

The Revision of the Posted Workers Directive: towards a full level playing field?

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1. Introduction

The free provision of services recognises the right for companies, established in one Member State, to provide services in the territory of another Member State.¹ While exercising this economic right, businesses may send their workers from the domestic Member State (hereafter, Sending State) to another Member State (hereafter, Host State) in order to provide the services. This concept, also referred as posting raises the question what labour legislation should be applicable to the working conditions of the posted worker during the period of posting. Taking the cross-national differences regarding labour standards within the EU into account, from an economical point of view, a service provider that sends workers from a Member State with relatively low labour standards has a competitive advantage in a Member State with higher labour standards, as it results convenient in terms of labour cost.

This was the framework where the EU intervened with the adoption of the Posted Workers Directive 96/71/EC (hereinafter, PWD), in order to protect the position of workers in derogation from the free movement principle, and to establish a minimum floor of rights. More concretely, the PWD forces posting companies to comply with the *'hard core'* of working conditions, including the minimum wage, as laid down within legislation and general applicable collective labour agreements (hereinafter, CLA) in the Host State when more favourable.² However, literature indicates that, despite the protection provided by the PWD, the concept of posting has been (mis)used by companies as a way to recruit cheap labour.³

In 2014, the Enforcement Directive 2014/67/EU (hereinafter, ED) has been introduced in order to ensure that Member States implement the provisions of the PWD, with respect to the monitoring and enforcement of labour conditions of posted workers, in a more uniform manner.⁴ While most Member States transposed the ED only recently into their domestic legislation, on 8 March 2016, the European Commission proposed a reform of the current rules on posting of workers by applying the *'remuneration'* rather than *the 'minimum rates of pay'* of the Host State in order to promote the *'principle of equal pay for equal work at the same*

¹ Consolidated Version of the Treaty on the Functioning of the European Union art. [56], 2008 O.J. C 115/47, [hereinafter TFEU].

² PWD, art. 3

³ See for instance Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011; Lisa Berntsen, 'Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries', *International Journal of Comparative Labour Law and Industrial Relations*, no. 31 (4), 2015

⁴ Recital 7 of the ED

place'.⁵ This proposal is particularly sensitive, as it touches upon controversial interests at stake between the Western EU Member States and the Central and Eastern EU Member States.⁶

The concept of level playing field is frequently used within the debate on the revision of the PWD. It indicates that both foreign and local competitors are subject to the same set of rules. Due to the complexity of the matter, and the conflicting interests at stake, the question is whether the current legislative framework on posting, is adequate enough to create a level playing field between domestic and foreign service providers in the receiving Member States and whether the revision of the PWD would improve the current situation in terms of labour costs.

Houwerzijl and Van Hoek identified three main areas in the PWD which are aimed at ensuring a level playing field between local and foreign competitors: rates of pay, health and safety and working time and holidays.⁷ While addressing the full scope of the PWD, this study mainly aims to examine whether a level playing field is ensured in terms of rates of pay.

2. Posting from a sending and a receiving perspective

Before analysing the EU legislation on posting, it is important to illustrate the different interests at stake between sending and receiving Member States. The literature distinguishes two main models of posting: the skills driven model and the labour costs driven model.⁸ The skills driven model addresses the temporary movement of workers driven by skills shortages elsewhere and takes place in high value chains.⁹ While, the labour costs driven model, hold up that posting of workers is triggered by labour cost differentials between Member States. The latter form of posting is concentrated in low value chains such as the construction, transport and agriculture sector.¹⁰

⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter, the proposal)

⁶ Rebecca Zahn, 'Revision of the posted workers directive: a Europeanisation perspective', *Cambridge Yearbook of European Legal Studies*, no. 19, p. 19

⁷ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', To the European Commission Contract, no. 96, 2011, p.8

⁸ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.9

⁹ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.17

¹⁰ Ibid

At this moment, the EU represents a territory of 28 Member States.¹¹ Every Member State has its own industrial system characterized by a unique set of labour legislation and social policies. Those national social models are the outcome of historically and culturally rooted processes¹², and while they may share some common values, they have developed a wide variety of wage levels and working conditions. By taking the cross-national differences between Member States concerning labour legislation, and thus labour costs, and the free provision of services into account, certain conflicts might occur in case countries with high labour costs receive posted workers from countries with relative low labour costs. One might argue that posting under the labour costs driven model is more sensitive to social dumping as a poor protection of the posted workers may affect the competitive position of the foreign service provider positively in terms of labour costs.

