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# DISCUSSION PAPER

## The revision of the Posted Workers Directive: towards a sufficient policy adjustment?

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### Executive Summary

Labour mobility within the European Union continues to be a limited phenomenon. This concerns both long-term intra-EU mobility and more temporary forms of mobility such as posting of workers, i.e. workers posted to another member state in the framework of cross-border service provision. Yet, despite the limited nature of posting, this topic is far from being absent from the public and political debates. Several factors contribute to this.

Firstly, a surge in the number of posted workers has been noticed over the recent years and increased attention has therefore been paid to this issue. Quite a few economic sectors, including construction, manufacturing, and social work, are very concerned by this trend. Secondly, several types of abuses have been recorded such as letter-box companies, bogus self-employment and exploitation of the posted workers' vulnerable situation. Thirdly, questions have been raised as to whether the balance struck by the EU legislator in 1996 (when adopting the Posted Workers Directive) between the freedom to provide cross-border services and the workers' social rights is still valid today.

These elements highlight the need for a policy adjustment in order to preserve the legitimacy of the citizens' and workers' freedom to move and, to a certain extent, of the social dimension of the European project. In this context, the European Commission published a proposal to revise the 1996 Directive in order to strike a better balance between economic and social rights. But is this proposal sufficient to ensure a level playing field between economic actors and equal treatment between workers? How will this proposal affect the implementation of other EU initiatives aiming to tackle fraud and abuse? What else is needed to address the tensions between the Single Market principles and the EU's social objectives?

This discussion paper, published in the context of the Dutch Presidency and the ongoing negotiations of a revised Directive on posted workers, focuses on these questions while proposing some concrete solutions for a fairer policy framework.

# 1. Introduction

In spite of European policies promoting and facilitating the free movement of workers (Art. 45 of the TFEU), the freedom of establishment (Art. 49 of the TFEU), and the freedom to provide services (Art. 57 of the TFEU) within the European Union (EU), labour mobility remains a very limited phenomenon. Indeed, a European integrated labour market is in the making as a result of the EU's continuous efforts to remove remaining barriers. However, statistics show that European workers' mobility remains rather modest. This is true both for permanent and temporary mobility trends.

This discussion paper – published in the context of the ongoing negotiations of the reform of the Posted Workers Directive (PWD) – aims to give a brief overview of intra-EU labour mobility flows in general and of the dynamics concerning the posting of workers within the EU in particular. In addition, this background paper emphasises the bad connotations posting has received due to its imperfect legal framework, inconsistencies with other EU instruments and the tensions between fundamental EU freedoms and principles it embodies. Also, the paper discusses the types of abuses and fraud that overshadow this practice's potential to contribute to facilitating the free provision of cross-border services and justifies the need for a policy adjustment in order to preserve the legitimacy of this core EU fundamental freedom. To this end, the current paper looks into the recent European Commission's proposal for a revised Directive on posted workers.

## Intra-EU labour mobility: A limited but increasing phenomenon

According to the 2014 annual report on labour mobility published by the European Commission, there were slightly over seven million EU citizens who lived and worked in another EU country than their own, representing 3.3% of the total employment in the EU.<sup>1</sup> Although this percentage shows the limited extent of geographical labour mobility, it must be noted that the number of EU citizens working and living in another member state than their country of citizenship has been increasing in the last decade. For instance, between 2005 and 2012 their number increased by more than 50%.<sup>2</sup> Whereas Germany (2.6 million), the UK (1.9 million), Spain (1.4 million) and Italy (1.3 million) are the top destination countries in absolute numbers, it is Luxembourg (44%), Cyprus (12%) and Ireland (10%) that have the largest shares of EU-28/EFTA mobile workers.<sup>3</sup> In terms of origin countries, Romania (20% of the total EU-28/EFTA movers), Poland (14%), Italy (9%), Portugal (8%) and Germany (5%) come on top.

To sum up, work-related geographical mobility in the EU concerns just a minority of the EU population. Interestingly, although this type of mobility is encouraged, the share of third country nationals working in the EU (4%) is higher<sup>4</sup> – despite the obstacles they face in entering the EU labour market – than that of EU citizens working in another member state than their country of origin (3.3%).

