The Transnational Supply of Workforce within the European Union
Issues of equal treatment for migrant workers

Salomè Archain, 2017

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Introduction

The present dissertation aims at analysing the current situation of transnational supply of manpower within the European Union and its expected evolution, while awaiting the approval of the 2016 Targeted Revision of the rules on the posting of workers.

The European normative framework, based upon Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and Directive 2014/67/EU (the so-called "Enforcement Directive"), will be considered to comprehend consequences and challenges of the cross-border migrant workers' regulation.

Since 1996, the economic and labour market situation in the European Union has changed considerably. In the last two decades, the Single Market has grown and wage differences have increased, thereby creating unwanted incentives to use posting as a mean to exploit these differences. Indeed, the legislative framework put in place by the 1996 Directive excluded any interference with the principles regulating employees' social security contributions, which shall continue to be paid within the country which they came from for the duration of their posting abroad and posting companies were asked to comply only with the minimum rates of pay of the host Member State. This situation stimulated business and jobs based upon illegal posting or, in the best-case scenario, increased the number of companies using labour costs differences between posted and local workers - even when complying with the requirement of payment of the minimum rates of pay applicable to workers in the host Member State as required by the Posted Workers Directive - to help increase their profits.

The outcome of this course is that posted workers today, as stated by the Commission in the 2016 Commission Work Programme, are reported to earn up to 50% less than local workers in the most affected sectors, such as in the construction, the meat industry, the agricultural and the transport sector.

These cases of social dumping are intrinsically connected with workers' exploitation, because in most cases of illegal practices, posted workers are marginalised in the foreign country and due to the risk to be sanctioned or dismissed by their employers, these workers have often no recourse to protect their rights and address their complaints. Further, even if the administrative cooperation and mutual assistance system enhanced by the 2014 Enforcement Directive is now producing its first positive effects, the control over the payment of social security contributions and taxes in the host country is still an issue of debate between Member States, to ensure the correct implementation of, and to monitor compliance with, the substantive rules on terms and conditions of employment to be respected with regards to posted workers.

Significant wage differences distort the level-playing field between companies, thus undermining the smooth functioning of the Single Market. Posted workers, who are looking for a job, are confronted with their ruthless exploitation and national social security protection schemes are undermined and circumvented. Updating the rules on posting of workers to current economic and social conditions is therefore necessary both from an economic and social point of view.

The first chapter will focus upon origins and downfalls of Intra-EU mobility, giving some historical background and perspective within the European 2020 Strategy. The achievement of fundamental labour and social rights - and the construction of Social Europe itself - will be analysed based on European legislation and the case law of the European Court of Justice.

In the central part of the chapter the interaction between free movement of services and free movement of workers' provisions will be further deepened. Under Treaty provisions on free

movement of services, businesses can move cross-border with their workforce or, in case of temporary work agencies, post their workers as the main aspect of their service activity, to carry out projects. Those workers who move cross-border with their employers - or are sent to another country to provide an employment activity - are called “posted workers”, emphasising that their base remains that of the state they have come from (the so-called home state) rather than the state where they are carrying out the activity (the host state). This situation raises a choice as to which employment and social security standards should be applied to posted workers: if those of the home state or those of the host state, or a combination of the two. The growing legal and societal debate is about finding, on one hand, a balance increasing the possibilities of undertakings to provide services in other Member States, which means Europe’s free internal market and its free competition standards and social protection of workers, that excludes social dumping, on the other hand.

In the last part of the chapter, consequences of enlargement of the European Union, access process and transitional measures, such as restrictions on the free movement of workers coming from new EU Member countries, will be examined considering the impact of labour migration from the new to the older Member States.

The second chapter will pay exclusive attention to labour market flexibility and atypical work, with a close examination of Directive 97/81/EC on part time work, Directive 99/70/EC on fixed term work and Directive 2008/104/EC on temporary agency work.

The second part of the chapter will then consider Directive 96/71/EC on posting of workers which applies to undertakings, established in a Member State, which post workers for a limited period (Article 2 para. 1) in the framework of transnational services to the territory of a Member State (Article 1 para. 1) other than the Member State in which the worker works normally.

The Directive covers employees being sent to another Member State in three situations:

- When an employer posts a worker to another Member States on his own account and under his direction, under a contract which the employer has concluded with the party in the State for whom the services are intended (subcontracting of workers);
- When an employer posts a worker to an establishment or to an undertaking owned by the group in the territory of a Member State (intra-company or intra- group secondments);
- When the employer, being a temporary employment undertaking or placement agency, hires out a worker to a user undertaking established or operating in another Member State, if there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting (temporary work for a user).

Even though the fifth paragraph of the Directive’s preamble, as above mentioned, states that “promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers”, it will be underlined how its primary objective was not to protect workers, but rather to enhance the freedom to provide services.

The last part of the chapter will focus on the summary of the proposed and discussed new provisions of the 2016 Targeted Revision project of the Posted Workers Directive.

In the third chapter, it will be considered the specific situation of posting throughout temporary work agencies. The relation between the Temporary Agency Work Directive and the Posting of Workers Directive represents a particularly delicate issue, because of the problems related both to the triangular relation in every posting situations between sending undertakings, hosting undertakings and posted workers and additionally, the peculiar triangular employment relationship between temporary agencies, users undertakings and temporary agency workers. The two Directives

have different legal bases, for the Posted Workers Directive the legal basis is represented by the provisions on the freedom to provide services while the Temporary Agency Work Directive was adopted in the framework of the provisions on the free movement of workers. In this sense, even in cases of cross-border services, principles and conditions referred to in the Temporary Agency Work Directive - especially the principle of equal treatment between national and posted workers - should apply, without altering the scope of, or the possibilities for exemptions from, the Directive on the posting of workers. However, in the absence of any obligation stated by law, Member States interpreted the principle of equal treatment narrowly, as including only those minimum standards established by Directive 96/71/EC and characterised by several misleading definitions such as that of which components of pay shall be included within the term "minimum rates of pay" and so on. The Temporary Agency Work Directive will be analysed with regards to the implementation process and to the ambiguity of some of the main notions used in the text. Specifically, different kinds of relationships and employment contracts commonly stipulated between temporary workers, agencies and user undertakings, will be considered. Attention will be given to the limits of application of the principle of equal treatment as regards basic employment conditions between nationals and posted temporary workers.

Eventually, the Italian normative framework on temporary agency work will be analysed within the European scenario.

In the fourth chapter, a case study on illegal posting by temporary work agencies will be carried out, thanks to accurate and detailed information given by academics, Labour Inspectors and Cgil representatives, to whom I am sincerely grateful[1].

The presentation of fieldwork's results, will underline different levels of European and national law infringements, from small irregularities to severe labour exploitation. First will be considered cases of illegal posting based on legal uncertainties and restrictive interpretation of the Directives' provisions. Later, cases of illegal posting seriously in breach of EU laws will be examined and compared, for their gravity, to other national and European cases of severe workers' exploitation.

In the last part of the chapter it will be proposed to increase public attention and monitoring actions to combat all forms and levels - not only situations of slavery or abuses connected to trafficking, but also when fair and just conditions are at stake - of severe labour exploitation. Within the Italian criminal law provisions on illegal intermediary activities and exploitation of workers, as recently amended by Law 199/2016, it will be considered the application of this normative framework to cases of illegal posting by temporary work agencies to give proper formal protection to foreign workers.

[1] Thanks to all Filt-Cgil and Flai-Cgil representatives for the information given during my field research on current issues related to temporary posted workers in Italy and particularly, to Giovanni Mininni, Rodolfo Giorgetti and Professor Giovanni Orlandini for valuable contacts who allowed further detailed studies and because of their opinions given on my thesis.

Chapter I
The coexistence of economic and social rights within the European Union

> "It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions hardened, and hard ones became fluid. The mythology may change back into a state of flux; the riverbed of thoughts may shift"[2].

Wittgenstein's riverbed metaphor shall be regarded as a useful thought to be kept in mind while describing the changing role - and language[3] - of social rights and labour law in relation to the construction of the Common Market, and particularly in connection with economic freedoms. The complexity of this dynamic relationship will be considered from the origins of the European Union project, to the most recent steps forward a more uniform convergence between the free movement of services and the protection of workers' rights, when considering the increasing recourse to posting activities and transnational supply of workforce.

1. A legal-historical overview

The European Community's original aim, as enshrined in the founding Treaties of 1951 and 1957 - the Treaty of Paris establishing the European Coal and Steel Community and the Treaty of Rome which created the European Economic Community -, was to bring about an economic and institutional order able to prevent future war, from the immediate post-Second World War period onwards, by integrating its members. In the same period, throughout the founding countries of the ECSC and the EEC, social and welfare policies became the pillars on which relied the reassertion of the nation-state as the "basic unit of political organisation"[4]. Leaving to academic experts the in-depth analysis of the historical and political reasons behind the Common Market's social and economic foundations, it may indeed be underlined how:

> In welfare-state mass democracies, highly productive capitalist economies were socially domesticated for the first time, and were thus brought more or less in line with the normative self-understanding of democratic constitutional states[5].

This aspect of post-war European constitutionalism was accompanied by the opening-up of national economies to free trade. So, it has been affirmed, that the same creation of the European Economic Community reflected a national compromise between the need to extend the state's capacity for economic and social intervention and the rapid expansion of intra-Community trade[6].

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[2] Wittgenstein, L., *On Certainty*, ed. Anscombe, G.E.M. and von Wright, G.H., Oxford 1969-1975, para. 96-99.

[3] See Giubboni, S., *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge Studies in European Law and Policy, 2006, p.2, on which the above statement is based.

[4] Milward, A.S., *L'Europa in formazione*, in Anderson et al. (eds), *Storia d'Europa*, vol. I, p.163, Einaudi, 1993.

[5] Habermas, J., *The Postnational Constellation*, Political Essays, Cambridge, 2001, p. 48.

[6] Giubboni, S., *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge Studies in European Law and Policy, 2006, p. 14-15, on the description of the post-war institutional compromise of embedded liberalism.

The idea of embedded liberalism, or Keynesian compromise, as capable to enact a "spontaneous and progressive harmonisation of national social systems" and strengthen the Member States' powers of economic intervention, by opening-up and integrate the countries' economies, showed its limits during the economic and political environment changes of the 1970s. One of the results of this complex process of "constitutional metamorphosis"[7] can be identified in the relaunching of economic integration between member countries around the programme for the single large market, based on the absence of internal frontiers, as confirmed by the ratification of the Single European Act of 1986. Further, with the Maastricht Treaty of 1992, it was established the creation of economic and monetary union.

The outcome of this process, from the original constitutional balance to the new Single Market's project, can be seen in the direct and explicit constraints of transnational economy, that prevail over national sovereignty in social policy[8], without being replaced by functions of positive integration at supranational governance level. According to academic observers, the cause of this dangerous gap between negative and positive integration is due to the absence, reinforced after the crisis of the 1970s, of a counterbalance to the unconditional principle of an open economy and a free competitive market in the shape of "the principle of the welfare state or at least of labour protection"[9]. From this viewpoint, the Treaty of Amsterdam - amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 1997 - attempted to find a new balance between the laws of the economy and social policies, even including a new Title on Employment, with the new strategy of supranational coordination of national employment policies. The Treaty of Nice, which entered into force in 2003, consolidated this social *acquis* which was confirmed as being the most solid basis for legitimation of the Community action with the Charter of Fundamental Rights of the European Union, proclaimed in 2000 and which has become legally binding with the entry into force of the Treaty of Lisbon, in December 2009.

The shift towards a more proactive internal market policy, as envisaged by the Commission in the Single Market Review Package released in 2007 and as provided by the Lisbon Reform Treaty, has further accentuated the need for a European social dimension capable of including labour law and social rights' protection under its policy program. In this scenario, the failure of the unratified Treaty establishing a Constitution for Europe (TCE), signed in 2004, leaved largely avoided the question on the affirmation of a discourse on fundamental social rights in the European Union.

1.1 European integration in the European 2020 strategy

Considering the most recent steps forward taken with the project for a new balance between social policies and the laws of the economy at supranational level, it is essential to identify challenges and promising aspects of the European Union's future scenario.

In their statement of objectives to achieve by 2020 (the so-called Europe 2020 Strategy), the institutions of the European Union pointed at the need for Europe to act "collectively, as a Union",

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[7] See ibid Giubboni, p. 24.

[8] Scharpf, F.W., *Governing in Europe. Effective and Democratic?*, Oxford, 1999, pp. 28 and 47 ff.

[9] D'Antona, M., *Armonizzazione del diritto del lavoro e federalismo dell'Unione europea*, Rivista Trimestrale di Diritto e Procedura Civile, 1994, p. 704 (now also in D'Antona, *Opere*, vol. I, *Scritti sul metodo e sulla evoluzione del diritto del lavoro. Scritti sul diritto del lavoro comparato e comunitario*, eds. Caruso, B. and Sciarra, S., Milan, 2000, pp. 325 ff.).

in order to achieve high levels of employment, productivity and social cohesion[10]. Future strategic planning policies can be seen as a noticeable source capable of underline the direction chosen for common efforts at the European level, within a scenario of economic governance reforms and austerity measures which has been taken by Member States in the aftermath of the 2008 financial crisis. Studies and reports on strategic planning and effective policies, further help awareness on the ongoing problems in need for attention, both related to supranational policies' implementation in national frameworks as to the impacts on Member States' social and economic systems.

The European Union's ten-year jobs and growth strategy was launched in 2010 to create conditions for "smart, sustainable and inclusive growth". After the first years of implementation of the Strategy plan, halfway to its 2020 horizon, the Commission launched a public consultation to the state of delivery on the strategy's objectives so far. Based on the contributions received, the Commission identified a summary of strengths, weaknesses, opportunities and threats for the Europe 2020 strategy. This summary should be studied because of the essential information provided on the current picture of European policies' development. The Commission's statements could be the starting point for a further closer analysis on the critical aspects of this process. Indeed, the general outcome was that the European Union is "far from reaching the targets on employment, research and development and poverty reduction"[11].