In the lack of any legislation in force to solve those conflict-of-laws, this situation might result in a downward spiral of wage and labour cost competition which might have a negative impact on the labour conditions and wage-setting regimes of workers in the receiving countries, generally the “older” Member States.¹³ At the same time, research indicates that the sending countries (with lower labour costs) are likely to benefit from the outflow of labour in terms of a decrease of unemployment and an increase in wages.¹⁴

3. The EU legal framework on posting

The current discussion about the revision of the PWD illustrates the conflicting stakes between the free provision of services on the one hand and the protection of workers’ rights within a climate of fair competition on the other hand as the imposition of domestic labour standards on foreign service providers touches upon a sensitive area as it restricts (indirectly) the free provision of services.¹⁵ The aim of this section is to explore the legal framework on posting at the EU level from three angles: social security law, tax law, and labour law.

¹¹ When the PWD was introduced, there were only 15 Member States. As argued in 2.2.2, with the enlargement of the EU, differences among systems of industrial relations have grown as well.

¹² Roger Blanpain, *European labour law*, Kluwer law international, 2008, p.208

¹³ See Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004; Jan Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (CLR/International Books 2011); Nathan Lilie and Ines Wagner, ‘Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building’, in Jan Drahoukoupil (ed), *The outsourcing challenge: organizing workers across fragmented production networks*, Etui, 2015; Rebecca Zahn, ‘Revision of the posted workers directive: a Europeanisation perspective’, *Cambridge Yearbook of European Legal Studies*, no. 19

¹⁴ Anzelika Zaiceva, ‘Post-enlargement emigration and new EU members’ labor markets’, *IZA World of Labor*, p. 1

¹⁵ See for instance the judgement of the Court of 25 July 1991, *Säger*, C-76/90: a restriction of the free provision of services has to *be justified by overriding reasons of public interest*, the restriction has to be *non-discriminatory* to nationals and non-nationals, the restriction has to be *objectively necessary*, and the restriction must *not go beyond what necessary* in order to attain the objective.

3.1 Posting and Social security law

Already in 1971, before the adoption of the PWD, the concept of posting was introduced in Regulation 1408/71 (now Regulation 883/2004) on the coordination of social security in the case of free movement of persons.¹⁶ Based on the principle of equal treatment, the starting point of the Coordination Regulation is the *lex loci laboris* principle: workers are subject to the social security system where the work is performed.¹⁷ An exception is made for European workers being subject to posting¹⁸ for a period of less than 24 months. Those workers remain subject to the social security system of the Sending State.¹⁹ The employer who posts the workers to the territory of another Member State, has to carry out its activities normally in the Sending State. Article 14 (2) of the Implementation Regulation 987/2009 describes in more detail that the employer has to perform substantial activities, other than purely internal management activities, in the Member State in which it is established. As a consequence, the legislation of the Member State of establishment is not automatically applicable to the posted workers. Therefore, businesses cannot establish themselves in low tax jurisdictions, while performing substantial activities in the territory of another Member State by structurally ‘sending’ workers from the low social security cost jurisdiction to the high social security jurisdiction.

