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**POLICY DEPARTMENT**  
ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs

**Employment and Social Affairs**

Environment, Public Health and Food Safety

Industry, Research and Energy

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# Posting of Workers Directive - current situation and challenges

STUDY for the EMPL Committee





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **Posting of Workers Directive – current situation and challenges**

## **Abstract**

This study was commissioned by the European Parliament's Policy Department for Economic and Scientific Policy, upon request of the Committee on Employment and Social Affairs. It provides an overview of the Posting of Workers Directive, focussing on the current situation and major patterns regarding the posting of workers in the EU. Attention is also paid to major problems and challenges and how these have been addressed by political and jurisdictional debates as well as by proposals to improve the regulatory framework of posting. In light of the Commission proposal (published on 8 March 2016) to revise the Directive, the study aims to provide the EMPL Committee with an assessment of the proposal, having taken into account both the key challenges addressed, and the previous resolutions and requests made by the European Parliament.

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## **AUTHOR(S)**

**Eckhard Voss**, Wilke Maack GmbH, Hamburg  
in cooperation with  
**Michele Faioli**, Law School of Tor Vergata University, Rome  
**Jean-Philippe Lhernould**, University of Poitiers  
**Feliciano Iudicone**, Fondazione Giacomo Brodolini, Rome

## **RESPONSIBLE ADMINISTRATOR**

Marion SCHMID-DRÜNER

## **EDITORIAL ASSISTANT**

Mirari URIARTE

## **LINGUISTIC VERSIONS**

Original: EN

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To contact Policy Department A or to subscribe to its newsletter please write to:  
Policy Department A: Economic and Scientific Policy  
European Parliament  
B-1047 Brussels  
E-mail: [Poldep-Economy-Science@ep.europa.eu](mailto:Poldep-Economy-Science@ep.europa.eu)

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## LIST OF ABBREVIATIONS

<b>ALDE</b>	Group of the Alliance of Liberals and Democrats for Europe
<b>APWD</b>	Amended Posting of Workers Directive (Commission Proposal of 8 March 2016)
<b>CA</b>	Collective Agreement
<b>CEEP</b>	European Centre of Employers and Enterprises providing Public Services
<b>CJEU</b>	Court of Justice of the European Union
<b>DG</b>	Direction General
<b>EBC</b>	European Builders Confederation
<b>ECOSOC</b>	Economic and Social Committee
<b>ECPW</b>	Expert Committee on the Posting of Workers
<b>ED</b>	Enforcement Directive 2014/67/EU
<b>EEA</b>	European Economic Area
<b>EFBWW</b>	European Federation of Building and Woodworkers
<b>EPP-ED</b>	Group of the European People's Party and European Democrats
<b>ETUC</b>	European Trades Union Congress
<b>Eurociett</b>	European Confederation of Private Employment Services
<b>FIEC</b>	European Construction Industry Federation
<b>Greens/EFA</b>	Greens/European Free Alliance
<b>GUE/NGL</b>	Confederal Group of the European United Left - Nordic Green Left
<b>IMI</b>	Internal Market Information System
<b>IND/DEM</b>	Independence/Democracy Group
<b>MNC</b>	Multinational company
<b>MRP</b>	Minimum Rates of Pay
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PWD</b>	Posting of Workers Directive 96/71/EC
<b>TAW</b>	Temporary Agency Work
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UEAPME</b>	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises

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## EXECUTIVE SUMMARY

### Background and context

As a specific form of temporary labour mobility, **posting has been a prominent topic of public and political debate** during previous decades; this is despite it still being a relatively small-scale phenomenon, in terms of both the numbers engaged in the activity and its overall employment share in general. **Posting is often linked to broader issues**, such as the labour market effects of EU enlargement and, here in particular, restrictions on the free movement of workers, unfair competition based on labour costs and 'social dumping', amongst others.

More recently, **several factors have further contributed to the debate**. Firstly, there has been an increase in the number of postings, as well as more evidence of **unfair competition and the substitution of domestic workers in labour-intensive sectors**. This has occurred mainly in North-Western European countries as a result employers' strategic use of posted workers from lower wage countries. Secondly, there has been a **growth in 'creative', abusive and fraudulent practices**, such as letter-box companies, bogus self-employment and numerous other forms of unacceptable practice, which involve the exploitation of posted workers. Thirdly, questions have been raised as to **whether the 1996 Posting of Workers Directive (PWD) provides a sufficient legal instrument for ensuring a level playing field** in the free cross-border provision of services within the EU, whilst also delivering a sufficient foundation for the social protection of posted workers, in accordance with the EU Treaty. In this context, it is not only European trade unions that have strongly advocated the need for significant improvements, but also employer organisations in the construction sector and the European Parliament. The improvements sought include strengthening the social dimension within the PWD, with clear reference to Article 153 of the Treaty on the Functioning of the European Union (TFEU) and the social policy objectives. Questions have also become more relevant as a consequence of numerous **rulings made by the Court of Justice of the European Union (CJEU)**, which have raised new questions for policy debate and interpretation.

While the **Enforcement Directive 2014/67/EC** focussed mainly on improving processes and rules in order to better apply and enforce the provisions of the existing PWD, **it didn't touch upon more fundamental questions relating to the framework of posting**, namely with regards to a better definition of the 'hard core' of working and employment conditions, as well as inconsistencies between the PWD and regulations in the field of social security coordination.

Against this limited scope of the Enforcement Directive, the **EU Commission published a proposal to revise the PWD** in March 2016. This was in order to find a better balance between economic freedoms and social protection rights. Apart from a limited number of proposed changes, the Commission's proposal constitutes a significantly altered perspective on the rights of posted workers: a revised PWD should guarantee *"that the same work in the same place is rewarded by the same pay"*.

### Objectives of the study

The aim of this study is to provide the European Parliament's Committee on Employment and Social Affairs (EMPL) with an **up-to date overview and basic information on the current circumstances regarding the posting of workers in the EU**, the current regulatory framework, and the key challenges and needs for improving the functioning and application of the PWD.

By considering the Enforcement Directive 2014/67/EU, along with the Commission's recent proposal to revise the Directive, the study aims to provide the EMPL Committee with an overview regarding key provisions in light of stakeholder requests (including the European Parliament) and important CJEU rulings. By doing so, **the study aims to support the EMPL Members in the upcoming debates and negotiations on the revision of the PWD**, as well as on the further elements of the 'Labour Mobility package', which will be carried out later this year.

## Key results and findings

- There is a **significant lack of reliable information on posting** within the EU. As highlighted in various resolutions of the European Parliament, this lack of employment data makes evidence-based political discussions and decisions extremely difficult.
- Based on existing statistical data (collected for social security purposes), a number of major patterns and trends are obvious however: The **phenomenon of posting is concentrated on roughly a dozen EU countries**. Despite the overall impact being limited in terms of employment share, the role and effects of posting for specific sectors, as well as regions and countries, can be quite significant.
- There are **two major 'models' of posting**: One mainly driven by labour cost differentials, whilst the other is driven mainly by the shortage and demand for skilled and highly professional workers.
- The **legal framework constitutes an inherent tension within the PWD**, which plays an important part in regulating the posting of workers. This legal framework also regulates the balance between the aims of providing a level playing field, ensuring a free and relatively unrestricted cross-border provision of services, and guaranteeing a means with which to meet the objectives relating to the social protection of posted workers.
- While the PWD includes a clear reference to the legal basis of Article 56 TFEU, which concerns the freedom to provide services within the internal market, the social protection objectives are provided by a complex construction of 'hard core rights'; workers' rights are constituted by a combination of home country and host country provisions. This **fragile setting** has been continuously scrutinized and interpreted by CJEU rulings.
- There are **significant national variations in the application of the PWD in Member States**, which result from provisions within the Directive that allow for flexibility in terms of modes of regulation (legal versus collective agreements), scope of sectors covered and further provisions or derogations (with regards to the protection of posted temporary agency workers).
- During the last decade, several developments have contributed to a **growing awareness that the PWD needs to be improved**, highlighting the fact that it is suffering from multiple problems. Such problems, and the need for adjustments, result mainly from legal and jurisdictional developments and inconsistencies that exist, or may exist, between the PWD and other EU legislation. Furthermore, various forms of abusive practice, circumvention and malpractices in the implementation of the PWD have resulted in an increased awareness of the need for legislative action.
- Apart from problems related to the **effective enforcement of the PWD**, more substantive problems have also become increasingly obvious over time, namely the **unclear provisions of the PWD regarding the terms and conditions of employment and minimum rates of pay**. There is an **inconsistency between the basic provisions of the PWD and the regulation coordinating social security systems and competences to levy income tax**.

- As a result of these deficiencies in the application and implementation of the PWD, during the last decade, the posting of workers into the labour intensive sectors of higher wage countries has resulted in **labour market distortions and "social dumping", based on labour cost and tax differentials**.
- The **Enforcement Directive**, which came into force in 2014 and needs to be transposed at the national level by 18 June 2016, has only addressed the problems and shortcomings of the PWD that are related to the implementation of existing rules: better implementation rules, intensified coordination and information exchange, and other measures.
- At the same time, **the Enforcement Directive did not alter the essence of the PWD and also did not address the more fundamental issues that have been addressed in the resolutions of the European Parliament**, namely those concerning: minimum versus broader protection floors of posted workers; the definition of applicable working conditions by national public provisions or collective agreements; equal treatment and pay; or the tackling of social dumping practices.
- Such issues have been partly addressed by the **Commission's March 2016 proposal for a revision of the PWD**, which must be interpreted as a political initiative that is motivated by the aim to implement a more substantive change in the regulation of posting, in correspondence with the **principle of "equal pay for equal work at the same place"**.
- Against this backdrop, it is not surprising that **key stakeholders have reacted in very different ways to the Commission's proposal** – the gulf of assessments and political interpretation is huge, not only between trade unions and employer organisations but also between groups of countries.
- The latter is clearly illustrated by the fact that under the **Yellow Card procedure**, 11 national Parliaments have issued reasoned objections to the proposal.
- An overview of **key resolutions passed by the European Parliament** shows that the Parliament has played a decisive role, since the 1990s, in the debates on regulation and rules for posted workers and for improving the PWD.
- However, as an **overview of key demands and positions** show, these have only been partly addressed by legislative and other initiatives of the Commission so far.

## Main conclusions and recommendations

- Irrespective of whether the Enforcement Directive may be the most appropriate instrument to tackle the key challenges and problems related to the posting of workers, or whether further targeted (as proposed by the EU Commission) or more substantial changes (e.g. by extending its legal basis and provisions for equal treatment) of the PWD are required, **any legislative and other action should be measured by the extent to which it contributes positively to the situation of posted workers**.
- As the **Enforcement Directive** is still in the process of national transposition and it is too early to make an assessment of whether it will solve major problems and challenges relating to posted workers. However, given that there are a number of deficiencies, inconsistencies and loopholes that in the PWD that the Enforcement Directive has only partly taken on board (including key suggestions and demands of the European Parliament), it is **more than likely that further improvement will be necessary**.
- However, the question of whether a more comprehensive approach for revising the Directive is required, or whether a 'targeted revision' through technical changes and clarification seems sufficient, is difficult to answer and **key stakeholders have given different interpretations, suggestions and recommendations**.

- Against the previous experience of complicated, difficult and lengthy processes to adopt the PWD and the Enforcement Directive, the study argues for an evidence-based and pragmatic approach to be applied in the context of future discussion on reform. Thus, the debate on a future framework should be based on a joint understanding of **what constitutes 'fair posting'**, which must also include a concrete and broad definition. It is vital to fully consider the perspectives of both posted workers and workers in the receiving countries, as well as the perspectives of sending and receiving countries. Mutual understanding and common diagnostic techniques are also important in dealing with forms of malpractice and misuse, which still persist and must be addressed. Therefore, **instead of disputing singular provisions of the proposal, the reform debate should be oriented towards the question of whether the situation of posted workers will be improved by envisaged changes and actions.**
- It is also suggested that key demands and principles regarding a better and fairer framework of posting, as highlighted by **various resolutions passed by the European Parliament, might provide a source of further guidance** in the upcoming debates on a possible revision.
- A further recommendation arising from the study is to base the debate on possible adjustments and reforms on existing evidence to a much greater extent than has been the case in the past. This can be achieved by **generating new and reliable data on posting**, and through the greater **involvement of social partners**, who can participate more directly in both the reform debate and the elaboration of different options and areas of focus.
- Given the broad consensus of all stakeholders currently, the **utmost priority should be given to an effective implementation of the Enforcement Directive**; the monitoring and exchange of its implementation at national and cross-national level will be an essential task. The focus here should be particularly on the provision of sufficient and **additional resources for labour inspections and competent authorities**, as these are essential in the fulfilment of new requirements.
- Finally, it is recommended that the **debate on improving the legislative framework of posting should be carried out in an evidence-based way** as much as possible and that it must not be mixed with wider political demands. It should be limited to the phenomenon of posting, and the joint concerns of actors and stakeholders in both sending and receiving countries.

# 1. INTRODUCTION

## Context

Though currently only affecting **around 1% of the total number of employees in the EU**, the issue of posting and posted workers has been at the centre of a lively and often controversial debate within the EU, as well as in individual Member States for several decades. At the core of the debate, which has also been fuelled by several CJEU rulings since the 1990s, the issue of posting of workers has been characterised by the tension between social and labour rights, as well as the normative objective of equal treatment (as defined in Article 45 TFEU), the freedom of service provision within the internal market (as enshrined in Article 56) and the prohibition of any restrictions to provide such services on the other. Thus, the **regulation of posting by EU Directives was and still is driven by the tension between the protection of workers and economic competition rules**: should posting be regarded as an expression of the employers' freedom to provide services within the EU market in the first place? Or should posting be regarded as a specific expression of the free movement of workers with the respective right to equal treatment with workers in the host state?

Against this, the **EU Directive 96/71/EC (PWD) must be regarded as a peculiar formula to balance the competing rights**: Posting is framed as an expression of employers' freedom to provide services in a market environment of fair competition rules and does not entail the right of workers to equal treatment. Thus, posted workers from the perspective of the Directive are a **specific category of workers** that differ from EU citizens who decide to seek employment in another Member State and enjoy full equal treatment rights. In contrast, the only reference in the PWD - apart from the preamble - to equal treatment is made regarding the equality of treatment of undertakings but not with regards to posted workers. Therefore, posted workers have no claim to equal treatment or equal pay in comparison with workers in the host state. Instead, the PWD requires the Member States only to apply a **certain "hard core" of labour rights**, consisting of a catalogue of working conditions and terms of employment.

The 1996 Directive and the specific formula of balancing the competing rights it established has to be seen also as a **response to social, political and jurisdictional developments in the context of the enlargement of the European Community**, cross-border mobility of labour and the evolving single market. Furthermore, social, economic and political framework conditions since 1996 have framed the debate on posting and the Directive since then, namely the enlargement of the EU from 15 Member States in 1995 to 28, as is the case today (or 31, as the PWD is also applicable to the European Economic Area (EEA)). In the context of EU enlargement, specific forms and patterns of posting have also emerged as an alternative form of cross-border labour mobility in response to restrictions that have been imposed on the free movement of workers in the context of EU enlargement; firstly after 1985 when Portugal and Spain joined the then European Community, but even more after 2004 with the Eastern Enlargement.

As a result, the political and jurisdictional debate not only intensified during the last decade but also **changed in terms of normative orientation**. In the early years, it still was dominated by the objective of guaranteeing the freedom of service provision and to contain labour law regulation or collectively agreed rules and rights that may compromise these freedom and fair competition rules. At the same time, increasing evidence of unacceptable practices, violation of rules and massive problems with the implementation of the PWD on the ground resulted in an increasing awareness among EU institutions, trade unions and employer organisations, who then identified that there was a **need for adjustment**.

While this finally resulted in the **Enforcement Directive 2014/67/EU**, it was clear from the beginning – at least for a number of stakeholders - that this could only be a partial solution. The Enforcement Directive did not address major inconsistencies and weaknesses of the Directive, which have also been identified by more recent CJEU law cases and that relate to the concept of the **“hard core” of working conditions** and terms of employment. Furthermore, the Enforcement Directive left out conflicts and contradictions that exist between the PWD and the **EC Regulation 883/2004 regarding the coordination of social security systems** in the EU.

Whereas this has led to the decision to carry out a **“targeted review”** of the PWD addressing these issues, the political agenda of the Commission also included the ambitious objective to move further. The Commission Work Programme for 2016 stated that it would present a **“targeted revision”** of the PWD *“... ensuring that the same work in the same place is rewarded by the same pay”*.

The reasoning behind the proposal for an amended PWD (APWD), which was published by the Commission on 8 March 2016, contains more substantial and general considerations:

*“Since 1996, the economic and labour market situation in the European Union has changed considerably. In the last two decades, the Single Market has grown and wage differences have increased, thereby creating unwanted incentives to use posting as a means to exploit these differences. The legislative framework put in place by the 1996 Directive no longer fully replies to these new realities.”<sup>1</sup>*

### **Objectives of this study**

The aim of this study is to provide the EMPL Committee with an **up-to date overview and basic information on the current state of the posting of workers in the EU** and to focus particularly on persistent problems and debates with regards to the PWD. With the Commission’s view on the proposal published on 8 March 2016, the briefing note aims to provide the EMPL Committee with an **assessment of the proposal in light of both key the problems of the Directive and its implementation**, as well as the link and potential overlapping with the Enforcement Directive that is currently implemented in the EU Member States.

The report is divided in **six main sections**: following this introduction, the second section provides background information detailing the developments leading to the current situation of posting in the EU. It starts with a brief overview of posting as a concept: a peculiar form of cross-border labour mobility. The section then provides an overview of basic data, as well as geographical and sectoral patterns of posting today. The third section briefly describes the legal framework that regulates posting following the adoption of the PWD in 1996. In the fourth section, key difficulties, loopholes, and evidence of poor implementation and abusive practices are summarized as emerging from research studies and other literature as well CJEU rulings on the PWD. The fifth section provides an overview of how these problems have been addressed by the 2014 Enforcement Directive, as well as the recent proposal of the Commission. In this section there is also a consideration of the various views and opinions of key stakeholders involved in the political and legal debate, including the European Parliament. The sixth and final section draws a number of conclusions and recommendations from the authors’ point of view, highlighting in particular key challenges that the legislative and political debate on posting will have to face – and hopefully master – in the future.

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<sup>1</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-467\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-467_en.htm)

## 2. POSTING OF WORKERS IN THE EU – KEY FEATURES AND PATTERNS

### KEY FINDINGS

According to EU legislation, the posting of workers is a peculiar form of cross-border labour mobility within the context of the freedom to provide services that, in contrast to other forms, is only partly covered by the right of equal treatment.

While there is a significant lack of reliable information on the posting of workers, available data show that the overall share in employment is small.

With view on major sending and receiving countries, the phenomenon of posting is concentrated on around a dozen EU countries.

The role and impact of posting for specific sectors as well as regions and countries can be quite significant.

There are two major 'models' of posting: One mainly driven by labour cost differentials, the other driven mainly by the shortage and demand for skilled and highly professional workers.

### 2.1. Posting - a peculiar form of cross-border labour mobility

Posted workers and the posting of workers by companies in the context of the provision of services is a peculiar form of cross-border labour mobility that **differs from other forms of labour migration**. In particular, the following aspects constitute the unique character of posting:

- In contrast to people who decide to seek employment in another EU Member State, such as a migrant or self-employed worker, a posted worker has a **genuine employment relationship with the employer in the country of origin/sending country**.
- The basis of posting is a contract between an undertaking in an EU Member State (sending country) and an undertaking in another Member State (receiving country) on **the temporary provision of a service within the territory of the receiving country**.
- Based on this service contract, the posted worker will not carry out his/her work in the country where they normally work, but in the receiving country for a **limited period of time**.<sup>2</sup>
- In **contrast to other forms of cross-border labour mobility**, which are covered by the EU Treaty's provision on the right of every citizen to move freely to another Member State to work and reside there (Article 45 TFEU), the posting of workers is covered by the **freedom of service provision right** that gives undertakings the right to provide services in another Member State (Article 56 TFEU).

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<sup>2</sup> This is reflected in the PWD that generally defines a posted worker as "a person, who, for a limited period of time, carries out his or her work in the territory of an EU Member State other than the state in which he or she normally works" (Directive 96/71/EC).

- The linkage of posting to Article 56 TFEU, and the special status of posted workers as still being employed in the home country, has the implication that – in the host country - they are **only partly covered by the right of equal treatment**.

## 2.2. Posting – lack of data but evidence of increasing significance for specific countries and sectors

### 2.2.1. Data and major patterns and trends

Already in 2007, a Communication made by the EU Commission<sup>3</sup> stressed that there are "**no precise figures or estimates of posted workers in the EU**." This lack of knowledge has not changed substantially since then. The discrepancy of available data at EU level with national sources has resulted in demands to establish an EU-wide register for posting.<sup>4</sup>

#### Box 1: Data on Posting

The estimation method used by the EU Commission is based on an analysis of the number of portable social security documents A1 (PDs A1).<sup>5</sup> However, even the authors of the study admitted that there is uncertainty about the extent to which the number of PDs A1 issued by Member States is a precise measure of the actual number of postings taking place. Key problems are that the definitions of posting workers, as of the PWD and as arising from the Regulation on Social Security Coordination (EC) 883/2004, are not identical (e.g. the latter data include self-employed that are not covered by the PWD). Also, the data do not reflect the real picture as, for example, companies might not apply for A1 documents if the worker is posted for a very short period of time, only for social security purposes. In addition, postings that last longer than 12 months are not considered to be postings in terms of social security. Finally, the same worker can be posted several times per year; therefore, A1 documents would only reflect the number of postings rather than the number of posted workers.

A study published in July 2015, which is based on EU-level A1 figures as well as data of the German Pension Insurance on postings to Germany in the years 2012/2013, indicated figures that were four times higher than those provided on the basis of the A1 documents.<sup>6</sup>

In its impact assessment of the proposal for amending the PWD, the EU Commission also admits the weaknesses of the available data: "*From a receiving perspective, data from national compulsory registration systems show a relevant gap between EU and national figures, with the latter being up to five times higher in the case of Denmark*". Also significant gaps were reported for Belgium and France.

Based on an analysis of the number of portable A1 documents<sup>7</sup>, the overall number of posted workers in 2014 totalled over 1.9 million.<sup>8</sup>

Although the overall **share in total employment is still less than 1%**. Posting (there was a stagnation of the number of posting in 2009 and 2010) has **increased quite significantly since 2010**: Based on the number of A1 documents, between 2010 and 2014 the number

<sup>3</sup> EU Commission 2007: Communication on Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers (COM(2007) 304 final), p. 3.

<sup>4</sup> ISMERI Europa 2012: Preparatory study for an impact assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Final Report, Brussels.

<sup>5</sup> Pacolet, J., De Wispelaere, F. 2014: Posting of workers: Report on A1 portable documents issued in 2012 and 2013, Network Statistics FMSSFE, European Commission, Brussels.

