

POSTED WORKERS IN THE EU: STATE OF PLAY AND REGULATORY EVOLUTION

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EXECUTIVE SUMMARY

Over the years, posting of workers has come to symbolise the deep-running tensions between social and economic pillars of European integration. Posting consists of temporary movement of labour between member states with the aim of encouraging more competition in European service markets. However, the existing regulatory loopholes allow the companies to abuse these temporary workers and engage in unfair competition leading to social “race-to-the-bottom” between the member states. Consequentially, even though the phenomenon of posting between member states is very limited in scope, it represents wider public concern about the future socio-economic equilibrium and the overall legitimacy of the EU. How to ensure sufficient levels of competition while at the same time safeguarding social acquis of European citizens?

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Today the question is on the top of socio-economic EU agenda. European Commission has proposed a new so-called Enforcement Directive to reinforce the current regulatory framework. The amended form of this Directive has been adopted by the Council of Ministers and is now under the scrutiny of the European Parliament (EP). Employment and Social Affairs Committee of the EP has endorsed the Directive on 18 March 2014 and it will now be voted by the EP as a whole in the April session.

The political sensitivity of the issue also makes it one of the “hot potatoes” of the upcoming European elections and puts it under discussion in the wider public arena.

However, despite of significant media attention and intense public debate at least in several member states, including France, various intricacies related to posting often remain obscure and misunderstood. Such confusion can be convenient for anti-European forces, especially before the election.

The aim of this policy paper is to shed some light on various aspects and layers related to the posting phenomenon in Europe. The paper is divided into three sections to give a complete picture of this practice in the EU.

The first section provides the background information and the state of play of posting today. To start with (1.1), the arguments for and against posting are recalled. Indeed, even though posting tends to be viewed negatively in many more developed welfare states, positive economic effects generated by the practice can be significant for every member state separately and the EU as a whole. The section continues (1.2) with an overview of available data to grasp and the extent of posting and its geographical distribution in Europe. Data reveals that posting concerns a tiny proportion of EU workforce only and is highly concentrated in several member states and in certain sectors of economic activity.

The second section discusses the legal framework that has been governing posting since the adoption of the Posted Workers Directive in 1996 (PWD’96). The Directive has been conceived with the good intentions of encouraging economic competition and ensuring social protection for posted workers; however the EU enlargements and subsequent decisions of the European Court of Justice (ECJ) have significantly altered the founding principles of this piece of legislation (2.1). The section (2.2) also deals with tangent regulations related to social coordination in Europe. As posted workers remain attached to their home country social security systems, various questions related to possible tax competition between member states are addressed.

The third and final section of the paper analyses the weaknesses of the current framework (3.1) and the new proposals enshrined in the Enforcement Directive (3.2). This directive will undoubtedly reduce the scope of fraudulent behaviour by posting firms, yet it may not be sufficient to ensure genuinely fair competition for posted workers. Lastly, several ways of further reinforcement are discussed (3.3). More competition must be complemented with solidarity and cooperation mechanisms to ensure fair and competitive future for European economy and society.

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INTRODUCTION

Posting of workers has increasingly become a highly politicised and highly mediatised issue, often referred to as a prime example of unfair competition or “social dumping”.¹ The question is extremely sensitive in the member states where the cost of labour is high and is subject to fierce competition from the less expensive posted work. Indeed, there is a general sentiment that deepening of the single market in the past decades has effectively enabled firms to post workers freely and arguably “optimise” social laws to their own benefit and at the detriment of more generous welfare states. Such strategies were made attractive by subsequent waves of EU enlargement towards increasingly less prosperous welfare states and cheaper labour destinations (first Southwards and then Eastwards).

“ POSTING OF WORKERS IS OFTEN REFERRED TO AS A PRIME EXAMPLE OF ‘SOCIAL DUMPING’ ”

Today the question is as topical as ever for at least three reasons. First, an important legislative proposal on the posting of workers has been adopted by the Council and is now being discussed in the European Parliament (EP) with a final compromise expected in April’s plenary session. Second, against the backdrop of economic and financial crisis, the general sentiment of many European citizens has become particularly gloomy, as they feel insecure about losing national jobs to foreign workers. Third, with the upcoming EP elections in May 2014, various political actors escalate the topic hoping to earn certain political dividends.

The aim of this policy paper is to shed some light on the complex issue of posting from economic and legal perspectives. The first part of the paper overviews why posting is important for European economies and to what extent posting of workers is widespread in the EU today. In the second part, current legislative framework and its applications are discussed. The third and final part analyses recent legislative initiatives and whether they are sufficient to ensure fair competition in the EU.

1. Posted workers in Europe today: what is it all about?

In order to better understand the policy debate that is currently going on at the EU level, it is important to identify the logic behind and the extent of the posting phenomenon in the EU. The purpose of this section is twofold. First, it outlines the benefits and the risks associated with the posting of workers (1.1). Second, it provides an overview of available facts and figures about the overall numbers of the posted workers, their evolution in time, their presence in different sectors and different member states (1.2).

1.1. The rationale for posting workers in the EU

It is important to start the discussion on posted workers by providing a clear understanding of what it is. Quite often in the media and public debate the notion of posted workers is intertwined with the free movement of labour and the famous “Polish plumber”. Indeed, evidence suggests that “the debate at national level

1. For a more nuanced discussion of the issues related to social dumping, please see Mastauskaite Kristina, “Social Competition: Myths and Realities”, *Notre Europe – Jacques Delors Institute, Study & Report No. 97*, June 2013, Paris.

often does not clearly distinguish between posted workers and the broader phenomenon of migrant or foreign workers.² However, the posting of workers is in fact an outcome of one of the other three freedoms of the single market, namely the free cross-border provision of services. It follows that companies can post their workers to provide a well-defined service across borders on a temporary basis.

**“ POSTING OF WORKERS
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IN THE EU ”**

The general logic behind the posting of workers phenomenon in the EU is rather straightforward: trans-border provision of services can bring the benefits of a more competitive market equilibrium and an increase of welfare in the EU. Today, intra-EU trade in services, which accounts for three quarters of EU GDP, remains sub-optimal, whereas productivity levels are lagging behind.³ Such poor performance is often attributed to incomplete and fragmented EU single market in services. Despite existing legislation (such as the Treaty provisions on free establishment or the so-called “Bolkestein Directive”), EU businesses still struggle to freely supply services in all member states. As a result, the lack of competition means higher prices for European consumers and producers at all stages of production, less innovation and lower quality as well as reduced European competitiveness on the global markets. Posting of workers, which is one of several ways to boost competition in services, is expected to add to rectifying this suboptimal situation.