## The specific case of posted workers: Scope and trends

The limited nature of the long-term intra-EU labour mobility also concerns more temporary forms of mobility. The case of posted workers – which involves a worker being employed in his/her home country and sent to another member state to work temporarily in the context of a cross-border provision of services by the employer – is particularly relevant in this sense.

In 2014, there were 1.92 million posted workers in the EU (the statistics presented in the previous subchapter do not include this category of workers).<sup>5</sup> Once again, although this number appears to be relatively modest<sup>6</sup>, it is interesting to note that the surge in the number of posted workers was 10.3% between 2013 and 2014 and 44.4% between 2010 and 2014.<sup>7</sup> Therefore, whereas posting still has a limited impact on EU's working age population (only 0.7% of total employment)<sup>8</sup>, its share in the annual flows of intra-EU mobility is becoming more significant.<sup>9</sup>

Furthermore, posting is particularly relevant for several economic sectors. 42% of the total postings are concentrated in the construction sector. In addition, 21.8% of the posted individuals work in the manufacturing industry. Service sectors, such as education, health and social work are also part of this phenomenon: they account for 13.5% of the total postings. Finally, 10.3% of the posted workers perform their activity in the administrative, professional, and financial services.<sup>10</sup>

In absolute numbers, Germany, France and Belgium are the three main destination countries of posted workers. Altogether they received 50% of the total postings in Europe. However, in terms of share of the domestic employment, Luxembourg (9%), Belgium (3.8%) and Austria (2.5%) have the highest percentages of posted workers.<sup>11</sup>

As for the sending countries, Poland, Germany and France were, in 2014, the three largest senders of posted workers in absolute figures; 54% of the total of workers posted in 2014 came from these three countries. In terms of percentage of the domestic employment: Luxembourg (26%), Slovenia (11.5%), and Slovakia (4%) had the highest proportions of workers posted in other member states.<sup>12</sup>

Nevertheless, the fact that cross-country mobility flows (be they permanent or temporary) are still at a low level within the EU does not mean that this topic is absent from the public debate. On the contrary, the specific case of posting is intensely debated and generates diverging political opinions. The political dissent is mainly due to the fact that posting is a policy anomaly with possible wider implications on the functioning of national labour markets and/or on the social rights of workers themselves.

## **Posting: a policy anomaly. Why?**

The tensions between the freedom to provide cross-border services and the principle of equal treatment that emerged from posting practices can be easily explained. Posting is a very specific type of labour mobility leading commentators to describe it as a policy anomaly. Thus, before addressing the flaws of posting, it is important to understand why it is a policy anomaly.

First, because the legal basis of the PWD (96/71/EC) adopted on 16 December 1996 are Articles 53(1) and 62 of the TFEU related to the freedom of establishment and the free provision of services. Therefore, even though the fifth paragraph of the Directive's preamble states that "*promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*", the primary objective of this legal instrument is not to protect workers. The emphasis is placed on the freedom to provide services. This led the Court of Justice of the European Union (CJEU) to interpret this Directive in such a way that it facilitates the cross-border provision of services sometimes to the detriment of the workers' labour rights (this case-law is discussed further on in this paper).

Second – and linked to this choice of legal basis – unlike the workers who use Article 45 of the TFEU<sup>13</sup> to move *a priori* permanently to another member state, posted workers are not entitled to equal treatment with workers in the host state. This leads to discrimination between two categories of people who move inside the EU (permanently and temporarily), which could be interpreted as the EU sacrificing its social dimension to the benefit of an economic freedom.

To repair this policy anomaly it is important to ensure a thorough understanding of the phenomenon (including its unforeseen consequences) but also to combat the received ideas which are linked to it. This would help policy makers define what type of regulatory framework adjustments are needed.

## 2. Towards a policy adjustment – Why is it essential?

### The growing number and unforeseen nature of postings

Data sources containing information about the number of posted workers across the EU are still rather imperfect. As a matter of fact, an EU-wide register with such information does not exist and national statistics are often very difficult to compare. The European Commission uses information provided by the A1 administrative forms (formerly E101) issued by the authority of the posted workers' country of origin stating in which country the worker is entitled to social security rights.<sup>14</sup> But significant gaps between national and EU figures show that an underestimation of the real number of posted workers is very likely.<sup>15</sup> In addition, these forms are far from being perfect as they lack precise information on aspects related to the duration of posting, the qualifications of the posted worker, and their earnings.

