

Protection of Posted Workers in the European Union:

Findings and Policy Recommendations based on existing research

PROMO briefing paper

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1. Executive summary

Posting of workers has become a vehicle for labour mobility for millions of workers around the European Union (EU), and a standard way in which some sectors recruit labour. It is also a constant point of contention between those concerned about a race to the bottom on labour standards, and those who wish to promote unregulated labour markets. Some see it as just a trick to avoid national labour regulations, while others believe such views are disguised national protectionism. Our goal here is to sift through what is known about posting, and see what can be done to build a well-functioning system of labour protection, within the European framework of free movement. Without throwing away the benefits of an open European market in labour and service provision, how do we solve the serious worker protection problems which have emerged?

The PROMO project² is based around a series of policy workshops/conferences in 2017 and 2018, encouraging discussion and dissemination of good practices for protection of posted workers. From the perspective of promoting good EU and national posted worker policies, the project aims to make recommendations to improve:

- national labour protection systems;
- institutions, practices and channels for promoting industrial democracy;
- collection of data relevant to making informed posted worker policy decisions.

Our method is to take existing research knowledge, and improve on it through policy workshop discussions with experts and stakeholders. From these discussions, we will produce policy reports with well-grounded recommendations.

For this first PROMO briefing paper, we have conducted an extensive survey of the research literature in industrial relations, political science, economics, legal studies, and sociology dealing with the issues related to the posting of workers after the EU Eastern enlargement in 2004. This paper was first distributed to all of the participants of the first PROMO workshop in Helsinki 23-24 May 2017 who were given a possibility to comment on it. After the workshop the paper was modified according to the relevant feedback. This paper will first present possible policy and practices' recommendations for improving the rights of posted workers, following a more detailed overview of research literature in the field.

From the large body of literature we have identified six areas, in which there seems to be a consensus that policies and practices should be improved. These are:

- 1) Ensuring fair wage and other employment conditions for posted workers based on host country standards.
- 2) Ensuring that protections granted to posted workers in law are actually effectively accessible to the worker.
- 3) Building extensive cooperation between systems of worker protection, both between local/national actors and cross-border.

² PROMO is organised by a consortium led by the University of Jyväskylä, Finland and including University of Padova, Italy, Multicultural Center Prague, Czech Republic, Fafo Institute for Labour and Social Research, Norway, SOLIDAR, Belgium, and Forschungs- und Beratungsstelle Arbeitswelt FORBA, Austria. See more: <http://www.solidar.org/en/activities/protecting-mobility-through-improving-labour-rights-enforcement-in-europe-promo>

- 4) Instituting effective and dissuasive sanctions against companies who cheat workers of pay, or who otherwise commit serious labour rights violations, or who fail to pay social security contributions or taxes.
- 5) Ensuring that posted workers have an effective and accessible right to join, be represented by and participate in trade unions, and lodge complaints in host country courts.
- 6) Collecting and making available more extensive, systematic and reliable data about posting of workers.

1. *Ensuring fair wage and other employment conditions for posted workers based on host country standards*

Many studies have shown that rules and regulations applicable to posted workers have created regulatory caps and posting of workers can provide companies a competitive advantage through using regulatory arbitrage and/or regulatory evasion. To successfully fight unlawful posting practices, labour inspectorates and trade unions need more rights and resources. Especially after the *Laval* quarter judgments it has become clear that some national systems are better for protecting the rights of posted workers than others. For ensuring that posted workers are protected from extreme abuses, statutory minimum wages and/or generally applicable collective agreements play a key role in many contexts. The right to a collectively bargained wage should not depend on the host country having a system of legal extension of collective agreements. If it does, then Member States and trade unions should consider implementing legal extension systems. To guarantee wage-based non-discrimination of posted workers, statutory wages should cover different skill categories (and regions), so that posted workers would not only get minimum wages applicable. To close regulatory caps, countries should also extend posting regulations to all sectors.

2. *Ensuring that protections granted to posted workers in law are actually effectively accessible to the worker*

In each country, the rules and regulations which apply to posted workers are different from those in other countries, and also different from those which apply to non-posted workers. Lack of knowledge about these (by posted workers and/or service providers) can lead to non-compliance with posting regulations. Posted workers should also have a possibility to consult relevant authorities about their rights. Good practices that can enhance the compliance with posting regulations are information centres directed to migrant/posted workers (preferably providing information in multiple languages), administered either by trade unions, other civil society organisations or state institutions. Trade unions' actions (e.g. organising campaigns, distributions of information, mobilisation) towards posted workers also help to raise the workers' awareness of their rights and to gain knowledge about local practices.

State-administered web-pages and European-wide information sites have been put forth as a solution to the problem of lack of knowledge about relevant labour standards. So far, there is little evidence that these are effective. However, in the wake of the Enforcement Directive sites like the ECMIN 2.0 for the construction sector, administered by European Federation of Building and Woodworkers³ and EURODETACHMENT resource centre⁴, which are greatly improved over past efforts and offer relevant and constantly updated information in different languages, could make internet channels an important source of information for workers and employers (but also for other rights enforcing actors). It is also crucial that posted workers would be aware of places they could find information.

³ <https://www.constructionworkers.eu/en>

⁴ <http://www.eurodetachment-travail.eu/default.asp>

3. *Extending cooperation between systems of worker protection, both between local/national actors and cross-border*

Posting of workers is a complex phenomenon. Ensuring that the rights of posted workers are protected in practical situations requires comprehensive cooperation – like joint visits to work sites of posted workers, enhanced information exchange – of different national actors (depending on national system these can be inspectorates, other state bodies, and social partners). National actors also need more resources (such as training and finances) to deal with the complex phenomenon of posting. Moreover, posting of workers falls under both sending and receiving country regulations, but enforcers of the rights of posted workers (e.g. trade unions, labour inspectorates) are constrained by their national jurisdictions. In order to more effectively monitor and enforce the rights of posted workers, more extensive cross-border cooperation – requiring additional resources – is crucial.

4. *Applying effective and dissuasive sanctions against companies who cheat workers of pay, or who otherwise commit serious labour rights violations, or who fail to pay social security contributions or taxes*

There is an epidemic of wage theft in the European Union, centred around worker posting. Many studies have shown that there are companies that violate posting rules and regulations in numerous ways. At the same time, labour inspectors lack the resources to control and combat the fraud effectively and transnational enforcement of fines is a long and complicated process, indicating that more resources, knowledge and transnational cooperation are necessary.

The basic problem is twofold 1) enforcement is too weak, so the prospect of getting caught is small and 2) penalties are not punitive, so that getting caught leads only to a small fine, and paying the legally required wages and fees. For firms the clear rational choice is to try to get away with wage theft, and if caught simply pay what is required. Higher fines might help to force firms to comply with applicable regulations. Stricter liability schemes (like the German chain liability system) and ‘soft measures’ (like making service recipient co-responsible for the violation of subcontractors through collective agreements) might help more effectively ensure the compliance of foreign service providers with applicable rules and regulations and ensure that posted workers will receive their earned wages. Rules on corporate registration should be changed to discourage letterbox companies.

5. *Ensuring that posted workers have an effective and accessible right to join, be represented by and participate in trade unions (or works councils, where applicable), and lodge complaints in host country courts*

Posted workers generally do not join host country trade unions, and are often unwilling to share information about their wages and conditions (or even talk with anyone they think might be from the union). One reason seems to be because they are afraid, with good reason, that if employer finds out, they will get fired. In practice, there seem to be no repercussions to employers for dismissing posted workers for union activities or union membership. As a result, posted work is usually non-union work, and posted workers are effectively excluded from this well-established fundamental right of collective representation. Posted workers need better protection from unfair dismissal for union activities, and for registering complaints with authorities. Their well-justified fear of dismissal underlies many of the other problems with posted work regulation. They should also have practical access to host country’s juridical system. The time needed for labour courts to handle posted worker cases should be shortened, and

possibilities for access improved – including making them more affordable and available to workers who have to leave the country before a decision is made.

The well-known *Laval* case even calls into question the right of posted workers to bargain collectively, in absence of extended generally applicable collective agreements or minimum wages. Works council-based worker representation systems, such as exist in Germany, are problematic for posted workers, as the firm-centred nature of representation usually prevents them from having elected shop-floor representatives of their own, because they work in foreign subcontractors. Representation by main contractor's works councillors is often unavailable or problematic for them: shop steward based systems are less problematic in this respect. Works councillors should have legal rights to represent workers on the same sites at subcontractors, and they should be encouraged to do so when appropriate.

6. *Collecting and making available more extensive, systematic and reliable data about posting of workers*

Accurate data is crucial for answering urgent questions about posting, in order to design good policies and effectively find posted workers and enforce their rights. Such data is scarce, mostly because appropriate systems have not been set up to collect it, but also because collecting the data is seen as a possible infringement on the free movement rights of firms. Although numerous qualitative studies about posting of workers have been conducted, the nature and volume of these is different between countries and sectors (e.g. construction sector is rather well studied; very few studies cover Eastern Europe as a receiving region). Case studies and other qualitative data collection suggest that posting of workers is most commonly used by firms seeking to avoid labour regulations, but there is almost certainly a bias toward studying the more problematic cases: there is a large amount of legitimate worker posting also occurring. We do not know how much of this occurs, or why, however, because we do not have the data.

Quantitative studies are either based on national data, or have to cope with the inadequacies of using A1 Portable documents as a data source. Currently, the only comparative quantitative data source is based on the Portable Documents A1 that posted workers are required to obtain from their sending countries if they pay social contributions in another member state than the one they are posted to. This data source, however, provides only an indicative picture of the actual number of postings. The lack of adequate data hampers the possibility to get a proper picture of the phenomenon, and the possible economic and social benefits of this form of mobility which should be weighed against the regulatory challenges.

Some countries have established mandatory registration systems for foreign service providers / posted workers, but these are not available everywhere, nor are they comparable across sectors and countries. We suggest that there is a need for improving the reliability and compatibility of administrative data collection across the EU, and also increasing the amount of information collected. Stricter registration rules (like notifications before service provisions, penalties for not following the rules, making service recipients co-responsible for registration) for service providers using posted workers could enhance the quality of information about postings and monitoring and enforcing the rights of posted workers.

2. Introduction

Posting is a situation when a worker is sent abroad by his or her employer to work for a limited time, as part of an ongoing work relationship in the home country. This is in contrast to an intra-EU free movement of workers, where a worker moves abroad to search for or take up a job, but not as part of an ongoing work relationship. Legally, posting is based on the freedom of movement for services and establishment - i.e. on the right of the firms to move their employees between EU member states. Individual movement of workers, on the other hand, is based on the right of free movement of labour. This seemingly unimportant difference actually has important implications for the *labour rights* to which the worker in question has access - for posted workers, their rights derive in the first instance from *sending* country (usually, but not always, their home country); for individual free movers, their rights derive from the country in which the work is performed (Dølvik & Visser 2009). This means that posted workers are in a partial *state of exception* to the principles of territorial sovereignty, which have in the past governed labour regulations, through which worker safety, union representation, and social welfare have all been ensured (Lillie 2010).