In addition, a number of more specific benefits can be associated with the posting of workers. For instance, such short-term migration of labour might help shield cyclical divergences on sectorial or national levels. Companies may thus keep their experienced workers without having to go through firing-and-hiring procedures depending on economic cycle of one member state whereas workers get to keep their jobs, albeit temporarily based in another member state. Other obvious benefits of posting relate to better job matching, reduction of skilled work shortages in specific sectors of economic activity and facilitated international exchange of knowledge. Finally, posted workers might have a significant positive impact on firms’ competitiveness, internationalization and productivity levels⁴.

At the same time, the posting of workers can give rise to numerous risks and dangers. Often posted workers can be in a vulnerable position due to poor knowledge of local language, lack of information and social connections, all of which can entice abusive behaviour by their employees. For example, posted workers might be asked to work longer hours, be paid less than the minimum salary or work in poorer health and safety environment than local workers. Other types of risks might relate to “creation of more/longer subcontracting chains and intermediate agencies for recruitment thereby increasing market complexity and having a negative effect on market transparency”.⁵ Finally, there is a risk of “social dumping” whereby cheaper posted foreign employees displace national workers and the national authorities are forced to downgrade existing labour rights to prevent unemployment.

1.2. Facts and figures: small, but increasing phenomenon

1.2.1. Data availability and estimation method

Before analysing legal complexities of posting in the EU, it is useful to look into some facts and figures in order to apprehend the scope and the significance of this phenomenon in the EU. Nevertheless, it should be emphasized that there is no one perfect data source that could give exact and comparable numbers of posted workers

2. Eurofound, “Posted workers in the European Union”, 2010, Dublin (p. 2).

3. See, for example, Uppenberg Kristian, “Economic growth in the US and the EU: a sectoral decomposition” in “Productivity and Growth in Europe: Long term trends, current challenges, and the role of economic dynamism”, *EIB Papers*, Vol. 16 (1), 2011.

4. IDEA Consult, “Study on the economic and social effects associated with the phenomenon of posting of workers in the EU”, on behalf of the European Commission Directorate General Employment, Social Affairs and Equal Opportunities, Final Report, 2011, Brussels (p. 8).

5. *Idem*, p. 152.

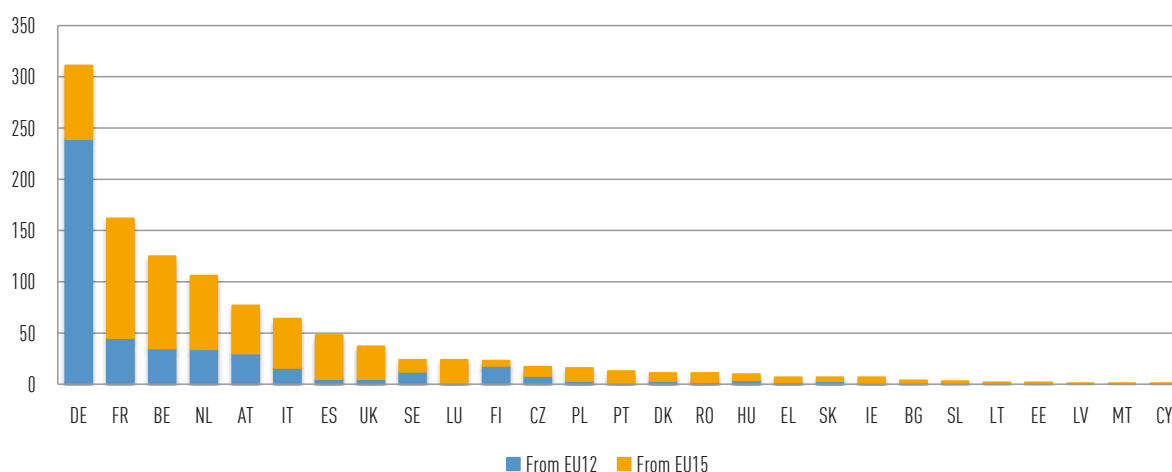
across member states. Unfortunately, no EU-wide register exists while national estimations are available in a few countries only and are not directly comparable.⁶

The usual estimation method used by the European Commission (EC) concerns the administrative forms A1⁷ that are used for social policy coordination between the member states. Despite the fact that these data suffer from some methodological problems and can only be used as a proxy,⁸ A1 numbers can provide a fair magnitude of order of the posting phenomenon. Overall, it should be noted that posted workers constitute only a tiny fraction of EU labour force. According to the latest data for 2011, European Commission suggests that around 1.2 million workers, or less than 1% of EU working age population, can be considered as posted workers throughout the EU and EFTA.⁹ Even though the time span of reliable data is rather short (2007-2011)¹⁰, it suggests that the number of postings was stagnating during 2008 and 2009 (at around 1 million), but has been on the rise since, especially between 2010 and 2011¹¹.

1.2.2. Geographical realities

In terms of receiving countries, over 80% of posted work is carried out on the soil of the EU15. Top host countries for posted labour consist of Germany (311,000), followed by France (162,000), Belgium (125,000) and the Netherlands (106,000). As shown in Figure 1, in many member states, such as France, Belgium, Netherlands and Austria, the overwhelming majority of posted workers come from the old member states. There are only three countries, namely Germany, Sweden and Finland, where the proportion of workers coming from the EU12 is larger.

FIGURE 1 ► Postings by Destination Country, 2011 (in thousands)



