

Position of CESI on Social Dumping

The four freedoms, which are now the cornerstones of the European Union, include the free movement of workers, services, goods and capital. They were established with the objective to complete the Single Market with the Single European Act of July 1987.

After over 30 years and a clear liberal market orientation of policies and case law linked to the Single Market, it is now time to establish the right balance between the continuous promotion of the four freedoms on the one hand and the need to achieve ‘a triple-A on social issues’ on the other. Diverging social protection, employment protection and tax standards may lead to strategic business choices which make of use the four freedoms while opting for the legal regimes that foresee the lowest standards. The Single Market enables companies to shift their profit to countries where taxes are low, and their production or main place of business to countries where workers are the least protected.

While CESI recognises the fact that social, employment and tax policies remain to a great extent in the hands of the Member States, hence offering certain competitiveness margins, it highlights the fundamental significance of a strong social dimension for the future of the EU, resulting from the Union’s goals for full employment and social progress.

CESI recognises the fact that as long as the Single Market rules remain under the exclusive competence of the EU, while social policies are primarily the responsibility of the Member States, it will be difficult to achieve a balance between Single Market freedoms and social-political goals on an EU level.

CESI stands for the recognition of the equal value of social and political goals of the EU in the face of the Single Market and its fundamental freedoms. CESI therefore defends the establishment of the highest possible standards for the European social policy in order to achieve upwards convergence.

1. Definition of social dumping

Social dumping usually describes unfair competition due to the application of different wage, tax, employment and social protection rules.

On the one hand, social dumping describes any practice which **violates existing legislation** at national and EU level, and social partner agreements which should not be allowed across the European Union.

On the other hand, it indicates practices used by employers to downgrade working conditions, workers’ rights or social protection standards which are not illegal *per se* but that, through **gaps and loopholes** in the existing legal frameworks have *de facto* creating unfair competition on the ground.¹

¹ Example: While violations of the EU posted of workers directive or breach of rules on undeclared work still happen, it is the responsibility of the Member States to actually enforce the laws laid down by the EU. In that spirit, a directive on enforceability of the posted of workers’ rights directive was adopted in 2014 in order to help Member States to enforce the 1996 directive.

1.1. Enforcing existing legislation

To fight social dumping, the European Union and its Member States need to take further action in order to ensure the more consistent **enforcement** of existing legislation.

1.1.1. CESI's recommendations for legislation enforcement

In order to ensure the proper implementation and application of the law in the field, many players should be involved and be held accountable.

- When interpreting cases relating to the four freedoms, the **judiciary** should increasingly value social laws, not only taking into account secondary law, but also principles established by primary law and the EU Charter of Fundamental Rights. When weighed against each other, fundamental social rights need to be increasingly reconciled with economic freedoms.
- **Member States and public authorities** must have the political and legal responsibility to implement and enforce the rights and obligations created at both national and European levels.
- Member States should also increasingly invest in **public services** such as tax inspectorates, public employment agencies and labour inspectorates. Those entities are responsible for the constant monitoring of abusive behaviour in the field and they need resources in order to detect, fight and punish social dumping perpetrators.
- **Trade unions** should be more involved and proactive on all levels to ensure that mobile workers in the EU are not being denied their rights. Trade unions should also be fully involved in the **creation of structures** within all EU Member States which would provide advice and support for posted and mobile workers. The further **unionisation** of workers must be promoted at all levels. Only a seamless representation of workers will protect them against abuse and exploitation, and enable them to better exercise their rights, in particular in cases with a cross-border dimension.
- The **European Union** needs to respect **trade union pluralism** across the EU and go beyond the inclusion of only cross-sectorial social partners within instances taking action that help directly or indirectly in the fight against social dumping.
- The **European Union** should monitor and detect difficulties to implement and/or enforce adopted legislation and take action to help Member States and enterprises to respect and enforce legislation.
- **Enterprises and companies** should be held responsible for violations and appropriate sanctions must be applied by the responsible authority, and reported to and then monitored by the EU.

