to be a "betrayal of the very foundation of European spirit", and against the idea of a "Europe which protects", an idea he intends to defend during his term in office. On the occasion of the Employment, Social Policy, Healthcare and Consumer Council (PESCO) on 15th June the French government put forward several amendments to the Commission's proposal:

- The maximum duration of a posting would be brought to down to 12 months – undertaken over a reference period of 24 months. This proposal was backed by Germany, Austria and the Benelux countries;
- The period for the directive's transposition would be set at 2 years and not three as set out in the Commission's original proposal;
- The text must explicitly guarantee transport, lodging and meal allowances, to prevent these being assimilated as part of the employees' remuneration;
- The new measure must provide for the issue of an A1 certificate before the start of the posting and prior affiliation for a three month posting to a social security system of the country of establishment;
- The company must make at least 25% of its turnover in the country of establishment, in order to prevent the emergence of "letterbox" companies;

¹⁹. Bulgaria, Croatia, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Czech Republic.

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- The revised directive will have to apply directly to the road haulage sector;
- Pluriactivity regulation measures must be introduced;
- Administrative cooperation has to be strengthened and implemented via a European work inspectorate coordination platform.

Some of the French proposals might appear maximalist in the eyes of their partners. This applies to the length of the posting brought down to 12 months. The initial period of 24 months, as put forward by the Commission, seemed to be a factor that would finally be accepted by a majority of Member States. It remains that the French approach enables one that is universal to the issue of posting, notably insisting on the aspect of social security and, in particular, the role played by the A1 certificate. We should recall that the use of the latter leads to the legitimisation of the posting without guaranteeing that this will be undertaken in the conditions as laid out in the directive.

The new compromise text presented on 30th August last by the Estonian Presidency of the Council is to serve as a base to the negotiations planned for 23rd October. The duration of the posting is still that provided for in the Commission's initial proposal, i.e. 24 months. The text still provides that the transport sector be addressed in a specific manner, via the mobility package, whilst France wants its full, complete integration. The transposition period would be three years, with France and her allies in the Council insisting on a 2 year period. The question of lodgings being part of the employer's obligations has been removed. Although the text still rules out the reimbursement of travel, lodging and food expenses in the calculation of remuneration, it remains to be seen whether these reimbursements will be undertaken on the basis of the living standards of the host country.

This text might then, at varying levels, be seen as a compromise rather more favourable to the Visegrad Group countries. Previously the latter adopted a negotiation mandate regarding the text on 19th July last. However this was a negotiation base and not a final text. We should also note that beyond the mediation of the Estonian Presidency of the Council, a rapprochement was noted between France and some Visegrad countries. A technical meeting was organised on 4th August in Budapest between the representatives of the five countries over the issue of improving cooperation between Member States. The meeting of heads of State and government from France, Austria, Slovakia and the Czech Republic on 23rd August in Salzburg witnessed a rapprochement over issues related to pay, particularly regarding the basic principle of the revision: "Equal work for equal pay", the duration of the posting and the fight to counter fraud as well as "letterbox" companies. A meeting between the French President and his Romanian counterpart on 24th August in Bucharest helped in part amend the French position regarding road haulage, thereby confirming separate negotiations over this sectoral chapter. It seems that Poland is increasingly isolated over the issue of remuneration and might amend its position. It remains firm however regarding the exclusion of road transport from the directive's scope.

5. TOWARDS DEDICATED EUROPEAN POSTED WORK AGENCY?

On the occasion of his speech on the "State of the Union" on 13th September in Strasbourg the President of the European Commission^[20] called for the creation of a Common Labour Authority, designed to "monitor the respect of equity in our single market". This would fall in line with the legislative proposals on posting and would help prevent "second class workers". Although this idea is only in its infancy the project should help strengthen cooperation between the labour market authorities. It might be granted several tasks:

- The settlement of disputes between national authorities;

²⁰. http://europa.eu/rapid/press-release_SPEECH-17-3165_fr.htm

- The role of a single one-stop shop for citizens, businesses and public authorities in terms of cross-border mobility;

- The fight to counter fraud, notably facilitated by joint inspection actions on the borders.