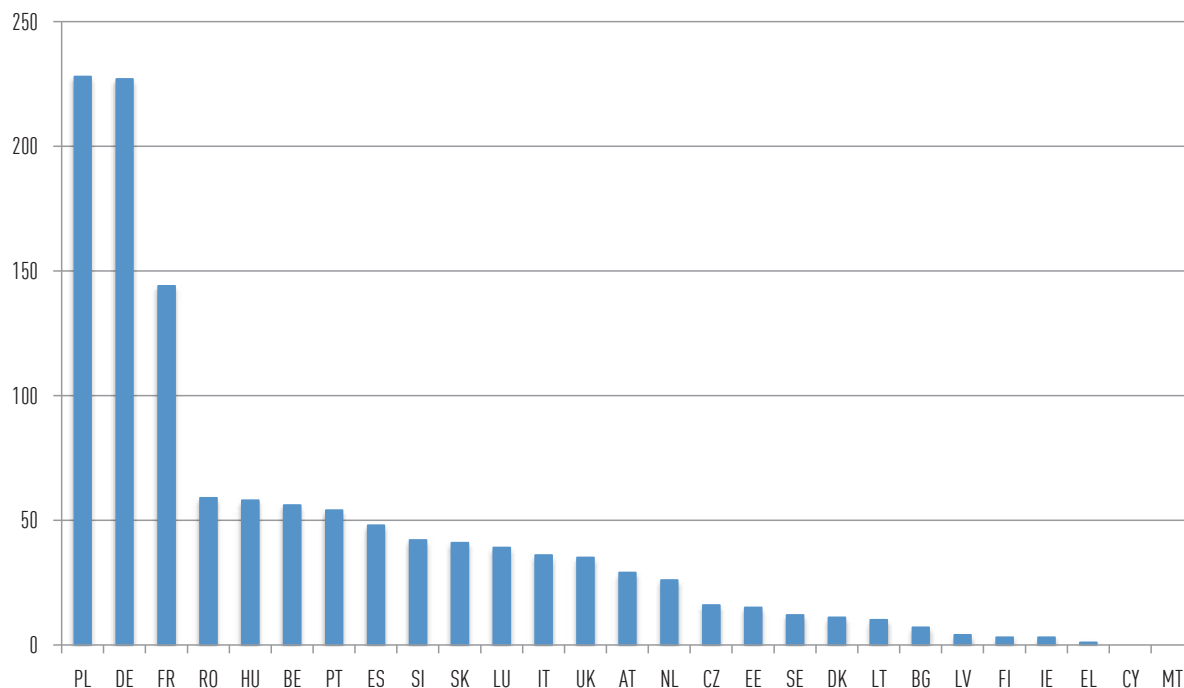
Data source: European Commission¹²

Indeed, as regards the country of origin, it is not true that all posted workers in the EU come from the new member states. In fact, generally speaking, EU15 member states send more workers than EU12: 60% and 40% respectively. In absolute numbers (Figure 2), three biggest sending countries for posted workers are the

6. Ismeri Europa, "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, 2012, Brussels (p. 37).
 7. An A1 (formerly E101) statement is a document stating the country in which a worker is covered by social insurance. The A1 forms are issued not only for posting as defined in Art. 12 of Regulation (EC) no. 883/2004, but also other activities such as international transport or persons working in 2 or more member states as defined in Art. 13 of the same regulation. In this policy paper the data used relates to posting of workers only.
 8. The definition of posting workers is not identical in the regulation concerning the social security and the posting workers directive; therefore, some posted workers are undoubtedly misrepresented. For example, companies might not apply for A1 if the worker is posted for a very short period of time only for social security purposes. In addition, postings of above 12 months are not considered as postings in terms of social security. Finally, same worker can be posted a number of times per year; therefore, E101 would only reflect a number of postings rather than a number of posted workers.
 9. European Commission, "Posting of workers: EU safeguards against social dumping", Communication, 2013, Brussels.
 10. Data is available since 2005, but it is not reliable until 2007 due to numerous omissions.
 11. DG Employment, Social Affairs and Inclusion, "Posting of workers in the European Union and EFTA countries: Report on A1 portable documents issued in 2010 and 2011", 2012, Brussels.
 12. *Ibid.*

biggest leading economies of both country “blocs”: Poland (228,000) sends the most workers, but is closely followed by Germany (227,000) and France (144,000).

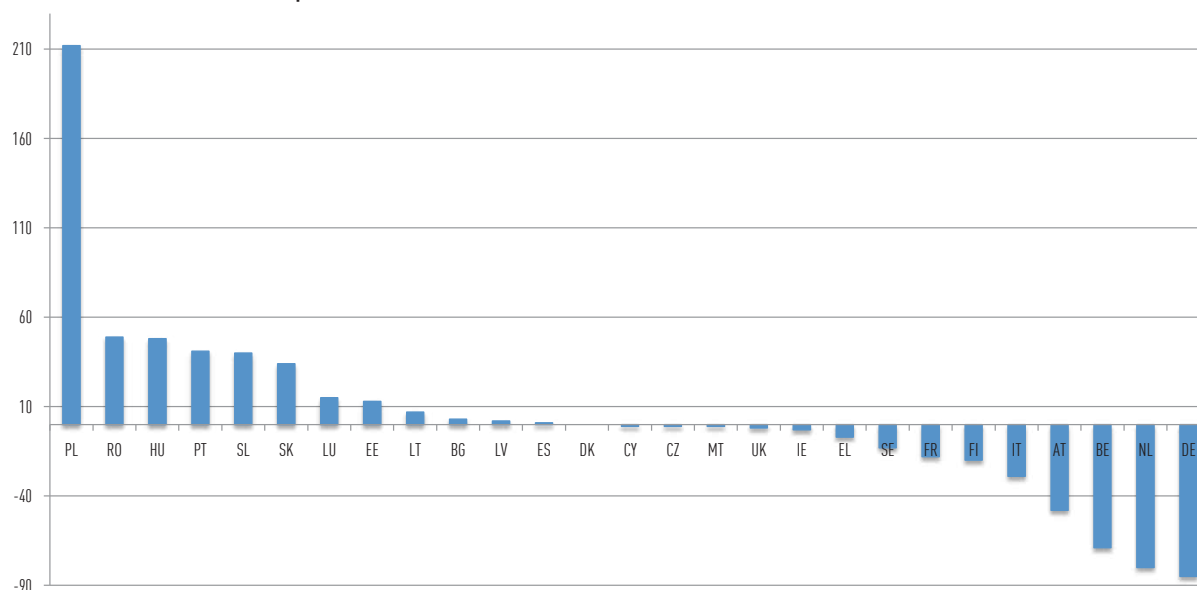
FIGURE 2 ▶ Postings by Sending Country, 2011 (in thousands)



Data source: European Commission¹³

Figure 3 depicts the net balance between the posted workers sent and received. Germany together with Belgium and Netherlands are the main net receivers, whereas Poland (followed by many other EU12 member states) is the overwhelming leader in posting workers abroad.

FIGURE 3 ▶ Net balance between posted workers sent and received in 2011



Data source: European Commission¹⁴

13. *Ibid.*
14. *Ibid.*

Another important aspect about posting is that geographical proximity matters. Posted workers from Central and Eastern Europe mostly get sent to Germany. Despite the folkloric image of Polish plumber in France, only 11% of Polish posted workers move to the Hexagon.¹⁵ France is the prime choice for posted workers from Luxembourg, UK, Belgium and Spain. In their turn, posted workers from France mostly go to Belgium, Germany and Italy. The trends observed by the EC clearly indicate that geographic proximity can be considered as a main explanatory variable of posting patterns.¹⁶

1.2.3. Sectorial developments

Absolute numbers say nothing about sectorial developments, which can reveal many interesting trends, too. Even though sectorial data is even more difficult to obtain, European Commission provides rough partial estimates (based on data from 14 member states)¹⁷ suggesting that 71% of all posted workers work in industry, 27% in services and only 2.5% in agriculture and fishing.

Within industry, construction is the most affected sector employing 43% of all posted EU workers. In addition, almost a half (47%) of all workers that were posted from Poland, the largest sending country, worked in construction sector, a third (29%) in services, a fifth (20%) in other industries and 4% in agriculture.

