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# Vysílání pracovníků v rámci Evropské Unie

**Diplomová práce**

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Katedra evropského práva

Datum vypracování práce (uzavření rukopisu): 21.06.2017

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# Posting of workers in the European Union

**Master's thesis**

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Date of completion (manuscript closure): 21.06.2017

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## Poděkování

Děkuji své vedoucí práce, JUDr. Tereze Kunertové, LL.M., Ph.D., za ochotu vést mou diplomovou práci, trpělivý přístup a za cenné rady, které mi při psaní práce poskytovala.

## Acknowledgement

I would like to express my gratitude to JUDr. Tereza Kunertová, LL.M., Ph.D. for her willingness to be my advisor as well as her time, patience, expert advice and all her valuable and helpful comments.

# Contents

# 1 Introduction

Posting workers is a phenomenon used on the labor market as a flexible and efficient tool which enables to satisfy an undertaking's temporary demand of labor.

On the national level, it raises issues in regard to the separation of responsibilities among the undertaking making the posting (i.e. the employer of the worker) and the undertaking temporarily receiving the worker. Although an efficient tool on the one hand, posted workers can be delicate targets of employment law abuse. Therefore national labor law aims at striking a reasonable balance between the best interests of posted workers and needs of employers.

On the European Union level, the situation is all the more complex in that it requires not only a balance between the interests of employers and posted workers, but also a balance between the interests of high-waged MS (primarily the prevention of social dumping caused by the influx of cheaper labor from other MS) and low-waged MS (primarily the application of the "country of origin" principle preserving the competitive advantages of national service providers), as well as a balance between the protection of social rights of posted workers on the one hand and the freedom to provide services on the other. The complexity of posting workers within the EU also lies in the necessity to determine the legal regime of which MS shall apply to posted workers; therefore, a thorough examination of the phenomenon requires the involvement of three branches of law – European Union law, national labor law and private international law. The complexity of posting workers is also underlined by the fact that from the European Union legal perspective, de facto two basic freedoms are concerned – the freedom to provide services as well as the freedom of workers. Which of the two regimes is prioritized and why shall be explained in the upcoming chapters.

Mostly due to its complex and transcendent nature, the phenomenon is overlooked and thorough studies are scarce. Posting workers is also often misunderstood and surrounded by false beliefs. For instance, the public assumes that workers are posted from "new" member states to "old" member states and that only non-qualified workers are concerned. Statistics

refutes both beliefs, showing that in case of France and Belgium, for instance, the vast majority of posted workers are posted from old MS (i.e. EU 15). Moreover, Germany and France – two old member states belong to the top three sending countries. Even though the majority of posted workers perform low-skilled or medium-skilled tasks, some high-productivity services such as the financial services are also involved (highly-skilled services amounting to 10.3% of the total number of postings).[1]

According to latest available data, in 2014 there were over 1.92 million postings in the European Union, which represents a "mere" 0.7% of the total European Union labor work force. The relatively small amount of concerned workers is another reason why the phenomenon is underestimated and not addressed sufficiently. However, statistics also show that the use of the concept is on a constant rise. In comparison to the year 2013, 2014 was marked by a 10.3% rise in postings, and in comparison to 2010, by an even more significant rise of 44.4%.[2] Trends such as an increasing interest in labor mobility among the European Union workforce, facilitation of mobility and incitation by Member States to exercise the freedom of movement and various other factors are in favor of a continuing increase in the upcoming years.[3] Moreover, available figures are likely to be underestimated due to the difficulties in collecting data as well as weak inspections. Only some member states have developed registration systems that gather reliable data, while in other member states statistics are only generated on the basis of social security portable certificates. Such certificates, however, are not required in case of postings shorter than one month or longer than 24 months and so the data is not complete.[4] Therefore, it is more than likely that in reality a greater number of posted workers is concerned.

[1] DHÉRET, Claire a Andreia GHIMIS. *Discussion paper: The revision of the Posted Workers Directive: towards a sufficient policy adjustment?* [online]. 2016 [cit. 2017-06-07], p. 5-7.

[2] *COMMISSION STAFF WORKING DOCUMENT - 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*. 08.03.2016. 2016. ISSN COM(2016) 128 final., p. 6-8.

[3] The constant rise could, however, be temporarily disturbed due to Brexit, depending on the terms and conditions of labor mobility negotiated within the deal between the EU and UK.

[4] *COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT: op.cit.*, p. 8.

As far as the use of posting in specific economic branches is concerned, posted workers is particularly significant in the construction sector, which represents 42% of the total postings. However, it is also common in the manufacturing industry, transportation and in service sectors, such as personal services (education, health and social work) and business services (administrative, professional, and financial services).[5]

My Erasmus studies at *Université Toulouse I Capitole* deepened my interest in the internal market (particularly the free movement of persons) and inspired me to choose a related topic for my thesis. The subject would have to be sufficiently topical and not yet exhausted. Posting of workers within the EU became the ideal candidate. Not only is posting workers an underestimated and therefore insufficiently elaborated concept, but it´s also particularly topical due to two reasons – the increasing cases of misinterpretation by certain member states in regard to drivers sent abroad within transit transport activities[6], as well as due to the fact that on March 8, 2016, the European Commission presented a proposal of the revision of the current legal framework, introducing substantial changes in regard to the legal regime applicable to posted workers. My choice of the topic became definite thanks to my internship with a Member of the European Parliament involved in the Committee on Employment and Social Affairs, which permitted me to develop an in-depth understanding of the practical challenges of posting workers as well as gain insight on Committee debates and get involved in the process of drafting amendments to the European Commission's proposal.

There is a number of theses which approach the phenomenon of posting workers from the perspective of labor law and focus on its specifics on the national scale and implications for the national labor market. This is why I decided to examine the subject from a more global, universal perspective, and focus on posting workers on the intra-European Union scale in light of European Union law.

[5] *COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT: op.cit.*, p. 8.

[6] See inter alia: GRECU&PARTNERS. *Germany restricting freedom of movement by adopting MiLog* [online]. In: . 2016 [cit. 2017-06-07]; DIMITROVA, Gabriela. *The European Commission takes legal action against France on the 'Loi Macron'* [online]. In: . [cit. 2017-06-07].

In order to provide a broader understanding of posting workers within the EU and the logic of its regulation at EU level, I do not limit myself to a legal analysis of relevant texts, but also describe the chronological process of legislative evolution, including the context of each stage of development. Therefore, the outline of this thesis corresponds to the key milestones of legal regulation, which were the adoption of the "Posting of Workers Directive", followed by the adoption of the "Enforcement Directive", and eventually amounting to the current revision proposal. In order to demonstrate the transcendence of the phenomenon and its relation to other concepts, I also pay attention to other related secondary acts. Last but not least, I address key judgments of the Court of Justice of the European Union and demonstrate their impact on the interpretation of secondary legislation as well as the balancing of two colliding principles, the freedom to provide services and protection of workers.

The aim of this thesis is to provide a complex understanding of the *de lege lata* framework, demonstrate practical challenges, conflicting interests, relation to other key concepts and legislative acts, but also consider the topic from the *de lege ferenda* perspective.

# 2 General legal framework including case law

The key relevant *TFEU* provision is *Article 56* which states that "*restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*".[7] Accordingly, neither rules applicable on posted workers (be it EU or national legislation) nor practices imputable to MS may impede the freedom to provide services, unless such a rule or practice invokes an overriding reason of general interest, is non-discriminatory, proportionate, suitable for the attainment of the respective general interest and the general interest is not safeguarded under the rules applicable in the MS of origin. The extent to which national legislation and practices are compatible with the freedom to provide

[7] With regard to the EEA EFTA States, the corresponding provision is laid down in *Article 36 Part III, Chapter 3 EEA Agreement*.

services is the subject of various CJEU judgments which will be gradually addressed in respective sections of this thesis.

As regards secondary legislation, the acts directly pertaining to posted workers are *Directive 96/71/EC concerning the posting of workers in the framework of the provision of services* and *Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System*. However, the status of posted workers cannot be assessed without regard to a number of other crucial legislative acts, inter alia *Regulation 593/2008 on the law applicable to contractual obligations*, *Directive 2006/123/EC on services in the internal market*, *Directive 2008/104/EC on Temporary Agency Work* and *Regulation 883/2004 on the coordination of social security systems*. The aforementioned legislation shall equally be developed in respective chapters of this thesis.

The legal basis of the key act, *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* (hereinafter *"PWD"*), is identified in *Articles 53(1) and 62 TFEU* related to the freedom of establishment and the freedom to provide services. Therefore, even though the *PWD*'s preamble also highlights the protection of workers, stating that "*promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*"[8], the primary objective of the *PWD* is to facilitate the freedom of services, not protect workers. This is why CJEU seems to favor the freedom to provide services over the protection of social rights of workers, as will be shown further on in this thesis.[9]

[8] Paragraph 5 PWD Preamble
[9] DHÉRET, Claire a Andreia GHIMIS : op. cit., p. 5-7.

## 2.1 Posting workers in the context of the freedom of services

From the legal perspective, posting workers within the EU is a hybrid phenomenon due to its close factual ties to two core concepts of the internal market – the free movement of workers as well as the free movement of services. Even though posted workers are workers by nature, their legal status is derived from provisions on the freedom of services. Free movement of services can entail or even require the movement of workers who are necessary to perform a contracted service in a host MS.[10] If a service provider is to enjoy the liberty of providing services, he must necessarily have the legal possibility to take advantage of his workers from the MS of origin (i.e. the MS in which he is established), without the host MS (i.e. the MS on the territory of which the services are provided) interfering with the selection of his employees. Posted workers are simply part of the equipment and facilities with which a service provider moves to a host MS in order to perform a service contract.[11] Therefore, the right of entry to a MS for the purpose of providing a service applies not only to service providers, but also to their workforce, regardless of EU citizenship or third-country nationality.[12] Subsuming posted workers under the regime of freedom of services is the only viable solution in regard to preserving key internal market principles.

In accordance with this, the service provider is the primary addressee of protection under EU law whereas posted workers are essentially derived beneficiaries entitled to a limited set of rights to the extent that their protection is required either in order to ensure the *effet utile* of the freedom of services or to respect basic social standards and prevent social dumping. Thus, posted workers cannot be associated with workers within the meaning of *Article 45 TFEU* (hereinafter "*Workers*"), who enjoy a variety of specific rights unknown to posted workers, including the right to equal treatment as well as the right to free movement within the EU. Unlike Workers, posted workers are only posted for a temporary period of time

[10] VOS, Marc. Free movement of workers, free movement of services and the posted workers directive: a Bermuda triangle for national labour standards? *ERA Forum* [online]. 2006, 7(3), 356-370 [cit. 2016-11-19]. DOI: 10.1007/BF02857086. ISSN 16123093, p. 357.

[11] WATSON, Philippa. *EU social and employment law*. Second edition. ISBN 978-0-19-968915-6. P. 280

[12] BARNARD, Catherine. *The substantive law of the EU: the four freedoms*. 3rd ed. New York: Oxford University Press, 2010. ISBN 978-0-19-956224-4, p. 370.

and once they fulfil the services, they are obliged to return to the MS of origin. While Workers enter the labor market of another MS in essence exclusively on the basis of their independent decision, posted workers are posted to another MS by their employer on the basis of their existing employment contract. While standard employment contracts may be concluded for an indefinite period of time, posted workers may only be posted for a definite period of time.[13] No employment contract is concluded between the posted worker and the contractor in the host MS.[14] Therefore, posted workers remain attached to the labor market of the MS in which the service provider is established[15] while the *TFEU* chapter on free movement of Workers applies only to Workers who become part of the host MS´s labor market.[16]

This being said, a posted worker must also be distinguished from a service provider. Even though the difference may appear to be obvious in theory, in practice it is less so. What may have once been relatively clearly distinguished has become blurrier in the context of today´s globalized world, with increasing use of subcontracting chains, outsourcing and a constant introduction of new flexibility instruments for workers. Consequently, workers are becoming increasingly independent of their employers whereas service providers increasingly dependent on the orders of their contractor.[17]

Differentiation between the two is crucial in order to define applicable legal provisions, because unlike workers operating under an employment contract, service providers are not covered by labor standards. At national level, difficulties in distinguishing workers and service providers generate issues regarding the application of labor law and social security systems. At EU level, it has become increasingly difficult to distinguish between the free movement of Workers and services. The importance of drawing a clear line between the two was accentuated by the 2004 EU accession of 10 new essentially lower waged MS. The accession treaty authorized temporary limitations to the free movement of Workers (which all but three

[13] BARANCOVÁ, Helena. *Vysielanie zamestnancov*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2009. Autorské publikácie. ISBN 978-80-7380-156-4., p. 41.
[14] BARANCOVÁ, Helena: op. cit., p. 46.
[15] WATSON, Philippa: op. cit., p. 280.
[16] VOS, Marc: op. cit., p. 358.
[17] VOS, Marc: op. cit., p. 358.

MS activated) while allowing immediate free movement of services.[18] Consequently, citizens from new MS didn´t have automatic access to the labor market of other MS for seven years.[19] However, since access of service providers to the service market of existing MS wasn´t subject to any such restrictions, a number of citizens of new MS, *de facto* Workers, would circumvent the rules by feigning the status of service providers and accordingly benefit from the freedom of movement. Due to lower protection standards applicable to entrepreneurs as opposed to workers, verifying the true nature of self-proclaimed service providers remains a key problem up to this day.

A clearer boundary between the notions of a Worker, posted worker and service provider can be drawn with the aid of established case law.

In the *Lawrie-Blum* case, the CJEU identified the essential features of an employment relationship as follows: *"For a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."*[20] Doing so, the CJEU created an obligatory, common meaning of the notion of Worker under Article 45 TFEU. The key element which can be deduced from the definition is the subordinate position of a Worker in regard to an employer. In subsequent case law, the CJEU maintained its position, availing itself of the *Lawrie-Blum* definition when examining various questionable situations.

The creation of a common definition of a Worker had the potential to ensure protection to Workers in all MS. However, the benefit was relativized in the *Meeusen* judgment. In the present case, the CJEU stated that "*the existence of a relationship of subordination is a matter which it is for the national court to verify*."[21] The deferral to national courts was surprising, considering that the CJEU had consistently upheld the common

[18] ÞACU CÃTÃLIN. Posting of Workers in Crisis: Europe Looking for Solutions. *Ovidius University Annals, Economic Sciences Series* [online]. 2012, XII (2), 230 [cit. 2016-11-19]. ISSN edsrep., p. 231.

[19] European Commission. *MEMO/11/259 Frequently asked questions: The end of transitional arrangements for the free movement of workers on 30 April 2011* [online], Brussels, 28 April 2011 [cit. 21.11.2016].

[20] Judgment of 3 July 1986, Lawrie-Blum, C-66/85, ECLI:EU:C:1986:284, paragraph 17.

[21] Judgment of 8 June 1999, *Meeusen*, C-337/97, ECLI:EU:C:1999:284, paragraph 16.

European nature of the notion Worker.[22] Due to the lack of existence of a European framework for a common understanding of its key element, *"subordinate position"*, the benefit of the common definition provided in *Lawrie-Blum* was compromised.

A common framework for interpreting the element *subordinate position* was eventually developed in the *Allonby* case. In the present case the CJEU did not refer to the national court in order to interpret the relationship of subordination, but developed a European concept, upholding that the process of evaluating whether a relationship of subordination exists, must be done "*in each particular case having regard to all the factors and circumstances"*[23] characterizing the relationship between the parties. Nevertheless, a person considered as a self-employed person (and thus potentially a service provider) under national law can be considered as a Worker under EU law and vice versa.

In regard to posted workers, unifying the notion of Worker was only a partial victory. The CJEU was also confronted with the problem of differentiating posted workers and subsuming them under a different regime, which would be less favorable than that of Workers as such yet still protective to a certain extent. The CJEU determined the specificity of the legal status of a posted worker vis-à-vis that of a Worker soon after *Lawrie-Blum*, in the *Rush Portuguesa* case.

## 2.2 Specific status of posted workers held in Rush Portuguesa

In the present case, a Portuguese service provider Rush Portuguesa entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in the west of France, bringing its Portuguese employees from Portugal to perform the service. France claimed the right to recruit Portuguese Workers due to transitional restrictions regarding the free movement of Workers within the EU applicable vis-à-vis Portugal at the time. The CJEU opposed posted workers to Workers asserting that "*such workers return to their country of origin after the completion of their work without at any time*

[22] VOS, Marc: op. cit., p. 360.
[23] Judgment of 13 January 2004, *Allonby*, C-256/01, ECLI:EU:C:2004:18, paragraph 69.

*gaining access to the labour market of the host Member State.*"[24] The CJEU held that TEC [TFEU] provisions on the freedom of services preclude a MS from "*prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.*[25]" Therefore, posted workers do not fall under the same regime as Workers and are not subject to national procedures regarding the entry of non-MS employees to their labor market.

This ruling could be considered as entirely satisfactory in regard to the interest of protecting the freedom of services. However, the CJEU also considered that "*Community law does not preclude 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; nor does Community law prohibit Member States from enforcing those rules by appropriate means.*"[26] On the one hand, after recognizing the specific status of posted workers, the CJEU forbade MS to impose restrictions on the access of posted workers to their service market, and on the other hand enabled MS to apply national labor regulations on them, which, essentially, represents a type of restriction itself.

The ruling in *Rush Portuguesa* was not the first of its kind. The CJEU previously recognized the possibility of host MS to apply national law vis-à-vis posted workers in the *Seco* case.[27] However, the ruling in *Seco* was more restrictive in that it was limited to the matters

[24] Judgment of 27 March 1990, *Rush Portuguesa,* C-113/89, ECLI:EU:C:1990:142, paragraph 15.
[25] Judgment of 27 March 1990, *Rush Portuguesa,* C-113/89, ECLI:EU:C:1990:142, paragraph 12.
[26] Judgment of 27 March 1990, *Rush Portuguesa,* C-113/89, ECLI:EU:C:1990:142, paragraph 18.
[27] Judgment of 3 February 1982, *Seco,* C-62/81, ECLI:EU:C:1982:34, paragraph 14.

of minimum wage, whereas *Rush Portuguesa* acknowledges the possibility in regard to all working conditions.[28]

The possibility of MS to apply national law to posted workers recognized in *Rush Portuguesa* was so extensive that it seemed to categorically exempt national labor laws from the scope of *Article 56 TFEU*.[29] The response was two-folded, consisting of a limitation to such a possibility in subsequent case law and the adoption of the posting of workers directive.

## 2.3 Post Rush Portuguesa case law

As of 1991, less than a year after *Rush Portuguesa*, the CJEU began developing case law restricting the possibility of MS to endanger the freedom to provide services by imposing their national law on service providers established in other MS.

The *TEC´*s (now *TFEU)* provisions on free movement had long been understood to forbid both direct and indirect discrimination, but building on its previous case law, the CJEU extended the prohibition of restrictions beyond non-discrimination in order to ensure the *effet utile* of services. According to this approach, even restrictions that discriminate neither directly nor indirectly can still be considered as a breach of *Article 59* if they somehow hinder the activities of an incoming service provider.[30]

Within five years, the CJEU developed settled case law, according to which the principle of free movement of services requires *"not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede od render less advantageous the activities of a provider of services established in another Member State*

[28] WATSON, Philippa: op. cit., p. 284.
[29] SCHÜTZE, Robert. *European Union law*. ISBN 978-1-107-41653-6, p.646.
[30] TOMÁŠEK, Michal, Vladimír TÝČ a Jiří MALENOVSKÝ. *Právo Evropské unie*. Praha: Leges, 2013. Student (Leges). ISBN 978-80-87576-53-3, p. 235.