This situation of posted workers combines with the usual challenges that migrant workers have in protecting their labour rights and makes posted worker protection particularly challenging for unions and labour inspectorates. There is now widespread recognition among unions, researchers, and labour

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inspectors that systems of worker protection for posted workers in the European Union have serious inadequacies. Problems include an epidemic of wage theft, the growth of a grey economy of labour intermediaries, violations of trade union rights, and social security fraud. Intra-EU labour mobility

brings job opportunities to millions, but taking advantage of these opportunities can be a risky business for workers.

The freedom of service provision, in addition to free movement of goods, people and capital are the four pillars of the single European market project. As argued by Mussche et al. (2016) shorter-term service mobility significantly contributes to creating the single market and it provides also advantages to mobile workers: to a certain extent they can circumvent linguistic, cultural, institutional and other problems that individual migrants might encounter. However, especially after the enlargement of the EU in 2004/07 posting of workers in the framework of free movement of services has become a controversial topic and has received considerable academic and political attention. Dølvik and Visser (2009) emphasise that European Union is facing a trilemma concerning its fundamental principles. The posting of workers brings about a conflict between the free movement of services and labour on the one hand, and basic social rights, in the form of non-discrimination and equal treatment of workers and the right of association and industrial action, on the other. The *Laval* quartet decisions by the Court of Justice of the European Union (see section 3.2) assert a supremacy of treaty-based free movement rights over trade union rights (ibid.).

Not all worker postings are problematic. While posting as a political and labour rights problem has mostly been framed in terms of posting for labour cost advantage, which pits East vs. West (and to a lesser extent, South vs. North), this is only one aspect of the issue. Firstly, posting is not a new phenomenon and workers are posted both between 'old' EU-15 and between EU-28 countries (Mussche et al. 2016). Secondly, a study conducted in 2010 across 12 countries showed that there are many kinds of posting arrangements with different motivations. These vary from so-called normal posting (i.e. the original

concept of posting), in which contactors provide temporary services – generally well-paid skilled workers who belong to the posting companies' core workforce – in another European country, motivated by labour shortages or a search for know-how. On the other end of the spectrum, there are various fake posting arrangements, including recruiting workers who already reside in the host country as posted workers and turning *de facto* posted workers into bogusly self-employed or deducting different costs from posted workers' pay. In between these extremes are companies who use posting as a way to avoid certain employment regulations in the host country, and who may sometimes violate labour regulations, but who basically offer real jobs for real pay (Cremers 2011a; 2011b; 2013).

3. European regulations on posting of workers

Transnational employment in the European Union is regulated by the private international law, laid down in the Rome I Regulation, and internal market rules, specified by the Posted Workers Directive (van Hoek 2014). Before the enactment of the Posted Workers Directive (PWD)⁵ posted workers were subject to the laws of their home country, even when they were temporary working in another EU/EEA country. For the development and longer description of the regulations concerning posting of workers, see Evju and Novitz (2014).

3.1. Posting of Workers Directive (PWD)

The directive 96/71/EC, i.e. the Posting of Workers Directive of 1996 sets the legal framework for cross-border labour mobility in the form of posting of workers. It establishes that in certain aspects posted workers are entitled to the statutory minimum conditions – stipulated by law, regulation, administrative provision and/or by generally applicable collective agreements – during the period they are posted to another member state, either home or host country ones, whichever is more favourable, irrespective of the law that applies to the employment contract (Cremers et al. 2007). PWD (Article 3(1)) regulates the terms and conditions guaranteed to the posted workers in the following categories:

1. Maximum work periods and minimum rest periods;
2. Minimum paid annual holidays;
3. The minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
4. The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
5. Health, safety and hygiene at work;
6. 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; and
7. Equality of treatment between men and women and other provisions on non-discrimination.

The PWD, however, is implemented differently in the respective EU member states: in some it covers the whole economy, while in others it only covers certain sectors. In addition, the PWD does not give a clear definitions to concepts like ‘posted worker’, ‘posting’ and the directive does not set the maximum duration for the posting. The directive (Article 2(1)) defines 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.’ This creates legal uncertainty, leaves room for manoeuvring for companies and makes it difficult for state authorities and social partners to check the genuine nature of posting (van Hoek & Houwerzijl 2012).

A hotly debated issue has been the floor or ceiling character of the PWD: can social partners negotiate and establish higher rates of pay and better employment conditions for posted workers (as they do for local workers) or should posted workers be entitled to only the minimum host country provisions stipulated in the PWD. Following the adoption of the directive the widely held view was that it was a ‘minimum directive’, and countries were able to impose also other terms and conditions than the ones listed in the directive and set higher standards for posted workers than the mandatory minimum indicated in the Article 3 (1) (Evju & Novitz 2014: 60). After the so-called *Laval* quartet it became clear that according to the European Court of Justice (ECJ, since 2009 renamed the Court of Justice of the European Union, CJEU) the list of employment conditions stated in the PWD should be considered as a maximum

⁵ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0071>

applicable for posted workers and the full range of employment benefits applicable to local workers, including individual migrants, cannot be mandated for posted workers (Lillie 2012). Related to that, one of the most problematic aspects in implementing the PWD has been securing host country minimum wages for posted workers. In the absence of statutory minimum wage or wages stipulated by the generally applicable collective agreements posted workers stay uncovered by the host country wage system. If trade unions try to secure better conditions for posted workers than the minimum ones stated in the law or generally applicable collective agreements, this might be considered as a restriction to the free movement of services.

Currently the PWD is under revision and the new draft aims to provide stricter rules for posting and to make remuneration of posted workers more equal with local workers. The difficulty of implementing it relates to the fact that EU consists of 28 different labour law, tax regime and social security systems and their interaction creates loopholes. The second problem relates to different conflicting views on the necessity of the revision (Pancaldi, PROMO presentation 2017). While the proponents of the stricter regulations (mostly receiving countries, trade unions) argue that it would help to create a level playing field, take wages out of competition and help to combat social dumping, the opponents (mostly sending countries, some employers' representatives) highlight that equal remuneration might render posting economically unviable, the Enforcement Directive should be first assessed (before making new changes) and the revision coincides with other measures limiting access to EU Internal Market (Bernaciak, PROMO presentation 2017).

3.2. The Laval quartet

In 2004 Latvian company Laval un Partneri Ltd (Laval⁶) posted workers from Latvia to work in a Swedish construction sites. Local Swedish Building Workers' Union started collective agreement negotiations with the company with the aim of extending sectoral level collective agreement also to the posted workers, but Laval instead signed an agreement with a Latvian union. As a reaction, Swedish Building Workers' Union started a blockade at Laval building sites and Swedish Electricians' Trade Union took secondary industrial action (both were lawful under Swedish law). Laval filed a lawsuit to the Swedish Labour Court with an aim to declare the industrial action unlawful. The Swedish Labour Court, however, denied the request and in 2005 sent the case to the CJEU. The CJEU's decision in 2007 declared that the industrial action by the Swedish unions was in breach of the freedom to provide services under Article 49 EC and with the hard nucleus defined in Article 3(1) of the PWD. The court deemed unions' right to use industrial action in order to make a foreign company sign a collective agreement as discriminatory (see also Ahlberg et al. 2006; Davies 2008; Dølvik & Visser 2009; Eklund 2006; Joerges & Rödl 2009; Rönmar 2010; Woolfson et al. 2010; 2014). Taking CJEU decision into account, the Swedish Labour Court returned to the *Laval* case and declared the industrial action illegal and the unions had to pay damages (Woolfson et al. 2010: 345). Later on both Sweden and Denmark (who have similar bargaining systems) amended their posting of workers acts and made unions' right to take action against foreign employers more restrictive (Malmberg 2010: 8-9, see also section 5).

Another case concerning the right to strike refers to the Finnish firm Viking⁷ who owned a ferry that operated between Helsinki and Tallinn. Initially the ferry sailed under Finnish flag and had mainly Finnish crew. When the company wanted to register the ferry in Estonia and replace Finnish crew with an Estonian one (and opt out from the more expensive and restrictive Finnish industrial relations system), the International Transport Workers Federation (ITF, with headquarters in London) and ITF's affiliate, the

⁶ Case C-341/05, Laval un Partneri Ltd, ECR 2007, I-11767.

⁷ Case C-438/05 Viking, ECR 2007, I-10779.

Finnish Seamen's Union (FSU), planned an industrial action against the re-flagging of the ferry and ITF advised its Estonian member union (Estonian seamen's) not to enter into collective agreement negotiations with Viking. Under the ITF's 'Athens Agreement' between the seafaring union members of the ITF, (of which the Estonian Seaman's Independent Union is one) collective bargaining jurisdiction over a ship, regardless of flag, falls to the union from the country from which that ship is beneficially owned. Viking applied to the English Commercial Court, which was possible because the ITF is based in London, and obtained an injunction restraining the unions' from industrial action, because the court found that the unions were in breach of Viking's right to freedom of establishment. The unions appealed to the Court of Appeal in the UK, which referred the case's decisive questions to the CJEU (see Davies 2008; Donaghey & Teague 2006; Joerges & Rödl 2009).

The CJEU rulings established that trade unions' industrial action could be restricted because it constrained firms' enjoyment the EU's 'four freedoms'. In the *Viking* case, the freedom in question was the freedom of establishment, as the unions' demand to force Viking to abide by Finnish collective

The ECJ's Laval quartet decisions constrain the ways in which EU governments and unions can protect posted workers. Some see the decisions as putting firms' free movement rights above workers' rights.

agreements made reflagging pointless, as the point of it was to gain a cost advantage by employing Estonian workers. However, CJEU also stated that the policy to combat the use of flags of convenience could be – under certain circumstances – be interpreted as legitimate restriction to the right of freedom of

establishment. In order to be interpreted as legitimate, the national courts had to decide that the industrial action was proportionate to protect workers' employment conditions, jobs and/or be in the public interest (Lindstrom 2010: 1321). In 2008 CJEU decided on two more cases – *Rüffert*⁸ and *Commission v Luxembourg*⁹ – on the applicability of host country labour law to posted workers. *Rüffert* constrained the ability of governments to mandate labour and social conditions of workers at government contractors: as with *Laval*, the wages established could only be those in accordance with procedures provided in the PWD. These judgements also reinforced the norm that posted workers are only subject to a nucleus of mandatory rules of the minimum protection set in the PWD, but not to the whole regulation applicable to local workers, including terms and conditions set by the non-universally applicable collective agreements (Barnard 2009b; Blauburger 2014; Malmberg 2010).