There is no EU-level data on sectorial differences in the receiving countries; yet this data is available for France (Table 1). As mentioned above, in France, where the notion of posted workers is often confounded with the cheap labour from the East, almost two thirds (59%) of posted workers came from EU15 in 2012, even though the proportion of workers coming from the EU12 is slowly growing.¹⁸

TABLE 1 ► Weight of declarations by economic sector and country bloc in France in 2012

	AGRICULTURE	CONSTRUCTION	HOSPITALITY AND TOURISM	INDUSTRY	CULTURE/ PERFORMANCES	INTERIM AGENCIES	INTRACOMPANY MOBILITY	OTHER	TOTAL
EU15	25%	60%	59%	58%	64%	68%	60%	56%	59%
EU12	39%	37%	40%	36%	2%	32%	16%	36%	34%
Third countries	37%	3%	0%	5%	34%	0%	24%	9%	6%

Source: Direction générale du travail¹⁹

It has been also argued that workers coming to France from EU15 and EU12 are not of the same nature,²⁰ i.e. workers coming from the new member states tend to work in less qualified sectors. Table 1, therefore, compares the weight of EU12 versus EU15 posted workers in a given sector in France. One interesting observation is that in neither of the sectors do the workers from EU12 represent more than 40% of all posted workers. As the total proportion of EU12 posted workers in France is 34%, it implies that posted workers from the new member states are proportionally distributed across sectors; therefore it cannot be claimed that the presence of posted workers from EU12 in some sectors is disproportionately high (even though the proportion is slightly higher in hospitality and agriculture sectors). However, it is true that posted workers from EU12 rarely get posted within international companies or to provide cultural services.

15. *Ibid.*

16. *Ibid.*

17. *Ibid.* The numbers are based on partial data as only 14 countries have provided relevant data on the breakdown by economic activity. Germany and France are excluded from these numbers, for example.

18. Direction générale du travail, "Analyse des déclarations de détachement des entreprises prestataires de services en France en 2012", 2013, Paris (p. 4).

19. Direction générale du travail, *op. cit.*, p. 23.

20. Bocquet Eric, "Rapport d'information fait au nom de la commission des affaires européennes sur les normes européennes en matière de détachement des travailleurs", Sénat, No. 527, 2013, Paris (p. 16).

2. Posted workers: EU regulatory framework

After providing the general overview of the logic and the state of play of posting within European single market, this section looks into the basic regulatory framework governing temporary provision of services across borders. Two different aspects are discussed: the provisions foreseen by the Directive 96/71/EC²¹ and the significance of European Court of Justice (ECJ) rulings (2.1) as well as the notion and scope of social coordination (2.2).

2.3. Directive and the role of ECJ

2.1.1. Directive 96/71/EC

“THE DIRECTIVE ON POSTING ATTEMPTS TO RECONCILE ECONOMIC FREEDOMS WITH SOCIAL COHESION”

Directive 96/71/EC (PWD'96) was conceived in order to maximise the benefits and to minimise the risks of posting as discussed in section 1.1. It attempts to reconcile economic freedoms guaranteed by the single market and social cohesion, one of the core values of European integration. Generally speaking, PWD'96 remains as unrestrictive as possible in terms of free provision of services and defines a set of common social rights to avoid social competition.

In terms of economic rights, the Directive maximises the scope for posting by remaining elusive about several key concepts. Two of the definitions (or, rather, the lack thereof) have been particularly problematic.

The first one relates to the posted worker who is defined as “a worker who, for a limited period, carries out his work in the territory of the member state other than the state in which he normally works”. The absence of any precise indication of this “limited” period makes it difficult to qualify a posted worker as such.

Another controversy arises from the fact that the Directive applies to the undertakings established in a member state, which posts workers to the territory of other member states; yet the exact meaning of “establishment” is not clear either. Obviously, one of the consequences of such a lack of clarity is that it enlarges the possibilities for posting.

The Directive 96/71/EC is more precise as per the types of posting that can be used by the companies. First, posting (as it is most commonly understood) means that a company based in one member state can send its workers to another member state for the provision of services. Second, “intra-corporate” posting allows multinational enterprises to shift their workers temporarily across corporate branches in different member states. Third, workers might be employed and posted by temporary employment and placement agencies.

In terms of social rights, PWD'96 foresees a host country control principle for matters related to labour law. It enumerates a set of “hard core” minimum employment terms and conditions (Box 1) to be respected according to the principle of *lex loci laboris*²². All other labour law matters falling outside this set of pre-defined rights are to be applied in a non-discriminatory manner, and based on mandatory rules (of labour law and/or generally applicable collective agreements). Member states are allowed to apply other labour rights “in the case of public policy provision” provided the equality of treatment is guaranteed (Art. 3.10). Collective agreements can also extend this list if these agreements are “universally applicable (i.e. “observed by all undertakings in the geographical area and in the profession or industry concerned”).

21. 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, 1996, Brussels.

22. The Directive foresees that the core rights must be applied in the construction sector and may be applied in other sectors too.

BOX 1 ► Hard nucleus of minimum labour rights foreseen by the PWD'96 (Art. 3.1)

- (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.
-

From the onset, the Posted Workers Directive was meant to provide minimum social floors to be respected by all member states while at the same time all member states were free to apply “terms and conditions of employment which are more favourable to workers” (Art. 3.7). In other words, the core rights listed in the Directive were non-regressive with a possibility of upward upgrading (the principle of “floor, but not ceiling”²³), which resulted in general optimism of various stakeholders. For example, after the adoption of the Directive, European social partners of construction sector entered in a negotiation process to encourage upward convergence by comparing the labour laws between home and host countries and applying the laws that would be the most favourable to the posted worker.²⁴

At this point, it has to be noted that the Directive was conceived for twelve member states only and adopted by fifteen. Generally speaking, this group of countries shared strong labour protection laws, attachment to European social model and well-developed (albeit varying) industrial relation traditions. This cannot be said about all of the twelve new member states that joined the union in the 2000's. Soon after the enlargements, the Directive as well as the general socioeconomic balance in the EU was put at test by a number of international labour disputes.

2.1.2. The ECJ rulings

Famous rulings of the European Court of Justice such as Viking, Laval, Rüffert and Luxembourg²⁵, have significantly changed the face of the Directive. With the Laval and Luxembourg cases, the ECJ has made it clear that the hard core labour rights enumerated in the Directive are not to be considered as minimum floors; instead, they constitute an exhaustive list of rights that must be respected by the posting employers. Member states cannot use public policy argument to introduce additional rights if they go against the freedom to provide services. Additional stricter requirements can only be imposed on the companies by the member states (Luxembourg) if these requirements are justified and proportionate.²⁶

In these decisions the ECJ has suggested that in the posting situations, competition should be considered fair and social dumping absent if all of the minimum hard-core requirements defined in the Directive are respected. By extension, the previously perceived idea that the Directive could lead to an “equal treatment of domestic and foreign service providers, as regards wages and employment conditions, has been rejected in favour of a principle of minimum protection.”²⁷ Consequentially, the Directive has been de facto transformed “from a minimum to a maximum directive”.²⁸

The Viking case has had equally important implications for industrial action and its place within the European social model. The Court has ruled that industrial action is a fundamental right, but it can be significantly

23. DG Internal Policies, “The impact of ECJ judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action”, Study, 2010, Brussels (p. 4).