3.2 Posting and Tax law

With the establishment of the European Single Market, taxation has remained almost utterly within the sovereignty of the Member States²⁰, meaning that each country is entitled to determine the connecting factor arising tax liability within its jurisdiction. In this terms, in order to achieve a coordination of tax law regarding cross-border situations, it has been of utmost importance to rely on the agreement of bilateral tax treaties²¹, which are meant to avoid double taxation and double non-taxation. Within the EU, most of those bilateral tax treaties are based on the OECD Model Tax Convention.²² Similar to the *lex loci laboris* principle, as starting point, with respect to cross-border situations, the wage is taxed in the Country where the employment is exercised. However, the wage remains subject to taxation in the Contracting State (the Sending State) under two conditions. When the employee is present in the Host State for no longer than

¹⁶ Regulation (EC) No 883/2004, preamble 1

¹⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 11

¹⁸ A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf.

¹⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 12 (1)

²⁰ Only Value Added Tax is harmonized at the EU level. For more information see Laurence Gormley, *EU taxation Law*, Oxford University Press ed. 2, 2018

²¹ Frederic de Wispelaere and Jozef Pacolet, ‘Posting of workers: the impact of social security coordination and income taxation law on welfare states.’, 2015, p. 4

²² Ibid

183 days in 12 months, and the employer has no physical presence²³ in the country where the employment is exercised.²⁴ For instance, a worker being posted from Poland to the Netherlands, is subject to taxation in Poland with respect to his wage received during the period of posting under condition that he resides no longer than 183 days in the Netherlands and his employer has no physical presence in the Dutch territory. As argued by De Wispelaere and Pacolet it is quite remarkable that under tax law, posted workers remain subject to the Sending State for the first 183 days, while for social security law, the posted workers remain subject to the Sending State for a period of 24 months, while both taxes are considered as labour taxes.²⁵

3.3 Posting and Labour Law

Before the enactment of the PWD, there were no provisions at the EU level on the application of the labour provisions of the Host State in case of posting.²⁶ In practice, with respect to the posting of workers, several Member States deviated from the *lex loci laboris* principle: incoming posted workers remained subject to the labour legislation of the Sending State during the period of posting.²⁷ However at the same time, as confirmed in the *Rush Portuguesa* case²⁸, and then formalized by the introduction of the PWD, Host Member States are able to impose (higher) labour conditions to posted workers.

3.3.1 Posted Workers Directive

The legal foundation of the PWD can be found within article 53 (1) and 62 TFEU on the free movement of services, and not on the Treaty Title on EU social policies. As described in the recital, the PWD has the aim to promote the '*transnational provision of services*' in a '*climate of fair competition*' by guaranteeing '*respect for the rights of workers*'. In order to reach those objectives, a (partial) level playing field is created under the terms of the PWD,²⁹ and this has been attained by establishing a derogation to the free movement of services. More precisely, with the introduction of the PWD, service providers who post workers to perform temporary work in the territory of a Member State have the obligation to observe the nucleus of mandatory rules for minimum protection that apply in the Host Member State.³⁰

²³ The company is no resident and has no permanent establishment in the Host State

²⁴ OECD Model Tax Convention on Income and on Capital, art. 15 (2)

²⁵ Frederic de Wispelaere and Jozef Pacolet, 'Posting of workers: the impact of social security coordination and income taxation law on welfare states.', 2015, p. 4

²⁶ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.152

²⁷ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.150

²⁸ *Rush*, paragraph 18

²⁹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.12

³⁰ PWD, recital 13

Thus, the PWD applies the *lex loci laboris* principle to the position of the posted worker to a certain extent, namely with reference to the ‘hard core’ of terms and conditions of employment as listed in article 3 (1):

(a) *maximum work periods and minimum rest periods;*

(b) *minimum paid annual holidays;*

(c) *the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*

(d) *the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*

(e) *health, safety and hygiene at work;*

(f) *protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;*

(g) *equality of treatment between men and women and other provisions on non-discrimination.*

Those matters are to be covered by the Host State rules, when laid down by law, regulation or administrative provision, and/or collective agreements which have been declared universally applicable within the Host State.³¹ In some critical rulings, the CJEU interpreted the imposition of labour conditions beyond the minimal protection of the PWD, as non-compatible with the free provision of services.³²