Based on the *Laval* quartet it can be concluded that in the cross-border situations (such as *Laval* and *Viking* cases) collective action might be considered as a restriction to the freedom of services and establishment. The Court has recognised that there exists a right to take collective action in EU law, but considered that this right must be balanced against the free movement rights of firms. The *Viking* and *Laval* judgments assert that the right to collective action is not uniform, but depends on the type and aim of the action. Unions have the right to use collective action if it is 'proportionate' and aims to enforce minimum standards in accordance to the PWD (Davies 2008). Dorssemont (2011) argues that *Viking* and *Laval* judgments highlighted several clashes within the EU: firstly, a constitutional one between the

⁸ Case C-346/06 *Rüffert*, ECR 2008, I-1989.

⁹ Case C-319/06, *Commission v. Luxembourg*, ECR 2008, I-4323.

domestic orders (of Sweden and Finland) and the legal order of the European Union (so-called fundamental economic freedoms), and secondly, the legal order of the EU on the one hand and the Council of Europe and the ILO (fundamental rights) on the other hand.

The *Laval* quartet also established that PWD should be considered as a maximum/ceiling, not as a minimum directive. In CJEU's interpretation the Directive almost exhaustively describes the competences of EU countries in

relation to posted workers, only exception can be in the case of public policy provisions, as stated in the Article 3(10) (Dølvik & Visser 2009; Malmberg 2010), although in the case *Commission v. Luxembourg* CJEU set very high threshold in order to be considered as such provisions (Barnard 2009b; Kilpatrick 2009c). CJEU's recent decision on the case *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* (C-396/13) about a Polish posted workers in Finland confirms that host country trade unions are able to claim for the local pay rates that depend on the skill level, and also holiday and overtime payments for posted workers, if these rates are established by a legally extended collective agreements (Cremers 2016; Lillie & Wagner 2015). Thus, according to the ruling all relevant elements of remuneration in Finland are applicable to posted workers (Hellsten, PROMO presentation 2017).

The Laval quartet decisions (2007-08) took the Posted Workers' Directive, which many had considered a 'minimum directive' or a floor for posted workers' rights, and turned it into a maximum/ceiling for posted worker rights. The Sähköliitto decision (2016), however, confirms that unions still have some options to set higher standards.

3.3. The Enforcement Directive

The long debated Enforcement Directive (Directive 2014/67/EU¹⁰, to be transposed by June 2016) aims to improve the implementation and enforcement of PWD in practice by setting a framework of measures and control mechanism. It provides a non-exhaustive list of factual elements that should make it easier to determine the genuine establishment of the posting company and to evaluate if the worker is only temporarily working in another member state (Article 4). It establishes framework for improving access to information relevant for posting (Article 5) and for enhancing cooperation between countries (Articles 6 and 7). Furthermore, it gives a list of justified and proportionate administrative requirements and control measures that might be applied by the member states (Article 9) and establishes that member states

The Enforcement Directive is intended to improve enforcement of posted worker labour rights, but critics believe there are still loopholes.

have to ensure effective mechanisms for posted workers to lodge complaints and institute juridical or administrative proceedings (also through trade unions) against their employers also in the member state where they are posted (Article 11) and the possibility to apply

subcontracting liability arrangements, although making compulsory only the application of joint and several liability in the construction sector (Article 12). The effectiveness of these measures, of course, depends on how they are interpreted and implemented in a concrete national context both legally and in

¹⁰ <http://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX%3A32014L0067>

practice (Houwerzijl, PROMO presentation 2017). See also Cremers (2016: 160-1) for the possible shortcomings of the Enforcement Directive in guaranteeing the rights of posted workers and the enforcement of the PWD.

4. The number and impact of posting of workers

Key to assessing the impact of posting and designing effective regulatory policies around it would be reliable posting statistics. We, however, lack accurate numerical information about posting, such as how many workers are posted, what industries are they posted in, what are their wages, and what the characteristics of the posted workers are.

As a result, most studies about posting of workers are qualitative. This is also related to the focus of the studies (e.g., studies exploring posted workers' working lives in depth require a qualitative approach), and to the aspect that posted workers are hard to reach via quantitative methods. The main (and only comparable European wide) quantitative data source about posting of workers are Portable Documents A1 (PD A1) that posted workers are required to obtain if they pay social contributions in another member state than the one they are posted to. This data source, however, provides only an indicative picture of the actual number of postings (Pacolet & De Wispelaere 2016) and researchers, enforcement agencies and trade unions have generally acknowledged that the lack of adequate data hampers the possibility to get a proper picture of the phenomenon (e.g. Dølvik & Visser 2009; Friberg et al. 2014; Thörnqvist & Woolfson 2012; Houwerzijl & van Hoek 2011).

Out of the 2.05 million PDs A1 issued in 2015, 1.49 million were postings, i.e. issued to posted employed persons and posted self-employed persons¹¹ (Pacolet & De Wispelaere 2016: 14). The main sending member states of posted workers were Poland (251,107 PDs A1/postings; 16,8% of total postings), Germany (218,006 PDs A1/postings; 14,6%), France (130,468 PDs A1/postings; 8,7%) and Slovenia (126,153 PDs A1/postings; 8,4%) (ibid.: 18; 44). Main receiving countries of posted workers in 2015 were Germany (418,908 PDs A1/postings), France (177,674 PDs A1/postings), Belgium (156,556 PDs A1/postings) and Austria (108,627 PDs A1/postings) and the largest flows were from Poland to Germany (130,893 PDs A1/postings) and from Slovenia to Germany (60,976 PDs A1/postings) (ibid.: 18). Between 2010 and 2015 the number of postings has increased by 41,3% (ibid.: 22). Most PDs A1 were issued to posted workers employed in the construction sector (41,5%), followed by service sector (32,7%) and other industrial activities (25,4%) (ibid.: 25).

Some member states (e.g. Austria, Belgium, Denmark, Finland, France, Luxembourg, the Netherlands) have also established national registration requirements for posted workers that provide an additional data on postings, although these databases have mostly not been utilised in research (notable exception being the Belgian LIMOSA register, see De Wispelaere & Pacolet 2017; Mussche et al. 2016). As systems for collecting data differ between countries, it is not possible (or at least not easy) to compare the data across countries. Based on the LIMOSA database, De Wispelaere & Pacolet (2017: 8-9) show that in 2015, the main transnational service provision countries in Belgium were the Netherlands (26,5%) and Poland (13,6%). While posted workers working for service providers from Poland, Portugal, Romania,

¹¹ The number of A1 forms includes both posted employees as well as self-employed posted workers. However, the self-employed do not fall under the PWD.

Slovakia and Slovenia are mainly employed in the Belgian construction sector, workers working for service providers based on France and Germany are mainly posted to sectors other than the construction. In addition, significant amounts of posted workers in the construction sector are self-employed (e.g. 40% of Polish construction workers) and Belgian wages and working conditions are not applicable to this group of workers.

The Belgian LIMOSA database has the most potential as a model for collecting useful data for policy and research; the data it can collect, however, has been restricted as it was deemed a burden on employers.

The LIMOSA database includes also information about service providers outside EU/EEA and the nationality and place of residence of the posted workers. Posting of workers has become even more popular after Belgium lifted the restrictions to free movement of workers for the new member states. Posting is also used as a way to employ third country nationals, avoiding the need for a work permit in the host country. Instead, the workers have a work permit for the country they are posted from. In Belgium, the largest share of posted third country nationals (TCNs) in 2012 was Turkish, followed by Brazilians and Moroccans (Mussche et al. 2016: 13). Cases of TCNs being posted via an EU country to another EU country seem to be growing phenomena, and reports indicate these arrangements are often problematic from a labour rights perspective (Elonen, PROMO presentation 2017).

Pacolet & De Wispelaere (2016: 29-31) have estimated the impact of posted workers on national labour markets based on PDs A1 (although data has limitations). They estimate that in 2015 0,4% of employment (or 0,24% as a full-time equivalent) in the EU could be related to the employment of posted workers. Especially affected as sending countries are Luxemburg, Slovenia, Croatia, Hungary and Estonia who post a considerable share of their workers. As receiving countries, most affected are Luxemburg, Belgium and Austria (especially in the construction sector). The construction sector in Switzerland, Germany, Sweden, the Netherlands and Finland also uses a high share of posted workers.

Dalla Pellegrina & Saraceno (2016), using E101 certificates (in 2010 replaced by PDs A1) have also investigated the effect that posting of workers has had on different variables – on domestic employment (measured by the share of employed individuals on total labour force); on hourly labour costs in industry and services; and on labour productivity – of sending and receiving countries' labour markets during the period 2007-2009. Acknowledging the data limitations, they conclude that in an aggregate level (data from 27 EU countries) no significant effects are found on the sending country labour market variables. As regards receiving country labour market variables, they find that there is a non-significant relationship between postings and receiving country employment rate (indicating that posted workers might not be replacing local workers) and the inflow of posted workers actually increases labour costs and leads to higher labour productivity (Dalla Pellegrina & Saraceno 2016). Although the database used has limitations, this study indicates that posting of workers can in general have positive effects for the labour markets of receiving countries.

However, as evidenced by studies discussed in the following, the effects can be different for different sectors, countries and groups of workers, and there are also fraudulent posting practices that official data might not cover. Based on the LIMOSA database, De Wispelaere & Pacolet (2017: 12) estimate that posting in the Belgian construction sector has to a certain extent resulted in displacement of local labour,

especially in the 'Construction of buildings, development of building projects' and 'Plastering' sub-sectors. Arnholtz and Hansen (2013) also point out that if migrant/posted workers are segmented into specific sectors and jobs, then they might be experiencing rather poor working conditions, without these having a significant impact on the overall labour market situation or the working conditions of natives (Arnholtz & Hansen 2013). All in all, although intra-EU posting numbers are relatively small, the impact of posting is important for the EU political economy (Bernaciak, PROMO presentation 2017).

5. The impact of European regulations of posting on different national systems and national responses to EU regulations

The EU's regulatory framework for posted work is similar in each country, but the impact is different from one country and one industry to another. This is because the EU's harmonized framework interacts with national industrial relations systems which are not at all harmonized. From the perspective of worker protection, very different outcomes can result. In particular, the legal details of wage and other employment conditions' setting systems can leave posted workers fairly well protected, or with few legal rights and very little recourse in a given situation. Rules and regulations applying to the posting of workers are shaped by a complex interplay of EU, home and host country, but also industry-specific regulatory environments (Lillie & Wagner 2015) and the European Court of Justice's decisions have brought about legal ambiguity that enables to a certain degree divergent national responses to the case law (Blauberger 2014). This section gives an overview of the impact of EU's regulatory framework for posted work on different national contexts and examines the national/social partner responses to the changing regulatory framework. Most research has focused on the impact of posting regulations on EU-15 (especially the Nordic countries, Germany, and the Netherlands) as the main host countries for posted workers from CEE and not much has been written about the impact of posting regulations on Central and Eastern Europe.

