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Revision of the Posted Workers' Directive: Equality at Last?

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Revision of the Posted Workers' Directive: Equality at Last?

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Introduction

Recent evidence published by the European Commission suggests that the number of workers who are sent from one Member State to work in another for a limited period of time – 'posted' workers – has increased sharply.[1] However, posted workers often earn substantially less than local workers for the same work and there have been concerns about posted workers being vulnerable to fraudulent activities such as undeclared work practices.[2] The main relevant regulatory framework has hitherto been the Posted Workers' Directive (PWD)[3] which came into force in 1996. The PWD has mixed objectives – the promotion of the transnational provision of services within a climate of fair competition while also guaranteeing respect for the rights of workers[4] – the balancing of which has led to tensions in its interpretation; culminating in the much-debated decision of the Court of Justice of the European Union (CJEU) in *Laval*[5] which created a difficult interface between the free movement provisions contained in the Treaty on the Functioning of the European Union (TFEU) and national labour law. In particular, the decision had the effect of raising questions over the PWD's ability, in its current form, to fulfil its objectives of 'guaranteeing respect for the rights of workers' and maintaining 'a climate of fair competition' between local and posted workers while also promoting 'the transnational provision of services'. As part of its Work Programme 2016 and in recognition of ongoing tensions in the area of posted work, the European Commission published a proposal for a Directive amending the PWD on 8 March 2016.[6] This paper first contextualises the phenomenon of posted work in the EU and then briefly outlines the current legal framework governing posted work. A subsequent section discusses the extent to which the PWD fulfils its objective of guaranteeing 'respect for the rights of workers' and identifies remaining gaps in protection. A final section assesses the Commission's most recent proposal.

The phenomenon of posted work

Recent evidence produced by the European Commission indicates that between 2010 and 2014, the number of workers posted from one EU State to another increased by almost 49% to a total of approximately 1.9 million workers.[7] 86% of workers are posted to the EU-15 Member States with Germany, France and Belgium receiving the largest share. Poland, Germany and France accounted for

1 See further European Commission, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services SWD(2016) 53 final.

2 Ibid.

3 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

4 Recital 5 of the Preamble to the Directive.

5 Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

6 http://europa.eu/rapid/press-release_IP-16-466_en.htm.

7 The statistics in this paragraph are drawn from European Commission, *Impact Assessment*, pp. 6-8.

the three largest senders of posted workers in 2014. Postings involve 0.7% of the total EU workforce although there are wide variations in different sectors. 42% of total postings occur in the construction sector but posting of workers is also important in the manufacturing industry (21.8%), and in other service sectors such as personal services (education, health and social work, 13.5%) and business services (administrative, professional, and financial services, 10.3%). It has been estimated that the vast majority of posted workers are male.[8] It should be noted however that these statistics are far from perfect. The European Commission uses information provided by administrative forms issued by the authority of the posted workers' country of origin. But significant gaps arise between national and EU figures and there is a lack of precise data on the duration of posting, the feminisation rate of posted work, the qualifications of the workers and their earnings.[9]

The regulatory framework

The main legislation governing posted work within the EU is the PWD. It aims to establish a legal framework of minimum labour rights which regulates the working conditions of workers sent temporarily to work in another Member State. As such, the PWD provides posted workers with certain minimum rights but, in the interests of cross-border competition, it does not shield host state workers from having to compete with cheaper foreign labour. The PWD was first proposed in 1991 when the European Commission sought to regulate the provision of services in an attempt to find a balance between workers' rights and the free provision of services.[10] This followed the decision by the CJEU in *Rush Portuguesa*[11] where the Court held that Community law does not preclude host Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. The decision in *Rush Portugesa* concerned Portuguese workers working for a Portuguese entrepreneur in France. Due to the Accession Act, the Portuguese workers did not benefit from the free movement of workers at the time however the Court found that the employer, as a service provider, was entitled to make use of his rights under the Treaty 'with all his staff'[12]. France was given permission to extend its domestic labour laws to posted workers although posted workers were not given a right to equal treatment with employees of host State establishments. In effect, the Court clarified that national treatment by the host State, as far as labour standards were concerned, did not amount to indirect discrimination against home State service provid-

8 See Eurofund, *Posted Workers in the European Union* available at http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/posted-workers-in-the-european-union

9 See C. Dhéret and A. Ghimis, 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?' European Policy Centre Discussion Paper, 20 April 2016, p. 4.

10 J. Cremers, J.E. Dølvik & G. Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) *Industrial Relations Journal* 524, p. 526.

11 Case C-113/89, *Rush Portuguesa Lda* v. *Office national d'immigration* [1990] ECR I-1417. The decision in *Rush Portugesa* is widely regarded as instrumental in the adoption of the PWD. See, e.g., J. Dølvik and J. Visser, 'Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?' (2009) 40 *industrial Relations Journal* 491. However, Evju traces a much longer and more complex background to the Directive in S. Evju, 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast' (2009-2010) 12 *CYELS* 151.

12 Para 12.

ers.[13] At the same time, the Court firmly placed the regulation of posted work within the scope of the freedom to provide services rather than the free movement of workers.

In the wake of the CJEU's decision and after extensive consultations with Member States and the social partners[14], the Commission proposed a directive in 1991 to regulate the cross-border temporary provision of services in order to create legal certainty for the employer. The proposal met with opposition from Member States and the European Parliament, and an amended proposal was put forward in 1993 which, following a number of revisions, was adopted in 1996. [15] The legal base for the Directive can be found in articles 53 and 62 TFEU on the provision of services and the right to establishment, rather than in the social policy provisions. Thus, although the PWD was adopted in order to protect workers' rights, the primary aim of the Directive is to facilitate the cross-border provision of services.[16]

The Directive identifies minimum standards of core working conditions in article 3(1) which should apply equally to national and posted workers in order to fulfil the PWD's objective of guaranteeing respect for the rights of workers. These include working time and annual holidays, minimum rates of pay, the regulation of temporary work, health and safety, measures which aim to protect pregnant women and young people, and equality of treatment between men and women. 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. Minimum rates of pay must be laid down by law, regulation or administrative provision, and/or by collective agreements which have been declared universally applicable.[17] Those moving as posted workers cannot claim a general right to equal treatment with national workers on the basis of EU law. As such, the term 'worker' is a misnomer here and posted workers' rights as 'workers' (under article 45 TFEU) are suspended during the period of posting.