*where he lawfully provides similar services."* [31] The same case law concurrently developed an established theory of overriding reasons in general interest (hereinafter "*overriding reasons*"), which justify restrictions or obstacles of a certain nature. Restrictions or obstacles are legitimate as long as:

(1) The interest is not safeguarded by the rules to which the service provider is subject in the MS where he is established;
(2) The restriction is suitable for securing the attainment of the objective which it pursues;
(3) The restriction does not go beyond what is necessary in order to attain its objective (the objective cannot be attained in a less restrictive manner);
(4) The restriction is applied in a non-discriminatory manner.[32]

Subsequently, the CJEU would have to clarify this position in regard to MS applying national law to posted workers and evaluate whether such imperative application of national law could be justified by an overriding reason, and if so, under what conditions. According to *Vos*, "*The CJEU has always been hesitant to develop labour exemptions to the internal market principles and has typically gone for a balancing approach."*[33] The CJEU decided to proceed in line with this methodology and avoid collision with *Rush Portuguesa*. Accordingly, it gradually developed a multistep approach in assessing the legitimacy of the application of national law on incoming service providers.[34]

[31] VOS, Marc: op. cit., p. 362. See also Judgment of 25 July 1991, *Säger v Dennemeyer,* C-76/90, [1991] ECLI:EU:C:1991:331, Judgment of 30 November 1995, Gebhard, C-55/94, ECLI:EU:C:1995:411 and Judgment of 5 October 2004, Caixa Bank, C-442/02, ECLI:EU:C:2004:586.

[32] See also Judgment of 25 July 1991, *Säger v Dennemeyer,* C-76/90, ECLI:EU:C:1991:331, Judgment of 24 March 1994, Schindler, C-275/92, ECLI:EU:C:1994:119 and Judgment of 10 May 1995, Alpine Investments, C-384/93, ECLI:EU:C:1995:126.

[33] VOS, Marc: op. cit., p. 364.

[34] See inter alia Judgment of 9 August 1994, *Vander Elst*, C-43/93, ECLI:EU:C:1994:310, Judgment of 28 March 1996, *Guiot*, C-272/94, EU:C:1996:147, Judgment of 23 November 1999, *Arblade*, C-369/96, ECLI:EU:C:1999:575, Judgment of 15 March 2001, *Mazzoleni*, C-165/98, ECLI:EU:C:2001:162, Judgment of 25 October 2001, *Finalarte*, C-49/98, ECLI:EU:C:2001:564; Judgment of 24 January 2002, *Portugaia*, C-164/99, ECLI:EU:C:2002:40; Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, ECLI:EU:C:2004:610.

The CJEU assumes that the application of a host MS´s legislation is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative or economic burdens. Whether or not such is the case, is for the national courts to assess.[35] The CJEU considers the application of national law legitimate if the criteria of overriding reasons are met and a legitimate general interest is invoked. The CJEU had the occasion to recognize a number of overriding reasons justifying the application of national law.

Essentially, the CJEU recognizes socially motivated reasons of public interest, but not economically motivated ones. Thus, it rejects reasons related to economic protectionism, such as the protection of domestic businesses or the reduction of unemployment.[36] Even though avoiding disturbances on the local labor market has been recognized as a legitimate overriding reason, the motif is of marginal importance in the context of posting workers, because as explained above, posted workers are employees of a service provider and as such they are integrated in the labor market of the MS of the service provider´s establishment and due to the temporary nature of their posting do not seek to gain access to the host MS´s labor market.

Despite its refusal of economically motivated reasons, the CJEU has hinted its willingness to recognize the prevention of unfair competition through cheaper labor standards in *Wolf&Müller*.[37] In particular, the CJEU held that *"Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, [..], such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services*".[38] However, the case was specific in that apart from the prevention of unfair competition, another public interest was upheld, particularly the protection of workers.

[35] VOS, Marc: op. cit., p. 364.
[36] VOS, Marc: op. cit., p. 365.
[37] BLANPAIN, Roger. European labour law. 13th rev. ed. Alphen aan den Rijn: Kluwer Law International, 2012. ISBN 9789041140227.
[38] Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, ECLI:EU:C:2004:610, paragraph 41.

In this regard, the CJEU considered that "*Article 56 TFEU does not preclude [..] a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking´s subcontractors to pay the minimum wage to a worker […], if the safeguarding of workers´ pay is not the primary objective of the legislation or is merely a subsidiary objective*" and that *"[..] there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other."*[39] Therefore, it would appear that the CJEU recognizes the prevention of unfair competition insofar as another legitimate public reason is safeguarded by the same measure.

According to *Vos*, there is a dangerous circular ring to such an approach. "*National labour laws will by definition correspond to an overriding public interest, irrespective of the implications for the posted workers, if a difference in labor standards is equaled with unfair competition. Unfair competition rhetoric focuses on local business interests and on the acquired rights of incumbent workers in the host country labour market. It can hardly be maintained as a viable overriding interest to the extent that it does not also protect the incoming posted workers.*"[40]

Similarly, considerations of purely administrative nature cannot constitute an overriding reason unless they are the underlying requirement of achieving either effective protection of workers or effective control of such protection.[41]

The protection of incoming posted workers is thus considered as a key overriding reason. However, the CJEU underlined that the reason cannot be invoked if the posted workers in question already enjoy the same or similar protection by virtue of an obligation to which the service provider is subject in the MS of origin. The necessity to take into account the fact that the interest is safeguarded in the MS of origin corresponds to the principle of "home-state control" or "country of origin" based on the idea that the MS of origin is the

[39] Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, ECLI:EU:C:2004:610, paragraph 42.
[40] VOS, Marc: op. cit., p. 366.
[41] Judgment of 23 November 1999, *Arblade*, C-369/96, ECLI:EU:C:1999:575, paragraph 37.

primary regulator and the host MS can only impose supplementary measures to the extent to which they are not provided for in the MS of origin.[42]

The CJEU also provides a binding methodology for the analysis of overriding reasons. Firstly, the analysis must be conducted on objective grounds, i.e. be based on *"the actual substance and effect of the contested provision*". "*Therefore, while the intention of the legislature, to be gathered from the political debate preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive.*"[43] For instance, if the protection of posted workers is claimed as the overriding reason, the CJEU upholds that the "*rules concerned confer a genuine benefit on the workers concerned, which significantly adds to their social protection.*"[44] Accordingly, the criteria of overriding reasons are not met if the national law of the host MS obliges the service provider to pay contributions to a national fund while invoking protection of posted workers, if the fund confers no social advantage to the posted workers.[45]

Secondly, of equal importance is the obligation to consider each case individually, in regard to its context. *Vos* illustrates this case-by-case approach on the case law of minimum payment.[46] In principle, MS may impose their rules on minimum wages if invoking an overriding reason, ex. the protection of posted workers. However, the application of national law will not be perceived as legitimate if considered disproportionate or unnecessary with regard to the attainment of the invoked reason. Such is the case, if posted workers enjoy - on the grounds of the national law otherwise applicable to them - "*an equivalent position overall in relation to remuneration, taxation and social security contributions*" as Workers of the host MS. Therefore, remuneration cannot be isolated from other aspects of labor law ensuring the

[42] BARNARD, Catherine: op. cit, p. 381.
[43] VOS, Marc: op. cit., p. 366.
[44] Judgment of 25 October 2001, *Finalarte*, C-49/98, ECLI:EU:C:2001:564; Judgment of 24 January 2002, *Portugaia*, C-164/99, ECLI:EU:C:2002:40; Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, CLI:EU:C:2004:610.
[45] Judgment of 28 March 1996, *Guiot*, C-272/94, EU:C:1996:147, paragraph 15.
[46] VOS, Marc: op. cit., p. 367.

protection of Workers, and such protection of Workers must be assessed in its complexity with regard to all relevant factors.[47]

Thirdly, the measure must be appropriate for securing the attainment of the objective which it pursues and may not go beyond what is necessary to attain it. In other words, it must be ascertained that the objective cannot be achieved in a less intrusive manner.

However, the CJEU has applied these requirements with considerable flexibility, in some cases engaging in detailed examination of the justifications claimed by MS and the requirement of proportionality, while in others (particularly those related to sensitive socio-cultural matters), it has afforded a considerable margin of appreciation to MS.[48] If the case at hand involves politically sensitive issues, the CJEU is lenient in that it does not itself examine the condition of proportionality and instead defers such evaluation to national courts, as was the case of *Schindler* regarding restrictions to lotteries. The CJEU seems to be more prudent in regard to activities which are not legal to the same extent in various MS in order to avoid interfering with the system of values.[49]

It can be concluded that even though the CJEU didn´t overturn *Rush Portuguesa*, it modified it significantly by introducing limiting criteria that must be respected in order to justify the application of national law vis-à-vis posted workers. Starting with the *Vander Elst* case, the CJEU has cleverly rephrased *Rush Portuguesa* as to apply to minimum wages only and the unconditional possibility of MS to impose their national laws became strictly conditional.[50]

[47] See Judgment of 15 March 2001, *Mazzoleni*, C-165/98, ECLI:EU:C:2001:162, Judgment of 24 January 2002, *Portugaia*, ECLI:EU:C:2002:40, Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, ECLI:EU:C:2004:610.

[48] BARNARD, Catherine: op. cit., p. 381.

[49] BARNARD, Catherine: op.cit., p. 383.

[50] VOS, Marc: op. cit., p. 369.

# 3 The Posting of Workers Directive

Next to the Post Rush Portuguesa case law, the *PWD* was the second reaction to *Rush Portuguesa*, marked by the will to put a stop to extensive application of host MS's law. Unlike Post Rush Portuguesa, hower, the PWD laid the basis of a universal legal framework regulating the posting of workers phenomenon, which contributed to legal certainty.

## 3.1 Genesis of the Posting of Workers Directive

The European Commission decided to take initiative in order to relativize the right of MS to apply their national labor regulations to workers posted to their territory by service providers established in other MS, which the *Rush Portuguesa* ruling recognized without imposing any limits.[51] The European Commission strived for balance between the social protection of workers and an internal market without restrictions.

However, case law was not the only incentive to regulate the posting of workers phenomenon. Inspiration was also drawn from foreign regulation. Most authors identify the source of the idea behind European regulation with the US federal law entitled *David-Bacon Act of 1931* and the *International Labor Organization Convention 94 (The social clause in the Public contracts of 1949).*[52] Both acts imposed the principle of subjecting workers to the minimum wage in effect in the geographical area where the service is provided. Inspired by these two acts in the early 1980s, European building Unions pleaded for a social clause in procurement rules for public works to guarantee compliance with working conditions and collective agreements in the MS where the work is carried out. Early drafts of the *Community Charter of the Fundamental Social Rights of Workers* advocated such a labor clause in all public contracts and even though the provision was not included in the final version, the Action

[51] VOS, Marc: op. cit., p. 362.

[52] CĂTĂLIN, ȚACU. CHALLENGING EUROPEAN HUMAN RESOURCE MANAGEMENT: POSTING OF WORKERS, FROM LITERATURE REVIEW TO RESEARCH IDEAS. *Managerial Challenges of the Contemporary Society* [online]. 2013, (6), 143-148 [cit. 2016-11-19]. ISSN 20694229, p. 145.

CREMERS, Jan, Jon Erik DØLVIK a Gerhard BOSCH. Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU. Industrial Relations Journal [online]. 2007, 38(6), 524-541 [cit. 2016-11-19]. DOI: 10.1111/j.1468-2338.2007.00462.x. ISSN 00198692, p. 526.

Programme proposed the adoption of an instrument requiring a clause guaranteeing equal treatment.[53] Even though the EU´s initial initiative concerned the public sector, it was eventually extended in the directive drafted in 1991 due to anticipated consequences of the enlargement by Portugal and Spain.[54] *"Subsequently the fall of the Berlin wall and the opening to the East also created the atmosphere where initially ignorant politicians realized that 'something had to be done' ".*[55]

The incentive was welcomed by the European Parliament, but confronted with less enthusiasm in the Council of Ministers. In its *1991 Action Programme* based on the *Charter of Fundamental Social Rights of Workers*, the European Commission presented two acts intended to address posting of workers - a proposal for the *PWD* and an initiative to regulate liability in sub-contracting chains. The latter was dropped, but the former was soon to constitute the foundation stone of EU regulation via secondary acts.[56]

The legislative procedure was lengthy as key conflicting interests were at stake. While higher waged countries advocated for extensive application of the law of the MS in which the service is carried out, in order to ensure fair competition and reduce social dumping, lower waged countries plead for restrictive application, fearing loss of their competition advantage. In regard to EU values, higher waged MS emphasized social protection of workers, whereas lower waged MS favored the freedom to provide services. The collision of these two values was the main ground for debate. The political discussion was also strongly influenced by the enlargement of the European Union with Portugal and Spain in 1986. Public debate about the influx of Iberian workers created a climate in favor of legislation.[57] In fact, the main argument for higher waged MS became not equal treatment, but fears that "*they will take our jobs*".[58]

[53] WATSON, Philippa: op. cit., p. 302.
[54] CĂTĂLIN, ȚACU (2013): op. cit., p. 145,
[55] CREMERS, Jan, Jon Erik DØLVIK a Gerhard BOSCH: op. cit., p. 527.
[56] CREMERS, Jan, Jon Erik DØLVIK a Gerhard BOSCH: op. cit., p. 526.
[57] CĂTĂLIN, ȚACU (2012): op.cit., p. 231.
[58] CREMERS, Jan, Jon Erik DØLVIK a Gerhard BOSCH (2007): op. cit., p. 527.

The particular issues that were most controversial throughout the debate were the case of posting for short periods of less than three months, lack of a common definition of a worker, a universal understanding of the "*hard core*" of labor conditions (to be explained in the upcoming chapters) and the relationship with collective bargaining.[59] For this reason, five long years passed before the directive was voted in 1996, with the obligation of MS to ensure implementation by the end of 1999.

The enacted version of the *PWD* regulates the posting of workers phenomenon in a minimalistic manner. It consists of 9 articles, with *Article 1* determining its scope, *Article 2* specifying the notion of a posted worker, *Article 3* setting forth the areas and conditions of application of the national law of the host MS, *Article 4* regarding cooperation and exchange of information between MS, *Article 5* imposing the obligation of MS to take measures, *Article 6* modifying jurisdiction, *Article 7* setting an implementation deadline and *Article 8* imposing a deadline for the European Commission to conduct a review of the *PWD*.

## 3.2 Personal scope of the Posting of Workers Directive

*Article 2(1) PWD* defines a posted worker as "*a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works*". Paragraph 2 of the same article, specifies that "*for the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted*." Therefore, for the purposes of the *PWD*, CJEU´s common EU understanding of the notion of worker (in the meaning of *Article 45 TFEU*) is inapplicable.

The fact that the *PWD* does not provide a common definition is unfortunate due to significant differences in the understanding of self-employed persons under national law of various MS. Consequently, if considered as self-employed under the national law of the host MS, workers will not benefit of the social protection provided by the *PWD*.[60] However, the

[59] CREMERS, Jan, Jon Erik DØLVIK a Gerhard BOSCH (2007): op. cit., p. 526.
[60] BARANCOVÁ, Helena: op. cit., p. 45.

CJEU case law[61] moderates this in that the definition of a worker under national law of the MS of origin will be relevant if more advantageous for the person in question.[62]

The *PWD* is applicable to all workers of the service provider, regardless of their nationality, i.e. whether they are EU citizens or third-country nationals. Accordingly, the host MS cannot impose the obligation of prior issuance of work permits by their respective authorities.[63]

## 3.3 Material and territorial scope of the Posting of Workers Directive

As set forth in *Article 1(1)*, the *PWD* applies to "*undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State*". *A contrario*, the *PWD* doesn´t apply vis-à-vis undertakings established outside of the EU. In order to prevent non-EU undertakings from profiting of more liberal rules and consequently endangering the competition within the internal market, *Paragraph 4* further stipulates that "*undertakings established in a non-Member State must not be given more favorable treatment than undertakings established in a Member State*". In effect this means that third country undertakings must comply with the *PWD* as regards the minimum protection they must ensure.[64]

*Paragraph 3* of the same article covers three economic models of posting workers, which fall within the scope of the *PWD*. The Directive applies to undertakings to the extent that they take one of the following transnational measures:

a) *"Post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State,*

[61] Judgment of 15 June 2006, *Commission v France*, 106 C-255/04, ECLI:EU:C:2006:401, paragraph 38.
[62] BARANCOVÁ, Helena: op. cit., p. 46.
[63] BARANCOVÁ, Helena: op. cit., p. 62.
[64] WATSON, Philippa: op. cit, p. 292.

*provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting."*

This model of posting workers, considered as posting within the framework of the provision of services *stricto sensu,* is the most frequent situation. It is also the most controversial between MS. Based on this model, a worker is posted to another MS in order to provide services on the basis of a service contract concluded between the service provider and a contractor. Therefore, the *PWD* isn´t applicable to workers posted for the internal needs of their employer nor to the case when a service contract exists, but is concluded with an entity which doesn´t conduct business on the territory of the host MS.[65]

b) *"Post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; "*

This situation concerns posting within multinational corporations, i.e. between a parent company and a subsidiary or among subsidiaries. It is specific due to its weak link with the provision of services (consisting in staff mobility among undertakings belonging to the same group rather than the provision of services as such) and stronger link between the posted worker and the undertaking to which it is posted (the posted worker performing tasks under the direction and control of such an undertaking).[66]

In case that the worker is a third-country national posted from a company established outside the EU to a company belonging to the same group but established within the EU, the worker is subject to *Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer* (hereinafter "*ICT Directive*"). The *ICT Directive* introduces a single-permit procedure providing legal stay and work authorization for employment in a first and then a subsequent MS in case of subsequent intra EU mobility. However, the legislative

[65] BARANCOVÁ, Helena: op. cit., p. 14.
[66] COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT: op. cit., p. 17.

text doesn´t apply to all third-country nationals, but only managers, specialists and trainee employees.[67]

*Article 18(1) ICT Directive* refers to the *PWD* in stipulating that "*Whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out*." Moreover, *Paragraph 2* of the same Article lists a number of areas in regard to which posted workers enjoy the right to equal treatment with nationals of the MS where the work is carried out. These areas include freedom of association and affiliation and membership of an organization, recognition of qualifications, certain social security rights pursuant to the *Temporary Agency Work* and *Regulation 883/2004 on the coordination of social security systems* (hereinafter "*Social Security Regulation*") and access to goods and services and the supply of goods and services made available to the public (the latter being subject to a number of reserves). Furthermore, *Article 5(4)(b)* provides that third-country nationals must be given a remuneration "*not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions*". Therefore, third-country nationals enjoy more rights under the *ICT Directive* than posted workers under the *PWD*.

Since the extent to which the law of a host MS applies as well as other matters regarding the status of the third-country national are different under the *PWD* and the *ICT Directive*, it is essential to determine which of the two shall prevail. The collision of scopes is resolved in *Article 2(2)(c)* of the *ICT Directive* which states that it "*shall not apply to third-country nationals who are posted in the framework of Directive 96/71/EC*".

c) *"Being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member*

[67] Recital 13 & Article 2(1) ICT Directive.