For this purpose, European institutions proposed a governance and policy programme renewed in guideline 7 of the 2015's public consultation. They encouraged Member States to reduce labour market segmentation, enhancing the functioning of labour markets. It is stated that employment protection rules and institutions should provide a suitable environment for recruitment while offering adequate levels of protection to those in employment and those seeking employment or employed on temporary contracts or independent work contracts. Quality employment should be ensured in terms of socio-economic security, education and training opportunities, working conditions (including health and safety) and work-life balance. And further the Commission highlighted that "mobility of workers should be ensured with an aim of exploiting the full potential of the European labour market and at the same time by guarding against abuses of the existing rules".

To ensure that, Europe 2020 strategy delivers a strong and effective system of economic governance which has been set up to coordinate policy actions between the EU and national levels. The institutions of the European Union, while working to move beyond the crisis and create conditions for an economy with higher levels of employment, seek to put flesh on the bones of the new Article 3 of the Treaty on the European Union which states the aims of European integration (as introduced by the Lisbon Treaty).

To understand the mandate and legal framework for European Union intervention to that effect, it should be noted that EU law is a remarkably dynamic and powerful device[12]. It is animated by the *effet utile* principle: the Treaty on the European Union (hereinafter referred to as TEU) and the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) set out policy objectives conferred upon the Union by its Member States; an institutional machinery then gives

[10] European Commission, 'A strategy for smart, sustainable and inclusive growth' (COM(2010)2020 final), 5.

[11] 2015 Commission proposal for new guidelines for the employment policies of the Member States-Memorandum (COM(2015) 98 final).

[12] Muir E., *EU Regulation of Access to Labour Markets*, Wolters Kluwer, 2012, p. 1-13.

effect to these objectives through a variety of legal mechanisms interpreted in a very purposive way. EU law is thus a functional system of norms[13] that prevails over domestic legal instruments.

The central legal tools regulating the interaction between EU and national legal orders are the principles set out in Article 5 TEU: attributed competences, subsidiarity and proportionality. After the entry into force of the Lisbon Treaty, Articles 2 to 6 TFEU provided an indicative competence catalogue that, together with the legal bases in the Treaty itself and relevant case-law of the European Court of Justice, give guidance on the objectives pursued by EU intervention. Although crucial, the toolbox contained in these Articles is limited. European competences are thus certainly specified, but the "whole pattern is utterly unsystematic"[14]. The actual interaction between EU and domestic legal orders is thus also to be found in the detailed application of EU substantive law, on the analysis of the constitutional implications of the exercise by the EU of its competences through an enquiry. Grasping the nature of EU competence and its effect on State competence demands analysis of a complex normative construction composed by Treaty provisions, secondary legislation and judicial interpretation[15].

While these characteristics warrant great political as well as academic attention for the opportunities that they present, they also warrant attention for the conflicts that are created between EU and domestic legal orders. This system of EU constraints is indeed *ab initio* unbalanced: some competences are attributed to the EU, but domestic authorities are entrusted by their own constitutions with the task of regulating the economic and social life of their citizens well beyond the specific competences attributed to the EU. The four freedoms, pillars of the internal market, consist of broad principles and narrow exceptions, so that Member States' legislation and administrative measures need - when limiting those kind of freedoms - to be justified, necessary and proportionate.

The European Union can be deeply unsettling for national legal orders and policy makers requested to accommodate the primacy of EU law within the exercise of the competences they retain. By giving prevalence to a set of specific policy objectives, EU law creates certain imbalances in domestic policies designed to address broad socio-economic connections. It is, for example, often feared that the EU prohibition of obstacles to the free movement of persons in the internal market threatens domestic social systems[16]. Nevertheless, looking at European integration as the core pillar of the European process, the concept of Europe as a community shall be also applied to the provisions on the free movement of workers and further, on workers' fundamental rights. In this field, Joseph H.H. Weiler argued that the Treaty provisions:

> On the one hand they have a de-humanizing element in treating workers as 'factors of production' on par with goods, services and capital. But they are also part of a matrix which prohibits, for example, discrimination on grounds of nationality, and encourages generally a rich network of transnational social transactions. They may thus also be seen as intended not simply to create the optimal conditions for the free movement of factors of production in the Common Market. They also serve, echoing Hermann

[13] Weiler J.H.H., *The Constitution of Europe*, Cambridge University Press, 1999, pp. 60 and 41-44.

[14] Weatherill, S., *Competence Creep and Competence Control*, Yearbook of European Law, 2004, p. 2-5.

[15] See ibid.

[16] Muir E., *EU Regulation of Access to Labour Markets*, Wolters Kluwer, 2012, p. (2-5).

> Cohen, to remove nationality and state affiliation of the individual, so divisive in the past, as the principal referent for transnational human intercourse[17].

The spirit behind this analysis should be reminded while discussing upon Europe integration. Indeed, this is even more outstanding inside the field of labour law policies where the strain to achieve the objectives of Europe's 2020 strategy has already shown its limits for the accomplishment of EU markets' integration. Intra-EU mobility of job seekers and posted workers appears to be seen by national governments as the biggest menace because of its impact on social and economic systems. In connection with the ongoing process of enlargement of the European Union, precisely because of the 2004 and 2007 enlargements and, more recently, with the lifting in 2014 of the last transitional restrictions on free movement of Eastern European new Member States, the number of European citizens entitled of the four freedoms rights has consequently increased and the process towards integration finds more challenges on its way.

2. The interaction between fundamental freedoms

The Four Freedoms - free movement of goods, persons, services and capital - are cornerstones and fundamental elements of the European Union. Therefore, considering the current growing number of "European citizens", these are presumably key elements of assessment and evaluation of new EU countries issuing for membership within the perspective of achieving the aims of the Union.

The issue of Intra-EU mobility, particularly for the mobility of new EU citizens, has thus become heavily politicised. Indeed, there is still the fear that with a large number of new states - predominantly from Central and Eastern Europe joining the European Union - there will be an increasing number of workers moving to Western Europe and successfully competing with Western European workers through lower labour costs.

Negative portrayals of internal migrants, whether EU citizens or third country nationals, in terms of economic and social costs are more and more prevalent in the media and have also been widely used in national and European electoral campaigns[18].

It is not the first time that this kind of reactions turned up. Even during the Third enlargement of 1986, when Spain and Portugal acceded to the European Economic Community, the accession process was length and difficult.

The *acquis* under Chapter 2 of the 'Conditions for membership' provides that EU citizens of one Member State have the right to work in another Member State. European Union migrant workers must be treated in the same way as national workers in relation to working conditions, social and tax advantages. This *acquis* also includes a mechanism to coordinate national social security provisions for insured persons and their family members moving to another Member State.

The idea of an enlargement of EU membership followed by an enlargement of persons entitled of the rights guaranteed by the European Union, was at once connected with the idea of Intra-EU mobility as related to the creation of inequalities. The comparison of different domestic legal orders, particularly in the case of labour and employment law, as of social security systems' regulation, it

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[17] Weiler, J.H.H., *Thou shall not oppress a stranger: on the judicial protection of the Human rights of non-EC nationals-a critique*, European Journal of International Law 3, 1992, p. 68.

[18] HORIZON 2020, *Work Programme 2016-2017, Europe in a changing world-inclusive, innovative and reflective Societies*, European Commission, p. 37-38.

always required special consideration in balancing the free movement with the States' own welfare system and the tension between economic and social rights.

Even being aware of the great differences in domestic legal orders, the fundamental objective of creation of the single market limited the possibilities of the introduction of a pre-accession requirement to fulfil EU Social Rights standards, before entering the European Union. However, on 9 September 2015 President Juncker in his State of the Union[19] indicated in his speech that:

> We have to step up the work for a fair and truly pan-European labour market. (...) As part of these efforts, I will want to develop a European Pillar of Social Rights, which takes account of the changing realities of Europe's societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area. The European Pillar of Social Rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU. I will expect social partners to play a central role in this process. I believe we do well to start with this initiative within the euro area, while allowing other EU Member States to join in if they want to do so.

Further in its Communication, the Commission underlined the importance of building the European Pillar of Social Rights on the common values and principles shared at national, European and international levels. Such values and principles, prominently described in reference documents such as the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights and the case-law of the European Court of Justice, as well as in international instruments such as the Social Charter adopted by the Council of Europe and recommendations from the ILO, shall have to be strengthen in their actual taken-up and implementation within the European Union.

New guidelines and principles will thus drive reforms at national level, within a framework of promised reform of the pillars of the European Union which is still in progress and which will affect the future interaction between social policies and laws of the economy at national and supranational level.

2.1 Origin and downfalls of intra-EU mobility

Facilitating cross-border workforce allocations within the European Union has been one of the cornerstones of the European project since 1957, but it is common knowledge that there was little or no 'Social Europe' to talk about at the time[20].

The Treaty of Rome itself, as above mentioned in the first paragraph, was oblivious in discussing either the need of, or the desirability of, any type of supranational social regulation and - apart from a timid 'equal pay for equal work' clause - it completely neglected to introduce any provision directing the EEC toward the creation of a common social policy[21].

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[19] See COM/2016/0127 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Launching a consultation on a European Pillar of Social Rights*, Strasbourg, 8 March 2016.

[20] See Sciarra S. (edited by), *Manuale di Diritto Sociale Europeo*, Giappichelli Editore-Torino, 2010; and See also Giubboni S., *Diritti e Solidarietà in Europa*, Il Mulino, 2012. On the evolution of European Social Law see as the most recent text Roccella M. And Treu T., *Diritto del Lavoro dell'Unione Europea*, CEDAM, 2016.

[21] Countouris N. And Freedland M., *Resocialising Europe in a time of crisis*, Cambridge, 2013.

In the aftermath of the Second World War, the main provisions of the European Economic Community Treaty (TEEC) relating to employment were intended to match better the labour supply and demand, owing to cross-border mobility. From the "common market" perspective, labour was treated as a factor of production.

As noted in the Spaak Report[22] "the spontaneous tendency to harmonisation of social systems and of the level of wages (...) will be favoured by the progressive creation of a common market"[23]. Free movement of workers in the Union was in that sense introduced to allow the movement of workers from States with high unemployment levels to those in need of labour. It was thought that EU workers' right to move freely within the European Union would thereby enable the necessary workforce movements between Member States and, ultimately, work for the greater well-being of European people. The application of these policies alone, it has been said before, did not produced the economic and social effects as wanted by the founding fathers.

It was in the year 1956 that the International Committee on European Integration first considered the creation of a common market as the driving force of all changes needed for harmonisation. It was in the year 2010 that the Mario Monti's Report on the re-launch of the Single Market used the same words while defining the economic crisis as enough of an argument to reinforce the Single Market. The creation of the internal market, based on the principles of free movement, took place in a situation where liberalisation and deregulation had become the leading ideology in many European countries.

The system's shortcomings in the predicted direction by the Spaak Report of spontaneous tendency to harmonisation, led to the beginning of a process of alienation and rejection of the market project itself. From the embers of the "Eurosclerosis" period of economic and political stagnation of the 1970s, the project of Completing the Internal Market between 1985 and 1994 was accompanied and compensated by the development and broadening of a European social dimension. In deepening the European Market project (exemplified by Delors' 1985 White Paper[24] and later by the 1992 Maastricht Treaty) was thus developed a set of European social policies, mostly in the form of European directives, providing for minimum standards, in a number of areas of labour regulation. The major principles on which the European labour law model is based were established by the, socially ambitious but not legally binding, 1989 Community Charter of the Fundamental Social Rights of Workers[25].

Paradoxically the appeal of the Social Europe promise has been such as to obfuscate the fact that during the 1990s the European free market project was prominently gained by the free-market, deregulatory and increasingly neo-liberal position and deprived by its social face. In addition to this overturn, "the leap forward in the social dimension" seemed to be stopped by those elements shown to be balanced with social rights in the Community Charter of 1989: "the Social Charter will show our political will to build a Social Europe, in accordance with the essential subsidiarity and also with variety"[26].

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[22] The report formed the cornerstone of the Intergovernmental Conference on Common Market and Euratom at Val Duchesse in 1956 and led to the signing, on 25 March 1957, of the Treaty of Rome establishing the EEC and the Euratom Treaty.

[23] Rapport des Chefs de Délégation aux Ministers des Affairs Etrangères, Brussels, 21 April 1956, p. 65.

[24] European Commission, *Completing the Internal Market*, COM (85) 310 final, 14 June 1985.

[25] The provisions of the Charter were kept by the Lisbon Treaty (Article 151 of the Treaty on the Functioning of the EU) and by the EU Charter of Fundamental Rights.

[26] Declaration made by President Delors on 8 December 1989 at the European Council of Strasbourg.

Building on the European Employment Strategy[27], the Member States were enticed into deregulating their labour laws and social security systems and introducing new forms of flexible labour contracts offering as a trade off the promise that by 2010 Europe was "to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"[28].

Although European integration was originally intended for the realisation of the Internal market, it has become accepted as inevitable a cohesion between economic and social integration. However, the question of how the balance between economic and social integration should exactly be considered and realised it was, and remains, a matter of debate.

Indeed, by 2010, the largely deregulated Europe was in the midst of its worst economic recession since 1929, with high levels of unemployment and in spite of its failure, the Lisbon Strategy was revived with the introduction of the essentially identical Europe 2020 Agenda[29].

The European labour law debate was and still is thus concerned with the social dimension of European integration and - in the present times characterised by globalisation, economic competitiveness agendas, financial market volatility and European labour market or welfare system reform - the debate on "Resocialising Europe" will only intensify[30].

Being aware that the need for employment policies and social protection can raise barriers that are sometimes perceived as obstacle to the goal of growth in a globalised economy, these policy issues are being included at the heart of the European integration debate. A "holistic vision of the market"[31] seems nowadays insufficient to overcome the economic crisis, if not accompanied by other factors.

The global transformation of the world as a space of competition between different legislations is creating an epistemological alteration either for judicial systems as for the rule of law and democracy. In relation to judicial systems, it is undermined the founding principle of any legal order (the localisation), that is the constituent nexus of the principle of "order and orientation" (*Ordnung und Ortung*)[32], which is itself the basis of the modern concept of nation-state and territorial inscription of the law[33]. The principle of the rule of law[34] is also affected by global changes, meaning that the freedom given to anyone to choose the most favourable legislation to be applied to its activity is an antinomic principle with that of the submission of all subjects to the law. Lastly, democracy is damaged because law shopping contrasts with the democratic principle, whose

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[27] See the very first 1998 Employment Guidelines.