Member States are thus permitted, in principle, to apply their own labour legislation to employees of a company providing temporary services. It should be noted though that all of the conditions listed in article 3(1) of the PWD, apart from minimum rates of pay[18], are the subject of harmonising EU legislation. It is therefore not surprising that controversies over interpretation persist in the area of minimum rates of pay although the Court has carefully scrutinised any claims by Member States that leg-

13 P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) 3 *Common Market Law Review* 571.

14 See COM(91) 230 final and Evju, 'Revisiting the Posted Workers Directive'.

15 See Evju, 'Revisiting the Posted Workers Directive, p. 166. Of particular concern were provisions on the way in which a host country's labour laws were to be laid down. Denmark and Italy also tabled amendments to make provision for the regulation of posted workers' rights by collective agreements of 'general applicability' and by those agreements concluded by the most representative organisations.

16 Ibid., 572–573. See also Evju, 'Revisiting the Posted Workers Directive', p. 169.

17 See further article 3(8).

18 Directive 2008/104/EC on temporary agency work [2008] OJ L327/9 lays down, in article 5(1), the principle of equal treatment between agency workers and workers directly employed by the user undertaking, in respect of a number of 'basic working and employment conditions'. However, the flexibility inherent in the Directive which as arguably necessary in order to secure its adoption means that 'the resulting instrument effectively secures only minimal rights and protections for agency workers' and issues over the protection of agency work and posted work continue to arise. See further N. Countouris and R. Horton, 'The Temporary Agency Work Directive: another broken promise?' (2009) 38(3) *Industrial Law Journal* 329.

islative restrictions operate for the protection of posted workers.[19] As was noted by the EFTA Court, the aim of the PWD is clearly to protect services rather than workers.[20]

Nonetheless, this system of regulation did not prove to be particularly problematic prior to the European enlargements in 2004 and 2007 even though critics writing at the time of the adoption of the Directive questioned how the Court would interpret its provisions.[21] Following the European enlargements in 2004 and 2007, and the increased number of posted workers sent from 'new' to 'old' Member States, the PWD fell far short of its goal of guaranteeing certain labour conditions to posted workers. The CJEU was finally asked to give a ruling on the Directive in the *Laval* case[22]. In *Laval*, the capacity for minimum wages (and other work related benefits) to be set for posted workers by collective bargaining by trade unions in the host State was cast into doubt. The main focus of the CJEU's judgment was whether the collective action in the form of a blockade taken by trade unions in this case was compatible with the EU rules on the freedom to provide services (article 56 TFEU). One aspect that the Court discussed at length was the characteristic of the host country that the legislation to implement the PWD had no express provision concerning the application of terms and conditions of employment in collective agreements. The relevant collective agreement in this case provided for more favourable conditions than those envisaged by the PWD. The Court, therefore, considered whether the collective action taken was justifiable in light of its objective, namely, to force a service provider to grant more favourable conditions to its workers than those prescribed by EU law.

In response the Court, first, reiterated its settled case law on the free movement of services which allows a Member State to apply its legislation or collective agreements to a service provider as long as the application of these rules is appropriate for securing the protection of workers and does not go beyond what is necessary for the attainment of the objective.[23] Against this background, the PWD therefore lays down a level of minimum protection the exact content of which may be defined by the individual Member States.[24] However, the Court did not accept the method of implementation of the PWD in Sweden where the applicable rates of pay were negotiated on a case by case basis through the social partners without being supplemented by legislation providing for universal applicability: it concluded that this leads to a climate of unfair competition as between national and posted service

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[19] See, for example, Joined Cases C-49, 50, 52, 54, 68 and 71/98 Finalarte Sociedade de Construçâo Civil Lda [2001] ECR I-7831 and Joined Cases C-369 and 376/96 *Criminal Proceedings against Jean-Claude Arblade and Arblade & Fils SARL and against Bernard Leloup and others* [1999] ECR I-8453.

[20] Case E-3/12 *Norway v Jonsson* [2013] OJ 277/9, [58].

[21] P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) *Common Market Law Review* 571. The CJEU was not asked to rule on many of the key aspects of the Directive prior to 2007. Most cases were decided before the deadline for the implementation of the Directive had passed.

[22] There is a vast amount of literature on the case and its aftermath. For a small selection of literature see the website of the European Trade Union Institute (*http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The-interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements*). *Laval* forms part of a 'Quartet' of cases decided at a similar time which included Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti ECR* [2007] I-10779; Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen* [2008] ECR I-1989 and Case C-319/06, *Commission of the European Communities* v. *Grand Duchy of Luxemburg* [2008] ECR I-04323.

[23] Para 56.

[24] Paras 58-60.

providers.[25] Furthermore, the Court pointed out that the PWD does not allow 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.[26]

The judgment has been heavily criticised for its potential to limit trade unions' rights to take collective action and for its failure to take into account the successful and flexible system of collective bargaining prevalent in Sweden.[27] It also 'effectively settled'[28] any doubts over the hierarchy of the PWD's objectives with the economic arguments clearly taking precedence over concerns for the protection of workers' rights.

Following the judgment, the European social partners were invited by the European Commission to respond to the consequences of the CJEU's case law. A joint report was issued in 2010.[29] In addition, the ETUC argued for a revision of the PWD and for a Social Progress Protocol[30] to be attached to the EU Treaties.[31] The European Parliament in 2008 called for changes to be made to the PWD in order to improve its correct application and enforcement. In 2010, the European Economic and Social Committee argued in favour of the PWD's revision in order to improve its implementation. In 2012, the Commission issued proposals for an Enforcement Directive[32] and a Regulation[33] (the 'Monti II Regulation') to regulate the right of workers to take collective action. Although the Monti II Regulation failed to see the light of day[34], the Enforcement Directive was adopted with minor amendments in May 2014.[35] As its name suggests, the Enforcement Directive aims inter alia to raise awareness of

[25] Paras 71 and 80-81.