*State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting. "*

Posting workers by temporary work agencies is also governed by *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (hereinafter "*TAW Directive*") which harmonizes rules on posted workers assigned by work agencies to user undertakings within a *single* MS. The *TAW Directive* only applies to workers understood as "*any person who, in the Member State concerned, is protected as a worker under national employment law."*[68]

The relation of the *TAW Directive* with the *PWD* is addressed in its *Recital 22,* according to which the "*Directive should be implemented […] and without prejudice to 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.*" However, the interaction of the *TWA Directive* and *PWD* is problematic. While the *TAW Directive* stipulates that temporary agency workers are obligatorily granted the same working and employment conditions as comparable workers of the user undertaking[69], under the *PWD*, equal treatment vis-à-vis nationals is simply optional and becomes mandatory only if imposed by the respective MS.[70] Consequently, agency workers recruited directly in the host MS benefit of better protection than transnational agency workers, unless the host MS has decided to impose otherwise.[71]

In regard to the *PWD*'s negative material scope, *Article 1(2)* exempts merchant navy undertakings. Recent events (namely the imposition of fines by French and German authorities vis-à-vis drivers of service providers established in other MS[72]) testify to the problem of non-uniform and incorrect interpretation of the *PWD´*s *Article 1* concerning its scope. The aforementioned MS interpret the *PWD* extensively by imposing *PWD´*s regime on

[68] Article 3(1) 1), a)) TAW Directive.
[69] Article 5(1) TAW Directive.
[70] Article 3(9) PWD.
[71] *COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT*: op. cit., p. 15.
[72] See footnote 6.

workers in situations other than the three corresponding to the *PWD´*s scope. For instance, transit transport does not fall under the scope of the *PWD* due to the absence of a service contract between the service provider and an undertaking in a MS through which the driver simply passes. These incidents and the related political debate have raised considerations regarding the possibility of exempting other fields of activities. In its current proposal for the *PWD* revision, the European Commission considers that "*Because of the highly mobile nature of work in international road transport, the implementation of the posting of workers directive raises particular legal questions and difficulties (especially where the link with the concerned Member State is insufficient)*"[73] and expresses the intention to address posting of workers within the road transport sector in sector specific initiatives which it announced in its 2016 Programme.[74]

As far as the territorial scope is concerned, the *PWD* applies to EU MS as well as the European Economic Area and Switzerland.[75]

## 3.4 Application of a host member state's national law

The *PWD´*s fundamental provision is doubtlessly *Article 3*, according to which MS shall ensure that regardless of the law applicable to the employment relationship, undertakings guarantee workers posted to their territory the terms and conditions of employment covering certain matters, laid down in the MS by law, regulations or administrative provisions (in case of postings in all sectors of the economy) as well as collective agreements or arbitration awards which have been declared universally applicable (with limitation to the construction sector[76]).

[73] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services: COM(2016) 128 final* [online]. In: . [cit. 2017-03-17], Recital 10.

[74] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC:* op. cit., p. 3-4.

[75] BARANCOVÁ, Helena: op. cit., p. 19.

[76] As specified in Annex 1 of the PWD.

The selection of specific terms and conditions of labor law which would become the so-called "*hard core*" of social protection of posted workers was subject to a politically heated debate accompanying the *PWD* legislative process. The final list is exhaustive and includes the following:

*(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."*

Instead of introducing partial harmonization, the *PWD* prefers the method of coordinating legal systems and simply modifies conflict of law rules which would otherwise apply pursuant to *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* (hereinafter "*Rome I*"), which makes the concept of *PWD* quite remarkable.[77] Thus, *Article 3(1)* can be seen as a basis for quasi conflict of law rules.

However, even though the *PWD* itself doesn´t harmonize respective rules, on closer examination it can be noted that (with the exception of minimum rates of pay) the listed elements have been harmonized by legislative instruments, whether in parallel with the

[77] HO-DAC, Marion. La directive d´exécution relative au détachement des travailleurs et le droit international privé : une relation à approfondir. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(595), p. 105.

adoption of the *PWD* or during the years that followed.[78] Particularly, **(a)** *maximum work periods and minimum rest periods* were harmonized by *Directive 2003/88/EC, concerning certain aspects of the organization of working time (2004) repealing Directive 93/104/EC (1996)*, **(b)** *minimum paid annual holidays* by *Directive 2003/88/EC, concerning certain aspects of the organization of working time (2004) repealing Directive 93/104/EC (1996)*, **(d)** *conditions of hiring-out of workers by temporary employment undertakings* by the *TAW Directive (2011)*, **(e)** *health, safety and hygiene at work by Directive 89/391/EEC, on the introduction of measures to encourage improvements in the safety and health of workers at work (1992)*, **(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* by D*irective 92/85/EEC, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (1994)* and *Directive 94/33/EC, on the protection of young people at work (1996)*, and **(g)** *equality of treatment between men and women and other provisions on non-discrimination* by *Directive 2006/54/EC, on the implementation of the principle of equal, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.*[79]

The matter of minimum rates of pay remains the only area without its counterpart in common EU standards, which alone is not surprising, considering that the determination of salaries is a sovereign competence of MS. *Catalin* refers to this problem as the normative amalgam and the "*missing brick*".[80]

Due to harmonization of the said elements, despite applying respective national law pursuant to *Article 3*, MS will essentially apply the same standards. However, the outcome will not necessarily be uniform, because in case of minimum harmonization, MS may maintain or

[78] CĂTĂLIN, ȚACU (2013): op.cit., p. 145.
[79] CĂTĂLIN, ȚACU (2012): op.cit., p. 233.
[80] CĂTĂLIN, ȚACU (2012): op.cit., p. 233.

introduce even more protective rules under their national law as well as in collective agreements applicable in the construction sector.

As regards the selection of specific components constituting the "*hard core*", it is unclear why some areas are included while others omitted. For instance, while *Article 3(1)(f)* includes special measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, children and young people, no similar protection is provided to men raising children as well as disabled persons, even though such protective measures are well developed within the EU.[81]

In comparison to the regime introduced by the *Rush Portuguesa* case, which enabled MS to apply national law on undertakings from other MS without limiting such a possibility to certain elements of labor law, the *PWD* may appear to be more restrictive in that it determines an exhaustive list of areas in which the host MS´s law applies. However, it is more extensive and favorable to host MS in that while *Rush Portuguesa* recognized the *possibility* of MS to apply national law, the PWD imposes the *obligation* to apply national law to the extent that it regulates aspects that fall within the hard-core determined in Article 3.[82]

Nevertheless, the application of the host MS's law in regard to the "*hard core*" is limited by the principle of more favorable working conditions. The *PWD* provides that "*the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers*".[83] The CJEU has also underlined the principle in its case law, by considering that "*the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of*

[81] ŠTEFKO, Martin. The Posted Workers Directive as the End of National Welfare Policy: A case study in Central Europe. *The Lawyer Quarterly*. 2011, 2011(2), p. 80.

[82] BARNARD, Catherine: op. cit., p. 371-372.

[83] Recital 17 PWD. See also Article 3(7).

*origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision."*[84]

The advantageousness of each right is to be considered separately. Therefore, even though the principle is both logical and legitimate, it entails practical difficulties. It requires a comparison of national laws of various MS in regard to each component of the "*hard core*" and subsequently a fragmented parallel application of the national laws. Ergo, service providers are required to become acquainted in detail with the respective national laws, compare individual elements of the hard core under such national laws and in regard to each element ensure the application of the more favorable national law. Service providers can already encounter difficulties in the very first step, as it is often challenging to retain information regarding the host MS´ national law in a language other than the official language of such a MS.

The problem of performing a comparison between national law of different MS can be demonstrated on the example of maximum work periods and minimum rest periods (corresponding to (a) of the hard core). Despite harmonization of the matter, there is no uniform definition of working time and rest periods, which renders comparison difficult. For instance, a break can be considered as a rest period in some MS but a working period in others. Whether a longer unpaid rest period is more favorable than a shorter paid working time or vice versa, is a matter of opinion. Another problem is that the materials MS upload to the official EU website only include general information on maximum work periods or minimum rest periods, with no mention of existing exceptions which could also influence the result of the comparison. This is just one of the many examples of difficulties which arise from the application of the principle of more favorable working conditions.[85]

Conversely, the exhaustive nature of the list of hard core areas does not impede MS to apply additional rules exceeding the hard core. In fact, *Article 3(10)* explicitly recognizes such

[84] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 81.
[85] ŠTEFKO, Martin: op. cit., p. 80-83.

extensive application in case of public policy provisions. Many MS understood this as being given the general possibility to apply higher standards to national and foreign undertakings. However, the CJEU relativized such an interpretation by ruling that MS can impose higher standards only on service providers established in the host MS which post workers abroad whereas any higher standards in regard to foreign undertakings are admitted only when complying with the freedom to provide services under the EU Treaty.[86] The CJEU has held that *Article 3(1)* provides an exhaustive list and that the public policy exception in *Article 3(10)* needs to be considered as a derogation from the fundamental principle of the freedom to provide services and as such must be interpreted restrictively and cannot be determined unilaterally by the MS.[87] In doing so, the CJEU has provided a minimalist definition of the exception within the *PWD* so as to maximize its liberalizing effect.[88]

According to *Vos*, the *PWD´*s *„general and unconditional obligation for Member States to guarantee the application of local "hard core" labour conditions to the posted workers of transnational services providers must now [i.e. following post Rush Portuguesa case law] be read as limited and conditional, in accordance with Article 49 TEC [current Article 56 TFEU] and its discussed interpretation by the ECJ [CJEU] [… and] the Directive´s general obligation to impose local labour laws and regulations would now constitute a violation of Article 49 of the TEC and therefore has to be reduced to within the boundaries authorized by the TEC [TFEU], as determined by the ECJ [CJEU]*".[89] This interpretation is based on the fact that *Article 56 TFEU* is hierarchically superior to the *PWD* and thus national legislation and practices pursuant to the *PWD* have to be in conformity with this primary law provision.

In the same vein, even though, according to *Lalanne*, *Article 57(2) TFUE*[90] enables host MS to apply their national legislation to posted workers, the CJEU prohibits an automatic

[86] SCHLACHTER, Monika. *Posting of Workers in the EU*. 2010., p. 90.

[87] Judgment of 19 June 2008, *Commission v Luxemburg*, C-319/06, ECLI:EU:C:2008:350, paragraph 30. Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 81.

[88] SCHÜTZE, Robert: op. cit., p. 650.

[89] VOS, Marc: op. cit., p. 369.

[90] "*Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."*

application of national law to temporary activities and in light of the principle of proportionality, it conducts systematic comparison of the national law of both the MS of origin and host MS (not only in regard to the "*hard core*", but labor law in its entirety) to verify that the obligations imposed by the host MS are justified by the overriding reason of protecting workers.[91]

## 3.5 Relation of the Posting of Workers Directive to other key acts

The *PWD* represents a *lex specialis* in two manners – in regard to the general regime of the freedom of services as well as in regard to the rules of international private law.[92] As such, it deserves examination apropos of its correlation with *Rome I* as well as the *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market* (hereinafter "*Services Directive*").

### 3.5.1 Relation of the Posting of Workers Directive to Rome I

The relation between a service provider and a worker posted to the territory of another MS is, by its nature, a situation with a foreign element. Therefore, recourse to private international law, particularly *Rome I*, is inevitable.

*Article 8* of *Rome I* consecrated to the determination of law applicable to individual employment contracts favors the principle of choice of law by the contractual parties. In absence of such a choice of law, the applicable law would be that of the MS where the work is habitually carried out (or, failing that, from which the employee habitually carries out his work), which *"remains unchanged if the worker is temporarily employed in another country".*[93] The fact that the place of habitual performance of work supersedes the place to which the worker is temporarily relocated could be considered as a parallel to principles applicable in the domain of free movement of goods where MS must rely on mutual recognition, i.e. the

[91] LALANNE, Stephane. Posting of Workers, EU Enlargement and the Globalization of Trade in Services [article]. International Labour Review [online]. 2011, 150(Issues 3-4), 211 [cit. 2016-11-19]. ISSN 00207780, p. 242.

[92] DE LA ROSA, Stéphane. La modernisation du cadre juridique du détachement et la jurisprudence Viking-Laval. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(596), p. 151.

[93] Article 8(2) Rome I.

sufficiency of standards in another MS.[94] In case of the impossibility to determine the MS in which or from which the work is habitually carried out, then the law of the country where the place of business through which the employee was engaged is situated. If the contract is more closely connected with another MS than the MS pursuant to the two preceding rules, then the law of such a MS will govern the contract.[95] Hence, prior to *Rome I*, the law of the MS to which the worker is posted would only apply if chosen by the contractual parties or in the absence of choice of law if it is considered that the employment relation is most connected with the host MS.

In order not to deprive workers of the protection that they would otherwise enjoy and in view of the disequilibrium of the bargaining power of an employer and employee, *Rome I* somewhat limits the choice of law by providing that "*Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article*". In other words, the posted worker may not be deprived of protection provided by mandatory rules of the law applicable in absence of such a choice of law, any such choice of law being invalid in this respect.[96] Such a rule ensures that the employee´s standard of protection under the law governing his habitual contract of employment cannot be eroded.[97]

Even though the list in the *PWD* sets out mandatory rules in regard to the situation of posting workers, the rules cannot be understood as a simple specification of mandatory rules of the law which would be applicable if the choice of law wasn´t made, because unlike the *PWD*, *Rome I* essentially refers to mandatory rules of a MS *other* than the host MS.

However, *Rome I* authorizes intervention of the law of the forum (i.e. the host MS) by stipulating that "*effect may be given to the overriding mandatory provisions of the law of the*

[94] ŠTEFKO, Martin: op. cit., p. 76.
[95] Article 8(2)(3)(4) Rome I.
[96] SCHLACHTER, Monika: op. cit., p. 89.
[97] WATSON, Philippa: op. cit., p. 296.

*country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.*"[98] This possibility is exploited by the *PWD* in its *Article 3* which transforms the possibility into an obligation by determining a list of areas in regard to which the law of the host MS shall apply.

*Article 34* of *Rome I* states that "*The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with 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.*" This means that the *PWD* prevails over *Rome I*, which only applies to the matters not covered by the *PWD*.[99]

The relation between the *PWD* and *Rome I* can thus be characterized in that the *PWD* designates minimum mandatory rules (corresponding to the "*hard core*" in *PWD*'s *Article 3*) for trans-border posting situations at EU level and *Rome I* explicitly states that it does not interfere with the *PWD.*[100]

### 3.5.2 Relation of the Posting of Workers Directive to the Services Directive

The situation of posted workers was also taken into consideration in the process of drafting the *Services Directive* (baptized „*Bolkestein*"), which aims at suppressing all obstacles to the freedom of services. The proposal of the *Services Directive* was based on the principle of the "*country of origin*" with a number of exceptions, including the "*hard core*" labor law rules of *Article 3 PWD*. However, throughout the debate, attention was drawn to other key areas such as the right to strike and layoffs, which exceeded the *PWD´*s "*hard core*". Certain

[98] Article 9(2) Rome I.
[99] BLANPAIN, Roger: op. cit., p. 453.
[100] SCHLACHTER, Monika: op. cit., p. 89.

clarifications were attempted but the principle was eventually omitted from the directive and thus the debate regarding the extent of exceptions to the principle became groundless.[101]

*Article 24 and 25* of the original draft included a provision indicating obstacles to posting workers considered as incompatible with the good functioning of the internal market, including registration formalities, the obligations to have a representative in the host MS and to maintain all the social documents regarding posted workers in the host MS and authorization procedures vis-à-vis work agencies.[102] Due to frequent abuses by national authorities, the proposal also intended to forbid MS to impose the obligation of prior declaration. However, this was controversial because such a prohibition would impede MS to exercise effective control in regard to observance of national law.[103] The European Parliament voted the removal of the respective articles for the sake of preventing social dumping.[104]

Restrictions vis-à-vis posted workers naturally fall under the *Services Directive´s* general provision prohibiting MS to condition access to the provision of services by measures which do not observe the conditions of non-discrimination, necessity and proportionality.[105] Nevertheless, the only explicit mentions of the *PWD* maintained in the *Services Directive* are *Article 3(1)(a)* which gives supremacy to the *PWD* should the provisions of the two directives collide and *Article 17(2)* which includes matters covered by the *PWD* in the list of legal derogations from the freedom to provide services within the meaning of *Article 16* of the *Services Directive*. Moreover, *Recital 86* affirms that "*this Directive should not prevent Member States from applying terms and conditions of employment on matters other than those listed in Article 3 (1) of Directive 96/71/EC on the grounds of public policy*." Therefore, in terms of initial attempts to favor the freedom of services over social protection of workers, the outcome could be regarded as rather disappointing.

[101] LALANNE, Stephane: op. cit., p. 240.
[102] LALANNE, Stephane: op. cit., p. 240.
[103] LALANNE, Stephane: op. cit., p. 241.
[104] BARANCOVÁ, Helena: op. cit., p. 26.
[105] TOMÁŠEK, Michal, Vladimír TÝČ a Jiří MALENOVSKÝ: op. cit., p. 222.

# 4 The Enforcement Directive

This chapter is dedicated to the examination of *Directive 2014/67/EU of the European Parliament and of the Council 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 and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' )* (hereinafter "*ED*") and its benefit in regard to overcoming the *PWD´*s insufficiencies, unclarities and problems arising from its application.

## 4.1 Genesis of the Enforcement Directive

The deadline for the *PWD´*s transposition was set on December 16, 1999 and a reexamination by the European Commission was to be performed by the same date in 2001 at the latest. The European Commission carried out the reexamination in 2003 and concluded that in a number of MS, the *PWD´*s transposition was either unsatisfactory or entirely absent. Namely the vagueness of the temporariness of a posting, lack of requirements regarding the genuine nature of a posting and inefficient cooperation between MS paved a way to circumventions by undertakings. It became clear that a clarification of rules as well as a system of stronger cooperation among MS was inevitable. The necessity of clarification in order to reinforce workers´ protection and preserve the freedom of services was also underlined by the fact that by the time that the re-examination was performed, the *PWD* was the subject of more than 40 prejudicial questions in interpretation.[106]

## 4.2 Circumventions at the origin of the Enforcement Directive

Problems related to the interpretation of the *PWD* enabled a number of abusive practices and circumventions. To begin with, dishonest undertakings take advantage of posted workers´ language barriers, social isolation and difficulties in obtaining information on the level of protection to which they are entitled. Such undertakings simply do not ensure the required level of protection, deduct excessive amounts for lodging, food and transportation

[106] RAPOPORT, Cécile. L'élaboration de la nouvelle directive "détachement" : le pragmatisme juridique au service d´une ambition sociale? *Revue de l'Union Européenne*. Dalloz, 2016, 2016(595), p. 76, 79.

from wages or even declare bankruptcy without paying salaries to the posted workers, which can leave the latter without an alternative undertaking to turn to.[107]

Besides such simple forms of infringement, circumventions also include more elaborate abusive mechanisms. The most notorious forms of such illegal practices are letter box companies and bogus self-employment.

Letter box companies are companies established in a MS with lower social contributions for the purpose of reducing social security costs and thus gaining a significant competition advantage in regard to companies established in the host MS. In practice, an existing service provider X established in MS A establishes a new company Y in MS B, without hiring a local labor force and performing local economic activities. X´s existing employees conclude employment contracts with Y and formally become Y´s employees, even though *de facto* they continue working for X and have no factual relation to Y nor the territory of MS B. In doing so, X formally becomes a contractor and Y a service provider, the advantage for X consisting in that the posted workers regime will apply to the workers and accordingly, X reduces costs by benefiting of lower social security contributions, taxes and wages of another MS. By artificially reducing its costs, X gains a competitive advantage over companies in the host MS, which may economically motivate these to pursue the same possibility. Since the social protection of involved posted workers is undermined without any equivalent compensation and the practice may inspire other competitors to follow, letter box companies results in what is referred to as the "*race to the bottom*" or "*social dumping*".