[28] Presidency Conclusions, *Lisbon European Council*, 23 and 24 March 2000.

[29] Hyman R., *Trade Unions, Lisbon and Europe 2020: from Dream to Nightmare* (Leqs Paper 45/2011).

[30] Countouris N. and Freedland M., *Resocialising Europe in a time of crisis*, Cambridge, 2013, part 1(3).

[31] Sciarra, S., *L'Europa e il lavoro. Solidarietà e conflitto in tempo di crisi*, Laterza, 2013, p. IX (own translation).

[32] Schmitt, C., *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin, 1950, tr. Eng. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, Ulmen G. L., Telos Press, 2003.

[33] Perulli A., *Globalizzazione e dumping sociale: quali rimedi?*, Lavoro e Diritto (ISSN 1120-947X), fascicolo I, inverno 2011, tr. Eng. Revisited, p. 15.

[34] Santoro E., *Diritto e diritti: lo stato di diritto nell'era della globalizzazione*, Giappichelli Editore, 2008, pp. 26-45.

capacities of extension are mechanically reduced in countries where social, fiscal and environmental legislations are put into a global scale competition[35].

Trying not to enter in the complicated discussion on the international economic view of dumping which - in the pure economic vision[36] of the market as still an "invisible hand" - is however limited to international price discrimination (even if also this position is nowadays criticised)[37], let's try to consider the specific European normative framework of the free movement of persons and the meaning of dumping in situations of transnational posting.

This study will show the European notion of social dumping as it emerged in the last years and the approach used by the European legislator into tackling the problem of a "race to the bottom", particularly in the field of posted workers.

2.2 Normative framework of the free movement of workers

In this scenario, it seems to be required an analysis of European employment and social policy through its normative framework[38], the case-law of the European Court of Justice and the strategic aims stated, as to improve workers' rights mostly in the field of flexible type of works, which nowadays represent the typical and no more atypical kind of employment contracts.

"When placing European social law in context, an alienation effect arises for the labour lawyer: the traditional categories which previously helped in understanding and evaluating a system of individual and collective rights no longer apply"[39]. Indeed, at the European Union level, the legal product that is called 'labour law' has many faces and various contextual reasons of existence. In particular, it has to be considered the role of labour law in the context of European Union's internal market objectives.

European Union labour law traditionally has its legal basis in the "Social Policy Title" (Title X of the TFEU), but internal market policies (such as free movement principles) seriously affect labour law and require for an increased instrumentalist approach to the subject[40]. Under Article 151 TFEU it is stated that:

> The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the

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[35] Supiot, A.,A legal perspective on the economic crisis of 2008, International Labour Review 149 (2): 151-162.

[36] See Krugman P. R. and Obstfeld M., *International Economics: Theory and Practice*, Pearson, 2007.

[37] See on the necessity to reduce the governance gaps, 2009 report by John Ruggie to Human Rights Council.

[38] See Gaja G. and Adinolfi A., *Introduzione al diritto dell'Unione europea*, Manuali Laterza, 2013; and See also Orlandini G. and Giubboni S., *La libera circolazione dei lavoratori nell'Unione europea*, Il Mulino, 2007.

[39] Sciarra S., *Building on European Social Values: An Analysis of the Multiple Sources of European Law*, in Snyder F. (ed), *Constitutional Dimensions of European Economic Integration*, Kluwer Law International, 1996, p. 175.

[40] See Blanpain R. and Hendrickx F. (eds), *Labour Law between Change and Tradition. Liber Amicorum for Antoine Jacobs*, Kluwer Law International, 2011, pp. 75-87.

development of human resources with a view to lasting high employment and the combating of exclusion.

In order to contextualise these objectives, it has to be always kept in mind that essential aspects of labour law (such as pay, freedom of association and the right to strike) are excluded from the social chapter of the Treaty on the Functioning of the European Union, which addressed them as national territory matters. Indeed, as regards labour law, the EU complements national policy initiatives taken by individual Member States by setting "minimum standards" through EU directives. Member States are usually free to provide higher levels of protection, as it has been done in relation to the Working Time Directive. However, as it will be discussed further on, after the *Laval* case[41] of the European Court of Justice in which the Court stated a reinterpretation of Article 3 (7) of the Posted Workers Directive, it was affirmed that "more favourable conditions" of employment only referred to the home Member State and not the host Member State of the posted worker. Thus, changing the definition of EU intervention, from setting minimum standards to maximum applicable standards.

In addition to European labour law directives and starting from the Treaty provisions, it shall be stated that free movement, and the rights attached thereto, is not only a principle of the European single market, but mainly it is a fundamental right for EU citizens (see Article 20 TFEU).

The provisions governing the free movement of workers in the Treaty are however not concerned "with the actual possibilities and economic incentives to move across intra-EU borders, but only with the legal right to do so". In practice, indeed, convergence between the economies of Member States may reduce incentives to move; many barriers to free movement also remain, such as cultural and linguistic habits, and family ties. As a result, and in this context, questions of employment policy are almost exclusively raised within the scope of EU free movement rules in a negative manner, when their compatibility with free movement rules, and especially free movement of services and right of establishment, is at stake.

The prohibition of discrimination against workers on grounds of nationality has been present in the EEC Treaty and it is now contained in Article 45 (2) TFEU, which can be invoked directly by individuals before national courts. Article 45 (2) TFEU, as the enactment of the general principle expressed by Article 18 TFEU, establishes that "freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States about employment, remuneration and other conditions of work and employment".

By placing this Article on the right of free movement for workers under the same Title IV of the TFEU - as Article 49 which states the right of establishment and Article 56 which states the right to provide services - the Treaty confirmed a pragmatic concept of free movement rights as functional to achieve economic integration[42].

The provision of Article 46 TFEU represents the decision made by the European Institutions to look forward at the free movement of workers as having a role in the achievement of the internal market. This Article contains the indications for the European Parliament and the Council to issue secondary normative, as regulations and directives, setting out the measures required to bring about freedom of movement for workers. However, the issue of enforcement and protection of workers' rights shall be deemed consistent - as it will be done in the next chapters for the case of posted workers - with the new status of European citizenship. In this sense, the protection of fundamental labour and social rights are connected with human dignity, defined by Article 1 of the EU Charter

[41] ECJ Case C-341/05, *Laval*, p. 80.

[42] Sciarra S. (edited by), *Manuale di Diritto Sociale Europeo*, Giappichelli, 2010, chapter 1 para. 2.

of Fundamental Rights as an inviolable right that must be protected and respected. Severe labour exploitation of European workers moving within the EU, or third-country nationals moving into European labour market, is a pervasive phenomenon even if it remains often invisible and finds out a perfect field to take roots in situations of temporary posting activities. Therefore, the analysis of the normative framework of free movement shall be analysed along with prevention, monitoring and enforcement of workers' right to fair and just employment and working conditions.

At the beginning, with Regulation 15/61[43], the right of workers to enter and reside in a host Member State was expressed in relatively restrictive terms[44]. Article 1 of the Regulation stated the priority of the national market over free movement of workers, establishing that migrant workers were only afforded free movement rights where there was an absence of suitable candidates from among the regular workforce of the host Member State. In the associated 1961 Directive, which details procedures on the entry, employment, and residence of workers, Articles 2 and 3 underlined that migrant workers could only move and reside in another Member State for the purposes of accepting employment offered. Furthermore, migrant workers could be restricted both in terms of the geographical location in which they were permitted to work and the professional activities they were entitled to pursue[45]. Indeed, it was only after a minimum period of four years' regular work that migrant Member State nationals were afforded unrestricted access to the labour market[46]. From the outset, free movement and residence rights were extended to family members of migrant Member State nationals[47]. However, the definition of family member was limited to the worker's spouse and children under the age of twenty-one[48].

Regulation 15/61 and 1961 Directive were subsequently replaced by Regulation 38/64 and Directive 64/240/EEC which sought to enhance the free movement rights of migrant workers[49]. In that period, further two more Directives were adopted: Directive 64/220/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States - with regard to establishment and the provision of services - and Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security and public health.

With respect to workers, Regulation 38/64/EEC under Article 8 established that Member States could no longer, as a rule, maintain in force measures favouring their own nationals. However, by derogation from this rule, free movement provisions could be suspended in respect of defined categories of migrant workers where there was an over-supply of labour available as regards a particular professional activity or a particular geographical territory. Moreover, Directive

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[43] Regulation 15 of 16 August 1961 on initial measures to bring about free movement of workers within the Community (161 OJ 57/1073).

[44] Guild E., Peers S. and Tompkin J., *The EU Citizenship Directive, a commentary*, Oxford University Press, 2014, chapter 3 para. b.

[45] Article 4 of the 1961 Directive and Articles 3 and 6 of Regulation 15/1961.

[46] Article 6 of Regulation 15/61. The relevant period was five years for seasonal workers spending between eight and twelve months a year in employment in the host Member State.

[47] Articles 2 and 3 of the 1961 Directive.

[48] Article 1(b) of the 1961 Directive incorporates the definition of family member provided for in Article 11 of Regulation 15/61.

[49] Regulation 38/64/EEC of 25 March 1964 on the freedom of movement for workers within the Community (OJ 64/965) and Directive 64/240 of 25 March 1964 on the abolition of restrictions on the movement and residence Member States' workers and their families within the Community (OJ 64/981).

64/240/EEC introduced the still applied distinction between short- and long-term residence in a host Member State and it ensured that the right of entry and residence in a host Member State was granted generally for taking up employment[50]. Further, Article 17 of Regulation 38/64 broadened the definition of family members to include ascendants and descendants of the migrant Member States nationals as well as of their spouse.

The legal framework governing free movement of workers was subsequently amended in 1968 with the adoption of Regulation 1612/68 on the freedom of movement for workers and Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

In particular, Article 7 of Regulation 1612/68 prohibited any discrimination against migrant Member State national workers in respect of conditions of employment and work. This Regulation still represents one of the fundamental normative sources in the field of migrant workers, even after its codification and repeal by Regulation 492/2011.

Nevertheless, it is still of the utmost importance to develop a coordinated strategy in order to provide clear, easily accessible and effective safeguards to protect social rights of intra-EU migrant workers. The necessity to adopt provisions to prevent social dumping is more and more evident to strike an appropriate balance between the protection of workers' rights and the freedom to provide services.

2.3 From the free movement of economically active persons to social Europe

By the late-1960s, consideration was given by the normative framework on free movement and residence to conferring those rights and to facilitate movement that took place in connection with economic activities. This option was driven by the scope of free movement provisions, as stated in the Treaties, that was limited to furthering economic objectives, primarily the establishment of a functioning internal common market. This intention was transposed in secondary legislation that could not be extended beyond the scope of primary law on which it was based.

However, the founding Treaties did confer an autonomous residence entitlement for Member States nationals who had previously spent time working in the host Member State but who were not economically active[51].

Firstly, Regulation 1251/70, adopted on that basis, set out the conditions on the right of workers to remain in the territory of a Member State after having been employed in that State. This Regulation provided protection where Member State nationals and their family members had ceased a working activity because they reached the retirement age or when they had become permanently incapacitated. Further the Regulation extended residence rights to former workers who had subsequently taken up employment in another Member State, but wished to retain their residence in that State.

By the mid-1970s, new initiatives were developed in the context of a growing recognition that the activities of the European Community were not merely of concern to Member States in facilitating economic integration, but also impacted directly upon the lives of Member State nationals. Among such initiatives featured a proposal for a Council Directive on the right of residence for nationals of

[50] Articles 2(1) and 3(1) of Directive 64/240.

[51] Article 48 (3)(d) of the EEC Treaty.

Member States in the territory of another Member State which was submitted to the Council on 31 July 1979. According to the recitals of the 1979 Proposal, the removal of obstacles to the free movement of persons served the objectives of laying the foundations of an ever-closer union among the peoples of Europe[52]. Despite a long discussion, agreement could not be reached and the proposal was eventually withdrawn in 1989.

In its place, in 1990, the Union proceeded to adopt three separate residence Directives: Directive 90/364 which provided a general right of residence to Member State nationals who did not fall within the scope of any other provision of Community law; Directive 90/365 which governed residence rights of former workers or self-employed persons no longer pursuing an occupational activity; Directive 90/366 (subsequently annulled and replaced by Directive 90/365)[53] which regulated residence rights of vocational students.

Although these Directives represented an important recognition of free movement rights to economically inactive persons, such rights were nevertheless subject to a requirement of adequate health insurance and sufficient financial resources.

The big step forward European integration, distinguished by free movement rights for all Member State nationals, was made by the introduction of Union citizenship in the EC Treaty by the 1992 Maastricht Treaty. Within this new paradigm, enshrined in Article 21 TFEU, it was guaranteed an express right of free movement detached from the performance of any economic activity.

2.4 The free movement directive

With a view to remedying the sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, in 2001 the Commission adopted a Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The final outcome was Directive 2004/38/EC.

This Directive provides that Union citizenship should be the fundamental status of nationals of Member States when they exercise their right of free movement and residence. It was therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons to simplify and strengthen the right of free movement and residence of all Union citizens[54].

It was underlined that the right of all Union citizens to move and reside freely within the territory of the Member States, if it is to be exercised under objective conditions of freedom and dignity, should be granted also to their family members, irrespective of nationality[55]. Indeed, the Directive shall apply to all Union citizens who move to, or reside in, a Member State other than that of which they are nationals, and to their family members as defined in point 2 of Article 2 who accompany or join them[56].

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[52] First recital of the 1979 Proposal.

[53] Directive 90/366 had been annulled by the Court in Case C-295/90 *Parliament v Council* because it had been adopted on an incorrect legal basis.

[54] Directives 2004/38/EC, preamble n. (3).

[55] Directives 2004/38/EC, preamble n. (5).

[56] Article 3, Chapter 1, Directives 2004/38/EC.

Under this Directive every citizen has the right to reside on the territory of another Member State for the first three months without any conditions or formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice[57].

