Posted workers in the EU
– Lost in EU’s area of freedom, security and justice? –

THEMIS Semi-Final C
International Judicial Cooperation in Civil Matters –
European Civil procedure

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According to a recent study published by the European Commission – while there are no precise figures – there is a growing number of workers sent from one Member State to another for the purpose of working there for limited amount of time. These workers possess a special status: they often receive significantly lower payments and are more vulnerable to fraudulent activities. In addition, posted workers are less familiar with the foreign legal environment and usually fall victim of undeclared work practices.

LEGAL BACKGROUND AND THE STRUCTURE OF DIRECTIVES

For a better understanding of the phenomenon of posted workers, it is necessary to analyse the European legislation dealing with the judicial cooperation in civil matters and legislation dealing especially with the posted workers.

Judicial cooperation in civil matters
The Lisbon Treaty has made serious changes in the life of the EU by the greater attachment to create an area based on the freedom, security and justice (hereinafter AFSJ) to ensure the freedoms and protection of rights of the citizens. The fundamental provisions are included in the Treaty of the Function of the European Union (hereinafter TFEU) in Title V, which aims, among others, to ‘facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.’ It was necessary because more and more disputes included cross-border dimension arising questions like which Member State’s law is applicable, which court has a jurisdiction or how can be enforced a decision in another Member State. The proper functioning of the Single Market also required establishing the AFSJ. As a result of the free movement of workers, the freedom to provide services, freedom of establishment the European labour market was deeply affected with these cross-border featured troubles: conflict of laws and of jurisdiction along with others. The AFSJ within the judicial cooperation in civil matters gives a great opportunity to the EU and the Member States as well to handle the questions arising ensuring the principle and fundamental rights of the EU to be exercised.

European labour market and AFSJ
Within the field of the EU legislation, the first source of law concerning international labour law cases was the Rome Convention on the law applicable to contractual obligations. Two decades later, a new key

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3It has realised the Tampere, The Hague and Stockholm programmes.
4TFEU Article 67.4, see also Article 81.
5REGULATION ROME I. Preamble, Section 1 and. 6.
6CONVENTION on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.
element of the journey of strengthening the cooperation between Member States came into force: The Rome I Regulation’, which is based upon and replaces the Rome Convention and governs ‘choice of law’ in the European Union. Rome I applies to contractual obligations arising in civil and commercial matters. The cornerstone of the Regulation is the principle of party autonomy, since Article 3. (1) provides that a contract will be governed by the law chosen by the parties. However, here are a number of specific exclusions and limitations on the extent to which the parties are free to choose the governing law of their contracts. The Rome I furthermore provides special regulations on labour law matters; Article 8. (2) applies for employment contracts, that says ‘To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.’

Moreover, there are two different types of carrying out work in another Member State. First model is within the scope of the free movement of workers (Article 45 of the TFEU), whereas the other model is an evolvement of the freedom to provide services. The Directive 96/71/EC (hereinafter PWD) covers the second form as an exception of the regulations of the Rome I, since the provisions of the PWD prevail in cases where a worker is posted to another Member State8. The regulations of PWD defer from the above mentioned Article 8. (2) of Rome I in the event of ‘norm collision’, since it orders that the applicable law in posting cases adjusts to the sending Member State instead of the one where the work is carried out.

**Posted worker phenomenon**

Before discussing the topic, it is sufficient to understand the term ‘posted worker’: ‘posted worker means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works9, while not integrating in its labour market’.10 This usually happens when a service provider concludes a contract with a party from another state and sends its employees to carry out the contract there. It should be noted, that for this reason, posted workers are not entitled to equal treatment as nationals concerning working and social conditions, which leads us to the aforementioned problem. It must be mentioned here that there is a special group of employees who, at first glance, seem to be posted workers, but because de facto they are ‘self-employed’, they are exception of the application of legislation related to posted workers.11 The first case referred to the European Court of Justice (hereinafter ECJ) concerning

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8Definition detailed below.
9DIRECTIVE 96/71/EC, Article. 2. (1)
11This is one of the main critics related to PWD, because on the contrary, workers active in two or more Member States may fall under the terms and conditions of the PWD, and thus be considered as ‘posted workers’ in their own right. See the European Commission’s Report on Posting of workers: [http://ec.europa.eu/social/main.jsp?catId=471](http://ec.europa.eu/social/main.jsp?catId=471)
posting of workers was the Rush Portuguesa case in 1990, which lead to the birth of the PWD in 1996 and the latter Directive 2014/67/EU on the enforcement of Directive 96/71/EC (hereinafter Enforcement Directive) in 2014\(^1\), whereby the EU tried to gain control over the situation and provide aid for the problem of inequalities. The directives define a set of mandatory rules regarding the terms and conditions of employment to be applied to posted workers to guarantee that these rights and working conditions are protected throughout the European Union (hereinafter EU) and to avoid ‘social dumping’ where foreign service providers can undercut local service providers because their labour standards are lower.\(^2\)