24. Cremers Jan, “In search of cheap labour in Europe”, *European Institute for Construction Labour Research*, 2010, Amsterdam (p. 7).

25. C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union [2007] ECR I-10779 (Viking); C-341/05 Laval un Partneri [2007] ECR I-11767; C-346/06 Rüffert [2008] ECR I-1989 and C-319/06 Commission v Luxembourg [2008] ECR I-4323.

26. For more information on these ECJ decisions, please see Supiot Alain, “Europe won over to the ‘communist market economy’”, *Notre Europe – Jacques Delors Institute*, 2008, Paris.

27. DG Internal Policies, *op. cit.*, p. 13.

28. Bucker Andreas and Warnecke Wiebke, “Viking-Laval-Rüffert: consequences and policy perspectives”, *ETUI*, 2010, Brussels (p. 10).

restricted by the European economic freedoms. In trans-border situations, collective action might occur only if it passes a “proportionality test” (Gebhard formula), i.e. its aim must be justified by public interest, 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.²⁹ Furthermore, in Ruffert the ECJ 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.

“THE COURT DE FACTO
SUBJECTS THE SOCIAL
RIGHTS TO ECONOMIC
RIGHTS”

These ECJ decisions have been often judged as threatening the sustainability of the European social model or at least exposing “the fault lines that run between the single market and the social dimension at national level”.³⁰ The fragile socioeconomic equilibrium of the EU’s construction has been pushed to the benefit of the economic freedoms and, arguably, at the expense of the social rights. European social partners, represented by the ETUC, have been most critical and called the ECJ action as “license for social dumping”.³¹

2.2. Posted workers and social 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. Posting of workers, however, is a derogation³² from this rule as posted workers remain attached to the social security system in their home country. This means that posted workers and their employers pay all social contributions in the state where they both “normally” work. By the same token, posted workers can claim social security benefits related to unemployment, pensions, work accidents and the like in their home country only. Access to health system via the European Health Insurance Card (EHIC) is the sole right the posted worker can enjoy in the host state. These provisions are not treated in the PWD’96 itself, but are encoded in the three regulations concerning social system coordination.³³

For the purposes of social security coordination, the definitions relating to posting are more concrete than those in the PWD’96. The definition of a posted worker is based on three important conditions. Workers are posted by the (i) companies that normally carry out their activity in the home member state to (ii) perform paid work on the part of their employer for (iii) a limited duration of time.

First of all, it means that the sending company must carry out a substantial (and not purely administrative) part of its activity in the member state where it is established, which can be checked by a series of indicators.³⁴

Second, there must be a direct relationship between the posted worker and the sending company. Even when posted, the worker continues working under the work contract signed³⁵ with the posting company and under its supervision.

Third, the duration of posting cannot exceed 24 months and the worker cannot be posted to simply replace another posted worker.³⁶ Because of different definitions found in the PWD’96 and in the Regulations on social coordination, not all posted workers in the meaning of PWD’96 fall under the social coordination clauses.

29. Deakin, S. F., “Regulatory competition after Laval” in *Cambridge Yearbook of European Legal Studies* 10, 2008, Cambridge.

30. Monti Mario, “A new strategy for the single market: at the service of Europe’s economy and society”, 2010, Brussels.

31. ETUC opinion available online at: <http://www.etuc.org/ri/847>

32. Regulation (EC) 883/2004 of the European Parliament and of the Council on the coordination of social security systems, 2004, Brussels, Art. 12.

33. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) and its three amending regulations available as a [consolidated version](#).

34. European Commission, “Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland”, 2012, Brussels (p. 7).

35. Work contract must be signed at least one month before posting.

36. For instance, one relevant difference refers to the temporariness of posting, which remains undefined in the case of the PWD, whereas the maximum limit for social security purposes is two years.

Bearing in mind the intrinsic features of the posting phenomenon as well as the wide variety of EU welfare state, such derogation was necessary in order to ensure the continuity of workers' rights in their home countries. Full application of host country control principle would have meant that workers who may have been posted for very short periods of time to different member states would have to adhere to the social security systems of all countries. Subsequently and throughout their lifetimes, these workers would have to be able to access various social security rights (such as pensions or unemployment benefits) in all of these states. Obviously, such system would be extremely difficult to implement, not least because social security rights and contributions are very different between member states. As a consequence, European policy makers consider that such "unnecessary and costly administrative and other complications [...] would not be in the interest of workers, companies and administrations".³⁷

“ MORE GENEROUS WELFARE STATE COULD EXPERIENCE TAX INCOME LOSS IF POSTED WORKERS WERE TO BE TAXED IN THEIR HOST COUNTRY ”

In addition, more generous welfare states such as France could even experience tax income loss if posted workers were to be taxed in their host country. As the employer contributions for low salaries (including various rebates) are generally low, France could potentially lose budgetary revenue by taxing the minimum salaries of incoming low skilled posted workers and losing the taxes from outgoing highly skilled French specialists posted in London or Luxembourg.

However, it is often claimed that such situation might lead to social competition in terms of labour taxation as the differential in social security contributions might become one of the main drivers of posting.³⁸ This is especially problematic for countries that tax labour heavily and receive posted workers from countries that tax labour less. Indeed, it has been estimated that the labour cost differential arising from savings in terms of social contributions could be around 25 to 30%.³⁹