After three months of residence some conditions are required to be filled, depending on the status of the citizen in the host country: those who are employed or self-employed do not need to meet any other conditions; students and other people not working for payment, such as those in retirement, must have sufficient resources for themselves and their family, so as not to be a burden on the host country's social assistance system, and comprehensive sickness insurance cover[58]. The right of residence for more than three months was extended to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in Article 7 paragraph 1(a), (b) or (c), if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) are following a course of study, including a vocational training and have comprehensive sickness insurance cover in the host Member State and have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence[59].

It's clear how crucially, and for the first time, the movement of diverse categories of persons was regulated by a single Union legislative instrument which sought to give effect to the cornerstone of the status of European Union citizenship.

2.5 Fundamental social and labour rights

As considered in the first paragraphs of this chapter, the original absence - in the founding Treaties - of any reference to fundamental social and labour rights was a consequence of the decision to confer limited powers on the new Community and of the belief in national orders' capacity to guarantee secure protection to those rights.

The gradual affirmation of a system of protection of fundamental rights, has been deeply conditioned by the Court of Justice case-law. However, the "quiet revolution"[60] of the Court with the "constitutionalisation" of the Treaties starting from its judgments in *Van Gend en Loos*[61] and *Costa*[62], developed and progressively refined the protection of civil and economic rights, but did not provide the same for social rights[63].

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[57] Article 6, Chapter 2, Directives 2004/38/EC.

[58] Article 7, Chapter 2, Directive 2004/38/EC.

[59] Article 7 par (2), Chapter 2, Directive 2004/38/EC.

[60] Weiler, J., H., H., see *A Quiet Revolution. The European Court of Justice and Its Interlocutors*, Comparative Political Studies, 1994, pp. 510ff.

[61] ECJ Case C-26/62, *Van Gend en Loos*, 1963.

[62] ECJ Case C-6/64, *Costa*, 1964.

[63] See Giubboni, S., *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge Studies in European Law and Policy, 2006, pp. 98-149.

This Community protection deficit and mostly, the risk of conflict between Community economic freedoms and national social rights - accompanied by the need to re-establish the legitimacy of the Court - led to the adoption of the 1989 Community Charter. By providing a series of rights, principles and simply objectives for social policy, without including any binding legal force, the Community Charter was mostly a programmatic text rather than a new instrument to strengthen social rights.

The Maastricht Treaty, signed in 1992, maintained also unchanged the weak position of social rights and even reinforced the position of first-generation rights. The relation between market freedom and competition and, on the other hand, social rights turned out to be more and more unbalanced. As it has been effectively stated:

> the European Community/Union was, in a way, taken back 'to the first stage in Marshall's evolutionary cycle of rights[64], contradicting the inspiration of many constitutional traditions of national welfare states[65].

A first step towards the recognition of fundamental social rights, was the explicit inclusion of the 1961 European Social Charter and the 1989 Community Charter in the Treaties, made by the Treaty of Amsterdam signed in 1997. Albeit in absence of full constitutionalisation of social rights, it has been affirmed for the first time the fundamental nature of these rights and this had immediate consequences for the decisions of the European Court of Justice when balancing between social and economic values. The *Albany International BV* case[66] represents the most emblematic example in this direction, but at the same time it clarifies all the limits of the new system. Indeed, fundamental social rights, were admitted into the *acquis communautaire* essentially "as guidelines for activities of both the Community and the Member States"[67], as objectives of social interest and not as justiciable subjective positions.

The discussion over whether social and economic rights should be distinguished between soft (programmatic) rights and hard (justiciable) rights will continue to be one of the main aspects of debate from here on. Thus, it can be said that:

> even after the Treaty of Amsterdam Community labour law remained enclosed within a dimension that has been described as 'pre-constitutional'[68] inasmuch as, although it rests on the constitutional traditions of Member States, it lacks deep roots in the Treaties[69].

Starting from these premises, the Nice Charter proclaimed in December 2000 at the Nice summit by the Parliament, Council and Commission, broke down the barriers between the various categories of fundamental rights. In the affirmation of the principle of indivisibility, interdependence and complementarity of first-, second- and third-generation rights, the equal ranking of civil, political,

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[64] La Torre, M., *Citizenship and Social Rights. A European Perspective*, EUI Working Papers - EUF n. 98/2, p.12.

[65] See ibid Giubboni, S., p. 102.

[66] ECJ Case C-67/96, *Albany International BV*, 1999.

[67] Commission of the European Communities, *Affirming Fundamental Rights in the European Union. Time to Act*, Report of the Expert Group on Fundamental Rights chaired by Prof. Spiros Simitis, DGV, Brussels February 1999, p.11.

[68] Sciarra, S., *Integration Trough Courts: Article 177 as a Pre-Federal Device*, in Sciarra (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, Oxford-portland, 2001, pp. 1-30, here p. 23.

[69] See ibid Giubboni, S., p.105.

economic and social rights was eventually established. The limits of influence of the Charter of Fundamental Rights upon the riverbed of the creation of the common market, were overtook when on 1st December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the EU institutions and on national governments, just like the EU Treaties themselves. The Charter of Fundamental Rights of the European Union sets out rights that are of particularly relevant for workers moving within or into the EU labour market. The most relevant are human dignity (Article 1), the prohibition of slavery and forced labour (Article 5), the freedom to choose an occupation and the right to engage in work (Article 15), the principle of non-discrimination (Article 21), the right to access placement services (Article 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), the prohibition of child labour and protection of young people at work (Article 32), consumer protection (Article 38) and the right to an effective remedy and to a fair trial (Article 47).

Nevertheless, as it is going to be analysed in the next paragraphs, the influence of the Charter upon the discussion on the balance between economic and fundamental rights has been rather disappointing and the test of proportionality applied by the European Court of Justice when balancing between the freedom to provide services and national labour law systems, has clarified the acceptance of a certain level of social dumping within the internal market[70]. If anything, criminal law provisions against severe exploitation in employment relationships should clearly address irregular situations to all individuals, because under a human rights perspective[71], the right to just and fair working conditions requires workers' effective protection against severe exploitation not only in cases of abuses such as slavery, but also in other cases when "there is a striking disproportion compared with terms and conditions of employment of legally employed workers (...), which offends against human dignity"[72].

As it will be considered in the last chapter, there is an urgent need for more targeted monitoring, as well as enhanced criminal justice actions and greater efforts to enable and encourage victims to report cases of labour exploitation, in order to reduce grey areas of labour market and improve the situation.

2.5.1 A common definition of worker

To find a common definition of worker[73], at the European level, it is necessary to look at the interpretation given by the ECJ to this terms, that throughout the last decades has been very dynamic. Indeed, the European legal framework has developed a case-law definition, as it was underlined by the Court of Justice itself: "It must also be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied"[74].

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[70] See Orlandini, G., *Mercato unico dei servizi e tutela del lavoro*, Franco Angeli, 2013, pp.13-62.

[71] See European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union*, report summary of March 2016.

[72] Article 2 of the *Employers Sanctions Directive*, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing minimum standards on sanctions and measures against employers of legally staying third-country nationals.

[73] See for the European definition of worker, ibid Orlandini G. and Giubboni S., 2007.

[74] ECJ Case C-85/96, *Màrtinez Sala*, 1998.

From the 1980s onwards, the ECJ sought to expand the notion of worker as to include categories of persons who had a limited economic activity or those seeking employment. The Court applied worker's rights to a variety of different categories of economically inactive Member State nationals, including job-seekers[75], former workers[76] and even vocational students[77], within parameters laid down in such case law. The principles laid down by the ECJ case-law in the context of interpreting equivalent conditions, now codified by the Free Movement Directive 2004/38, were though based on a broad interpretation of the scope of treaty rights. Having special consideration to the identification of discriminatory measures against migrant workers, the Court found a decision process mechanism which started once established that the case involved a worker within the meaning of Article 45 TFEU. Then the Court assessed whether the provision under scrutiny constituted a hindrance to the mobility of the worker. In doing so, the Court has evolved from reflecting a mere analysis of the discriminatory nature of the measure, to a simpler assessment of the hindrance that a measure is likely to constitute in the exercise of free movement rights.

As part of the doctrine stated, it should be distinguished between a European definition of worker as necessary in order to apply Article 45 TFEU and to guarantee a minimum standard of protection of the right to free movement, opposed to a national definition of worker on which it depends the application of particular protective provisions in the field of harmonisation of social security systems, when common measures has not been taken[78].

The definition of worker in the field of social security is stated by Article 48 TFEU and it is distinguished by the notion of worker under Article 45 TFEU by the possibility for Member States to declare that a draft legislative act in this field would affect important aspects of their social security systems or would affect the financial balance of those systems. The dynamic process toward a common definition of worker was partially crystallised by the ECJ in 1986 when it was stated that:

> A restrictive interpretation of Article 48 TEEC (now Article 45 TFEU) would reduce freedom of movement to a mere instrument of economic integration, would be contrary to its broader objective of creating an area in which Community citizens enjoy freedom of movement (...).

Further the Court declared that:

> The term 'worker' covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship.

This wide definition appeared to be fundamental as to include under the applicative framework of Article 45 TFEU new kind of flexible contracts. In that regard, the Court of Justice, in its case-law, stated that: "the concept of 'worker' within the meaning of Article 39 EC (now Article 45 TFEU) has a specific Community meaning and must not be interpreted narrowly". Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of

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[75] ECJ Case C-292/91, *Antonissen*, where the Court observed that a strict interpretation of the Treaty provision would jeopardize the chances of a job-seeker finding employment and that what is now Article 45(3) TFEU must entail freedom of movement for the purposes of seeking employment.

[76] ECJ Case C-39/86, *Lair*.

[77] ECJ Case C-293/83, *Gravier*.

[78] Tosi P. and Lunardon F., *Introduzione al diritto del lavoro*, Manuali Laterza, 2005, p. 94.

an employment relation is, in the words of the European Court of Justice, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration[79].

This very dynamic reading of the free movement provisions adopted by the ECJ raised the concern that this case-law might promote a deregulatory threat. It may unduly affect Member States' competences in the field of labour law. If Member States are required to abolish obstacles to entrance into their labour market (such as administrative procedures), they are also obliged to extend the regulatory regime protecting their nationals to workers from other Member States. Thereof the Internal market rules are essentially aimed at removing obstacles to intra-Community trade and not at a deregulation, as such, at a national level.

Further in the Community system of checks and balances, it is not because a national measure comes within the ambit of the internal market rules that it is also automatically prohibited. There are, indeed, 'Higher Policy Objectives' which are identified as derogations from Internal market rules. Whereas the Treaty on the Functioning of the European Union expressly mentions certain exceptions, - such as those relating to public policy, public security or public health in Article 36, 45 and 52 TFEU - the possibility to invoke other higher objectives, the so-called mandatory requirements, was already early on acknowledged by the ECJ in the *Cassis de Dijon* case[80].

More recently, one may discern two new and potentially important developments in the case-law[81]. Firstly, the ECJ has in some cases opened the door to derogations based on the protection of fundamental rights. Secondly, the ECJ acknowledges that the insertion of new and distinct policies in the Treaties call for a renewed search for balance.

As it has mentioned before, once it is established that a national measure falls inside the scope of internal market law, the application for a derogation brings the measure within the scope of judicial review by the European Court of Justice, regardless of whether it concerns a Member States' competence. The ECJ will thus determine whether the measure is justified in view of the higher objective invoked and proportional, which means that there is no alternative applicable measure less restrictive of intra-Community trade. Member States may in principle invoke all higher objectives, including for instance the protection of workers or public health, as long as they are non-economic in nature. Even derogations to harmonisation measures are possible but strictly under the conditions of Articles 114 (4) and (5) TFEU. In practice, however, derogations to internal market rules are of course most often invoked with respect to non-harmonised measures.

In a particular line of cases, among which are *Schmidberger*[82], *Omega*[83], *Viking*[84] and *Laval*[85], the European Court of Justice has pointed toward the possibility for Member States to invoke the protection of fundamental rights, such as the right to demonstrate or the right to strike, as a

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[79] ECJ Case C-94/07, *Raccanelli*, 2008, par. 33.

[80] ECJ Case C-120/78, *Cassis de Dijon*.

[81] Govaere I., *Modernisation of the Internal Market: potential clashes and crossroads with other policies*, in De Vos, M., (ed.), *European Union internal market and labour law: friends or foes?*, Antwerp, Oxford, Intersitia, 2009, pp. 3-17.

[82] ECJ Case C-112/00, *Schmidberger*, 2003.

[83] ECJ Case C-36/02, *Omega*, 2004.

[84] ECJ Case C-438/05, *Viking*, Judgment of 11 December 2007.

[85] ECJ Case C-341/05, *Laval*, Judgment of 18 December 2007.

derogation to the internal market rules. At first sight this development was welcomed as an important recognition of fundamental rights to be one of those higher objectives which allows derogation from the four freedoms rules. However, the ECJ in doing so put the fundamental rights on balance with the four fundamental freedoms and the outcome of this operation was not always in favour of fundamental rights.

Further, in relation to the equal treatment principle concerning social rights, in a recent group of cases[86] decided by the European Court of Justice, it was at stake the fact that Member States are having problems reconciling the European right of free movement of persons with maintaining control over national welfare systems and avoiding cases of "social tourism". As a result of the economic crisis and austerity measures, it appears that national authorities are increasingly interested in curbing what they see as the "exploitation of EU rules regarding social and tax advantages and limiting access to social assistance and benefits, more generally"[87]. As an example of this aptitude, it can be useful to look at some recent ECJ judgements.

In particular, the *Dano* case concerned the interpretation of existing rules on free movement and the extent to which European migrants have a right to equal treatment with nationals of the host Member State with regards to access to specific social benefits. The Court ruled that:

> The [2004 free movement] directive thus seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence. A Member State must therefore have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

Within the continuously amended legal framework of migrant workers' rights, the realisation of a coordinated system of protection seems to be difficult to achieve.

Recently the new Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, lays down provisions which facilitate the uniform application and enforcement in practice of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) N. 492/2011. Nevertheless, the European legal balance tackling discrimination conditions between workers coming from different Member States, is moreover mould by the emergence of new forms of work contracts and by the accession to the European system of new countries.