Bosch and Weinkopf (2013) have analysed the impact of European regulations of posting on national wage systems. The main question is whether foreign service providers are able to provide cheaper

The most extensive wage regulation systems for posted work are in countries where generally binding industry-specific collective agreements that cover most of the economy exist, as in those systems foreign providers must follow the (minimum) provisions stipulated in the agreements.

services (by paying lower wages) than the local ones. They conclude that especially vulnerable have been the voluntarist wage setting systems, but they also add that no wage setting system is totally resistant to the transnational posting arrangements and EU's regulations that accompany these. The most successful are countries where generally binding industry-specific collective agreements that

cover most of the economy exist, as in those systems foreign service providers also have to follow the (minimum) provisions stipulated in the agreements. These countries include Belgium, France and the Netherlands where there exist both national minimum wage and also collectively agreed minimum wages for different sectors.

The situation is more difficult for systems with weaker trade unions and for countries where extension of collective agreements is not a common practice. In the United Kingdom (UK) (and most CEE countries), where trade unions are usually not able to secure sectoral collective agreements, posted workers are protected only by the existing (low) statutory minimum wage, that might protect them from extreme violations, but that keeps their wages considerable lower than the sectoral average. The situation has also been difficult for the voluntarist wage systems of Scandinavian countries where statutory minimum wages or generally applicable collective agreements do not exist (Bosch & Weinkopf 2013).

Countries like **France, the Netherlands and Belgium**, where posted workers are covered by the national minimum wage and in most sectors also by the generally applicable collective agreements, can be considered rather successful in countering foreign wage-based competition (Bosch & Weinkopf 2013).

However, Houwerzijl (2010) argues that the Dutch adoption of the PWD was initially too minimalistic as regards ensuring its effectiveness and scope. Initially, it covered only the construction sector, but in 2005 the extension of hard core provisions in collective agreements were extended to posted workers in all industries. Since then, the government and social partner organisations have also started more actively monitoring and enforcing the rules for posted workers. Belgium and France have adopted rather stringent posting regimes (following the principle of 'equal pay and other conditions for equal work'), adjusting them as little as possible after the restrictive CJEU decisions (Dølvik, Eldring & Visser 2014).

Enforcement problems and malpractices, however, have still been reported even in systems that in theory should be rather effective in securing the basic rights of posted workers (see e.g. Berntsen 2015a; Dølvik, Eldring & Visser 2014, section 6). In Belgium, in order to enhance the controllability of legal provision of services, since 2007 all foreign undertakings have to notify about their activities and about using posted workers through the LIMOSA system (Cremers et al. 2007). All people who want to perform a temporary economic activity have to register online before they start the activity. This kind of extensive information collection about posted workers is rather unique and provides probably the most accurate data source about postings. Belgium also had to reduce the amount of information they collected initially because according to the CJEU they restricted the free movement of services (Mussche et al. 2016).

In **Austria** the dominant way to regulate employment relations is through generally applicable collective agreements that cover a great part of the economy, and thus most posted workers are covered as well. Posted employees are entitled to at least the amount of remuneration ('*Mindestentgelt*') (including overtime, special payments, other allowances) that is set by legally binding collective agreements as well as in some industries by ordinance or statute. Additional provisions apply for posted construction workers.¹² However, enforcing the compliance with the agreements has deemed to be problematic in companies where labour representation channels do not exist, as is generally the case with foreign service providers. Both unions and the main employers' association, the Economic Chamber of Austria, were concerned about the social dumping by foreign service providers and they agreed on the measures to improve the enforcement possibilities, like more inspections on worksites, a duty to present pay documents in German, and fines for firms who underpay their workforce. These measures were enacted by the government in 2011 as an Act against Wage and Social Dumping. The Act has been amended in 2015 and 2017, clarifying 'minimum remuneration', competencies of different national authorities, the explicit inclusion of cross-border transport services into the reach of posting regulations as well as foreseeing higher fines in case of wage and social dumping (Krings 2016; Gagawczuk 2016). In addition, a web-based information platform has been launched providing information in seven languages (German, English, Slovakian, Polish, Hungarian, Slovenian, and Czech) about rights and duties of posted workers and posting companies.¹³

The **Swiss** labour market also became re-regulated after the labour market openings to the labour migration/service mobility from the EU in 2000 and 2005. As there is no statutory minimum wage and state's intervention in the regulation of employment conditions has been rather limited, generally binding sectoral level collective agreements are the main way posted workers' labour conditions are regulated. The number of collective agreements extended through *erga omnes* principle has increased considerably, and the number of workers covered by these agreements has increased as well (Afonso 2016). Posting of workers is subject to compulsory notification and companies that post workers have to prove that they meet Swiss minimum applicable employment conditions (Afonso 2012: 722-3). There are still

¹² http://www.entsendeplattform.at/cms/Z04/Z04_10.2/minimum-wage

¹³ <http://www.entsendeplattform.at/>

considerable problems with enforcing the established minimum standards for posted workers (Afonso 2016).

Germany has implemented only minimum protection for the posted workers and German Posting Law does not apply to all industries, but only to those sectors listed in it. In unlisted sectors home country employment conditions, including pay, apply (Lillie & Wagner 2015). As no statutory minimum wage existed in Germany until 2015 the employment conditions of posted workers in sectors not listed in the PWD and without generally binding collective agreements have been very precarious. Foreign companies have often provided very poor working conditions, triggering a downward spiral. The situation of posted construction workers has been better than the situation of posted workers in most other sectors, as the construction sector was the first to introduce an industry-specific minimum wage, applicable to all posted workers. On the other hand, the industry minimum wage has been low by German standards - lower than the collective agreement rates applied by those employers belonging to the employers' associations (Bosch & Weinkopf 2013; Wagner & Lillie 2014). There are also problems with collective representation of posted workers (Wagner & Lillie 2014; see also section 6.3).

The situation in the German meat industry has been even worse for the posted workers, as there has been no government or social partner intervention to regulate the industry until recently. This has created a secondary labour market in the industry, dominated by the foreign (posted) workers with meagre employment conditions and no collective representation (Wagner & Hassel 2016; Wagner & Refslund 2016). Until mid-2014 German meat sector was not included in the German Posting Law. As a consequence posted work became widely used and workers from low-wage countries, especially Bulgaria and Romania, earned extremely low wages and worked in meagre conditions according to German standards. Currently both statutory minimum wage and sectoral minimum wage apply to all workers in the sector, making their employment considerably less precarious (Lillie & Wagner 2015). Furthermore, in 2015 six largest meat producing companies agreed to sign a voluntary commitment to improve employment conditions and practices in the sector (motivated by the bad media coverage, public outrage and political pressure), including abandoning the use of posted workers. According to the companies, previously posted workers are currently employed by companies registered in Germany. Although these workers have now better access to the German social security system, there has been little increase in the number of workers on permanent contracts, and there are still frequent reports of poor wages, and long working hours (Wagner 2017).

The implementation of the national minimum wage, together with changes in the German Posting Law – lobbied by the unions – were to a great extent related to the impact that posting has had to the German labour market, including social dumping and further dualisation of the labour market (Krings 2016). The *Rüffert* decision in the CJEU concerning the Public Procurement Act of the German Land Lower Saxony also triggered a legislative reform throughout Germany: 13 out of 16 Land revised their public procurement legislation to make rules about social clauses in public contracts EU-compatible (Blauberger 2014). Most notably, the requirements of collective agreement declarations were limited to minimum wages set in the generally applicable collective agreements and minimum wages for public procurement have been introduced (Blauberger 2012).

The **United Kingdom** (UK) did not pass a specific legislation to implement the PWD. Instead, the logic was that all labour laws would apply to all workers falling within UK's territorial scope, including posted workers. However, this approach's effectiveness in regulating posted worker conditions is challenged by the *Laval* quartet decisions, according to which posted workers are entitled to only those regulations that fall under the areas listed in the PWD Article 3(1) (Barnard 2009b). Although in the UK collective agreements do not exist in most sectors, in the construction sector there are industry-wide agreements.

They are, however, not generally applicable and it is hard to enforce the conditions established by these agreements on posted workers, as posting companies are generally not the members of local employers' associations. Thus, posted workers in the UK are mostly only covered by the national minimum wage which is considerably lower than wages established by the collective agreements (Bosch & Weinkopf 2013; Fitzgerald 2010).

The consequences of the impact of posting of workers on the poorly regulated labour market of UK are illustrated by the Lindsey Oil Refinery (Total) dispute of 2009 and Alstom dispute of 2008. The disputes involved unauthorised 'wildcat' strikes by rank and file workers during a time of high unemployment in the British construction industry. Two issues framed the disputes: posted workers were paid less than what was stipulated in the applicable UK collective agreements and because of that local workers were not being hired. Local workers demanded that they should be used instead of a cheaper foreign labour (Barnard 2009a; Gall 2012; Kilpatrick 2009a; Kilpatrick 2009c). After the disputes an industry-wide agreement (the National Agreement for the Engineering Construction Industry, NAECI) in the engineering industry was amended to better deal with the issue of non-UK contractors, although UK labour law does not have provisions to make agreements generally binding. According to the agreement the managing/major contractor is obliged to ensure the compliance of non-UK contractors with the terms set in NAECI, including the implementation of workers' rights set by the agreement and equal hiring opportunities for local workers (Houwerzijl & van Hoek 2011).

Ireland has many similarities with the UK. Similarly to the UK, the Irish labour market is rather loosely regulated. The PWD was transposed into national legislation by the Protection of Employees Act 2001 and it simply extended the Irish employment legislation also to posted workers (Cremers 2011a: 81). All posted workers are covered by the low statutory minimum wage. Collective bargaining is decentralised, although in the construction sector binding collective agreements exists that set wages higher than the minimum one. Social partners have also agreed on some measures to combat social dumping related to posting of workers, like the creation of a government agency dealing with compliance with labour law (Afonso 2012: 718-20).

Italy's approach towards implementing the PWD was also put under question after the *Laval* quartet decisions, as Italy considered that the entire corpus of labour law should be regarded as public policy provisions, and thus also applicable to the posted workers (Pallini 2006). Italy does not have a statutory minimum wage and wages are regulated mostly via collective agreements. Collective agreements in Italy are not formally extended, although clauses concerning minimum wages in sectoral collective agreements have in practice *erga omnes* effect 'as courts take these provisions as a basis for calculating the constitutionally guaranteed "decent wage"' (Houwerzijl & van Hoek 2011: 23). In construction sector the obligation for foreign service providers to respect the collective agreement can be a consequence of the national collective agreement for the construction sector (CCNL), as the contractor is expected to impose on their subcontractors the terms stated in the agreement (ibid.: 26).