Despite these data flaws, the estimations made by the European Commission point to a substantial increase of the number of posted workers in the last years (for example, it grew by 44.4% between 2010 and 2014). Some researchers<sup>16</sup> have reached the conclusion that this surge can be attributed to the transitional arrangements introduced by most EU15 countries after the enlargements in 2004, 2007 and 2013, temporarily limiting the freedom of movement of people due to fears of considerable labour market shocks if they were opened immediately. In 2004, almost all EU15 countries opted for these transitional measures except Ireland, Sweden and the UK. Cyprus and Malta were the only two countries from the 2004 enlargement whose citizens were not subject to any restrictions. The restrictions concerning the EU8 member states (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) were lifted in 2011.<sup>17</sup>

Romanian and Bulgarian (EU2) workers were also subject to transitional restrictions which ended in January 2014 when the last nine member states – Austria, Belgium, Britain, France, Germany, Luxembourg, Malta, the Netherlands and Spain – opened the access to their labour markets.

The first phase of the temporary restrictions ended for Croatian citizens in July 2015. On this occasion, Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg and Spain decided to lift these restrictions whereas Austria, Malta, the Netherlands, Slovenia and the United Kingdom chose to maintain them for another three years. As for the remaining member states, they granted Croatian workers full free movement rights already in July 2013.<sup>18</sup>

Although it is difficult to establish a direct causal relationship, the coincidence between the timing of these transitional arrangements and that of the substantial rise in the number of posted workers shows that the two developments are likely to be interlinked. In addition, several authors<sup>19</sup> suggest that the temporary restrictions did not change the fact that people moved across the EU but the way in which they moved. Statistics confirm this shift from the regular freedom of workers to move to another member state on a permanent basis towards other mobility channels such as posting and/or (bogus) self-employment. For example, in 2011, the rate of self-employment (without own employees) in Germany was around 18% for EU8 nationals, 10% for EU2 nationals and only 6% among German citizens.<sup>20</sup> Similar discrepancies between self-employed nationals and EU10 citizens were noticed in the Netherlands and Belgium. Therefore, there is little doubt that the self-employment option was used to circumvent the restrictions imposed during the transitional periods.

Coming back to the figures on posting, it must be highlighted that despite the progressive removal of transitional arrangements, the number of postings continues to grow. Thus, whereas the temporary labour market restrictions are likely to have started this trend, the asymmetric impact of the economic and financial crisis, as well as the persistent economic divergence between EU member states contribute to the constant

rise of the number of posted workers and associated displacement effects at micro and sectoral level (as developed below in this paper).

Yet, the threat it entails is not as much related to the scale of the phenomenon than it is to its nature. Posting is indeed becoming an alternative to free movement rights, especially for temporary movers.<sup>21</sup> In the current state of EU law, the free movement of workers for temporary occupation only exists in the framework of the employers' rights to provide services. The workers' right to move temporarily to another member state does not exist *per se* and this has, therefore, serious consequences on their social rights (see chapter 3).

## **Tensions between EU principles and legal instruments**

The PWD is a typical example of an instrument that reflects the tension between EU's economic and social natures and more specifically between the employers' freedom to provide transnational services and the workers' social rights. When adopting this Directive in 1996, the EU legislator managed to strike a balance between these two competing interests by imposing – although minimal – employment standards on cross-border service providers. However, several socio-economic, political, legal and jurisprudential developments have put this balance into question by showing that the level of workers rights' protection included in the Directive contradicts the desire to give more prominence to the social dimension of the EU (see chapter 3).

There is also inconsistency between different EU legal instruments. For instance, the EU Directive on Agency Work (2008/104/EC) establishes the equal treatment principle (for basic working and employment conditions) between the agency workers and the workers at the user firm (Article 5.1). Although the level of protection of the equal treatment principle is not equivalent to the one imposed for permanent mobile workers (Article 45 of the TFEU) who are entitled to full equal treatment, it is still more advantageous than the regime created for posted workers for which Directive 96/71/EC only provides minimum protection standards.<sup>22</sup> These discrepancies have no justification and they must be addressed by the EU legislator.