2.5.2 Intra-EU migrant workers' rights

The right of free movement for workers and, in particular, the abolition of any discrimination based on nationality between migrant and national workers of the host Member States as regards employment, remuneration and other conditions of work and employment, are now established by Article 45 TFEU.

Intra-EU migrant workers' rights were first clarified by the EEC Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Article 1 of the

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[86] ECJ Case C-140/12 *Brey*, C-67/14 *Alimanovic*, C-299/14 *García-Nieto and others* and C-333/13, *Dano*.

[87] See EUROPEAN REPORT on the Free Movement of Workers in Europe in 2012-2013, February 2014, by the Former network of experts (2003-2013) which is no longer active and has been replaced by FresSco (Free movement of workers and Social security coordination), pp. 8-9.

Regulation provided the abolition of any discrimination as regards eligibility for employment, stating that any national of a Member State shall have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State. The Regulation set forth that provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply: where they limit application for, and offers of, employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals, or where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered[88]. This prohibition causes that any clause of collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal, shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of other Member States[89]. The Regulation continues specifying different discriminatory conditions concerning eligibility for employment, as stating that are prohibited such provisions laid down by law, regulation or administrative action of Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level[90]. Further it is expressly prohibited under Article 6 paragraph 1 of the Regulation the engagement and recruitment which depends on medical, vocational or other criteria which are discriminatory on grounds of nationality. Nevertheless, it is specified by Article 6 paragraph 2 that a national who holds an offer in his name from an employer in a Member State other than that of which he is a national, may have to undergo a vocational test, if the employer expressly requests this when making his offer of employment. The same criterion is used by the provision of the Regulation which clearly prohibits any indirect discrimination, Article 3 paragraph 1, when it states that conditions relating to linguistic knowledge required by reason of the nature of the workplace to be filled, shall be justified.

Above all, it was clarified that workers who are nationals of a Member State and who are employed in the territory of another Member State shall enjoy equality of treatment (Article 7) as regards membership of trade unions and the exercise of rights attaching thereto (Article 8), including the right to vote. Migrant workers may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, they shall have the right of eligibility for workers' representative bodies in the undertaking.

The list of discriminatory conditions of employment and work based on ground of nationality stated by the Regulation, it is not mandatory in nature and does allow for exceptions, as the Court of Justice and the relevant doctrine confirmed[91].

2.5.3 The coordination of social security systems as necessary to support the free movement of workers

The basic principle enshrined in the Treaty of Rome is the removal of obstacles to the free movement of persons between Member States. To achieve this, it is necessary to adopt social

[88] Article 3 par (1), Regulation 1612/1968/EEC.

[89] Article 7 par (4), Regulation 1612/1968/EEC.

[90] Article 4 par (1), Regulation 1612/1968/EEC.

[91] See for all Roccella M. And Treu T., *Diritto del Lavoro dell'Unione Europea*, CEDAM, 2009, p. 106.

security measures which prevent European citizens who are working and residing in a Member State other than their own, from losing some - or all - of their social security rights[92].

The principle of equal treatment, as provided by the 1968 Regulation on the free movement of workers, shall also be applicable in connection with social and tax advantages (Article 7 paragraph 2 of the Regulation 1612/1968/EEC).

The legal basis of the coordination of social security systems are today identified by Articles 48, 153, 156 and 352 of the Treaty on the Functioning of the European Union (TFEU). Under Article 48 TFEU it is stated that:

> The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.

The first social security measures were adopted in 1958, when the Council issued two regulations on social security for migrant workers, which were subsequently superseded by Regulation 1408/71/EEC and then supplemented by an implementing regulation (Council Regulation 574/72/EEC).

Under Regulation 1408/71/EEC, given that each Member State remained free to design its social security system independently, the coordination regulation was intended to determine under which country's system a European citizen should be insured where two or more countries are involved. The general principles provided, in order to comply with social security cover, were the country of employment principle, or, in the absence of employment, the country of residence principle[93]. The coordination regulation thus replaced all pre-existing social security agreements between Member States covering the same scope and recognised the following four main principles:

1. Equal treatment: Article 3 of the Regulation provided that persons resident in the territory of one Member State shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State. For the principle of equal treatment to apply, three conditions must be met: equivalence of facts, aggregation of periods and retention of rights. The benefits covered by the Regulation were clarified by Article 4 of the same Regulation.

2. Aggregation: The aggregation principle means that the competent Member State must take account of periods of insurance and employment completed under another Member State's legislation, in deciding whether a worker satisfies the requirements regarding the duration of the period of insurance or employment.

3. Prevention of overlapping benefits: This principle, stated by Article 12, is intended to prevent anyone from obtaining undue advantages from the right to freedom of movement. Therefore, it is stated that contributing to compulsory social security systems in two or more

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[92] See Chiaromonte W. in Sciarra, S., (ed.), *Manuale di Diritto Sociale Europeo*, Giappichelli, 2010, pp. 248-264.

[93] Article 13, Title II, Regulation 1408/71/EEC.

Member States during the same period of insurance does not confer the right to several benefits of the same kind.

4. Exportability: This principle means that social security benefits can be paid throughout the Union and prohibits Member States from reserving the payment of benefits to people resident in the country, but it does not apply to all social security benefits (as listed under Title III of the Regulation).

Originally, Regulation 1408/71/EEC only covered workers[94] but, with effect from 1st July 1982, its scope was extended to cover self-employed persons too. This Regulation also covered members of workers' and self-employed persons' families and their dependants, as well as stateless persons and refugees. An important extension of the definition of persons entitled of the equal treatment principle in this matter, was ensured by the Council Regulation 307/1999/EC, which further included within the scope of the previous Regulation, all insured persons, particularly students and persons not in gainful employment. Eventually third-country nationals - provided they are legally resident on the EU territory - were covered by Council Regulation 859/2003/EC. The most recent legal act, Regulation 1231/2010/EU, confirmed the extension of these modernised European social security coordination rules to third-country nationals legally resident in the EU and to a cross-border situation (who were not already covered by these rules solely on grounds of their nationality). The cover now also applies to their family members and survivors, if they are in the EU.

In 2004, the coordination regulation (Regulation 883/2004/EC) was adopted to replace and extend Regulation 1408/71/EEC. The 'modernisation coordination package' comprehended Regulation 883/2004/EC, as amended by Regulation 988/2009/EC, and the implementing regulation (Regulation 987/2009/EC). The new Regulation 883/2004/EC is based on the same four principles of Regulation 1408/71/EEC, but its aim is to simplify the existing European rules on the coordination of Member States' social security systems, by strengthening cooperation between social security institutions and improving methods on data exchange between them. Since the entry into force of the Lisbon Treaty, the ordinary legislative procedure has been applied in this field and social security rights for workers have been voted by a qualified majority in the Council (Article 48). However, the intention of a national control over this normative area was always expressed by Member States and it was codified by Article 48 paragraph 2 TFEU. Indeed, a Member State can ask for a draft legislative act to be referred to the European Council if it declares that the draft legislative act would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system.

Improvement of the coordination security system is still needed as the Parliament, during its Resolution of 14 January 2014 on social protection for all, called on the Commission to review legislation and enhance the monitoring of implementation and coordination of social security systems so as to safeguard European migrant workers' entitlements to benefits.

3. A balance between free movement of services and free movement of workers, a preliminary analysis on the case of posted workers

The interaction between free movement of services and free movement of workers represents the background of some of the most interesting developments of the European labour market. More and more, business practices require outsourcing and subcontracting activities, and increased has been the resort to temporary work agencies, requiring the posting of workers.

[94] Article 1(a) "definitions", Regulation 1408/71/EEC.

In addition to this trend, the enlargement of the European Union, as it has been underlined:

> has paved the way towards more systematic posting of workers, not only because of labour costs differences but also because posting can operate as part of a free movement of services which remains largely unchecked by the transitional limitations on free movement of workers[95].

Under Treaty provisions on free movement of services, businesses can move cross-border with their work-force or, in case of temporary work agencies, post their workers as the main aspect of their service activity, in order to carry out projects. Those workers who move cross-border with their employers - or are sent to another country to provide an employment activity - are called "posted workers", emphasising that their base remains that of the state they have come from (the so-called home state) rather than the state where they are carrying out the activity (the host state). This situation raises a choice as to which employment and social security standards should be applied to posted workers: if those of the home state or those of the host state, or a combination of the two.

The growing legal and societal debate is about finding a balance increasing, on one hand, the possibilities of undertakings to provide services in other Member States, which means Europe's free internal market and its free competition standards and the social protection of workers, that excludes social dumping, on the other hand. Considering that free movement of services generates international competition between labour standards, the legal distinction between an actual movement of "services" (Article 56 TFEU) - which cannot be limited by national restrictions - and a movement of "workers" (Article 45 TFEU) - which entails the abolition of any discrimination and the application of the principle of equal treatment - needs to be further analysed.

For several decades now, as discussed before, the European Court of Justice has consistently defined the essential features of an employment relationship as that "for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration"[96]. The essential difference between a service provider performing service activities for remuneration and a worker, is thus the position of subordination of the worker with the person who receives the services (the employer) which the self-employed provider of services has not.

Nevertheless, those separate concepts usually overlap in several situations. Indeed, "a free movement of services can entail or even be based - as underlined before - on a movement of workers who are necessary to perform the contracted service in the host country"[97]. However, in this situation, the workers concerned will not be considered as "workers" covered by the free movement provisions and particularly, Article 45 TFEU will not apply[98], because those workers will not become part of the host country's labour market, mainly because of the temporary nature of their employment activity carried out in a Member State different from their country of origin. In this case workers are indeed an element of a specific cross-border provision of services and they do not as such enter the labour market of the host country if they return to their country of origin or residence after completion of their work.

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[95] De Vos, M., *Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?*, ERA Forum, September 2006, Volume 7:356-370, p. 356.

[96] See e.g. ECJ Case C-66/85, *Lawrie-Blum*, 1986; C-197/86, *Brown v Secretary of State for Scotland*, 1988; C-85/96 *Martinez Sala*, 1999; C-337/97, *Meeusen*, 1999.

[97] See ibid De Vos, M., September 2006, Volume 7:356-370, p. 357.

[98] See,e.g., ECJ Case C-113/89, *Rush Portuguesa*, 1990; joined Cases C-49/98,C-50/98,C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte*, 2001.

Thus, neither under private international law rules[99], national labour standards of the host country shall apply to those workers. Therefore, the normative framework just before the decision of approval of Directive 96/71/EC, created the possibility to offer services in costly host countries with personnel that remains formally subjected to the cheaper conditions of their country of origin, denounced as social dumping.

Until the *Rush Portuguesa* case in the early 1990s, the provisions on free movement of workers were also be seen, even by the European Court of Justice, as covering the case of posted workers, stipulating that all workers should be treated equally, irrespective of whether they were foreign or national employees. But in contrast to ordinary migrant workers, posted workers remained insured in the home country and were exempted from social insurance charges (and income taxes) in the host state, when they were posted for a maximum period of 12 months, which could be extended by another 12 months, saving host country companies which were using posted workers substantial labour costs.

This limitation to the application of national labour standards, based on the difficult interaction between free movement of services and workers, was addressed by the Posted Workers Directive which finally stated that, whatever the law applicable to the employment relationship is, transnational services providers must guarantee workers, posted to the territory of the host country, the terms and conditions of employment covering a hard core of labour matters (Article 3 of Directive 96/71/EC).

It is necessary to remind that the Posted Workers Directive covers three cross border situations:

1. posting under a contract concluded between the business making the posting and the party for whom the services are intended (‘contracting/subcontracting’);

2. posting to an establishment or business owned by the same business group in the territory of another Member State (‘intra-corporate transfers’);

3. hiring out by a temporary employment firm or placement agency to a user business established in another Member State (‘temporary agency work’).

Further, and these requirements will be closer analysed in the next chapters, for a case of posting to fall under the Directive, the employment relationship must remain with the undertaking making the posting and the posting must be for a limited period of time. Thus, the country-of-origin rule applies to aspects of the employment relationship outside the “hard nucleus” of host country employment terms and conditions listed under Article 3 (1) of the Posted Workers Directive.

What is fundamental to consider here, it is the decision taken to make partially applicable the regulation on free movement of workers to cross-border activities of foreign services providers, as regards a minimum coverage of posted workers under national labour law. However, this trend was accompanied by a specific choice of identification of the Directive’s legal basis. Indeed, the preparatory work discussions ended supporting Article 49 TCE (now Article 56 TFEU) as the legal basis of the Posted Workers Directive, maybe in order to adopt directives only with a qualified majority rather than with the unanimity criterion requested in the field of social policy. This choice was also seen as a consequence of the previous case-law of the European Court of Justice, particularly the *Rush Portuguesa* case, in which the Court for the first time decided on the problem of identification of the law applicable to posted workers within the provision of services. In this specific case, the French *Office National d’Immigration* was asking for the application of national

[99] See 1980 Rome I Convention which allows posted workers to remain employed, in the absence of a chosen law, under the employment law of the country of habitual employment.

labour law to Portuguese posted workers, while Rush Portuguesa was asking for the application of the country of origin principle. The decision of the Court in favour of the application of the free movement of services provisions, was highly influenced by the fact that at the time free movement of workers' provisions could not have been applied to Rush Portuguesa, because of the transitional restrictions established in the Act of Accession of Portugal to the European Union. Thus "the Portuguese construction company, bypassing the restrictions on free movement of workers, had offered its services and brought in its cheap Portuguese labour force as part of the services provision"[100]. The free movement of services was instead immediately implemented in Portugal; thus France could not refuse the use of Portuguese personnel within a cross-border service activity. Such restrictions to the access of the host country's national services market were prohibited under Treaty provisions, but the Court - in the attempt to lead back the principle of equal treatment of posted workers (as established now by Article 49 TFEU) to the movement of services[101]-, stated that:

> Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means[102].