**THE PHENOMENON OF POSTED WORKERES IN NUMBERS**

\[ Net \text{ balance between postings sent and received 2010 and 2014 (in 1 000)} \]

As it is clearly visible, 86% of total postings went into the EU15\(^3\) countries. In 2014, 86% of total postings went into the EU15 countries with Germany (414,200), France (190,850) and Belgium (159,750) being the three most important countries, receiving around 50% of all postings. As a proportion of domestic

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\(^1\)http://ec.europa.eu/social/main.jsp?catId=471

\(^2\)http://ec.europa.eu/social/main.jsp?catId=471

\(^3\)Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom
employment, Luxembourg (9%), Belgium (3.6%) and Austria (2.5%) were the main receiving countries in 2014.\textsuperscript{15}

In absolute terms, Poland is the most important sending country. Poland (266,700), Germany (232,800) and France (119,700) were the largest senders of posted workers in 2014. If postings to multiple Member States are also taken into account, the number for Poland would be much higher, amounting to 428,400 posted workers in 2014. As a proportion of domestic employment, the incidence of posted workers in sending countries was highest in Luxembourg (20.7%) and Slovenia (11.5%).\textsuperscript{16}

**Geographic proximity**

The majority (52%) of posted workers are sent to a neighbouring state. The pattern of geographic proximity is particularly strong in the Benelux countries as well as Austria, France and Italy from the sending perspective and in Luxembourg, Austria and the Czech Republic from the receiving perspective.\textsuperscript{17}

**Duration of posting**

The average duration of posting is less than 4 months with significant differences between countries. Available data (information is not available for many Member States, including on main sending countries such as Poland) suggests that the average duration of posting in 2014 was 103 days. There are significant differences between the Member States: the average is not longer than 33 days in France, Belgium and Luxembourg but more than 230 days in Estonia, Hungary and Ireland.

**STRUCTURE OF DIRECTIVES**

To achieve this, the directives declare a set of core rights for posted workers that they possess in the host Member State, even though they are legally employed by the sending company in the Member State of their origin.

The set of rights are maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates (this point does not apply to supplementary occupational pension schemes); the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; 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 and equality of treatment between men and women and other provisions on non-discrimination.\textsuperscript{18}

\textsuperscript{15}\textit{The Posting of Workers Directive – current situation and challenges}, 2016, p. 16.
\textsuperscript{16}\textit{The Posting of Workers Directive – current situation and challenges}, 2016, p. 16.
\textsuperscript{17}\textit{The Posting of Workers Directive – current situation and challenges}, 2016, p. 17.
\textsuperscript{18}DIRECTIVE 96/71/EC, Article 3. (1)
The rules of PWD

The PWD aims to provide a legal minimum, a common set of rules, so called 'hard core' minimum terms of employment and working conditions. The PWD is applied to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3\textsuperscript{19}, to the territory of a Member State.\textsuperscript{20} In order to enforce the rights stipulated in the PWD, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.\textsuperscript{21} These rules are binding for the host Member State, and in this sense it can be viewed as a clarification of the rules of private international law (Rome Convention and Regulation Rome I) which allows the application of mandatory rules of the hosting Member State.\textsuperscript{22}

The rules of the Enforcement Directive

The Enforcement Directive was approved with the aim to strengthen the practical application of the PWD by addressing issues related to fraud, circumvention of rules, and exchange of information between the Member States.\textsuperscript{23}

While the goal was to establish a clear legal framework to guarantee fair competition and respect for posted workers’ rights along with taking full advantage of internal market opportunities and allowing employers to offer more favourable conditions than the sending member states – when it comes to legal disputes, evidence shows different. It is clear that the main point of the regulation was to protect workers from the possible worse conditions of the hosting Member State, and it fails in situations, where the posted worker should receive protection from the hosting Member State opposed to the Member State of origin.

The Enforcement Directive was needed to be transposed by the member state until July 2016, although the quick proposal for revision in March 2016 indicates that the regulation is far from perfect.

\textsuperscript{19}The Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures: (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

\textsuperscript{20}DIRECTIVE 96/71/EC, Article. 1. (1)

\textsuperscript{21}DIRECTIVE 96/71/EC, Article. 6.

\textsuperscript{22}http://ec.europa.eu/social/main.jsp?catId=471

\textsuperscript{23}http://ec.europa.eu/social/main.jsp?catId=471
THE REGULATION IN PRACTICE

In the next section we are going to take a look on the three substantial problems of the regulation of the posted workers phenomenon. The overall evaluation of the regulation and the related practice of the ECJ, the problems arising from the exchange of information between the Member States and posted workers and the inequalities and the dead ends of payment regulation and its practice.