## **Need for a better understanding of the phenomenon and its impact**

Despite the growing attention to the question of posted workers, this very complex and multi-dimensional issue must be further analysed and explained in order to set the basis of a sound debate. Indeed, the political debate and public opinion are polarised around several stereotypes. This makes it even more difficult to make informed policy decisions and reach agreements. To break the deadlock and resume dialogue on this multifaceted subject, several stereotypes must be combatted.

### ***Debunking stereotypes: The geographical pattern***

The first misperception related to posting is that the wide majority of posted workers are sent by employers based in one of the new EU member states to perform their activity in an old member state. Statistical data shows that this is not necessarily the case. As highlighted in the section above, the main receiving countries of posted workers are, in absolute numbers, Germany, France and Belgium. While this might not be very surprising taking into consideration the degree of economic development of these countries, it must be noted that in some of these important destination countries, such as France and Belgium, the vast majority of posted workers come from old EU member states (EU15).<sup>23</sup> This is also the case for the Netherlands and Austria. Conversely, only three countries have higher percentages of posted workers from EU12 countries: Germany, Sweden and Finland.

In what concerns the origin countries of posted workers, the presence of Germany and France in the top three sending countries (after Poland) must be highlighted.<sup>24</sup> In 2014, sent posted workers accounted for 1.7% of the total employed population in Poland and about 0.6% in France and Germany. Moreover, the

French case is a very interesting one, showing that geographical proximity is a very relevant factor explaining posting trends. On the one hand, workers who are posted in France mostly come from Luxembourg, the UK, Belgium and Spain. On the other hand, the preferred destination of French posted workers are Belgium, Germany and Italy.<sup>25</sup>

However, data concerning the net balance between the sent and received posted workers confirms the East/West 'cleavage' as it shows that Poland, followed from a distance by Slovenia and Slovakia are the countries that send significantly higher numbers of posted workers than they receive on their territory. At the other end, Germany, Belgium, France, Austria and the Netherlands receive more than they send.<sup>26</sup>

### ***Debunking stereotypes: Posting only concerns low-skilled workers***

The second debatable aspect about posting is the type of occupations it concerns. Whereas posting is more frequent in sectors that require medium- and low-skilled workers, such as the construction services, posted workers are also employed for the provision of high-productivity services, such as financial services or other types of particularly skilled labour.<sup>27</sup> As the European Commission underlines, 10.3% of the posted workers have highly-skilled professions in the administrative, professional, and financial services.<sup>28</sup> In fact, the most recent Report on A1 portable documents highlights that most of the workers posted by Belgium, Germany, Malta, the Netherlands, Finland and Iceland work in the service sector of the receiving member state.<sup>29</sup> From a receiving perspective, most of the workers posted in Bulgaria, Greece, Italy, Cyprus, Lithuania, Hungary, Malta, Portugal and Iceland perform their activity in the service sector.<sup>30</sup>

While this report also presents more concrete data, it is more cautious – taking into consideration the data flaws mentioned above – to only highlight trends rather than focus on precise numbers and percentages. These trends show that posting also concerns highly-skilled occupations, although it is more frequent in sectors that require lower qualifications.

### ***Debunking stereotypes: Posting leads to social dumping, abuse of workers and loss of jobs***

Due to its atypical nature, the posting of workers has a negative connotation and is now widely perceived as a way of circumventing the social security and tax legislation of member states where labour is heavily taxed, leading to unfair competition, a deterioration of workers' rights protection and social dumping. The damaging political discourse on this topic has deteriorated the acceptance of posting (and labour mobility in general) as an adjustment mechanism contributing to economic development.

Nevertheless, posting is an instrument created to facilitate the freedom of employers to provide services, which is one of the four core freedoms of the EU's single market. In addition, posting – and labour mobility in general – is meant to act as a stabilising/adjustment mechanism to asymmetric shocks. In this sense, posting can contribute to increasing employment, decreasing unemployment and to increasing household incomes and labour tax revenues in the member state of origin.<sup>31</sup> In addition, the purpose of posting is to enable the professional development of the worker as well as the organisational growth of a company via a diversified workforce.