[26] Para 80.

[27] There is a substantial amount of literature discussing the judgments, not all of which can be mentioned in this section. For different views on the judgments see, for example, M. Freedland and J. Prassl, *Viking, Laval and Beyond*, Hart, Oxford, 2004; M. Rönmar (ed.), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives*, Kluwer, Frederick, MD, 2008; R. Blanpain & A.M. Swiatkowski (eds.), *The Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia*, Kluwer, Frederick, MD, 2009; and articles by A. Dashwood, T. Novitz, M. Rönmar, S. Deakin and S. Sciarra in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, 2007-2008, Vol. 10, Hart Publishing, Oxford.

[28] Evju, 'Revisiting the Posted Workers Directive', p. 169.

[29] ETUC et al., Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases, 19 March 2010, available at http://www.etuc.org/sites/www.etuc.org/files/Joint_report_ECJ_rulings_FINAL_logos_19.03.10_1.pdf.

[30] The idea of a Social Progress Protocol is not new. For an overview of the discussion see A. Bücker, 'A comprehensive Social Progress Protocol is needed more than ever' (2013) 4 *European Labour Law Journal* 4.

[31] ETUC, 'The Posting of Workers Directive: proposals for revision', 9-10 March 2010, available at http://www.etuc.org/documents/posting-workers-directive-proposals-revision#.VBwN8hb9mMk.

[32] European Commission, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 97/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final.

[33] European Commission, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

[34] For an overview of the difficulties encountered by the Regulation see The Adoptive Parents, 'The Life of a Death Foretold: The Proposal for a Monti II Regulation' in M. Freedland and J. Prassl, *Viking, Laval and Beyond*, Hart, 2015 and F. Fabbrini and K. Granat, '"Yellow Card but no Foul": the Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 *Common Market Law Review* 115.

[35] Council Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 2014 No. L159, 28 May 2014. Member States had until 18 June 2016 to transpose the Directive. For an analysis of the Directive see J. Cremers, 'Economic freedoms and labour standards

workers and companies about their rights and obligations as regards the terms and conditions of employment; improve cooperation between national authorities in charge of posting; clarify the definition of posting increasing legal certainty for posted workers and service providers; and define Member States' responsibilities to verify compliance with the rules laid down in the PWD. The Enforcement Directive also introduces liability for subcontractors in the construction industry. Although the Enforcement Directive attempts to address some of the issues surrounding effective enforcement of the PWD, it does not alleviate many of the concerns raised by the CJEU's judgments in *Laval.* The European Trade Union Confederation (ETUC) confirms this view in its reaction to the Directive:

> *Measures to be taken by member states to combat abuse and under-payment of posted workers should not be subject to free market rules. The current text does not guarantee that. Rules applying to posted workers falling outside the scope of the directive are not clear either.*[36]

In particular, the Enforcement Directive does not address inequality of treatment between posted and local workers, and it fails to introduce an EU-wide monitoring system which could help to reduce problems of differential treatment across Member States. In addition, the Enforcement Directive does little to tackle problems related to the definition of pay which has raised particular concerns.[37]

In its subsequent case law on the PWD, the CJEU has sought inter alia to clarify the notion of 'minimum rates of pay'.[38] The facts of the case in *Sähköalojen ammattiliitto ry*[39] have much in common with the *Laval* case[40]: Polish workers posted to work on a Finnish construction site were not paid the minimum remuneration due to them under the relevant Finnish collective agreement and assigned their pay claims to a Finnish trade union. However, unlike in *Laval*, the relevant collective agreement was generally applicable. It provided for a calculation of minimum pay which included inter alia holiday allowance, compensation for travelling time and accommodation costs, and a daily allowance. The dispute at issue therefore centred on the definition of 'minimum rates of pay' under article 3 of the PWD[41]; the Finnish industrial relations system as such was not subject to challenge. In its judgment, the CJEU clarified that a host Member State can require sending companies to include in the payment to posted workers holiday allowances, daily flat-rate allowances to compensate workers for disadvantages entailed by the posting, and compensation for travelling time, on equal terms as local workers; provided these constituent elements of the minimum wage do not have the effect of im-

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in the European Union' (2016) 22(2) *Transfer* 149.

36 ETUC, 'Provisional deal on posting of workers will not put an end to social dumping', 5 March 2014, available at http://www.etuc.org/press/provisional-deal-posting-workers-will-not-put-end-social-dumping#.VBwW4xb9mMk.

37 See D. Schiek et al, *EU Social and Labour Rights and EU Internal Market Law: Study for the EMPL Committee* (Brussels: European Parliament, 2015), p. 62 which found that problems relating to fair working conditions for posted workers were the most prevalent. Respondents from trade unions and labour inspectorates from the Member States analysed expressed concern that posted workers were paid significantly lower wages than other workers in the host States.

38 It has also been concerned with the use of public procurement legislation to enforce labour standards. See Case C-549/13 *Bundesdruckerei v Stadt Dortmund*, judgment of 18 September 2014 and Case C-115/14 *Regio Post GmbH & Co. KG v Stadt Landau in der Pfalz*, judgment of 17 November 2015.

39 Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spólka Akcyjna*, judgment of 12 February 2015.

40 See paras 33, 34 and 67 of Advocate General Wahl's Opinion in Case C-396/13 *Sähköalojen ammattiliitto ry*.

41 The CJEU was also asked to rule on the division of competences between the Finnish and Polish trade unions.

peding the freedom to provide services.[42] Moreover, the ruling acknowledged that if collective agreements set different pay levels related to the categorisation of employees into pay groups, these pay levels need to be considered as valid in line with the Directive, provided that the conditions are universally binding and transparent.[43] However, the CJEU in this case permitted the exclusion of posted workers from specific allowances relating to the costs of accommodation and meal vouchers, which workers in the host state received.[44] Although the judgment leaves it up to the national court to determine whether certain allowances form part of the minimum wage, the CJEU also reiterated the principle that posted workers are only entitled to minimum protection and not to equal treatment.[45]

The continuing lack of a clear definition of 'minimum rates of pay' and the absence of an equal treatment principle in the PWD, particularly in relation to pay, have led to widespread criticism of the Directive and have raised concerns over the extent to which the PWD, in its current form, can fulfil its objective of promoting the transnational provision of services *while also* providing for a climate of fair competition (for host State workers) *and* protecting (posted) workers' rights. The next section therefore discusses these remaining gaps in protection and identifies a number of unintended consequences of the Directive, namely the extent to which it leads to discrimination on the grounds of skill levels and gender.