A well-known example of letter box companies is the case of *Dinotrans*, a German-Latvian agency which recruited workers from the Philippines. As third-country nationals, they were not allowed to enter the EU. However, Latvian national law recognized the recruitment in case of a shortage of skilled labor in international trucking as a motif legitimizing the entry of such workers to the EU. Invoking this national disposition, the workers were recruited and

[107] MASLAUSKAITE, Kristina. Posted workers in the EU: state of play and regulatory evolution. *Notre Europe – Jacques Delors Institute* [online]. 2014, (107), 14 [cit. 2017-03-08].

then instantly posted to undertakings in other MS, where they were paid as little as €2.36 per hour.[108]

Another type of circumvention is bogus self-employment, which is used particularly in the construction and road transport sectors. Since protective provisions provided for by national law are traditionally limited to workers while self-employed persons are exempted from such protection, individuals who *de facto* perform work in a relation characterized by subordination can be compelled to feign the status of a self-employed person. Consequently, the *de facto* employer isn´t obliged to observe protective provisions applicable to workers, which permits him to reduce costs.

Current rules also enable discrimination of work agencies established in the host MS vis-à-vis work agencies established in another MS. As already explained earlier on in this thesis, the reason for this is that while *Article 5* of the *TAW Directive* imposes equal treatment of posted workers in regard to comparable directly recruited workers of the undertaking to which they are posted, *Article 3 (9)* of the *PWD* gives MS a choice to impose the same rule to workers posted by work agencies established in another MS. Thirteen MS have not made use of this option; therefore, local work agencies are disadvantaged, for their wage expenses are higher.[109]

A common abusive practice consisting in the circumvention of the temporary nature of posting is successive posting. Once the duration of a posting risks being qualified as excessive by control authorities, the service provider automatically replaces such a posted worker by another, while posting the initial worker to a different contractor. Consequently, certain permanent job positions are never occupied by direct, permanent Workers, but instead filled in by various successively posted workers.[110]

[108] CREMERS, Jan. Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping. *ETUI Policy Brief* [online]. 2014(5), 4 [cit. 2017-03-08], p. 4.

[109] *COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT: op. cit., p.* 15-16.

[110] DHÉRET, Claire a Andreia GHIMIS: op. cit., p. 7.

Service providers also take advantage of the fact that the rules of the host MS only apply to the extent that they are laid out by law or (in case of the construction sector) certain types of collective agreements and post workers to MS in which minimum rates of pay are covered by company level collective agreements (such as Germany), which the PWD does not recognize in this regard. Therefore, service providers are not obliged to apply such rates to posted workers, which leads to wage competition among local and foreign service providers and social competition of Workers and workers posted to the same undertaking.[111]

Circumventions can also consist of combinations of the above described abusive models, thus making infringement even less transparent or impossible to identify. This can be demonstrated on the example of a logistics company which commissioned a subcontractor with package delivery in certain districts. Instead of carrying out the work himself, the subcontractor commissioned three foreign workers on the basis of a civil work contract. The workers had to establish their own business and become formally self-employed on paper, worked excessive hours and were not paid for long months, which they had to tolerate, as the subcontractor provided for their lodging and had other means of pressuring them.[112]

## 4.3 Case law at the origin of the Enforcement Directive

Apart from difficulties arising in practice, the necessity of clarification by means of revising the *PWD* was equally due to the evolution of case law which demonstrated the need to strike a balance between economic and social rights. Despite its continuous affirmation of the protection of posted workers´ social rights, the CJEU considered a number of situations invoking the protection of social rights as contrary to the freedom of the provisions of services. Such practices included collective bargaining (*Laval[113] and Viking[114]*), limitation of access to

[111] ICARD, Julien. La notion de détachement après la directive n° 2014/67/UE. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(595), p.82.

[112] VOSS, Eckhard, Michele FAIOLI, Jean-Philippe LHERNOULD a Feliciano IUDICONE. *Posting of Workers Directive - current situation and challenges: Study for the EMPL Committee* [online]. 2016, , 42 [cit. 2017-03-08].

[113] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809.

[114] Judgment of 11 December 2007, *Viking*, C-438/05, ECLI:EU:C:2007:772.

the public market (*Rüffert*[115]) or extensive application of the *PWD´*s hard core (*Commission v. Luxembourg*[116]) (together referred to as the "*Laval quartet*").[117]

The most influential of the cases were certainly *Laval* and *Viking*, both of which were decided in 2007. Due to the resemblance of the cases and especially the findings that can be drawn from both of the judgments in regard to posting workers, I choose to confine myself to elaborating the case of *Laval* in order to demonstrate the CJEU's opinion in more detail and avoid repetition.

Laval un Patneri was a company based in Latvia that posted workers to its subsidiary in Sweden in order to perform work within the construction sector. A Swedish trade union requested Laval to enter into a collective agreement with it and threatened to take collective action should Laval refuse to do so. Negotiations between Laval and the Swedish trade union were unsuccessful and so the trade union launched blockading at the construction site, while other trade unions declared sympathy actions in regard to all services provided by Laval in Sweden. Consequently, Laval´s posted workers had to return to Latvia and Laval brought an action before the Swedish courts inter alia seeking a declaration that the collective action was unlawful.

Sweden lacks a system of declaring collective agreements universally applicable and while in principle the "*hard core*" of the *PWD* is set forth by national legislation, such is not the case of minimum rates of pay. Trade unions have the exclusive competence to settle wage conditions and normally these are fixed by means of collective negotiations on a case-by-case basis.[118] Therefore, minimum rates of pay are neither fixed by legal acts nor any collective agreement applicable *erga omnes* and the collective agreement that the Swedish trade union intended to impose on Laval contained provisions which provided more favorable terms to posted workers than the terms set forth by Swedish law, provisions setting minimum rates of

[115] Judgment of 3 April 2008, *Rüffert*, C-346/06, ECLI:EU:C:2008:189.
[116] Judgment of 19 June 2008, *Commission v Luxemburg*, C-319/06, ECLI:EU:C:2008:350.
[117] DE LA ROSA, Stéphane : op. cit., p. 152.
[118] WATSON, Philippa: op. cit., p. 297.

pay (which were entirely absent under national legislation) and provisions related to other matters than those covered by the *PWD´*s hard core. Within a preliminary proceeding, the CJEU was to examine the permissibility of such measures and in doing so, strike a balance between the freedom to provide services and the right to collective action seeking protection of social rights.

The CJEU first considered that the activities of the Community [EU] should not be reduced to an internal market free of obstacles to the free movements, but also a policy in the social sphere and that such interests must be balanced.[119] However, the CJEU underlines that the *PWD* is primarily intended to "*ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally*"[120] and only secondly mentions the *PWD´*s aim to provide for protection of workers[121]. According to *Barnard*, the *Laval* case demonstrates that the *PWD* is primarily a measure to facilitate free movement of services and not a measure to realize a social policy objective.[122]

The CJEU further acknowledged that pursuant to *Article 137(5) European Commission* [*Article 153(5) TFEU]*, the EU has no power to regulate the right to collective action, i.e. the right to strike and lock-out. However, it added that even in domains which exclude EU competence, MS must exercise their sovereignty in respect of EU law and therefore, the right to collective action is relevant to the freedom to provide services and falls under the scope of *Article 49 European Commission [Article 56 TFEU]*.[123] Accordingly, the CJEU recognized the right to collective action as a fundamental right which represents an integral part of general principles of EU law, but considered it to be subject to certain restrictions.

The CJEU considered that in principle a blockading action aimed at ensuring certain social protection is legitimate; however, in the given situation the obstacle cannot be justified

[119] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraphs 104-105.
[120] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 74.
[121] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 75.
[122] This understanding is supported by the PWD´s legal basis, Articles 53 (2) and 62 TFEU.
[123] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraphs 86-111.

in regard to the specific obligations resulting from the collective agreement.[124] It held that *"the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector — certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision — is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC."*[125] Therefore, *Article 49 European Commission [Article 56 TFEU]* and the *PWD* are to be interpreted as precluding a trade union to force a foreign undertaking to conclude a collective agreement establishing more favorable conditions than those resulting from legislative provisions.[126] The CJEU thus based its ruling on a narrow reading of the *PWD* and reversed *Paragraph 18* of *Rush Portuguesa* in two ways – a host MS can insist on applying its law only in respect of the matters covered by the hard core and by respecting the formal framework of national rules recognized in the *PWD.*[127]

The CJEU also considered as directly discriminatory and thus contrary to EU law the provisions of Swedish law that prohibited trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, but subjected such a prohibition to the condition that such action must relate to terms and conditions of employment to which the national law applies directly, thereby making it impossible for an undertaking which posts workers to that MS and which is bound by a collective agreement subject to the law of another MS to invoke such a prohibition vis-à-vis Swedish trade unions.[128]

[124] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraphs 107-108.
[125] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 99.
[126] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraph 111.
[127] BARNARD, Catherine: op. cit., p. 372.
[128] Judgment of 18 December, 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, paragraphs 112-120.

The case law resulting from the "*Laval quartet*" was criticized by a number of MS. Sweden and Denmark decided to review national legislation as to comply with the new case law but simultaneously preserve their traditionally autonomous collective bargaining model.[129] Several European trade unions considered CJEU´s judgments as anti-social and requested a revision of the *PWD*.

## 4.4 Adoption of the Enforcement Directive

After reexamining the *PWD*, the European Commission - instead of proposing a revision - initially tried to overcome the deficiencies by a number of non-legal instruments.

In 2006 it published a Guidance addressed to MS in the form of a Communication, attempting to clarify the permissible extent of administrative requirements, identifying unacceptable practices and suggesting alternative measures which could be considered as compatible with *Article 56 TFEU* (such as replacing an authorization procedure by an obligation of declaration).

The 2006 Communication was followed by another in 2007, in which the European Commission assessed the existing control measures, considering measures in a number of MS as contrary to *Article 56* (such as the obligation to have a representative in the host MS, requirement of a work permit, minimum employment periods or particular types of employment contracts).[130]

In 2008, the European Commission issued a recommendation inciting MS to enhance administrative cooperation. The European Commission also established a committee of experts consisting of representatives of MS as well as social partners in order to discuss the difficulties of implementing the *PWD*.

[129] MALMBERG, Jonas a Laurence SMAJDA. *The impact of the ECJ judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action*. Brussels: European Parliament, 2010, p. 7-8.

[130] WATSON, Philippa : op. cit., p. 294-296.

Finally in September 2009, it was decided that a new legal instrument would be proposed.[131] The EC´s response to the *PWD´*s implementation difficulties and CJEU case law initially consisted of two proposals – a regulation on the exercise of the right to strike in regard to transnational activities and a directive on the enforcement of the *PWD*, which was to become the *ED*. The European Commission decided to propose two distinctive legal instruments due to their different subject-matter scope – while the *ED* would be applicable exclusively to the provision of services, the regulation on the exercise of collective rights would also concern the freedom of establishment.[132]

The purpose of the proposal of the regulation was two-fold - create a mechanism for an informal settlement of disputes and re-iterate CJEU's conclusions that all EU workers have the right to industrial action in cross-border situations while recognizing, however, that the right is not absolute and any collective action must be proportionate.[133] Prior to the text, respective national authorities would have been obliged to conduct a conciliation between social and economic rights. Eventually the proposal was dropped for a number of reasons, namely its legal base *Article 352 TFEU* requiring unanimity (which would have made adoption unlikely), its potential breach of *Article 153 TFEU* (which formally excludes the right to strike from the areas of social policy harmonization) and the nature of the intended legal instrument (i.e. a regulation, which was considered as too intrusive). These were the primary reasons that resulted in the historically first activation[134] of the yellow card procedure, with a total of 19 votes considering the proposal contrary to the principle of subsidiarity[135]. Accordingly, the European Commission decided to withdraw its proposal of the regulation.

The *ED*, which is all that eventually resulted from the revision, addresses collective rights only indirectly in its *Article 1(3)*, stipulating that *"this Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level,*

[131] RAPOPORT, Cécile : op.cit, p. 76.
[132] RAPOPORT, Cécile : op. cit., p.77.
[133] MASLAUSKAITE, Kristina: op.cit., p. 14.
[134] RAPOPORT, Cécile : op.cit., p. 77.
[135] DE LA ROSA, Stéphane : op. cit., p. 153-154.

*including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice."*

While the *ED* cannot be regarded as a satisfactory response to the "*Laval quartet*", its benefits can be identified elsewhere, as will be demonstrated further on.

## 4.5 Nature of the Enforcement Directive

The legal nature of the *ED* is remarkable in three ways. Firstly its nature of an instrument enforcing the *PWD*, secondly due to the fact that it modifies the *Regulation on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC* (hereinafter "*IMI Regulation*"), and thirdly the joined declaration of the European Parliament, Council and European Commission, by which it is accompanied.

As concerns its characteristic as an enforcement directive, its designation as „enforcement" simply implies that its primary role is to reinforce the *PWD* and ensure its full efficiency. Instead of replacing the *PWD* by a new directive (the terms of which would have entailed a controversial discussion, MS risking to fail finding common ground), it was decided to complement the *PWD* by a new directive, reinforcing the *PWD*, clarifying its provisions and completing it. The method of reinforcing one legal act by the adoption of another is not rare and is occasionally used in the domain of social policy or other fields (such as *Directive 1999/95 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports* or *Regulation 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013*).[136] However, the *ED* is unique in that it doesn´t simply complete the *PWD* with operational systems such as an administrative procedure and technical tools, but it interprets the *PWD´*s

[136] RAPOPORT, Cécile : op. cit., p. 78.

provisions, which *de facto* obliges MS to interpret a previous legislative act (the *PWD*) in the light of a subsequent one (the *ED*).

The *ED´*s second particularity consists in the fact that as a directive, it modifies a regulation. Specifically, *Article 22 ED* modifies the *Annex* of the *IMI Regulation*, enlarging the list of EU acts to which the electronic system of administrative cooperation (hereinafter "*IMI system"*) is applicable. Even though it isn´t rare for a legislative act to modify a previous one, usually both acts are of the same type. It is unusual for a directive to modify a regulation, considering the different legal effects that the two types of acts produce. However, such a construction was only logical, given the already existing IMI and its potential to reinforce the *PWD*. *Article 22 ED* therefore produces the legal effects of a regulation, despite the fact that the legal act of which it constitutes an integral part is a directive.

The *ED´*s third curiosity consists of a joint declaration of the Parliament, European Commission and Council. Even though such declarations often accompany treaties, they are less common in case of simple legislative acts. The declaration concerns *Article 4(3)(g)* on successive postings in regard to circumventions and its purpose is to indicate an interpretation for MS aiming for a uniform evaluation of successive posting situations, which are not always necessarily non-genuine postings. A common interpretation laid out in a joint declaration is less binding on MS than if incorporated directly in the *ED´*s body, but in practice MS remain unlikely to disregard it.

## 4.6 The Enforcement Directive´s content

The *ED* aims at solving five essential issues: the vague definition of posting (by creating a methodology for evaluating the true nature of posting and thus combatting circumventions), weak protection of posted workers (by guaranteeing access to information regarding their respective rights as well as strengthening their position in trial), poor system of administrative cooperation (by strengthening cooperation both in the phase of preventive administrative investigations as well as in the repressive stage - i.e. mutual recognition of sanctions), abuse of inspections conducted by MS (by specifying permissible modalities of inspections as well as

administrative requirements that may be imposed by national authorities) and lack of sufficient responsibility mechanisms (by introducing the principle of solidary responsibility of direct subcontractors).[137]

## 4.7 The Enforcement Directive and its substantive provisions

As explained in the previous section, one of the particularities of the E*D* consists in that it completes the interpretation of the *PWD´*s substantive provisions. In particular, the E*D* clarifies the notion of "posting" by specifying two of its elements – its temporariness and true nature of posting.

### 4.7.1 Temporary nature of posting

The definition of a posted worker in *Article 2(2) PWD* considers „a limited period" of the posting as one of the essential elements. However, in none of its provisions does it set a limit of the duration. One of the primary aims of the *ED* was to overcome this deficiency. Possible solutions consisted of fixing a particular maximum duration, introducing a simple presumption of a permanent character of mobility once the posting would exceed a certain time limit, adding quantitative elements to the existing definition of posting, establishing a particular rule on successive postings or harmonizing the notion with the one figuring in *Rome I*.

Considering the diversity of such alternatives, the final choice of the EU legislator is minimalistic and overcomes the problem only partially. Instead of introducing a particular time limit of the posting or specifying the temporary nature in any other direct way, the *ED* provides certain criteria that the national judge can consider in order to evaluate the temporary character of the posting. Ergo, the *ED* opts for a qualitative and subjective rather than quantitative and objective approach. In principle, the qualitative criteria are observations from common types of circumventions in practice and should therefore enable identifying such practices and eradicate them. The list is demonstrative and the criteria are of a simple

[137] RAPOPORT, Cécile : op. cit., p. 80.

indicative nature. National judges or administrative authorities shall make an overall assessment of *all* factual elements which are deemed to be necessary[138] and the criteria are not to be applied mechanically while disregarding the particularities of each individual case.

Even though certain progress of the *ED* in regard to specifying the temporariness of posting is incontestable, it is not entirely satisfactory in that it enables a legally rather uncertain *ex post* assessment by public authorities and doesn´t provide for an objective preventive assessment on the part of service providers and posted workers. Moreover, the absence of a specific rule on subsequent postings in fact continues to tolerate one of the most wide-spread circumventions.[139]

One of the *ED´*s weaknesses is its insufficient alignment with other texts applicable in the domain of posting. Unlike the *PWD*, the *Social Security Regulation* sets a maximum duration of posting to 24 months. Even though the limit is set only for social security purposes, the lack of a corresponding provisions in other matters regarding posted workers is often overcome by extending the application of the 24 month rule (by way of analogy) to other areas regarding posted workers. Accordingly, a period of posting may be taken as not to exceed 24 months unless the MS agree otherwise.[140] However, the solution is not universal and from a legal point of view, incorrect. Harmonization of temporariness pursuant to the two texts would be beneficent for two reasons. Firstly, it would lead to coherence of administrative inspections. Secondly, it would enable applying the law of the same MS in case of departing from the scope of both legislative texts. The *Social Security Regulation* designates *lex labori loci* (i.e. the law of the MS in which the work is habitually carried out), as the applicable law in case of a non-genuine posting situation. This is an efficient sanction for combatting all types of abuses, and would be desirable in other matters regarding posting workers than just social security.[141]

[138] Article 4(1) ED.
[139] ICARD, Julien : op. cit., p. 85.
[140] WATSON, Philippa : op. cit., p. 286.
[141] ICARD, Julien : op. cit., p. 86.