This balance between Internal market rules and social, as workers' rights, protection was followed by the European Commission and the Council while adopting Directive 96/71/EC. It needs clarification the fact that, whereas the European Court of Justice had previously accepted the possibility for Member States to impose national labour law to posted workers within the provision of services, the new Directive required Member States to do so. "Through Directive 96/71 the dominating labour issue in transnational posting of workers evolved from being the applicable law to the supervision and enforcement of the imperatively applicable national law"[103].

4. Joining the EU: accession process and transitional provisions

In order to comprehend the difficulties which raises in practice the application of the equal treatment principle relating to employment and work conditions as social rights, it has to be considered the mechanism of conferral of these rights to new European citizens in case of accession of new EU Member Countries.

The Treaty on European Union provides under, Article 49, the legal basis for any European country to join the EU. It is established that "any European State which respects the values referred to in Article 2 (TEU) and is committed to promoting them may apply to become a member of the Union".

The Union's capacity to absorb new members, while maintaining its objective of European integration, is one of the main issues to be taken into account when considering the current situation

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[100] See ibid, De Vos, M., September 2006, Volume 7:356-370, p. 361.

[101] See Lo Faro, A., *Diritti social e libertà economiche del mercato interno: considerazioni minime in margine ai casi Laval e Viking*, Lavoro e Diritto (ISSN 1120-947X), Fascicolo 1, inverno 2008, pp. 68-76.

[102] See ECJ Case C-113/89, *Rush Portuguesa*, 1990, paragraph 18.

[103] See ibid De Vos, M., September 2006, Volume 7:356-370, p. 362.

of the Internal market. The European Union reserves the right to decide when a candidate country has met the eligibility criteria and when the EU is ready to accept the new member.

In particular, during the pre-accession phase, the Commission monitors the candidate country's efforts to implement the *acquis communautaire*. The parties discuss whether (and how) some rules can be introduced gradually to allow the new member or existing European countries time to adapt.

Running in parallel with the negotiations is the so-called screening stage[104], which consists of verifying whether individual items of the acquis listed in each chapter have been transposed into the law of the candidate country. Only when the candidate country shows that it has already implemented a chapter of the acquis, or that it will implement it by the date of accession, can that chapter be provisionally closed.

The ultimate goal of the negotiations is to prepare an Accession Treaty. The accession must be approved unanimously by the Council and must receive a single vote on consent with the majority of votes cast of the European Parliament. The treaty is then signed and ratified by each of the EU countries and by the acceding country, each according to its own constitutional procedures.

In 1951, six countries founded the European Coal and Steel Community, and later, in 1957, the European Economic Community and the European Atomic Energy Community: Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

Seven rounds of enlargement of the original Community of six Member States have taken place so far:

- 1 January 1973: Denmark, Ireland and the United Kingdom;
- 1 January 1981: Greece;
- 1 January 1986: Spain and Portugal;
- 1 January 1995: Austria, Finland and Sweden;
- 1 May 2004: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia;
- 1 January 2007: Bulgaria and Romania;
- 1 July 2013: Croatia.

As it will be seen in the next paragraph, transitional measures are often used to limit the feared negative effects on national labour markets of the access to the EU of new Member States.

4.1 Restrictions on the free movement of workers from new EU member countries

One of the most sensitive areas of entitlement of rights, during the accession process of new countries in the European Union, is represented by the field of free movement of workers. Indeed, restrictions - for a transitional period of up to seven years after the accession - are applied on the full recognition of free movement rights to workers who come from new European member countries.

[104] See the europa.eu website, about the EU, page contents "Countries".

Individual governments of countries that were already part of the EU, can decide themselves whether they want to apply restrictions to workers from new European member countries or not, and what kind of restrictions.

However:

- They are not allowed to restrict the general freedom to travel, but only the right to work in another country as an employed person.
- For the first two years after a country joined the European Union, national law and policy of the countries that were already part of the EU determines access to the labour market of workers from that country so that they may need a work permit. If a country wants to continue to apply these restrictions for three more years, it must inform the Commission before the end of the first two years.
- After that, countries can continue to apply restrictions for another two years if they inform the Commission of serious disturbances in their labour market, but all restrictions must end after seven years.
- Once they are legally employed in another EU country, workers are entitled to equal treatment with national workers of the country where they are working.

Temporary derogations from European rules on free access of workers from the new member countries to the labour markets of the other Member States are established by the Accession Treaty of each new country. Member States of the European Union can request the application of restrictions to workers posted from the new European countries as to request only an application of the restrictions to workers and not to the self-employed persons and companies providing services.

The reason of the application of restrictions to free movement of workers during a transitional period was the protection of domestic labour markets of the old Member States prior to the new expansions.

Greece was granted full free movement of workers six years after joining the EC in 1981, while Portugal and Spain obtained full freedom of movement seven years following their 1986 admission. As early as 1998, transitional periods were under discussion in anticipation of the upcoming eastern enlargement of the European Union. However, when it was decided that Bulgaria and Romania would join the EU in January 2007, Member States decided to apply the same transitional arrangements as it was for the previous accessions. Transitional restrictions on access of workers to the labour market of the old Member States were applied also for citizens from Croatia in several countries during the first phase of the transitional period.

The following data of Table 1 give an overview of the extent to which EU Member States have imposed restrictions on workers from newer Member States over the last three enlargement rounds. Although, transitional arrangements in the enlarged European Union are still in place, a new approach was proposed by several studies on the issue of the legitimacy of such transitional periods in the field of free movement of workers.

Studies made on the impact of labour migration from the new to the old member countries[105] showed that there should be other solutions such as allowing immigration quotas (given as one of the options in the Commission's Information Note) rather than the present transitional periods which do not contribute to an idea of integration in Europe. They also affirm that the opening of the

[105] Lang I. G., *Transitional Arrangements in the Enlarged EU: how free is the free movement of workers?* (CYELP 3 [2007] 241-271).

borders between the new and the old Member States has mostly had positive impacts by increasing productivity, reducing unemployment and improving attitudes towards the European Union.

This view, opposed to that of those who sustain the current necessity of a gradual accession to the labour market, considers that even a temporary removal of the entitlement of free movement workers' rights represents a blow to one of the most important values associated to the European Union, which could have negative effects on European integration and increase the division between 'first class' and 'second class' EU membership.

Table 1: Transitional arrangements for the free movement of workers following 2004, 2007 and 2013 enlargement[106]

Country groups	Member States	Entry of EU8 workers		Entry of workers from Bulgaria and Romania			Entry of workers from Croatia
		May 2004 - April 2006	May 2006 - April 2009	Jan 2007 - Dec 2008	Jan 2009 - Dec 2011	Jan 2012 - Dec 2013	July 2013 - June 2015
EU15	Austria	Restricted	Restricted	Restricted	Restricted	Restricted	Restricted
	Belgium	Restricted	Restricted	Restricted	Restricted	Restricted	Restricted
	Denmark	Restricted	Restricted	Restricted	Open	Open	Open
	Finland	Restricted	Open	Open	Open	Open	Open
	France	Restricted	Restricted	Restricted	Restricted	Restricted	Restricted
	Germany	Restricted	Restricted	Restricted	Restricted	Restricted	Restricted
	Greece	Restricted	Open	Restricted	Open	Open	Restricted
	Ireland	Open	Open	Restricted	Restricted	Open	Open
	Italy	Restricted	Open (as of July 2006)	Restricted	Restricted	Open	Restricted
	Luxembourg	Restricted	Open (as of November 2007)	Restricted	Restricted	Restricted	Restricted
	Netherlands	Restricted	Open (as of May 2007)	Restricted	Restricted	Restricted	Restricted
	Portugal	Restricted	Open	Restricted	Open	Open	Open
	Spain	Restricted	Open	Restricted	Open	Restricted	Restricted
	Sweden	Open	Open	Open	Open	Open	Open
	United	Open	Open	Restricted	Restricted	Restricted	Restricted

[106] Source: Eurofound (2014), Labour mobility in the EU: Recent trends and policies, Publications Office of the European Union, Luxembourg, pp. 6-7.

	Kingdom						
2004 enlargement countries	Czech Republic	No restrictions imposed on other new Member States		Open	Open	Open	Open
	Estonia			Open	Open	Open	Open
	Cyprus			Open	Open	Open	Restricted
	Latvia			Open	Open	Open	Open
	Lithuania			Open	Open	Open	Open
	Hungary			Restricted	Open	Open	Open
	Malta			Restricted	Restricted	Restricted	Restricted
	Poland			Open	Open	Open	Open
	Slovenia			Open	Open	Open	Restricted
	Slovakia			Open	Open	Open	Open
2007 enlargement countries	Bulgaria	No reciprocal measures					Open
	Romania	No reciprocal measures					Open
2013 enlargement countries	Croatia	Reciprocal measures					Open

4.2 Recent policy developments as regards the free movement of workers

After the analysis of the legal background relating to the access of new countries to the European Union, it's necessary to compare the Union's policy developments and the numbers on labour mobility provided by the European Commission's Annual report. As an example of the interaction between the European bodies and EU Member States on the issue of labour mobility flows, it can be recalled that in November 2013, the European Commission published a Communication on 'Free movement of EU citizens and their families: Five actions to make a difference', following a letter sent to the Commission in April 2013 by the Interior Ministers of Germany, Austria, the Netherlands and the UK, in which they voiced their concern regarding potential abuses related to mobility flows. The Communication highlights that the main reasons why EU citizens move are professional opportunities and that these people are, on average, younger, more likely to be economically active than the local population, and tend to be less intensive users of social benefits. The Communication clarifies the conditions to be met to be entitled to free movement, social assistance and social security benefits, as well as the instruments available to fight fraud and abuses. It encourages the use of available EU funds to facilitate the social and economic inclusion of mobile EU citizens, and it sets out five actions to help Member States and their local authorities to apply EU laws and tools to their full potential. The European Parliament welcomed the Commission's initiative.

Moreover, on 9 February 2014, Swiss people approved a referendum to introduce 'quantitative limitations and quotas' for all EU citizens entering Switzerland. While the Swiss Federal Council

has three years to implement the constitutional provision approved by the referendum, as an immediate consequence the Federal Council refused to sign the - already negotiated - Protocol to extend the free movement of persons' agreement to Croatia. The European Commission stated that such quotas are contrary to the principle of free movement and the Swiss Federal Council announced its intention to renegotiate the AFMP to adapt it to the new constitutional provisions, which would apply to all EU citizens, including cross-border workers.

Further, a big blow on European integration has been set by the referendum held on Thursday 23 June, when the UK has voted to leave the European Union. While waiting negotiations - based on Article 50 of the Treaty on the Functioning of the European Union - to officially begin, it should be reminded how free movement of persons has been one of the main politicised issues which represented the emotional case for Brexit. This decision underlined the difficulties in finding future adequate instruments to meet migrant and national workers' rights needs for protection.

4.3 Executive summary of the 2014 Annual report on labour mobility

On closer analysis from the 2014 Annual report on labour mobility[107] prepared by the Network Statistics FMSSFE (as the most recent reliable and comparable data) the framework of intra-EU labour mobility becomes more clear.

In 2013, the share of citizens of working age (15 to 64 years) from an EU-28 Member State or EFTA[108] country who resided in another EU-28 Member State was around 3.1% of the total population residing in the EU-28 Member States. In the EFTA countries, this share was around 13%. Further, the five EU Member States or EFTA countries with the largest numbers of working-age EU-28/EFTA movers[109] were Germany (2.6 million), the UK (1.9 million), Spain (1.4 million), Italy (1.3 million) and Switzerland (934,000). France followed closely with around 890,000 EU-28/EFTA movers.

However, the EU Member States/EFTA countries with the highest shares of working-age EU-28/EFTA movers of their total population were Luxembourg (44%), Switzerland (17%), Cyprus (12%) and Ireland (10%). The shares in all other countries were below 10%.

Looking at the new accessions to the European Union, it is said that Romanians are the largest single national group (20%) from all working-age EU28/EFTA movers across the EU-28 Member States. They are followed by Polish (14%), Italian (9%), Portuguese (8%) and German (5%) citizens.

Around 50% of the working-age EU-28 migrant population has been residing in their current country of residence for less than ten years. Norway, Denmark, the UK and Ireland have comparatively high shares (70% or more) of working-age EU-28 migrants who came within the past ten years, whereas France and Germany have particularly high shares (60%-70%) of such migrants who have come more than ten years ago.

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[107] This report has been prepared in the framework of Contract No VC/2013/0301 "Network of Experts on intra-EU mobility - social security coordination and free movement of workers".

[108] European Free Trade Association (Switzerland, Iceland, Liechtenstein and Norway); the EFTA countries included in this report are Iceland, Norway and Switzerland. Liechtenstein was excluded since no data from the EU-LFS is available.

[109] EU-28 or EFTA citizens between the ages of 15 and 64 who are residing in a EU-28 or EFTA country other than their country of citizenship (definition created for the purpose of this study).

The main countries of origin of EU-28/EFTA movers of working age who have been residing in their current country of residence for less than ten years were by far Poland and Romania (together around 48% of all recent EU-28/EFTA movers).

The main national groups of recent EU-28/EFTA movers of working age in most EU-28 and EFTA countries are from neighbouring countries. The main exceptions are Romanian, Polish, Spanish, Portuguese and British citizens, who moved in larger numbers to countries further away.

Recent EU-28/EFTA movers have a higher employment rate[110] than nationals in most EU-28 Member States/EFTA countries. However, on EU-28 average, recent EU-28 movers are significantly over-represented in elementary occupations[111].

In all countries of origin, apart from the UK, the emigration rate of young persons (15 to 34 years) who emigrated within the past three years to another EU/EFTA country is higher than the emigration rate of persons of working age (15 to 64 years), in many countries twice as high. Indeed, more than 50% of the EU-28 citizens aged 15-34 who left their country of citizenship for another EU/EFTA or third country in 2012 came from Poland, Romania or the UK.

Among recent active EU-28 movers, highly educated people were slightly more likely to move (2.3% have moved) than the total active population of working age (1.9%). This is true for most EU Member States/EFTA countries and the positive difference is particularly high for Austrian (highly educated were more than twice as likely to move as the average) and Italian (highly educated were around three times as likely to move as the average) active movers. On the contrary, in some Eastern European countries (BG, EE, LT, LV, RO), persons with lower educational levels seem to be more likely to move than highly educated persons. However, overall, most movers from Eastern European Member States have a medium level of education. A comparison of figures of active[112] Romanians and Bulgarians who have moved to Italy, Spain, Germany and the UK since 2007 suggests that these movements are linked to other factors than transitional arrangements, such as the economic situation of these countries, the job market and socio-cultural networks.