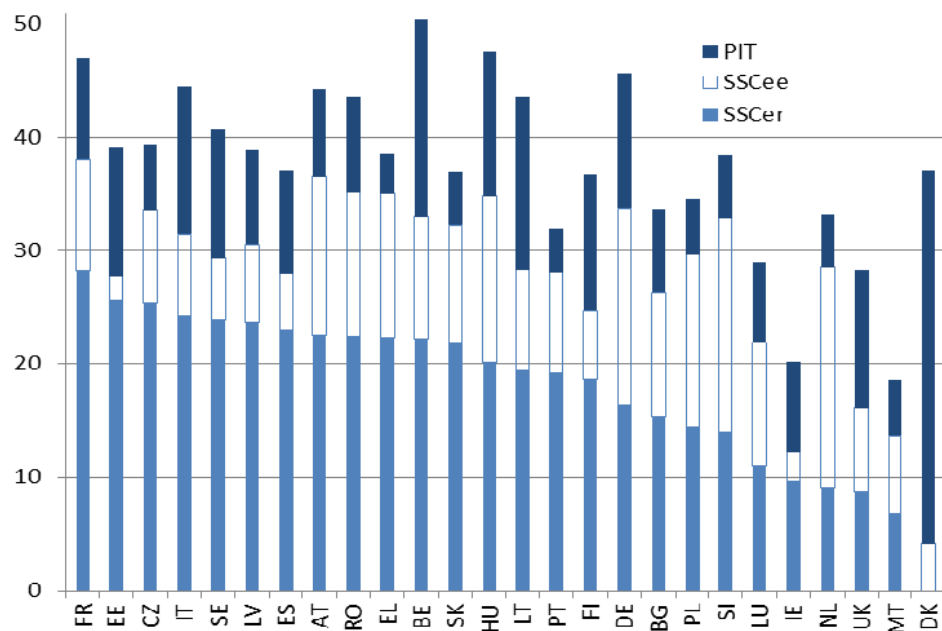
Figure 4 depicts three different types of labour taxation in the EU for the low paid work (67% of average national wage): one paid by employers (SSCer) and two paid by the employees (PIT and SSCee). Employers of low paid labour are taxed the least in Denmark, Malta, UK, the Netherlands and Ireland. By this token, Danish workers posted to France and receiving French minimum wage would cost nothing to their employers in terms of social contributions. It is interesting to note that many of the Central and Eastern European member states tax the employers more than, for example, Germany or Belgium. In fact, Estonia and Czech Republic line up just behind France to form the most taxed trio. That said, the difference between French social contributions paid by the employers and that of Poland or Slovakia is still between 10 to 15%, somewhat confirming the possibility of fiscal optimisation. Conversely, the difference between social contributions paid by the Danish employers and that of Poland or Slovakia is also huge, then giving a competitive advantage to Danish firms and workers. This shows the impact of not only the level but also the structure of social contribution systems over the intensity of social competition, including as regards posted workers.

37. European Commission, "Practical guide", *op. cit.*, p. 6.

38. For further discussion see Mastauskaite Kristina, "Social Competition: Myths and Realities", *Studies & Reports No. 97, Notre Europe - Jacques Delors Institute*, June 2013, Paris.

39. Cremers, *op. cit.*, p. 32.

FIGURE 4 ► Tax wedge on the low earners (67% of average wage) in 2012 in order of magnitude of social security contributions paid by the employer



Short description: *Data for non-OECD-EU countries (BG, LV, LT, MT and RO) are only available for 2011. No data for CY. Legend: SSCEr: social security contribution paid by employer; SSCee: social security contribution paid by employee; PIT: personal income tax.

Source: Joint European Commission-OECD project, Tax & benefits indicators database⁴⁰

However, this data should be treated with caution. The most interesting and relevant comparison of labour taxation would consist of measuring different tax levels on minimum wages, rather than the “low wages” as defined by the European Commission. For example, in France employers receive significant employer social contribution rebates on their minimum wage employees (“Fillon law”). This rebate can bring employer social contributions to less than 20% only, hence putting France next to Poland and behind Slovakia in Figure 4.⁴¹ Unfortunately, such data for all EU member states is not readily available, not least because many member states do not have a national minimum wage.

⁴⁰. European Commission, “Tax burden on labour”, 2012, Brussels (p. 3).

⁴¹. For more information on Fillon law, see: “Réduction Fillon: réduction des cotisations patronales sur les bas salaires”.

3. Between fair and unfair competition

This last part is devoted to the analysis of the weaknesses related to the current regulatory framework and the types of abuse that have emerged over the years (3.1). It then discusses the current legislative proposals, notably the Enforcement Directive (3.2) and whether it is sufficient for ensuring fair competition of labour in the EU (3.3).

3.1. Weaknesses of the current framework and types of abuse

The Directive on Posted Workers is suffering from various legal, administrative and enforcement weaknesses that have given rise to abusive practices throughout Europe. Table 2 summarises main problems associated with the current framework by type.

TABLE 2 ► Problems with the PWD’96 framework:

TYPE	SOURCE FOR ABUSE
Legal	<ul style="list-style-type: none"> • Definitional problems regarding temporariness of service, temporariness of posting and establishment
Administrative (monitoring)	<ul style="list-style-type: none"> • Host country control and proportionality test for national administrative requirements • Insufficient cooperation between member states for information exchange • Insufficient information availability to the companies/posted workers
Enforcement (sanctioning)	<ul style="list-style-type: none"> • Poor sanctioning mechanism because no notion of “appropriate measures” needed to enforce the Directive • Contractors not jointly and severely liable • Dispute resolution too complicated

First of all, in terms of legal issues, current framework does not provide precise definitions of temporariness of both service provided by a foreign company on the host country soil⁴² and the duration of posting as well as the exact notion of “establishment”. Of course, “there is no magic formula”⁴³ and such definitions are difficult to construct simply because the variety of services concerned is enormous. Nonetheless, the lack of clear distinction between the right of establishment and the right to provide services leaves room for abuse. Similarly, the “limited period” of posting is a loose concept, which does not specify the length of posting, the number of times a worker can be posted or the proportion between the working time at home and in the host country.

Secondly, current legislation is particularly vulnerable due to inefficient administrative procedures and poor monitoring. Host member states are responsible for collecting information, supervising and informing posting companies and posted workers. However, their margin of manoeuvre is limited for at least two reasons. On the one hand, national regulators must ensure that their actions and demands are necessary, appropriate and proportionate. On the other hand, information exchange between home and host member states remains limited; therefore, host country regulators have few means of ensuring the legality of posting companies. In addition, there is no template of information concerning national laws and regulations that should be provided to the posting companies as well as posted workers.

Thirdly, enforcement of the Directive is rather ineffective. Even though the Directive obliges all member states to set up a mechanism with “appropriate measures” ensuring credible enforcement, member states are free to choose the sanctioning mechanism. 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. In addition, enforcement is made difficult because national regulators have few means to pursue international posting companies whereas their contractors are not liable for

42. A number non-binding indicators are available, but these indicators can be mixed and matched to prove temporariness of service. See: Communication from the Commission on the “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, 16.06.2007.

43. Barnard 2010, *op. cit.*, p. 369.

any infringements regarding the posted work.⁴⁴ Finally, 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”.⁴⁵

All the aforementioned regulatory loopholes have resulted in opportunistic distortions and illegal behaviour on behalf of numerous posting companies, which is causing public outcry in many member states. One of the commonly used techniques, aimed at minimising employee social security contributions, is the creation of so-called “letter-box” companies or affiliates in member states where labour is taxed the least. Such companies do not carry out significant economic activity in their “home” country; instead, their primary purpose is to post workers abroad while taking advantage of lowest employee labour taxes. In addition, such companies are often constructed as a complex multi-level net in different member states; for example, Bouygues has contracted Irish agency, which posted Polish workers through its Cypriot subsidiary.⁴⁶ Such schemes make posting companies very difficult to track and to hold accountable.