Apart from the *Social Security Regulation*, the *ED* also has an unclear relation to *Rome I*, particularly as concerns the notion of the "*place in which the worker usually carries out his work*" which appears both in the *PWD* and *Rome I*. In principle, *Article 8(2)* and *Recital 36 Rome I* designate the law of the MS in which the posted worker habitually carries out his work as the applicable law under the condition that "*the worker is expected to return after the posting"*. According to *Icard*, it is essential that national authorities and judges apply the *Rome I* definition when interpreting the *PWD*. In case of a posting considered as excessive pursuant to the *PWD* and *ED*, the sanction would be the application of conflict of laws rules as determined by Rome I, which would be that of the host MS. However, if the notion "*place in which the worker usually carries out his work*" was not interpreted in line with *Rome I*, the applicable law could be that of the MS of origin. Consequently, service providers would *de facto* be incited to abuse posting of workers rules. Certain MS aware of this risk decided to directly impose the application of national law (i.e. law of the host MS).[142] However, such national measures are in fact contrary to the *ED*, for the latter imposes to pass by the conflict of laws rules set forth in *Rome I*, despite the identity of the applicable law.[143] MS which have not adopted such rules are dependent on the CJEU which must coordinate the understanding of the temporary nature of posting under both legislative texts.[144]

### 4.7.2 Genuine nature of posting

The *ED* contributes to clearer rules and combatting circumventions by underlining the necessary existence of a genuine link of an undertaking to the MS of origin. The *ED* clearly transcends the simple mission of enforcing the *PWD* by introducing a new substantive conceptual feature of a posting situation - the necessity of substantial activities performed by the service provider in the MS of origin. Accordingly, national judges and authorities are *obliged* to verify the existence of a genuine link of the service provider to the MS of origin. The *ED* proceeds in a similar manner as in the case of clarifying the temporary nature of posting, i.e. by setting forth a non-exhaustive list of indicative criteria to be taken into consideration

[142] Such as France in article L. 1262-1 Labour Code.
[143] Recital 11 ED.
[144] ICARD, Julien : op. cit., p. 85-86.

by national judges and authorities when verifying the existence of the genuine link. The criteria can be classified into three categories – criteria related to administrative implantation (venue of the undertaking's registered office, administration, office spaces, venue of tax payments and social security contributions, professional license or registration with chambers of commerce of professional bodies)[145], employee implantation (the place where posted workers are recruited and from which they are posted)[146] and commercial implantation (the law applicable to employment and business contracts, the place of substantial business activity and administrative staff, the number of contracts and size of turnover realized in the MS of origin)[147]. The introduction of this new element by the *ED* enables combatting certain illegal practices such as letter box companies.

## 4.8 The Enforcement Directive vis-à-vis service providers

The position of service providers is affected by the *ED* in that *Article 9* sets the framework of obligations that MS are entitled to impose on service providers posting workers. The Article provides a demonstrative list of permissible measures including the obligation of notification, obligation to keep certain documents (including employment contracts, time-sheets and pay slips) as well as provide their translation or deliver such documents to authorities of the host MS upon request within a reasonable time after the posting, obligation to designate a person to liaise with authorities of the host MS and obligation to designate a contact person for the purpose of collective bargaining. Pursuant to *Paragraphs 1 and 2* of the said Article, other administrative procedures, requirements or measures would be considered as obstacles to the freedom to provide services unless they are necessary to ensure effective monitoring of compliance with obligations as well as justified and proportional.[148] In order to avoid excessive costs and administrative burdens for service providers, *Paragraph 4* explicitly states that all procedures must be user-friendly and conducted at a distance and if possible by

[145] Article 4 (2) a) ED.
[146] Article 4 (2) b) ED.
[147] Article 4 (2) c), d), e) ED.
[148] MICHEL, Stéphane. L'effectivité de la directive nº 2014/67/UE par le prisme de ses acteurs. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(595), p. 91-92.

electronic means. Furthermore, all measures adopted by MS must be communicated to the European Commission as well as service providers, the latter being informed by means of a single national website.

Among the aforementioned obligations, the most essential one is that of notification to the authorities of the host MS. The notification must be made no later than at the commencement of the posting and in a language accepted by the host MS. Service providers must notify all information that is necessary in order to allow factual controls at the workplace, including the identification of the service provider, the anticipated number of posted workers, anticipated duration of the posting (as well as its beginning and end), address of the workplace, and nature of the services justifying the posting. The obligation of notification can by no means be replaced by an authorization procedure.[149]

## 4.9 The Enforcement Directive vis-à-vis member states

The ED attempts to reinforce the observance of the *PWD* in a complex manner, by focusing both on the prevention of abusive practices as well as their sanctioning. Accordingly, MS have the obligation to establish a preventive organization structure and provide for appropriate sanctions. The system is completed by a set of new obligations aiming for more efficient administrative cooperation between MS.

According to *Article 10*, MS are obliged to establish appropriate and effective mechanisms of control. Such controls may not be systematic and should be conducted primarily on the basis of a prior risk assessment (notwithstanding the possibility of random checks). The risk assessment should take into account factors such as the sector of activities in which posting workers is significant on the territory of the MS in question, performance of large infrastructural projects, existence of long chains of subcontractors, geographic proximity, special problems and needs of specific sectors, past record of infringement and vulnerability of certain groups of workers.

[149] MICHEL, Stéphane : op. cit., p. 91.

The *ED* does not attempt to harmonize administrative procedures and instead simply introduces a framework of administrative controls. Consequently, practices of national authorities will differ in each MS. The possibility of establishing a common labor inspectorate on EU level was considered and the idea revisited, but hasn´t been pursued up to this day.

*Article 6(1)* provides that MS cooperate closely without unreasonable delay in order to facilitate the application of the *PWD*. A general framework of administrative cooperation is set forth in *Article 197 TFEU* according to which the EU may support the efforts of MS to improve their administrative capacity to implement EU law, including actions facilitating the exchange of information. However, institutional and procedural autonomy does not oblige MS to proceed to administrative cooperation. The modalities of cooperation must be specified by means of an ordinary legislative procedure. The fact that the EU is not authorized to proceed to a harmonization of national systems explains poor progress in this regard.[150]

A system of vertical cooperation between the European Commission and national authorities designated by MS as well as horizontal cooperation between national public administrations authorized to oversee conditions of employment was already attempted by *Article 4 PWD*. However, the impact of such a provision was limited because it consisted of a simple incentive rather than obligation. Actual mechanisms of exchanging information among national authorities were in fact rare.[151] The *ED* aims at improving horizontal cooperation by imposing a set of obligations on MS (both the host MS and MS of origin), such as the obligation to designate competent authorities to perform functions set out in the *PWD* and *ED*[152], obligation of host MS to perform appropriate and effective checks[153] and obligation of MS of origin to respond to reasoned requests of host MS[154].

[150] COLAVITTI, Romélien. Le mécanisme de coopération administrative établi par la directive d'exécution rélative au détachement des travailleurs. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(595)., p.100.

[151] COLAVITTI, Romélien : op. cit., p. 99.

[152] Article 14 ED. See also Article 3 & Article 10 (1) ED.

[153] Article 10 (1) ED.

[154] Article 6 (2) ED.

The effect of the system of cooperation is dependent on the often limited extent of the *PWD´*s substantive rules.[155] *De lege ferenda*, a more specific and efficient exchange of information can be envisaged, such as mutual access to national black lists indicating undertakings which previously committed fraud in regard to posting situations.

One of the weak points of the current system of cooperation can be identified in the delivery and status of social security certificates of posted workers. Such certificates became "*portable*" pursuant to the *Social Security Regulation.* They enable a service provider to prove that social security charges are paid in the MS of origin and thus exonerate him from paying corresponding charges in the host MS. The conditions of delivery of the certificate vary significantly in MS and in this sense it can be considered as unfortunate that *Recital 12* provides that the lack of the certificate "*may be an indication that the situation should not be characterised as one of temporarily posting to a Member State other than the one in which the worker concerned habitually works in the framework of the provision of services*". Host MS cannot question the validity of the certificate nor the status of the posted worker to which it relates.[156] The *ED* does not in any way interfere with the procedure of delivery nor the certificates as such.

Similarly, the *ED* does not attempt to harmonize rules on judicial cooperation, recognition or execution of civil and commercial decisions. This being said, even though the *ED* strengthens cooperation between MS, the decisive role remains with the MS as such.[157]

*Articles 6, 7 and 8* establish a triad of cooperation typical for international agreements on cooperation (particularly in the domain of judicial cooperation) based on mutual assistance, controls and mutual monitoring, and measures reinforcing cooperation.[158]

[155] COLAVITTI, Romélien : op.cit., p. 100.
[156] WATSON, Philippa : op. cit., p. 291.
[157] MICHEL, Stéphane : op. cit., p. 91–93.
[158] COLAVITTI, Romélien : op. cit., p. 101.

*Article 6* stipulates that cooperation of MS consists in particular in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations with respect to the situations of posting, including the investigation of any non-compliance or abuse of applicable rules on the posting of workers, the sending and service of documents and consultations of registers. Both the host MS and the MS of origin are obliged to provide such information free of charge and within strict time limits (2 working days in urgent cases and 25 in standard situations).

*Article 7* clarifies the separation of powers between authorities of host MS and MS of origin. It stipulates that the inspection of terms and conditions is the responsibility of the authorities of the host MS; however, where necessary the MS of origin shall cooperate with the host MS, and continue to monitor, control and take necessary supervisory or enforcement measures in accordance with its national law, practice and administrative procedures. The article also underlines the exclusive competence of each MS to conduct checks on its own territory, the competence of a MS in regard to the territory of another MS limited to the right to request cooperation.

*Article 8* completes the system of cooperation by inciting MS to take accompanying measures to support the exchange of officials responsible for administrative measures, enforce compliance with the directive, and support associations that provide information to posted workers. *Article 8* also enables the use of EU financing instruments to support cooperation among MS, including "*the development and updating of databases or joint websites containing general or sector-specific information concerning terms and conditions of employment to be respected and the collection and evaluation of comprehensive data specific to the posting process*".

Besides the described standard aspects of the system of cooperation, the *ED* is specific in that it integrates the system into the *IMI system*, an electronic instrument introduced by the *IMI Regulation* in order to enhance cooperation in the domain of legislation related to the internal market. The *IMI system* is a secured internet application accessible in all official

languages of the EU and in all MS and enables MS to overcome technical difficulties related to the division of powers among national authorities, diversity of administrative cultures and the use of different languages. The *IMI system* is used in the domain of administrative cooperation within the internal market, recognition of professional qualifications, the rights of patients receiving cross-border health care and cross-border transport. The *ED* extends the scope of the *IMI regulation* by integrating cooperation in the domain of posting workers into the existing list of applicable domains. Consequently, the authorities of host MS conducting inspections should have easier access to documents administered by the MS of origin.[159]

As regards MS' obligation to provide for sanctions pursuant to *Article 20*, such sanctions have to be effective, proportional and dissuasive.[160] Following the adoption of the *ED*, certain MS revised their national systems of sanctions.[161]

## 4.10 The Enforcement Directive vis-à-vis posted workers

The protection of posted workers is enforced in that the *ED* imposes an information obligation in their favor and equips them with a legal action in protection of their rights.

*Recital 18* identifies difficulties in accessing information as one of the primary reasons why respective rules are not observed by service providers.[162] In order to overcome this weakness, *Article 5* obliges MS to establish a single national website, on which they are to make accessible all working conditions and rules (i.e. the "*hard core*") imposed by national law that apply to posted workers as well as clearly indicate which collective agreements are applicable and to what extent (including access to the resulting terms and conditions, and, in particular, the different minimum rates of pay and their constituent elements, method used to calculate the remuneration due and qualifying criteria for classification in the different wage categories). MS must indicate contact persons at the liaison office in charge of dealing with requests for information as well as ensure free of charge access to brochures with an

[159] COLAVITTI, Romélien : op. cit., p. 101.
[160] See also Recitals 44 and 47.
[161] MICHEL, Stéphane : op. cit., p. 91-93.
[162] See also Recital 19 in regard to the accessibility and transparency of collective agreements.

overview of respective rights (including the procedure for lodging complaints) in all official languages of the MS as well as the most relevant languages taking into account demands of the national labor market. Furthermore, MS must indicate the bodies and authorities to which workers and undertakings can turn for general information on national law and practices applicable to them concerning their rights and obligations. Both obligations enable posted workers to be informed on the "*hard core*" of applicable national rules (regardless of whether they result from legal acts or collective agreements), which is a prerequisite for the second manner in which the *ED* enforces the position of posted workers - a legal action.

*Article 11(1)* stipulates that MS are obliged to put in place effective mechanisms to lodge complaints and the right to institute judicial or administrative proceedings also on the territory of the host MS, even once the posting has ended. The provision appears to establish alternative jurisdiction in favor of the host MS' judge, but the possibility is not new, as it was already recognized by *Article 6 PWD.*[163] It goes without saying that this has no impact on the legal regime applicable to the posting situation and the judge will therefore be bound by the *lex contractus* pursuant to the rules set forth in *Rome I* in combination with the *PWD*. The provision cannot be considered as a simple conflict of jurisdiction rule in that it also provides posted workers with a legal action to enforce their rights - a legal tool which was not necessarily automatic in MS nor accessible to the same extent. The *ED* uses substantial rules of international private law to lay down the framework of such a legal action. As far as the material scope of the legal action is concerned, the title of *Article 11* refers to "*back-payments*", but more generally, *Paragraph 1* mentions "any loss or damage as a result of failure to apply the applicable rules". Other aspects of the legal action are to be determined by national law.[164]

[163] Both articles modify jurisdictions rules set forth in Article 21 of *Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, according to which an employer domiciled in a MS may be sued before the courts of the MS where he is domiciled, the courts of the place where the employee habitually carries out his work or if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

[164] HO-DAC, Marion : op. cit., p. 107-108.

In view of the delicate situation of posted workers who file any such demand, *Paragraph 5* stipulates that in such situations posted workers shall be protected from any unfavorable treatment by their employers.

The framework of the law suit is extensive in that the right to engage in any such proceeding is consecrated not only to posted workers, but also to trade unions and other third parties such as associations, organizations and other legal entities with a legitimate interest in ensuring that the respective rules are observed. Such entities may file the law suit on behalf of or in support of the posted worker or their employer and with their approval.[165]

## 4.11 Introduction of (limited) liability in subcontracting chains

The *ED* also reinforces the protection of posted workers by equipping them with an action of direct payment vis-à-vis their employer´s contractor, thus recognizing the concept of subcontracting liability. However, in comparison to the law suit that the posted worker can file against his employer, the possibility is considerably limited. The posted worker´s possibility to invoke the responsibility of an undertaking in a subcontracting chain other than his employer is subject to three limits - the construction sector[166], the direct contractor of the posted worker´s employer and the matters of minimum rates of pay. In all other cases, a law suit may only be filed against the posted worker´s employer and thus the contractor in the host MS can benefit of circumventions without risking that posted workers could bring an action against him.

Solidary responsibility can therefore easily be overcome by the creation of a more elaborate structure of subcontractors.[167]

Subcontracting chains increase the risk of deterioration of posted workers´ working conditions, because the multiplication of involved undertakings decreases the transparency of responsibilities. The problem was identified prior to the adoption of the *PWD*, but the *PWD*

[165] Article 11(3) ED.
[166] As explained further on, this limit applies only if national law doesn´t provide otherwise.
[167] MICHEL, Stéphane : op. cit., p. 94-96.

did not address the issue in any way. In the judgment of *Wolff&Muller* the CJEU validated the German system of solidary responsibility vis-à-vis service providers established in other MS. The judgment served as an inspiration to the European Parliament, which drew attention to the problem of sub-contracting liability in its resolution regarding the *PWD´*s implementation and invited the European Commission to initiate rules introducing the concept of solidary responsibility at EU level. However, since national rules regarding the matter were very diverse, the European Commission considered that only few aspects of the liability could potentially be subject to a European solution.[168]

Accordingly, the *ED* imposes liability only vis-à-vis the direct contractor (which permits elaborate sub-contracting chains to remain unaffected), exclusively in respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions covered by *Article 3 PWD* and only in regard to the construction sector (as laid out in the Annex of the PWD). Limitation to the construction sector owes to the fact that the phenomenon is particularly widespread in this specific sector. However, it is also relatively common in other economic sectors such as transport, tourism or the cleaning industry.[169] In regard to such sectors, the *ED* simply recognizes the possibility of MS to adopt rules imposing the liability of direct contractors to the same extent as in the construction sector (under the standard conditions of non-discrimination and proportionality). Considering that the possibility was already acknowledged in *Wolff&Müller*, the contribution of the *ED* in this regard is *de facto* reduced to its explicit recognition in a legislative text. In fact, the recognition of the possibility seems to be more extensive in *Wolff&Müller* in that it recognizes the liability of not only direct contractors by considering that "*Article 56 TFEU does not preclude [..] a national system whereby, when subcontracting the conduct of building work to another*

[168] JAOUEN, Magali. La responsabilité solidaire en matière de sous-traitance dans la nouvelle directive "détachement" : un progrès en demi-teinte. *Revue de l'Union Européenne*. Dalloz, 2016, 2016(596), p. 166-167.

[169] JORENS, Yves, Saskia PETERS a Mijke HOUWERZIJL. *Study on the protection of workers' rights in subcontracting processes in the European Union*. 2012, p. 5.

*undertaking, a building contractor becomes liable […] for the obligation on that undertaking or that undertaking´s subcontractors to pay the minimum wage to a worker […].”*[170]

As far as the conflict of liability is concerned, direct contractors can be held liable either in addition to *or* in place of the employer. Contrary to general understanding, the contractor´s liability does not necessarily have to be solidary. As an alternative to solidary responsibility, MS may choose joint responsibility in the case of which the contractor would be held responsible *together with* the employer. Accordingly, the value of the posted worker´s claim would be divided among the two and the posted worker would have to enforce his claim vis-à-vis each one to the limit of their respective share, which would be unfavorable should either one of the two be insolvable. Therefore, *Article 12* in fact entails the risk of aggravating the situation of a posted worker and the possibility to enforce his rights.[171]

The system of solidary responsibility established by *Article 20* also entails a preventive mechanism consisting of MS' possibility to exonerate the direct contractor provided that the contractor has undertaken due diligence obligations.[172]

The *ED* recognizes the possibility of MS to provide for more stringent liability rules[173], but appears to exclude the possibility of extending any such rule to entities beyond the direct contractor.[174] On the other hand, it seems that under the condition of conformity with EU law, MS may adopt rules engaging the liability in regard to other hard core rules than just the minimum rates of pay. It is up to the CJEU to verify that such facultative systems of more stringent liability rules are non-discriminatory and proportional. In view of the limited harmonization and despite divergences in national systems, the CJEU should perform rather strict control of proportionality in regard to the protection of posted workers.[175] For instance,

[170] Judgment of 12 October 2004, *Wolff & Müller*, C-60/03, ECLI:EU:C:2004:610, Ruling.
[171] JAOUEN, Magali : op.cit., p. 167-168.
[172] The mere possibility pursuant to the wording of Article 12(5) is conceived as an incitation in Recital 37, according to which MS „should be able to[…]“.
[173] Article 12(4) ED.
[174] Article 12(6) ED.
[175] HO-DAC, Marion: op. cit., p. 108.

in *Commission v. Belgium*[176], the CJEU considered as disproportional the Belgium system, reasoning that it could have imposed a less restrictive measure permitting contractors to be exonerated from solidary responsibility provided that they accomplished certain formalities in order to verify the fiscal situation of service providers with which they conclude contracts.