But some forms of abuse and illegal behaviour do exist.

One of the most common forms of abuse is the creation of the so-called "letter box" companies. This is a strategy aimed at avoiding taxes and lowering the social security costs by opening a company in another member state with no (or very few) employees in the country of registration. The company has therefore very little or no economic activity in the country of establishment, its main objective being to send workers abroad, occasionally calling this 'posting'. The abuse goes even further, as even when falsely called 'posted', the workers in question only get the pay levels and conditions of their country of origin. An example of such practices was identified in Hungary in the transport sector. Several drivers, mainly Hungarians, were on the payroll of a Hungarian subsidiary based in one of the premises of

PricewaterhouseCoopers in Budapest, although they were mainly working for the Dutch headquarters. The Hungarian subsidiary only had one half-time administrative employee on parental leave.<sup>32</sup> These arrangements often involve very complex, multi-level arrangements between several companies established in different member states, which makes any control very difficult.

Another form of abusive practice is false self-employment, which is particularly rampant in the construction industry. It is used by some employers to evade taxes and engage workers without having to respect employment and other rights such as holiday pay, sick pay and pensions. In Ireland, for instance, 24% of the people working in the construction industry were self-employed in 2005.<sup>33</sup> In 2014, this percentage was approximately 50% higher, i.e. 38% of the workers in the construction industry were registered as self-employed. This method used, among others, by posting companies, has very negative consequences for the workers concerned, for the industry and for the state.

In addition, exploitation has been highlighted in terms of working conditions. Because of the rather vulnerable situation of posted workers, who are not familiar with their rights and who are facing linguistic, cultural and social barriers, some employers have abusive behaviours, which lead to deterioration of the posted workers' working conditions. For instance, some employers tend to subtract disproportionate sums from the workers' salaries for food, transport and accommodation. Another phenomenon that has been noticed is the creation by companies of permanent jobs abroad which are then filled in by several posted workers successively.

Although less visible at macro-economic level, abusive behaviours sometimes have serious negative consequences at local level, leading to a loss of jobs and businesses. For instance, the European Builders Confederation (EBC) estimated that, between 2011 and 2014, close to 15,000 (over 8%) of workers in the construction sector in Belgium lost their job "due to unfair competition showed by a constant increase of posted workers". According to EBC, figures from the French construction sector are similar.<sup>34</sup>

In conclusion, to combat them, the presence of different forms of fraud and abuse, as well as the existence of negative consequences of posting at local level must be acknowledged. Also, these issues must be addressed in order to preserve the positive aspects of posting and their potential in contributing to the health of the European single market. The Enforcement Directive 2014/67/EU is already a step in the right direction and can contribute to eliminating some forms of fraud and abuse. However, ensuring a level playing field between economic actors as well as the consistency of the legislative framework is a different matter and requires a change of the posting Directive itself. This change is needed to preserve the legitimacy of the freedom of movement and, to a certain degree, of the European project.

### 3. The way forward – Improving the situation of posted workers without damaging economic freedoms

#### The importance of a changing context

On 8 March 2016, the European Commission proposed a revision of the rules on posting of workers within the EU. This proposal follows the Commission's commitment in its annual Work Programme for 2016 to submit a labour mobility package comprising a targeted revision of the PWD.

Prior to the publication of this proposal, two groups of ministers (the first one made up of labour ministers from Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden and a second one including ministers from Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) sent letters to Commissioner Marianne Thyssen expressing their view on the issue. The debate amongst them focused on whether the balance between the freedom to provide services and the protection of workers' rights struck in 1996 still provides sufficient safeguards to protect the social rights of posted workers today. To better understand the context of this discussion, two different trends must be analysed: one related to the evolution of the level of protection granted by the 1996 Directive in the CJEU's case law and the other one linked to the strengthening of the EU's social dimension since the Directive has been adopted.

While codifying CJEU's case law prior to its adoption, the PWD establishes a minimum level of protection of certain labour rights enumerated in Article 3(1), among which:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- the minimum rates of pay, including overtime rates;
- health, safety and hygiene at work; and
- equality of treatment between men and women and other provisions on non-discrimination.