Never achieved goals: protection vs. freedom
Even though the PWD from 1996 was revised in 2014, practice has not seem to change. The ECJ’s practice have been consequent on the issue, seemingly going against the real goal of both the original and the latter regulation. The legal environment fails to bring justice to the European Community.

Posted workers are naturally at a disadvantage when it comes to the comparison with local employees. They are not familiar with the environment, the legal background along with others. The PWD came to life to ensure minimal standards and establish protection for people who find themselves in these situations. The directive complemented with the practice of the ECJ fails to achieve goals like avoiding inequality and discrimination, unifying working conditions, and avoiding social dumping, furthermore to respect the freedom to provide services. The ECJ’s cases below will outline the real nature of the conflict between the protection of workers vs. the aforementioned freedom.

The International Transport Workers’ Federation & The Finnish Seamen’s Union v Viking Line Abp & Oü Viking Line Eesti – C-438/05
The Viking case is not closely related to posted workers, though it can be viewed as an antecedent for the cases below concerning the issue of posted workers and their protection.

The case briefly; a Finnish passenger, ferry operator Viking – after making a loss – decided to operate under a ‘flag of convenience’ instead of the Finnish flag in order to avoid collective agreements with Finnish trade unions and be able to cut jobs and influence the terms and conditions of employment. The Finnish unions called for boycott and strike. The ECJ ruled that Viking’s rights for freedom of establishment were infringed, since the actions of the unions had the effect of making the exercise of their rights less attractive or even pointless.

24 http://ec.europa.eu/dgs/legal_service/arrets/05c438_en.pdf
Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Partners – C-341/05

Laval, a Latvian company has successfully tendered to renovate a school in Vaxholm, Sweden, where they posted 35 Latvian construction workers. The workers’ remuneration and their level of insurance protection were lower and overall less favourable than what the Swedish collective agreement would have guaranteed, therefore, the Swedish construction unions tried to get Laval to sign up to collective agreements in the construction sector. The contracts would have covered payments, holidays, insurance agreements, etc. Laval refused to sign up, hence the Swedish construction unions – along with the Swedish electricians’ union – blockaded the construction site, which action brought the Swedish arm of Laval into bankruptcy.

Laval brought the case to the Swedish court stating that the Swedish unions infringed their rights of freedom to provide services. The company also argued that they have been discriminated because the Swedish national provisions disregarded the collective agreements concluded with unions in Latvia. The ECJ ruled that while collective industrial action is a fundamental right, Laval’s rights of freedom to provide services have been infringed. The protection provided in the PWD has been exceeded while there was no clearly defined national law.

Dirk Rüffert v Land Niedersachsen – C-346/06

A German company, Objekt und Bauregie entered into a contract with a party from Land Niedersachsen for structural work, the subject of the contract was building a prison. Objekt und Bauregie sub-contracted the work to a Polish company. According to the local regulation tenderers to public contracts, the contractor was obliged to ensure a remuneration to their workers prescribed by the local collective agreement. The Polish company paid its 53 workers only the 46.57% of the minimum wage laid down in the collective agreement, hence the contract was terminated and contractual penalties were demanded.

The Polish company brought the case to the German court, which referred the case to the ECJ to decide if the public procurement rules are incompatible with the freedom to provide services. To put it forward, according to the ruling of the ECJ, Rüffert’s rights of freedom to provide services were infringed. The Court stated that the local law cannot be considered as an implementation of the PWD, furthermore the mentioned collective agreement was not universally applicable. The ECJ also added that the collective agreement differentiated between public works contracts and private contracts, which excludes the agreement from the scope of the PWD.

**Commission v Luxembourg – C-319/06**

The Commission of the European Communities brought an enforcement action against Luxembourg. According to the Commission, Luxembourg failed to fulfil its obligations declared in the PWD and the TFEU (freedom to provide services) by transforming the PWD into an instrument restricting the right to take action for the sake of ensuring equal pay for equal work. The Commission claimed that Luxembourg has exceeded its scope with its legislation applicable to foreign posted workers.

The ECJ ruled that even tough Luxembourg offered better working conditions for workers, it went further than the minimum protection offered by the PWD, therefore it is unacceptable and the law must be amended.

**Our conclusions on the case-quartet**

It seems like while the ECJ analyses and interprets the PWD word-for-word, it puts the freedom to provide services into a way broader scope and interprets it in a teleological way. While this latter approach is understandable and – furthermore – necessary, approaching the PWD differently fails to reach its goals and strips it from its instruments. It must be noted tough that the TFEU – which declares the fundamental freedoms including the freedom to provide services – is considered to be a source of law of a higher level, special regulations shall not go against the general legal principles, as the use of general legal principles shall not lead to jeopardize or hinder the application of special regulations either.