1.2. Closing loopholes

The European Union and its Member States need to take action to **close the gaps** allowing such abuse. This could be achieved mainly by revising, adapting and adopting both new legislation and other guiding measures at national as well as at an EU level.

1.2.1. CESI's recommendations to close loopholes

a. Under the Social Chapter

The TFEU tackles social policy under chapter X. The EU supports and complements the activities of the Member States in several fields, including the working environment to protect worker's health and safety, working conditions, social security and social protection of workers and many other social aspects (see article **153 TFEU**). Article **156 TFEU** encourages cooperation between the Member States and facilitates the coordination of their actions in certain social policy fields: employment; labour law and working conditions; basic and advanced vocational training, social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association; and collective bargaining between employers and workers.

- All new and revised legislation and recommendations enacted by the European Union, such as the directive on transparent and predictable working conditions and the recommendation on access to social protection for all, should have a highly specific **definition of ‘workers’**. This definition should aim to provide core workers’ rights to all dependent work relationships, including bogus self-employment, digital work, mobile work and flexible work.
- In CESI’s view, reviving a directive on **decent work** with the same definition prerogative as above would be a way to diminish cases of working condition abuse and set appropriate standards across the EU.
- A binding directive on **social protection** for all, instead of the Council Recommendation recently tabled, would be the adequate way to tackle the importance of the obligation that lies with the employers to ensure their employees have social protection.
- A functioning and revised **Working Time Directive**, adjusted to today’s labour market realities, including digital work, mobile work and flexible work is required.

b. Under internal market and competition rules

An effective European Labour Authority (ELA)

The European Labour Authority’s role is to “improve access for individuals and employers to information on their rights and obligations, to support cooperation between EU countries in the cross-border enforcement of relevant Union law, including facilitating joint inspections, to mediate and facilitate a solution in cases of cross-border disputes between national authorities or labour market disruptions”.

According to CESI, the following must be ensured:

- The ELA should have the adequate competences to act as a **coordinating institution** to tackle cross-border labour disputes and manage the growing number of people who are posted within the EU for work.
- The ELA should also act as a **supervisory authority**, with with a fully-fledged complaint mechanism for trade unions, authorities or organisations on the one hand, and on the other, a permanent unit helping Member States’ labour agencies actively detect abusive cross-border practices.
- Complementing this, the ELA should also **advise Member States** on adequate solutions. A common European **database** should be established from which all competent authorities within Member States could obtain crucial information on activities across the EU in order to complete their investigations.
- The ELA should also be a vector and major actor in the promotion of information about those rights to the public at large and workers, and ensuring that **information and consultation rights** are respected in undertakings and amongst workers.

EU company law

- **The malpractice of establishing letterbox companies** and other creative solutions allowing enterprises to avoid taxation and lower their social standards should be tackled to a greater extent - e.g. through the establishment of a clear ‘real seat’ principle by law. Generally speaking, when weighed against each other, fundamental social rights need to be reconciled with economic freedoms.
- **Workers’ participation** cannot be undermined by cross-border transfers of **company headquarters**, and the links between companies’ main places of business, the registered seat and the existing tools for the workers’ participation must be reinforced.
- Member States should require that enterprises commit to **Corporate Social Responsibility** schemes and have an active exchange within **CSR Europe** and engage in dialogues in order to hear and promote good practices across the EU. Vigilance plans within companies could be an example thereof; Member States should implement laws that force companies to prevent and remedy violations of **fundamental rights** throughout their supply chains and operations. Companies should have the legal responsibility to buy from other companies offering decent pay and working conditions.

Posted workers

The posting of workers is a direct consequence of the freedom of services across the EU. Social dumping is mostly present in the context of the posting of workers for the delivery of cross-border services, meanwhile regulated by the newly-adopted Directive 2018/957 amending Directive 96/71/EC.