The interpretation given to these provisions by the CJEU in four key decisions (*Viking* C-438/05; *Laval* C-341/05; *Commission v Luxembourg* C-319/06 and *Rüffert* C-346/06) has *inter alia* transformed this minimum level of protection into a maximum one. Without going into the details of these rulings, they all involved a conflict between the freedom to provide services or the freedom of establishment and a right related to the working conditions of the posted individuals. While the Court stated that the fundamental social rights and the fundamental economic freedoms are of the same value, it only analysed whether the social rights were restricting the fundamental freedoms and not the other way around<sup>35</sup> – giving therefore more importance to the single market values and transforming the PWD into a maximum threshold of protection.

Nevertheless, this Directive and the rulings mentioned here above were issued before several developments reinforcing Europe's social dimension occurred. For instance, they were delivered before the Treaty of Lisbon opened up opportunities to further strengthen social Europe by introducing the social progress clause in Article 9 of the TFEU. Furthermore, at the moment when these cases were decided, the Charter of Fundamental Rights of the EU – which contains several social rights (Article 12 – freedom of assembly and association, Article 28 – right of collective bargaining and action) and equal treatment provisions (Article 20 and Article 21) – was not legally binding for EU institutions and national governments.

Recently, signals have come from different EU institutions showing a need to re-evaluate the balance struck in the 1996 Directive and to work towards fighting fraud and abuses.

In 2014, the EU adopted an Enforcement Directive 2014/67/EU aiming to better define the rules for the application of the PWD. In order to reduce the risk of fraud, this Directive aims to increase cooperation



between national authorities in view of checking the genuine nature of the posting and the actual existence of the business. In addition, it offers the possibility for trade unions or other interested parties to take legal/or administrative action against their employers in case the workers' rights are not respected.<sup>36</sup> Also, the new Directive creates a system to facilitate cross-border enforcement of financial administrative penalties.<sup>37</sup> The transposition deadline for the Enforcement Directive is 18 June 2016. However, despite the new tools it puts in place to strengthen control, this Directive does not tackle the issue of equal treatment of posted workers. This led the European Commission to put the revision of the 1996 Directive (which we describe below) on the table.

More recently, the CJEU also recognised in the *Sähköalojen ammattiliitto* C-396/13 ruling, delivered in February 2015, the right of trade unions to bring an action before a court of the host country in order to recover pay claims for the posted workers in light of Article 47 of the Charter (right to an effective remedy and a fair trial). The CJEU further recalled that questions concerning minimum rates of pay, including the methods of calculating such rates, are governed by the law/practice of the host country, whatever the law applicable to the employment relationship is. In this case, EU judges also gave more details as to how the "minimum pay rates" should be calculated by excluding for instance meal vouchers and accommodation expenses from their scope. This new jurisprudence represents an advancement in the social protection of posted workers.

The same objective is targeted by Guillaume Balas (S&D Member of the European Parliament) with his own initiative report<sup>38</sup> on social dumping in the European Union, which is currently discussed in the European Parliament's Employment and Social Affairs Committee.

All in all, the European Commission's proposal comes in a context of increased acknowledgement of the need for a more protective regime of posted workers' social rights. With its recent proposal, the Commission is thus trying to strike a better balance between economic and social rights and ensure the highest level of fairness for all parties involved without eroding the sovereign powers of member states.

## **The Commission's proposal: Towards a balanced deal?**

The revision proposal focuses on three main areas: the remuneration of posted workers, rules on temporary work agencies and rules applying to long-term posting, with the aim of applying the principle of equal pay for equal work.

Concerning the remuneration of posted workers, the objective is to reduce the wage differences that exist between posted and local workers. While employers only have to respect the minimum rates of pay under the current Directive, the new proposal obliges them to apply the rules of the host country, as laid down by law or by universally applicable collective agreements. In addition, these rules set by universally applicable collective agreements become mandatory in all sectors, whereas previously they were only mandatory in the construction sector. This implies that employers will have to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, to posted workers as to local ones.

Regarding rules on temporary agencies, the new proposal foresees to ensure equal treatment between local temporary agency workers and posted temporary agency workers with respect to remuneration and working conditions.