It can be concluded that by limiting sub-contracting liability to direct contractors, the construction sector and matters of remuneration, the system set forth by the *ED* provides too wide of a leeway to MS and *de facto* continues to tolerate circumventions consisting in the multiplication of actors in subcontracting chains. Furthermore, the system is incoherent with EU law in that *Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals* imposes solidary responsibility vis-à-vis *all* undertakings involved in a subcontracting chain. Finally, *Paragraph 7*, which stipulates that MS are to communicate all adopted relevant measures to the European Commission (a typical aspect of coordination), demonstrates the hybrid nature of the system of sub-contracting liability, which is not strictly based on harmonization. Due to significant divergences in national law, control performed by the European Commission as well as the CJEU remain crucial.[177]

# 5 Persisting challenges and current revision of legal framework

## 5.1 The Enforcement Directive´s impact assessment

The *ED´*s transposition deadline elapsed on June 18, 2016 and an impact assessment was to be carried out by the same date in 2019. The European Commission finalized the assessment on March 3, 2016.

In the impact assessment, the European Commission recognizes the *ED´*s positive impact on administrative cooperation, better access to information and effective sanctioning of frauds and circumventions related to posting workers.[178] On the other hand, it identifies

[176] Judgment of 9 November 2006, *Commission v Belgium*, C-433/04, CLI:EU:C:2006:702
[177] JAOUEN, Magali : op. cit., p. 169-170.
[178] *COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT* :op. cit., p. 18.

the following problems: differentiated wage rules, social dumping and the fact that not all MS have systems of declaring collective agreements universally applicable, unfair competition, deteriorated acceptance of posting and legal uncertainty resulting from the lack of clarity of the temporary nature of posting as well as the elements which are covered by minimum rates of pay, inconsistency between EU legislation, and incentives for companies to replace locally hired workers with foreign service providers.

Differentiated wage rules are attributable to three factors.

Firstly, the fact that minimum rates of pay are defined by law or collective agreements which have been declared universally applicable. In case a MS lacks such a system of declaring collective agreements in line with *Article 3 (8) PWD*, only the statutory minimum wage applies to posted workers, which creates a wage gap between posted workers and local workers.

Secondly, the constitutive elements of minimum rates of pay vary significantly MS by MS. The CJEU has clarified the notion of minimum rates of pay in a number of judgments. For instance, in *Commission v. Germany*, the CJEU held that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the host MS cannot be considered as part of minimum rates of pay, by reasoning that if an employer requires a worker to carry out additional work or to work under particular conditions, compensation provided for such an additional service cannot be taken into account for the purpose of calculating the minimum wage. Only elements which do not alter the relationship between the service provided by the worker and the consideration that he receives in return can be considered as components of minimum rates of pay.[179] Accordingly, in *Isbir* the CJEU recognized that contributions towards savings, the construction or acquisition of a residence or capital life insurance could be considered as elements of minimum rates of pay, with the reserve that it is for the national court to verify that the relationship between the service and received consideration is not altered.[180] In *Sähköalojen*

[179] Judgment of 14 April 2005, *Commission v Germany*, C-341/02, ECLI:EU:C:2005:220, paragraphs 39-40.

[180] Judgment of 7 November 2013, *Isbir*, C-522/12, ECLI:EU:C:2013:711, paragraph 46.

*ammattiliitto ry*, the CJEU ruled that the minimum rates of pay which a host MS can require to be paid to posted workers include compensation for daily travelling time, daily allowance and holiday pay. In the same case, it held that coverage of accommodation costs cannot be considered as an element of minimum wage.[181] Despite these clarifications in case law, incertitude persists and the term minimum rates of pay is often incorrectly associated with the notion of minimum wage.

The third problem is related to the specific legal situation in Denmark and Sweden, which lack statutory provisions on minimum wage, general collective agreements set basic wage floors in only some relevant exposed sectors and company level agreements rarely involve transnational service providers.

The European Commission also criticized the fact that the *ED* imposes uniform rules, which are not a suitable solution to certain posting situations. In particular, the rules are not convenient for postings within subcontracting chains, as the *ED* determined who can be held liable for wage payment, but fails to address the question of what wage a posted worker in a subcontracting chain is entitled to. Nor are the rules adequate for temporary agency workers, as these are exposed to the risk of different treatment in regard to agency workers recruited directly in the host MS, due to which temporary agencies established in the host MS face unfair competition.

The lack of specification of the temporary nature of posting was criticized due to its inconsistency with the *Social Security Directive*, due to which once the period of posting exceeds the duration of 24 months, posted workers are integrated into the social security system of the host MS but continue paying income taxes in their home country. Workers posted on a long-term basis do not benefit of the principle of equal treatment with local workers, even though they are *de facto* integrated into the local labor market, and domestic

[181] Judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, ECLI:EU:C:2015:86, paragraphs 52, 57, 58, 69, 70.

companies face unfair competition due to higher costs resulting from the respect of higher labor law standards.

The European Commission also draws attention to the risk of *Article 5(4)(b) ICT Directive* which provides that third country nationals must be given a remuneration "*not less favorable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions*". The aforementioned provision could lead to distortion of competition between companies having or not having subsidiaries within the EU and a difference of treatment between EU citizens and third-country nationals.

The European Commission acknowledged the positive role of the CJEU in regard to clarifying certain provisions of the *PWD* and *ED* (namely concerning minimum rates of pay), thus contributing to more legal certainty, but underlined the necessity of legislative intervention, as the role of the CJEU is limited to clarification of existing provisions and is unpredictable in that it depends on the number and nature of cases brought before the CJEU.

## 5.2 Revision of the Posting of Workers Directive

On March 8, 2016, the European Commission presented its proposal for the revision of the *PWD*, doing so before the lapse of the *ED´*s implementation deadline and without prior consultation of social partners. This was criticized by the Parliament Chambers of 11 MS which activated the yellow card procedure.[182]

The initiative is based on the aim to facilitate the cross-border provision of services (by improving clarity and transparency of rules as well as consistency between EU legislative acts), ensure a level-playing field between local service providers and service providers from other MS (by diverting competition away from wage costs and working conditions, but not

[182] BROUGHTON, Andrea. *EU-Level: Posted workers proposal gets 'yellow card' from Member States* [online]. 2016 [cit. 2017-06-08].
VINCENTI, Daniela. *Posted workers revision gets off to shaky start* [online]. 2016 [cit. 2017-06-08].

interfering with other differences such as taxes, social security, access to loans, etc.) and provide sufficient protection to posted workers.

At the time of the finalization of this thesis, the legislative procedure is at the stage of deliberations held within the Council and its preparatory bodies and within the Committee on Employment and Social Affairs of the European Parliament.[183] Since the legislative procedure is still at an early phase, the initial proposal is likely to be modified by the abundance of proposed amendments, which is why I will limit myself to the key proposed changes that are most debated among MS and within the EP.

First of all, the proposal attempts to eliminate doubts concerning the understanding of the limited nature of posting by introducing a rule according to which once the duration of the posting exceeds 24 months, the host MS shall be deemed to be the country in which the posted worker habitually carries out his work. The consequences of such a provision are set by *Rome I* and are such, that not only will the law of the host MS govern the individual employment contract in case of absence of choice of law, but even in case a *lex contractus* is stipulated by the parties to the employment contract, such law shall be superseded by the law of the host MS to the extent that imperative norms are concerned. Moreover, in order to combat circumventions in the form of successive postings, the proposal imposes an additional rule according to which in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods concerned shall be taken into account, with regard to workers that are posted for at least six months.[184]

Secondly, the proposal strives for improving remuneration conditions of posted workers by replacing "*minimum rates of pay*" in the "*hard core*" of the *PWD* by "*remuneration, including overtime rate*". It specifies that "*For the purpose of this Directive, remuneration means all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been*

[183] Amendments were tabled and a vote scheduled for July 12, 2017.

[184] Article 1(1) *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC:* op. cit.

*declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in the Member State to whose territory the worker is posted.*" Low-waged MS are strongly opposed to this extensive modification, as they consider it to interfere with the sovereign power of MS to determine wages and other matters regarding remuneration vis-à-vis employees on their labor market. Moreover, these MS fear that rather than achieving salary convergence, the proposed rule would discriminate against national service providers, which would be deprived of their greatest competition advantage, lower wage expenses.[185]

Thirdly, in regard to liability in subcontracting chains, the European Commission proposes that if service providers established in the territory of a MS are obliged to subcontract only to service providers that guarantee certain terms and conditions of employment covering remuneration, the MS may provide that such undertakings will be under the same obligation regarding subcontracts with service providers from other MS (or other undertakings within the meaning of *Article 1 PWD*). The terms and conditions of remuneration which can be imposed may result not only from national law or universally applicable collective agreement, but also other collective agreements.[186]

Fourthly, the proposal introduces stricter rules in regard to workers posted by work agencies established in other MS than the host MS. Such posted workers would be entitled to equal terms and conditions vis-à-vis the workers of the undertaking to which they are posted. Currently, prior to the *TAW Directive*, this only applies to workers posted by work agencies established in the same MS as the undertaking to which the worker is posted and it is up to

[185] Article 1 (2) *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC:* op. cit.

[186] Article 1 (2)b *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC:* op. cit.

each MS to decide whether or not the right to equal treatment shall apply also in case of workers posted by work agencies established in another MS.[187]

Lastly, the proposal extends the possibility to apply universal collective agreements to all sectors. Therefore, the possibility to invoke collective agreements of the host MS would no longer be limited to the construction sector.

# 6 Conclusion

This thesis demonstrates the complexity of the posted workers phenomenon, both in regard to its legal regulation as well as the number of interests and values that are concerned.

In order to comprehend the legal status of posted workers, one must turn to a number of legislative acts, namely the *PWD*, *ED* and *Rome I*. Rules of private international law in *Rome I* determine the MS of which the law shall govern a worker´s individual employment contract. The specificity of posted workers in contrast to Workers consists in the temporal nature of their mobility, the fact that they do not enter the labor market of another MS and that they were conceived as a tool intended to facilitate the freedom to provide services. For these reasons, posted workers do not enjoy the same level of protection as Workers, particularly the freedom of movement and right to equal treatment. However, since posted workers are vulnerable, the *PWD* interferes with a "*hard core*" of aspects of labor law, in regard to which posted workers are entitled to rights provided for by the rules of the host MS. The CJEU is also active in regard to posting workers and contributes by clarifying uncertain terms and by limiting restrictions imposed on the freedom to provide services. Nevertheless, it developed a theory of overriding reasons of public interest which under particular circumstances allows the law or practices of host MS to supersede the principle of country of origin which would otherwise apply beyond the scope of the *PWD*'s "*hard core*".

[187] Article 1 (2) c of *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC:* op. cit.

The legal regulation of posted workers is controversial and is bound to remain so, regardless of the direction it will pursue following the current revision or on the occasion of upcoming revisions in the more distant future. The matter is considerably ideologized due to conflicting interests of the freedom to provide services (striving for minimum intervention of the host MS) and protection of social rights of posted workers (aiming for maximum intervention of the host MS) as well as interests of high-waged MS (invoking principles such as fair competition between companies and the prevention of social dumping) and low-waged MS (invoking the freedom to provide services and suppression of all restrictions). The approach of each MS and individual stake holders is naturally determined by their economic position that they find themselves in and which they automatically advocate. The influence of the position of particular MS is also apparent in the works of many authors who publish studies regarding posted workers. Therefore, distinguishing between facts and biased points of view was sometimes a challenge when collecting resources for my thesis. These colliding views is the reason why there is no universally correct answer to the extent and manner in which posting workers should be regulated, why the topic is particularly sensitive and reaching a consensus challenging. Since the interests at stake are in essence conflicting, one must accept that there is no optimal solution that could satisfy all stakeholders and a reasonable balance must simply be struck between the conflicting interests.

However, common ground can be found between the MS as to some problematic aspects which should be solved. Development in recent years has already managed to at least partially overcome the greatest issues, such as lack of sufficient access to information by posted workers, weak mechanisms of enforcing posted workers' rights, poor cooperation among MS which enabled widespread abusive practices or inefficient controls and certain vague terms such as the temporary nature of posting.

Accordingly, the *ED* reinforced administrative cooperation (by integrating posted workers into the IMI system, imposing the obligation of cooperation among MS and laying out the basic principles of such cooperation or inciting MS to cooperate more closely by encouraging the exchange of personnel), clarified inspection powers, imposed new

information obligations on MS, provided posted workers with a guarantee of recourse to national courts, and introduced a number of measures limiting abuses (such as imposing partial liability in subcontracting chains or clarifying the temporary and true nature of posting). The CJEU has also intervened with a number of judgments in which it clarifies certain terms (such as minimum rates of pay) and determines the extent to which host MS can invoke their rules beyond the scope of the hard core.

However, some issues have only been reduced (non-transparent subcontracting chains), some terms only partially clarified (evaluation of the temporary nature of posting) and a number of problems have not yet been addressed (consecutive postings, the difference of treatment between workers posted by work agencies locally and those from another MS). Many issues are also due to insufficient articulation of the *PWD* and *ED* with other acts, such as the *TAW Directive* or *Rome I*. It is also difficult to strive for greater improvements without sufficiently relevant data and effective controls. Therefore, certain unclarities and problems surrounding the phenomenon persist.

Besides the intended modifications in the current proposal for revision, other changes may be envisaged, such as the extension of the "*hard core*" beyond the currently included matters. For instance, if the protection of *women who have recently given birth is* ensured, protection of fathers caring after children in place of mothers should also be guaranteed. Within the deliberations in the Council, the French delegation also proposed the inclusion of safety and hygiene of accommodation.

Certain sectors could also be excluded from the scope of the *PWD* and subsequently possibly become subject to sector specific legislation. Recently, the European Commission already proposed specific rules for the road transport sector within its initiative "*Europe on the move*" presented on May 31, 2017. Based on the proposal, remuneration prior to the legislation of the host MS would only be applicable on a driver works at least three days a month in a MS with higher remuneration rates. Furthermore, the obligation for the truck company to have a contact point in each MS where the posting takes place would also be

canceled.[188] However, other sectors are also particularly sensitive, including the music performance or science. Excessive rules could limit exchange in these often key areas of cooperation. Moreover, other exceptions in the form of very short-term postings could be established. Such postings would be either entirely exempted from the legal framework or only subject to its partial application.

The Council also proposes a compromise between the current remuneration rules and those proposed by the European Commission. The compromise consists of a "*dual system*" of remuneration, according to which workers posted for a period shorter than 24 months would be remunerated in line with current rules (i.e. minimum rates of pay), while workers posted for a longer period would be remunerated according to the newly proposed rules (remuneration in its entirety).

The recommended length of this thesis and the ongoing status of the revision proposal are not in favor of an in-depth analysis of the legal framework in preparation. However, this aspect certainly deserves more attention in a separate future study.

The currently ongoing revision is likely to bring clarification, but due to conflicting interests, it is uncertain whether significant changes will be achieved and at what cost. The heated debates within the Council as well as the Committee on Employment and Social Affairs testify to the fact that posting workers triggers a number of controversial questions without clear answers.

To what extent should posted workers be protected and be entitled to equal treatment in regard to Workers in the host MS? As noble as the aim sounds, increasing protection entails excessive costs and administrative burdens on the part of service providers, which could render the provision of services through employees unattractive. Service providers would possibly even have to dismiss such employees and abandon the concept of posted workers,

[188] *Europe on the Move: Commission takes action for clean, competitive and connected mobility* [online]. [cit. 2017-06-08].

instead hiring local labor or entirely seizing their activities in other MS. Excessive protection could therefore produce opposite effects.

To what extent should rules on remuneration of the host MS apply to posted workers? As much as the principle of same work for same pay may appear fair, it collides with national sovereignty to determine wages as well as spontaneous market based wage convergence. Different wages are one of the elements of free competition on the internal market. Service providers from lower-waged MS may have a competitive advantage vis-à-vis service providers from higher-waged MS thanks to lower labor costs, but these are balanced by higher costs linked to posted workers´ accommodation, transportation or meals.

These are just a couple of the many questions showing that all potential modifications can be assessed from two different points of view. Either way, excessive regulation could lead to the abandonment of the posting workers phenomenon, which would become more of a burden for service providers than a tool to facilitate cross-border provision of services. Consequently, the main initial purpose of regulating the phenomenon would be compromised. Moreover, the seizure in posting workers could lead to lead to serious disturbances on the internal market in regard to sectors particularly dependent on the tool (namely the construction sector). Therefore, the phenomenon of posting workers is condemned to a constant balancing of involved interests.

# Master's thesis summary in Czech / Teze diplomové práce v češtině

Vysílání pracovníků v rámci EU je komplexní fenomén, který se oproti vyslání v národním měřítku vyznačuje střetem mezi protichůdnými zájmy členských států s vyšší úrovní mezd a zájmy členských států s nižší úrovní mezd, střetem mezi svobodou poskytování služeb a ochranou pracovníků, jakož i faktem, že vysílání fakticky souvisí s mobilitou pracovníků i poskytovatelů služeb. Vysílání pracovníků v rámci EU je potřeba analyzovat z pohledu tří právních odvětví – unijního práva, mezinárodního práva soukromého a pracovního práva.

Dle nejaktuálnějších dat z roku 2014 dosahoval v daném roce počet vyslaných pracovníků 1.92 milionů, což představuje až 44.4% nárůst oproti roku 2010. V nadcházejících letech lze očekávat pokračování tohoto trendu. Vysílání pracovníků je obzvláště využíváno ve stavebním průmyslu, ale vyskytuje se i v jiných sektorech včetně odvětví s vyšší kvalifikací, jako jsou např. finanční služby.

Cílem této práce je představit koncept vysílání pracovníků komplexně, tj. nejen z pohledu platného práva, ale i možného vývoje, a současně v kontextu jiných souvisejících legislativních aktů. Záměrem je i poukázat na některé praktické problémy a legislativní snahu o jejich řešení.

Klíčovými předpisy sekundárního práva jsou Směrnice Evropského parlamentu a Rady 96/71/ES ze dne 16. prosince 1996 o vysílání pracovníků v rámci poskytování služeb (dále jen „Směrnice o vysílání"), Směrnice Evropského parlamentu a Rady 2014/67/EU ze dne 15. května 2014 o prosazování směrnice 96/71/ES o vysílání pracovníků v rámci poskytování služeb a o změně nařízení (EU) č. 1024/2012 o správní spolupráci prostřednictvím systému pro výměnu informací o vnitřním trhu (dále jen „Směrnice o prosazování"). Do úpravy však zasahují i Nařízení Evropského parlamentu a Rady (ES) č. 593/2008 ze dne 17. června 2008 o právu rozhodném pro smluvní závazkové vztahy (dále jen „Řím I"), Směrnice Evropského

parlamentu a Rady 2006/123/ES ze dne 12. prosince 2006 o službách na vnitřním trhu (dále jen „Směrnice o službách“), Směrnice Evropského parlamentu a Rady 2008/104/ES ze dne 19. listopadu 2008 o agenturním zaměstnávání (dále jen „Směrnice o agenturním zaměstnávání“) a Nařízení Evropského parlamentu a Rady (ES) č. 883/2004 ze dne 29. dubna 2004 o koordinaci systémů sociálního zabezpečení (dále jen „Nařízení o koordinaci“). Právním základem Směrnice o vysílání jsou články 53(1) a 62 SFEU související se svobodou poskytování služeb a svobodou usazování. Z uvedeného vyplývá, že právní režim vysílání pracovníků se odvíjí od svobody poskytování služeb, nikoliv od volného pohybu pracovníků.