Examining the Laval and Rüffert cases it becomes obvious that the main goal of the regulation was not achieved: preventing discrimination and social dumping. Furthermore, after the Viking, Laval and Rüffert cases the ECJ went even further with the Luxembourg case undermining protection of workers. It failed to protect workers for the sake of freedom and did not manage to bring equality into the labour market.

**THE NEW APPROACH OF THE ENFORCEMENT DIRECTIVE**

The discussed cases revealed certain deficiencies of the PWD, therefore the Commission was willing to eliminate negative effects of the regulations when drafting the Enforcement Directive. Although misuse is practically inevitable in posting cases, communication and cooperation may be effective supporting tools for the Member States and the involved parties in order to recognize the key elements of the occurring problems and keep negative effects on a minimum level.

[27](https://www.etuc.org/IMG/pdf/summary_of_judgment_230608_EN.pdf)
From this aspect, an impressive innovation of the Directive is the improvement of the access to information and the mutual assistance of the Member States and their authorities in this field. During the formation of the new directive and the anticipatory negotiations, one of the main goals was to achieve a stronger cooperation between the Member States as well as between the Member States and the Commission, furthermore to make all relevant regulations related to posted workers and its practice more transparent. In order to accomplish these aims, a more elaborated and controllable legal background was needed concerning the regulations on the exchange of information.

There are two main fields of the right to information in this matter. We can distinguish between the obligation of the Member States to provide information about their legal regulations and practice and cooperate with each other during this information exchange process, and the other main field that concentrates on the rights of the individual posted workers, who require information in order to exercise their rights stipulated in the directive and the national laws.

When comparing the Directive 96/71/EC and the Enforcement Directive, it stands out that the regulations on information exchange are not only longer and more detailed in the new Directive, but it also brings a new field under regulation that is favourable for the individual posted workers under a new chapter of the Directive. When reviewing the Directive 96/71/EC a main target of the Commission was to avoid fraud that occurred often during the application of the laws concerning posted workers. Therefore the Enforcement Directive aims an increased awareness of posted workers and companies about their rights and obligations and an improved cooperation between national authorities in charge of posting. The Enforcement Directive sets a higher level of protection, since it empowers trade unions and other parties to lodge complaints and take legal and administrative action against the employers of posted workers, if their rights are not respected and it even ensures the effective application of administrative penalties and fines across the Member States if the requirements of EU law on posting are not respected. However, granting rights in order to protect workers may be redundant without a legal background that ensures the access to information on their rights and obligations.

**Obligation of Member States to provide information**

A genuine problem of posting is that an employee may face obstacles to obtain information about the applicable law that affects their employment. Since most if the labour law regulations of the Member States are not harmonized, there are great differences between the applicable laws in the discussed matters. Under Article 3 of the PWD, certain provisions of the host state prevail in posting cases, both stipulated by law and administrative provisions and by collective agreements. For certain nationalities even the understanding of

the term ‘collective agreement’ may cause problems, since many Member States regulate most employment issues by laws and not by profession-specific, sectoral collective agreements.\textsuperscript{29} Therefore it is crucial for the individual to access information on terms and conditions of employment, no matter if they are laid down in collective agreements or in acts or administrative provisions\textsuperscript{30}. The Enforcement Directive points out that ‘difficulties in accessing information on terms and conditions of employment are very often the reason why existing rules are not applied by service providers’, and lays emphasis on the improvement of the accessibility when stipulating in the preamble that Member States should ensure that such information is made generally available, free of charge and that effective access to it is provided, not only to service providers from other Member States, but also to the posted workers concerned.’

This regulation is a reflection of the protection of the weaker party, which phenomenon is a key aspect of labour law on both international and national levels. Remarkable example of this aim of international cooperation between Member States Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\textsuperscript{31} that stipulates in Article 18 of the preamble that ‘in relation to […] employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules’.