With respect to long-term posting (i.e. lasting more than two years), the Commission proposes that long-term posted workers are now covered by the mandatory rules of the host country's labour law.

Do these new elements really lead to a full implementation of the principle of equal pay for equal work? The response to this question is hotly contested among the different parties involved: certain see these changes as a significant improvement, others denounce a missed opportunity to get full equal treatment in Europe, while others believe that the new proposal already goes a step too far and limit the economic opportunities of the Single Market.

## Further elements for consideration

A lot of criticism regarding the Commission's new proposal concerns the implication of relying merely on universally binding collective agreements. For instance, the European Trade Union Confederation (ETUC) deplores the fact that other types of agreements are excluded, such as most sectoral collective and all company-level agreements. In addition, the new provision regarding temporary agency workers might cause some problems in some member states that have no universally applicable collective agreements. Thus, narrowing down the Directive to a certain type of agreement neglects the reality of collective bargaining in Europe, which is characterised by great diversity. In addition, it creates inequality among posted workers: the ones working in sectors with universally binding collective agreements will enjoy a higher level of social protection than the ones who are active in less regulated sectors. While this point needs to be seriously considered during the negotiations, it also calls for social partners to play a stronger role in ensuring that posted workers have the right tools to protect themselves.

Adequate protection of workers can be obtained by collective agreement and some sectors, such as the construction sector, have been more successful than others in developing transnational regulation. Trans-border collective bargaining is therefore essential for the future of posted workers and sectoral social partners need to create the structures for transnational collective bargaining. In the same vein, posted workers need to be better represented. Posted workers' representation in national trade unions is usually weak. More cooperation among national trade unions is therefore required to reach out to posted workers and traditional work-based representation needs to be complemented by other methods.

Another course of action relates to information on posting. There is a large consensus on the lack of data and reliable information regarding posted workers. At the moment, the debate is based on information provided by the A1 forms, which is used for social policy coordination between member states. However, the information provided in these forms is not always reliable and clearly insufficient to get a complete understanding of posting across Europe. This is due to two main reasons. First, companies that only post workers for social security reasons do not apply for A1 forms, and there have even been cases of falsified A1 forms. Second, a lot of information is missing in the A1 form as it does not include information related to posted workers' salary and working conditions.

Against this background, there is an urgent need to implement a comprehensive strategy against social fraud and abuses. This strategy should be twofold. On the one hand, the creation of a common EU electronic database of A1 forms would increase transparency and allow for rapid checks and control. To make this database efficient, and as suggested by the European Federation of Building and Woodworkers, a unique European registration number for companies and workers could help track their history and identify irregularities. On the other hand, additional resources should be allocated to countries encountering difficulties to carry out sufficient labour inspections. These additional resources could also help them to create an appropriate system necessary to meet the new requirement about posting online elements of remuneration in collective agreements. This is particularly relevant in the context of the forthcoming review of the EU Budget; the EU should make sure that member states have the necessary means to carry out efficient controls and to fulfil the new requirements.

## 4. Conclusions

There is no doubt that the upcoming months of the Dutch EU Presidency will be marked by intense negotiations on the revision of the PWD. As already indicated by ongoing discussions, posting is subject to strongly diverging interests and it is unlikely that member states will adopt a more flexible position in the weeks to come. Thus, both the European Commission and the Dutch EU Presidency will have the difficult mission of trying to strike a deal that meets the highest level of fairness for everybody. To do so and in the absence of a comprehensive dataset on posting trends, one of the most important objectives will be to ensure that negotiations are not poisoned by biased perceptions and stereotypes. In other words, the challenge will be to elevate the debate by making everybody recognise the benefits of posting for the European general interest, while agreeing upon a fair and level playing field.

As the current debate on posting has shown, the equal treatment principle has been subject to numerous interpretations and defining what fairness means in an enlarged single market still remains to be done. If wage differentials are inevitable in a large market where different levels of economic development and social standards co-exist, the negotiating parties should rather concentrate on defining what unfair competition means and make all necessary efforts to combat it. In other words, while accepting to move towards a completion of a Single European Labour Market will still certainly entail competition on wages until member states reach the same level of economic development, ensuring that everybody respects the same rules and offers decent working conditions to workers is key. That being said, revising the PWD alone will not be sufficient. The EU and its member states will also have to recognise that reconciling economic freedoms with social equity in a large market requires further advancements of Social Europe, including an upwards convergence of social standards. Moreover, it should not be forgotten that a revision of posting could result in other legislation circumventions, such as bogus self-employment. With all these elements in mind, it is crucial not to confine the discussions to the specific case of posting but rather to enlarge the debate and to look into how a Single European Labour Market can offer high social and labour standards for all.