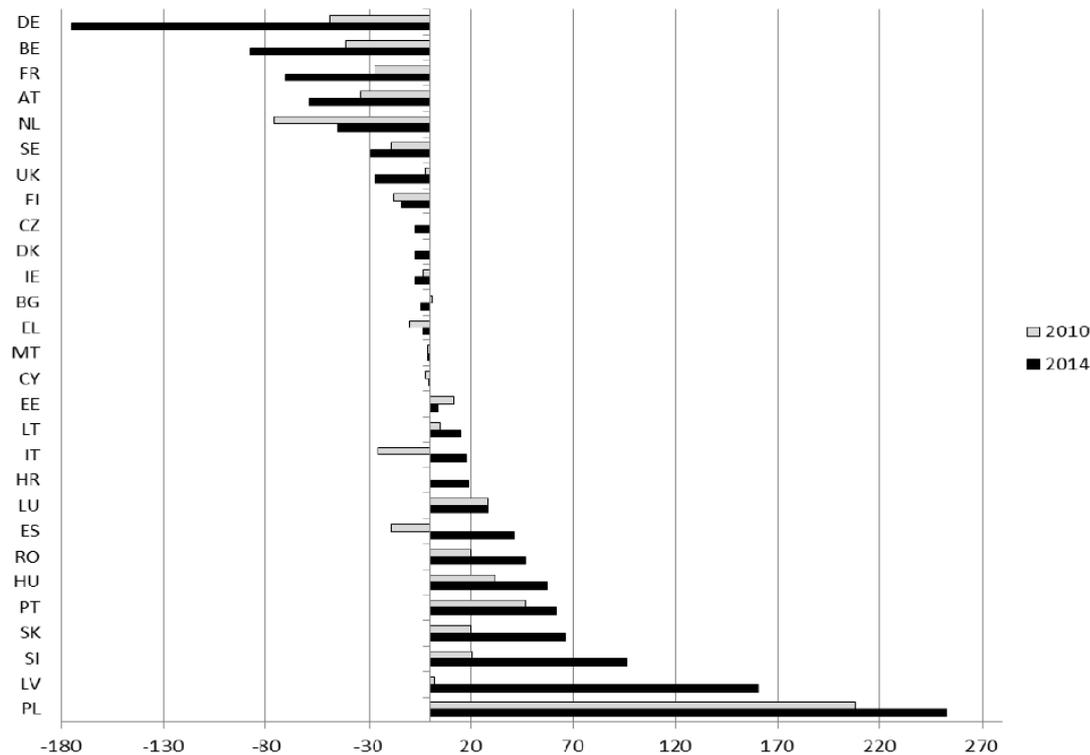
<sup>6</sup> Wagner, B., Hassel, A. 2015: Europäische Arbeitskräftemobilität nach Deutschland – Ein Überblick über Entsendung, Arbeitnehmerfreizügigkeit und Niederlassungsfreiheit von EU-Bürgern in Deutschland, Hertie School of Governance, Berlin.

<sup>7</sup> Pacolet, J., De Wispelaere, F. 2015: Posting of Workers. Report on A1 portable documents issued in 2014, Network Statistics FMW&SSC, European Commission, Brussels.

<sup>8</sup> The total figure includes different forms of posting: Around 75% are postings to a single Member State, about 22% postings to two or more Member States, 2% were postings based on agreements between Member States and 0.05% were flight or cabin crew member postings.

of postings has increased by 44.4%, much stronger trend than estimated in earlier studies.<sup>9</sup> Though comparisons are difficult to make, it is likely that the posting of workers during the previous years has been the **fastest growing form of cross-border labour mobility** in the EU.

**Figure 1: Net balance between postings sent and received 2010 and 2014 (in 1,000)**



Source : EU Commission, Impact Assessment 2016, p.67

In terms of the **country specific patterns** of posting between 2010 and 2014, the following patterns and trends seem particularly striking:

**Table 1: Country specific trends and patterns of posting 2010 – 2014**

<p><b>86% of total postings went into the EU15 countries</b></p>	<ul style="list-style-type: none"> <li>• 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.</li> <li>• As a proportion of domestic employment, Luxembourg (9%), Belgium (3.6%) and Austria (2.5%) were the main receiving countries in 2014.</li> </ul>
<p><b>In absolute terms, Poland is the most important sending country</b></p>	<ul style="list-style-type: none"> <li>• Poland (266,700), Germany (232,800) and France (119,700) were the largest senders of posted workers in 2014.</li> <li>• The figure above refers only to postings to single Member States. If postings to multiple Member States are also taken into account, the figure for Poland would be much higher, amounting to 428,400 posted workers in 2014.<sup>10</sup></li> <li>• As a proportion of domestic employment, the incidence of posted workers in sending countries was highest in Luxembourg (20.7%) and Slovenia (11.5%).</li> </ul>

<sup>9</sup> ISMERI Europa 2012.

<sup>10</sup> EU Commission 2016, Impact assessment, p. 57.

<b>Impact of the crisis on posting</b>	<ul style="list-style-type: none"> <li>Italy and Spain have turned from being net receivers to becoming net senders of posted workers between 2010 and 2014, mostly due to the impact of the economic crisis.</li> </ul>
<b>CEEC countries as well as Greece recorded strongest increase of posted workers</b>	<ul style="list-style-type: none"> <li>Since 2010, Slovenia, Slovakia, Greece, Lithuania and Bulgaria recorded the highest increase in the number of posted workers sent to another EU country. In all of these countries, the number more than doubled and in Slovenia it even tripled.</li> </ul>
<b>High increase in receiving countries in high-wage countries as well as Slovenia and Estonia</b>	<ul style="list-style-type: none"> <li>Since 2010, Sweden, Germany, Belgium and Austria, as well as Slovenia and Estonia, recorded the highest increase.</li> </ul>
<b>Geographic proximity</b>	<ul style="list-style-type: none"> <li>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.</li> </ul>
<b>The average duration of posting is less than 4 months with significant differences between countries</b>	<ul style="list-style-type: none"> <li>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.</li> <li>there are significant differences between the Member States: not longer than 33 days in France, Belgium and Luxembourg but more than 230 days in Estonia, Hungary and Ireland.</li> </ul>

**Source:** EU Commission 2016: Impact Assessment.

Based on analyses of flows of posting between countries and groups of countries, as well as sectoral patterns, previous studies<sup>11</sup> have identified **two basic models of posting**:

- First, mainly **triggered by labour cost differentials and the competitive advantage of lower-wage countries**, a significant share of posting is in low value chains, including construction, transport or agriculture, i.e. services that cannot be delocalised. As labour cost and wage competition is particularly relevant for this model of posting, posting companies tend to strictly apply the minimum terms of employment and rates of pay required in the receiving country. According to calculation of DG Employment<sup>12</sup> this model of posting from the low-wage<sup>13</sup> to high-wage country group<sup>14</sup> accounts for around one third of all posting in 2014. If postings from medium-wage<sup>15</sup> countries to high-wage countries were to be included (which accounts for nearly 16%), this model of posting would account for more than 50%.
- There is however a second model of posting that is driven not by wage competition, but by **skills shortages and the need of highly specialised personnel and services**. This form of posting is in high value chains that require a highly-skilled workforce, such as in engineering, specialised construction professions or financial services. In the context of this model, minimum rates of pay or terms of employment conditions are not relevant factors – wages of posted workers are either based on what is paid in the home country if it has higher wage levels than

<sup>11</sup> ISMERI Europe 2012.

<sup>12</sup> EU Commission 2016 Impact assessment, p. 33.

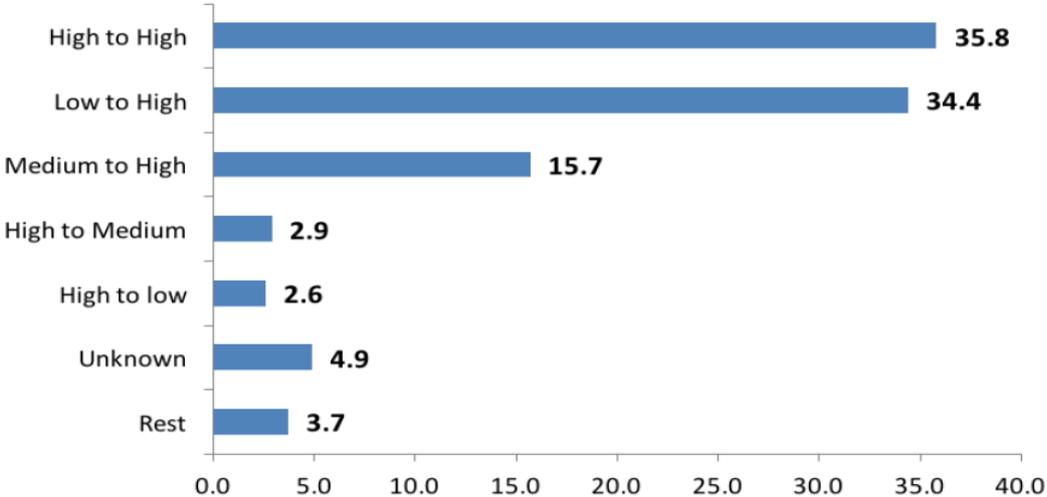
<sup>13</sup> Low-wage countries according to DG EMPL are defined by less than half of the EU average wage that are Croatia, Czech Republic, Estonia, Poland, Slovakia, Hungary, Latvia, Lithuania, Romania and Bulgaria.

<sup>14</sup> Above the EU average wage: Denmark, Luxembourg, Sweden, Finland, Belgium, Netherlands, Germany, France, Austria, Italy and Ireland.

<sup>15</sup> Around the EU average wage: Cyprus, Spain, Greece, Malta, Slovenia and Portugal.

the receiving country, or the other way round.<sup>16</sup> According to the estimations of DG Employment, this model of posting between high-wage countries in 2014 accounted for nearly 36% of all postings.

**Figure 2: Flow of postings between EU Member States divided by wage groups, % of total posting, 2014**



Source : EU Commission 2016, Impact Assessment, p. 34.

Notes: Calculation of DG Employment. High-wage (above EU average wage, year 2012): DK, LU, SE, FI, BE, NL, DE, FR, AT, IT, IE; Medium-wage (around EU average, 2012): CY, ES, EL, MT, SI, PT; Low-wage (less than half of the EU average wage): HR, CZ, EE, PL, SK, HU, LV, LT, RO, BG; no data on the destination of postings from CY, DK, and the UK.

Though posting tends to be pro-cyclical, recent studies on posting have argued that more recently a **specialisation of lower wage countries in the provision of labour-intensive services to higher wage countries can be observed**, particularly in sectors such as construction or transport.<sup>17</sup> As the following examples show, the social and economic effects of posting on local labour markets are not only felt in the higher wage countries.

**Box 2: Negative effects of posting on local labour markets in Romania**

According to the experience of Romanian interview partners, posting in the domestic construction sector is characterised by unfair competition practice. In the context of posting, foreign companies are reported to have entered the Romanian market, employing mainly non-EU workers and frequently circumventing EU standards. “At the same time, Romania has lost many skilled workers and experienced widespread insolvency of SMEs put under intense pressure by larger companies and by the difficulty in getting the necessary financial support. Not unlike Germany, the social partners in Romania cooperate and often share opinions and positions, especially when dealing with issues such as combatting fraud, corruption and the undermining of collective agreements.”

Source: EESC Study on the Working of the Service Directive in the Construction Sector 2014, p. 41

<sup>16</sup> ISMERI Europe 2012 and FGB 2015.

<sup>17</sup> Pacolet and De Wispelaere 2015 and FGB 2015 (for specific sectors).

### 2.2.2. Sectoral patterns and trends

Although posted workers in 2014 account for only 0.7% of the employed population in the EU,<sup>18</sup> the **impact of posting on domestic labour markets is much stronger in specific sectors** and Member States:

**Table 2: Sectoral patterns and trends of posting 2010 – 2014**

<p><b>Sectoral patterns of posting in older and newer Member States</b></p>	<ul style="list-style-type: none"> <li>• The FGB study indicates that the older Member States (for example Belgium, Germany, and the Netherlands) mostly send out service workers, while Poland and Romania mainly send out industry and construction workers.</li> </ul>
<p><b>The construction sector is the most important target sector of posting</b></p>	<ul style="list-style-type: none"> <li>• 42% of all postings in 2014 were concentrated on the construction sector, followed by 22% in the manufacturing industry and 13.5% in education, health and social work.</li> <li>• In Slovenia, Sweden, Finland, Austria, Belgium and Latvia, posted construction sector workers represented over half of the total number of workers received in 2014.</li> <li>• From a sending perspective, construction workers represent over 50% of posted workers sent from Estonia, Portugal and Slovenia, followed by Hungary, Poland and Luxembourg with shares slightly below that level.</li> <li>• Measured as a proportion of the domestic employed workforce in the sector, posted workers made up 20% of Belgian construction workers in 2014, and about 10% of Austrian and Luxembourgish workers.</li> </ul>
<p><b>Other sectors</b></p>	<ul style="list-style-type: none"> <li>• According to various studies (e.g. FGB study 2015) and stakeholder experiences, there is a trend of blurring boundaries and uncertainties of determining the employment status of migrant/cross-border workers in sectors such as health/care and road transport.</li> <li>• In particular, various challenges exist in the road transport sector with regards to the posting of workers and other forms of cross-border labour/service provision. The FGB wage study shows that that wage gaps between domestic and posted/foreign workers/drivers are significant, other reports and stakeholder evidence<sup>19</sup> indicate a serious increase in unfair competition practices and deterioration of working conditions for drivers. Economic studies have also shown that the posting of road transport workers into higher-wage countries such as Germany, France or the Nordic countries has evolved as an important business sector in countries such as Poland.<sup>20</sup></li> </ul>

**Source:** EU Commission 2016: Impact Assessment.

<sup>18</sup> EU Commission 2016: Impact Assessment, p. 60.

<sup>19</sup> See for example Sitran, Allesio / Pastori, Enrico 2013: Social and Working Conditions of road transport hauliers. Study for the European Parliament's Committee on Transport and Tourism. COWI 2015: Byways in Danish Transport. Study report was prepared at the request of 3F Transport and the Danish Transport and Logistics Association (DTL) and with support from the Danish Working Environment Authority's fund for activities relating to social dumping and foreign labour. See also the example in textbox 13 below. According to the German service trade union ver.di (interviews carried out in the context of this study) not only a growing part of road transport of goods but also increasingly passenger road transport (long-distance bus-connections) is carried out by foreign drivers, also in the context of posting.

<sup>20</sup> See Deloitte 2015: Where is the Single European Market heading? Impact of the MiLoG law on the Polish road market sector. Report financed by the Transport and Logistics Poland Employer Association.

## Posting in the temporary agency work sector

As arising from previous studies as well as the analysis of PD A1 data, the following additional features and patterns of posting can be highlighted:

In 2014, the **posting of workers through temporary work agencies accounted for 5% on average**, according to available data from PD A1 documents. There are **significant cross-country differences** in the posting of agency workers, resulting also from differences in the regulations (e.g. ban of agency work in the construction sector in Germany).

A1 data for 2014 indicate high shares of posted agency workers from the receiving perspective for the **Netherlands, Belgium, France and Portugal** (more than 10% of total postings) and from the sending perspective for the Netherlands (35%) and Belgium (25.7%).

A study carried out in 2015<sup>21</sup> provides some insights into the companies using posted agency workers, both from the sending and receiving perspective, based on the perspective and assessments of stakeholders.

The **construction sector** is mentioned as a typical final user – often in the context of subcontracting chains - in the Netherlands, Belgium, Denmark, France and Sweden. Germany is an exception as temporary agency employment in the construction sector is not allowed according to German law. Social partners at sectoral level in Belgium, Denmark, France and Germany have also stressed that posted temporary agency workers play an important and increasing role in the transport sector. Finally, the agricultural sector is also a common employer of workers posted by temporary work agencies (i.e. in the Netherlands, France, Germany and Denmark).

As to **posting into higher-wage professions**, it is reported that Sweden makes good use of doctors and nurses posted by foreign temporary work agencies, while Germany makes use of Nordic agencies to secure sufficient workers for the offshore wind sector.

### Box 3: Posted temporary agency workers in France and Sweden

In **France**, according to the Labour Ministry's survey, posting declarations in the Temporary agency work sector represented 19 per cent of the total number of posting declarations in 2012 and 16 per cent in 2013. As a result, posting by Temporary work agencies established in another Member State stands in second position just behind the construction sector and just before the Industrial sector (15 per cent in 2012 and 16 per cent in 2013).

In **Sweden**, according to the chief negotiator of the employers' association Swedish Staffing Agencies, there is a large difference between the earnings of local and posted agency workers, unless the latter are covered by Swedish collective agreements. It is estimated that the majority of workers employed by Swedish agencies are paid between 120 and 170 SEK per hour, while those who are posted by foreign work agencies may earn only between 30 – 50 SEK.

**Source:** FGB Wage Study 2015.

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<sup>21</sup> FGB 2015, p. 51.

### 3. THE CURRENT REGULATORY FRAMEWORK

#### KEY FINDINGS

The regulation of posting of workers and the PWD has left room for different interpretation.

While the posting of workers is regulated within the context of the freedom to provide services within the internal market, as guaranteed by the TFEU, the social protection of posted workers is provided by a deliberated set of 'hard core rights' that combine home country and host country provisions.

There are significant national variations in the application of the PWD in Member States, which result from provisions within the Directive that allow for flexibility in terms of modes of regulation (legal versus collective agreements), scope of sectors covered, further provisions or derogations (with regards to the protection of posted temporary agency workers).

There is an inconsistency between basic provisions of the PWD and the regulation of the coordination of social security systems and competences to levy income tax.

#### 3.1. The substantive scope of the PWD

The Posting of Workers Directive has recently been described as a "political anomaly"<sup>22</sup> insofar as it aims to find a **regulatory balance of two principles** that – as practical experience of implementation, as well as perceived and unintended effects, show – seem to be rather incompatible: **First**, the principle to guarantee a level playing field of cross-border service provision in a way that is as unrestricted as possible and **secondly**, the principle of social cohesion and protecting the rights of posted workers by guaranteeing a common set of social rights in order to avoid unfair treatment.

#### Box 4: The difficult birth of the PWD

Already at the time of the Southern Enlargement of the European Community in the 1980s, there were heated debates, mainly between potential recipients of labour (France, Belgium, Germany, Denmark and Luxemburg), who were in favour of European regulation, and those who were more likely to be exporting labour (UK, Portugal, Ireland and Greece).<sup>23</sup> When the European Community was enlarged with Portugal and Spain in 1986, public debates about the influx of Iberian workers created a climate for legislation with regard to temporary foreign workers, in which the main argument was not equal treatment but fears that that jobs in the higher wage countries were in danger. Political agreement was reached by a qualified majority, where the UK voted against the Directive and Portugal abstained. It was only after the enlargement of the European Union in 1995 with Austria, Finland and Sweden – potential higher wage, receiving countries - that the deadlock in the discussions between supporters and opponents was broken in favour of the former group of Member States.

<sup>22</sup> Dhéret, C., Ghimis, A. 2016: The revision of the Posting of Workers Directive: Towards a sufficient policy adjustment?. Discussion Paper, European Policy Centre, Brussels, p. 3. A legal study on the posting of workers and the PWD has characterised the PWD also as an "atypical Directive" as it not only addresses one main legal discipline but stands at the crossroads between national (collective) labour law, internal market law and private international law. See: Van Hoek, A. / Houwerzijl, M. 2011: Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Report to the European Commission (Contract Number VT/2009/0541), Brussels, p. 138.

<sup>23</sup> Druker, J., Dupre, I. 1998: The posting of Workers Directive and Employment Regulation in the European Construction Industry, European Journal of Industrial Relations 1998; 4; p.311-312.

The **actual weight of each of the two principles**, whether there should be a hierarchy, or both are equally important, have all proven to be a **cause of major debate**. The legal basis of the Directive is Article 56 of the TFEU guaranteeing the free provision of services. Correspondingly, the preamble of the PWD in most paragraphs refers to the objectives to abolish obstacles to the free movement of persons and services, the prohibition of restrictions for service providers based on nationality or residence requirements, and to foster a dynamic environment for the transnational provision of services. **Reference to fair social treatment** is only made in one paragraph of the preamble, which states that the transnational provision of services should be carried out in a climate of "*fair competition and measures guaranteeing respect for the rights of workers*".

However, the PWD primarily aims to regulate a **common set of rules** for the trans-border provision of services and is **not providing a framework for posted workers' rights of equal treatment or pay equality** with workers in the receiving country.

Instead, the Directive in Article 3.1 establishes a set of **'hard core' minimum terms of employment and working conditions**, which should be respected according to the **host country principle** (see textbox below).<sup>24</sup> In this regard, the PWD is a clarification of the rules of private international law (Rome Convention and new Regulation 593/2008), which allows for applying the mandatory rules ("*lois de police*") of the receiving country to posted workers.

Where these terms and conditions of employment are laid down by law, regulation or administrative provisions, Member States must apply them to workers posted to their territory. Member States must equally apply them to posted workers if they are laid down by collective agreements or arbitration awards that have been declared universally applicable within the meaning of **Article 3.8 of the Directive**, insofar as they concern the activities referred to in the Annex to the Directive (building work).

**Box 5: The substantive scope or "hard core" of the PWD**

Article 3.1 of the PWD lists the elements of the "hard core" of terms and conditions of employment set out in the **host country** legislation that posting firms should apply to posted workers:

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work; (f) 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;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

With regard to social security payment and applicable systems, posted workers, who have been working in the recipient country for up to two years, pay their contributions in the **home country**. This is stipulated according to Article 12 of Regulation 883/2004 on the coordination of social security as an exemption to the general rule that workers pay contributions in the Member State where they are actually working.

<sup>24</sup> This *lex loci laboris* however must be applied only in the construction sector. With regards to other sectors it "may" be applied according to the Directive.

Reflecting also the different traditions and practices of labour market regulation, as well as the important role of autonomous collective agreement by social partners in this context, the PWD in Articles 3.7 and 3.10 allows Member States to extend the above list to other matters (see below '**minimum versus broader protection**').<sup>25</sup> Furthermore, according to Article 3.8, the minimum terms of employment and working conditions can be applied to posted construction workers. This can be done not only by "universally applicable" collective agreements or arbitration awards, but also as an equivalent to collective agreements, which are "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned", and/or "which have been concluded by the most representative employers' and workers' organisations at the national level and which are applied throughout national territory". In all cases, Member States are required to ensure equality of treatment for national and foreign undertakings in a similar position.

Such extensions, according to Article 3.10, also have to respect the overall rationale of the PWD that is guaranteeing the "**equality of treatment**" of undertakings.

### 3.2. Varieties of national regulation

Though there are a number of "grey areas" and controversial interpretations, the PWD as described above provides for **two fundamental choices**, in principle, that the Member States could make when implementing the Directive: implement either minimum or broader protection; and implement protection either through legal instruments or through autonomous collective bargaining:

- **Minimum versus broader protection:** Article 3.1 defines a 'hard core' of terms and conditions of employment that are laid down by law, regulation or administrative provisions; Member States must apply them to workers posted within their territory. Member States must apply them equally to posted workers if they are laid down by collective agreements or arbitration awards that have been declared universally applicable within the meaning of Article 3.8 of the PWD, insofar as they concern the activities referred to in the Annex to the Directive (building work). With regard to other activities and extended protection, Member States are left with the choice of imposing terms and conditions of employment laid down by these collective agreements or arbitration awards, which is also the case outside the construction sector, according to Article 3.10, second indent. They may also, in compliance with the Treaty, impose terms and conditions of employment in matters other than those referred to in the Directive, in the case of public policy provisions according to Article 3.10, first indent. Broader protection could be so wide as to include the entire labour legislation.<sup>26</sup>
- **Legislation versus collective agreement:** Protection of posted workers can be granted through applying either (certain) legislative instruments or collective agreements. Actually, most of the national laws implementing the Posting of Workers Directive mention both law and collective agreements as the means for setting the protection levels for posted workers. Only in Latvia, Poland and the UK is the regulation of posting solely based on legislation. In the case of collective agreements, the legislation implementing the PWD could stipulate that bargained minimum protection simply replaces the legal ones listed in Article 3.1, or it could provide for the complete application of collective agreements to posted workers.

<sup>25</sup> However, the CJEU has interpreted the application of Art. 3.7 and 3.10 in a very restrictive way. For further details see chapter 4.1.3.

<sup>26</sup> This however relates mainly to theory/the legal text. In practice, CJEU rulings have restricted a broader protection level. See footnote above.

- **Coverage of all or only selected sectors:** Apart from Cyprus, Germany, Ireland and Luxembourg, minimum terms and conditions of employment, including minimum rates of pay, are set for all economic sectors.