Remaining gaps in the protection of workers' rights?

The PWD covers three different types of posting: 'normal' posting (article 1(3)(a)) whereby undertakings post workers to another Member State in order to provide services in that State; intra-corporate posting (article 1(3)(b)); and, posting through temporary agencies (article 1(3)(c)). The first type of posting is the least problematic and often involves highly-skilled, highly-paid workers.[46] In relation to intra-corporate posting, the picture is more varied and there have been some reports of subsidiaries, particularly in labour-intensive sectors, being created in order to circumvent labour standards and other obligations.[47] As Cremers argues, 'the cost advantages of posting from a low social security country to a country with 'normal' social security costs can mount up to 25-30%. Other cost advantages are obtained if posted workers are not properly paid according to the correct skill/qualification level so that such workers are subject to minimum pay and conditions, instead of the equivalents paid to the ordinary workforce in the host State.'[48] Most issues arise however in the third scenario when temporary work agencies are involved; this is most prevalent in the construction sector where there have been reports of agencies established purely for the purpose of circumventing the application of labour standards.[49] It is estimated that posting of workers through temporary

42 See also Case-522/12 *Tevfik Isbir v DB Services GmbH*, judgment of 7 November 2013.

43 Paras 42 and 44.

44 The reasoning justifying such exclusions based itself on an interpretation of article 3(7) of the PWD.

45 See para 30.

46 See further J. Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, CLR Studies 6, Brussels, 2011.

47 Ibid, p. 26.

48 Ibid.

49 Ibid. A high-profile example of this can be found in the so-called 'Irish Ferries' dispute which first erupted in December

agencies represents, on average, 5% of total postings in the EU, albeit with significant cross-country variations.[50]

In those sectors where issues with posting have been reported, posted workers generally earn substantially less than local workers, with reports of income of less than 50% than that usually paid in a given place for the same job.[51] This results in segmentation of the labour market which the PWD's provisions do little to prevent. Instead, the PWD's provisions on pay create inequality between posted and local workers by allowing for a structural differentiation of wage rules. This structural differentiation arises directly as a result of the PWD's imprecision over minimum rates of pay. First, the PWD only guarantees that posted workers will be paid minimum rates of pay as part of a 'hard core of clearly defined protective rules'[52] while in the host Member State. Minimum rates of pay are defined either by the law or by universally applicable collective agreements. In the absence of universally applicable collective agreements, Member States may decide to base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.[53] However, in the wake of the 2008 financial crisis, both universally applicable collective agreements and general/sectoral collective bargaining systems have been progressively dismantled across a number of Member States as a direct consequence of austerity policies.[54] In the absence of collective agreements which comply with the requirements of the PWD, posted workers are only entitled to whatever statutory minimum wage that there might be in the receiving country. This, in effect, means that posted workers may be paid substantially less than local workers for the same work. In addition, even when collective agreements are applicable, it is widely reported that sending companies tend to pay the rates applicable to the lowest pay group, rather than the adequate pay group corresponding to workers' job tasks, educational level and seniority.[55]

2004 when Irish Ferries, a company operating ferry services between Ireland and France, reflagged one of its vessels to the Bahamas and then sought to replace 150 Irish workers with agency staff who were to be paid substantially less than the Irish minimum wage. Although this dispute was settled in early 2005 following industrial action, Irish Ferries in September 2005 proposed to replace an additional 543 Irish workers with Central and Eastern European agency workers posted to work on three further Cypriot-flagged ships from Cyprus in order to circumvent applicable Irish labour law and, in particular, the minimum wage legislation. For a detailed overview of the facts see T. Krings, 'Irish Ferries, Labour Migration and the Spectre of Displacement' in M. Corcoran and P. Share, *Belongings: Shaping Identity in Modern Ireland* (Dublin: Institute of Public Administration, 2008).

[50] All figures are drawn from the Commission's Impact Assessment accompanying the Proposal for a Directive amending the PWD. It should be noted that strong data limitations on posting of workers remain an on-going problem. There have been a number of studies which have sought to look in more detail at the problems surrounding the interaction between posting and temporary work and this is not discussed in more detail here. See further Cremers, *In search of cheap labour in Europe* and A. Van Hoek and M. Houwerzijl, *Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011.

[51] European Commission, *Impact Assessment*, p. 13.

[52] PWD Preamble, para 14.

[53] Article 3(8) PWD.

[54] The effect of the crisis on national labour law systems is explained by the ETUI in individual country reports here: *https://www.etui.org/Publications2/Working-Papers/The-crisis-and-national-labour-law-reforms-a-mapping-exercise*. See also A. Koukiadaki, I. Tavora, and M. Martinez-Lucio, *Joint Regulation and Labour Market Policy in Europe during the Crisis*, ETUI, Brussels, 2016.

[55] European Commission, *Impact Assessment*.

Second, the composition of the minimum rates of pay guaranteed to posted workers in the host Member States is unclear. In *Sähköalojen ammattiliitto ry*, the CJEU only clarified selected issues of the concept of 'minimum rates of pay'. Article 153 TFEU expressly excludes pay from the EU's competence and the definition and composition of 'minimum rates of pay' therefore varies enormously across the Member States. For example, certain bonuses or allowances (such as Christmas bonus or seniority bonus) are constituent parts of pay in some Member States but not in others. The absence of a clear definition of the constituent elements of pay results in legal uncertainty 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. For the latter, access to knowledge about entitlements to pay is rendered even more difficult by the fact that the language, laws and legal system of a host State are likely to be foreign to posted workers who can also be left without effective local trade union representation.