Another mode of abuse relates to fake self-employment. Many regulations relating to working time, taxes and wages, normally guaranteed under the Directive, are laxer to self-employed workers. Therefore, 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”⁴⁷. This trend is particularly on the rise in construction industry where bogus self-employed workers are often paid lower than minimum wage.⁴⁸

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.

3.2. Latest proposals to ensure a better enforcement of current legal framework

As a result of relatively recent ECJ’s decisions and overall ineffective regulatory framework, the phenomenon of posting workers has become one of the most sensitive issues for EU citizens and politicians, especially in the member states where labour is expensive. The current situation is seen as depleting European values such as social cohesion, generous welfare states and strong industrial relations. So much so that for Mario Monti the increasing divide between economic and social rights “has the potential to alienate from the single market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration”⁴⁹.

According to Monti’s report, two legislative ameliorations are urgently needed for the overall improvement of the current situation, which “should not be left to future occasional litigation before the ECJ or national courts”.⁵⁰ On the one hand, a new Regulation (now the so-called Monti II) should re-iterate ECJ’s conclusions that all European workers have the right to industrial action in the cross-border situations, yet this right “is not absolute” and any collective action must be proportionate (and thus subject to economic freedoms). Such regulation should also specify the mechanisms for informal solutions of labour disputes. On the other hand, a new complementary Directive should be adopted with the aim of improving the implementation and the functioning of the PWD96’.

44. 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 Chambery 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.

45. van Hoek Aukje and Houwerzijl Mijke, “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).

46. Bocquet, *op. cit.*, p. 20.

47. Buelen Werner, “Self-employment and bogus self-employment in the European construction industry”, 2008, Brussels (p. 18).

48. *Ibid.*

49. Monti Mario, *op. cit.*, p. 68.

50. *Ibid.*, p. 69.

The European Commission has translated both of these ideas to actual legislative proposals within the Single Market Acts I and II. However, the lifespan of Monti II Regulation has been very short: for the first time since the adoption of the Lisbon Treaty, national parliaments have successfully used a “yellow card” procedure to signal that the piece of legislation was not compatible with the subsidiarity principle. Twelve national parliaments (retaining 19 votes)⁵¹ have opposed to the proposal, which lead to complete withdrawal of this Regulation by the European Commission. European social partners have welcomed the decision of withdrawal claiming that social rights and social progress must take precedence over economic freedoms.⁵²

The proposal of Enforcement Directive is currently undergoing difficult scrutiny. After laborious negotiations, the Council of social affairs ministers (EPSCO) has reached a compromise on 9 December 2013. The Committee of Employment and Social Affairs of the European Parliament has also given green light for the proposal, which will now have to be adopted by the EP in April. Table 3 summarises the main objectives and means for reaching them foreseen in the Directive.

TABLE 3 ► Main Objectives and Measures of the Enforcement Directive

OBJECTIVE		MEANS
Legal clarity (Art. 3)		Indicative, non-exhaustive list of qualitative criteria characterizing both the temporary nature of the provision of services and the notion of establishment of the posting company in its home state
Information availability (Art. 5)		All information regarding the laws and collective agreements applicable to the posted workers available on the national websites and in several languages
Cooperation between national authorities (Art. 6-8)		Home member state has to provide any useful information to the host member state on its own initiative, within two weeks if that information was specifically requested
Control measures (Art. 9)	EC Proposal	A defined list of three types of control measures: simple declarations, employment contracts/payslips and designation of a control person
	Council conclusions	Any justified and proportionate control measures (no pre-defined list)
Joint and Several Responsibility (Art.12)	EC Proposal	In the construction sector, direct contractors may be liable for non-payment of (minimum) salary and any other payments unduly withheld from the salary
	Council conclusions	In the construction sector, direct contractors may be liable for non-payment of (minimum) salary only

The Directive brings a number of significant improvements to the PWD’96 implementation, some of which are largely consensual. In terms of legal clarity, exact definitions of temporariness of service and establishment are still missing, but a number of usable indicators is now made available in the Directive. Information destined to the posted workers and posting firms should also become easier accessible online in all member states. Moreover, countries of establishment are now given new obligations in terms of information provision, cooperation, monitoring and control.

Two issues raised in the Directive are more divisive. Firstly, the Commission has proposed a closed-list of control measures that could be required by host country supervisors from the posting companies. As mentioned in section 2.1.2, ECJ’s jurisprudence has concluded that some of the requests of national authorities might constitute a restriction of freedom to provide services. Therefore, the Commission has attempted “to codify the case law”⁵³ into the Directive to bring some clarity and uniformisation. The Council of ministers, however, has decided that such list was unnecessary and maintained the open-ended option.

The second question of joint and several responsibility of contractors is also contentious. According to the EC’s proposal, a contractor might be held partially or fully liable for its subcontractor, but only if there is a direct contractual arrangement between the two and only in the construction sector. In addition, contractor is only liable for non-payment of minimum wage and other payments (back-payments or refunds of taxes) unduly

51. 18 votes are needed to trigger the procedure.

52. ETUC’s opinion available at: <http://www.etuc.org/a/10329>.

53. Malmberg Jonas and Johansson Caroline, “The Commission’s Posting Package”, *Swedish Institute for European Policy Studies*, 2012, Stockholm (p. 10).

withheld from the posted worker. Contractors can be exempted if they had taken all measures of due diligence. The Council has accepted this formulation proposed by the Commission, but limited responsibility to the non-payment of salaries only. In the meantime, on 25 February 2014, the French parliament has endorsed a more restrictive national draft law, which institutes joint and several responsibility in all sectors of economic activity on the French soil.⁵⁴

3.3. Are latest proposals sufficient to ensure fair competition?

“MANY STAKEHOLDERS
THINK THAT THE DIRECTIVE
DOES NOT GO FAR ENOUGH”

The first question to be answered is whether the Enforcement Directive will be effective in implementing the clauses foreseen in the PWD’96. Even though the compromise achieved at the Council marks a significant step forward to that direction, many stakeholders, including the European Parliament, social partners and national policy makers, think that the Directive does not go far enough.

ETUC and EP seem to agree that limited application of joint responsibility as foreseen in the Directive is insufficient.⁵⁵ In its report, EP has proposed significant amendments to broaden the scope of responsibility in several ways. Joint and several responsibility should apply to all sectors of economic activity and to the whole chain of subcontracting (direct and indirect contractual relationships). Moreover, instead of referring to minimum pay only, EP report argues that all “due entitlements to the employees and/or due social contributions to common funds” should be covered by the provision. Unfortunately, the Employment and Social Affairs Committee has not managed to introduce these changes in the draft proposal.