**Table 3: National regulation of posting of workers in the EU28**

Country	Minimum or broader protection	Sectoral coverage	Type of regulation	Sources of minimum rates of pay
Austria	Broad	All	Legislation and CA	Binding collective agreements
Belgium	Broad	All	Legislation and CA	Binding collective agreements
Bulgaria	Minimum	All	Legislation and CA	Statutory minimum wage
Croatia	Minimum	All	Legislation and CA	Statutory minimum wage
Cyprus	Minimum	Selected	Legislation and CA	Binding collective agreements <sup>27</sup>
Czech Rep.	Minimum	All	Legislation and CA	Statutory minimum wage
Denmark	Broad	All	Legislation and CA	Nationwide agreements (Art. 3.8)
Estonia	Minimum	All	Legislation and CA	Statutory minimum wage
Finland	Broad	All	Legislation and CA	Binding collective agreements
France	Broad	All	Legislation and CA	Binding collective agreements
Germany	Broad	Selected	Legislation and CA	Binding collective agreements <sup>28</sup>
Greece	Minimum	All	Legislation and CA	Binding collective agreements
Hungary	Minimum	All	Legislation and CA	Statutory minimum wage
Ireland	Broad	Selected	Legislation and CA	Binding collective agreements <sup>29</sup>
Italy	Broad	All	Legislation and CA	Binding collective agreements
Latvia	Minimum	All	Legislation	Statutory minimum wage
Lithuania	Minimum	All	Legislation and CA	Statutory minimum wage
Luxembourg	Broad	Selected	Legislation and CA	Binding collective agreements <sup>30</sup>
Malta	Minimum	All	Legislation and CA	Statutory minimum wage
Netherlands	Minimum	All	Legislation and CA	Binding collective agreements
Poland	Minimum	All	Legislation	Statutory minimum wage
Portugal	Minimum	All	Legislation and CA	Binding collective agreements
Romania	Minimum	All	Legislation and CA	Statutory minimum wage
Slovenia	Broad	All	Legislation and CA	Binding collective agreements
Slovakia	Minimum	All	Legislation and CA	Statutory minimum wage
Spain	Minimum	All	Legislation and CA	Binding collective agreements
Sweden	Broad	All	Legislation and CA	Nationwide agreements (Art. 3.8)
UK	Broad	All	Legislation	Statutory minimum wage

**Source:** Eurofound 2010, EU Commission 2016 Impact Assessment.

<sup>27</sup> Minimum wages have statutory effects for some professions only, namely shop assistants, clerks, child-care workers, personal care workers, security guards, and cleaners at business/corporate premises.

<sup>28</sup> Sector-specific collective agreements declared universally binding by public order exist in the sectors of waste management, training services, construction industry, roofing trade, electrical trades, industrial cleaning services, money and valuable services, scaffolding erection, agriculture, forestry and horticulture, painting and decorating trades, care provision, slaughter and meat processing, stonemason and stone sculptor, the textile and clothing industry, laundry services and temporary agency work sector.

<sup>29</sup> Employment Regulation Orders with statutory effects are currently in place in the catering, contract cleaning, hairdressing, hotels, retail and trades and in the security industry sectors.

<sup>30</sup> Collective agreements are universally binding in the main nine sectors of posting (building and associated trades, transport, road haulage and road passenger transport; cleaning of buildings; security guarding; brewing; printing; banking and insurance; social sector and care; temporary agency work).

### 3.3. Regulation of posted temporary agency workers

**Article 3.9** of the PWD allows EU Member States to go beyond the minimum requirements of Directive 96/71, which relates to the basic employment and working conditions for posted agency workers. This article seeks to apply the same conditions and terms of employment as comparable agency workers in the destination country.<sup>31</sup>

This means that the **applicable regulation on equal pay** should be the same as that which is applied to agency workers who are assigned at national level. This is defined by **Article 5 of the Directive 2008/104/EC** on temporary agency work, which includes the options of derogations from equal pay, particularly derogations made by collective labour agreements.

It should be noted here that **the concept of “terms and conditions of employment”, as applied in Directive 2008/104/EC<sup>32</sup>, is wider than the corresponding provisions of the PWD**. This is because it also encompasses provisions laid down by any kind of collective agreement. It therefore seems possible to guarantee that company level agreements are respected and that they can also be applied to posted agency workers.

However, as Article 3.9 is only an option, rather than a legal obligation, Member States are also free to apply only the hard core of rights. This includes minimum rates of pay, but not full equal treatment. As the following overview shows, there are currently **15 Member States** that apply the equal treatment provisions of the TAW Directive, while **13 Member States** are yet to set any specific provisions for posted agency workers.<sup>33</sup>

**Table 4: National regulation of temporary agency work in the context of posting**

<b>Equal treatment between local and cross-border temporary agency workers</b>	Belgium, Bulgaria, Croatia, Czech Republic, Germany, Denmark, Spain, France, Italy, Luxembourg, Malta, Netherlands, Romania, Sweden, and UK
<b>Application of the hard core only</b>	Austria, Cyprus, Estonia, Greece, Finland, Croatia, Hungary, Ireland, Latvia, Poland, Portugal, Slovenia, and Slovakia

**Source:** EU Commission 2016: Impact Assessment, Annex VI.

### 3.4. Posting, social security rights and tax payments – inconsistencies of regulation and their effect on labour cost differentials

#### 3.4.1. Social security coordination

Under normal circumstances, EU law is based on the principle that any worker who works in a given Member State is subject to the whole body of the legislation of that State to ensure equal treatment and non-discrimination (host country principle). Posting of workers, however, constitutes derogation from the **lex loci laboris rule** as posted workers remain attached to the social security system in their home country.

<sup>31</sup> For an overview on the scope of Art. 3.9 PWD see annex 2.

<sup>32</sup> Article 3(1)(f) of Directive 2008/104/EC refers to the working and employment conditions that have been set out by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking. These aspects all relate to: i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and ii) pay.

<sup>33</sup> Regarding the actual transposition of Art. 3.9 into national regulation, the social partners in the temporary agency work sector have established the "[European Observatory of Cross-Border Activities](#)". However, the European employer organisation, Eurociett, has highlighted the persistent lack of information in a recent [position paper](#); [in the same paper, they also](#) highlighted the need for an "*in-depth legal analysis on the interrelation between the Directive 2008/104/EC on temporary agency work and the Directive 96/71 on the posting of workers (...) as both Directives address the employment and working conditions of agency workers.*" (p. 5).

The treatment of **posted workers as a specific case in EU level coordination of social security rights of migrant workers** and the application of home (posting) country rights, rather than those of the host (temporary employment) country, was justified by the Commission as being necessary in order to avoid intensive and difficult implementation measures. Full application of the host country principle would have meant that workers, who may have been posted for very short periods of time and/or to many different Member States, would need to adhere to the social security systems of all countries. This would make it more difficult to determine, for example, the pension rights of these workers.

According to the social security coordination rules, as set out in **Regulation 883/2004 and the implementation Regulation 987/2009**, social security contributions concerning posted workers need to be paid in the state where the employer normally carries out his or her activities, i.e. in the posting/sending Member State (which is the competent Member State). By the same token, posted workers can claim social security benefits (such as related to unemployment, pensions, work accidents) in the country where they are insured.

In contrast to the PWD, Regulation 883/2004 does not refer to a habitual state of work and thus there is a **difference in the definition of posting by the PWD and the social security coordination rules**.

A recent report<sup>34</sup> has highlighted that the definitions relating to posting are more concrete than those in the PWD, for the purposes of social security coordination. The **definition of a posted worker is based on three important conditions**. Workers are posted:

- by companies that normally carry out their activity in the home Member State
- to perform paid work on behalf of their employer
- for a limited duration of time.

This means that the **sending company must conduct a substantial part of its activity in the Member State where it is established**. Furthermore, there must be a **direct relationship between the posted worker and the sending company**. Finally, according to Regulation 883/2004, the **duration of posting** cannot exceed 24 months.<sup>35</sup>

However, it is important to note that posting for longer periods (of up to five years) is possible, provided that it is based on agreements between sending and receiving Member States (according to Article 16 of Regulation 883/2004).

#### 3.4.2. Posting and the payment of taxes

In order to **avoid double taxation of labour**, there is not only a need to coordinate national social security law but also income taxation law.<sup>36</sup> However, in the context of posting, there are **no coordination rules determining which Member State will tax labour income**. What exists instead, in national law or bilateral tax agreements is based on the general principle that income tax is paid in the country in which the income is earned. This general rule is partially applied to posting, only because EU Member States follow the “**183-days-rule**” defined in the context of the “OECD Model Tax Convention on Income and on Capital”. The Convention stipulates that the posted worker will be subject to income tax in the sending Member State on the basis that they work for less than 183 days within a period of 12 months in the receiving state.

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<sup>34</sup> Maslauskaitė, K. 2014: Posted Workers in the EU, p. 10.

<sup>35</sup> Ibid. p. 10.

<sup>36</sup> As highlighted in a recent research paper on the issue, the impact on posting not only is limited to income taxation but also affects other tax forms, e.g. VAT or corporate taxes. See: De Wispelaere, F. and Pacolet, J. 2015: Posting of Workers: Impact of social security coordination and income taxation law on welfare states. KU Leuven. Working Paper, November 2015.

The variation in the regulations on social security coordination and income tax rules, with regards to the period of time before the rules of the receiving country apply (24 months or longer, in contrast to 183 days), are quite striking:

- for **periods of less than 183 days**, the sending Member State has the competence to levy income tax and social security contributions;
- for **periods longer than 24 months**, the receiving Member State has the competence to levy both taxes and contributions;
- for **periods between 183 days and 24 months**, (or even longer) there is a split: income tax is levied by the receiving Member State while social security contributions are levied by the sending Member State.

### 3.4.3. Effects on labour cost differentials

While **minimum wage requirements** of the host country apply to posted workers, they continue to pay their **social security contributions** in the Member State where they are normally based for up to two years and for up to 183 days in the case of income tax.

**Companies providing cross-border services therefore have a cost advantage** when social security contributions and income taxes are lower in the sending country than in the receiving country.<sup>37</sup>

The following table provides an approximate illustration of the **cost savings that are achieved through posting**. The example shows that despite the three nationals earning the same net income, posting a worker from Portugal (or Poland) saves an employer a significant amount on labour costs through the difference in social security payments. It should be noted that the calculation is based on the assumption that income tax is paid in the receiving country and thus no differences exist. Given the fact that most postings last no longer than 3-4 months and fall within the 183-days rule, income tax is levied by the sending country in most cases. Therefore, the **cost saving made by those using posted workers is even higher in most cases**, given that there are significant differences in income tax levels between Member States.<sup>38</sup>

**Table 5: Savings made by companies through posting (€)**

	Dutch worker	Posted worker from Portugal	Posted worker from Poland
<b>Net salary</b>	1,600	1,600	1,600
<b>-/- social security</b> (paid in the sending country)	496	81	350
<b>-/- taxes</b> (paid in the receiving country, i.e. after the 183-day period)	81	81	81
<b>Gross salary</b>	<b>2,177</b>	<b>1,762</b>	<b>2,032</b>
<b>Percentage saving as compared to a Dutch worker</b>		<b>19.1%</b>	<b>6.7%</b>

**Source:** Author, based on Berntsen, L. 2015: Social dumping at work: uses and abuses of the posted work framework in the EU, ETUI Policy Brief, Brussels, p. 3.

<sup>37</sup> For the differences in income tax and social security contributions in the EU Member States see figures 5 and 6 in the statistical annex (annex 4).

<sup>38</sup> See also table 6 in annex 4. On the complex issue of differences in income tax wedges see also: De Wispelaere, F. and Pacolet, J. 2015: Posting of Workers: Impact of social security coordination and income taxation law on welfare states, p. 10-12.

## 4. NEED FOR IMPROVEMENTS – LEGAL UNCERTAINTIES, REGULATION LOOPHOLES AND NEW CHALLENGES IN RELATION TO THE POSTING OF WORKERS

### KEY FINDINGS

During the last decade, several developments have contributed to a growing awareness that the PWD requires improvement as it is suffering from multiple problems.

These problems and the need for adjustments stem mainly from legal and jurisdictional developments and inconsistencies, which exist or may exist between the PWD and other EU legislation.

Furthermore, various forms of abusive practice, circumvention and malpractice in the implementation of the PWD have resulted in an increased awareness of the need for legislative action.

However, aside from the problems related to the effective enforcement of the PWD, more substantive problems have also become increasingly obvious over time, namely the unclear provisions of the PWD regarding the terms and conditions of employment and minimum rates of pay.

Resulting from these deficiencies in the application and implementation of the PWD, the posting of workers during the last decade in labour intensive sectors of higher wage countries has resulted in labour market distortions and "social dumping" based on labour cost and tax differentials.

### 4.1. Legal loopholes and ambiguities

#### 4.1.1. Insufficient definition of 'temporariness' of the service provision and posting

In order to justify the difference in treatment between posted workers and migrant workers in terms of equal treatment, posting has to be of a **temporary nature**. As highlighted in a previous report by the EU Commission, in cases where posting is frequent or even permanent, the rationale behind the difference in legal status between these two categories of workers would no longer be valid.<sup>39</sup> The same situation occurs in situations where "rotational posting" is taking place: the employees are repeatedly recruited by an undertaking with the sole purpose of being posted to another Member State, in order to carry out the same job ("rotational posting").

In the PWD (Art. 2.1), a posted worker is defined as a worker who, for a "limited period of time" carries out work in the territory of a Member State other than the state in which he/she normally works. However, presently, there is **no clear indication with regards to the temporary nature of posting**. Contrary to Regulation (EC) 883/2004, the PWD neither provides for a fixed time limit nor other criteria (e.g. requested periods of previous

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<sup>39</sup> EU Commission 2012: Impact assessment "Revision of the legislative framework on the posting of workers in the context of provision of services". SWD (2012) 63 final of 21 March 2012, p.34.

employment in the sending Member State) to determine the temporary character of the posting duration in the host country.

Also the **CJEU has not provided much clarity**<sup>40</sup>: According to the rulings in the cases of *Gebhard* (C-55/04) or *Schnitzer* (C-215/01) the temporary nature of the service provision in the host country has to be determined in light of not only the duration of the service but also other aspects, such as regularity, periodical or continuous nature. Thus, in the context of complex projects, such as in the construction sector, the temporary provision of services may last several years. According to the *Schnitzer* ruling, an activity carried out on a permanent basis or at least without foreseeable limits in its duration, does not fall within the freedom to provide services. It also has to be added that the legal concept of “limited period of time” may vary depending on the legal framework that is applied (i.e. social security coordination, taxation, provision of services or labour, etc.).

With regards to **rotational posting**, there is no reference in the PWD that would ban the possibility of repeated posting for the same job.

In contrast to the PWD, the **rules defined in the Regulation 883/2004** on social security not only set a limit of two years (after which the obligation applies that the employee must be covered by the social security regime of the host country), the regulation also excludes the possibility of repeated postings for the same job.

**Box 6: Rotational posting for the same job**

An Irish temporary work agency posted 93 Polish workers with Irish E101 certificates, stating that they were covered by Irish social security law, to work on a big infrastructure project in Sweden. The certificates indicated that the workers had been living in Ireland two months before the posting. However, it was discovered that 45 of them had previously been posted from Poland to Sweden to work for the same Swedish company. 38 of them had moved to Ireland during the same period in which they had been working in Sweden and had been posted from Poland. The 93 workers were residing at six addresses in Ireland – 46 of them at one single address, which was not an apartment block. Swedish authorities called into question the certificates before the Irish authorities. In the meantime, the same workers received new E101 certificates from Cyprus.

**Source:** EU Commission, Impact Assessment 2012, p. 35/36

**4.1.2. Ambiguities with regards to ‘establishment’**

The Directive sets out that the posting undertaking has to be ‘established’ in a Member State. This requires the **existence of a genuine link between the undertaking and the sending Member State**. However, the Directive does not set the criteria in order to determine if there is a genuine link and it has proven to be very difficult to verify whether a firm is really established in a foreign Member State or not.

Also here, the **social security legislation** (Art. 12 of Regulation 883/2004 in conjunction with Art. 14.2 of Regulation 987/2009) applying to posting is more explicit, as it establishes criteria that allow for a **more precise definition of posting**: an undertaking must ordinarily carry out substantial activities in the territory of the Member State in which it is established in order to be authorised to post its workers to another Member State.

This **loophole in the PWD has stimulated multiple practices to evade or circumvent employment or social security legislation**. In this context, the use of ‘letter-box companies’, often in combination with **bogus subcontracting or unlawful agency work**,

<sup>40</sup> See the overview of major law cases and their impact on the interpretation of the PWD in annex 1.

has attained a great deal of attention and has been regarded as highly problematic by the EU Commission<sup>41</sup>, as well as by trade unions and employer organisations.<sup>42</sup>

**Box 7: Letterbox 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.

**Source:** EPC Discussion Paper 2016. For concrete example of such practice see below in section 5.3.2

Another example is '**regime shopping**' in the field of transnational temporary agency work. Here agency workers are sourced from locations which are convenient in terms of social security to countries with more restrictive regulations. Fraudulent work agencies also seem to be particularly involved in abusive practices of utilising **bogus self-employment** in order to avoid the protections granted by the PWD to posted workers.

The **current PWD does not contain any provision to prevent or sanction such abuses.**

**Box 8: Regime shopping**

A prominent example is provided by the Bouygues Travaux Publics in the construction of a nuclear site in Flamanville concerning some Polish workers posted from a Cypriot subsidiary of an Irish temporary work agency specialised in construction engineering and related trades. The workers were found to have wages around half of those of French workers. The company was also accused of covering-up 38 undeclared accidents out of the 112 declared accidents. The same case was echoed in the public debate in the UK, where the unions were worried that the same subcontractors could be used in the construction of another nuclear site. Indeed, the presence of large contractors and sub-contractors in the engineering sector with EU-wide operations can facilitate the emergence of common practices violating workers' rights. At the same time, this also points to the possibility of building a transnational system of monitoring and enforcement and, in positive, it could help the diffusion of good practices. In this respect, it is interesting to note that the issues around posting do not only refer to SMEs coming from low labour cost countries, but also involve large MNCs based in high labour cost countries.

**Source:** ISMERI Europe, Preparatory Study, p. 66

**4.1.3. Unclear and controversial interpretation of the terms and conditions of employment**

The **nucleus of mandatory terms and conditions of employment**, as defined in Article 3.1, as well as the legal and other instruments by which these are implemented represents the heart of the PWD. However, they have also been the **focus of much political and juridical controversy.**

At the time of its adoption, the PWD reflected an approach of codifying earlier **CJEU rulings** by defining the notion of a minimum level of protection of workers' rights. At the same time, with regards to the instruments to regulate terms and conditions of employment, the PWD

<sup>41</sup> See for example EU Commission 2012: Impact assessment "Revision of the legislative framework on the posting of workers in the context of provision of services". SWD (2012) 63 final of 21 March 2012, p. 36.

<sup>42</sup> See the joint report of the EU-level cross-sectoral social partners: ETUC, BUSINESSEUROPE, UEAPME, CEEP: Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Ruffert and Luxembourg cases, 19 March 2010.

acknowledged the diversity of legal provisions as well as the important role of **collective agreements as a means of employment regulation and working conditions** in the Member States.

Already at the time of the adoption of the Directive, there was a dispute between Member States as to whether this approach may restrict the freedom of service provision. Later on, in the context of the adoption of the Services Directive<sup>43</sup> in 2006, the debate focussed mainly on the question of **whether the hard core should be regarded as a "minimum floor" or "maximum ceiling" of terms and conditions of employment**.

In 2007 and 2008, the four rulings of the CJEU on the cases of *Viking* (C-438/05), *Laval* (C-341/05), *Rüffert* (C-346/06) and *Commission vs. Luxembourg* (C-319/06) significantly influenced the debate by interpreting key provisions of the PWD in a very restrictive way:

- By the *Laval and Luxembourg* rulings, the CJEU ruled that the hard core labour rights enumerated in the Directive are not to be considered as minimum floors but should be considered as an exhaustive list of rights that must be respected by the posting companies.<sup>44</sup>
- The CJEU also ruled that Member States are not totally free to use the **public policy clause** of the PWD (Art. 3.10) to introduce further rights. Such action is not allowed if it restricts the freedom to provide services. Therefore, stricter requirements can only be imposed on the companies by the Member States if these requirements are justified and proportionate.
- In the *Rüffert* case, the CJEU's interpretation of Art. 3.7, regarding "terms of employment more favourable to workers", significantly limited the application of more favourable conditions in the sending country and prevented the hosting country from applying more favourable provisions to posted workers above the conditions set in Article 3.1, for example by public procurement provisions.
- The CJEU interpretation of the concept of **universally applicable collective agreements** in Article 3.8 excluding the Swedish and Danish system of de facto generally binding collective agreements from the scope of this provision, at least as far as such collective agreements do not clearly define the applicable minimum wage.<sup>45</sup>
- Furthermore, the *Laval*, *Viking* and *Rüffert* rulings had a significant restrictive impact on the possibility of national trade unions engaging in disputes and conflicts that concern the working conditions of posted workers, and demanding the application of domestic collective agreements. Thus, they were perceived by trade unions as imposing a screening of industrial action by EU or national courts whenever such action could affect or be detrimental to the exercise of freedom to provide services or freedom of establishment.

When consider industrial action, the *Viking* case has been perceived as a significant **restriction of trade union rights**: while the CJEU ruled that industrial action is a

<sup>43</sup> Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/36

<sup>44</sup> Whereas Art. 3.7 of the PWD states that "Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers", the CJEU ruling in the case of *Laval* interpreted the minimum level of protection not as a maximum ceiling: "Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. With regards to the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness." (*Laval*, C-341/05, §80). Furthermore, as clarified in the ruling on the case of *Luxembourg* (C-319/06), the CJEU called for a very strict application of Art. 3.10 of the PWD.

<sup>45</sup> This has resulted both in Denmark and Sweden to legislative reforms in order to adjust national rules according to new requirements set by the CJEU.

fundamental right, it also stated that in trans-border situations of service provision it is restricted by the European economic freedom. Here, collective action might occur only if it passes a **"proportionality test"** according to the formula that was defined by the Court in the **Gebhard** ruling; i.e. its aim must be justified by public interest, and its means must be suited and not go beyond of what is necessary for the attainment of that aim. Because it is only the right to take collective action (and not the right to provide services) that is "tested", the Court de facto subjects the social rights to economic rights. Furthermore, in **Rüffert** the CJEU ruled that collective agreements that are not universally applicable in the host country do not have to be respected by the companies that are posting workers abroad.<sup>46</sup>

#### 4.1.4. The lack of a substantive definition of minimum rates of pay

In the current PWD, **it is legally unclear as to which components of the wage paid should be regarded as constituent elements of the minimum rate of pay in the host country.** In this context, ambiguities of the regulation of posting by the Directive are particularly relevant and have resulted in uncertainties at national level.

According to Article 3.1 of the PWD, "the concept of minimum rates of pay (...) is defined by the national law and/or practice of the Member State to whose territory the worker is posted." This flexible approach has resulted in a **large variety of defining minimum rates of pay in the EU countries and significant uncertainties.**

#### Box 9: Uncertainties regarding 'minimum rates of pay' at national level

These situations contribute to uncertainty and misunderstandings. With regard to the notion of minimum rates of pay, there is only a narrow area of well-settled solutions: the minimum rates of pay refer to the gross salary; they include overtime rates. There is no tangible solution in many other cases: depending on countries and/or sectors the classification, mobility-related costs, bonuses, holiday pay, social protection advantages are/are not constituent elements of the minimum rates of pay. From an instrumental point of view (statutory versus collective agreements), social partners are more likely to address the matter of the constituent minimum rates of pay than the law.

**Source:** FGB Study on Wage Setting 2015, p. 16

As the following overview table shows, this has resulted in a **significant variety of national concepts as to different types of expenses, allowances or bonuses** being an element of minimum rates of pay or not.

<sup>46</sup> See also: Malmberg, J. 2010: The impact of the CJEU judgements on Viking, Laval, Rüffert and Luxemburg on the practice of collective bargaining and the effectiveness of social action, European Parliament Study (<http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf>). See also Faioli, M., Voss, E., Madsen, P. 2016: [Posted Workers and Wage Setting in Germany, Denmark and Italy](#), *Economia and Labor* 1/2016.