Since a minimum standard of the terms and conditions of employment are laid down in the laws of the host state\textsuperscript{32}, posted workers may face encumbrances to understand the regulations applicable to their employment. This problem has been recognized when preparing the Enforcement Directive, therefore an individual chapter deals with this issue. The Directive formulates ‘improved access to information’ as an obligation of the Member States, when it prescribes the way how relevant information shall be provided by them on a single official website. The aim to provide workers and service providers with access to this information in languages other than the official language or languages of the country in which the services are being provided has been outlined during the preparation of the Enforcement Directive.\textsuperscript{33} Although the Directive describes it as an obligation of the Member States in point (c) of Article 5. (2)\textsuperscript{34}, it resigns the choice of the certain language to the states, which freedom may cause problems in the future, with respect to the fact that

\textsuperscript{29}See the Study ‘The extension of collective agreements in Europe, 2015’ of the CENTER FOR ECONOMIC STUDIES (CES) INSTITUTION.
\textsuperscript{30}PREAMBLE OF THE ENFORCEMENT DIRECTIVE, Section (19)
\textsuperscript{31}This principle has already appeared in Preamble of the COUNCIL REGULATION (EC) NO 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
\textsuperscript{32}ENFORCEMENT DIRECTIVE 2014/67/EU, Article 3. (1)
\textsuperscript{33}Opinion of the European Economic and Social Committee on the Posting of workers in the framework of the provision of services — Maximising its benefits and potential while guaranteeing the protection of workers, (2008/C 224/22)
\textsuperscript{34}’In order to bring about further improvements with respect to access to information, Member States shall make the information available to workers and service providers free of charge in the official language(s) of the host Member State and in the most relevant languages taking into account demands in its labour market, the choice being left to the host Member State.’
there may be a wide range of sending parties in some Member States. The Enforcement Directive furthermore obliges the Member States to supply all information by electronic means, although in some regions internet access might face difficulties. However, it is true that this might be the only way to make information generally available free of charge. We also have to take into account that there are two major models of posting; one mainly driven by labour cost differentials, therefore in this group less educated workers may be concerned. The other model is driven mainly by the shortage and demand for skilled and highly professional workers.\textsuperscript{35} It is clear that the first main group might face more difficulties while understanding applicable laws considering their employment.

**Information exchange between Member States**

The second fundamental element of the Enforcement Directive considering information is the mutual assistance between Member States in terms of information exchange, investigation and enforcement of the provisions stipulated in the Directive and national laws. During the revision of the PWD, it was recognized that in order to avoid fraudulent practices, it is inevitable to strengthen the cooperation between Member States in many means.

It became clear that ensuring an effective way to obtain sending and service documents is fundamental for a host Member State in posting cases, in order to comply with the regulations and to receive information about the workers, the agreement, and the terms and conditions of employment. The first case where the ‘employment documentation issue’ occurred was a key judgement of the European Court - as far as European civil procedure law is concerned. In Joined Cases C-369/96 and C-376/96\textsuperscript{36}, the Court established that ‘the Treaty precludes the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to draw up social or labour documents such as labour regulations, a special staff register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.’ In this case, the relation between the problems of temporary deployment of workers conflicted the freedom to provide services. A main line of the case is an example for the information issue discussed above. In order to obtain information about the worker sent from another Member State, the host state may require certain documents, provided this obligation does not exceed a certain level that may infringe rights stipulated in the Treaties.

\textsuperscript{35}Posting Workers Directive- Current situation and challenges, Study for the EMPL Committee, 14.
\textsuperscript{36}JUDGMENT OF THE COURT of 23 November 1999. - Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)
The conclusion of this decision arises in many other cases, such as Case C-490/04, where the Court established that overriding a certain level of undertakings is unjustifiable, therefore the obligation to translate every relevant document to German is a disproportionate restriction on the freedom to provide services.37

Even though the infringement of the freedom to provide services has been established in many cases in accordance with the required documents related to posted workers, it has not been a question that certain information on workers should be available for host states and employers in order to control the work carried out in their territory and comply with the relevant regulations in this field. Recognizing these needs, it is understandable that the Enforcement Directive declares in its preamble that a service provider shall ensure that the posted workers identity is verifiable for the duration of the posting by the competent authorities.38

However, administrative provisions in order to identify the posted workers may be justifiable, as it has been declared by the Court in Case C-315/1339, where the PWD Directive was concerned. Provided it is necessary for safeguarding an overriding ground of public interest, it is legitimate if the host Member State’s authorities require a declaration prior to the commencement of the work in order to identify the workers who are unable to submit a proof of a similar declaration that their employer should have made in the sending state. The protection of workers and the combating of social security fraud are examples for the overriding public interest, as established in this case.

Practice has revealed the importance of the cooperation between the Member States, consequently the Enforcement Directive addresses ‘letter-box’ companies that use posting to circumvent the law. Furthermore administrative requirements are laid down in order to recognize the responsible competent national authorities and to keep and make available certain documents. To fulfil these obligations, Member States may designate a contact person if necessary, to enter into collective bargaining within the host Member State. These measurements might be advantageous for the workers as well as for their employers, however the practice will show how effective these new regulations will be, since only a short time has passed since the Enforcement Directive had been implemented by the Member States. It is crucial that the states share their best practices in the future in order to avoid problems discussed above. For this purpose, a stronger cooperation might be an appropriate solution, as mentioned in Article 21. (2) of the Enforcement Directive, where it declares that ‘Member States may apply additional bilateral agreements concerning administrative cooperation’. The three Baltic States are a good example for this enhanced administrative cooperation in this

38PREAMBLE OF THE ENFORCEMENT DIRECTIVE, Section (24).
39JUDGMENT OF THE COURT (Third Chamber) of 3 December 2014. Criminal proceedings against Edgard Jan De Clercq and Others.
We can mention another example for the cooperation between Member States before the Enforcement Directive. In 2013, the Confederation of German Trade Unions (DGB) and the Bulgarian trade union confederations (PODKREPA and KNSB) concluded an agreement to cooperate in DGB’s two-year-long project, called ‘Fair mobility’ for posted workers.