In the Italian transposition of Directive 96/71/EC, the translation of the term *posting* seems to be problematic, leading to some discrepancies between Community regulation and Italian legislation (Costa 2011; 2012; Mattei 2011). One of the main consequences concerns the role of para-subordinate workers, whose posting is envisaged by European law, while it is excluded from local regulation (Costa 2012). Also, while not mentioned in the European Directive, in Italian jurisprudence a fundamental requirement in the posting of workers is the ongoing interest of the employer. As stated by Article 30 of Legislative decree No 276/03, in fact, an employer who posts a worker more than 50km away from his/her regular work location must prove his/her own interest. However, a demonstration of the employer's interest in the posting is not required at a European level. This entails 'a clear and paradoxical discrimination' (Amato

2010: 134) against the workers, who are thus subjected to a different treatment depending on whether the posting takes place in Italy or in another Member State.

Spain transposed the PWD through the Spanish Law 45/1999 on Posting of Workers and other legislation. Postings that are at least 8 days long are subject to mandatory posting notifications. Posted workers are eligible to minimum wage that includes not only the base wage, but wage supplements (e.g. holiday payments), extraordinary payments, overtime and night work rates established in the provincial-level collective agreements. Posting companies are also subject to Spanish working time regulations (Cremers 2011a: 133; 142).

Although all **Nordic countries** are generally considered to have strong unions, with high level of unionisation, high level of collective agreement coverage and high labour standards, they also have considerable differences in their labour market / industrial relation structures and these interact with posted work regulations differently (Dølvik & Eldring 2008: 52-54). It is common to all Nordic countries that there are no statutory minimum wages. Strong social partners negotiate wage levels for each sector separately and these are stipulated in the collective agreements. In **Finland** and **Iceland**, sectoral level collective agreements are also made generally applicable, but this is not the case in **Denmark** and **Sweden** which have autonomous collective-agreement models. In the latter group it is expected that foreign companies – even those who do not belong to an employers' organisation – would also sign a collective agreement with local unions, and unions have considerable resources available to pressure them to do this, if a company is not willing to sign an agreement voluntarily (Ahlberg et al. 2006; Alsos & Eldring 2008; Cremers et al. 2007; Malmberg 2010).

After the EU enlargement **Norway** has applied generally applicable collective agreements (*erga omnes*) in some sectors, like construction (Alsos & Eldring 2008). This practice was also supported by the unions, despite their past support for voluntaristic wage setting systems. Employers associations' view on this issue was more divided, with those associations representing delivery firms and domestic subcontractors, who fear that they will be out-priced, usually supporting the introduction of generally applicable collective agreements, while those associations dominated by big contracting companies have welcomed low-cost foreign subcontractors (Dølvik & Eldring 2006).

Alsos and Eldring (2008) argue that extension of collective agreements might be more effective for the protection of foreign labour than autonomous collective-agreement model. However, a common problem with posted workers in systems where statutory minimum wages or generally applicable collective agreements exists is that in practice local workforce usually receives higher wages than minimum provisions. The employers of posted workers might not take into account the region where posted workers are employed, or they might not pay the higher rate appropriate to the workers' qualifications (Bengtsson 2013; Lillie 2012). For example, in the Norwegian construction sector the average wages of Norwegian workers are higher than minimum rates established in collective agreement. This implies that by using foreign labour it is still possible to save labour costs (Alsos & Eldring 2008) and Friberg et al. (2014: 43), based on a survey conducted among Polish migrants in Oslo, have found that being employed through Polish subcontractor firms has a strong negative effect on the level of wages. Norway has also implemented other measures, like supply-chain liability that makes all contractors in the chain liable for the violations of generally binding collective agreements; introducing mandatory ID-cards in construction and cleaning sector and establishing information centres for foreign workers (Friberg 2016).

After the enlargements of the EU, **Finland** and **Iceland** have also further tightened their regimes for posting of workers with a range of legislative measures, like liability schemes in subcontracting chains (Cremers et al. 2007). In recent years the Finnish government, influenced by the social partners, has

taken deliberate steps to regulate construction sector, a main destination for posted workers.

These include establishing a construction site register and a system of compulsory tax numbers for all construction workers (Sippola & Kall 2016).

The employers' federation

representing the Finnish construction sector (the Finnish Construction Industries RT) has highlighted that regulations that lead to more visibility and easier monitoring of working conditions of workers throughout the subcontracting chain are crucial for ensuring fair competition in the sector (Kari, PROMO presentation 2017). Sippola and Kall (2016) argue that the tightening of regulations in the construction industry has reduced the profitability of using posted workers.

In Finland, both the trade union and employers' federation in the construction sector see the advantage of some tighter regulations for combating unfair competition.

Denmark and **Sweden** decided to preserve their industrial relation systems and not to change autonomous collective-agreement models. However, CJEU decision about the *Laval* case has raised considerable concern whether this model is sustainable (Cremers et al. 2007). Woolfson et al. (2010; 2014) argue the *Laval* judgement has re-defined the 'Swedish model' of industrial relations and diminished Swedish unions' capacity to defend local labour standards, especially in low-skill and low-wage occupations. Following the *Laval* and *Viking* decisions both Denmark and Sweden reviewed their legislation adjusting it to comply with the new case law. After the amendments, the Swedish Posting of Workers Act stated that unions are subject to more restrictive regulations in order to take collective action with the aim of regulating posted workers' employment conditions. Specifically, the conditions that unions can demand must correspond to those concluded in the nationwide collective agreements generally applicable for the respective sector and these conditions must also remain within the hard nucleus of the PWD. Industrial action is not allowed if the employer of posted workers can show that these workers already enjoy at least these minimum conditions, e.g. through personal employment contracts (Malmberg 2010; Rönnmar 2010). As a consequence, the position of Swedish unions in relation to posting companies has become weaker and the number of signed collective agreements with foreign construction companies has dropped dramatically (Seikel 2015: 1175-6).

Bruun (PROMO presentation 2017) also highlighted that there exists a tension between the EU's public procurement regime and the Swedish model of industrial relations. According to the EU regime, Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators should comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, and collective agreements or by the international environmental, social and labour law provisions. However, in Sweden there is no official register where it would be possible to find terms and conditions of the applicable collective agreements (labour market parties own the agreements and do not have to tell what they have agreed upon), thus when bidding on a contract (foreign) (sub)-contractors might not know how much their labour costs will be (Bruun, PROMO presentation 2017).

Denmark also made amendments to the Posting of Workers Act. The amendments stated that unions have the right to use collective action to ensure the conclusion of collective agreements that regulate only pay (and not other conditions) with foreign service providers who use posted workers. Differently from Sweden, however, pay can be a fixed sum containing also other possible costs for local employers, like holiday bonuses and leave payments. The act also states that the agreed wage should be equal to the respective wage Danish employers have to pay and the agreements have to be agreed upon by the most

representative social partners (Malmberg 2010). Siekel (2015: 1173) concludes that the changes in Denmark have been more favourable to preserving the Danish model of industrial relations than the changes in Sweden for the continuation of the Swedish model. Still, research by Friberg et al. (2014: 46) suggests that the Danish model is not fully successful at regulating posted work. A survey conducted among Polish migrants in Copenhagen shows that Polish workers in the construction sector earn considerably lower wages than their Danish counterparts and up to 40% less than the minimum wage stipulated in the construction sector collective agreement.

Little has been written about posting of workers in 'new' Europe (Central and Eastern European (CEE) countries that joined EU 2004 or later). Evju and Novitz (2014: 88) describe the implementation of PWD in **Poland**. As Poland (similarly to other CEE countries) has a statutory minimum wage, all posted workers are covered with a national minimum. Moreover, Polish legislation allows taking collective action only in the name of trade union members whose employment contracts are subject to Polish labour law (thus ruling out conflicts similar to the *Viking* and *Laval* cases).

It can be concluded that after the *Laval* quartet judgments in 22 out of 28 EU member states where there exists a statutory minimum wage (Fric 2016), posted workers are at least formally protected from extreme abuses, as statutory minimum wages are in accordance with the PWD Article 3(1) and are applicable to all posted workers. However, local workers in most sectors generally receive higher wages than the statutory minimum (either through personal employment contracts or collective agreements) and this puts posted workers still in a disadvantageous position. Thus, in countries where sectoral collective agreements are generally applicable posted workers generally enjoy more equal pay and employment conditions than countries where these kinds of agreements do not exist.

5.1. Company practices, social dumping, regulatory caps and regime competition

Posting regulations create regulatory caps and bring about possibilities for companies to opt out from stricter and more expensive national regulations and make it easier to use illegal or semi-legal employment practices in order to gain competitive advantage over companies operating in a more regulated sphere of employment relations. Lillie et al. (2014: 319) argue that posting firms use both regulatory arbitrage and regulatory evasion/avoidance. Regulatory arbitrage refers to the situation where firms 'base themselves in other countries with low regulatory requirements, but do business in countries with high ones, with only a limited set of requirements for compliance with host country employment regulations'. Lillie and Greer (2007), based on a study conducted in the UK, Finland and Germany, conclude that in the construction industry, where transnational employment practices are especially widespread, employers are seeking and finding ways to avoid local industrial relations rules in all national institutional frameworks (for the recruitment strategies of construction companies, see also Fellini et al. 2007; Forde et al. 2009; Krings et al. 2011).

An example of regulatory arbitrage is a situation where posted workers are employed on legitimate contracts and the host country offers a legal possibility to pay posted workers less than native workers – if, for example, wages normally paid to locals are higher than those established by collective agreement. This has been the situation in German meat sector until recently (Lillie & Wagner 2015). Furthermore, as the 'temporariness' of posting is not clearly defined at the EU level, member states use several different notions for defining the temporary character of posting, also without giving maximum time limit (van Hoek & Houwerzijl 2012). This might mean that in practice a situation where a mobile worker does not fully 'enter into the labour market' of the country where they work; this might not be just for a short period of time, but take rather a permanent character. In addition, through entirely legal means, companies can gain a labour cost based competitive advantage when they post workers from countries with lower social

security contributions to countries with higher ones. Social security contributions of posted workers are paid in the sending country. For example, De Wispelaere & Pacolet (2017: 17) show that in Belgium only two out of ten of the main posting countries have higher employer contribution percentage than Belgium.

Employers in the transport sector also enjoy possibilities to avoid host country regulations. Recently, there has been much debate about the possibility to regulate transport work as posted work. In June 2016 the European Commission announced legal action against France and Germany for their systematic application of minimum wage legislation to cross-border transport.¹⁴ Though the application of minimum wage regulations in case of cabotage as well as for bilateral traffic, i.e. for transport services with loading and/or unloading in another member state, seems (up until now) in line with the PWD – member states interpret the application of this principle differently. It is not clear whether and how transit states can

Some firms choose to establish letterbox subsidiaries in certain countries simply to arbitrage between national labour protection regimes, and social security schemes to find the cheapest legal system to manage posted worker contracts. This can leave posted workers without accessible legal rights, and cheat them of social security contributions.

regulate labour conditions in road haulage (Gagawczuk & Völkerer 2016).