**Table 6: Elements of minimum rates of pay in EU Member States**

Country	Seniority allowance	Allowances/Supplements for dirty, heavy, dangerous work	Quality bonus	13 <sup>th</sup> month bonus	Travel expenses
Austria	Yes	Yes	No	Yes	No
Belgium	Yes	Yes	Yes	Yes	No
Bulgaria	No	No	No	No	
Croatia	n.a.	n.a.	n.a.		
Cyprus	No	No	No	No	No
Czech Rep.	No	No	No	No	No
Denmark	n.a.	n.a.	n.a.		
Estonia	No	Yes	Yes	No	No
Finland	n.a.	n.a.	n.a.		
France	X	x		x	No
Germany	Yes	No	No	No	No
Greece	Yes	Yes	No	Yes	No
Hungary	No	No	No	No	No
Ireland	No	No	No	No	No
Italy	Yes	Yes	No	Yes	No
Latvia	No	No	No	No	No
Lithuania	No	No	No	No	No
Luxembourg	X	X	X	X	
Malta	No	No	No	No	
Netherlands	No	No	No	No	No
Poland	Yes	Yes	Yes	Yes	No
Portugal	No	n.a.	n.a.		
Romania	No	n.a.	n.a.		
Slovenia	Yes	Yes	Yes	No	
Slovakia	No	No	No	No	No
Spain	No	Yes	Yes	Yes	No
Sweden	n.a.	n.a.	n.a.		
UK	n.a.	n.a.	No	No	No

**Source:** FGB 2015, EU Commission, Impact Assessment

Also, **rulings of the CJEU did not send clear guidance**. The Court has not provided a common notion of minimum wages. However, the CJEU has stated that “*allowances and supplements which are not defined as being constituent elements 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 provisions of Directive 96/71, be treated as being elements of that kind*” (*Commission vs. Germany*, C-341/02).

Though in case of ***Commission v. Germany*** (C-341/02) and *Isbir* (C-522/12), the CJEU has given some guidance as to specific components of the wage payment (additional work, contributions for capital formation/pension savings) and whether it should be regarded as an element of the minimum rate of pay or not; the Court confirmed the PWD approach that this

definition should rest totally with national law and/or the practice of the Member State to whose territory the worker is posted.

This was also stressed very clearly by the CJEU in 2015, in the ruling on the case of **Sähköalojen ammattiliitto ry** (C-396-13): The task of defining what are the constituent elements of the minimum wage, for the application of that Directive, is a matter for the law of the Member State of the posting, "*but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States*".

However, by stressing the **flexible nature of the concept of minimum rates of pay**, the question of how to define it in practice was not solved. According to the Impact Assessment accompanying the March 2016 Proposal of the EU Commission for a revision/amendment of the PWD Directive, the current situation is characterised by

*"(...) the lack of a clear standard generates uncertainty about rules and practical difficulties for the bodies responsible for the enforcement of the rules in the host Member State; for the service provider when determining the wage due to a posted worker; and for the awareness of posted workers themselves about their entitlements."*<sup>47</sup>

This has led the Commission to propose a revision of the PWD that would **remove the reference to the minimum rates of pay applicable to posted workers and establish instead the reference to the concept of 'remuneration'** (for further details see section 5.2.1).

#### 4.1.5. Inconsistency between PWD and other EU regulations

As highlighted elsewhere, there is a **growing tension between the EU's objectives in the field of economic policy, the freedom of transnational service provision and the social rights of workers**. Furthermore, the basic provision of the PWD reflects the situation of 1996, but since then a number of EU legal instruments and principles have been adopted, resulting in an increasing inconsistency:

- One example, which was also highlighted in the EU Commission's proposal for an amended PWD, is the **unequal treatment of posted temporary agency workers and those directly recruited in the host Member States**. This is because of the "problematic interaction" between the PWD and the EU Directive on Agency Work (2008/104/EC): "*While the TAW Directive establishes that temporary agency workers should be granted the same working and employment conditions of workers as comparable workers of the user undertaking, in the Posting of Workers directive the same principle is not mandatory.*"<sup>48</sup>
- As already highlighted above, there is a mismatch between the PWD and regulation (EC) No 883/2004 on the **coordination of social security systems** as to the temporary character of posting: whereas the PWD does not provide any criteria to define the temporary nature of posting, the regulation does so (a maximum duration of 24 months). The definition of the key concept of 'posting' is also not uniform between both instruments.
- Finally, a more fundamental mismatch between the PWD and EU constitutional principles has been highlighted in a recent study on EU social rights and internal market law that was conducted for the European Parliament.<sup>49</sup> According to the study, the **Lisbon Treaty** that came into force in 2009 has established a legally binding

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<sup>47</sup> EU Commission 2016: Impact Assessment, p. 11.

<sup>48</sup> EU Commission 2016: Impact Assessment, p. 15. For further details see 3.3 above.

<sup>49</sup> Schiek, D., Oliver, L., Forde, C., Alberti, G. 2015: EU Social and Labour Rights and EU Internal Market Law. Study for the EMPL Committee, p. 91.

**catalogue of fundamental rights for the European Union that involves explicit guarantees of social and labour rights.** As a result and in contrast to earlier constitutional phases, social and economic objectives according to the Lisbon Treaty are regarded as equally important. Against this, the question arises **whether the provision of the PWD, to withhold the right to equal treatment from posted workers, would be in line with the Treaty.**<sup>50</sup>

#### 4.2. Problems with regard to implementing and enforcing the PWD

During the last decade, the EU Commission has carried out **several initiatives** to identify problems with regards to the implementation and enforcement of the PWD:

- In 2003, it adopted an **implementation report** identifying several problems of deficient or incorrect implementation in specific Member States;
- In 2006, the Commission launched a **survey** involving Member States, EU-level social partners and the European Parliament to see how the Directive was being applied. The findings, announced in June 2007, revealed that **control mechanisms were still not completely effective**;
- In 2006 and 2007, the Commission adopted two communications in order to clarify which **control measures** could be considered as compatible with the Single market provisions and assess the state of administrative cooperation and other aspects of enforcement of the Directive.<sup>51</sup>

In the aftermath of the **European Parliament Resolution**, adopted in 2008, asking the Commission to partially review the Directive and propose modifications where appropriate, the Commission launched four ex-post evaluation studies concerning the social, economic and legal aspects of posting in 2009.<sup>52</sup>

In order to prepare the impact assessment, an **ex-ante evaluation study** was carried out by an external consultant in 2011. Further input to the search for improvements was provided by the work of the *Expert Committee on the Posting of Workers* (ECPW), in particular the pilot project on electronic information exchange using a separate and specific application of the Internal Market Information System (IMI) in the area of posting of workers.

A number of **deficiencies and problems** arise from these studies and analyses, with issues relating to the implementation, enforcement, administration and monitoring of the PWD being identified:

- **Insufficient cooperation between Member States** for information and data exchange. The PWD imposes obligations regarding cooperation between national administrations, and makes it the responsibility of Member States to create the necessary conditions for such cooperation. However, the provisions included in the Directive are not sufficiently precise.

<sup>50</sup> So far, the CJEU has taken the position of a rather limited impact of the Charter of fundamental rights on national legislation. See for example the ruling in the case of *Poclava* (C-117/14).

<sup>51</sup> EU Commission 2006: Communication "Guidance on the posting of workers within the framework of the provision of services" and the accompanying Staff Working Document SEC (2006) 439. EU Commission 2007: Communication "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.

<sup>52</sup> Idea Consult and Ecorys Netherlands 2011: Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union, Brussels. Van Hoek, A. and Houwerzijl, M. 2011: Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union. In addition to the studies mentioned above, in order to prepare the Impact Assessment an ex-ante evaluation study was carried out: ISMERI Europa 2012: Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services. All studies available at: <http://www.ec.europa.eu/social/posted-workers>.

- **Information concerning the applicable working conditions** in the host Member State is often difficult to obtain, uneven, and of insufficient quality.
- The monitoring exercise in 2007 showed that some Member States impose **administrative requirements and control measures on service providers** which are incompatible with prevailing EU law on the freedom of service provision<sup>53</sup>.
- The 'how' of **monitoring and enforcing** the rights conveyed in the Directive is left to the national level.<sup>54</sup>
- Poor **sanction mechanism** because of no definition of 'appropriate measures'.
- In addition, enforcement is made difficult because national regulators have few **means to pursue international posting companies**, whereas their contractors are not liable for any infringements regarding the posted work.<sup>55</sup>
- In the context of **subcontracting chains**, the lack of liability rules was regarded as a problem.
- Such gaps are compounded by the **short-term nature of much of the posting** taking place, which makes the task of controlling authorities more difficult.
- Article 6 of the PWD contains a jurisdiction clause allowing the posted worker to enforce his rights granted by the Directive in the host state. However, there is evidence indicating that **posted workers are not adequately protected in disputes** concerning individual employment conditions.
- Even though posted workers have the **right to use legal action** against their employers, this right "*has at present hardly been or has even never been used by posted workers nor by their representatives*".<sup>56</sup> In addition to this, **dispute resolution** mechanisms are too complicated.

### 4.3. Posting and current labour market distortions

#### 4.3.1. Three main sources of wage differentials between posted and local workers

The Impact Assessment published in 2012, in relation to the Commission proposal for an Enforcement Directive, identified examples of '**social dumping**' practices.<sup>57</sup> According to the study, these are particularly related to the **ambiguities of the PWD regarding wage-setting**.

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<sup>53</sup> EU Commission 2007: Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers, COM(2007)304 final.

<sup>54</sup> Consequentially, certain Member States have introduced new provisions (e.g. Germany), whereas others, including France, have decided to use already existing mechanisms governing temporary work within national borders.

<sup>55</sup> The legal precedent for holding a contractor liable for the wrongdoings of its subcontractor has been only recently established. In December 2013, the Court of Chambéry in France has condemned a property developer "Promogim" for having outsourced the construction work to a Polish company, which employed Polish workers illegally in France.

<sup>56</sup> Van Hoek A., Houwerzijl, M. 2011: Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union", 2011, Brussels, p. 35.

<sup>57</sup> EU Commission: SWD (2012) 63 final of 21 March 2012, p. 21-22. In a recent [briefing note](#) on posting of workers elaborated by the European Parliamentary Research Service, the term was defined as follows: "*Social dumping is a situation where foreign service providers can charge less than local service providers because their labour standards are lower.*" However, there is no clear-cut definition of 'social dumping'. For an overview of academic discussion see Bernaciak, M. 2012: Social dumping: Political catchphrase or threat to labour standards? Brussels, ETUI Working Paper 2012/06. See also: Vaughan-Whitehead D. 2003: EU Enlargement versus social Europe? The uncertain future of the European Social Model, Cheltenham.

**Box 10: Wage differentials and their reasons**

Wage differentials between local and posted workers seem to be quite substantial. In France, a report delivered by the French Senate in 2006 estimated wage differences between foreign posted workers and French workers to be around 50%. In Denmark, a study of the construction sector indicated that, in the mid-2000s, workers from Eastern European countries were paid on average 25-28% less than Danish building workers. A similar difference has been estimated for Germany by comparing the minimum wage levels with the actual wage levels in the construction sector. The average hourly gross salary in the building sector – EUR 17,11 (Federal Statistical Office) – is in fact 32% higher than the minimum wage for skilled workers and as much as 56% for the minimum wage of unskilled workers in West Germany.

The actual pay differences can be even higher, as suggested by the reports about common infringements of minimum wage rules in the German construction industry. Actual differences in wages between local and posted workers depend on national systems of setting minimum rates of pay. While some Member States only set one general minimum wage, other Member States apply several levels of minimum wages according to skill and/or occupation of the worker. In the latter case, wage differences between posted and local workers tend to be less significant. Where no minimum wage is set by law or universally applicable collective agreement this favours a 'race to the bottom' of wages. The meat processing sector in Germany is a prominent example in this respect.<sup>58</sup>

For road transport in Sweden, both the Transport Workers Union and the Road Transport Employers' Association are aware that foreign drivers are paid far less than domestic drivers. However, most of these drivers are not considered as posted workers, but are working according to cabotage rules.

For temporary agency work, the employers' association Swedish Staffing Agencies has estimated that posted workers earn around a third of the wage earned by workers employed by Swedish agencies.

*EU Commission Impact Assessment 2012, p. 20/21.*

A recent study on wage setting and minimum rates of pay for posted workers (FGB 2015), which included sector-specific analyses and interviews with relevant national stakeholders at national level in nine countries, highlighted the following aspects of unjustified **wage differences between posted and local workers** as particularly widespread:

- **Wage gaps are a common experience and particularly relevant in labour intensive sectors**, according to trade unions as well as employer organisations in EU15 receiving countries.
- Even if rules and provisions of the PWD are fully applied, labour costs of posted workers are lower, mainly due to **different social security contribution levels** – these are regarded as the major motivation of companies in the receiving countries to employ posted workers.
- Wage differentials may also stem from **additional factors**. In Germany, posted workers in practice are, in practice, classified in the lowest minimum wage group (e.g. in the construction sector) irrespective of their professional qualifications, while German workers with comparable professional experience receive higher wages due to higher wage groups.
- Both employer and trade union organisations have highlighted that, particularly in the transport sector, wage differentials are significant not only due to **a lack of effective enforcement and monitoring practice** but also because of **various creative possibilities to circumvent existing rules or exploit loopholes**.

<sup>58</sup> Very much driven by the public reaction to these practices in the meat processing sector, the social partners negotiated a sectoral minimum wage agreement in 2015.

These findings support previous studies that have come to the conclusion that **labour cost differentials are in fact one of the key drivers increasing the posting of workers**, particularly in the lower skilled professions.<sup>59</sup>

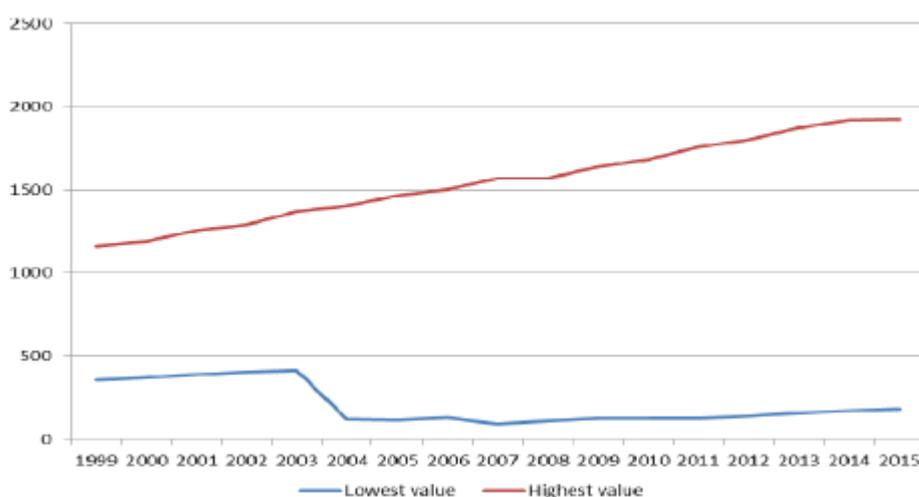
According to recent studies, the **labour cost differences from savings in terms of social security contributions** could be as much as 30%.<sup>60</sup>

Furthermore, and as shown in the previous section 3.4.2, **income tax differences** also contribute further to labour cost differentials, at least in those cases where taxes are paid according to the 183-days rule in the sending country.

A further aspect has been highlighted in the 2016 impact assessment of the EU Commission:

- “In light of EU labour market conditions, including wage differentials and diversity of wage-setting regimes, in the context of an enlarged European Union, the balance struck by the 1996 Directive to establish a climate of fair competition has changed considerably. (...) The **gap between Member States on minimum wages has constantly increased since 1996**, from a ratio between the lowest and the highest minimum wage of 1:3 to 1:10.” (EU Commission Impact Assessment 2016, p. 13)
- The figure below shows that the widening gap between minimum wage levels is the result of the **significant decrease and subsequent stagnation in the lower value after 2003** (due to the Eastern Enlargement of the EU), which has continued to remain constant since then, in contrast to a relatively consistent **increase in the higher value**.
- Though there is no direct correlation to posting, the **trend of widening gaps in average minimum wages across the EU** certainly incentivises both companies and workers to participate in posting, with the aim of increasing profits (for companies in higher wage countries) or income (for workers from sending countries in the lower minimum wage group).

**Table 7: Dispersion of the monthly minimum wages in the EU (1999-2015)**



**Source:** EU Commission 2016, Impact Assessment, p. 64.

<sup>59</sup> For instance ISMERI Europa 2012: Preparatory study for an impact assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Brussels.

<sup>60</sup> FGB 2015. See also: Maslauskaitė, K. 2013: Social Competition.

#### 4.3.2. Letterbox companies, sub-contracting chains and social dumping

The problems mentioned above have resulted in practices of abuse, circumvention and illegal behaviour in the context of posting, particularly in labour-intensive sectors and high-wage receiving countries. One of the commonly used techniques, aimed at minimising employees' social security contributions, is the **creation of so-called "letter-box" companies, or affiliates in Member States where labour costs are low.**<sup>61</sup> Such companies do not carry out significant economic activity in their "home" country; their primary purpose is to post workers abroad while **taking advantage of lower social security contributions.** In addition, these companies are often constructed as a complex multi-level network in different Member States or even involving workers from third countries, as the examples from the Benelux countries in the textbox below illustrate.

#### **Box 11: Letterbox companies and social dumping – examples from the transport sector**

In 2011, several transport companies in the Benelux countries received the offer to transfer their workforces to intermediate companies located in Cyprus and Liechtenstein, and to hire the staff through these intermediate service suppliers. With reference to the changes in the coordination of social security as a result of Regulations 883/2004 and 987/2009, the intermediaries offered to act as employers for the workforce. The original employer of the truck drivers would become the 'client' and would receive an invoice for supply of services, whilst the truck drivers would continue to work de facto for the original employer. By opening an office abroad – for instance in Cyprus – the intermediaries claimed that it was justifiable to offer a Cypriot employment contract to the truckers, even though they did not live there and had never visited the island.

The use of these go-betweens constitutes a clear instance of social dumping: it is an ideal way to save money, as it allows for the lowering of social security costs and avoidance of taxes. It means that there would be no employer costs for the original employer, no health and safety services, no wage indexation, the denial of a labour relation between the client and driver, and no trade union involvement. Hence, the freedom of establishment makes it possible to open a company in another country that has no staff and no activities in the country of registration, which consists of an office that is nothing more than a letter box.

An example of this practice, which became prominent in Denmark, Sweden and Germany in 2013, is the case of the German-Latvian agency Dinotrans:<sup>62</sup> The company recruited workers from the Philippines, who were in fact third-country workers that were not entitled to enter the EU. However, they were recruited using the argument of 'a shortage of skilled labour for international trucking' in Latvia, this being one of the justifications upon which permission for such workers to enter the EU may be granted. As soon as they entered Latvia, the drivers in question were hired out to other undertakings in Europe. The company's own financial statements recorded that the haulage contractor was paying these drivers approximately €2.36 per hour, making this practice tantamount to slave labour.

Another example could be found in the Hungarian transport sector as 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 part-time administrative employee on parental leave. These arrangements often involve very complex, multi-level arrangements between several companies established in different Member States, which makes any control very difficult.

**Source:** Cremers, J.: 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 No. 5/2014, Brussels, p. 3/4

<sup>61</sup> Cremers, J. 2014: Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping, ETUI, Brussels.

<sup>62</sup> See: <http://www.stoppafusket.se/2013/08/20/drivers-working-for-slave-wages-at-sia-dinotrans/>

As highlighted in the 2016 Impact Assessment accompanying the proposal for the revision of the PWD Directive, **posted workers in the context of sub-contracting chains are in a situation of particular vulnerability** (Impact Assessment 2016, p. 14/15).

Though there is a lack of reliable data on the extent of subcontracting in the context of cross-border service provision and posting, there has been plenty of evidence arising from research studies<sup>63</sup>, and sector-specific experiences have highlighted that sub-contracting – often with the involvement of **employment agencies** - is an extensive practice in the building and construction sector as well as in **transport, shipbuilding, hotels and restaurants, and other service sectors**.

#### **Box 12: Sub-contracting and posting**

A Belgian food processing undertaking dismissed its workers and concluded a service contract with a Dutch 'posting agency', which posted a considerable number of German-Polish workers to the Belgian undertaking. They were paid on average 10 Euros less than the company's dismissed Belgian workers before. Trade unions called for strike because of the dismissal.

**Source** Van Hoek, A. / Houwerzijl, M. 2011: Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 58.

#### **4.3.3. Blurring boundaries – posted workers and bogus self-employment**

Another mode of abuse relates to **bogus self-employment**, which seems to be **particularly widespread in the construction and road transport sectors**.<sup>64</sup> Given that many regulations relating to working time, taxes and wages are laxer for self-employed workers, temporary work agencies or other posting companies place workers "*who voluntarily or forcedly assume the statute of a self-employed, while in reality, there is a link of subordination*".<sup>65</sup>

However, there is plenty of evidence that self-employment is also widespread in other sectors, often in combination with triangular contractual arrangements, such as **agency employment**. The following example illustrates this:

#### **Box 13: Blurring boundaries between employment and self-employment**

Not only truck drivers, but also the foreign drivers of smaller vans for logistics companies have bad experiences. In particular, the delivery of mail and parcels by transport drivers is characterized by civil-work contracts, bogus self-employment and an impenetrable network of sub- and sub-sub-contractors. The example of TNT is an example how this practice works: The logistics giant commissioned a German subcontractor with the package delivery in specific districts. This subcontractor however never delivered a single parcel but commissioned three foreign workers on the basis of a civil work contract, each serving a specific location within the district. To get the job, the three workers had to establish their own business and become self-employed on paper. They worked almost nonstop to fulfill the order. The contractor didn't make any payment for months and was able to put pressure on them because, amongst other things, they provided for their lodgings.

**Source:** Molitor, C. 2015: Geschäftsmodell Ausbeutung. Wenn europäische Arbeitnehmer\_innen in Deutschland um ihre Rechte betrogen werden, Berlin, Friedrich Ebert Stiftung, p. 8. Courtesy translation by author.

<sup>63</sup> Jorens, Y., Peters, S., Houwezijl, M. 2012: Study on the protection of workers' rights in subcontracting processes in the European Union. Study for the EU Commission, Brussels.

<sup>64</sup> See Thörnquist 2013: False (bogus) self-employment in East-West Labour Migration; Buelen 2008: Self-employment and bogus self-employment in the European Construction Industry.

<sup>65</sup> Buelen, W.: Self-employment and bogus self-employment in the European construction industry, 2008, Brussels, p. 18.

Lastly, **posted workers are often in a vulnerable situation** due to language barriers, social isolation and lack of information on their rights:

*"Such workers are easy prey for dishonest posting companies that do not respect the hard-core requirements foreseen in the Directive and impose miserable working conditions. Moreover, illicit practices such as deducting exaggerated amounts for lodging, food and transportation from wages are common. Many posting employers have also declared bankruptcy and left their workers without pay; as contractors are currently not held directly liable, the employees have no means to redress."*<sup>66</sup>

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<sup>66</sup> Maslauskaitė, K. 2014: Posted Workers in the EU, p. 14

## 5. INTO THE FUTURE OF POSTING - ADDRESSING REGULATORY DEFICIENCIES AND MALPRACTICE

### KEY FINDINGS

Although the Enforcement Directive 2014 was a political compromise that was not easy to achieve, it addresses key problems regarding the implementation and functioning of the PWD.

At the same time, more complicated and politically controversial issues have not been touched – amongst those are a number of issues that have been addressed in the resolutions of the European Parliament.

Such issues have been partially addressed in the context of the Commission's 'targeted review' focussing on topics like the 'hard core' of the PWD, which has been carried out in parallel with the transposition of the Enforcement Directive that still is ongoing

The March 2016 proposal of the Commission for a revision of the Directive must be interpreted as a political initiative that is motivated by the aim to implement a more substantive change in the regulation of posting along the principle of "equal pay for equal work at the same place".

Against this background, it is not surprising that key stakeholders have reacted in very different ways to the Commission proposal – the gulf of assessments and political interpretation is huge, not only between trade unions and employer organisations but also between groups of countries.

The latter is clearly illustrated by the fact that, under the Yellow Card procedure, 11 national Parliaments have issued reasoned opinions against the proposal.

The European Parliament has played a decisive role in the debates on regulation and rules for posted workers since the 1990s.