Finally, there are uncertainties concerning the implementation of the PWD in Denmark and Sweden who lack both a statutory minimum wage and a scheme for the extension of collective agreements in accordance with the Directive. In Sweden, the judgment in *Laval* continues to negatively impact trade unions. As Woolfson et al. point out, '[b]y circumscribing the right of national trade unions to undertake collective action to enforce domestic terms and conditions on foreign employers sending workers to Sweden, the ECJ in *Laval* highlighted the soft underbelly of the Swedish model of autonomous collective bargaining pay formation.'[56] As a result, the number of collective agreements concluded with foreign employers has dropped significantly.[57] In the area of construction, the Swedish trade union confederation, LO, produced a report in 2010 which examined the use of posted workers for three large infrastructure projects in Malmö and Stockholm.[58] The report found that large numbers of foreign workers (mainly Polish) were posted to work on the building sites by Polish or Irish employment agencies at wages below the relevant collective agreements. In its response, LO called for increased regulation of posted work in Sweden in order to ensure that collective agreements are observed.[59] A Lex Laval which was passed in 2010 permits trade unions to take collective action with the aim of regulating the employment conditions of posted workers if certain criteria are met: first, the conditions at issue must correspond to generally applicable conditions in the relevant sector; second, trade union demands may only concern minimum pay or other conditions contained in the Directive; and, third, collective action is not permitted with a view to achieving 'a Swedish collective agreement if an employer can show that the employees are already included in terms and conditions (regardless if stipulated by collective agreement, employment contract or managerial decision) that are at least as good as those in a Swedish central branch agreement.'[60] Swedish trade unions complained about the Lex Laval to the ILO and the European Committee of Social Rights

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[56] C. Woolfson, J. Fudge and C. Thörnqvist, 'Migrant precarity and future challenges to labour standards in Sweden' (2014) 35(4) *Economic and Industrial Democracy* 695, p. 699.

[57] Ibid, 709.

[58] C.-M. Jonsson, T. Pettersson, H. Löfgren and K. Arvidsson, *När arbetskraftskostnaderna presser priset – en genomlysning av offentliga investeringar i infrastruktur*, LO-rapporten, Stockholm: LO, 2010. See also C. Thörnqvist and S. Bernhardsson (2015) Their own stories ? how Polish construction workers posted to Sweden experience their job situation, or resistance versus life projects. Transfer: European Review of Labour and Research, 21(1) 11.

[59] Ibid., 34-7.

[60] Prop 2009/10:48.

who both upheld the complaints.[61] There is a widespread recognition that the legislation has severe shortcomings yet both employer associations and trade unions recognise that 'it is difficult to find a model that is compliant with the Swedish industrial relations model and the Court's case law.'[62] Following political pressure, a further parliamentary governmental inquiry on posting of workers was set up in September 2012 with the aim of evaluating the Lex Laval.[63]

In practical terms, the PWD's differentiated rules on wages clearly translate into a competitive advantage for posting companies over local companies in host countries. According to Eurostat data for 2014, an average hour of work costs an employer €40 in Denmark and €39 in Belgium, but only €3.80 in Bulgaria, €4.60 in Romania and €8.40 in Poland.[64] Competitive advantages in relation to wages particularly affect domestically-provided services, such as construction and personal services; given their labour-intensive and price-sensitive character and the fact that delocalisation of these activities is not possible.[65] However, there are also wide variations between sectors and countries. Posted workers are reported to receive a lower remuneration level than local workers, especially in high-wage EU receiving countries, such as Belgium, Denmark, France, Germany, the Netherlands and Sweden. Because of the absence of data on the earnings of posted workers, only gross estimates exist. However, the wage gap is estimated to range from 10-15% in the Danish construction sector, up to about 25% - 35% in the construction sector in the Netherlands and Belgium, and up to 50% in the road transport sector in Belgium.[66] In addition, the Commission suggests[67] that wage differentiation is reported to be especially acute in two cases. First, posted workers in labour-intensive sectors, such as the construction sector and road transport are more likely to receive minimum pay rates than posted workers in high-end service sectors, e.g. finance and insurance. This is because in these sectors labour cost differentials are one of the key drivers of posting of workers while posted workers tend to have low skills. By contrast, the Commission's Impact Assessment[68] suggests that in sectors or for professions in which posting is driven by skills shortages, such as the care services sector, or when workers have higher skills, wages are not reported to be a problematic issue. Second, unequal wage treatment particularly affects workers posted from low- to high-wage countries. Although the

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[61] See Complaint No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, 12 July 2012 and ECSR, Decision on Admissibility and the Merits Complaint No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, 3 July 2013. For a discussion of the ECSR's decision see C. Barnard, 'More Posting' (2014) 43 Industrial Law Journal 194.

[62] D. Schiek et al, *EU Social and Labour Rights and EU Internal Market Law*, p. 66.

[63] See Kommittédirektiv Dir 2012:92. This Committee reported its findings on 26 October 2015. See Översyn av lex Laval, SOU 2015:83, available at http://www.regeringen.se/contentassets/d90af7051ee54a499950155582431922/oversyn-av-lex-laval-sou-201583. The Committee made a number of suggestions for reform which at the time of writing were passing through the Swedish Parliamentary process.

[64] http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs.

[65] European Commission, *Impact Assessment*, p. 13.

[66] The figures in this paragraph all stem from the Commission's Impact Assessment. See ibid note 1. See also Fondazione Giacomo Brodolini (FGB), *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, Final report, November 2015; D. Schiek et al, *EU Social and Labour Rights and EU Internal Market Law: Study for the EMPL Committee* (Brussels: European Parliament, 2015); and, S. Evju, *Cross-Border Services, Posting of Workers and Multilevel Governance*, University of Oslo Skriftserie 193, 2013.

[67] European Commission, *Impact Assessment*, pp. 13-14.

[68] Ibid, p. 14.