Regulatory avoidance, on the other hand, refers to the direct noncompliance with the applicable rules and regulations. This can happen because it is difficult to monitor and enforce the working conditions of posted workers and these workers themselves might not expect their working conditions

to correspond to the standards of host country (Lillie et al. 2014, see also section 6). Fake/incorrect posting would fall under this category. In practice it is often difficult to verify if the worker is posted in accordance with PWD. For example, it has been noted that temporary work agencies sometimes use countries with low social security contributions to incorporate their business, although hired workers in practice have no employment relations with those countries. In some cases, the worker does not habitually work in the nominal 'home' county (and indeed may have no ties there at all), and/or the employer is not genuinely established in a 'home' state.

Because self-employed workers do not fall under the posted workers directive, where national regulations allow it, employers sometimes use bogus self-employment as a way of circumventing regulation. There are also workers who are practically posted, but legally work under dubious arrangements, like bogus self-employment, sometimes not even knowing that they are legally self-employed (Cremers et al. 2007; Cremers 2013; Cremers 2016; Lillie & Wagner 2015; van Hoek & Houwerzijl 2012). Problematic are labour-only suppliers and letter-box companies whose main aim is to minimise labour costs, often by employing illegal practices (Cremers 2013). In countries like Germany, the Netherlands or in the UK the regulation of self-employment enables employers to avoid collective employment regulations if they classify workers as self-employed, even if these workers are *de facto* dependent posted workers (Lillie & Wagner 2015). In countries where posted work regulation has become strict and unions are rather successful in enforcing the PWD, companies also use organisational posting arrangements (e.g. bring workers for specific projects from another country, who have their travel and accommodation arranged), but sign host country employment contracts, so they do not have to pay daily allowances (Lillie 2012; Sippola & Kall 2016). To curb illegal posting activities, it might be more effective (although difficult) to

¹⁴ <http://www.etf-europe.org/files/extranet/-75/46198/ETF%20position%20-%20Application%20of%20DE%20and%20FR%20minimum%20wage%20in%20road%20transport%20EN.pdf>

target concrete individuals, not companies, as in several cases the same individuals are behind unlawful practices but they operate through a complex network of companies (Houwerzijl, PROMO presentation 2017).

Wagner (2015a) has studied how posting rules are violated at the company level in the German construction sector. She found that management used multiple illegal cost-saving strategies, like manipulating working hours, disregarding maximum work periods and withholding annual leave pay. By manipulating working hours posting companies are able to avoid paying overtime, night work supplements and weekend bonuses. Posted workers are afraid to voice grievances so enforcing their rights is difficult (Wagner 2015a, see section 6). Similar problems are noted also in other contexts (Cremers 2016; Lillie & Wagner 2015; Thörnqvist & Bernhardsson 2015). Service providers also have unlawfully deducted pay for accommodation, travel or other costs and sometimes misrepresented workers' skill levels, in order to pay highly qualified workers the wage applicable for a worker with lower skills and qualifications (Cremers et al. 2007; Cremers 2016; Lillie & Wagner 2015).

6. Enforcing the rights of posted workers

Numerous studies (e.g. Cremers 2016; Houwerzijl & van Hoek 2011; Wagner and Berntsen 2016) have shown that the enforcement of the rights of posted workers is problematic. Even though firms' employment practices fall under both sending and receiving country regulations, both unions and labour inspectorates face fundamental limitations on their ability to compel foreign service providers to respect these regulations. They are constrained by their national jurisdictions, restricted by the CJEU decisions (e.g. Cremers 2013) and face organizational challenges in developing transnational cooperation (Hartlapp 2014). European regulations on the free provision of services have made it difficult for countries to enforce the labour standards and through this transnational workplaces have developed dynamics of their own with autonomous rules and regulations (Wagner 2015a).

In addition, posted workers might not know their rights or are afraid to claim them. Employers might also not be certain about their obligations or they may try to gain competitive advantage by pretending ignorance to avoid certain rules and regulations. Based on recent studies Jan Cremers has concluded that labour inspectorates (and other rights enforcing bodies) have to handle cases involving complex and challenging issues (often several at the time) like false posting, social security fraud, bogus self-employment, questionable subcontracting, artificial firm arrangements and dubious tax behaviour (Cremers, PROMO presentation 2017), while acting within their legal competencies that might be quite restricted (Houwerzijl, PROMO presentation 2017). Firms take advantage of these complex issues to operate in social spaces with alternative or no regulation (Berntsen and Lillie 2016; Bosch and Weinkopf 2013; Lillie & Wagner 2015; Wagner and Lillie 2014) which makes labour rights enforcement complicated, raising serious capacity issues for unions and labour inspectorates. This section analyses the problems with and possible solutions for enforcing the rights of posted workers emphasized in different studies.

6.1. The role of national authorities

The current PWD does not put on national governments specific requirements to regulate the nature or level of monitoring and enforcements of the rights of posted workers. Although member states have to designate one or more liaison offices or one or more competent national bodies for the purposes of implementing the PWD, each member state decides on its own how to organise the enforcement and monitoring activities for its specific national system. Based on a comparative study on legal aspects of posting Houwerzijl and van Hoek (2011) consider this problematic, as findings from different countries indicate that the enforcement of national standards on the employment of posted workers is weak. National systems differ considerably, however, and thus, also, their effectiveness in regulating posted work differs. Although in most countries national authorities fulfil the official monitoring and inspecting role, there are systems where multiple authorities are involved (Belgium, Italy, Germany) and also systems where no authority is officially involved (UK) in monitoring and enforcing the labour law in respect to posted workers.

In most countries social partners are also either formally or informally involved (see problems in section 6.3 unions encounter when enforcing the rights). The extent of involvement varies as well and the effectiveness of monitoring/enforcing the rights is hindered by poor registration of posted workers and the lack of competences of the monitoring/enforcing bodies (Houwerzijl & van Hoek 2011). For example, Fitzgerald (2010) concludes that in the UK, where there are no direct enforcement measures with regard to the PWD and also no system of registration of posted workers, communication with and integration of posted worker into the local system is often difficult. Frequently there is not enough information about these workers and this contributes to the poor living and working conditions of posted workers (Fitzgerald 2010).

Generally no monitoring/enforcement activities targeted to inspecting the rights guaranteed by the PWD to posted workers are present; inspecting bodies monitor posted workers together with their ordinary prerogatives. However, in several European countries specific activities target the presence of posted workers. Countries such as Austria, Belgium, Denmark, France, Germany and Luxembourg have established notification/registration systems and requirements (for service providers) regarding the use of posted workers. Although registration requirements could in principle make it easier to monitor and enforce the rights of posted workers, employers of posted workers not always comply with them or undermine them by giving incomplete or incorrect information. To improve the situation Belgium and Denmark have made recipient of the service co-responsible (Houwerzijl & van Hoek 2011: 114).

One main issue for enforcing local rules for posted workers is that this group of workers fall under the complex mix of home and host country regulations and enforcement capabilities are also hindered by the relevant CJEU rulings, according to which the application and monitoring of host-country labour standards could be seen as a restriction to the free provision of services and a 'burden to business' (Cremers 2013). Thus, the CJEU's decisions have restricted both unions' and labour inspectorates' rights to effectively enforce posted workers' rights (Lillie & Wagner 2015; Wagner 2015a).

Wagner and Berntsen (2016), after studying German and Dutch construction sectors, argue that the enforcement of posted workers' rights is problematic at different levels: both internationally, nationally, and at the company level. Firstly, there are difficulties at the international level, as cooperation between the different national enforcement agencies is underdeveloped. Difficulties arise in the field of tracking

Cooperation between labour inspectorates is underdeveloped, considering the challenges raised by worker posting.

cross-border payment of social security contributions, detecting letter-box companies, controlling the payment of untaxed allowances, and enforcing the payment of fines in a cross-border employment situation. For

example, companies might provide two employment contracts, one referring to the host country (for inspection, complying with minimum wages levels there) and other referring to home country standards. In the end companies pay social security contributions based on the contract of sending country wage level. De Wispelaere and Pacolet (2017: 19) have proposed that to enhance the enforcement, countries could exchange information about proof of payment of social security contributions. In addition, cross-border cooperation is usually very time-consuming. Controlling if a posting company is operating legitimately in the host country can take months (Wagner & Berntsen 2016).

Hartlapp (2014) has studied the capacities and cooperation efforts of national labour inspectorates of 15 'old' EU countries, looking also how these have changed between years 2000 and 2010. She concludes that labour inspectorates have generally insufficient enforcement capacity and limited resources, and between 2000 and 2010 in 10 out of the 15 countries studied, the inspector-worker ratio decreased further; highest ratios being in Denmark, Finland, Greece and in Italy. She also concludes that the cross-border enforcement activities of labour inspectorates – like joint inspections of construction sites – have increased during the ten years, especially in relation to the free movement of services and labour. However, although cross-border cooperation is becoming more common, procedures are long and time-consuming and there are no proper sanctions available. The development of the Internal Market Information System (IMI) might be a move in the right direction (Hartlapp 2014). Furthermore, there have

been several EU-funded projects (like ENACTING¹⁵ and EURODETACHMENT¹⁶) that have aimed to improve the transnational collaboration and exchange of information between administrative bodies and social partners.

Secondly, Wagner and Berntsen (2016) emphasise that problems arise at the national level, as labour enforcement agencies might not always be suitably equipped to check violations in transnational workplaces involving posted workers and to enforce foreign companies' compliance with relevant regulations. Labour enforcement agencies are often lacking effective instruments to counter specific unlawful practices. For example, companies might manipulate with payslips and pay deductions, keep

Firms sometimes use transnational methods - such as keeping books in the home (sending) country - to hide wage theft. This is difficult for national actors such as unions and labour inspectors to detect.

actual accounting books in the home state, and these discrepancies are difficult to prove (Wagner 2015a). Furthermore, bogus self-employment is often used, in some cases workers not being even aware that they are working as a self-employed and not employees. Thirdly, there are problems at the workplace level, as

posted workers encounter problems with accessing host country collective representation channels. Posted workers feel often isolated from and unaware of existing channels of representation (Wagner & Berntsen 2016). The representative of the Norwegian Labour Inspection Authority also emphasised that posted workers might not understand the role of the inspectors, are afraid to talk to them and might be instructed about what to tell to authorities (Lund, PROMO presentation 2017). To facilitate better communication with foreign workers, the Norwegian Labour Inspection Authority has inspectors with different language skills, uses questionnaires available in multiple languages, has established two-day communication training program (topics include: how to establish trust and how to explain their role and aims) for all inspectors and has five service centres for foreign workers (ibid.).