However, as an overview of key demands and positions show, these have only been partly addressed by legislative and other initiatives of the Commission

### 5.1. The 2014 Enforcement Directive and the targeted review of the PWD

In response to key problems related to the deficiencies of the PWD, uncertainties resulting from CJEU law cases, as well as increasing evidence of malpractice, circumvention and abusive practices, there have been **increased demands to revise the regulation on the posting of workers**. Also the European Parliament has demanded significant improvements in several resolutions since the beginning of the last decade, particularly concerning enforcement, compliance and combating abusive practices (see section 5.3).

In response, the **Commission acknowledged the problems of implementing the PWD by various activities:**

- Based on an implementation report that was adopted in 2003, which identified several problems of deficient or incorrect implementation in specific Member States, the Commission launched a survey involving Member States, EU-level social partners and the European Parliament in 2006 to see how the Directive was being applied. The findings, published in June 2007, revealed that **control mechanisms were still not completely effective**.
- In 2006 and 2007, the Commission adopted two communications in order to clarify which control measures could be considered as compatible with the Single market provisions and assess the state of **administrative cooperation and other aspects of enforcement of the Directive**.<sup>67</sup>

Following intense discussion and debate, the **European Parliament adopted a resolution in 2008**, asking the Commission to partially review the Directive and propose modifications.<sup>68</sup>

At the same time, the **ETUC** was also particularly supportive of revising of the Directive, as well as trade union federations in the construction sector and national governments affected by the 2007/2008 *Viking*, *Laval*, *Rüffert* and *Luxembourg* rulings (Denmark, Sweden, Germany and Luxembourg).<sup>69</sup>

In 2008, the Commission adopted a **Recommendation calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations**, for more effective exchange of information between Member States and better access to information and exchange of best practice.

In the same year, it also established an **Expert Committee on Posting of Workers**, composed of Member States and social partners, with the aim of discussing and clarifying problems of implementing the Directive.

As the issue of posting became quite a prominent issue in the elections for the European Parliament, along with the imbalance between the freedom of service provision within the internal market and basic social and labour rights, **in 2009 the new Commission announced a legislative initiative** to address the key problems of the implementing and interpreting the PWD.

The Commission drafted the **Single Market Acts I and II in 2011 and 2012**, in response to the assessment of the Monti report<sup>70</sup>, which highlighted the increasing divide between economic and social rights and how this could potentially endanger the integration process. However, the second Single Market Act (the so-called Monti II Regulation) was rejected due to the first use of the **Yellow Card procedure** since its inception in the Lisbon Treaty; a dozen national parliaments with 19 votes found that the legislation was not in line with the subsidiarity principle. This led to the complete withdrawal of the regulation by the EU Commission.

Against the varying political interests and demands, the **2014 Enforcement Directive** focussed a great deal on the aspects of the PWD that, from the point of view most

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<sup>67</sup> EU Commission Communication 2006 and 2007.

<sup>68</sup> European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

<sup>69</sup> The European level cross-sectoral social partners also carried out a joint analysis of the consequences of the CJEU decisions for workers' mobility and rights. The "Report on joint work of the European social partners on the CJEU rulings in the *Viking*, *Laval*, *Rüffert* and *Luxembourg* cases" was published in 2010.

<sup>70</sup> Monti, M. 2010: A new strategy for the single market: at the service of Europe's economy and society, 2010, Brussels. According to the report, the debate on posting, fuelled by the *Viking*, *Laval*, *Rüffert* and *Luxembourg* rulings "have exposed the fault lines that run between the single market and the social dimension at national level".

stakeholders should be improved. These are better related to the enforcement of compliance, improving legal certainty and strengthening administrative cooperation.

**Table 8: Main objectives and measures of the Enforcement Directive 2014/67/EU**

<b>Legal clarity (Art. 3)</b>	Establishing a common framework of competent authorities and liaison offices in order to set appropriate provisions, measures and control mechanisms necessary for a better and more uniform implementation, application and enforcement
<b>Identifying genuine posting (Art.4)</b>	In order to identify “genuine posting”, competent authorities in the Member States are required to make an overall assessment of “all factual elements”
<b>Information availability (Art. 5)</b>	Member States are obliged to take the appropriate measures to ensure that the information on the terms and conditions of employment, referred to in the PWD, is made generally available
<b>Cooperation between national authorities (Art. 6-8)</b>	Rules to improve and enhance administrative cooperation between national authorities in order to exchange information and facilitate the implementation, application and enforcement of the PWD and the Enforcement Directive
<b>Control measures and inspections (Art. 9-10)</b>	General rules and indicative list of information that Member States “may” request from service providers in order to ensure effective monitoring of compliance with the obligations set out in the PWD and the Enforcement Directive “provided that these are justified and proportionate in accordance with Union law”
<b>Strengthen complaint possibilities (Art. 11)</b>	Trade unions and other parties can now lodge complaints and take legal and/or administrative action against the employers of posted workers, if their rights are not respected
<b>Subcontracting liability (Art. 12)</b>	In order to tackle fraud and abuse, Member States may, after consulting the relevant social partners and, in accordance with national law and/or practice, take “additional measures” on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the service provider is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker.

Source: Author.

While the Enforcement Directive, which must be transposed into national law by Member States by 18 June 2016, provides for a number of improvements regarding administrative coordination, exchange of information about posting workers and obligations in terms of the provision of data, **more controversial issues were left untouched.**

In particular the following “leftovers” must be highlighted:

- the Enforcement Directive has **not contributed to a consolidation of CJEU rulings regarding minimum rates of pay**;
- the Enforcement Directive **did not address the CJEU’s controversial rulings that interpreted the PWD in a restrictive way** and thus limit the scope of Member States and social partners to take measures and action in order to improve the protection and equal treatment of local and migrant workers in the host country;
- in contrast, the **CJEU ruling in the case of *Sähköalojen ammattiliitto (C-396/13)***<sup>71</sup> in February 2015 was interpreted as a strong message regarding

<sup>71</sup> See ETUC: <https://www.etuc.org/presse/arr%C3%AAt-de-la-cour-de-justice-europ%C3%A9enne-en-faveur-de-l%E2%80%99%C3%A9galit%C3%A9-salariale-pour-les-travailleurs#.Vzx5ZnpW5Qt>.

**a less restrictive interpretation of the PWD and a stronger focus on the social protection element of the PWD**; this also strengthened the role of collective agreements in order to determine applicable working conditions and terms of employment, including minimum rates of pay;

- though the Enforcement Directive provides for measures to clarify “genuine posting”, in order to fight abusive and circumventive practices such as letterbox companies or permanent posting, it **still does not provide a definition for the temporary character of posting and is rather vague in relation to necessary control and inspection measures**;
- the Enforcement Directive has **not addressed the inconsistencies that have been highlighted above between the PWD and EU regulation in the field of social security coordination** regarding the definition of posting (particularly in relation to the temporary character of posting) or considering the equal treatment of temporary agency workers;
- the Enforcement Directive **has also failed to address emerging practices, such as ‘regime shopping’ or bogus self-employment in the context of posting**;
- finally, and perhaps most importantly, the Enforcement Directive **failed to touch upon the question of how to achieve a better balance between economic and social rights** in order to ensure the highest level of fairness for all parties involved.

Against this backdrop, and also in response to stakeholder demands to strengthen measures to fight social dumping<sup>72</sup>, the European Commission announced a “targeted revision” of the PWD in its annual work programme for 2016.

## 5.2. The Commission’s proposal to revise the Directive – A step forward with regards to fair rules or new confusion?

### 5.2.1. From ‘targeted review’ to ‘targeted revision’

Having initially indicated that a ‘targeted review’ of the PWD would be carried out in parallel with the national transposition of the Enforcement Directive, the EU Commission signalled that it would come up with a **proposal to revise the PWD** in autumn 2015; this was in order “*to address unfair practices leading to social dumping and brain drain by ensuring that the same work in the same place is rewarded by the same pay.*”<sup>73</sup>

With regards to the needs to revise the PWD, the Commission highlighted in particular on the fact that **the 1996 Directive no longer replies new realities within the Single Market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition**. The Commission referred specifically to the need to tackle the shortcomings in the concept of “minimum rates of pay” that resulted in “*stark wage differences between posted and local workers, especially in Member States with relatively high wage levels*”, as well as the mismatch between the existing PWD and Regulation 883/2004 on the coordination of social security systems and the Directive on Temporary Agency.

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<sup>72</sup> Here, the own initiative report of MEP Guillaume Balas should be mentioned that with his own initiative report on social dumping in the European Union, which is currently discussed in the European Parliament's Employment and Social Affairs Committee. See: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-571.622%2B01%2BDOC%2BPDF%2BV0%2F%2FEN>.

<sup>73</sup> European Commission 2015: No time for business as usual. Commission Work Programme 2016. COM(2015) 610 final, p. 8.

The **proposal** for an amendment of the current PWD<sup>74</sup> includes changes in the following specific areas:

- **Remuneration** (proposed Article 3 (1)): The proposal of the Commission would substitute the requirement that posted workers are subject to the minimum rates of pay by the provision that the same rules of remuneration, laid down by law or universally applicable collective agreements, as those of the host Member State would also apply for posted workers. Thus, when it comes to remuneration, the posted worker should be treated according to the same rules as local workers and 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.
- **Extending the scope to all sectors** (proposed Article 3 (1)): By referring to the fact this is already a practice in a number of EU Member States, the Commission is proposing that the rules regarding remuneration, which are set by universally applicable collective agreements, become mandatory in all sectors, whereas previously they were only mandatory in the construction sector.
- **Subcontracting chains** (proposed Article 3 (1a)): The proposal includes a new paragraph on subcontracting that would give Member States the option to oblige companies to subcontract only to providers (national or foreign) that respect the applicable conditions of remuneration. This provision is directly related to recent CJEU rulings (namely the *RegioPost* case C-115/14) on public procurement, which a Member State may use to impose the obligation to respect the applicable rates of pay to the tenderers and their subcontractors in the context of public procurement.
- **Equal treatment of posted temporary agency workers** (proposed Article 3 (1b)): The new proposal is formulated to ensure equal treatment between local temporary agency workers and posted temporary agency workers with respect to remuneration and working conditions. This therefore aligns the PWD with the current legislation on domestic temporary agency work, according to the equal treatment provision of Art. 5 of the TAW Directive 2008/104/EC<sup>75</sup>. For example, this means that in cases where a temporary worker is posted to a company bound only by a collective agreement that is not universally applicable (a company level collective agreement for instance), the more favourable terms and conditions must then be applied to the temporary agency workers who have been posted by an agency established in another Member State.
- **Rules applying to long-term posting** (proposed Article 2a): In order to ensure the *"aligning the Posting of Workers Directive with the conditions set by the Regulation on the coordination of social security systems as regards long-term posting, thus eliminating a source of inconsistency in the EU regulatory framework"*<sup>76</sup>, the Commission proposes that workers posted for longer than two years should at least be covered by the mandatory rules of protection, included in the labour law of the host Member State, i.e. by application of the rules of the Rome I Regulation (EC 593/2008).<sup>77</sup>

According to the Commission, the new proposal is **fully complementary to the Enforcement Directive** as it only addresses problems and issues that were not touched upon in 2014. However, as the following overview shows, there are **areas where both**

<sup>74</sup> EU Commission: Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Strasbourg, 8.3.2016 COM(2016) 128 final.

<sup>75</sup> And presumably restricted to Art. 5 of the TAW Directive only, see the discussion on the current Art. 3.9 PWD in annex 2.

<sup>76</sup> EU Commission 2016: Impact Assessment, p. 25.

<sup>77</sup> It is however questionable whether the proposal would eliminate inconsistency between the PWD and social security coordination rules as the consequence of the proposal would be that posted workers after the period of 24 months still would be posted workers according to the PWD but not according to Regulation 883/2004.

**proposals address similar problems/aspects**, e.g. improving the information on terms and conditions of employment or the protection of workers in subcontracting chains.

**Table 9: The Enforcement Directive and the Proposal for Revision 2016 in light of key problems related to the PWD**

Problem	Reasoning in the PWD	Enforcement Directive	Proposal of a revised PWD 2016
<b>Problems related to the implementation, monitoring and enforcement of the applicable working conditions, including the protection of posted worker's rights</b>	Articles 4 and 5 of the Directive are formulated in a rather general manner and do not state precisely enough Member States' obligations with respect to the implementation, monitoring and enforcement of the Directive. With regard to some aspects (national control measures and the mechanisms to protect worker's rights) the respective provisions are missing in the Directive or they are not sufficient.	<b>Yes</b> , main purpose of the Directive	<b>Partly</b> , by the provision on Member States of an obligation to publish information on the constituent elements of remuneration.
<b>Problems related to the abuse of the posted workers status in order to evade or circumvent legislation</b>	There is a lack of legal clarity with regard to the notion of posting, in particular the two key aspects of temporariness and the existence of a genuine link of the employer with the sending Member State. There are no indicative criteria in order to enable the Member States to identify real posting situations and distinguish them from other situations (e.g. self-employment) or determine the temporary character of posting.	<b>Partly</b> , by obliging Member States to improve the determining of "genuine posting". ED includes suggestions on how Member States may identify and sanction bogus self-employment and letter-box companies or determine the temporary character of posting.	<b>Partly</b> , e.g. by the new provision regarding equal treatment of posted agency workers or long-term posting. As to highly mobile sectors such as road transport, the revision proposal suggests to address these through sector-specific legislation rather than under the PWD.
<b>Problems regarding the protection of posted workers in subcontracting chains</b>	Posting of workers in the context of subcontracting causes particular problems. Violations of minimum working conditions established by the Directive have been reported in cases where e.g. the posting subcontractor has defaulted on its contractual obligations.	<b>Yes</b> , establishing the possibility of liability of the employer of which the service provider is a direct subcontractor. Limited to the construction sector.	<b>Yes</b> , new rule gives the option to Member States to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements.

<b>Problems related to the controversial or unclear interpretation of terms and conditions of employment</b>	While the CJEU has clarified a number aspects of Art. 3, e.g. on the scope and level of regulation that however is not shared by all stakeholders, jurisprudence has not brought sufficient clarity at all with regards to the concept of minimum rates of pay.	<b>Partly</b> , by the obligation of Member States to provide information on the minimum rates of pay.	<b>Yes</b> , key motivation of the proposal, implemented by the new concept of remuneration substituting the context of MRP. <sup>78</sup> However, the new
<b>Tensions between the freedom to provide services/establishment and national industrial relation systems</b>	This problem is linked to the Directive but goes beyond as it concerns the exercise of the right to strike in the context of the freedom to provide services and of establishment (CJEU rulings on Laval and Viking have fuelled the debate on the issue).	<b>No</b>	<b>No</b>

Source: Author.

Apart from the partial overlap between the Enforcement Directive and the new proposal, there **a number of areas and aspects that have neither been addressed by the 2014 Directive nor by the new proposal**:

- While some problems relating to the abuse of the posted workers status in order to evade or circumvent legislation have been targeted (e.g. letterbox companies, abusive practices of posting in the temporary agency work sector) other problems such as **bogus-self-employment**<sup>79</sup>, **replacement of direct workers by posted workers** or **rotational/permanent posting** situations have not been addressed or only indirectly.
- With regard to **highly-mobile sectors, such as road transport**, which are characterised by an increasing deterioration of social and working conditions, according to various studies and evidence provided by social partners<sup>80</sup>, the Commission's revision proposal does not include any suggestions regarding how best to improve the situation of posted workers. Instead, the revision referred to "legal questions and difficulties", focussing in particular on establishing a clear link with the Member State concerned (Commission proposal, recital 10). As a solution, the Commission suggests addressing "these challenges" by using a sector-specific regulation that "*is deemed more suitable to tackle the problem*".<sup>81</sup>
- Furthermore, the **inherent tension within the PWD between collective labour rights, namely the right to strike and the freedom to provide services, and the freedom of establishment has not been addressed** either by the Enforcement Directive<sup>82</sup> or the current proposal.

<sup>78</sup> However, the new proposal on remuneration creates a number of new questions (e.g. regarding the the reference to the proportionate character of national rules of remuneration) and should not be regarded as providing "equal pay for equal work as the proposal does not change the criteria for applicable collective agreements.

<sup>79</sup> According to Recital 10 of the Enforcement Directive 2014/67/EU, improved monitoring and a more clarified definition of 'workers' should enable national competent authorities to identify "workers falsely declared as self-employed."

<sup>80</sup> See for example Sitran, Alessio / Pastori, Enrico 2013: Social and Working Conditions of road transport hauliers. Study for the European Parliament's Committee on Transport and Tourism.

<sup>81</sup> EU Commission 2016: Impact Assessment, p. 28.

<sup>82</sup> Art. 1.2 of the Enforcement Directive contains references to fundamental labour rights and stipulates that the Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. However it is unclear

- The same relates to the balance between the free movement of services and free movement of workers. The Amended Posting of Workers Directive (APWD) proposal **maintains the concept of posting of workers under the umbrella of free movement of services, without any move towards the application of free movement of workers.**
- There are a number of **further individual aspects** that both the Enforcement Directive and the current proposal have not, or only partly, addressed; these are highlighted in the following sections as well as in the conclusions and recommendations.

### 5.2.2. Stakeholder reactions

The EU Commission had already made the announcement of the decision to carry out a 'targeted review' in 2015, but the March proposal for a revision of the PWD has triggered quite different and **controversial reactions from stakeholders and Member States:**

For those stakeholders that are strongly **demanding a full implementation of the equal pay for equal work principle**, the new proposal is a missed opportunity that only delivers "equal treatment for some" (*ETUC*) or that could only be regarded as an impartial solution to key problems related to posting (*EP Group of Socialists and Democrats*).

In contrast, for a number of employer organisations, such as *BUSINESSEUROPE* and a group of national employer federations from Poland, the Czech Republic, Malta, Lithuania, Latvia, Portugal, Slovakia and Ireland<sup>83</sup>, the **new proposal goes too far in the wrong direction as it limits key principles of economic freedom.**<sup>84</sup> Furthermore, as highlighted in a joint letter of Nordic Employer Organisations that was sent to the Commission November 2015, employers have serious concerns with regards to the unintended effects of the "equal pay for the same work at the same place" principle on national systems of wage setting and collective bargaining.<sup>85</sup>

**Table 10: EU level social partners and the Commission's proposal to revise the PWD**

<b>ETUC</b>	<ul style="list-style-type: none"> <li>• The ETUC welcomes the proposed targeted revision, including the new concept of remuneration. However, it only partly addresses key demands of the organisation, in particular the demand for unconditional equal pay for posted workers which is a demand of all member organisations of the ETUC, including in the Central and Eastern European countries. For the European unions, the revised PWD should include a clear commitment that competition on labour costs in the context of posting is not accepted.</li> <li>• The proposal is also criticised with regards to the restrictive definition of the type of collective agreements applicable under the PWD. According to the ETUC there should be sufficient flexibility in the provision and also other types of collective agreements, e.g. at sectoral or even company level should be applicable. Otherwise equal remuneration of posted workers will not be feasible.</li> <li>• Further positions of the ETUC: the maximum duration of posting should be reduced significantly in order to reflect; the provisions on posting in subcontracting chains are too weak – there should be a stronger joint and several liability mechanism;</li> </ul>
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whether this provision only is to be read in the context of the Enforcement Directive or also relates to the interpretation of the PWD itself.

<sup>83</sup> Joint letter of 9 February 2016 of the presidents Polish Confederation Lewiatan, Confederation of Industry of the Czech Republic, Malta Chamber of Commerce, Enterprise and Industry, Lithuanian Confederation of Industrialists, Employer's Confederation of Latvia, Confederation of Portuguese Business, RUZ Slovakia, IBC Ireland.

<sup>84</sup> In their joint letter, the employer organisations particularly highlighted that the envisaged equal pay provision would result in "unequal treatment of foreign services". Furthermore it would harm the Treaty provisions related to the competencies of the EU and application the subsidiarity and proportionality principle.

<sup>85</sup> Joint letter of 18 November 2015 by the Confederation of Finnish Industries, Business Iceland, Confederation of Norwegian Enterprises, Confederation of Swedish Enterprises and Confederation of Danish Employers to Commissioner Thyssen.

	and as to temporary agency work, the ETUC demands improved conditions in order to guarantee equal treatment.
<b>BUSINES SEUROPE</b>	<ul style="list-style-type: none"> <li>• According to BUSINESSEUROPE there is no need to revise the current legal framework as the existing PWD already provides a fair and level playing field and the Enforcement Directive is targeting illegal practices that are the key problems.</li> <li>• On the contrary, if implemented, the Commission's proposals would make lawful posting very difficult and more complicated and thus might create new unintended consequences.</li> <li>• According to the employer organisation, the proposal would undermine the competitive position of foreign service providers. It would also interfere in national wage-setting systems and would have other negative consequences for the single market, as well as economic and labour market development in the EU.</li> </ul>
<b>CEEP &amp; UEAPME</b>	<ul style="list-style-type: none"> <li>• The two other European cross-sectoral employer organisations (CEEP and UEAPME) have not expressed an opinion on the Commission's proposal.</li> <li>• However, the CEEP General Secretary stressed, in a statement on the revision proposal, that there is a need to legally clarify the relationship between the PWD and public procurement rules that seek to foster social criteria in tender processes.</li> <li>• In a press release, UEAPME regretted that the Commission had not consulted the social partners before the proposal was issued and highlighted that the concept of equal pay of posted workers raises a number of questions, likely to create new legal uncertainties.</li> </ul>
<b>EFBWW</b>	<ul style="list-style-type: none"> <li>• For the EFBWW, the proposal only addresses some of the key problems of posting, particularly in the construction sector. As the key problem stems from the one-sided orientation of the PWD on Art. 57 TFEU, the EFBWW strongly would be in favour of a broader legal basis, including also Art. 153 TFEU.</li> <li>• Furthermore, the EFBWW states that there should be no restriction in the PWD with regards to the kind of collective agreements that are applicable – the national systems of industrial relations should be respected in this context</li> <li>• Further criticism relates to the 24-month limit for posting (too long), the new regulation of temporary agency work and subcontracting. While the new concept of remuneration is welcomed generally, the EFBWW strongly criticises the reference to the "proportionality" of remuneration in the revision proposal.</li> </ul>
<b>FIEC and EBC</b>	<ul style="list-style-type: none"> <li>• For <b>FIEC</b>, it is questionable as to whether the new proposal will provide real added value. The organisation is not convinced about the new concept of remuneration either. However, FIEC considers the new proposals on posting of agency workers as a positive step – at least for some countries</li> <li>• FIEC clarified that it has been a strong advocate of concrete proposals to reduce abusive practices and to improve the enforcement of the PWD. However, it has not demanded any revision and opening up of the current Directive.</li> <li>• <b>EBC</b> stresses that micro and small enterprises are negatively affected by unfair competition to a much greater extent than other companies. Therefore, the organisation welcomes the proposal as a step towards a new model of posting that would be based on innovation or specialisation, rather than only on exploiting wage differentials</li> </ul>
<b>Eurociett</b>	<ul style="list-style-type: none"> <li>• Eurociett sees no need for the revision of the PWD. The European employer organisation stressed that it supports the principle of equal pay for equal work and that 15 EU Member States already make use of the option to apply the equal pay principles of the TAW Directive.</li> <li>• At the same time, Eurociett underlined that it supports the current optional nature of the equal pay provision in the PWD.</li> </ul>

**Source:** Author on the basis of press statements, initial assessment as provided in written form or in interviews. See also the more detailed overview in the next section 7.3.

The assessments and comments also reflect earlier positions of EU level social partner organisations, such as those on the Enforcement Directive: more specifically, **trade union organisations** argued that the Enforcement Directive would not prevent or halt the

downward pressure on local employment conditions in the host Member States and demanded a full revision of the PWD.<sup>86</sup>

**Employer organisations**, on the other hand, highlighted that the Directive offers a sufficiently clear and protective legal framework and should not be changed. They point to the analysis carried out by the Commission in 2009-2011, which led to the Enforcement Directive, and argue that the basic Directive should not be touched before more information is known about the effect of the Enforcement Directive.<sup>87</sup>

With regards to the current proposal, the gulf between trade union and employer organisations in their assessment of the Commission's proposal widened further in relation to key aspects; these include the general objective and need for legislative change, suggested measures to improve the functioning of the Directive and the anticipated effects. In addition, and interestingly, **Nordic employer organisations** have raised concerns about the effects of the proposal on their industrial relations and collective bargaining systems.