**CHALLENGES IN THE FIELD OF PAYMENT OF POSTED WORKERS**

As mentioned above, the Article 3. (1) of PWD enumerates the main terms and conditions of employment that must be guaranteed in the host Member States. These may be laid down by legislation or by collective agreements or arbitration awards. It is an important requirement that the collective agreements, as well as the arbitration awards, must be universally applicable. That means the collective agreements are observed by all undertakings in the geographical area in the profession or industry concerned. Out of the above mentioned terms and conditions of the Directive, we put the emphasis on the main problems with the payment of the posted workers. It is important to add that those enumerated labour rights cannot be considered as minimum floors and the PWD has not harmonised the material content of those mandatory rules of minimum protection.

As established above, the posting of work has an essential role in the labour market of the EU. This is the reason why having a certain and clear regulation on this issue should be so important. However, after analysing the relevant rules of PWD, we can conclude the Directive misses the clear definition of minimum rates of pay and it does not contain the principle of equal treatment. In ideal case, the PWD would make a fair balance between the competition and the protection of rights of the posted workers. According to the practice of ECJ, that ‘provision aims to ensure that posted workers will have the rules of the host Member State for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State’.

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40EU Programme for employment and social innovation- EaSI (2014 - 2020) EaSI Grants awarded as a result of the call for proposals VP/2014/007, Posting of workers: enhancing administrative cooperation and access to information
42DIRECTIVE 96/71/EC Article 3.(8)
43KRISTINA MASLAUSKAITE, Posted workers in the EU: Stole of play and regulatory evolution, p. 9.
44SÄHKÖALOJEN AMMATITILITTOO RY CASE, C-396/13, ISBIR CASE, C-522/12
46According to the main objectives of PWD, see paragraph 5. of the Preamble of PWD
48SÄHKÖALOJEN AMMATITILITTO RY CASE, C-396/13 paragraph 30., see also LAVAL UN PARTNERI CASE, C-341/05 paragraphs 74 and 76.
The problem of ‘the minimum rates of pay’
For a better understanding, it is needed to clarify logic behind the regulation of the PWD. The EU is based on many fundamental principles such as free movement of workers and freedom to provide services. We can make a strict distinction between the last two. The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there, to protect them against the different types of discrimination and remuneration and working conditions compared to nationals of the host Member State. The freedom to provide services gives businesses the right to provide services in another Member State.\textsuperscript{49} This right enables businesses to post their own workers to another country within the territory of the EU, thus the posting of workers is based on a pure economic approach and it has determined the structure of its regulation. This may conflict the protection of the posted workers’ rights, since due to the ECJ’s practice the ‘posted workers phenomenon’ shall be discussed in the scope of the freedom to provide services.

One of the main challenges is the diversity of the Member States’ labour law legislation. The minimum wage, for instance, is set in collective agreements or by law – depending on the national legislation. The question of minimum wage becomes more complicated and impenetrable if we take into account that 6 out of 28 Member States has no regulation on minimum wage at all.\textsuperscript{50} Needless to say that makes the situation of posted workers harder if they leave their country and face a legal system that is way different to the one they got used to. They – possibly – do not speak the official language of the host Member State. Due to these problems, posted workers are in a difficult situation which raises several serious questions. Unfortunately, PWD could not answer them sufficiently, as we highlighted these problems in connection with the right to information.

Related to the payment, it is an immense absence of PWD that the term of ‘minimum rates of pay’ is not clear enough. The very base uncertainty with the minimum rates of pay is the absence of a simple and clear definition or enumeration of constituent elements of the minimum rates of pay. As a result of this deficiency, in practice, posted workers earn significantly less than local workers, put it in other way, there is a massive average wage gap from 10\% up to 15\% between these two. The gap can be deeper in specific sectors such as transport sector in Belgium where the difference is estimated up to 50\%.\textsuperscript{51} It creates the risk that posted workers will be subject of undeclared work practiced like ‘envelope wages’ or ‘cash-in hand’ or the phenomenon of ‘bogus self-employment’.\textsuperscript{52} Because of this uncertainty the ECJ had to make decisions considering the minimum rates of pay, especially the component element of the minimum wage (e.g. 13th, 14th month bonuses, meal vouchers, holiday pay etc.).