6.2. Liability arrangements

To improve the enforcement of posted workers rights several countries have implemented liability arrangements for the subcontracting chains that apply also to posted workers. These systems, however, differ considerably between countries and sectors (see Jorens et al. 2012; Houwerzijl & van Hoek 2011: 130-4). In the UK, for example, there are no legal provisions for making (main) contractors liable for subcontractor debts. In countries and sectors where joint and several liability mechanisms exist, contractors can be held liable if their subcontractors do not act in accordance with the labour law and (minimum) provisions of generally applicable collective agreements. Liability helps ensure that it is possible for (posted) workers to claim their back-pay and social security contributions in case direct employer does not fulfil their obligations, e.g. disappears or goes bankrupt. Such provisions may force (principal) contractors to better consider the reputation of subcontractors (Lillie & Wagner 2015).

¹⁵ <http://www.adapt.it/enacting/>

¹⁶ <http://www.eurodetachment-travail.eu/>

Chain liability (and similar tools) are seen in some countries as an important way to ensure that the most powerful actors in supply chains (main contractors) take responsibility for ensuring their subcontractors are respectable. It often becomes a legal tool of last resort when workers are cheated.

For example, Germany has gradually implemented stricter and more extensive liability schemes and currently has a far-reaching model of strict chain liability that applies to the payment of minimum wages (Bogoeski 2017), so that each subcontractor up to the principal contractor might be held liable in the case of misconduct. In addition, less strict chain liability

applies also for the payment of social security contributions and wage taxes (Houwerzijl & van Hoek 2011; Wagner & Berntsen 2016). The enforcement of the German liability system is not without problems and it still leaves obstacles for the effective enforcement of posted workers rights (Bogoeski 2017; Wagner & Berntsen 2016). Factual obstacles, like the lack of written employment contracts and other necessary documents and limited access of posted workers to the legal assistance due to not being union members hamper posted workers' possibilities to protect their rights in the German juridical system (Bogoeski 2017). Wagner and Berntsen (2016) highlight that major German construction companies often institute site-level systems of checks to ensure they will not be held liable to subcontractors' unpaid wage bills. In some cases, all employees of subcontractors on the site sign statements (that might also contain false information) saying they have received mandatory minimum payments. Although this does not exempt them fully from liability, it does make possible proceedings in court more complicated. Furthermore, liability regulations are still under court interpretation and in certain cases it is not clear who can be held liable: when can a 'client' also be considered as a 'contractor' (Bogoeski 2017). Still, there are several cases where existing regulations have helped to achieve successful collection of contributions and to establish fines for misbehaviour in both out-of-court negotiations and court proceedings (ibid.).

Norway also introduced chain liability for minimum wages, overtime pay and holiday pay in 2010, taking the German system as a role model. However, cases where the liability regulations have actually been applied are rather rare, at least between 2010 and 2013 (Alsos, PROMO presentation 2017). A similar liability system to the German one is in place also in the Netherlands since May 2015. Since that date chain liability also applies to wages in accordance with collective agreements. Before 2015 chain liability only applied to income taxes and social security contributions. In the temporary agency work sector there existed a liability system for the statutory minimum wage already since 2010, but it only guaranteed the minimum wage rather than the collective agreement wage, which is generally higher (Wagner and Berntsen 2016). As regards foreign contractors with posted workers, the liability arrangement for social security contributions and income taxes for the first 183 days of work do not apply (Houwerzijl & van Hoek 2011).

In the Belgian construction sector a special liability system – consisting of several liability, worksite notifications and deduction obligations – exists for the payment of social security and fiscal contributions. Firstly, all Belgian users have to report all subcontractors active on the construction site. Secondly, a user/contractor is to a certain maximum amount severally liable for the social debts of his contractors. However, no system of liability exists for the payment of wages. More extensive system exists in France, where clients are made jointly liable for the wage, taxes, and social security contribution payments (Houwerzijl & van Hoek 2011). In Austria, liability regulations covering social insurance contributions, fiscal contribution and minimum wage against the principal contractor are in place for construction work. However, enforcement is complicated and subject to various limitations. The employee for instance has to prove that the principal contractor was aware of an unreliable subcontractor some levels further down in

the chain to be held liable for withheld wages, which is a difficult task to accomplish. What is more, workers have to sue for their wages on their own; in this respect status of limitation is important. Provisions also do not apply if the subcontractor goes bankrupt, which is a problem as bankruptcy is a frequently used strategy to avoid paying back wages. In addition, specific liability regulations apply if the client is a subcontractor under a public-sector contract.¹⁷

Some countries (like Denmark, Finland, Ireland, Italy, the Netherlands, Norway, and the UK) also use 'soft measures' or self-regulatory mechanisms, like social clauses in collective agreements to facilitate the liability of subcontractors. For example, certain Finnish sectoral level collective agreements, like in the construction sector, state that subcontracting contracts must include a provision that obliges the subcontractor to respect the terms and conditions set by the generally applicable collective agreement for the sector (Jorens et al. 2012: 16-17).

6.3. Trade union strategies to represent posted workers and problems with representation

In many European countries trade unions (or also works councils, as in Germany) have taken a role of monitoring and enforcing the rights of posted workers. Posted workers are migrant workers, and migrant workers are widely thought difficult to organize and represent. In addition to the challenges unions face to representing migrant workers (e.g. Eldring et al. 2015; Hardy et al. 2012; Marino & Roosblad 2008; Tapia & Turner 2013), with posted workers trade unions face additional challenges, such as these workers' hyper-mobility and mix of labour regulation applicable. The role and the effectiveness of unions in representing and protecting posted workers also greatly vary between different national and sectoral contexts and is hindered by the CJEU decisions. Posted workers are dramatically underrepresented in host country trade unions. Of the very few who are members, their relationship to the union is usually tenuous and brief. This is caused by several interrelated factors. Firstly, posted workers might be satisfied with their employment conditions as these are better than home country ones, although they might be considerably lower than the general standards in the host country (Lund, PROMO presentation 2017; Houwerzijl & van Hoek

2011). This also makes it difficult for unions to engage with posted workers. Secondly, posted workers often live together with other posted workers in isolated areas, do not communicate much with domestic workers, stay distant from the host society and

Posted workers are hard to organise because they are accustomed to lower pay, physically and socially isolated from locals and afraid of losing their jobs.

are often unaware of local rules and regulations, including possible ways to defend their rights. They often have limited local language skills. In addition, they usually stay at one workplace for a short period. These factors, in turn, create both social and spatial segregation (Arnholtz & Hansen 2013; Danaj & Sippola 2015; Caro et al. 2015; Houwerzijl & van Hoek 2011; Wagner & Berntsen 2016; Wagner & Lillie 2014; Wagner & Refslund 2016).

Posted workers rarely seek out collective representation. This is in part due to their employer dominated working and living situations. For example, fear of losing the job when employer finds out that one has joined a union prevents posted workers from becoming members or even talking to union representatives. This kind of problems have been reported by unionist and posted workers themselves in several countries (Alberti & Danaj 2017; Danaj & Sippola 2015; Lillie & Wagner 2015; Houwerzijl & van Hoek 2011; Wagner

¹⁷ http://www.entsendepattform.at/cms/Z04/Z04_10.6.3/enforcement/client-liability

& Berntsen 2016). For example, according to the Swedish Building Workers Union there have been cases where posted workers have been fired after they have joined the union (Houwerzijl & van Hoek 2011: 146). Also, posted workers might have no previous (good) experience with trade unions, especially if they come from the CEE countries where the tradition of unionism is weak (Danaj & Sippola 2015; Sippola & Kall 2016; Houwerzijl & van Hoek 2011).

Nevertheless, in some cases trade unions have tried to organise and represent posted workers and there are cases when posted workers have been effectively mobilised in order to defend their rights and improve their employment situation. However, when studying these cases most researchers point out to the limitations deriving from the situation of hyper-mobile posted workers that make unions' efforts complicated and victories rather short term. Danaj and Sippola (2015) argue that although strategies developed by trade unions to organise long-term/permanent migrant workers are to some extent also applicable to posted workers, considering that posted workers' stay is relatively short-term and posting is a special situation, unions also need special initiatives and strategies to organise posted workers. Based on the studies in three construction sites in different national (industrial relations and labour law) context – Finland (Olkiluoto 3), the Netherlands (Eemshaven) and the UK (Ferrybridge and Carrington) – Danaj and Sippola (2015) argue that unions' approach towards posted workers can be grouped into four categories: (1) Making unions available for the workforce: accessibility; (2) Approaching the workforce directly: pro-activity; (3) Gaining the trust of the workforce: trust-building; (4) Cooperating with other stakeholders outside the workplace (including media coverage): community outreach.

Danaj and Sippola (2015) emphasise that unions need to be available for the posted workers, who usually do not search for unions themselves. To facilitate contacts with posted workers, at the Finnish Olkiluoto site shop stewards made site visits that were accompanied by a Polish-speaking union official, as Polish workers were the main group of posted workers. They also went to the rest places of workers and hung up posters with

information regarding employment conditions. In the UK's Carrington and Ferrybridge construction sites, the union established an office on site with two shop stewards available at all times and union meeting were also held during lunchtime in an on-site cafeteria. British union also managed to get them included in the induction process of the new workers, and through induction process new

Unions need to be open and easily available to provide services to posted workers if they want to avoid them undermining local wage norms; this is often frustrating to unionists because posted workers rarely join, do little on their own to protect their own rights, and have little trust in trade unions.

workers got to know also the collective agreement, local unions and their services. In the Dutch construction site at Eemshaven the union established office hours on the site, visited workers' accommodation and distributed leaflets in various languages. Being accessible (also in workers' native language) and providing assistance to posted workers with their individual grievances helped to establish trust that is generally more complicated with hyper-mobile posted workers, as trust building takes time and there are language barriers (Danaj & Sippola 2015). Berntsen (2015b), based on a study from Dutch supermarkets distribution centres, adds that in order to effectively mobilise non-native mobile workers, a flexible worker-centred approach is needed. Building up within-group solidarity using small-scale protest action was essential for the non-native (Polish) workers to strike together with the Dutch colleagues and to try to improve their employment conditions (Berntsen 2015b).

Different unions in the Finnish and British case also cooperated with each other in order to more effectively protect workers' rights. Finnish and Dutch sites with posted workers also had a fair amount of media coverage. Media channels reported the poor working and living conditions of non-native construction workers. This can be useful to unions, as main contractors usually try to maintain a good reputation and avoid bad publicity (Danaj & Sippola 2015). Wagner (2015b) states that when in the German meat industry the use of low-wage posted workers – who have been excluded from the traditional channels of labour representation – intensified, trade union NGG formed an alliance with a local civil society organisation to better represent posted workers. Thus, the union moved its strategy from traditional social partnership to coalition-building and this has proven to be effective in such situation. The exploitative labour practices of posted workers received local and national attention when these workers shared information about their meagre living and working conditions with local community activists (one community activist was also Polish native speaker, helping to establish trust). Later on, the NGG union negotiated with the employer on behalf of the posted workers. As the labour conditions gained considerable media coverage, regional government decided to fund 'service points' where posted workers could get consultation about workers' rights. Employers were also willing to form an association and negotiate a minimum wage for the meat industry sector (Wagner 2015b; Wagner & Refslund 2016).