As a result, both parties indicated their dissatisfaction with the Commissions' proposal. However, both sides of the industry also strongly pointed out their deep dissatisfaction towards the absence of any involvement from social partners in the elaboration of this legislative initiative – a concern that was also stressed by statements made by major **political groups within the European Parliament**.

With regards to **EU Member States** prior to the publication of the new proposal, there were two groups of ministers: those representing major receiving and higher wage-level countries on the one hand; and those representing sending and lower-wage countries on the other. They have both sent letters to Commissioner Thyssen highlighting their views and concerns on the issue:

- In their joint letter of 18 June 2015, the **"higher wage" group** (made up of labour ministers from Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden) demanded a substantive change in the regulation of posting along the principle of "equal pay for equal work in the same place" as the only way to re-balance economic and social principles in a fair way, and to avoid social dumping.<sup>88</sup>
- In contrast, in August 2015, the **"lower wage" group** (ministers responsible for labour and social affairs from Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) expressed their view on the issue, arguing that a discussion on a possible revision of the PWD was premature and should be postponed until "a proper assessment" become available on the implementation and results achieved by the Enforcement Directive. Furthermore, the ministers raised concerns about the potential negative effects that a substantive change of the PWD would have on the freedom to provide services.<sup>89</sup>

Both **positions differ strongly** with regards to their assessment on whether the balance between the freedom to provide services and the protection of workers' rights, which was struck in 1996, still provides sufficient safeguards to protect the social rights of posted workers today. Furthermore, the assessments differ with regards to the question of whether

<sup>86</sup> See for example the positions of the [ETUC](#) or [EFBWW](#) on the Enforcement Directive.

<sup>87</sup> See in particular the positions of [BUSINESSEUROPE](#) on the Enforcement Directive.

<sup>88</sup> See <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2015/06/19/brief-aan-europees-commissaris-thyssen-over-de-detacheringsrichtlijn/2015-06-18-consolidated-version-letter-to-thyssen.pdf>.

<sup>89</sup> "In this respect, we consider any reference to equal pay for equal work in the same place as being misguided and incompatible with a genuine single market (...). (...) it is important to emphasise that pay rate differences existing among Member States do not constitute an unfair competition when the freedom to provide services is concerned and there should be no obstacle for service providers to profit from a competitive advantage resulting from the differences between the national rates of pay (...)."

See [http://arbetsratt.juridicum.su.se/euarb/15-](http://arbetsratt.juridicum.su.se/euarb/15-03/nio_medlemsstater_utstationeringsdirektivet_augusti_2015.pdf)

[03/nio\\_medlemsstater\\_utstationeringsdirektivet\\_augusti\\_2015.pdf](#). See also the [letter of the BUSINESSEUROPE President](#) to Jean-Claude Juncker of 26 November 2015.

the Enforcement Directive already provides a sufficient instrument to fight abusive practices, circumvention and fraud through legal provisions, and address further challenges relating to the proper implementation of the Directive.

In April 2016, the **European Economic and Social Committee**, in its Opinion on "*Fairer labour mobility within the EU*", recalled in 2012 that the EESC already took the position that the Enforcement Directive is not enough to satisfy the Committee's requirements, despite it being a step towards strengthening the social dimension of the internal market.<sup>90</sup> With regards to regulatory changes, the EESC made the following general statement:

*"The EESC urges the Commission to address, in consultation with the social partners, all necessary issues regarding posted workers to address unfair practices that lead to social dumping. Similarly, any new measures at European level must respect national competences for collective bargaining and the different systems of industrial relations."* (Opinion on fairer labour mobility, p. 3)

#### **Box 14: Reactions of political groups in the European Parliament**

Immediate reactions of political parties in the European Parliament have been more balanced than those of the European social partners. In a press release on 8 March 2016<sup>91</sup>, the **Group of Socialist and Democrats** welcomed the proposal as a "good start to ensure fairer conditions in the labour market." The Group's spokesperson on employment and social affairs also made it clear that, with the new proposal, the Commission finally acknowledged that "there is a fundamental problem with the Posting of Workers Directive and not just with its enforcement". She also highlighted shortcomings and critical aspects of the Commission's proposal, such as the proposed 24 month time limit for the posting of workers for being too long, as well as there still being insufficient provisions with regards to letterbox companies or the permanent exchange of posted workers. Finally, she stressed that the principle of equal pay for equal work at the same place would be not be negotiable for the Socialists and Democrats Group. Members of the S&D Group also referred to the still persistent challenges relating to differences in social-security contributions and the need for the Commission to come up with an "ambitious" proposal on social-security co-ordination later in 2016.

A more critical position regarding the Commission's proposal was published by the chairman of the Committee on Employment and Social Affairs (EMPL) and member of the **GUEN/NGL Group**, who stressed that he could not find any real progress with regards to implementing the principle of equal pay for equal work in the same place.<sup>92</sup> He strongly criticised the time limit of 24 months as totally unrealistic and insufficient, as only statutory minimum wages or wages generally applicable through collective agreements would be paid, but not the vast majority of collective agreements. Furthermore, the proposals regarding the liability of contractors and bogus-self-employed are regarded as not sufficient in order to prevent social dumping or the circumvention of rules regarding the posting of temporary agency workers. Similar to the S&D Group, the chairman of EMPL also showed deep concerns about the insufficient involvement of the social partners in the context of the elaboration of the proposal.

In contrast, the **European Conservatives and Reformists Group** employment spokesman has argued that revisiting the Posting of Workers Directive is a mistake that risks adding more uncertainty and red tape to business.<sup>93</sup> Criticising the timing of the proposal as coming before the Enforcement Directive is transposed, the ECR representative raised concerns about the consequences of the agenda to create 'equal pay for equal work in the same place.'

By the time of writing, the **EPP Group** has not issued an official press statement. However, in a press release promoting the Groups position paper on social policy that was published on 3 March 2016, the EPP Group Spokesman for the European Parliament's Employment and Social Affairs Committee stressed the following in anticipation of the Commission's proposal:

<sup>90</sup> EESC 2016: Opinion of the European Economic and Social Committee on Fairer labour mobility within the EU (exploratory opinion). SOC/531, 27 April 2016. With view on the new proposal of the Commission the EESC in its opinion indicated that it will come up with a separate opinion.

<sup>91</sup> <http://www.socialistsanddemocrats.eu/newsroom/new-rules-posting-workers-are-overdue-first-step-say-sds>

<sup>92</sup> <http://www.guengl.eu/news/article/gue-ngl-news/no-improvements-in-the-latest-draft-of-posted-workers-proposal>

<sup>93</sup> <http://ecrgroup.eu/news/eu-posting-of-workers-proposals-could-create-more-confusion-for-businesses-and-workers/>

*"Any proposed measures must be clear, proportionate, non-discriminatory and justified, and respect the different wage-setting mechanisms in the Member States. The announced revision should only touch upon the necessary unsolved elements in order to ensure a just treatment of workers and a level playing field for business. A revised Directive must continue to facilitate the freedom to provide services."<sup>94</sup>*

Furthermore, the EPP Group calls on all Member States to quickly implement the Enforcement Directive on the Posting of Workers and to consequently analyse the impact of its implementation. For stricter controls to combat and prevent abuse, the Group calls for improved cross-border cooperation between inspection services and electronic exchange of information and data.

### 5.2.3. The Yellow Card procedure

By 13 May 2016 (i.e. within the deadline set for this procedure) the parliaments of **eleven EU Member States (Bulgaria, Croatia, Czech Republic, Denmark<sup>95</sup>, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) have issued "reasoned opinions"** and showed the so-called "yellow card" to the European Commission for the proposed amendment of the PWD. This represents 22 votes, which is therefore already 3 votes above the required threshold.

It should be noted that several other parliamentary chambers also submitted **contributions in the framework of political dialogue<sup>96</sup>**, whereby the Italian Senate, the Portuguese Parliament and the Spanish Cortes have expressed favourable opinions and the Polish Senate stated that the Commission's proposal is in breach of the principle of subsidiarity.

As the initiator of the legislative proposal, it is now up to the European Commission to acknowledge receipt of the reasoned opinions from national Parliaments and to confirm that the required threshold for the "yellow card" was reached. The European Commission must then review its proposal. After such review, **the European Commission may decide to maintain, amend or withdraw the draft**. Reasons must be given for this decision.

The **yellow card procedure also affects the legislative process in the European Parliament**: Rule 42 of the Parliament's Rules of Procedure states: *"Where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments or a quarter in the case of a proposal for a legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union, Parliament shall not take a decision until the author of the proposal has stated how it intends to proceed."*

<sup>94</sup> <http://www.eppgroup.eu/press-release/Posting-of-Workers%3A-targeted-revision-as-a-last-resort>

<sup>95</sup> It should be noted here that in the statement of the Danish Parliament it is stated that the majority welcomes the Commission's initiative and the objective to ensuring equal pay for equal work. According to the majority of the Parliament the envisaged amendment of the Directive will support to prevent social dumping. However, the majority of the Parliament also finds that the proposal involves a number of problems in connection with the subsidiarity principle in two particular aspects: First, because the proposal no longer contains the statement that pay is defined by national practice (Art. 3.1, last sentence) and secondly, because also the Art. 3.9 of the current Directive on the option to guarantee the same terms and conditions to posted temporary agency workers that apply to national agency workers. From the Parliaments perspective this raises doubts as to the national competence in this area.

<sup>96</sup> In the framework of the political dialogue, national Parliaments can send opinions to the Commission to which endeavours to reply within three months. See: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/np/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/np/index_en.htm).

**Box 15: The 'Yellow Card' procedure**

Protocol No. 2, which is attached to the EU Treaties, sets out a review mechanism involving national Parliaments regarding proposed legislation that does not fall under the exclusive competence of the European Union. Thus, national Parliaments may review EU draft legislative acts within eight weeks of transmission and issue a "reasoned opinion" if they consider that a draft legislative act does not comply with the principle of subsidiarity. The Protocol provides a procedure for compulsory review by the issuing institution, which is normally the Commission, of a legislative proposal when reasoned opinions received exceed set thresholds.

Within the procedure, each national Parliament has two votes. In the case of a bicameral system, each of the two parliamentary chambers has one vote. So with currently 28 national Parliaments there are a total of 56 votes. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of the votes allocated to national Parliaments (or a quarter in the case of the area of freedom, security and justice), the draft must be reviewed under the "*yellow card procedure*". After such review, the Commission may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision. With a total of 56 votes, the current "one third" threshold is at least 19 votes.

Protocol No. 2 also foresees a so-called "*orange card*" if, under the ordinary legislative procedure, the reasoned opinions sent by national Parliaments represent a simple majority of the votes allocated to them. As part of the UK's "renegotiation" deal, the February European Council also agreed on a process often referred to as "*red card*", where reasoned opinions represent 55% of the votes allocated to national Parliaments.

So far, national Parliaments had issued two "yellow cards" until now: In 2012 for the "Monti II" proposal on the right to strike, which the Commission withdrew afterwards (though not on grounds of subsidiarity), and in 2013 for the European Public Prosecutors Office, where the Commission maintained its proposal.

**5.3. The PWD Directive in light of EP Resolutions**

Since the 1990s, The **European Parliament has played a decisive role in the debates on regulation and rules for posted workers**. Apart from its involvement in the legislative process, Parliament has influenced and shaped the debate by its own initiatives and various resolutions.

**5.3.1. Early calls to prevent social dumping and effective implementation of the PWD**

The Parliament has always been a strong advocate for improving the PWD with regards to better implementation of the objectives of the Directive regarding "*core labour standards in the free movement of services and the prevention of social dumping*", as highlighted in the **Resolution of 15 January 2004** in response to the Commissions communication on the implementation of the Directive 96/71/EC (COM(2003)0458).

With regards to better implementation, the Parliament called for a comprehensive assessment of the PWD's implementation and functioning on the ground, focussing on aspects that, ten years later, have been partly addressed by the Enforcement Directive.<sup>97</sup>

In the 2004 resolution, the Parliament also made a number of **concrete proposals and/or called for specific action in order to improve the PWD**. Namely, the following demands should be recalled here:

<sup>97</sup> As noted in a [Briefing](#) on the posting of workers prepared by the Parliament's Research Service, the Commission's follow-up to this resolution did not come until 2006 when the report on the implementation of the PWD was adopted by the Commission.

- the need to **collect better and more concrete data** on the effects of national implementation;
- the consideration of **problems that were resulting from different options to implement the PWD**, particularly unfair competition, different social protection systems and the lack of a clear definition of the status of 'worker';
- the suggestion to examine the European legislative frameworks of other provisions to prevent unfair competition, social dumping and governing liability in the context of **subcontracting**;
- the need for a fundamental assessment of practical interpretation of key concepts and definitions in the PWD, namely the **components included or excluded in the minimum wage**;
- the need to examine the **implementation of key provisions by collective labour agreements** and their effects on competition between undertakings and employees;
- in this context, the Resolution also called on the Commission to submit proposals to simplify and improve the existing Directive with regards to better implementation and application in practice as well as with view on the "**dual goals of fair competition and respect for the rights of workers**"
- The Parliament's Resolution had already called on the Commission to facilitate the **work of competent authorities** 12 years ago. This was to be done through improved provision of information in the form of a website and the creation of relevant links;
- With regards to the EU enlargement 2004, the Parliament called on the Commission to "**consider the consequences regarding enlargement in the 15 Member States and the acceding countries**";

Furthermore, the Parliament stressed the **need for substantive** studies on the implementation of the PWD as well as the consideration of possible improvements in "*close cooperation with the social partners*".

The 2004 Resolution also **called on the Member States to ratify the ILO Migrant Workers Convention (C143)** that entered into force in 1978.<sup>98</sup>

### 5.3.2. Calling for combatting specific types of fraudulent posting and strengthening cooperation between key actors

In response to the Commission's communication regarding Guidance on the posting of workers within the framework of the provision of services (COM(2006)0159), the Parliament adopted a **Resolution on 26 October 2006**. This was on the application in which it had again highlighted that key problems associated with the application of the PWD were related to **poor transposition at national level**, as well as differences of interpretation of certain key concepts, "*such as worker, minimum salary, and subcontracting, the difficulty of both workers and small business in obtaining information, and the difficulty of monitoring compliance with the Directive*".

In its Resolution, the Parliament stressed that **the social partners have a major role in the successful implementation of the PWD** and that "*boosting the role of the social partners and greater cross-border cooperation would accordingly represent a decisive step toward achieving the desired equality*".

The Resolution also contained a **number of concrete demands and requests**, in particular:

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<sup>98</sup> This was without any concrete results at national level: Until today only Cyprus, Italy, Portugal, Slovenia and Sweden have ratified the convention, all of them before the Resolution.

- suggestions on how to tackle the issue of “**sham self-employment**” as this is a major strategy to circumvent the minimum standards of the PWD;
- pointed out that “**double posting**”<sup>99</sup> is one of the key difficulties of the PWD implementation and that better coordination between Member States and enhanced notification procedures are needed to counter this;
- called on Member States to integrate in their national transposition of the PWD provisions the provision under Art. 3.9 of the PWD in order to ensure that **posted temporary agency workers** benefit from the same conditions as applied to agency workers in the host Member State;
- demanded **increased information and simple procedures** that enable people to become better aware of their rights; calls for guidelines on best practice in the preparation of information for employees and employers to be elaborated by Eurofound in Dublin;
- supported the practice in some Member States requiring the **availability of a mandated representative of the posting company** with legal capacity in the host Member State in order to properly implement and monitor the PWD;
- with regards to better enforcement and cooperation, the Parliament strongly supported the Commission’s call on the Member States to **establish liaison offices** and provide these alongside inspection authorities with the necessary equipment and resources, to improve cross-border cooperation and information exchange, whilst also “*creating a permanent European structure for cross-border cooperation*”.

With regards to the **CJEU rulings** (namely the 2006 ruling *Commission vs. Germany*), the Parliament also stressed its opposition to a restrictive interpretation of the concept of public policy provisions. Therefore, the Parliament welcomed the CJEU ruling in the *Wolff & Müller* case that a **legal system of general liability of contractors** contributed to ensuring the protection of workers and is therefore an overriding reason in the general interest. The Parliament also called on those Member States that do not yet possess such national legislation “*to close this loophole without delay*” and also called upon the Commission to regulate joint and several liability for general or principal undertakings, “*in order to deal with abuses in the subcontracting and outsourcing of cross-border workers*” (2006 Resolution, para. 28)

### 5.3.3. Highlighting insufficient action at EU level

Reacting to the Commission Communication on the posting of workers of June 2007 (COM(2007)0304), and also **highlighting again key problems and challenges in the implementation and enforcement of the PWD**, the Parliament indicated its overall dissatisfaction about previous initiatives of the Commission in its **Resolution of 11 July 2007**, as these initiatives have not solved the problems encountered by the Directive. The resolution clarified a particular set of key standpoints and demands of the Parliament, such as:

- to fully **take into account the variety of labour market models** existing in the European Union when it comes to adopting any measure on posting; called on the Commission to respect that some Member States require the availability of a mandated representative with legal capacity in the host country in order to properly implement and monitor the Directive; this could be any person that has been provided with a clear mandate from the company (including a worker);

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<sup>99</sup> That is a situation where in which the worker is ‘posted’ to the service provider under a domestic (or transnational) contract and then posted by the user undertaking to another Member State. See Van Hoek, A. and Houwerzijl, M. 2011: Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union p. 184.

- pointed out that existing case-law recognises the **right of the host Member State to require certain documents** to verify compliance with the employment conditions laid down in the Directive;
- suggested that it would be appropriate for the **social partners** in those Member States where the Directive is implemented through collective agreements to gain direct access to information about the posting companies, so that they can exercise the supervision, which is subject to authorities that have such access to company information in other Member States;
- supported the practice that the host Member State should be able to demand a **prior declaration by the service provider** to enable it to verify compliance with the employment conditions.

#### 5.3.4. Defending a broader protection floor in response to the restrictive interpretation of the CJEU and call for equal pay

The Parliament responded to a number of CJEU law cases in two resolutions in 2008 and 2009, namely the Viking, Laval and Rüffert judgements ([Resolution of 22 October 2008](#) on “Challenges to collective agreements in the EU”) and to challenges relating to the increasing practice of subcontracting ([Resolution of 26 March 2009](#) on “Social responsibility of subcontracting undertakings in production chains”)

**With regards to the three rulings of the CJEU the Parliament strongly stressed that the “freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights and in particular the right of trade unions to take industrial action”.** In light of the rulings, the Parliament stressed the need to better clarify that economic freedoms, as established in the Treaties, should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights, including the right to negotiate, conclude and enforce collective agreements and to take collective action. Furthermore it should be clarified that economic freedoms may not restrict the autonomy of social partners when exercising these rights in pursuit of social interests and the protection of workers.

The Parliament also pointed out that:

- the **PWD allows public authorities and social partners to lay down terms and conditions of employment which are more favourable** to workers according to the different traditions in the Member States;
- the intention of the legislator in the PWD and Services Directive is incompatible with **interpretations which may invite unfair competition between undertakings**;
- it questioned the introduction of a **proportionality principle for actions against undertakings** which, by relying on the right of establishment or the right to provide services across borders, deliberately undercut terms and conditions of employment;
- it considered that there should be no question as to the **use of industrial action to uphold equal treatment and to secure decent working conditions**;
- the restricted interpretation of the PWD may lead to the PWD being interpreted as an **“express invitation to unfair competition concerning wages and working conditions”**;

The Parliament also considered that the **PWD regulation has both loopholes and inconsistencies and thus may have lent itself to unintended interpretations.** Against this backdrop, the Parliament suggested that a “re-examination” of the impact of the internal market on labour rights and collective bargaining may also include a partial review of the PWD. Such a review *“should deal in particular with issues such as applicable working conditions, pay levels, the principle of equal treatment of workers in the context of free movement of services, respect for different labour models and the duration of posting”*

In its resolution, the Parliament also asked the Commission and the Council to adopt measures to combat abusive practices, highlighting the activities of **letterbox-companies** in particular: These were not engaged in any genuine and effective business in the country of establishment but have been created, sometimes even directly by the main contractor in the host country, for the sole purpose of carrying out business in the host country, in order to circumvent the full application of host country's rules and regulations with regard to wages and working conditions in particular.

Thus the Parliament called on the Commission to lay down clear rules to combat such practice, e.g. within its **code of conduct for undertakings under the Service Directive**.

The reference to letterbox-companies, and their rapidly increasing presence in the construction sector in particular, was also highlighted in the [Resolution of 26 March 2009](#) on "**Social responsibility of subcontracting undertakings in production chains**".

In this resolution, the European Parliament also referred to the overriding importance of **equal treatment**:

- *"the basic principle of equal pay for equal work in the same place must apply to all employees, regardless of their status and the nature of their contracts, and that principle must be enforced"*

With the intention of improving working and employment conditions in subcontractor chains, the Parliament also repeated its demand for the Commission to regulate the **joint and several liabilities of the general or principal undertakings**.

In terms of enforcement, the 2009 Resolution also included the call on the Commission to intensify efforts to promote more and **better cooperation and coordination between national administrative bodies, inspectorates, government enforcement agencies, and social security and tax authorities**.

Furthermore, it called upon the Commission and the Member States,

- *"to adopt measures aimed at improving access to information by posted workers, reinforcing coordination and administrative cooperation among Member States, including clarifying the role of Member States liaison offices, and solving cross-border enforcement problems that hamper the effective implementation of Directive 96/71/EC"*

In particular, this latter demand is already very close to key objectives of the Enforcement Directive that finally entered into force five years later in 2014.

#### **5.4. The Parliaments position on the Enforcement Directive**

In its [Resolution of 15 December 2010](#) on the Communication of the Commission work programme for 2011, as well as in the [Resolution of 1 December 2011](#) on the Single Market Forum, the Parliament recalled the need to improve the PWD by a legislative proposal focussing on the implementation of the PWD as foreseen by the Commission in the Single Market Act. According to the Parliament, such a legislative proposal "*must clarify the exercise of fundamental social rights*" (Resolution of 15 December 2011).

In its [Resolution of 25 October 2012](#) on the "*20 main concerns of European citizens and business with the functioning of the Single Market*", the Parliament again emphasised the need to improve working conditions and ensure adequate protection without any form of discrimination for posted workers. Recalling previous demands, it called for action to improve the implementation and application of Directive 96/71 in **close cooperation with the social partners**. It also urged the Commission to establish a central coordination point at EU level, aiming to gather the concerns of mobile workers, employers and other interested parties, in

order to devise solutions between Member States and prevent problems arising from mobile employment relationships, including the posting of workers.

In the resolution, the Parliament also referred to abusive and illegal practices in the field of cross-border mobile work and posting, such as “**fraudulent employment agencies**”, tax and social security evasion and fraud; the Parliament then called on the Commission and the Council to draw up an action plan to address this issue (e.g. by closer cooperation of national labour inspectorates).

In 2012, the Commission published its proposal for the Enforcement Directive (COM(2012) 131 final) which – after intensive political debates and amendments – was finally adopted in the plenary of the European Parliament by a [Legislative Resolution](#) of 16 April 2014 and published as Directive 2014/67.

### 5.5. The Commissions’ revision proposal in light of previous demands of the Parliament

The following overview table provides a brief assessment of the Commission’s proposal to amend the PWD in light of demands that are contained in the various resolutions of the Parliament, indicating also whether the Enforcement Directive in 2014 had already such demands earlier.