The minimum rates of pay in the PWD

At this moment under the PWD, ‘it is legally unclear as to which components of the wage paid should be regarded as constituent elements of the minimum rate of pay in the host country’³³. This is quite worrying since both the employer, the foreign service provider, and the posted worker should be acquainted with the minimum rates of pay that applies within the Host State. The ambiguity about the concept of the ‘minimum rates of pay’ poses a two folded problem.³⁴ From the perspective of the Host State, it is important to determine the constituent elements of the minimum rates of pay.³⁵ Secondly, from the perspective of the foreign service provider, it is important to examine which components of the sum actually paid to the posted worker can be taken into account for the calculation of the minimum rates of pay of the Host Member State.³⁶

³¹ PWD, art. 3 (8)

³² See for instance the Judgement of the Court of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809 and the Judgement of the Court of 19 June 2008, *Commission v. Luxembourg*, C-319/06, EU:C:2008:350

³³ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.32

³⁴ European commission, 'Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors', *Contract No VC*, no. 36, 2015, p. 36

³⁵ *Ibid*

³⁶ *Ibid*

With the *Sähköalojen ammattiliitto ry* case, the CJEU came with a broad interpretation of the concept ‘minimum rates of pay’. Here the CJEU ruled that also posted workers are entitled to receive the gross wage as laid down in the detailed wage scheme or job ladder of the generally applicable collective agreement in the Host State. As argued by Houwerzijl and Van Hoek, in order to create a level playing field, the application of such an entire wage structure is of paramount importance.³⁷ Moreover, the CJEU ruled that the ‘*minimum rates of pay*’ includes a wide range of components, including a daily allowance and a compensation for overtime.

At the same time, it shall be borne in mind, that not every form of remuneration is considered as part of the minimum wage, as laid down in article 3 (7): ‘*allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging*’. For instance, costs for accommodation cannot be deducted from the minimum wage of the posted worker.

3.3.2 Revision of the PWD

Recently, the European Commission, under the impulse of President Juncker, proposed a revision of the PWD with the aim to make a step forward towards the creation of a level playing field with respect to the rights of the posted worker.³⁸ The proposal resulted in a clash between high-wage EU countries³⁹ and low-wage EU countries⁴⁰. On the one hand, high-wage EU countries are in favour of a widening of the scope and amendments of the PWD by applying the same local rules for remuneration to the posted workers rather than the ‘minimum rates of pay’, in order to minimize the downward pressure on national social policies and to ban abusive practices of posting at the costs of the social position of the posted worker.⁴¹ On the other hand, low-wage EU countries expressed their concern⁴² that the principle of ‘*the same pay for the same work at the same place*’ as part of the proposal is incompatible with the principles of the European single market since it will affect the competitive position of local service providers.

³⁷ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', To the European Commission Contract, no. 96, 2011, p.19

³⁸ COM (2016) 128

³⁹ Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden

⁴⁰ Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania

⁴¹ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.63

⁴² Ten Member States from Central and Eastern Europe and Denmark made use of the Subsidiarity Control mechanism by triggering the yellow-card procedure, see <http://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/>

In its proposal, the Commission emphasises that the revision of the PWD has to be seen as complementary to the ED.⁴³ The proposal of the PWD is quite revolutionary since it deviates from the principle of minimum protection, which is currently established in the PWD and case law, by replacing the reference to ‘*minimum rates of pay*’ by a reference to ‘*remuneration*’.⁴⁴ Another proposed change deals with the maximum period of posting, turning it into a limited period of 12 months.⁴⁵ This period can be extended with 6 months on the basis of a motivated notification of the service provider in question.⁴⁶

With respect to the concept of remuneration, a reflection of the case law on the *Sähköalojen ammattiliitto ry* is clearly visible in the amendments to the PWD.⁴⁷ This can be confirmed by the proposal itself which states that ‘*the concept of ‘remuneration’ should include, but should not be limited to, all the elements of minimum rates of pay developed by the Court of Justice of the European Union*’⁴⁸. By taking this into account, one might question whether the nature of the revision is substantial or rather symbolic. At the same time, it is fair to argue that the EU legislator seems to abandon the stigma in favour of the free provision of services by removing the barriers for Host States to protect posted workers beyond the minimum rates of pay.