An instrument of this nature was already provided for in 2013 by the Commission via the introduction of a structure designed to coordinate and strengthen investigations undertaken by national work inspectorates. The Agency planned by the Commission might in all events use pre-existing structures like the European platform to counter undeclared work introduced in May 2016, the European Foundation for the Improvement of Living and Work Conditions (Eurofound), the European Centre for the Development of Vocational Training (Cedefop), the Agency for Safety and Health at Work (EU-OSHA), the European Training Foundation (ETF) and the European Job Mobility Portal (EURES).

The creation of this Agency will help make inspection and cooperation effectively stronger between the Member States in terms of the entire posting procedure, both on the chapter of working conditions in themselves, as well as regarding the issue of social security affiliation. Hence, in the decision delivered on 27th April last the ECJ deemed that the French jurisdictions were not qualified to check the affiliation certificates to a social security regime delivered by another Member State, even when the workers involved are not really posted workers[21]. The Court founds its decision on the principle of mutual trust between the Member States: a document delivered by one of them is reputed valid.

Any contestation must respect the procedure established by the European texts, which is based on the principle of the obligation of loyal cooperation set out in article 4 of the TEU. Hence when asked by the host State, the institution of the State of establishment must reconsider the justification of the delivery of the certificate and

if need be, withdraw it. If this is not the case the administrative committee for the social security of migrant workers can be addressed for conciliation purposes[22]. If this fails an infringement procedure against the State of establishment can be initiated with the ECJ. This conciliation procedure might appear cumbersome in view of postings that are limited in duration since they cannot last more than two years. However in its decision the Court dismissed the reticence on the part of the French authorities regarding the efficacy of the procedure and their wish to prevent unfair competition and social dumping. The Court cannot justify ignorance of the procedure.

The Agency announced by the Commission matches the French government's wish, shared by several Member States, to introduce a real European supervisory platform[23]. In fact it might take on the remit of the administrative committee for the social security of migrant workers. It is vital in all events for it to be easier to be addressed and it has to be more responsive. The idea in fact is to have a real European Supervisory Agency of Mobile Work, the outline of which was set out in a European resolution adopted by the French National Assembly in 2013[24]. Its activities should be inter-sectoral. It would be responsible in particular for the monitoring of posting as a whole and any inter-state infringements that may occur, the monitoring of national legislation, the drafting of proposals to improve European regulations and the administrative information system between the Member States. It should aim to palliate any possible difficulties in terms of liaison and information exchange in operational deadlines and possibly substitute them in the event of proven deficiencies.

A rapprochement of the Council's positions regarding the revision of the 1996 directive will not mean the end of debate over the issue of the posting of workers. The adoption of the Commission's proposal will herald true

21. Decision of the Court 27th April 2017,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190167&pageIndex=0&oclang=fr&mode=lst&dir=&occ=first&part=1&cid=489001>

22. This committee established by articles 80 and 81 of the regulation 1408/71 of 14th June 1971 regarding the application of social security systems to paid workers, unpaid workers and to the members of their family who migrate within the Community comprises a government representative from each of the Member States, helped if necessary by technical advisors. A representative from the European Commission participates in the sessions, with a consultative vote. It benefits from the technical assistance of the International Labour Office (ILO).

23. The creation of this Agency was welcomed by Emmanuel Macron in his speech of 26th September 2017.

24. European resolution of the National Assembly n°185 (2012-2013) of 11th July 2013 on the draft directive on the implementation of the directive on posted workers. (Article 5).

progress however, especially if all or some of the amendments defended by Germany and France are integrated. However, the new legislation would not be totally effective if it does not go hand in hand with the introduction of new rules regarding the use of the A1 forms of affiliation to the social security of the country of establishment, in order to improve the prevention of the risks of fraud. The establishment of a new European agency devoted in part to posted work would also

help towards representing European ambition in this area, and to a large extent, erase the poor reputation of an instrument so that it can fulfil its primary ambition: palliating labour shortages.

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