PWD does not preclude companies from applying more generous conditions than the minimum standards of the host country, it does not exert any pressure on companies to do so and workers posted from low-wage countries tend to lack the bargaining power to obtain more generous conditions in line with the wage standards of the receiving countries. Within the host Member State itself, the PWD therefore has the potential to create a downward spiral of wage and labour cost competition which may have a negative impact on local workers and risks destabilising coordinated wage-setting regimes and the bargaining autonomy of the social partners in those countries.[69]

The rise in posted work points to the PWD's success in fulfilling its first objective: the promotion of the transnational provision of services. However, the lack of clarity over 'minimum rates of pay' and the absence of an equal treatment principle create conditions which in certain sectors clearly fall short of and, indeed mean that the PWD is merely paying lip service to its second and third objectives: the creation of a climate of fair competition and the guarantee of respect for the rights of workers. In addition, the PWD has the unintended consequence of further entrenching existing inequalities in relation to skill levels and gender.

Skill Levels

The PWD is sufficiently broad to cover a whole host of different types of posting (high skilled and low skilled) as well as EU and non-EU nationals. However the fact that it does not establish a strong catalogue of rights for posted workers, and does not differentiate between different skill levels or sectors means that posted workers largely have to rely on their own bargaining power in order to achieve the same conditions as local workers. The PWD as such only provides a minimum floor of guaranteed rights. This has the effect of entrenching existing inequalities on the grounds of skill levels.

The phenomenon of posted work has risen exponentially since the recent EU enlargements and while the general view is that increased free movement (whether of workers or under the umbrella of services) has been positive, there is also evidence that there has been some downward pressure on wages at the bottom end of the scale, particularly in low-skilled sectors.[70] Although official statistics do not contain information about skill levels, the main sectors which have been particularly affected by this increase in posted workers – construction and manufacturing – are those which have a high proportion of low-skilled labour. The European Builders Confederation (EBC) estimates that, between 2011 and 2014, close to 15,000 (over 8%) of workers in the construction sector in Belgium lost their job 'due to unfair competition showed by a constant increase of posted workers.' According to the EBC, figures from the French construction sector are similar.[71] It is the very nature of low-skilled work that workers are easy to replace and lack sufficient bargaining power in order to achieve equal treatment with local workers. In addition, lack of knowledge of language, local laws, customs and wage-setting practices in low-skilled sectors means that these posted workers are particularly vulnerable to inequality of treatment. It is in these sectors that there is the greatest disparity in wages between local and posted workers. The same is not true for highly-skilled posted workers where

69 See N. Lillie and I. Wagner, *Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building*, ETUI, 2015.

70 For evidence of this in the UK see M. Sumption and W. Somerville, *The UK's New Europeans: Progress and Challenges Five Years After Accession*, Equality and Human Rights Commission Policy Report, together with the Migration Policy Institute, January 2010.

71 Dhéret and Ghimis, 'The revision of the Posted Workers Directive', p. 7 and European Builders Confederation, 'Posting of workers: European small construction entrepreneurs welcome revision', 2016.

there is virtually no evidence of the posted workers being treated differently to local workers.[72] The PWD therefore contributes to the phenomenon of widening income inequality across the EU[73] and its potential to allow unequal treatment on the grounds of pay entrenches inequality on the basis of skill levels.

Gender

There is a lack of reliable data on the gender composition of posted workers however one can make a number of general comments about gender-related aspects of the Directive. The Directive does not mention gender and appears gender neutral. It therefore seeks to provide for 'formal' equality between men and women.[74] However, the very nature of posted work means that it is inherently disadvantageous to women especially as it is still the case that in most societies women have maintained primary care responsibilities.[75] As such, in appearing gender neutral, the PWD does little to encourage 'substantive' equality.[76]

A large part of posted work occurs in the construction sector: a male-dominated industry with very high labour costs.[77] Posting here is particularly profitable as it allows employers to dramatically reduce labour costs. It is therefore not surprising that the majority of postings occur in this sector. The Commission however suggests that widespread unfair treatment on grounds of wages is not an issue in areas where posting is driven mainly by skills shortages rather than competition on the basis of pay. The care sector – largely female-dominated stands out here. However, care work by its very nature tends to be low-paid[78] so there is limited scope for competition on grounds of pay and therefore there is admittedly little unequal treatment here between posted and local workers.[79] However, this

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72 European Commission, *Impact Assessment*, p. 14.

73 Ibid, p. 13.

74 It is beyond the scope of this paper to examine the differing theories which justify discrimination legislation. An overview of this can be found in S. Fredman, *Discrimination Law*, Oxford: OUP, 2nd edition 2011, chapter 1 and N. Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 *OJLS* 693. For EU Anti-Discrimination law see D. Schiek, 'From European Union non-discrimination law towards multidimensional Equality Law for Europe', *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, (D. Schiek & V Chege eds, New York et al: Routledge-Cavendish, 2009)3-27.

75 See OECD, *Closing the Gender Gap: Act Now*, OECD Publishing, 2012, pp. 199 ff and W. Patton, Conceptualising Women's Working Lives: Moving the Boundaries of Discourse, Sense Publishers, 2013, pp. 5 -6.

76 See further L. Jacobs, *Pursuing Equal Opportunities*, CUP, 2004, chapter 5 and S. Fredman, *Women and the Law*, OUP, 1997, chapters 1 and 4.

77 For an overview of the average costs see: http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs.

78 The feminisation of care is not restricted to the family sphere, but has also been reflected in paid care work. As the sector has grown, women have formed an ever larger majority of paid care workers. See further M. Daly and K. Rake, *Gender and the Welfare State: care, work and welfare in Europe and in the USA*, Cambridge: Polity Press, 2003. In keeping with the low value assigned to caregiving in the private sphere, this sector is characterised by low pay and poor working conditions, devaluing the value of care in economic and employment terms. As the Migration Observatory points out, in the UK, social care, which includes a range of care-related occupations, e.g. care assistants in residential care homes and in home care services, is one of the lowest paid sectors of the labour market. The sector has historically been reliant on women, who have combined low paid part-time work in social care with unpaid caring responsibilities for families. Although the introduction of the National Minimum Wage in 1999 brought about an increase in average pay levels for social care workers, particularly in care homes, most pay has since stayed on or near the National Minimum Wage. See further *http://www.migrationobservatory.ox.ac.uk/policy-primers/social-care-older-people-and-demand-migrant-workers.*

79 For references see http://www.migrationobservatory.ox.ac.uk/policy-primers/social-care-older-people-and-demand-

then raises broader questions over the value of care work vis-à-vis comparable low-skilled work in male-dominated sectors such as construction.[80]

The newest proposal – a rebalancing of objectives?