- CESI **welcomes** the revision of **Directive 96/71/EC**, and mostly approves the new application of regional and sector-specific social partner agreements to posted workers and further steps towards **equal pay for equal work** for posted workers. CESI also gladly notes new equal treatment provisions for local and posted temporary agency workers and new measures to prevent abusive posting regimes through letterboxes companies, infinite posting regimes or requirements to engage in bogus self-employment.
- However, CESI encourages EU decision makers to take **further measures** for fairer posting conditions in **subcontracting mechanisms** and to extend the rules for fairer posting to include the **road sector and truck drivers**.

Coordination of social security systems

Mobile workers and cross-border frontier region workers and their families cannot be discriminated against in **social security benefits** vis-à-vis domestic workers as a result of having exercised their right to free movement. In this regard, CESI welcomes the efforts to revise the EU regulations 883/2004 and 987/2009 to make the coordination of national social security systems among the Member States more transparent and more effective for mobile workers and their families.

More specifically, the transfer and coordination between the Member States of unemployment benefits, long-term care benefits, access to benefits for economically-inactive persons and family benefits should be handled quicker, rendered more understandable and transparent and should be made easier to enforce with fewer administrative burdens. New measures are required for greater legal certainty and a reduction of risks of temporary loss of protection or, of course, double payments.

c. An increased fallback on social fundamental rights and the Pillar of Social Rights

- The Charter and the **European Pillar of Social Rights** should be used as bases to enact new legislations to close the existing gaps.
- Many social fundamental rights included in the European Charter are relevant in the fight against social dumping, among others, i.e. the **right to dignity**, the **prohibition of slavery and forced labour**, and the **right to fair and just working conditions**. We, as a society and political decision-makers need to start denouncing social dumping as a practice that allows badly paid services and bad working conditions, which tremendously impact the living conditions and the mental health of the workers.
- The importance of the fundamental **right of association** and the right to create and join trade unions must be given particular attention within the framework of the Single Market. The seamless trade union representation, especially of the mobile and posted workers, is crucial for the fight against social dumping. A **counselor** within the States' authorities should be appointed in order to share information about rights and other data to every worker across the EU.
- The **right to social security and social assistance** should also be taken into consideration in the case of long-term posted workers, as well as their access to **medical care** in the host member states and the **cost** of medical appointments for workers, which often prevents workers from seeking care for minor health issues.

d. Taxation

Taxation schemes, and more specifically differences between tax systems across states, can have very detrimental effect on labour conditions and labour competition even if they are indirect.

- **Low tax regimes or disproportionate state aid** within the EU may be tailored to attract investors and entrepreneurs, which can lead to unfair competition and have negative repercussions on workers and employees' working conditions. CESI encourages the EU to carry on its work on **tax cohesion** and fight against tax abuse through the work of the Section for Economic and Monetary Union and Economic and Social Cohesion (ECO).
- Tax avoidance on an **international level** and mainly in developing countries has shown to be one of the causes of the increase of migration toward the EU. For this reason, it is crucial that politicians correctly use the tools to prevent **tax evasion**, and more importantly, that they make sure the legislation fighting those practices are correctly implemented (such as the OECD BEPS plan and the ATAD Directive).

e. A more social focus of the European Semester

The European Union and Member States should make better use the European Semester (also as a tool to implement the European Pillar of Social Rights) to tackle social issues directly or indirectly related to social dumping.

- Generally speaking, **social cohesion** and **social rights should be dealt with on equal footing with economic freedoms**.
- **Equal treatment**, equal work and equal pay, the respect of employment protection, social protection and collective agreements across the EU must be given prominence, as they reflect key priorities of the European institutions.
- The upwards convergence of wages, including through fair **minimum wages** across the EU, should be increasingly promoted so as to fight against in-work poverty and allow decent living standards.
- More broadly, boosting the **European Semester officers** as national information hubs, and increasing the financial incentive for Member States to pass **reforms by means of the Country Specific Reports** would have crucial and surely positive effects on the fight against social dumping practices.