Vyslaní pracovníci nepožívají téže ochrany jako pracovníci ve smyslu článku 45 SFEU, zejména svobody pohybu a práva na rovné zacházení. Na rozdíl od takových pracovníků zůstávají zaměstnáni v členském státě původu a v hostitelském státě vykonávají jen dočasné práce - nevstupují tedy na trh práce jiného členského státu. Vyslaní pracovníci představují součást vybavení, kterým poskytovatel služeb disponuje, a který je potřebný k tomu, aby svobodu poskytování služeb realizoval. Omezování mobility vyslaných pracovníků je překážkou svobody poskytování služeb, a proto není hostitelský stát oprávněn vyžadovat pracovní povolení vyslaného pracovníka, a to ani u příslušníků třetích států. Vázanost režimu vysílání pracovníků na svobodu poskytování služeb je tedy nezbytná pro zachování klíčových principů vnitřního trhu.

Vyslané pracovníky je potřeba odlišit i od poskytovatelů služeb. Toto rozlišení je v praxi často složité, neboť vzrůstající flexibilitou forem zaměstnávání, využíváním subdodavatelských řetězců a jinými faktory se rozdíly stírají. Vodítka pro určení rozlišovacích znaků mezi pracovníkem a poskytovatelem služeb lze nalézt v judikatuře Soudního dvora EU (dále jen „SDEU“). V případu Lawrie-Blum definoval SDEU pracovníka jako osobu, která po určitou dobu vykonává ve prospěch jiné osoby a pod jejím vedením činnosti, za které protihodnotou pobírá odměnu. Klíčovým znakem je tedy vztah subordinace. V případu Meeusen SDEU stanovil, že existenci takového vztahu ověřují národní soudy. Následně v případu Allonby SDEU vytvořil evropský koncept posuzování vztahu subordinace, když stanovil, že ověřování existence

takového vztahu musí být prováděno individuálně se zřetelem ke všem faktorům a okolnostem daného případu.

SDEU ve své judikatuře vymezil i pojem vyslaného pracovníka vůči obecnému pracovníkovi ve smyslu čl. 45 TFEU. V rozsudku Rush Portuguesa stanovil, že vyslaní pracovníci se po dokončení služeb vrací do státu původu a nezískávají tak přístup na trh práce hostitelského státu. Současně usoudil, že ustanovení SFEU o poskytování služeb zakazují, aby hostitelský stát omezoval vstup zaměstnanců poskytovatele služeb, jenž na území dotyčného členského státu poskytuje služby. Zároveň však SDEU uznal, že komunitární právo nebrání členským státům v uplatňování svého práva i vůči dočasně vyslaným pracovníkům, čímž fakticky a zřejmě nechtěně vyňal aplikaci národního pracovního práva ze zákazu překážek vůči svobodnému poskytování služeb. Tato judikatura vyvolala dvě reakce - zmírnění nepodmíněné možnosti aplikace národního práva v následných rozsudcích a přijetí Směrnice o vysílání.

Během následujících let se ustálila judikatura, dle které svoboda poskytování služeb vyžaduje potlačení nejen diskriminačních opatření, ale i takových opatření, které jsou způsobilé znemožnit, ztížit nebo jinak učinit méně atraktivním poskytování služeb poskytovatelům služeb usazených v jinách členskách státech. Ze stejné judikatury se vyvinula teorie naléhavých (mandatorních) požadavků z důvodu ochrany veřejného zájmu, dle které představují výjimku ze zákazu takové překážky, které ospravedlňuje veřejný zájem, jenž není zajištěn pravidly členského státu, ve kterém je poskytovatel usazen, omezení je vhodné k dosažení takového zájmu a zároveň potřebné (tj. cíle nelze dosáhnout mírnější překážkou) a překážka je uplatňována nediskriminačním způsobem.

SDEU tuto obecnou doktrínu pro oblast poskytování služeb v řadě rozsudků interpretoval ve vztahu k možnosti členských států aplikovat svou národní právní úpravu. V těchto rozsudcích jako důvody veřejného zájmu SDEU připouští v zásadě společenské, nikoliv však ekonomické zájmy (jako jsou ochrana domácí výroby či snižování nezaměstnanosti) ani administrativní, ledaže by takové zájmy byly nezbytné k zajištění potřebné ochrany pracovníků či efektivní kontroly jejího dodržování. Klíčovým důvodem veřejného zájmu je tedy ochrana

pracovníků, ovšem pouze za současného dodržení principu země původu, tj. jedině potud, pokud danou ochranu již nezajišťuje aplikace pravidel členského státu původu.

SDEU současně vyvinul závaznou metodologii analýzy naléhavých požadavků z důvodu ochrany veřejného zájmu. Z této metodologie vyplývá, že analýza musí být provedena objektivně ve vztahu ke skutečnému obsahu a dopadu příslušného národního ustanovení (nikoliv tedy na základě pouhé důvodové zprávy apod.). Je-li např. důvodem ochrana pracovníků, dané ustanovení musí vyslaným pracovníkům zajišťovat skutečnou výhodu, která zlepšuje jejich postavení. Dále je potřeba ke každému případu přistupovat individuálně se zřetelem k okolnostem daného případu. Navzdory této metodologii SDEU interpretuje kritéria naléhavých požadavků s jistou flexibilitou – např. v případech důležitých sociálně ekonomických zájmů, které se mohou v různých členských státech rozcházet, neposuzuje kritérium proporcionality sám SDEU, ale preferuje jej přenechat národním soudům. Lze shrnout, že svou následnou judikaturou SDEU nepřevrátil judikaturu Rush Portuguesa, ale zmírnil ji tak, že v zásadě neomezená možnost členských států aplikovat svou národní úpravu se stala přísně podmíněnou.

Druhou reakcí na judikaturu Rush Portuguesa bylo přijetí Směrnice o vysílání.

Tato směrnice za vyslaného pracovníka považuje osobu, která na dočasnou dobu vykonává práci na území jiného členského státu, než ve kterém obvykle pracuje. Pokud jde o definici pracovníka, pro potřeby vysílání pracovníků se neuplatní definice čl. 45 SFEU, ale definice hostitelského státu. Dle judikatury SDEU lze však upřednostnit definici vysílajícího členského státu, je-li pro dotyčného výhodnější. Směrnice o vysílání se rovnou měrou uplatní na všechny vyslané pracovníky poskytovatele služeb, tj. i na příslušníky třetích států.

Inspirací Směrnice o vysílání byla nejen judikatura, ale i tzv. David-Bacon Act z roku 1931 jakož i Dohoda Mezinárodní organizace práce z roku 1994, které vyslaným pracovníkům zakládaly právo na odměňování dle pravidel platných na území státu výkonu práce. Dle původního záměru se Směrnice o vysílání měla vztahovat pouze na veřejný sektor, ve své

platné a účinné podobě má však všeobecnou platnost. Původní návrh z roku 1991 počítal i s druhým předpisem, který by upravoval odpovědnost v subdodavatelských řetězcích, avšak tento druhý akt nakonec nebyl přijat. Proces přijímání byl zdlouhavý z důvodu protichůdných zájmů dvou táborů členských států - zatímco členské státy s vyšší úrovní mezd usilovaly o extenzivní aplikaci pravidel hostitelského státu (z důvodu předcházení sociálnímu dumpingu a zajištění spravedlivé konkurence), druhá skupina států usilovala o opak (z obavy ztráty konkurenční výhody svých poskytovatelů služeb). Politickou debatu zostřilo i přistoupení Španělska a Portugalska do EU z důvodu zvýšených obav z narušení vnitrostátního trhu práce levnou pracovní silou z těchto nových států. Nejspornějšími aspekty návrhu bylo vyslání na dobu kratší tří měsíců, chybějící společná definice pracovníka, vymezení tzv. tvrdého jádra a vztah ke kolektivnímu vyjednávání. Proces přijetí tak trval celých pět let a vyústil ve spíše minimalistickou úpravu.

Směrnice o vysílání se vztahuje na poskytovatele služeb usazené v členském státě EU, kteří vysílají pracovníky do jiného členského státu a to na základě jednoho ze tří modelů. Nejčastější variantou je případ, kdy k vyslání dochází na základě dvou smluv – smlouvy o poskytování služeb mezi poskytovatelem a subjektem přijímajícím služby a pracovní smlouvy mezi poskytovatelem a vyslaným pracovníkem. Druhou variantou je vyslání v rámci koncernu, kdy vysílající i přijímající subjekt jsou členy stejné skupiny osob. V případě vyslání příslušníka třetího státu subjektem se sídlem mimo EU se místo Směrnice o vysílání uplatní Směrnice Evropského parlamentu a Rady 2014/66/EU ze dne 15. května 2014 o podmínkách vstupu a pobytu státních příslušníků třetích zemí na základě převedení v rámci společnosti. Uvedená směrnice se však uplatní pouze na manažery, specialisty a stážisty. Oproti Směrnici o vysílání umožňuje širší aplikaci pravidel hostitelského státu a tím pádem větší ochranu vyslaných pracovníků. Především obsahuje výčet oblastí, u nichž se uplatní zásada rovného zacházení s vyslanými pracovníky ve vztahu k pracovníkům hostitelského státu, přičemž výčet zahrnuje i problematiku odměňování. Třetím modelem vyslání je vyslání agenturou práce. Směrnice o agenturním zaměstnávání se však na pracovníky vyslané agenturou práce vztahuje jen v případě vyslání, u něhož absentuje evropský prvek, tzn. na interní situace, kdy agentura

práce sídlí v témž členském státě jako přijímající subjekt. Tento dvojí režim agenturního zaměstnávání umožňuje diskriminaci vyslaných pracovníků – zatímco interně vyslaní pracovníci mají dle speciální směrnice právo na rovné zacházení ve vztahu k zaměstnancům přijímajícího subjektu, přeshraničně vyslaní pracovníci dle Směrnice o vysílání tímto právem disponují pouze tehdy, určil-li tak konkrétní hostitelský členský stát.

Pokud jde o negativní působnost Směrnice o vysílání, úprava se nevztahuje na personál obchodního námořnictva. Některé členské státy mají tendenci Směrnici o vysílání chybně vztahovat i na situace, které nespadají pod žádný ze tří výše popsaných modelů, jako je například případ silniční tranzitní dopravy.

Klíčovým ustanovením Směrnice o vysílání je článek 3, který vymezuje tzv. „tvrdé jádro“, tzn. seznam oblastí pracovního práva, v jejichž vztahu se na vyslaného pracovníka uplatní pravidla hostitelského státu. Zdrojem národních pravidel přitom mohou být právní předpisy, správní předpisy a v případě stavebního sektoru i kolektivní smlouvy nebo rozhodčí nálezy, které byly prohlášeny za všeobecně použitelné ve smyslu směrnice. Tvrdé jádro obsahuje následující oblasti: maximální délku pracovní doby a minimální dobu odpočinku; minimální délku dovolené; minimální mzdu (včetně sazeb za přesčasy); podmínky poskytování pracovníků (zejména prostřednictvím podniků pro dočasnou práci); ochrana zdraví, bezpečnosti a hygieny při práci; ochranná opatření týkající se pracovních podmínek těhotných žen nebo žen krátce po porodu, dětí a mladistvých; rovné zacházení pro muže a ženy a ostatní ustanovení o nediskriminaci.

Místo metody harmonizace daných aspektů pracovního práva tak Směrnice o vysílání volí metodu koordinace právních řádů a upravuje rozhodné právo, které by se jinak uplatnilo dle Římu I. Z podrobnějšího zkoumání však vyplývá, že s výjimkou minimálních odměn byly všechny ostatní dílčí aspekty tvrdého jádra postupně harmonizovány prostřednictvím zvláštních směrnic.

Oproti judikatuře Rush Portuguesa se může Směrnice jevit jako restriktivnější, neboť seznam oblastí, v jejichž vztahu může hostitelský stát uplatnit své právo, je taxativní. Směrnice je však extenzivnější v tom smyslu, že misto možnosti uplatňovat národní úpravu aplikaci takové úpravy (co se týče oblastí spadajících pod tvrdé jádro) naopak povinně ukládá. Na druhou stranu je aplikace pravidel hostitelského státu limitována principem výhodnějších ustanovení, který znamená, že i v oblastech tvrdého jádra se upřednostní právo země původu, pokud vyslanému pracovníkovi zaručuje ještě vyšší standard ochrany. Tento princip v praxi vyvolává potíže, neboť vyžaduje analýzu dvou právních řádů v jednotlivých aspektech pracovního práva, jejich srovnání a případnou paralelní mozaikovou aplikaci.

Směrnice o vysílání připouští aplikaci pravidel hostitelského státu i nad rámec tvrdého jádra, a to v případě, že jsou dodržovány předpisy veřejného pořádku. SDEU však ve své judikatuře zdůrazňuje, že tato možnost musí být vykládána v souladu se svobodou poskytování služeb a tedy minimalisticky. Dle některých autorů judikatura SDEU v kombinaci s argumentem vyšší právní síly článku 57(2) SFEU o svobodě poskytování služeb nemohou hostitelské státy svá pravidla aplikovat nepodmíněně ani v rozsahu tvrdého jádra a vždy bude potřeba naplnit zájem vyslaného pracovníka.

Vzhledem k tomu, že vztah mezi poskytovatelem služeb a pracovníkem vyslaným do jiného členského státu je vztahem s cizím prvkem, je potřeba vyslání pracovníků posuzovat i z hlediska mezinárodního soukromého práva, zejména nařízení Řím I. Dle tohoto nařízení je rozhodným právem pro individuální pracovní vztahy právo zvolené smluvními stranami a v případě jeho nezvolení právo státu, na jehož území je práce obvykle poskytována, přičemž určení tohoto státu se nemění v případě dočasného výkonu práce v jiném členském státě. V případě potíží s určením takového státu bude rozhodné právo státu, v němž se nachází provozovna, která zaměstnance zaměstnala. Je-li však smlouva blíže spojena s jiným členským státem, pak se řídí právem tohoto státu. Řím I rovněž omezuje možnost volby práva tím, že volba práva nesmí vyslanému pracovníkovi odepřít ochranu, na kterou by měl nárok dle kogentních ustanovení práva státu, jehož právo by se v případě absence volby práva uplatnilo.

Nařízení současně autorizuje intervenci kogentních pravidel hostitelského státu, a to za předpokladu, že se jedná o pravidla, jejichž dodržování je pro stát při ochraně jeho veřejných zájmů zásadní do té míry, že se jejich použití vyžaduje na jakoukoli situaci, která spadá do jejich oblasti působnosti, bez ohledu na právo, které by se jinak na smlouvu použilo. Článek 3 Směrnice o vysílání tuto možnost v rozsahu tvrdého jádra mění v povinnost.

Hodnocení Evropské komise ohledně provádění Směrnice o vysílání z roku 2003 poukázalo na řadu úskalí. Zejména problémy jako jsou neurčitost časové omezenosti vyslání, nedostatek kritérií pro ověření skutečné povahy vyslání a nedostatečná spolupráce mezi státy umožňují porušování pravidel. Poskytovatelé služeb zneužívají neznalosti jazyka i místních poměrů vyslaných pracovníků v hostitelském státě. Častými formami nekalých praktik jsou podniky typu „poštovní schránka“ a schwarz systém. „Poštovní schránky“ spočívají v založení fiktivní společnosti ve členském státě, v němž jsou nižší mzdové náklady, sociální zabezpečení i daně, přičemž tato nová společnost se stane pouze formálním zaměstnavatelem, jenž fiktivně vysílá vyslané pracovníky, kteří však žádné služby v domovském státě neposkytují. Tato praxe vyvolává tzv. sociální dumping. Schwarz systém spočívá v předstírání statusu samostatně výdělečné osoby osobou, která je zaměstnancem, což umožňuje faktickému zaměstnavateli snížení nákladů. Zneužíváním institutu je i postupné obměňování vyslaných pracovníků na totožnou pozici místo jejího obsazení stálým zaměstnancem, využívání netransparentních subdodavatelských řetězců, či kombinace různých předchozích praktik. Tato zneužívání nasvědčovala potřebě revize stávajícího právního rámce.

Naléhavost změn vyvolal i vývoj judikatury, konkrétně čtveřice judikátů (Laval, Viking, Ruffert, Komise v. Lucemburk), jejímž jádrem byla rovnováha mezi ochranou pracovníků a svobodou poskytování služeb. Vzhledem k podobnosti judikátů lze postoj SDEU demonstrovat na případu Laval. Laval byla společnost sídlící v Litvě a poskytující služby ve Švédsku. Švédské odbory usilovaly o uzavření místní kolektivní dohody a vzhledem k neochotě společnosti Laval začaly sabotovat její stavební práce, což společnosti poskytování služeb zcela znemožnilo. Kolektivní dohoda, o jejíž aplikaci švédské odbory usilovaly, přitom obsahovala výhodnější

ustanovení než národní právní úprava tvrdého jádra, ba dokonce překračovala oblasti tvrdého jádra, a upravovala i minimální odměňování, které v národních předpisech zcela chybělo. Kolektivní dohoda přitom nebyla všeobecně aplikovatelná, tedy nesplňovala podmínky ve smyslu Směrnice o vysílání. SDEU uznal potřebu sociální ochrany vyslaných pracovníků a právo na kolektivní vyjednávání a akce uznal jako základní právo, které tvoří součást obecných zásad evropského práva. Přesto však SDEU upřednostnil svobodu poskytování služeb z důvodu nedodržení formálního rámce Směrnice o vysílání, tj. vynucování pravidel, která přesahovala tvrdé jádro či nebyly obsaženy v pramenech práva, jenž Směrnice o vysílání uznává. SDEU tak fakticky potvrdil primární cíl Směrnice o vysílání, tj. ochranu před omezováním svobody poskytování služeb. Tato nová judikatura SDEU vyvolala kritiku ze strany členských států s tradičními systémy kolektivního vyjednávání i ze strany evropských odborů, které začaly volat po revizi Směrnice o vysílání.

Evropská komise na tuto kritiku zpočátku reagovala řadou nelegislativních aktů, kterými vymezovala přípustné formy administrativních omezení, zakázané formy a jejich přípustné alternativy (např. nahrazení systému povolení notifikační povinností) a vyzývala členské státy k blížší administrativní spolupráci. V roce 2009 Komise oznámila záměr podat návrh dvou samostatných aktů - nařízení o právu na stávku v případě přeshraničních aktivit a prováděcí směrnice ke Směrnici o vysílání (tzv. směrnici o prosazování). Nařízení se mělo vztahovat i na svobodu usazování a jeho podstatou bylo zejména vytvoření mechanismu pro neformální urovnání sporů. Od návrhu tohoto nařízení se však Evropská Komise po aktivaci procedury žluté karty komorami národních parlamentů rozhodla upustit.

Směrnice o prosazování je charakteristická třemi znaky - způsobem, kterým „prosazuje“ Směrnici o vysílání, skutečností, že mění nařízení a společným prohlášením Evropského parlamentu, Rady a Komise. Provádění Směrnice o vysílání nespočívá pouze v prostém doplnění Směrnice o vysílání administrativními procedurami či technickými nástroji, jak je obvyklé, ale i v interpretaci a doplnění hmotněprávních ustanovení Směrnice o vysílání. Prováděcí směrnice mění Nařízení Evropského parlamentu a Rady (EU) č. 1024/2012 ze dne

25. října 2012 o správní spolupráci prostřednictvím systému pro výměnu informací o vnitřním trhu a o zrušení rozhodnutí Komise 2008/49/ES tím, že rozšiřuje výčet oblastí, u nichž se uplatní elektronický systém administrativní spolupráce, i o oblast vysílání pracovníků. Změna nařízení formou směrnice je přitom ojedinělá. Třetí zvláštností prováděcí směrnice je společné prohlášení Komise, Parlamentu a Rady ohledně postupného vysílání, které je k aktu připojeno. Taková prohlášení jsou v oblasti sekundárních legislativních aktů netypická.