4.4 Main countries of residence of EU-28/EFTA movers

Within a cross-sectional picture of EU-28 and EFTA movers in the EU-28 Member States and EFTA countries for the year 2013, the analysis has shown the following main results.

The number of Third Country Nationals (hereinafter referred to as “TCNs”) is slightly higher than that of EU-28 movers throughout the top 5 countries of residence of EU-28 movers and across the EU-28 as a whole. TCNs make up around 58% of all foreigners, EU-28 movers make up around 41% and EFTA movers only around 1%.

Both across the EU-28 and EFTA and in the five main countries of residence (Germany, United Kingdom, Spain, France, Italy), the largest shares of EU-28 movers are of working age (over 65%).

The largest total numbers of EU-28/EFTA movers of working age live in Germany, the UK, Spain, Italy and Switzerland. However, the largest shares of EU-28/EFTA movers of working age can be

[110] The employment rate is the share of employed over the total population of the same age reference group.

[111] According to the International Standard Classification of Occupations (ISCO), elementary occupations include sales and services elementary occupations, agricultural, fishery and related labourers and labourers in mining, construction, manufacturing and transport.

[112] Any person who is either employed or unemployed (EU-Labour Force definition).

found in Luxembourg, Switzerland, Cyprus and Ireland, where EU-28/EFTA movers make up 10% or more of the total population in the country. As it was already underlined, Romanians are the largest single national group (20%) of all working-age EU-28/EFTA movers across the EU-28 Member States. They are followed by Polish (14%) and Italian (9%) movers as well as Portuguese (8%) and German ones (5%). Together, these five national groups make up around 56% of the EU-28/EFTA movers across the EU-28.

The importance of Romanian and Polish movers of working age (in terms of shares of all movers of working age) increased after 2003, but then decreased again after 2010, in favour of other groups, such as Italians, French and Spaniards. EU-28 movers who have arrived in 2006 or later make up around 37% and new EU-28 movers (who have arrived in 2010 or later) only make up around 15%. While Germany and France, for example, seem to be more traditional countries of residence of EU-28 movers, the UK hosts a much larger share of EU-28 movers who arrived less than ten years ago. Although there are no clear-cut dividing lines, Norway and Denmark have the highest shares of EU-28 movers who came during the past three years and Italy has the lowest share.

In total numbers, as shown in Table 2, Germany is the main country of residence of EU-28 movers, accommodating around 3.3 million EU-28 movers. It is followed by the UK (2.4 million), Spain (2.1 million), France (1.4 million) and Italy (1.3 million).

These top 5 countries of residence of EU-28 movers are also the Member States with the highest numbers of third-country nationals and overall number of foreigners (EU28, EFTA and TCNs).

Table 2: top 5 countries of residence of EU-28 movers, during 2013, in total numbers of foreign population

	EU-28		EFTA		TCNs		Total foreign population
DE	3259	42.3%	50	0.7%	4387	57.0%	7696
UK	2421	49.1%	33	0.7%	2475	50.2%	4930
ES	2062	40.7%	32	0.6%	2978	58.7%	5073
FR	1407	34.4%	52	1.3%	2631	64.3%	4089
IT	1304	29.8%	9	0.2%	3074	70.1%	4388
EU-28	14032	41.2%	273	0.8%	19783	58.0%	34089
EFTA	1515	63.6%	12	0.5%	854	35.9%	2380

Member States with the highest number of EU-28 movers in 2013, expressed in thousands, all age groups are included. The migrant population is broken down by broad national groups of EU-28 and EFTA citizens and TCNs. The percentages indicate the share of each group from the total foreign population[113].

In the EU-28, the most represented nationalities (Romanians, Poles, Italians, Portuguese and Germans) together make up 58% of the movers. In the EFTA countries, the most represented nationalities (Germans, Italians, Portuguese, French and Poles) together make up 70% of the

[113] Source: EUROSTAT data on population by citizenship and age group “migr_pop1ctz”, Milieu.

movers. It is interesting to note that some of the top countries of residence are also among the most represented countries of citizenship, such as Germany and Italy.

The breakdowns by the main countries of residence show that the EU-level figures are strongly influenced by the situations in these countries: in Italy and Spain, Romanians make up very large shares of working-age EU-28/EFTA movers (77% and 46%, respectively). In Germany and the UK, there are important groups of Polish movers (16% and 28%, respectively). Italians are very important groups in Germany (19%) and Switzerland (22%). Portuguese and Germans are also important groups, because they have moved to Switzerland in high numbers and make up 21% and 24% of the population of EU-28/EFTA movers there.

Other large groups of working-age EU-28/EFTA movers are the British (they have mainly moved to Spain where they make up 10% of the movers' population) and the French who have mainly moved to Belgium, Germany and the UK.

Eventually, looking at the labour sectors more influenced by the migration flows, it comes out that across the EU-28 Member States, the largest share of recent EU-28 movers is employed in manufacturing (14%), followed by construction (11%), accommodation and food services (11%), and wholesale and retail trade (11%). There are a few sectors where recent EU-28 movers are over-represented, when compared to nationals: in the accommodation and food sector (11% of EU-28 movers and 4% of nationals), in the construction sector (11% of EU-28 movers and 7% of nationals) and for households as employers (6% of EU-28 movers and 1% of nationals) but also in administrative and support activities (8% of EU-28 movers and 4% of nationals). On the other hand, recent EU-28 movers are under-represented in public administration (1% of EU-28 movers and 7% of nationals) and health and social work (7% of EU-28 movers and 11% of nationals).

4.5 New access to EU labour market and its impact on intra-EU mobility

The higher shares of employed persons and job-seeking persons among EU-28/EFTA movers compared to nationals indicate that employment is one of the main drivers of intra-EU mobility. In the context of recent developments, namely the EU enlargement to eastern countries and the economic crisis, the question arises as to which impact free movement and politically steered access to labour markets have on intra-EU labour mobility compared to other factors, such as the economic situation, the job market and socio-cultural networks.

Previous reports of the European Commission already looked at the impact of enlargement and of transitional arrangements on migration from the new Member States to the EU-15. Analysis of the impact of enlargement reported in 2011 found that around "75% of population flows from EU-8[114] since 2004 and 50% of the flows since 2007 in the case of EU-2[115] can be attributed to accession to the EU"[116].

However, the importance of (legal) access to the labour market should not be overestimated: econometric analysis on possible effects of transitional arrangements on immigration from the EU-8

[114] Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, Hungary(2004)

[115] Bulgaria and Romania (2007).

[116] "Employment and Social Developments in Europe 2011", European Union, 2012, p. 253.

across the EU-15[117] showed that transitional arrangements played a limited role in directing these immigration flows, whereas the general employment situation played a larger role.

On 31 December 2013, restrictions to the labour markets for EU-2 ended in all countries. The main countries of residence of these citizens that had applied transitional arrangements (DE, ES, IT, UK) ended those restrictions at different points in time: in Germany and the UK, restrictions to access to the labour market ended only on 31 December 2013; in Italy, they ended on 1 January 2012 and in Spain they had ended on 1 January 2009, but restrictions where re-introduced for Romanian workers in August 2011 (until 31 December 2013).

By comparing the figures over the period from 2007 to 2013, the 2014 Annual report of the Commission tried to find out, as shown in Table 3, indications on whether these flows have changed according to the changes in access to the labour market in the countries of residence.

Table 3: Active EU-2 movers in Germany, Spain, Italy and the UK, 2007-2013

	2007	2009		2011		2013	
DE	73.3	83.8	+10.5	106.9	+23.1	169.3	+62.4
ES	545.8	653.2	+107.4	608.4	-44.08	593.3	-15.1
IT	258.2	532.4	+274.2	672.3	+139.9	770.0	+97.7
UK	28.6	62.7	+34.1	93.5	+30.8	128.7	+35.2

The figures in the above Table, which considered flows of bi-annual changes in thousands, show that in Germany, Italy and the UK, the total number of active EU-2 movers has continuously increased since 2007.

However, there are some differences concerning this increase between different countries: in Germany, the increase accelerated, whereas in the UK it stagnated and in Italy it declined. On the other hand, in Spain the total stock of active EU-2 movers decreased between 2009 and 2013. Similar trends are shown by the numbers of inflows: in Italy and Spain, they decreased, whereas in Germany and in the UK they increased, despite the restrictions to access to the labour markets that were in place there. In Spain, the decrease (both of inflows and of total stocks) already took place between 2009 and 2011, so before the re-introduction of restrictions in August 2011.

Further, it should be noted that the change in stocks accounts for inflows and outflows, meaning that, for example, although there was a decrease in Spain between 2011 and 2013, there could still have been an inflow of migrants, but the outflow would have been higher, which is why the net change is negative.

Additionally, the Annual report looked at the change in the overall employment rates in these countries to find further indications on the reasons for changing inflows. These results indicate that the immigration of EU-2 citizens after their accession may be more linked to the labour market situation of the countries of residence. Namely: in Spain the employment rate decreased drastically between 2008 and 2013 (from 64.5% to 54.8%); in Italy, it was already lower and slightly decreased (from 58.7% to 55.6%); while, in Germany, the higher employment rate increased

[117] Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom, Austria, Finland and Sweden.

(70.1% to 73.3%); and, in the UK, it decreased until 2011 (71.5% to 69.5%) and then increased again (to 70.8%) but remained comparatively higher.

However, while considering the reasons for increasing or decreasing Intra-EU migrant flows, linguistic and cultural factors, as well as networks may also play a role. There are indications for that when looking at the figures of new movers from Romania: although the immigration of active Romanians into Italy has decreased since 2007, while it has increased into Germany and the UK, Italy still hosts around as many Romanians who moved there within the past three years as Germany and the UK, respectively. This means that despite the lower economic incentive, Romanians still moved to Italy over the past three years. Similar findings were made in a report from 2013, according to which "recent recession countries like Italy and Spain attracted a significantly higher inflow of Romanian migrants than other countries less affected by the recession and with equally open labour markets (e.g., Sweden)"[118].

These findings can only be indications for possible relations between new access countries and Intra-EU mobility. Interrelations and especially causal relations between inflows and access to the labour market or the employment structure in the country of residence would have to be tested controlling for other possibly intervening factors. Further, it should be considered the definition of "employed" used by statistical researches as well because, depending on that, persons who do work in a country but are not affiliated to its social security system are exempted and fall into the category 'others'. According to estimates made by the Employment Service, around 17% of the persons falling in the category 'others' are persons who actually work.

This causes an under-estimation of the number of 'employed' persons in the database. It is likely that this under-estimation is especially high for foreigners, due to the nature of their work (undeclared work or affiliation with a social security system in another country or special regulations, like EU officials) and it will be considered in the next chapter when trying to identify numbers and figures of temporary posted workers within the European Union.

Starting from the above-mentioned preconditions on the relation between economic freedoms and fundamental rights and upon the origins and downfalls of Intra-Eu mobility of persons and workers, the normative framework of some of the most illustrative examples of European social dialogue, from its first fruits such as the Directives on part-time, fixed-term work and posted workers, to the newest Directive on temporary agency workers, is going to be examined in the next chapter. The origins of the discourse upon fundamental social and labour rights on the riverbed of the Internal market's project and the enlargement of the European Union, with all its characteristics that we have seen, should be bore in mind while considering the evolution of basic principles that enriched the patrimony of rights and guarantees offered to specific kind of work contracts and employment relations.

[118] "A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence", European Union, 2013, p. 62.

Chapter II
Intra-EU mobility of flexible workers and the Posted Workers Directive

1. Free movement between conflicting logics

The employment contract is a document containing the terms of the employment relationship. Based on this document employees are provided with certain essential information, such as: the identity of the parties and the place of work; the nature of the job; the date the contract begins and its duration; the amount of payment; normal working hours; and the collective agreements governing the employee's conditions of work. The study of employment contracts is an essential instrument to analyse the level of protection assured to employees and avoid the insecurity about the terms of the employment relationship. Further, this study can create greater transparency on the labour market, especially when new forms of work have led to an increase in the number of types of employment relationship.

National laws of each European country decide whether an employment contract exists and if so, what the terms of that contract are. The definition of terms 'employee', 'contract', 'retribution' and 'employment relationship' is therefore left to national legislation. Indeed, the aim of European Directives on labour mobility was to regulate the interfaces between the conflicting logics of free provision of services and the protection of employee's rights during their period of cross-border movements of labour and national systems of labour market regulation.

The conflicts of interest between sending and receiving countries - that is, between low and high-cost countries - have prevailed and were accentuated by the enlargement of the EU from 2004.

Further it should be considered that where an employer requires an employee to work in a different European country, which is nowadays no more an atypical characteristic of the employment relationship, the European Union legislation and the transposition of EU Directives in each country is decisive in order to recognise dangers and challenges of the labour market.

1.1 Labour market flexibility and 'atypical' work: new kind of work contracts, from atypical work to common practice

The issues of labour market flexibility and atypical work, are increasingly been discussed from the perspective of *flexicurity*[119].

The concept of flexicurity[120] was developed within academia at the end of the 1990s (inspired, e.g. by the practice adopted in Netherlands and Denmark) and it came to prominence in EU institutional language with the adoption of the European Employment Strategy in Luxembourg in 1997.

[119] Dekker R. and Withagen T. in Koene B., Gartsen C., Galais N. (eds.), *Management and Organization of Temporary Agency Work*, Routledge, 2014, pp. 38-53.

[120] See on the definition and development of flexicurity Caruso B. and Sciarra S. (eds.), *Flexibility and Security in Temporary Work: A Comparative and European debate*, WP C.S.D.L.E. "Massimo D'Antona" .INT-56/2007.

Flexicurity is about combining flexibility for employers and security for employees, and aims at reducing labour market segmentation and increasing economic growth[121].