As underlined by the European Trade Union Confederation (ETUC), the scope of protection of the PWD remains limited to national legislation and generally applicable collective agreements.⁴⁹ As a consequence, collective agreements at the company level are still not covered by the revised PWD.⁵⁰

4. Level playing field

The concept of level playing field is frequently used within the debate on the revision of the PWD. It indicates that both foreign and local competitors are subject to the same set of rules. The exploitation of differences between national and sectoral labour market regulations, within the limits of the EU framework

⁴³ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 COM(2016) 55 final, p. 3

⁴⁴ Ibid, p. 8

⁴⁵ European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, recital 8

⁴⁶ Ibid

⁴⁷ Rebecca Zahn, ‘Revision of the posted workers directive: a Europeanisation perspective’, *Cambridge Yearbook of European Legal Studies*, no. 19, p. 17

⁴⁸ European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, recital 12a

⁴⁹ European Trade Union Confederation, Posted workers revision – equal pay for some [online] Available at <https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some#.WodSloPwbRZc>

⁵⁰ Ibid

on posting, have been referred to as ‘strategic posting’⁵¹ or ‘regime shopping’⁵². Despite the application of the nucleus of terms and conditions as laid down within the PWD, the legal framework on posting has been abused as a manner to recruit ‘cheap’ labour within the EU.⁵³ This section will explore whether a foreign service provider can have an (indirect) competitive advantage against the local service provider based on three main elements: taxation, social security, and the gross wage itself under the current legislation.⁵⁴

4.1 Gross wage

With respect to the gross wage of the worker during the period of posting, a distinction must be made between the situation where the worker is covered by a generally applicable collective agreement or not. In case of the former, based on a detailed wage scheme, the posted worker will be entitled to the same wage as local workers who are covered by the same collective agreement under the current legislation.

In contrast, in absence of a generally applicable collective agreement, the posted worker will be entitled to receive the statutory minimum wage of the Host State rather than the same wage. As a consequence, the wage gap between a local and a posted worker can rise to a high amount as the statutory wage is significant lower than the average wage in most sectors. This effect has been reinforced by the last two enlargements of the EU, since they brought even greater differences in the field of wages and employment (also in consideration in the differences in the industrial relations systems) between Western Member States on the one hand, and Eastern Member States on the other hand.⁵⁵

4.2 Taxation

As described before, based on most bilateral tax treaties, the competence to levy personal income tax stays with the sending country for the first 183 days of posting and only then moves to the receiving country. Every jurisdiction has its own tax system and therefore, different personal income tax rates. As a consequence, workers might pay more personal income tax in one State than in another. De Wispelaere and Pacolet state that the differences of personal income tax rates between the sending and the receiving Member States, constitute a financial incentive for posted workers as they retain a larger part of their gross

⁵¹ Magdalena Bernaciak, *Market expansion and social dumping in Europe*, Routledge, 2015,

⁵² Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.30

⁵³ See for instance: Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal*, no. 38(6), 2007; Jens Arnholtz and Nana Wesley Hansen, 'Labour market specific institutions and the working conditions of labour migrants: The case of Polish migrant labour in the Danish labour market.', *Economic and Industrial Democracy*, no. 34(3), 2013, p. 401-422; Torben Krings, 'A race to the bottom? Trade unions, EU enlargement and the free movement of labour', *European Journal of Industrial Relations*, no. 15(1), 2009, p 49-69

⁵⁴ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 38

⁵⁵ Guglielmo Meardi and others, 'Constructing uncertainty: Unions and migrant labour in construction in Spain and the UK', *Journal of Industrial Relations*, no. 54(1), 2012, p. 9

wage than the local workers.⁵⁶ Indirectly, this might affect the position of the foreign service providers as well.