Danaj and Sippola (2015) also state that organising posted workers is a difficult task even in the places with strong industrial relation systems and strong unions like the Netherlands and Finland. In the three sites they analysed, unionisation levels of these workers still stayed low, e.g. 15-20% of the non-UK workers at Ferrybridge, but no unionised workers in Carrington, and out of the 4300 Polish workers in Olkiluoto only 100-200 were organised. Berntsen and Lillie (2016) argue that in the Eemshaven construction site well-resourced Dutch unions were only able to improve the employment conditions for a limited group of workers and for a limited time period. Although workers on that site were covered by a legally extended collective agreement, enforcing the minimum standards for the posted workers in the agreement proved problematic for the unions: unions needed workers to provide them with employment contracts and payslips, but workers were afraid to interact with unions. Moreover, organising non-native workers into unions was difficult, but representing non-unionised employees, on the other hand presented unions with the free-rider problem. The FNV union mobilised considerable resources and was able to

Hypermobility of posted workers ensures that any membership gains made through union organising will be short lived.

organise a part of hyper-mobile workers, but this organising success faded as staff turnover was high (Berntsen & Lillie 2016). Similar problems were noted also by Lillie and Sippola (2011) in the Olkiluoto 3 construction site in Finland. In both cases unions were defending existing sectoral level collective agreement and operated

in rather favourable industrial relation contexts, but unions still struggled in representing posted workers.

There are also sectoral differences in the strategies of unions and their effectiveness regarding enforcing posted workers' rights. For example, in the Finnish case construction union has created and effectively uses a blacklist of bad employers to sanction subcontractors who do not comply with labour regulations. The Finnish metalworkers' union has not used this kind of strategy and has been in a more difficult situation in ensuring contractors' compliance with collective agreements (Lillie & Wagner 2015). Problematic for unions are also their limited rights in some contexts to represent only workers working under certain employer or belonging to a certain occupational group, as collective agreements that apply might be different for different group (Danaj & Sippola 2015).

Moreover, in several studies it was found that management tries to restrict the access of unions to the construction sites (Lillie & Sippola 2011; Wagner and Lillie 2014). For example, in the German construction sector companies use foreign subcontracting arrangement to isolate workers from local representation channels: in the German contexts both from the industry level trade unions and from the company-level works councils.

German unions and works councillors lack access to and information about the non-German companies and thus have difficulty in communicating and representing posted workers.

Although based on the collective agreement German construction union IG BAU has a right to

The German works council system, based on in-firm representation and separation of powers between unions and works councils is not generally able to represent posted workers.

access construction sites throughout Germany, in practice the construction sites management often restricts this right. For example, in the European Central Bank (ECB) construction site management claimed that based on the agreement between EU and German government, European Central Bank site has an extraterritorial status (although the extraterritoriality was supposed to cover the ECB headquarters, not the unfinished construction site). What followed is that the union was able to access the site only when asked permission, and that way employers could make everything seem in order and give workers instructions about how to answer the union's questions (Wagner and Lillie 2014).

German IG BAU has responded to the challenges of transnational posted work by creating the European Migrant Workers Union (EMWU). It aimed to establish a transnational structure for the mobile workers, so they could receive representation from their home countries as well (Wagner 2015a). EMWU was active several years, but failed to create a well-functioning independent structure and it was reintegrated into the IG BAU (Greer et al. 2013). To better represent mobile workers, the Confederation of German Trade Unions (DGB) has established fair mobility service centres in different regions in Germany, where workers with different language skills inform migrant workers about their rights (Wagner & Berntsen 2016).

In Denmark and Sweden, countries with voluntarist wage setting systems and strong tradition of social partnership, social partners are bodies responsible for monitoring the compliance with labour legislation and collective agreements and, except for the case of health and safety, no public authorities are involved. However, doubts have been raised whether unions can always effectively monitor the situation of posted workers. In the case of Denmark it was observed that only construction sector unions might be able to monitor the working conditions, as construction sites are visible and easier to access. There is also the problem that unions do not have enough/adequate resources for monitoring all workers. The unions' capability is also dependent on whether workers' direct employer or at least the main contractor is bound by a collective agreement. If the employer of posted workers is not bound by the collective agreement, unions have no means to pressure the employer (Houwerzijl & van Hoek 2011). Thus, it becomes essential for unions to try to sign collective agreement also with foreign contractors, although this is hindered by the CJEU decisions. Indeed, in countries without the extension of collective agreements – Denmark, Sweden, Italy and the UK – there are trade unions who specifically bargain to ensure better working conditions for posted workers. Specific negotiation in the name of posted workers do not occur in systems where generally applicable collective agreements are present, as posted workers are already entitled to at least minimum standards provided by these agreements (Houwerzijl & van Hoek 2011).

The Danish Copenhagen metro construction project can be considered a rare example of a successful union organising drive of posted workers. Initially the site seemed difficult for union, as the employers were unwilling to cooperate. The success came when union changed its organising strategy, and started organising only in the 'best' firms with highly skilled workers who were the easiest to organise. Representing these workers legitimated the trade union presence, as they were seen to be addressing the concerns of the workers, not just enforcing the collective agreements. The union also had a more strategic and selective approach to enforcement, for example going after the worst behaving firms, and involving different nationalities in their actions. Media attention and delays due to union disruption increased the sensitivity toward the labour standards issues by the developer and the main contractor. The union's strategy resulted also in a substantial number of posted workers joining the union (Arnholtz, PROMO presentation 2017).

Bengtsson (2013) has studied the choices towards organising migrants (posted workers) of three Swedish unions, all in a relatively strong institutional position. While IF Metall has relied on collective bargaining and social partnership with employers, other two – Byggnads (the construction sector union) and Transport who experience more precarious employment conditions in their sectors – have developed their organising strategy. IF Metall has focused on facilitating cooperation with employers and on securing level playing field through collective agreement with all employers, although they do worry that the *Laval* ruling has created uncertainty about the rules that apply. Construction sector union Byggnads has launched an Interpreter Project, in which they hired officials with different language skills to help organise the migrant workers, although related to the hyper-mobility of most migrant workers and employers' anti-unionism, organising success has remained limited. The transport union also uses interpreters, and has encountered similar problems as Byggnads (Bengtsson 2013). Even if posted workers turn to unions for help, it might be difficult to prove that employers have violated their rights and because of long processing times workers' contracts might end before any measures could be taken (Thörnqvist & Bernhardsson 2015).

The situation for unions and posted workers is even more difficult in countries like the UK, where labour markets are less regulated and unions have lower density rates and fewer resources available (Fitzgerald 2010). In this context, trade union presence in the site/company can be especially important for the well-being of workers, as emphasised by Danaj (PROMO presentation 2017): in the UK construction sector it makes a great difference (in terms of working conditions, health and safety and equal treatment) whether

The potential for fines may be preventing some unions from assertively representing posted workers

the site is unionised and operated under NAECI or not: in the latter case (posted) workers are much less protected. There are also considerable cross-country differences when it comes to legal opportunities of using industrial action to force employers to sign

collective agreements. For example, Danish union are in a better position than Norwegian or UK unions, as Danish ones have to pay a fixed fine in case an industrial action is deemed unlawful. Norwegian and UK ones, on the other hand, might have to compensate full losses of companies caused by such action. In contrast to UK unions, Norwegian and Danish ones can take industrial action even when they do not have members in the target company (Eldring et al. 2015). Wagner and Berntsen (2016) argue that collective redress can be an effective way to enforce the rights for posted workers, as posted workers are generally afraid to personally sue their employers. However, there are considerable legal differences between countries in this aspect. Dutch unions, for example, can initiate juridical proceeding themselves and defend employee rights in the court. It is expensive and time-consuming and unions prefer out-of-

court settlements. Only if other channels fail do Dutch unions turn to the courts for the protection of posted workers' rights. The situation is different under German law, where only individual employees can start legal proceeding to enforce the labour law (Wagner & Berntsen 2016).

In order to better represent hyper-mobile posted workers, host country unions have also considered transnational strategies and established cooperation arrangements with home country unions. For example, German IG BAU has signed agreements with Belgium, Dutch, Italian and Polish construction unions on the mutual assistance to each other's construction workers. Similarly, there exists a framework for mutual aid between French and Romanian and Italian and Romanian unions, but in practice these cooperation channels seem to be underused and not that effective. Polish unions have been especially active in concluding the cooperation agreements (Houwerzijl & van Hoek 2011). In 2007 the Latvian Builders Trade Union (Latvijas Celtnieku Arodbiedrības – LCA) and the Norwegian United Federation of Trade Unions (Fellesforbundet) signed an extensive cooperation agreement that commits both sides to organising, representing, and enforcing the rights of Latvian construction workers posted to Norway and to share information about posting companies and labour standards applicable in each context. Fellesforbundet also provided financial support to the Latvian union. Although the organising success has been limited, the activities stated in the agreement have helped both unions to get a better insight of labour conditions of Latvian workers and to solve labour disputes in the best interests of workers (Eldring 2015). Social partners from different countries have also signed agreements to ensure the mutual recognition of each other's' standards. An example of this is an agreement between Dutch and Belgian social partners in the construction sector that establishes the compatibility of their collective agreements (Houwerzijl & van Hoek 2011: 149).

Conclusions

The evidence is unambiguous that posted work should be better regulated. On the one hand, posted work has created job opportunities for millions and there is some evidence that it is an important way for legitimate employers to send employees abroad for short periods of time. It might enhance the positive integration of the European labour markets and be beneficial to both sending and receiving countries' economies. On the other hand, most studies in a variety of national contexts indicate that posting of workers has also opened up a pan-European 'grey market' for cheap, exploitable workers, undermining labour standards and trade union rights, overwhelming national labour rights enforcement bodies and creating labour market segmentation. If posted work is to become decent work, policy changes both at the EU and national level are needed. Furthermore, the role of trade unions and national labour standards enforcement bodies in protecting posted workers' rights should be strengthened. We propose that changes are needed in the following six areas:

- 1) Ensuring fair wage and other employment conditions for posted workers based on host country standards.
- 2) Ensuring that protections granted to posted workers in law are actually effectively accessible to the worker.
- 3) Building extensive cooperation between systems of worker protection, both between local/national actors and cross-border.
- 4) Instituting effective and dissuasive sanctions against companies who cheat workers of pay, or who otherwise commit serious labour rights violations, or who fail to pay social security contributions or taxes.
- 5) Ensuring that posted workers have an effective and accessible right to join, be represented by and participate in trade unions, and lodge complaints in host country courts.
- 6) Collecting and making available more extensive, systematic and reliable data about posting of workers.

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Arnholtz, J. (2017). Presentation at the policy workshop 'Protecting Mobility through Improving Labour Rights Enforcement in Europe' (PROMO). 23-24 May 2017.

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