

Private International Law and the ongoing process of revising the Posting Directive

PIL in a legal-political force field

The European Commission has recently cut an important knot in the topical file of regulation of labour migration within Europe: in the past summer months, the Commission decided¹ to *maintain* the proposal to revise the Posting Directive as it was released on 8 March 2016.² Thus, the yellow card procedure which was launched against the Proposal by a serial of EU-Member States in May 2016, did *not* result in the withdrawal or amendment of the Proposal. Accordingly, the path is now open towards a further discussion of the Proposal as it was presented on 8 March 2016.

Through the forthcoming legislative process, consideration should be given to rules of PIL. The drafters of the Proposal of 8 March 2016 have already recognised themselves the role of PIL in this theme. Further analysis and discussion is now needed on the issues – inter alia – of the way the European freedom of persons and the European freedom of services interact here with several PIL-rules and PIL-techniques such as the technique of the escape clause and the technique of the choice of law, as well as on the vision on the protection of employees as weak parties in PIL one wants to adhere here.³

Given the identification of the role of PIL in this theme, PIL has fallen explicitly in turbulent political waters, whereby PIL will have to find its place in a legal political force field: PIL has entered openly in the surf of a topical, fierce debate.

It is not a unique phenomenon that PIL falls into turbulent political waters. Earlier, in an article⁴ entitled “Private International Law: a discipline out of the wind or in the surf of fierce socio-legal debates?”, I already summed up, in a critical way, several attempts to carry out political goals originating from a restrictive *migration* policy through a particular handling of PIL rules. The analysis put forward there, dealt with the interaction between migration policy (in the broad sense of the word) and PIL; in that setting, I wondered⁵ to what extent a mission role was reserved for advocates of *foreigners* with an interest in PIL.

¹ See the Press Release http://europa.eu/rapid/press-release_IP-16-2546_en.htm

² COM(2016)128final.

³ For the presentation and elaboration of some of these issues, see the paper “Toepasselijk arbeidsrecht bij langdurige detachering volgens het voorstel tot wijziging van de Detacheringsrichtlijn” which will be published in pdf-format on <https://www.tilburguniversity.edu/nl/over/schools/law/intar/>. For a working paper version, see <https://www.uantwerpen.be/en/staff/veerle-vandeneeckhout/my-website/publications/>

⁴ V. Van Den Eeckhout, “Internationaal privaatrecht: een discipline in de luwte of in de branding van heftige juridisch-maatschappelijke debatten?” *FJR* 2005, p. 236-244 (in Dutch).

⁵ V. Van Den Eeckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van een nieuw decennium”, *Migrantenrecht* 2002, p. 144-158 (in Dutch).

As far as the future examination and discussion of PIL in *this* context - whereby the element of labour protection of employees plays a role – is concerned, a mission role seems to be reserved for advocates of *employees* with an interest in PIL; in any case consideration is needed for the way PIL-rules will be shaped in the *final* version of revision of the Posting Directive. Looking from this perspective, the further discussion of the Proposal for a revision of the Posting Directive ought to be followed up.

Various discussing points (potentially) coming forward in the context of the discussion of this particular Proposal, do touch *broader* issues in PIL, including fundamental PIL-issues – both issues within PIL (for example on the way the protection principle in PIL should be honoured in future) and issues touching the interaction of PIL with other disciplines (such as European Law). Thereby, moreover, much could be extrapolated from the European setting to the *global* setting – including the issue of protection of weak and vulnerable parties through PIL.

Put in a broader way, the issue coming forward here is not only the issue of the role of PIL in protecting *employees* as being weak parties: put in a broader way, what is emerging here is the issue of the protection through PIL of *weak* and *vulnerable persons* in society.