\textsuperscript{50}EUROFOUND (2017), Statutory minimum wages in the EU 2017, Dublin. p. 3-4.
\textsuperscript{51}EUROPEAN COMMISSION, SWD(2016) 52 final, p. 13.
\textsuperscript{52}EUROPEAN COMMISSION, COM(2016)128 final, p. 4.
‘The minimum rates of pay’ in the practice
In Commission v Germany case the European Commission brought proceedings against Germany, because the latter, according to the European Commission, took account only of the general bonus granted to workers in the construction industry as a constituent element of the minimum wage. Germany referred to forthcoming amendment, the misconstruction of the German rules and the calculation of the minimum wage. The ECJ pointed out in its judgement that ‘allowances and supplements which are not defined as being constituent element of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provision of Directive 96/71, be treated as being elements of that kind’. The ECJ also stated that, when a worker carries out additional work or works under particular conditions it is ‘entirely normal’, compensation must be provided for that additional work, but this has not to be taken into account for the purpose of calculation of the minimum wage.

In Isbir case, concerning Mr Isbir, who was employed in the industrial cleaning sector in Germany, applied for more favourable provisions establishing the hourly wages of the building cleaning sector, the ECJ has confirmed its point of view declared in the Commission v Germany case. In this case the ECJ added that the PWD did not harmonise the material content of the mandatory rules for minimum protection provided in article 3 of PWD, considering that it is the competency of the Member States to determine freely a system applicable.

The ECJ had the similar position, when stated in Leloup-Arblade joined case that the provision of constituent elements of the minimum should be determined by the Member State since nothing obliges Member States to extend their legislation or collective agreements relating to minimum wages. Another interesting thing related to this joined case was about the obligation of employer to keep a special staff register if the employer employs workers in more than one workplace and also an individual account. In this matter, the ECJ pointed out ‘the need for effective control by the authorities of the host Member States’, but it is the task of the Member States to establish such a regulation on the documentation be kept (on site) with regard to the freedom to provide of services. It was also a very important statement of the ECJ to make

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53COMMISSION V GERMANY CASE, C-341/02, paragraph 39.
54COMMISSION V GERMANY CASE, C-341/02, paragraph 40.
55ISBIR CASE, C-522/12, paragraphs 39 and 40.
56ISBIR CASE, C-522/12, paragraphs 34 and 35.
57LELOUP-ARBLADE JOINED CASE, C-369/96, paragraphs 41. and 44.
58LELOUP-ARBALDE JOINED CASE, C-369/96, paragraphs 74 to 75.
possible the restriction of the freedom to provide of services if the purpose of the restriction is justifiable, and the case also refers to the ‘information issue’ discussed above.

In Sähköalojen ammattiliitto ry case the ESA, a Polish undertaking, concluded employment contracts in Poland and under the Polish law in the electricity sector with 189 workers, who were posted to ESA’s Finnish branch. The posted workers of ESA claimed that the Polish undertaking did not pay them a remuneration that was due under the Finnish collective agreement for the electricity sector. The posted workers assigned their claims to the Sähköalojen ammattiliitto which brought proceedings. This case had two aspects. One was the question of conflict of law. In detail, the Polish law prohibits the assignment of claims arising an employment relationship while the Finnish one has not a prohibition like this. According to the ECJ in that case the rules of Polish law referred by ESA were irrelevant, partially because of the locus standi, on the other hand, with regard to the subject-matter of this case (minimum rates of pay). Article 3. (1) of PWD which makes ‘absolutely’ clear that a question concerning minimum rates of pay within the meaning of the PWD is governed by the law of the host Member State. The other aspect was about the minimum rates of pay. The ECJ also confirmed the decision made in Commission v Germany with the regard that ‘the minimum rates of pay are to be defined by the national law and/or practice of the host Member State.’ Consequently, the legislation of the host Member State can determine the way of calculating minimum wages. However, according to the ECJ, allowances, which are intended to ensure the social protection of the workers, are part of the minimum wage.