Several other ideas and critiques related to the Enforcement Directive are also circulating around. For example, a report prepared for French Senate suggests limiting the chain of subcontractors to a maximum of three and imposing corporate social responsibility clauses in the contracts between the contractor and the supplier.⁵⁶ In addition, European Parliament has adopted a resolution on the creation of European platform of labour inspectors to monitor undeclared work, “letter-box” companies and strengthen cross-border cooperation.⁵⁷ ETUC has recently declared that Directive does nothing to improve legal certainty, as the definitions related to posting remain too vague and easy to manipulate.⁵⁸ Finally, the Directive’s focus “on administrative enforcement rather than empowering trade unions or other parts of the civil society” is also criticised.⁵⁹

All these additions would undoubtedly contribute to further improvement of the Enforcement Directive and, as a consequence, of the posting process as it has been defined in the PWD’96. Nonetheless, it should be underlined that even if the Enforcement Directive would miraculously solve all the problems related to the implementation of PWD’96, the question of “fair” competition would probably still be raised by the opponents of posting.

First of all, it is true that a posting company will still be able to benefit from differentials in terms of social contributions between the member states, if it is located in a country where the level of such contributions is lower than in the host country (a perfect counter example is Denmark, where there are no such social contributions). While such social competition could potentially yield even some positive effects⁶⁰, it is bound to become less relevant within the reinforced framework. If the “letter-box” companies are successfully eliminated by effective regulation, such arbitrage should become less problematic. Indeed, it seems perfectly reasonable that a

54. For more information on the French national law, see “Travail : sous-traitance et lutte contre le dumping social”.

55. European Parliament, “Report on the proposal for a directive of the European Parliament and of the Council on the enforcement of directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2012)0131 – C7-0086/2012–2012/0061 (COD))”, Rapporteur Jazłowiecka Danuta, 2013, Brussels and ETUC, “ETUC position on the Enforcement Directive of the Posting of Workers Directive”, 2012, Brussels.

56. Bocquet Eric, *op. cit.*, p. 34.

57. European Parliament, “European Parliament resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe (2013/2112 (INI))”, 2014, Brussels.

58. ETUC, “ETUC position”, *op. cit.*

59. Malmberg Jonas and Johansson Caroline, *op. cit.*, p. 12.

60. EC has been encouraging member states for years to shift tax burden from labour to other modes (consumption, climate, etc.) as high labour taxes may be impeding growth.

genuinely established national company and its temporarily posted workers continue to contribute to and to benefit from their own national welfare states.

Secondly and more problematically, legal and legitimate posting firms will still be able to make savings on the margin between the minimum requirements foreseen in the PWD'96 and the actual working conditions in the host country. Indeed, the well-enforced Directive would ensure that all posted workers receive minimum protection, yet it does not necessarily guarantee equal treatment with the local workers. As discussed in section 2.1.2, member states and social partners are free to adopt any national labour market rules they see fit, yet the extension of these rules to posted workers is only allowed after the proportionality test has been passed. Consequentially, competition between local and posted workers might lead either to downgrading of national labour laws in order to align them to the minimum conditions listed in the PWD'96 or replacement of more protected national workers with the posted foreigners. Apart from that, there is a need to state that open competition will go on between workers whose wage is not close to the minimum levels as defined by the national law, where such legal provisions exist at all.

“ THE ‘FAIR’
COMPETITION AS
DEFINED IN THE CURRENT
FRAMEWORK MIGHT STILL
HAVE A NEGATIVE IMPACT
ON SOCIAL PARTNERS”

Finally, even a well-implemented PWD'96 is potentially erosive for the industrial relations, one of the key values of the European social model. In the current framework, social partners only have a limited impact in shaping the employment rights of the posted workers because of the proportionality test requirement and because posted workers are not represented by national trade unions. Furthermore, the collective agreements already present are only applied if they are universally binding. In voluntarist and “decentralised” industrial relations systems as well as “in cases where there are no legally sound rules that allow for the extension of bargaining coverage”, the role of collective bargaining is reduced.⁶¹ Therefore, the “fair” competition as defined in the current framework might still have a negative impact on social partners, or even on industrial relations systems, in a number of member states.

The two latter critiques are very important and will require special attention from both national and European stakeholders. As the Monti II Regulation has been dropped, a new compromise will have to be found to reconcile national social partners with European competitive forces. It is clear that concessions will have to be made on all sides: as discussed in section 1.1, Europe badly needs more competition in services, which should not be halted by new protectionist regulations. However, European social preferences, including the right to take industrial action, must be secured. National and European social partners will have to adapt to global and EU realities in order to stay relevant for defending their purpose; at the same time, European policy makers must make sure that social and economic concerns stand on equal footing as promised in European Treaties.

61. Eurofound, *op. cit.*, p. 15.

CONCLUSION

Posting of workers concerns only a tiny part of European labour force, yet it represents some of the most profound questions related to European integration. How to achieve economic optimization while at the same time safeguarding social clauses that are so precious to the EU citizens? How to avoid social competition in the single market with 28 different welfare traditions and preferences? Finally, how to ensure public support and legitimacy for the European project in all of the EU countries?

All these questions come down to the distinction between “fair” and “unfair” competition that should prevail in the single market. It goes without saying that “fair” competition within the single market, which is globally taking place, should be promoted as the best engine of convergence and growth. However, this competition cannot be self-regulatory for fairness is a normative notion that represents the balance between economic and social rights acceptable to European populations. It also delimitates the price the citizens are ready to pay for more economic prosperity in terms of their social preferences.

This policy paper has given an overview of policy framework that governs the posting of workers in the EU and discussed the different angles of how it could be improved. Obviously, the questions related to posting are complex and perfect compromises between 28 member states might seem close to impossible. Fortunately, the EU has managed to move in the right direction to ensure fairer competition for posted workers. The ongoing debate on better enforcement of the PWD’96 is a very significant step forward for the protection of a better constrained competition as defined 20 years ago. The compromise might not be perfect or contain all the necessary measures, yet it should reduce the scope of abuse and opportunism by the posting companies. The Enforcement Directive is bound to improve living and working conditions of European posted workers and enhance the acceptance of this phenomenon among national populations.

In the end, striking the right socio-economic balance in the matters related to posting is not only important for the 1.2 million of posted European workers, but also for the European project as whole. Here, as in so many other areas of the single market, the relevance of Jacques Delors famous formula is undeniable: in order to preserve Europe’s socioeconomic equilibrium, there is a need to promote jointly “competition that stimulates, cooperation that reinforces and solidarity that unites”, from the member states, from the social partners and from citizens.

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