On 8 March 2016, the European Commission issued a set of proposals as part of its mobility package which included a proposal for a Directive amending the PWD. The proposed Directive is to complement the Enforcement Directive rather than to replace it. The proposed Directive replicates the PWD's objectives and aims to facilitate the provision of services across borders within a climate of fair competition while ensuring respect for the rights of posted workers.[81] It has the same legal base as the PWD – firmly locating the regulation of posted work within the free movement of services – focuses on three main areas: rules on temporary work agencies[82]; rules applying to long-term posting[83]; and, the remuneration of posted workers where it introduces the principle of equal pay for equal work.

In terms of pay, the Commission proposal replaces the reference to 'minimum rates of pay' in article 3(1) of the PWD with the term 'remuneration' and imposes an obligation on Member States to publish information on the constituent elements of remuneration. This would mean that employers would have to apply the rules of the host country in relation to pay/remuneration, as laid down by law or by universally applicable collective agreements, and not just the minimum rates of pay. In addition, rules set by universally applicable collective agreements will become mandatory in all sectors, whereas previously they were only mandatory in the construction sector. This amendment builds on the case law of the CJEU in *Sähköalojen ammattiliitto ry* by entitling posted workers to some of the same advantages such as bonuses, or pay increases according to seniority as local workers. The new proposal also extends the equal treatment principle to posted temporary agency workers vis-à-vis local temporary agency workers with respect to remuneration and working conditions.

The Commission's proposal has already caused controversy. The ETUC considers the proposal a significant improvement but argues that it will result in a right 'to equal pay that many posted workers will never get.'[84] The proposal is certainly a step in the right direction in that it recognises a problem with the current definition of 'minimum rates of pay' and the way in which these are determined. The use of the term 'remuneration' allows for the inclusion of a variety of different elements as part of a pay package and gives social partners some discretion in bargaining over pay and its constituent

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migrant-workers. There have however been incidences of unequal treatment in relation to terms and conditions of work (not pay). For examples see Ver.di, Migrantinnen in Privathaushalten, 2014 and F. Colombo, A. Llena-Nozal, J. Mercier and F. Tjadens, *Help Wanted? Providing and Paying for Long-Term Care*, OECD Health and Policy Studies, 2011.

80 The concept of equal pay for work of equal value is enshrined in EU law. See the Recast Equal Treatment Directive 2006/54 which consolidated inter alia previous directives on equal treatment and equal pay, and incorporated principles derived from CJEU case law. See also Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535 and Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961.

81 *http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=2488&furtherNews=yes*.

82 The proposal introduces the principle of equal treatment between posted and local temporary agency workers.

83 The proposal aligns the definition of a posting period (24 months) with that of the relevant social security provisions. The current PWD does not define when a posting ceases to be 'temporary'. Under the Commission's proposal, long-term posted workers will be covered by the mandatory rules of the host country's labour law system following a period of 24 months of posting.

84 *https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some#.V3PVEaIYF2A*.

parts. As Novitz points out, 'this would enable the PWD to reflect the more dynamic wage-setting realities in the contemporary labour market.'[85] The proposal also makes provision for mandatory standards to be set for posted workers in all sectors by collective agreements which have been declared universally applicable (currently this only applies to the construction sector). However, in practice this is likely to have limited effect.[86] In addition, the proposed Directive only recognises wage setting through universally applicable collective agreements or legislation. There is no recognition of the role played by sectoral or company-level agreements. As such, the proposed Directive does little to tackle inequality in those countries, such as Germany or Italy which have no, or make limited use of, universally applicable or generally applicable collective agreements but rely instead on other forms of agreements. Posted workers working in sectors with universally binding collective agreements will therefore receive a higher level of protection than posted workers active in less regulated sectors. This not only creates inequality of treatment between different groups of posted workers but also raises a gender-dimension in that sectors such as the construction sector which are traditional trade union strongholds have been more successful than others[87], such as the care sector, in developing transnational regulation of working conditions. Such issues could be better dealt with if there was better collection of data on posted workers, their characteristics and skill levels. However, although the European Commission recognised the unreliability of existing data on posted work[88], the proposed Directive fails to establish a more reliable system for the collection of data. The proposed Directive has also been criticised for neither introducing a right for trade unions to bargain on behalf of posted workers nor does it address concerns over joint liability of sub-contractors and main contractors for respect of terms and conditions of employment.[89] Finally, the proposed Directive does not address the two central concerns raised in the wake of the *Laval* case: first, that the PWD sets out a ceiling of protection (rather than a floor of rights); and, second, that collective action taken by trade unions to enforce posted workers' rights to better treatment must be proportionate.

The response to the proposed Directive by national parliaments shows diverging interests between Member States.[90] Whereas the French parliament criticised the proposal for not providing sufficient protection for equality of treatment of posted workers, parliaments from Central and Eastern European Member States objected to the proposal on the grounds that a right to equal pay would harm competitiveness. As of 10 May 2016, fourteen chambers from eleven Member States (ten from Central and Eastern Europe, and Denmark) had made use of the Subsidiarity Control Mechanism to raise subsidiarity concerns and thereby triggered a 'yellow card'[91]. In addition, six national parliaments (Spain, Italy (both the Camera dei Deputati and the Senate), Portugal, the UK and France) sent opin-

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85 T. Novitz, 'The Scope for Collective Bargaining in Posting and Procurement—What Might Come From Recent Court of Justice Case Law and the Proposed Reform of the Posting of Workers Directive?' April 6 2016 available at http://legalresearch.blogs.bris.ac.uk/2016/04/the-scope-for-collective-bargaining-in-posting-and-procurement/.