**Table 11: Key demands of the Parliament as addressed by the Commission**

Topic	Key positions and demands of the Parliament	Included in Enforcement (ED) and/or revision proposal (APWD) or addressed elsewhere
<b>Clarity with regards to objectives</b>	Fundamental assessment of practical interpretation of key concepts of the PWD, namely minimum wage/rates of pay	<b>Yes</b> (research study 2015) <b>Not implemented in the way suggested by EP</b> - APWD concept of remuneration substituting MRP
	Submit proposals to simplify and improve the PWD with regards to better implementation of the "dual goals of fair competition and respect for the right of workers"	<b>Partly</b> , ED via better enforcement only APWD proposal is aiming at this goal but hardly in a simplifying way
	Making a clear statement that economic freedoms may not restrict the autonomy of social partners and the right to collective action to uphold equal treatment	<b>No</b>
	Demanding a legislative proposal that improves implementation of the PWD and clarifies the exercise of fundamental social rights	<b>Yes, partly</b> in ED, only regarding the first objective APWD rather focussing on equal treatment than social rights
<b>Unclear or inconsistent terms and concepts</b>	Consideration of problems related to different options to implement the PWD	<b>No</b> (revision of social security coordination)

	Clearer definition of status of 'worker'	<b>No</b>
	Consider "partial review" of the PWD with regards to improving the provisions regarding applicable working conditions, pay levels, principle of equal treatment of posted workers, respect of different labour market models and the duration of posting	<b>Partly</b> - only with view on pay/working conditions Long-term posting?
<b>Guidelines and dissemination of good practice</b>	Increasing the information and enable people to better understand the PWD provisions	<b>Yes</b> , ED
	Guidelines on good practice	<b>No</b>
<b>Data and information on posting</b>	Need to collect better and more concrete data on the effects of national implementation	<b>Not in a systematic</b> way but rather studies on specific topics
	Examine the implementation of key provisions by collective agreements and effect on competition between undertakings and employees	<b>No</b>
	Consider the consequences regarding the effects of enlargements in EU15 and acceding countries	<b>No</b>
	Establishing a central coordination point at EU level, gathering information on concerns of mobile and posted workers, employers and other stakeholders in order to devise solutions and prevent problems	<b>No</b>
<b>Social protection of posted workers / preventing abuse and unfair competition</b>	<i>Better regulation/more clarity regarding:</i> <ul style="list-style-type: none"> <li>- Double posting</li> <li>- Sham/Bogus self-employment</li> <li>- Letterbox companies</li> <li>- Joint and several liability of contractors</li> <li>- Fraudulent employment agencies</li> <li>- Tax evasion and social security fraud</li> </ul>	<b>No or only indirectly</b> (double posting, bogus self-employment, letterbox companies, tax evasion/social fraud)  <b>Partly</b> (fraudulent employment agencies, liability in the context of subcontracting)
	Call on Member States to ratify ILO Convention C143	<b>No</b>
<b>Minimum versus broader protection level</b>	Improve the Directive's provision in order to make sure that a broader protection and application of more favourable conditions for posted workers are proportionate and possible (in response to CJEU rulings)	<b>No</b>
	Calling upon Member States to apply the broader protection of posted temporary agency workers according to Art. 3.9	<b>Partly</b> - according to the APWD proposal Member States "shall" confer Art. 5 of the TAW Directive to posted agency workers but still derogation and only minimum protection is possible
<b>Preventing abuse and unfair competition</b>	Examine other EU legislative frameworks with view to combating unfair competition, social dumping and governing liability in the context of subcontracting	<b>Partly</b> (governing liability) by research studies resulting in new provisions in ED and APWD

	Calling upon Member States to establish general liability rules regarding contractors	No
	Stronger rules and provisions to stop the practice of letterbox companies, e.g. by integrating rules in the code of conduct for undertakings under the Service Directive	No
<b>Stakeholder involvement</b>	Conduct studies and in-depth examination of specific problems in close cooperation with the social partners	No
	Social partners should play a decisive role in the implementation of the PWD	Partly (ED: collective complaints)
	Strengthening the role of collective agreements in implementation of key provisions of the PWD	No
<b>Administrative cooperation and exchange</b>	Facilitate the work of competent authorities at national level by improved provision of information via websites	Yes, ED
	Better coordination between Member States and enhanced notification procedures	Yes, ED
	Stronger cooperation between national authorities, including in the field of social security and tax regulation	Yes, ED
<b>Monitoring compliance and enforcement</b>	Suggestion to provide social partners in Member States where the PWD is implemented via collective agreements to gain direct access to information about the posting companies	No
	Taking into account the variety and diversity of labour market models regarding measures on posting, e.g. the practice in some Member States requiring a mandated representative of the posting company in the host Member State or to require certain documents to verify compliance	No
	Establish single liaison offices in Member States and provide these with necessary equipment and resources	Yes, ED
	Strengthening labour inspectorates	Yes, ED

Source: Author.

The overview quite clearly shows that **key demands of the Parliament have not been implemented and addressed**, or have only been to a very limited degree by legislative initiatives and other action taken by the EU Commission.

**The most important impact of Parliament calls and requests for action has been in the field of improving administrative cooperation and coordination and exchange, monitoring and compliance as well as enforcement instruments**, i.e. by the Enforcement Directive 2014. This Directive matches positions and demands that have been pointed out and stressed in Parliamentary resolutions for a long time before 2014.

However, there are many **“leftovers”** as to Parliamentary demands, suggestions and calls on the Commission, as well as Member States, that were equally important but have so far never been touched upon: first of all, this relates to the “hot potato” issues relating to better matching the two goals of the Directive - fair competition rules and respect of the right of workers – and the demand for simplification and clarification regarding the ‘hard core’ of minimum rights. Also the frequent demands for greater efficiency in responding and

combatting major forms abuse, legal circumvention and other unintended effects have only been partially addressed in a limited way and (e.g. liability in the context of subcontracting).

Furthermore, the **constant demands of the Parliament have not brought about any significant effects thus far. These demands have included calls to: improve and intensify the gathering of data and information on posting; disseminate experiences of good practices; provide more guidance to workers and employers; and involve social partners and other stakeholders.** This is particularly surprising as these measures would be relatively easy to implement and follow.

## 6. CONCLUSIONS AND RECOMMENDATIONS

### 6.1. What is at stake?

The posting of workers from one country to another in the context of the provision of services is a constituent element of transnational business operation. **Posting is therefore not a new phenomenon but an element of internationalisation and enhanced cross-border activities in the global context, as well as in the context of cross-border markets.**

Thus, the posting of workers has been a **key component of the internal market for services** in the EU and the definition of rules concerning the posting of workers is an essential element for the achievement of the Union's fundamental objectives, the freedom of undertakings to provide cross-border services under Article 56 TFEU.

But from the beginning, the regulation of posting workers was not only regarded as an instrument of guaranteeing the free provision of cross-border services in the internal market. Against the background of **tensions in the context of the enlargement of the EU** in the 1980s and concerns about the effects of the **great wage differentials** between the existing Member States and the accession countries in Southern Europe (which resulted in the postponement of the free movement of workers for up to seven years), a second objective of the 1996 Posting of Workers Directive (PWD) was to define **appropriate protection of the rights of workers who had been temporarily posted abroad and avoid unfair competition based solely on wages, labour costs and/or working conditions and standards.**

However, **the dual objective of the PWD is not reflected in its current legal form.** Its sole legal basis is the free movement of services, as defined in Article 56 TFEU. For the purpose of social protection and fair competition rules, the PWD has defined a rather complicated set of rules and standards around the concepts of a 'hard core' set of rights and conditions as well as 'minimum rates of pay'. As the previous sections have shown, these concepts gave way to various juridical interpretations and rulings, and opened the door for 'creative' and circumventive practices, abuse and fraud.

Against this backdrop, the EU Commission has justified its March 2016 proposal of a "targeted revision" with the reason that the PWD no longer applies to the current realities and published its suggestions irrespective of the ongoing transposition of the Enforcement Directive. The proposal to **abolish the current concept of minimum rates of pay, and to establish the principle that posted workers are entitled to the same rules of remuneration as local workers**, has fuelled the heat of the debate further as illustrated by the reaction of national parliaments that showed the yellow card.

In a situation such as this, and also learning from the past experiences of two lengthy and complicated legislative experiences, a number of considerations and questions arise that may contribute positively to an outcome that matches key challenges and problems around the issue of posting:

It seems essential that the debate on any changes to the regulation of posting should focus on the key question, that is: ***Will the situation of posted workers change and be improved by the envisaged action?***

And more concretely, ***to what extent will the key deficiencies and problems of the PWD be resolved by the Enforcement Directive and what must still be regarded as left out and needing to be addressed by further action?***

With view on further action, the question arises as to **whether or not the regulator should envisage a more comprehensive approach of revising the Directive, or whether a ‘targeted revision’ through technical changes and clarification seems sufficient?**

All of these questions are **not easy to answer** and, as shown in the previous sections, key stakeholders have given different interpretations, suggestions and recommendations. Also, the CJEU rulings on posting have not provided a sufficient guidance for implementing key provisions of the PWD, particularly with regards to the application of minimum rates of pay.

Furthermore, at this stage it is simply not possible to make an assessment regarding improvements and concrete effects of **the Enforcement Directive as it is still in the process of transposition and implementation.**

However, what is quite evident at this stage is that, according to many stakeholders and experts (not all however) including the European Parliament, the **Enforcement Directive has only targeted some of the key problems of the PWD**, i.e. problems relating to its implementation on the ground, its enforcement, monitoring, exchange of data, providing information, etc.

At the same time, the Enforcement Directive has not addressed major issues and demands, which have been highlighted in **European Parliament Resolutions** and also by a number of stakeholders. There is still the need to:

- **provide greater clarity regarding the dual objectives of the PWD** with regards to fair treatment of service providers and workers' protection;
- **combat not only major forms of abusive practice but also unfair competition and unequal treatment** of posted workers;
- **simplify regulation and provide better information** to both the workers and employers involved in posting;
- **respect national systems of industrial relations, as well as the autonomy of social partners** to regulate in the field of labour law and employment terms and conditions.

## 6.2. Further muddling through or a fresh start?

With regards to the **proposal of the Commission**, published in March 2016, the question arises as to whether it addresses these objectives and contributes positively, or whether it rather contributes to further and even more confusion as many stakeholders (though sometimes from fundamentally different perspectives and interests) have argued.

**Key questions** in this context are:

- Are key provisions and instruments of the new proposal (namely the concept of remuneration and the provisions on liability in subcontractor chains) providing the **simplification or rules and the clarification of key terms** that the Parliament and other stakeholders have demanded for a long time? Or does the new proposal create **new inconsistencies**<sup>100</sup> and **unequal treatment between some posted workers and others** (such as those covered by universally applicable collective agreements and those covered by other agreements)?
- Does the proposal provide for a **harmonisation of the different concepts of posting, as defined in the PWD and the coordination of social security** (Regulation 883/2004), or will certain inconsistencies still exist?

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<sup>100</sup> For instance, with regards to remuneration, the APWD stipulates in Recital 12 that Member States must be able to justify the remuneration applied to posted workers, and that remuneration may not be “disproportionate”.

- What effects will the new proposal have on **the implementation of the Enforcement Directive**?
- To what extent does or should the PWD acknowledge the **variety of industrial relations and collective bargaining** in the EU, and provide for more flexibility?

While these questions need to be seriously considered during the political negotiations and legislative debates in the coming weeks and months, there are a number of **'essentials' that should also be taken into account**:

- There is a need for **much stronger involvement of the social partners** in the political and legislative discussion as well as accompanying the research process, producing guidance and gathering/disseminating information and experience.
- The debate should also, to a much greater extent than in the past, be based on a **solid basis of data with quantitative as well as qualitative information**; this has been consistently requested from the European Parliament for a long time. Currently, the whole debate on posting is based on data that are gathered for social security policy reasons but not for the purpose of labour market analysis and assessments. This must be changed urgently.
- Given the broad consensus that **the utmost priority at the moment should be an effective implementation of the Enforcement Directive**, the monitoring and exchange of its implementation at national and cross-national level is very important, irrespective of the evaluation in 2019. The focus here should be particularly on the provision of **sufficient and additional resources for labour inspections and competent authorities** as these are essential to fulfil the new requirements.

Furthermore, and particularly considering the difficult birth of the 1996 Directive and the 2014 Enforcement Directive, **it seems important that the debate on legislative changes of the framework for posted workers should focus on the essentials and should not be overloaded and overstretched by more general and fundamental political aspirations and orientations**.

Thus, the debate on a future framework should be based on a joint understanding of **what constitutes 'fair posting'**, which must also be a solid definition. It is vital to fully consider the perspectives of both posted workers and workers in the receiving countries, as well as the perspectives of sending and receiving countries. Furthermore, this understanding of what constitutes posting should also rely on a **shared understanding and common diagnostics** regarding forms of malpractice and misuse that still persist and must be addressed.

It would also imply a **thorough assessment** of which issues and challenges are directly related to the phenomena of posting and should be addressed in the context of the PWD and its Enforcement, and which problems and challenges should rather be addressed by separate legislative instruments, such as those relating to social dumping, unfair competition, and social security and tax evasion practices.

## 7. ANNEX

### Annex 1: Relevant CJEU rulings

CJEU case	Date of ruling	Key issues addressed	Regulatory impact
<a href="#">Case 279/80 Webb</a>	1981	Pre-directive: Freedom to provide services – Provision of manpower	Hiring-out should be treated under the provision of services
<a href="#">Joint cases C-62/81 and 63/81 Seco and Desquenne &amp; Giral</a>	1982	Pre-directive: Freedom to provide services – Social security contribution – home versus host country principle	Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the state in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the state in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the state in which the work is performed
<a href="#">C-113/89 Rush Portuguesa</a>	1990	Act of Accession – Transitional period – Freedom of movement for workers – Freedom to provide services Conditions to be imposed by MSs to foreign service providers entering into domestic labour market	Prohibition to preclude the access of the foreign service provider with its staff on a temporary basis – measures imposed by the host country shall not be discriminatory. But: Community law does not preclude Member States from extending their legislation or collective labour agreements to any persons who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.
<a href="#">C-369/96 Arblade and 376/96 Leloup</a>	1999	Application of rules regarding wage payments	Application of host country rules regarding minimum rates of pay must be appropriate for securing the attainment of the objective which they pursue, that is the protection of posted workers, and must not go beyond what is necessary in order to attain that objective. The requirement to have a representative in order to keep the documents after the posting had ended was contrary to EU law since less restricting measures could be taken, such as sending the documents to the competent authority in the host state.

CJEU case	Date of ruling	Key issues addressed	Regulatory impact
<a href="#">C-67/96 Albany</a>	1999	Compulsory affiliation to a sectoral pension scheme – Compatibility with competition rules – Classification of a sectoral pension fund as an undertaking	In the field of competition law, trade unions have a significant degree of discretion regarding labour market issues
<a href="#">Joint cases C-49/98, C-50/98, C-52-54/98, 68-71/98) Finalarte</a>	2001	Several cases in the construction sector related to holiday pay and sick-benefit funds in the construction sector and the obligation of posting employers to contribute to the fund	Such funds constitutes additional protection of workers that must be regarded as an overriding reason that is proportionate. Thus posted workers should benefit from those funds and must receive comprehensive information about the rules.
<a href="#">C-164/99 Portuguesa Construções</a>	2002	Freedom to provide services – Construction undertakings – Directive 96/71/EC – Posting of workers – Minimum wage	Community law does not preclude Member States to apply legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily with their countries
<a href="#">C-60/03 Wolff &amp; Müller</a>	2004	Undertakings in the construction sector – Subcontracting – Obligation on an undertaking to act as guarantor in respect of the minimum remuneration of workers employed by a subcontractor	The legal system of general liability of contractors contributes to ensuring the protection of workers and is therefore an overriding reason in the general interest Member States which do not yet possess any such national legislation should close this loophole.
<a href="#">C-341/02 Commission v Germany</a>	2005	Undertakings in the construction industry – Minimum wages – Comparison between the minimum wage established by the provisions of the Member State to the territory of which a worker is posted and the remuneration actually paid by his employer established in another Member State – Failure to take into account, as constituent elements of the minimum wage, all of the allowances and supplements paid by the employer established in another Member State	Bonuses in respect of the 13 <sup>th</sup> and 14 <sup>th</sup> month are constituent elements of MRP Quality bonus, bonuses for dirty, heavy or dangerous work are not constituent elements of MRP
<a href="#">C-60/03 Wolff &amp; Müller GmbH &amp; Co. KG v José Filipe Pereira Félix</a>	2006	Article 49 EC – Restrictions on freedom to provide services – Undertakings in the construction sector – Subcontracting – Obligation on an undertaking to act as guarantor in respect of the minimum remuneration of workers employed by a subcontractor)	Liability of contractors: According to Art. 5 of the PWD, interpreted in light of Article 49 EC, a national system of general liability of contractors contribute to the protection of workers and is thus an overriding reason in the general interest.
<a href="#">C-244/04 Commission v Germany</a>	2006	Article 49 EC – Freedom to provide services – Undertaking employing workers who are nationals of non-Member States – Undertaking providing services in another Member State – Work visa regime	Legislation imposing a requirement of a period of only six months' prior employment exceeds what can be required in the name of the objective of the social welfare protection of workers who are nationals of non-member countries.
<a href="#">C-341/05, Laval un Partneri Ltd. V</a>	2007	Posting of workers in the construction industry – National	<i>"the purpose of Directive 96/71 is not to harmonise systems for establishing</i>

CJEU case	Date of ruling	Key issues addressed	Regulatory impact
<a href="#">Svenska Byggnadsarbetar förbundet</a>		legislation laying down terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), save for minimum rates of pay – Collective agreement for the building sector the terms of which lay down more favourable conditions or relate to other matters – Possibility for trade unions to attempt, by way of collective action, to force undertakings established in other Member States to negotiate on a case-by-case basis in order to determine the rates of pay for workers and to sign the collective agreement for the building sector	<i>terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that Directive, provided that it does not hinder the provision of services between the Member States" (S68)</i> A Member State in which MRP are not determined in accordance with one of the means provided for in Art. 3(1) and (8) of the PWD is not entitled to impose on undertakings established in other Member States negotiations at the place of work
<a href="#">C-438/05 Viking</a>	2007	Maritime transport – Right of establishment – Fundamental rights – Objectives of Community social policy – Collective action taken by a trade union organisation against a private undertaking – Collective agreement liable to deter an undertaking from registering a vessel under the flag of another Member State	While the CJEU ruled that industrial action is a fundamental right, it also stated that in trans-border situations of service provisions it is restricted by the European economic freedom and collective action must be "proportionate."
<a href="#">C-346/06 Rüffert v Land Niedersachsen</a>	2008	Article 49 EC – Freedom to provide services – Restrictions –Directive 96/71/EC – Posting of workers in the context of the provision of services – Procedures for the award of public works contracts – Social protection of workers	Interpretation of Art. 3.10 of the PWD. A public authority cannot impose in the context of public procurement to foreign contractors an obligation to respect the provisions of a generally applicable collective agreement.
<a href="#">C-319/06 Commission of the European Communities v Grand Duchy of Luxembourg</a>	2008	Public policy provisions — Weekly rest days — Obligation to produce documents relating to a posting on demand by the national authorities — Obligation to designate an ad hoc agent residing in Luxembourg to retain all the documents necessary for monitoring purposes	Interpretation of Art 3.10 of the PWD. Restricting the possibility of establishing a broader protection level by public policy provisions.
<a href="#">C-515/08 dos Santos Palhota and others</a>	2010	Freedom to provide services – Articles 56 TFEU and 57 TFEU – Posting of workers – Restrictions – Employers established in another Member State – Registration of prior declaration of posting – Social or labour documents – Equivalent to those provided for under the law of the host Member State – Copy – Keeping available to the national authorities.	The host state may require a simple declaration prior to the posting (at the latest at the commencement of the service provision). The possibility of requiring a prior declaration is in line with the CJEU's case law, which has clarified that the host state may require a prior declaration as long as it is not combined with any kind of prior registration procedure or prior control.
<a href="#">C-577/10 Commission of the European Communities v Belgium</a>	2012	Failure of a Member State to fulfil obligations – Article 56 TFEU – Freedom to provide services – National legislation which imposes a prior declaration requirement on self-employed service providers	The LIMOSA Declaration and the respective obligations for self-employed service providers are disproportionate since they go beyond what is necessary to achieve the objectives of public

CJEU case	Date of ruling	Key issues addressed	Regulatory impact
		<p>established in other Member States – Criminal penalties – Obstacle to freedom to provide services – Objectively justified distinction – Overriding requirements in the public interest – Prevention of fraud – Protection against unfair competition – Protection of self-employed workers – Proportionality</p>	<p>interest not in accordance with Art. 56 TFEU.</p>
<p><a href="#">C-522/12 Isbir</a></p>	<p>2013</p>	<p>Minimum rates of pay – Lump sums and employer contribution to a multiannual savings plan for the benefit of its employees</p>	<p>Capital formation contributions are not constituent elements of MRP. The PWD does not provide any substantive definition of the minimum wage. <i>"The task of defining what are the constituent elements of the minimum wage therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States (§37)".</i> Only those elements of remuneration <i>"which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration that he receives in return, on the other, can be taken into account in determining the minimum wage within the meaning of Directive 96/71" (§40)</i></p>
<p><a href="#">C-315/13 De Clercq and Others</a></p>	<p>2014</p>	<p>National legislation requiring the person to whom posted employees or trainees are deployed to declare those who are unable to submit the acknowledgement of receipt of the declaration which should have been made to the host Member State by their employer established in another Member State — Criminal penalty</p>	<p>Articles 56 TFEU and 57 TFEU allow a Member State to lay down legislation under which the recipient of services performed by workers posted by a service provider established in another Member State is required to declare to the competent authorities, before those workers begin to work. Such legislation is capable of being justified as safeguarding an overriding ground of public interest, such as the protection of workers or the combating of social security fraud, when that legislation is appropriate for ensuring the attainment of the legitimate objective or objectives pursued and that it does not go beyond what is necessary to achieve them.</p>
<p><a href="#">C-549/13 Bundesdruckerei</a></p>	<p>2014</p>	<p>Procedures for the award of public service contracts – National legislation requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services relating to the public contract</p>	<p>The case dealt with a public tender of the City of Dortmund as the contracting authority for the service of digitalizing documents, which the tenderer, intended to perform exclusively in Poland. The contracting authority, the city of Dortmund, nonetheless required the contractor and subcontractor to pay their employees according to the "Tariftreuegesetz" (a wage floor via public procurement that contractors and their subcontractors have to comply</p>

CJEU case	Date of ruling	Key issues addressed	Regulatory impact
			with) in the Federal State of North Rhine-Westphalia. The Court found Directive 96/71 inapplicable in this case as the contractor would not have posted workers to Germany. As it prescribed a minimum wage higher than the one applicable in Poland, the Court found the measure to be an unjustifiable restriction of Art. 56 TFEU.
<a href="#">C-586/13 Martin Meat</a>	2015	Posting of workers – Hiring out of workers – Act of Accession of 2003 – Chapter 1, paragraphs 2 and 13 of Annexe X – Transitional measures – Access of Hungarian nationals to the labour market of States already members of the European Union at the date of accession to the European Union of the Republic of Hungary – Requirement of a work permit for the hiring out of workers – Non-sensitive sectors	The CoJ clarifies that hiring-out of workers as a service depend on three basic conditions (hired-out worker remains in the employment of the undertaking providing the service; the movement of the worker to the host Member State constitutes the very purpose of the provision of services provided by the service-providing undertaking; in the context of such hiring-out, the employee carries out his/her tasks under the control and direction of the user undertaking).
<a href="#">Sähköalojen ammattiliitto ry (C-396/13)</a>	2015	Minimum wage provided for by the collective agreements of Member State B – Locus standi of a trade union with its seat in Member State B – Legislation of Member State A prohibiting the assignment to a third party of claims relating to pay	MRP in the host Member State include holiday allowances, daily flat-rate allowances for posted workers to compensate them for disadvantages entailed by the posting, and compensation for travelling time, on equal terms as local workers In contrast, coverage of the cost for accommodation, meal vouchers are not considered as constituent elements of MRP. Every worker, whatever his/her play of employment is entitled to a period of paid annual leave of at least four weeks (Art. 7 Directive 2003/88/EC). Art. 3 of Directive 96/71, read in light of Art. 56 TFEU and 57 TFEU, must be interpreted as meaning that the minimum pay which the worker must receive for the paid annual holidays, corresponds to the minimum wage to which that worker is entitled during the reference period. Rules for categorising workers into pay groups, which are applied in the host Member State on the basis of various criteria including the workers' qualifications, training and experience and/or the nature of the work performed, apply instead of the rules that are applicable to the posted worker in the home Member State.
<a href="#">RegioPost (C-115/14)</a>	2015	Legislation of a regional entity of a Member State requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services covered by the public contract.	A member state is allowed to impose in the context of public procurement the respect of the applicable rates of pay to (domestic and foreign) companies and its subcontractors (Art. 3.10 of the PWD).