Prováděcí směrnice objasňuje pojem vyslání tím, že interpretuje dva jeho klíčové znaky - dočasnou i skutečnou povahu. „Dočasnost“ vyslání Směrnice o prosazování neupřesňuje vymezením délky přípustného trvání ani žádným jiným přímým a objektivním způsobem, ale volí kvalitativní a subjektivní přístup. Konkrétně stanovuje určitá demonstrativní kritéria, která v praxi často nasvědčují o trvalosti vyslání. Daná kritéria musí soudce při posuzování dočasné povahy vyslání vzít v potaz, aby se však zabránilo mechanickému postupu, musí přihlížet i ke všem okolnostem daného případu. Nevýhodou tohoto zvoleného řešení je jeho netransparentnost, neboť vyhodnocení provádí soudce pouze za pomoci některých pomocných kritérií a poskytovatel služeb tedy nemůže předem spoléhat na určité závěry posouzení. Dalším nedostatkem je absence řešení postupného vysílání a nejednotný limit vyslání v oblasti jiných předpisů EU. Na rozdíl od Směrnice o vysílání a Směrnice o prosazování je časový limit pro potřeby Nařízení o koordinaci jasně stanoven na 24 měsíců. Ačkoliv je toto pravidlo omezeno na potřeby příslušného nařízení, v praxi je chybně vztahováno i na jiné aspekty vyslání. Stanovení přípustné délky vyslání univerzálním způsobem by přitom usnadnilo administrativní kontrolu a posílilo právní jistotu. Směrnice o prosazování je nekonzistentní i ve vztahu k Římu I pokud jde o výklad pojmu „místo obvyklého výkonu práce“. Dle Řím I zůstává takovým místem území státu vyslání, ovšem za předpokladu, že se do něj pracovník po vyslání vrátí. Dle některých autorů je potřeba Směrnici o vysílání interpretovat v souladu s tímto pravidlem Řím I, neboť takový výklad umožňuje v případě překročení přípustné délky trvání aplikovat právo hostitelského členského státu.

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Prováděcí směrnice zdůrazňuje i požadavek skutečné povahy vysílání, čímž omezuje výskyt zneužívajících praktik. Konkrétně zavádí nový hmotněprávní požadavek vyslání, a sice nutnost, aby poskytovatel služeb vysílající pracovníka na území jiného členského státu vykonával podstatné činnosti ve členském státě původu. Za tímto účelem opět Směrnice o prosazování stanoví výčet návodných kritérií, kterými jsou např. zapsané sídlo a skutečné sídlo obchodních prostor, místo daňových odvodů a odvodů sociálních dávek, místo náboru vyslaných pracovníků a místo, z nichž jsou vysláni, právo, kterým se řídí pracovní smlouvy jakož i smlouvy o poskytování služeb, apod.

Směrnice o prosazování uvádí demonstrativní seznam opatření, která mohou hostitelské státy vůči poskytovatelům služeb aplikovat a mezi něž patří mimo jiné notifikační povinnost, povinnost uchovávat dokumenty a předkládat dokumenty včetně jejich překladů a povinnost označit osobu pro komunikaci s úřady. Jiná opatření by byla přípustná jen pokud by byla nezbytná pro zajišťování dodržování povinností a současně proporcionální. Veškeré administrativní procedury musí být zajištěny i prostředky komunikace na dálku, nesmí být nepřiměřenou zátěží a musí být oznámeny Komisi jakož i zveřejněny na jednotných národních stránkách. Notikační povinnost musí být splněna nejpozději prvním dnem vyslání a jejím předmětem jsou všechny skutečnosti, které jsou potřebné pro výkon kontroly.

Pokud jde o boj proti zneužívajícím praktikám, Směrnice o prosazování ukládá členským státům povinnost prevence i represe. K efektivnímu boji přispívají i povinnosti zajišťující efektivnější spolupráci. Mezi takové povinnost členských států patří povinnost zajistit efektivní systém kontrol, které však nesmí být systematické, ale musí být uskutečňovány na základě rizikového hodnocení dané společnosti, zeměpisné oblasti či odvětví. Členské státy jsou povinny při provádění kontrol spolupracovat. Směrnice o prosazování tak určuje jen obecný rámec administrativních kontrol, neprovádí však jejich harmonizaci. Již Směrnice o vysílání usilovala o stanovení rámce horizontální i vertikální kooperace, avšak ke spolupráci pouze vyzývala. Oproti tomu Prováděcí směrnice členským státům ukládá konkrétní povinnosti, a sice povinnost označit orgány příslušné k plnění úkolů

v oblasti vysílání pracovníků, povinnost provádět kontroly a reagovat na odůvodněné žádosti jiných států. Žádosti je potřeba vyřídit bezplatně a do 25 pracovních dnů (v neodkladných případech do 2). Směrnice o prosazování určí i dělbu kompetencí mezi vysílajícím a hostitelským členským státem. Přestože kontroly dodržování podmínek provádí hostitelský stát, vysílající stát je povinen poskytnout součinnost a přijímat potřebná opatření na svém území. Prováděcí směrnice současně vyzývá členské státy k využití možnosti dočasné výměny inspektorů či podpoře organizací, mezi jejichž činnost patří i informování vyslaných pracovníků. Současně umožňuje použití prostředků z evropských fondů za účelem podpory spolupráce, např. za účelem zřízení pomocných databází. Spolupráci usnadňuje i zařazení vysílání pracovníků mezi oblasti spolupráce usnadněné výše zmíněným. „IMI systémem“. Systém umožňuje snazší přístup k relevantním dokumentům. Národní sankce za porušení pravidel vysílání pracovníků musí být efektivní, proporcionální a odrazující. Prováděcí směrnice spolupráci zefektivnila, avšak jistá úskalí přetrvávají (například nejednotná pravidla vydávání certifikátů sociálního zabezpečení dle Nařízení o koordinaci).

Směrnice o prosazování posiluje ochranu vyslaných pracovníků dvojím způsobem - členským státům stanovuje informační povinnost a vyslaným pracovníkům zaručuje soudní ochranu. Členské státy jsou povinny informační povinnost plnit prostřednictvím jednotné národní webové stránky, na které musí zpřístupnit veškeré národní podmínky odpovídající tvrdému jádru Směrnice o vysílání a současně přehled všech aplikovatelných kolektivních smluv (včetně rozsahu jejich aplikace a obsahu) a případně i způsob řazení do mzdových skupin. Tyto informace musí být publikovány i v brožurkách ve všech oficiálních jazycích příslušného státu, jakož i jiných častých jazycích s ohledem na situaci na trhu. Současně jsou členské státy povinny označit osobu a orgány, které jsou příslušné vyslaným pracovníkům poskytnout pomoc. Členské státy jsou povinny zajistit efektivní mechanismy pro podávání stížností a domáhání se soudní ochrany, to i v hostitelském státě po ukončení vyslání. Pravomoci soudce hostitelského státu se může vyslaný pracovník domáhat v případě jakékoliv újmy způsobené porušením aplikovatelných pravidel. Soudní ochrany se přitom může

domáhat nejen vyslaný pracovník, ale společně s ním či samostatně v jeho zájmu i odborová organizace nebo jiné osoby s odůvodněným zájmem dbát na dodržování příslušných pravidel.

Směrnice o prosazování rovněž zavádí odpovědnost příjemců služeb v subdodavatelských řetězcích. Tato odpovědnost je však omezena na přímé subdodavatele zaměstnavatele vyslaného pracovníka a současně na sektor stavebnictví a otázky odměňování. Dodržování všech ostatních podmínek vyslání může tedy vyslaný pracovník vynucovat pouze po zaměstnavateli. Ve vztahu k jiným sektorům Směrnice o prosazování členským státům umožňuje zavést oddobný mechanismus odpovědnosti (ovšem opět s omezením na přímé příjemce služeb), čímž fakticky pouze potvrzuje rozsudek SDEU Wolff&Müller. Přímí příjemci služeb mohou být odpovědni buďto namísto zaměstnavatelů či společně s nimi. Tato odpovědnost může být solidární nebo dílčí, což by znamenalo, že by vyslaný pracovník musel své právo uplatnit současně vůči oběma subjektům a po každém požadovat pouze jejich příslušný podíl na odpovědnosti. Členské státy mají rovněž možnost liberovat příjemce služeb v případě, že řádně splnil povinnosti náležité péče. Směrnice o prosazování umožňuje zavést přísnější národní pravidla. Zdá se však, že pravidla nelze zpřísnit ve smyslu, že by se vztahovala i na vzdálenější subjekty v subdodavatelském řetězci. Oproti tomu je zřejmě možné zpřísnění rozšířením odpovědnosti i na jiné oblasti trvrdého jádra. Trojí omezení odpovědnosti v subdodavatelských řetězcích ovšem nadále umožňuje zneužívání subdodavatelských struktur. Odpovědnost i vzdálenějších příjemců služeb přitom není pro právo EU cizí a uplatňuje se v případě Směrnice 2009/52/EC o minimálních normách pro sankce a opatření vůči zaměstnavatelům neoprávněně pobývajících státních příslušníků třetích zemí.

Evropská komise provedla hodnocení dopadu Směrnice o prosazování tři měsíce před vypršením lhůty pro její implementaci, která byla stanovena na červen 2016. V hodnocení vítá přínosy jako jsou efektivnější spolupráce, sankcionování porušování pravidel a přístup k informacím. Na druhou stranu upozorňuje na přetrvávající problémy, mimo jiné nespravedlivá konkurence, právní nejistota ohledně dočasné povahy vyslání a nekonzistentnost v unijních předpisech.

Za potíž označila i odlišné způsoby výpočtu mezd v různých členských státech. Jedná se o to, že v některých státech jsou minimální mzdy upraveny v kolektivních smlouvách, které nejsou univerzálně aplikovatelné, a členské státy je tedy nemohou vůči vyslaným pracovníkům vynucovat. Dalším problémem je skutečnost, že každý členský stát považuje za dílčí prvky minimálních mezd něco jiného. Pojem „minimální mzda“ ve smyslu Směrnice o vyslání již SDEU upřesnil ve své judikatuře. Stanovil tak například, že na požadovanou minimální mzdu nelze započíst příspěvek na bydlení či jiné platby, které představují náhradu za práci či náklady vzniklé v důsledku vyslání. Naopak lze započíst příspěvky na spoření, životní pojištění a podobné příspěvky za předpokladu, že se nejedná o protiplnění za vykonanou práci. Navzdory těmto upřesněním jisté nejasnosti přetrvávají a pojem bývá ztotožňován s minimální mzdou ve smyslu národní úpravy. Evropská komise judikaturu SDEU vítá, avšak současně upozorňuje na potřebu legislativní intervence, neboť činnost SDEU je limitována na interpretaci platné právní úpravy a závisí na druhu a počtu podaných žalob. Evropská komise podrobila kritice i skutečnost, že univerzální pravidla neřeší specifika některých situací, jako jsou subdodavatelské řetězy či agenturní zaměstnávání.

Z výše uvedených důvodů podala Evropská komise v březnu 2016 návrh revize Směrnice o vysílání. Návrh usiluje o jednoznačné vymezení dočasnosti vyslání. Po uplynutí 24 měsíců by byl hostitelský stát považován za zemi, v níž vysílající pracovník obvykle vykonává svou práci. Důsledkem tohoto návrhu ve spojení s nařízením Řím I by se právo hostitelského státu aplikovalo při absenci volby práva a v případě provedené volby práva jiného členského státu by se právo hostitelského státu na vyslaného pracovníka vztahovalo v rozsahu jeho kogentních pravidel. Za účelem zamezení porušování pravidel formou řetězení vysílání se v případě postupného vyslání pracovníků k výkonu téže práce na stejném místě pro účely výpočtu 24 měsíčního období budou jednotlivé doby vyslání sčítat, avšak s účinky pouze pro pracovníky, jejichž dílčí doba vyslání dosáhne alespoň šesti měsíců.

Evropská komise navrhuje i změnu odměňování náhradou „minimální mzdy“ za „odměňování, včetně přesčasů,“ přičemž odměňováním by se rozuměly všechny složky

odměňování, které národní právní předpisy či univerzálně aplikovatelné kolektivní smlouvy označují za povinné.

Ve vztahu k odpovědnosti v řetězcích subdodavatelství Evropská Komise navrhuje zavedení pravidla, dle kterého by platilo, že pokud národní legislativa ukládá poskytovatelům služeb se sídlem v témž státě povinnost uzavírat smlouvy o subdodavatelství pouze se subdodavateli, kteří svým zaměstnancům zaručují určité podmínky odměňování, tytéž podmínky odměňování musí dodržovat i případní subdodavatelé se sídlem v jiném členském státě. Takové podmínky by přitom mohly vyplývat z kolektivních smluv, které nejsou univerzálně aplikovatelné. Jisté problémy a nejasnosti však přetrvávají. Vhodné by bylo např. vyřešit oblast subdodavatelství, pracovních agentur, zpřesnit dočasnou povahu vysílání a sjednotit úpravu Směrnice o vysílání s jinými sekundárními legislativními akty.

Návrh rovněž usiluje o překonání diskriminace mezi pracovníky vyslanými agenturami práce se sídlem v hostitelském státě a pracovníky vyslanými agenturami práce se sídlem v jiném členském státě. Pracovníci vyslaní agenturami práce by nově měli nárok na rovné zacházení ve vztahu ke srovnatelným zaměstnancům uživatele práce bez ohledu na sídlo agentury.

V neposlední řadě Evropská Komise navrhuje aplikovatelnost univerzálních kolektivních dohod hostitelského státu v rozsahu tvrdého jádra na všechny sektory, tj. již nejen pouze na odvětví stavebnictví.

Lze shrnout, že koncept vysílání pracovníků je komplexní svou právní úpravou jakož i protichůdnými zájmy aktérů. Status vyslaného pracovníka se řídí především Směrnicí o vysílání, Směrnicí o prosazování a Nařízením Řím I. SDEU svou interpretací pomáhá upřesňovat nejasnosti právní úpravy a vyvažuje střet protichůdných zájmů, kterými jsou svoboda poskytování služeb a ochrana pracovníků. Navzdory těmto protichůdným hodnotám a zájmům různých členských států se dosavadními kroky již podařilo dosáhnout pokroku. Částečný úspěch představují mimo jiné zajištění lepšího přístupu k informacím, zefektivnění přístupu

vyslaných pracovníků k soudu, zlepšení spolupráce mezi členskými státy a odstranění nejasností při výkladu některých pojmů.

Současná revize zřejmě přispěje ke zpřesnění některých aspektů, ale její finální podoba a skutečný přínos nelze v této fázi legislativního procesu předvídat. Debaty v rámci Rady jakož i v rámci Výboru pro zaměstnanost a sociální věci svědčí o tom, že téma je natolik citlivé a navozuje tolik otázek bez jednoznačných odpovědí (Do jaké míry by měli být vyslaní pracovníci chráněni? Do jaké míry by se na ně měla vztahovat pravidla odměňování hostitelského státu?), že stejně nejednoznačné je řešení, které nemůže nikdy zcela uspokojit žádnou ze zúčastněných stran. I do budoucna je tedy jediným možným přístupem vyvažování protichůdných zájmů.

# List of abbreviations / Seznam zkratek

| | |
|---|---|
| CJEU | Court of Justice of the European Union |
| ED | Enforcement Directive |
| EU | European Union |
| ICT Directive | Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer |
| MS | Member state(s) |
| PWD | Posting of workers Directive |
| TAW Directive | Directive on temporary agency work |
| TFEU | Treaty on the Functioning of the European Union |

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# Abstract

The aim of this thesis is to present the phenomenon of posting workers within the EU in the context of the freedom to provide services. The author introduces the *de lege lata* legal framework in a complex and chronological manner, taking into consideration the motives and political pressure behind key modifications. Accordingly, the thesis examines relevant Treaty provisions, case law and its evolution, key secondary acts, as well as the relation of such sources to legal acts which address posting workers in an indirect manner. The author focuses on the analysis of existing key provisions, their practical impact and insufficiencies. However, she also approaches the topic from the *de lege ferenda* perspective by presenting the ongoing revision of the current legal framework and by considering other potential changes which could improve the regulation of posted workers in the future.

Furthermore, the thesis demonstrates the complexity of posting workers by drawing attention to the colliding interests of involved member states and parties, showing the sensitivity of the subject. This underlines the fact that the phenomenon cannot be separated from its political context and is condemned to a constant balancing of two colliding interests – the freedom to provide services and social protection of posted workers. Posting workers is one of the aspects of the internal market which continues to divide member states with different social and economic backgrounds and in regard to which member states seem to be unwilling to find common ground. It testifies to the fact that despite the aim to suppress all obstacles on the internal market, barriers to the freedom of movement persist.

Even though the thesis primarily presents the phenomenon from the legal perspective, it also draws attention to some practical aspects. The author presents the most frequent types of circumventions as well as other practical challenges. She also explains the increasing role of posting workers based on relevant data.

# Abstrakt

Cílem této práce je představit problematiku vysílání pracovníků v rámci EU v kontextu svobody poskytování služeb. Autorka se komplexně a chronologicky zabývá stávajícím právním rámcem, přičemž zohledňuje i motivy a politické tlaky v pozadí stěžejních změn. Pozornost je věnována především příslušným ustanovením Smluv, judikatuře a jejímu vývoji, stěžejním předpisům sekundárního práva a jejich vztahu k jiným aktům, které s tématem souvisejí. Autorka posuzuje klíčová ustanovení, jejich praktický dopad a nedostatky. Tématem se však zabývá i z pohledu *de lege ferenda*, a to představením probíhající revize a zvážením jiných případných změn.

Práce poukazuje na komplexnost a politickou citlivost problematiky, což je zapříčiněno střetem protichůdných zájmů jednotlivých členských států a jiných zúčastněných aktérů, a sice konfliktem mezi svobodou poskytování služeb a ochranou vysílaných pracovníků. Z tohoto důvodu nelze problematiku vysílání pracovníků zcela oddělit od politického dění a protichůdné zájmy je potřeba neustále vyvažovat. Vysílání pracovníků je jedním z aspektů vnitřního trhu, které poukazují na přetrvávající rozdíly mezi členskými státy a neochotu nalézt všestranně přijatelné řešení. Současně svědčí o tom, že přes snahu odstranit překážky na vnitřním trhu jisté bariéry nadále přetrvávají.

Přestože je primárním cílem této práce představit fenomén vysílání pracovníků z právního pohledu, pozornost je věnována i některým praktickým aspektům. Autorka se zaměřuje na nejčastější druhy obcházení pravidel v praxi a na některé praktické problémy. S pomocí statistik rovněž poukazuje na vzrůstající význam vysílání pracovníků v praxi.

Cílem práce je umožnit komplexní porozumění stávající právní úpravy, ale současně upozornit na některé praktické výzvy a zamyslet se nad možným vývojem v budoucnu.

# Key words / Klíčová slova

**Key words:**

European Union law

Internal market

Freedom to provide services

Posted workers

**Klíčová slova:**

Právo Evropské unie

Vnitřní trh

Svoboda poskytování služeb

Vysílání pracovníků