A new proposal

After this little enumeration of the settled case law of the ECJ, it can be concluded that the practice is consistent in the matter that the minimum protection provided by the PWD does not lead to a harmonisation in the EU. For this reason, Member States are entitled to choose a system related to the minimum wages. Therefore the ECJ refuses to determine neither the definition of the minimum rates of pay nor the constituent elements of minimum wage. Nevertheless, this diversity does not redound the certainty which may provoke legal-natured disputes all over in the territory of the EU. Furthermore, we can add the economic-natured challenges such as the intention of sending companies to ‘pay the rates applicable to the lowest pay group, rather than the adequate pay group’ (level of education, job tasks etc.), the phenomenon of letter-box companies or social dumping. These challenges made the adoption of the Enforcement Directive necessary in order to build a more effective balance between the freedom to provide of services and the protection of

59LELOUP-ARBLADE JOINED CASE, C-369/96, paragraphs 34 to 38.
60SÄHKÖALOJEN AMMATTILIITTOO RY CASE, C-396/13 paragraphs 21 to 23
61SÄHKÖALOJEN AMMATTILIITTOO RY CASE, C-396/13 paragraphs 36, 38. and 39.
62SÄHKÖALOJEN AMMATTILIITTOO RY CASE, C-396/13 paragraphs 48., 49. and 70.
63EUROPEAN COMMISSION, SWD(2016) 52 final p. 11.
64JAN 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, N°5/2014.
posted workers and to reduce the enormous wage gap, furthermore to prevent the fraud and abuses regarding letter-box companies. The Enforcement Directive established a more sophisticated level of monitoring working conditions and access to relevant information, as it was mentioned above.

To establish a better level of protection of posted workers, the European Commission elaborated a proposal on PWD suggesting the replacement of the term ‘minimum rates of pay’ by ‘remuneration’ which may clarify the uncertainty of the term. The proposal has not been adopted yet. Some countries like France, Belgium or Germany are supporting the proposal and additionally aim to establish the principle of ‘equal pay for equal work’. Other countries like Hungary, Estonia expressed their doubts. According the opposing Member States the proposal is premature because we are not aware of the effect of the Enforcement Directive yet, and the principle of ‘equal pay for equal work’ is incompatible with the Single Market because the pay rate differences are a legitimate component of fair competition. The BusinessEurope in its position letter also argued the necessity of the Commission’s proposal. According to their arguments, the establishment of remuneration would mean the interference into the national wage-setting system. The arguments of opposing parties are understandable, but the desire to protect posted workers through the solution of the ‘anomaly of minimum wage’ would be a very key point in the field of the European labour market.

**SUMMARY**

The issue of posted workers is far more complex and deep rooted than what we would be able to grasp in a short paper. Our goal was to provide a brief summary on the phenomenon and draw attention to the arising problems of posted workers – a challenge needed to be addressed, questions needed to be answered.

We inspected the definition and the legal nature of the status of Member State employees working temporarily in another Member State. It is easy to see that their growing numbers are part of the European Community and this way it needs a proper European answer, a European regulation.

First, we analysed the problems of the regulation through the practice of the ECJ. While the text of the PWD was in accordance with the practice of the ECJ and TFEU, it is obvious that neither the legislation nor the application of law provide sufficient protection for posted workers. Experience shows that inequalities and social dumping still occur in the labour market.

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66BUSINESSEUROPE, Revision of the posting of workers directive – BusinessEurope position, 17/05/2016
It seems like we need either a higher level of standards guaranteeing worker-protection by not only establishing ‘hard-core minimum standards’, or we need a different approach that deals with situations where the worker must be “protected” from its sending Member State in comparison with the host Member State.

Secondly, we analysed the Enforcement Directive whether it is able to tackle problems arising from fraud, circumvention of law and eligible communication between Member States and workers. Since it is a fairly new revision, we cannot be sure yet if it is going to live up to the European expectations.

It is positive that the directive lays down requirements like mutual assistance and administrative cooperation, including an online database summarising general information. It tries to establish an appropriate and effective checking and monitoring mechanism that is in accordance with national laws, furthermore, it lays down rules on applicable penalties. While rights are granted, we still cannot be sure if posted workers will be informed sufficiently to be aware of their exact legal status. It is still questionable whether the obligation of Member States to provide effective mechanisms for posted workers to lodge complaints will be an efficient instrument in practice instead of establishing a central system or authority – at least unified forms – to handle problems.

Finally, we examined problems related to remuneration of posted workers through analysing the Commission v Germany, Isbir, Leloup-Arblade, and Sähköalojen ammattiliitto ry cases. There is an undeniable wage-gap phenomenon, which obviously backs up the fact that the regulation fails to prevent labour market related inequalities and social dumping.

The substantial question is the lack of an exact legal definition for the minimum rates of pay that could be applied in specific and individual cases, which makes court practice unjust in point of different Member States.

Differing national regulations also contribute to the complicated and ambiguous legal environment especially having Member States that has no statutory minimum wage, while other Member States are unable to interpret collective agreement in their national law.

As experience shows, regulation still leaves an open door for fraud and abuses, hence we are looking forward to see if the Enforcement Directive is able to give adequate solutions for these problems. As we mentioned earlier, the quick proposal for revision in March 2016 still leaves us sceptic.
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