Source: Author.

## Annex 2: The scope of Article 3.9 PWD

Pursuant to Article 3.9 of the PWD, Member States may provide that the temporary agencies must guarantee posted workers “the terms and conditions” which apply to temporary workers in the Member State where the work is carried out. Does the expression “terms and conditions” refer to any working conditions *lato sensu* (including rights provided by articles 6 and subs. of Directive 2008/104) or only to “*basic working and employment conditions*” such as defined by Article 5 of the “TAW Directive”?

In our view the narrow interpretation should prevail. At first glance, if nothing in the text of the posting Directive would prevent a broad interpretation of the expression “terms and conditions”, such interpretation would go against the coherence of both directives.

**The Posting Directive is based on the principle of free movement of services: the need for a narrow interpretation of Article 3.9 PWD.** The law of the country of temporary activity should apply to a provision of service only for what is necessary and proportionate. The law of this country should not become an unjustified obstacle to the principle of free movement of services. According to settled case law, the provisions of the Posting Directive which allow for the application of the law of the country of temporary activity must be interpreted narrowly.

Let us finally recall that Article 3.7 (“*terms and conditions of employment which are more favourable to workers*”) and Article 3.10 (“*terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions*”) constitute specific grounds for an extension of rights for cross-border TAW posted workers, but the Court of Justice ruled in favour of a restrictive interpretation of these provisions and, in fact, reduced their useful effect.

**A narrow interpretation of article 3.9 of the PWD is supported by the fact that posted workers do not access the local job market.** A broad interpretation of the scope of Article 3.9 of the posting Directive would not be coherent for an operation of cross-border TAW posting. The Court of Justice case law is based on the principle that posted workers “*return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State*” (CJEU *Rush Portuguesa*). By definition, a posted worker is meant to go back to the country of habitual work. He is not – nor is he supposed to turn into – a local worker. Thus, it would not be relevant to extend to posted workers a set of rules which are designed for workers who belong to the local job market. In particular, the extension to temporary agency workers of the rule on access to employment and vocational training (Art.6) would not make sense. The same remark can be made about Articles 7 and 8 of the TAW Directive which deal with the representation of temporary agency workers / Information of workers representatives.

**A narrow interpretation of Article 3.9 of the PWD is motivated by the nature of rights contained in Articles 6 and subs. of the TAW Directive.** Articles 6 and subs. cover a set of rights which are granted to workers who belong to the working community. Stability is a key element in order to be part of a working community. Cross-border posted TAW workers who, by definition, are working temporarily in that country, do not belong to the user company working community and they will not in the future (unlike local TAW workers who may). Consequently, access to rights such as collective facilities (see article 6) should be denied to cross-border TAW workers.

**The narrow interpretation of the scope of Article 3.9 of the PWD is consolidated by the proposal of revised Directive of 8 March 2016 (Com (2016) 128 final).** In this proposal indeed, the Commission clarifies the matter: Member States “*shall provide*” that the temporary agencies guarantee posted workers “*the terms and conditions which apply pursuant to Art. 5 Directive 2008/104/EC*”.

### Annex 3: Social partners' assessments of the EU Commission's proposal for a revision of the PWD

ORGANISATION	KEY POSITIONS
<p><b>ETUC</b> (European Trades Union Congress)</p>	<ul style="list-style-type: none"> <li>• The ETUC welcomes the proposed wording on remuneration in the targeted revision of the PWD as it would reflect CJEU judgements and inconsistencies regarding 'minimum rates of pay'</li> <li>• However, the ETUC still is not satisfied with the proposal as it is not providing for unconditional equal pay for posted workers, which has been a key demand of the ETUC and its member organisations in all EU Member States</li> <li>• The revised Directive should also include a clear commitment that competition on labour costs in the context of posting is not accepted.</li> <li>• However, the proposed restrictive definition of the type of collective agreements recognised is not satisfactory: excluding most sectoral collective agreements, and all company level agreements. In contrast, the ETUC demands a sufficient flexibility to be introduced in Art. 3.8 of the PWD as to enable the recognition of generally applicable collective agreements as well as company level agreements. Otherwise equal pay for equal work at the same place will not be feasible.</li> <li>• A 24-month duration for posting is too long a period, which does not correspond with the reality of posting today. In any case, the draft opens a door for circumvention of the time limit. The maximum duration of posting should be determined by the host Member State, in consultation with the relevant social partners. The revision is very narrow and fails to include a number of elements to stop the exploitation of workers, including full respect for the fundamental right to collective bargaining and collective action in the host Member State and a mandatory joint and several liability mechanisms in the subcontracting chain.</li> <li>• In the case of temporary agency work, the ETUC demands a clear requirement of a previous period of employment in the country of origin. A temporary agency worker with no previous period of employment in the country of origin should be considered as being habitually employed in the host country. Furthermore, Art 3.9 of the current PWD should be reintroduced as it clarifies that a temporary agency worker should benefit from equal treatment with a comparable worker in the host Member State.</li> </ul>
<p><b>BUSINESSEUROPE</b></p>	<ul style="list-style-type: none"> <li>• BUSINESSEUROPE is against the Commission's decision to revise the Posting of Workers Directive. This will trigger a prolonged period of debate and political divisions between Member States.</li> <li>• The existing Posting Directive provides a fair and level playing field. It adequately protects posted workers in line with the rules and cost of life in a host country, including the respect of minimum rates of pay of the host country as providing a decent level of income in that Member State.</li> <li>• To promote fair competition, the policy focus should be on fighting illegal practices, including through implementation of the 2014 Enforcement Directive. On the contrary, by making lawful postings very difficult the Commission's proposal would have the unintended consequence of increasing the incentives for undeclared work, bogus self-employment and other illegal practices.</li> <li>• The Commission's proposal is an attack on the single market. Through new disproportional rules on remuneration, longer postings, and subcontracting it undermines the competitive position of foreign services providers. If adopted, it would hamper cross-border trade in services and consequently overall growth and employment creation as well as convergence in the EU. The proposal would also interfere in national wage-setting systems. It seems to imply that companies in subcontracting chains can be obliged to pay the same wages no matter the differences in their productivity and the productivity of individual workers. It may also lead to a situation where workers employed by the same employer, performing the same tasks are being paid differently, depending on a subcontracting contract their employer is involved in.</li> <li>• In countries where posting of workers is hotly debated most examples mentioned in the public debate are in fact illegal practices. When it concerns legal postings the key issue to address is the lack of competitiveness of domestic enterprises due to excessive labour costs or lack of productivity and innovation. Reducing or shifting taxes away from labour is what is needed in these countries to increase employment opportunities.</li> <li>• BUSINESSEUROPE aims to encourage and support Member States to fight illegal practices and improve the enforcement of the provisions of Directive 96/71/EC</li> </ul>

ORGANISATION	KEY POSITIONS
	by promoting the transposition and effective application of the Enforcement Directive 2014/67/EU.
<p><b>EFBWW</b> (European Federation of Building and Woodworkers)</p>	<ul style="list-style-type: none"> <li>• The EFBWW believes that the proposed APWD addresses <i>only to a certain extent</i> the measures which need to be put in place if a fair and genuine competitive labour market is to be achieved, and that it therefore requires additional work on a number of points.</li> <li>• With regards to the legal basis, the EFBWW believes that the legal basis of the PWD needs to be brought into line with the new EU Treaty to give the former a more balanced foundation. Thus legal basis should be extended to express reference to both the Articles 57 TFEU[6] Article and 153(1)(b) TFEU.</li> <li>• The PWD should not restrict what kind of collective agreements can be applied to posted workers. Moreover, Member States, which have a system for declaring collective agreements universally applicable, should not be precluded from applying other types of collective agreements to posted workers, while Member States which rely on article 3.8 second subparagraph PWD – collective agreements which are “generally applicable” and/or have been concluded by the most representative organizations on national level – should be able to continue doing so and if they so desire not be precluded from making collective agreements universally applicable.</li> <li>• Regarding the duration of posting the EFBWW has highlighted a number of problems and aspects that should be considered. It regards the 24-limit as extremely long and not reflecting the average durations. Here, it also recalls the joint EFBWW/FIEC position of February 2015 that includes a similar assessment.<sup>101</sup></li> <li>• For the EFBWW the discussion surrounding the APWD should not be seen as an isolated topic; it is inextricably linked to, among other initiatives, the proposed revision of Regulation (EC) No. 883/2004 and, specifically, an updated/ efficient A1/E101 scheme and a more efficient and effective collection of social security contributions.</li> <li>• The EFBWW welcomes the extension of the application of the PWD to all sectors. However it demands that with view on collective agreements the restriction to those “which have been declared universally applicable” should be deleted. Posted workers must also be entitled to the rate of remuneration detailed in the collective agreements in force at regional level in the host country.</li> <li>• The proposed amendment to replace the concept of “minimum rates of pay” by “remuneration”, the proposed definition, and the proposed requirement to publish details of the constituent elements of “remuneration” are positive, but require utmost special attention.</li> <li>• For the EFBWW Recital 12 of the proposal which stipulates that Member States must be able to justify the remuneration applied to posted workers by the need to protect them, and that remuneration may not be disproportionate, is totally unacceptable.</li> <li>• With view on liability in the context of subcontracting the EFBWW points out that the proposed option to extend some of the rules which apply in a national context to subcontractors does not reflect the reality in many Member State with a federal system or with autonomous regions or with communal rule setting for e.g. public procurement.</li> <li>• With regards to posted temporary agency workers and the significant problems that exist in the construction sector in this regard, the EFBWW calls on the Commission to amend its proposal so as to make it clear that at least all the basic conditions as defined in article 3 of the TAW Directive shall be guaranteed, and that Member States also must apply other conditions, provided they are applied to local TAW workers. This would avoid any ambiguity in the future and would ensure that the original purpose of affording all temporary agency workers posted to another Member State the same conditions of employment and remuneration is retained.</li> </ul>
<p><b>FIEC</b> (European Construction Industry Federation)</p>	<ul style="list-style-type: none"> <li>• After a first assessment of the proposal of the Commission, its real added value remains questionable to FIEC. The organisation does not consider that the reference to the “remuneration” will provide a real useful added value.</li> </ul>

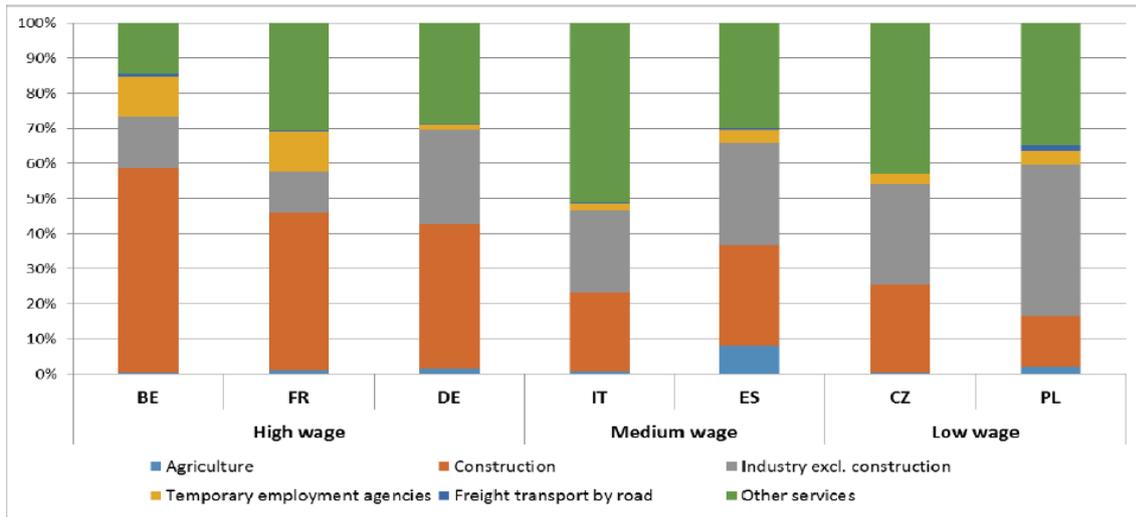
<sup>101</sup> Joint position EFBWW and FIEC, 27 February 2015: Towards a level playing field in the European construction sector - Joint proposals of the EU sectoral social partners.

ORGANISATION	KEY POSITIONS
	<ul style="list-style-type: none"> <li>• FIEC points out that it was not demanding any modifications to the "Posting" Directive and, in a joint position with the EFBWW in February 2015, had proposed a number of practical proposals aimed at improving the current situation and at avoiding abuses. <i>"Such proposed measures could have been put in place without re-opening the Directive itself, thereby avoiding a political debate, which, both within the European Parliament and the Council of Ministers, may divide the European Union further"</i>.</li> <li>• Before expressing an overall view on the "Labour mobility package" FIEC would like to see which decisions will be taken in relation to the "Social security" Regulation (883/2004/EC). Although they are separate pieces of legislation there are clear links and interactions between the two in the framework of the free provision of services.</li> <li>• However, FIEC considers that the clarification regarding the treatment of temporary agency workers in the case of posting, obliging the Member States to apply to cross-border agencies the same conditions applied to national ones, <i>"can effectively improve the situation in some Member States"</i>.</li> </ul>
<b>EBC</b> (European Builders Confederation)	<ul style="list-style-type: none"> <li>• In the context of a speech delivered at the EPSCO Council in April 2016 the President of EBC, representing construction micro companies and SMEs, said? That the organisation <i>"welcomes the fact that the European Commission took its foot off the brake and proposed a new Directive on posting of workers"</i>.</li> <li>• With regards to the experience that micro and small construction companies are particularly suffering from unfair competition and social dumping due to posting EBC hopes that the <i>"revision will finally be the occasion to face the reality of the current posting situations"</i>.</li> <li>• According to the EBC President the proposal of the Commission includes some positive elements to define the status of a posted worker and therefore to fight against bogus posting. At the same time he stressed that this is not enough – there is a need for a <i>"new culture of posting and competitiveness that is based on innovation or specialisation, not just on wage differentials"</i>.</li> </ul>
<b>Eurociett</b> (European Confederation of Private Employment Services)	<ul style="list-style-type: none"> <li>• According to a press statement of Eurociett published on 8 March 2016 there is no need for a revision of the PWD in order to ensure fair labour mobility. However, the organisation supports the principle of equal pay for equal work as defined by the EU Directive on temporary agency work to be applied to posted agency workers</li> <li>• Instead of opening up the Directive, the focus should be on a complete transposition of the Enforcement Directive on the Posting of Workers.</li> <li>• Eurociett recalled that in the case of posted agency workers providing for equal pay for equal work is already an option available to Member States under the PWD that is already used by around 16 Member States.</li> <li>• According to the organisation's Managing Director, "Eurociett supports the application of the principle of equal pay as defined in the EU Directive on temporary agency work to posted agency workers, <i>including the option of derogations</i>. Revision of the Posting of Workers Directive is therefore not needed (...)."</li> </ul>

**Source:** Author, on the basis of press statements, initial assessment as provided in written form or in interviews.

**Annex 4: Statistical tables and data**

**Figure 3: Posted workers received in 2014, by sector and selected group of countries**



Source: EU Commission, Impact Assessment 2016, p.67

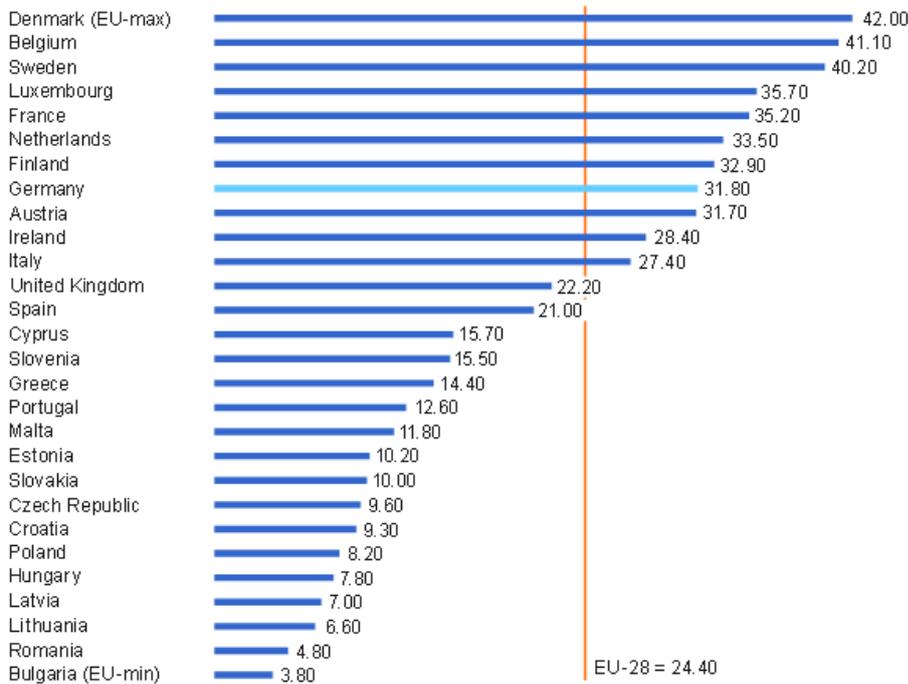
**Figure 4: Labour costs in the private sector, 2014**

Labour costs consist of gross earnings and non-wage costs. In 2014, the highest non-wage costs per 100 euros of wage were paid in France (47 euros), Sweden (46 euros) and Belgium (44 euros); the lowest in Malta (9 euros), Denmark and Luxembourg (15 euros), Croatia and Ireland (18 euros).

The main component of non-wage costs is the employers' social contributions, that is, especially the employers' statutory social security contributions, expenditure on employee pension schemes and expenditure on continued pay in case of sickness.

**Labour cost in the private sector, 2014**

per hour worked in EUR



Source: Own computations on the basis of Eurostat data.

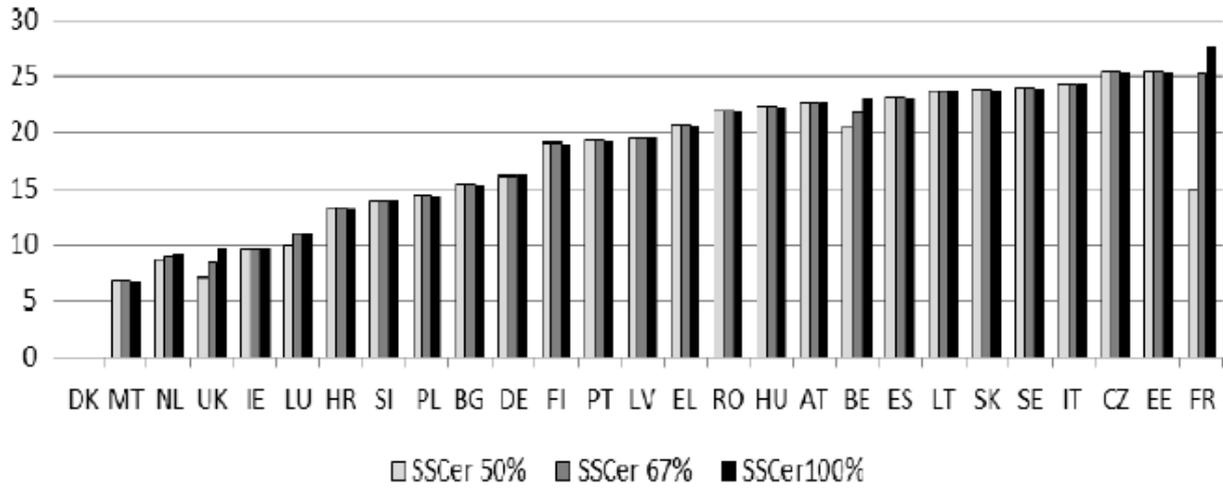
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**Table 12: Labour costs per hour worked and non-wage labour costs, private sector, 2014**

Country	Labour costs per hour worked	Employers paid an additional x euros of non-wage costs per 100 euros of gross earnings	Non-wage labour costs as a % of total
Denmark	42.00	15	13.9
Belgium	41.10	44	27.8
Sweden	40.20	46	32.1
Luxembourg	35.70	16	13.5
France	35.20	47	33.2
Netherlands	33.50	33	23.7
Finland	32.90	27	22.4
Germany	31.80	28	22.3
Austria	31.70	36	26.3
Ireland	28.40	18	13.7
Italy	27.40	39	27.9
United Kingdom	22.20	19	16.8
Spain	21.00	36	25.4
Cyprus	15.70	20	17.1
Slovenia	15.50	18	15.9
Greece	14.40	30	23.8
Portugal	12.60	27	20.4
Malta	11.80	9	6.6
Estonia	10.20	36	26.3
Slovakia	10.00	36	26.4
Czech Republic	9.60	37	27.1
Croatia	9.30	18	14.9
Poland	8.20	23	18.3
Hungary	7.80	30	22.7
Latvia	7.00	25	20.1
Lithuania	6.60	41	27.8
Romania	4.80	30	22.0
Bulgaria	3.80	19	15.7
EU 28	24.40	31	24.0
Euro Area	29.20	35	26.0

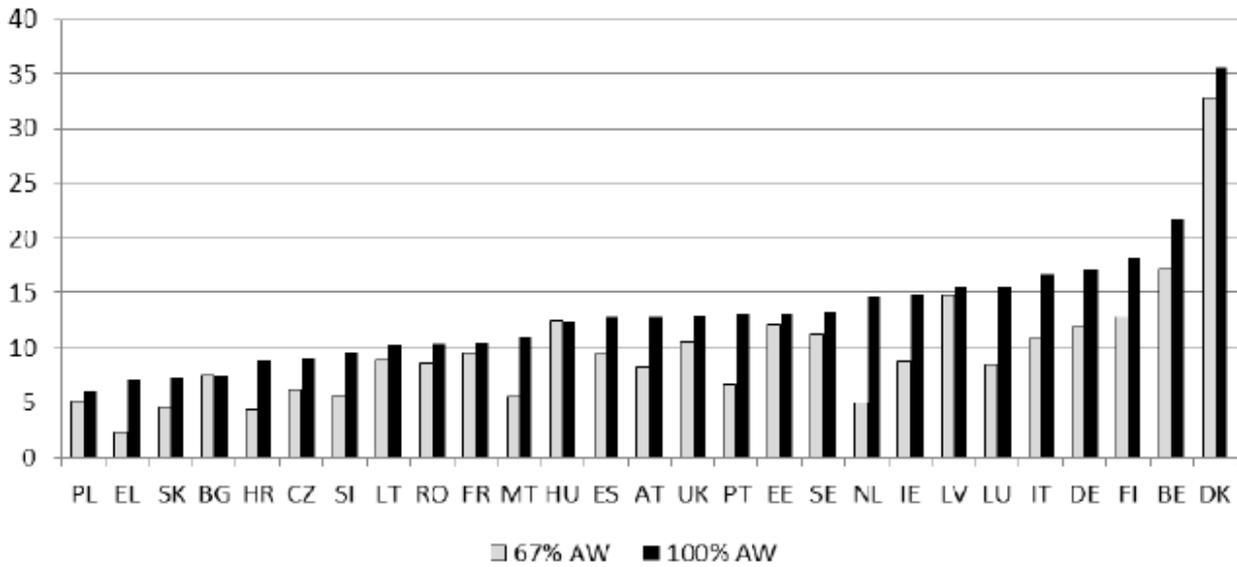
**Source:** Author's calculation on the basis of Eurostat data of April 2015.

**Figure 5: Social contribution rates paid by employers (at 50/67/100% of the average wage) , EU 28, year 2014**



Source: EU Commission Impact Assessment, p. 68.

**Figure 6: Personal income tax rates, at 67% and 100% of average wage (single person), 2014**



Source: EU Commission Impact Assessment, p. 68.

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# NOTES



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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