4.3 Social Security

As for social security, posted workers remain subject to the social security system of the Sending State.⁵⁷ The different rates of social security contributions from the perspective of the employer may imply that posted workers are less costly than local workers in case they are posted from jurisdictions with lower social security costs.⁵⁸

4.4 Conclusion

As starting point, for the creation of a level playing field in terms of labour costs, it is of utmost relevance that the posted worker is covered by a generally applicable collective agreement. Under the current legislation, based on a detailed wage scale in the collective agreements, posted workers are entitled to receive the same gross wage as local workers. As a consequence, the wage gap between local and foreign service provider in terms of the gross wage is minimal.

However, in case the posted worker is not covered by a generally applicable agreement, and thus has to rely on the statutory minimum wage of the Host State, a wage gap arises between a local service provider which applies the average wage and a foreign service provider which applies the statutory minimum wage. This situation is not likely to change, as also the revision of the PWD establishes a protection based on legislation and/or a generally applicable collective agreements. As a consequence, also under the revised PWD, generally applicable collective agreements are vital for the creation of a level playing field.

Nevertheless, despite the fact that both local and posted workers are entitled to receive the same gross wage when covered by a generally applicable agreement, it was found that foreign service providers are likely to have a competitive advantage based on the amount of social security contributions and taxation. Within the current legal posting framework, it is feasible for companies to gain a competitive advantage by strategic posting workers from States with relative low social security rates to the territory of States with relatively high social security rates. In a similar vein, personal income tax rates vary from State to State.

Revision of the PWD

⁵⁶ Frederic de Wispelaere and Jozef Pacolet, 'Posting of workers: the impact of social security coordination and income taxation law on welfare states.', 2015, p. 6

⁵⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 12 (1)

⁵⁸ Mijke Houwerzjl, Regime shopping across (blurring) boundaries, *Regulating transnational labour in Europe: the quandaries of multilevel governance*, 2014, p. 5

This raises the question whether the proposed revision of the PWD offers a solution for this imbalance. The answer appears to be negative, since the two elements behind unfair competition, social security contributions and personal income taxation, fall outside the scope of the (revised) PWD. The revised PWD focuses rather on the remuneration or the gross wage of the posted worker. However, as found in the analysis above, posted workers being covered by a sectoral collective agreement in the Host State, are already entitled to receive the same gross wage as local workers for the same work in line with a detailed wage scale.

At the same time, even if a perfect level playing field is not achieved, in order to minimize the disruptive effect of regulatory competition, Member States shall work altogether on matters dealing with enforcement and monitoring. Regarding social dumping, some scholars are concerned about the fact that the extension of protection of a posted worker, as part of the revision of the PWD, might result in a shift to the posting of (bogus) self-employed persons since they are not covered by the protection of the PWD.⁵⁹ Abusive practices such as the use of bogus self-employed workers highlight the need for adequate monitoring and enforcement. Recently, the ED has been introduced in order to improve the monitoring and enforcement of the PWD. As at this moment, no full level playing field is reached under the PWD and the proposed revision, unfair competition can be minimized by strong generally applicable collective agreements and adequate monitoring and enforcement.

5. Conclusion

Nowadays, the concept of posting of workers within the European Single Market is subject to a heated debate, between Western EU Member States who advocate the revision of the current EU rules, on the one hand, and Central and Eastern EU Member States who are strongly against a revision of the current rules on posting, on the other. This study found that within the current rules on posting, during the period of posting, foreign workers are entitled to receive the same gross wage as local workers when being covered by a generally collective agreement.

Nevertheless, it was found that foreign service providers are likely to have a competitive advantage, directly and indirectly, based on differences in the amount of social security contributions and personal income taxes. Therefore, at this moment, there seems to be no full level playing field between local and foreign service providers. The proposed revision of the PWD is not going to improve this situation since both

⁵⁹ European Commission, Impact assessment, Proposal for amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 2016, p. 43

taxation and social security are excluded from its scope. In order to minimize social dumping under terms of posting, Member States should focus on adequate monitoring tools and effective enforcement mechanisms with respect to the labour conditions of posted workers. In order to reach this goal, the EU should focus on coordination and cooperation among Member States.