Finally, by proposing a revision of the PWD, the European Commission demonstrated its appreciation of the urgent need for a policy adjustment in this area. However, the fact that this proposal was put on the table before the expiration of the Enforcement Directive's transposition deadline (June 2016) should not slow down the transposition and implementation process of the latter. The two Directives are two self-standing but complementary legal instruments pursuing different objectives. While the Enforcement Directive seeks to tackle abuse and fraud by (among others) reinforcing the exchange of information between national authorities and smoothing cross-border enforcement of financial penalties, the revision of the 1996 Directive aims to ensure a better protection of posted workers by reducing inequality between posted and local workers.

A substantial transposition and implementation workload still lies ahead of member states when it comes to the Enforcement Directive. As a matter of fact, almost all member states<sup>39</sup> still have to transpose it into their domestic legislation. Thus, it is important to remember that the difficult negotiations to be expected on the proposal to revise the 1996 Directive should not harm the implementation of the Enforcement Directive. Neither should it lead to further delay in implementation nor should it lower the quality of cooperation between member states.

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## Endnotes

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- 6 Some research papers do refer to even more modest figures and highlight that approximately 1.45 million of the Portable Document (PD) A1 were related to postings to one specific member state. The remainder PDs A1 were applicable to persons active in two or more member states (430,794 PDs A1), to common agreements (36,085 PDs A1) and to flight or cabin crew members (897 PDs A1).
- 7 European Commission (2016), op. cit.
- 8 Idem. However, it should be noted that PDs A1 are compared with native employment. This is not necessarily the best indicator to assess the impact on national labour markets. Better is to compare the total employment with the number of 'unique' posted persons. The number of unique posted workers stands for 0.4% of total EU employment.
- 9 De Wispelaere, F. and Pacolet, J. (2015), "Posting of workers as a stabilising mechanism. An enlarged notion of labour mobility as a prerequisite for an optimal currency area", KU Leuven Research Institute for work and society, p.6.
- 10 European Commission (2016), op. cit., p.8.
- 11 Idem.
- 12 Idem.
- 13 Article 45 of the TFEU enshrines the free movement of workers and prohibits direct and indirect discrimination in employment based on nationality.
- 14 Maslauskaitė, K. (2014), "Posted workers in the EU: state of play and regulatory evolution", Notre Europe Jacques Delors Institute Policy Paper, p. 4-5.
- 15 The uncertainty to what extent the number of PDs A1 is a precise measure is explained by several reasons. First, not all member states are able to provide all the requested information. Second, differences in definition of posting between Directive 96/71/EC and Regulation (EC) 883/2004 give rise to doubts as to the number of issued PDs A1 being an adequate source to assess the characteristics and the scale of posting in the EU. Furthermore, despite the obligation for the person concerned (employer or worker) to inform the competent institution of the member state whose legislation is applicable ("whenever possible in advance" in the framework of article 12 of the basic Regulation), experience shows that some workers deemed to be subject to the legislation of the sending member state begin to work in another member state without such notice to the competent institution and/or without portable document.
- 16 De Wispelaere, F. and Pacolet, J. (2015), op. cit., p. 6.
- 17 The transitional arrangements cannot exceed seven years and are designed following the 2-3-2 model. Initially they are introduced for two years. After this period, member states can choose to continue applying restrictions throughout the second phase, which lasts three years, but must notify the European Commission when doing so. During the last phase, which lasts two years, national authorities can only maintain the restrictions after notifying the Commission and in the event of serious disturbances of its labour market, or a threat of such disturbances. More information here: [http://europa.eu/rapid/press-release\\_MEMO-15-5068\\_fr.htm](http://europa.eu/rapid/press-release_MEMO-15-5068_fr.htm)
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