86 The Commission anticipates that it will only have an effect in a limited number of Member States including Ireland and Luxembourg. See European Commission, *Impact Assessment*, p. 24.

87 Dhéret and Ghimis, 'The revision of the Posted Workers Directive', p. 10.

88 European Commission, *Impact Assessment*.

89 https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some#.V3PVEaIYF2A.

90 Individual Member State opinions are available here: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm

91 See http://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/.This is only the third time that such a procedure has been triggered.

ions considering the proposal as compatible with the principle of subsidiarity. Central and Eastern European countries had already opposed a review of the PWD prior to the publication of the current proposal on the basis that the principle of equal pay for equal work in the same place may be incompatible with the single market, as pay rate differences constitute one legitimate element of competitive advantage for service providers. In responding to the subsidiarity control mechanism, the Socialists and Democrats Group in the European Parliament issued support for the proposed Directive and rejected national parliaments' concerns.[92] On 20 July 2016, the European Commission published a Communication[93] which concluded that the proposed revision of the PWD did not breach the subsidiarity principle. The Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen also reiterated that '[p]osting of workers is a cross-border issue by nature. The Juncker Commission remains firmly committed to the free movement of people on the basis of rules that are clear, fair for everybody and enforced on the ground.'[94] The renewed emphasis on protection of workers' rights and fair competition was confirmed by Jean-Claude Juncker in his State of the Union address on 14 September 2016 where he stated that 'workers should get the same pay for the same work in the same place. Europe is not the Wild West, but a social market economy.'[95]

The use of the Subsidiarity Control Mechanism in this case (and predominantly by one regional bloc) highlights serious divisions across Europe and is indicative of the tensions between economic and social rights which came to the fore in the *Laval* case. On 3 July 2016, the French Prime Minister, Manuel Valls, threatened to stop applying the PWD unless the revised Directive is adopted.[96] For home Member States, especially those from Central and Eastern Europe, the 'process of [relocation by enterprises], and that of the related migration of some of their workers to the old Member States, are the means by which convergence on Western European levels of productivity and per capita income are achieved.'[97] However, in light of current 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 PWD to establish a climate of fair competition and protect workers' rights while also promoting the transnational provision of services has changed considerably. Following the recent European enlargements, the ratio of highest to lowest national median wages across the EU has increased considerably and there are certainly valid suggestions that the way in which people move across the EU has changed. There has been a shift from the regular freedom of workers to move to another member state towards other mobility channels such as posting and/or (bogus) self-employment.[98] According to Cremers, 'posting has become one of the channels for the cross-border recruitment of "cheap" labour without reference to the rights that can be derived from EU law on genuine labour mobility.'[99] Instead, under the current system of regulation 'posted workers may un-

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92 http://www.politico.eu/wp-content/uploads/2016/05/3rd-yellow-card-V.Kreilinger.pdf.

93 Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 COM(2016) 55 final.

94 http://europa.eu/rapid/press-release_IP-16-2546_en.htm.

95 http://europa.eu/rapid/press-release_IP-16-3042_en.htm.

96 The Economist, *Going posted*, 9th July 2016.

97 N. Adnett and S. Hardy, *The European Social Model – Modernisation or Evolution?*, Elgar, Cheltenham, 2005, p. 201.

98 Dhéret and Ghimis, 'The revision of the Posted Workers Directive', p. 4.

99 J. Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22(2) *Transfer* 149, p. 157.

dercut the minimum conditions established by the host country's law or negotiated under generally applicable collective agreements and undermine the organization and functioning of local or sectoral labour markets.'[100] However, if posting of workers is to become a genuinely alternative mobility channel to the free movement of workers, then it must be subject to proper regulation, monitoring and enforcement. In its current form, the PWD is not, in many cases, able to adequately fulfil its own objectives. For host Member States, the absence of an equal pay principle and lack of clarity over minimum rates of pay lead to 'a concentration of posted workers in the lower echelons of labour markets [which] bears the risk of an erosion of labour standards and evasion of mandatory rules. This type of regime shopping leads to serious risks, such as the distortion of competition and a downward pressure on pay'[101]; which go directly against the PWD's objectives. The Commission's proposals for a revision of the PWD go some way towards alleviating some of these concerns and rebalancing the objectives of the Directive. However, it remains to be seen whether the proposals will be adopted in the face of substantial opposition from a number of Member States.

Conclusion

The phenomenon of posted work is on the rise across the EU and is part of a broader trend whereby workers are increasingly making use of different mobility channels in order to move from one Member State to another. The PWD aims to promote the transnational provision of services while also providing a climate of fair competition and ensuring respect for the rights of workers. The balancing of these objectives has led to tensions which culminated in the CJEU's decision in *Laval* where the Court firmly tilted the balance towards the protection of the transnational provision of services, and away from concerns for the rights of (posted) workers. Twenty years after its adoption, and in the context of an enlarged European Union, it is clear that the PWD is no longer able to adequately fulfil its objectives. The lack of clarity on the definition of minimum rates of pay and the absence of an equal treatment principle – inherent in the free movement of workers but not granted to posted workers who are regulated under the umbrella of free movement of services – has led to differentiated rules on wages across Member States. In effect, the PWD's provisions, as interpreted by the CJEU, give posting companies a competitive advantage over companies in host Member States which goes beyond 'fair competition'. This may lead to a downward spiral of wage and labour cost competition which has a negative impact on local workers and risks destabilising coordinated wage-setting regimes. Equally, the PWD fails to protect those workers' rights which it has set out as essential within its provisions. Attempts to amend the PWD have hitherto been unsuccessful. The Commission's most recent proposal is certainly a step in the right direction however it is limited in its potential due to the legal base. Diverging interests as evidenced by the Subsidiarity Control Mechanism may put an end to the newest proposal, yet that will not resolve the tensions which the PWD in its current form exacerbates.

Contents

[100] Ibid.

[101] Ibid.