Flexicurity pathways can be designed and implemented across four policy components defined by the European Commission[122] which need to be considered as a whole:

- flexible and reliable contractual arrangements;
- comprehensive lifelong learning strategies;
- effective active labour market policies;
- modern social security systems.

This flexicurity agenda has recently been taken up as a crucial element of the EES and the Europe 2020 Strategy, within the integration of Common Principles of Flexicurity which has been adopted by the Council.

Integrated flexicurity policies are now considered to play a key role in modernising labour markets and contributing to the achievement of the 75% of the 20-64 years old persons to be employed[123], starting from a rate of 69.2% in 2014, as the employment rate target set by the Europe 2020 Strategy.

It should be noted how the idea of flexicurity is partly about deregulation of employment protection combined with the principle of equal treatment applied to various forms of flexible employment, but it is also about effective active labour market policies, reliable and adaptable systems for lifelong learning, and modern social security systems. However, the project Common Principles of Flexicurity it has proved to be detached from this concept as a whole and thus these "principles have been criticized for focusing predominantly on labour market flexibility and deregulation rather than employment security"[124].

These criticisms should be read while considering the actual increasingly complex framework of employment relationships.

Indeed, in most employment contracts, there are only two parties involved, the employer and the employee. However, looking at the new kind of contracts - which are no longer atypical but common practice - in the labour market, it must be considered how different types of employment contracts are characterised by different distributions of flexibility and security in the relationship between employer and employee.

Part-time job contracts, fixed-term contracts and temporary agency work contracts since the late 1970s represented the focus of attention of the European Institution's efforts.

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[121] See COM(2007) 359 final.

[122] See ibid COM(2007) p.12.

[123] In 2008, the employment rate in the EU for the age group 20 to 64 peaked at 70.3%, after a period of steady increase. In the following years, employment trends reversed as a result of the unfavourable effect of the economic crisis on the European labour market. In 2009, the employment rate fell to 69.0% and has remained consistently low since 2010. In 2014, the rate slightly increased to 69.2%.

[124] Barnard C. and Peer S. (eds), *European Union Law*, Oxford University Press, 2014, p. 605.

But these new kind of work contracts should be considered both within European and national provisions, because each implementation process of the EU Directives identified by the Member States can easily result in forms of *flex-insecurity*[125].

The hard core of this applauded strategy is, by definition, to prefer employment security (in the sense of higher statistical rates of occupation) rather than work place. Pursuant to the leading opinion, labour flexibility must be maintained, and even raised, because companies benefit from it and it assists greater competitiveness and fiscal consolidation. However, this approach also considers essential to provide *ad hoc* instruments of intervention to temper human consequences generated by this strategy, mainly targeted to the most vulnerable situations, as to guarantee a more sustainable system in terms of social security. For this reasons flexicurity has been addressed as a "flexibility with a human face"[126]. The fundamental counterbalance seems to be clear the aim not to transform the higher number of flexible employment contracts in job insecurity.

Further, the concept of reconciling employer's need of a flexible labour market on the one hand, with worker's need of protection on the other hand, used - as one of its main axes - new datasets to examine changes in employment protection legislation, unemployment benefits and active labour market policies. The outcome was the combination of political and economic terms, producing a new European vocabulary.

The link between labour law and the EU flexicurity agenda was secured with the Commission's publication of the Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century" in 2006. This policy document noted the problem of segmentation arising from new kind of non-standard forms of work, as reported before.

The European Expert Group on Flexicurity, which outlined the four "flexicurity pathways" to encourage modernisation, as above mentioned, specifically recommended the "reduction of asymmetries between standard and non-standard contracts by integrating non-standard contracts fully into labour law".

It's therefore of the utmost importance to analyse the normative framework of the more used atypical employment contracts to find out vulnerabilities and to review the antinomies of flexibilisation. A crucial question is the extent to which the precise flexibility pathways chosen by Member States are compatible with sustainable social reproduction and avoid contributing to the growth of precarious employment[127].

The emergence of new kind of employment contracts requires to look at the exceptional working conditions surrounding them, given that they differ from 'standard' employment contracts by a lot of aspects and at the effects of their specificities within intra-EU mobility and the posting of workers.

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[125] For the italian legislation see Zoppoli L., *Flex/insecurity: La riforma Fornero (l.28 giugno 2012, n.92) prima, durante e dopo*, Editoriale Scientifica, 2012, p. 26. See also Meardi, G., *Flexicurity Meets State Traditions: The Differential National Effects of European Employment Policies*, International Journal of Comparative Labour Law and Industrial Relations, n. 27, 2011, Berton, F., Ricchiardi, M., and Sacchi, S., *Flex-insecurity: perché in Italia la flessibilità diventa precarietà*, Il Mulino, 2009 and Del Punta, R., *Diritto del Lavoro*, Giuffrè, 2010.

[126] Gallino L., *Il lavoro non è una merce. Contro la flessibilità*, Laterza, 2007, p. 122 (own translation).

[127] Fudge J. and Strauss K., *Temporary Work, Agencies and Unfree Labour*, Routledge, 2014, pp. 49-51.

1.2 The atypical work EU directives

After the Community Social Charter in 1989, the European Commission identified a need for regulation of non-standard employment contracts. The method chosen by the European Union to attain flexicurity objectives was clearly set out in a group of directives concerning atypical work: Directive 97/81/EC on Part Time Work, Directive 99/70/EC on Fixed Term Work and the more recent, Directive 2008/104/EC on Temporary Agency Work.

Flexicurity was, at first, explicitly mentioned as a goal in the Directive on Temporary Agency Work, but even the earlier directives both referred to the need of balance of flexibility and security of the employment contracts. The atypical directives adopt reflexive law-making techniques so that Member States and social partners are given opportunities to decide on levels and scope of implementation. Flexicurity as a procedural device uses soft-law mechanisms such as social dialogue and coordination, mixed with hard-law mechanism as the adoption of the legal method of the principle of equality. This means that the impact of the Directives on each Member State is diversified depending on their own labour institutions and traditions, as fostered by those qualified instrument chosen.

The principle of equality is used to promote comparison between atypical and full-time workers and to permit adjustments on the level of protection needed to allow flexibility. However, the equality approach may not achieve parity between standard and non-standard forms of employment and with the addition of open textured instruments and formulas, it may even result in further segmentation rather than convergence.

Further, when coming to posting of Intra-EU migrant workers, sent from one State to another in order to carry out employment activities, the complexity of the normative framework established by the atypical work EU Directives, has to be connected with the rules on the posting of workers. An example of this interaction is offered by Article 3 paragraph 9 of the Posted Workers Directive, where it is stated that Member States may provide that undertakings established in a Member State, posting workers within the framework of the transnational provision of services, to the territory of another Member States, must guarantee temporary agency posted workers, the terms and conditions which apply to temporary workers in the Member State where the work is carried out (terms and conditions now influenced by the Temporary Agency Workers Directive of 2008).

After a close examination of the Directives on part-time work, fixed-term work and temporary agency work, a more in depth analysis of the relation between these Directives - and mostly the Temporary Agency Workers Directive - and the case of posted workers, it will be worthy of exploration.

1.3 Directive 97/81/EC on part time work and the evolution of the definition of the principle of non-discrimination

The Part Time Directive was the first agreement on atypical forms of employment.

The Commission made unsuccessful preliminary proposals, which tried to regulate and restrict the use of atypical work. It later changed its attitude, as these forms of employment were increasingly perceived as opportunities for the creation of employment. At the same time, they were seen as

responding to both the need of employers for greater flexibility and the desire of employees to reconcile work and family life while retaining employment security[128].

The Part Time Directive was namely a Framework Agreement which set out the general principles and minimum requirements relating to part-time work, recognizing the diversity of situations in Member States and acknowledging that part-time work is a feature of employment in certain sectors and activities.

ETUC, UNICE and CEEP, the three most representative European trade unions at the time, requested the Commission to submit the Framework Agreement to the Council, under the current Article 155 TFEU, in order to achieve a decision which would make the requirements relating to part-time work binding in the Member States. The strenuous negotiations between the parties involved on the establishment of employment conditions of part-time workers[129], became obvious in the final text of the directive, characterised by general principles rather than clear regulations.

The signatory parties have agreed under Clause 1 that the purpose of the Framework Agreement is:

a. to provide for the removal of any discrimination against part-time workers and to improve the quality of part-time work;

b. to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which considers the needs of employers and workers.

A "part-time worker", under clause 3 of the Agreement, is defined as an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

In the Agreement, it is clarified that the term "comparable full-time worker" means a full-time worker employed in the same establishment and having the same type of employment contract or relationship, who is engaged in the same or a similar work, due regard being given to other considerations which may include seniority and qualification.

Eventually, as final circumstance considered by the parties, where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

The Agreement, as stated under Clause 2, applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State. Nonetheless, it is left to Member States the decision to exclude wholly or partly from the terms of the Agreement, part-time workers who work on a casual basis. Controversies within this open textured Clause about the question of comparability arose in the *Wippel* case[130] decided by the European Court of Justice.

The applicant of the case was a worker with a contract of employment under which hours of work and the organisation of working time were dependent upon the quantity of available work and were determined only on a case-by-case basis by agreement between the parties (principle of "work on

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[128] Blanpain R., *European Labour Law*, Wolter Kluwer, 2012, p. 479.

[129] On the analysis of part-time work and national systems, see Delfino M., *Il lavoro part-time nella prospettiva comunitaria. Studio sul principio volontaristico*, Jovene Editore, 2008.

[130] ECJ Case C-313/02, *Wippel*, 12 October 2004.

demand"). The lack of an agreement in the employment contract regarding hours of work and organisation of working time, caused a dispute between Ms Wippel and her employer. The Court stated that this kind of contract was a non-standard part-time job, under which the length of weekly working time and the organisation of working time were not fixed but were dependent on quantitative needs in terms of work to be performed, such workers being entitled to accept or refuse that work. The Court decided that such contracts covered employment relationships with a different subject-matter and purpose from any other part-time or full-time work contract and therefore they fell outside the scope of the Agreement because there was no possible "comparable situation".

The ECJ stated that "the prohibition on discrimination (...) is merely a particular expression of a fundamental principle of Community law, namely the general principle of equality under which comparable situations may not be treated differently unless the difference is objectively justified" (para. 56 of the judgment). It follows that a contract of part-time employment according to need which makes provision for neither the length of weekly working time nor the organisation of working time, does not result in less favourable treatment within the meaning of Clause 4 of the Framework Agreement.

The reasoning and outcome of this case reflect the problems of implementation connected to the principle of non-discrimination, which is the fundamental statement of the Framework Agreement under Clause 4. It is affirmed that in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time.

Equal treatment of part-time workers - but also fixed term and temporary agency workers - displays a difference regarding traditional non-discrimination regulation. Equal treatment here is not based on the employee's personal characteristics (such as sex, race or age), but on the employment contract and its form and content. The principle of non-discrimination in the Part Time Work Directive is limited, in that it requires the unfavourable treatment of the part-time worker to relate solely to the part-time work employment contract[131].

It also enables the employer to justify such different treatment with objective grounds. The principle of non-discrimination as set out in Clause 4, it is affirmed only in respect of the "employment conditions". Nevertheless, the European Court of Justice in its case-law clarified the necessity of a broad interpretation of the statement as to include remuneration conditions or pensions.

To interpret Clause 4 of the Framework Agreement as excluding from the term "employment conditions", within the meaning of that clause, financial conditions, such as those relating to remuneration and pensions, would effectively reduce - contrary to the objective attributed to that clause - the scope of protection against discrimination for the workers concerned by introducing a distinction based on the nature of their employment conditions, which is not in any way implicit in the wording of that clause[132].

Indeed, according to the *Bruno* case[133], Clause 4 articulates a principle of EU social law which cannot be interpreted restrictively. The case concerned a cabin crew members employed by the airline Alitalia who criticised the INPS (which is the largest social security and welfare institute in Italy) for considering, as qualifying periods of contributions for the purpose of acquiring pension rights, only the periods worked, to the exclusion of periods not worked, corresponding to the

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[131] Rönmar M. (ed by), *Labour Law, Fundamental Rights and Social Europe*, Hart publishing, 2011, p. 179.

[132] See ibid Blanpain, R., *2012*, Part I, Ch 4.

[133] ECJ Case C-395/2008 and C-396/2008, *Bruno*, 10 June 2010.

reduction in their working hours by reference to the hours worked by comparable full-time workers. Limitations on the use of Clause 4 emerged during this case. The first limitation is that only where the difference in treatment is solely based on the grounds of the part-time worker's status, then the different treatment is unlawful. The second limitation is that any difference in treatment can be justified on objective grounds[134], necessary and proportionate.

If, however, the discrimination cannot be objectively justified, the part-time worker will enjoy the same employment conditions of the full-time worker subject, where appropriate, to the principle of *pro rata temporis*.

Indeed, under Clause 4 of the Agreement the principle of non-discrimination is accepted to be limited by the application of the principle of *pro rata temporis*. This principle applies when the part-time worker's rights shall be defined in proportion of the length of working time performed, and it is excluded by the possibility for Member States, where justified by objective reasons and after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners, to make access to specific conditions of employment subject to a period of service, time worked or earnings qualification.

Further the Framework Agreement, under Clause 5, stated the necessity to identify and review obstacles which may limit opportunities for part-time workers and, where appropriate, eliminate them. However, under paragraph 2 it was specified that a worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned.

In fact, the only case where this provision has been considered is *Michaeler*[135], where the Court used Clause 5 (1) to remove an obligation on all employers to notify part-time contracts to the relevant authority because it discouraged employers from making use of part-time work[136].

In the Agreement's final Clause, it was underlined that implementation of the provisions of the Agreement should not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement.

This final non-regression Clause, which should be read in coordination with the necessity to eliminate the obstacles for part-time workers, means that rather than a *tout court* deregulation of the normative framework, it should be promoted a selective deregulation balancing flexibility and security.

Trying to picture the level of diffusion of part-time employment contracts within the European Union, it can be usefully read the latest Eurostat file[137] on persons working part-time or with a second job, which compares data from 2004 to 2014 (See Table 4).

The proportion of the EU-28 workforce in the age group 15-64 years reporting that their main job was part-time increased steadily from 16.7% in 2004 to 19.6% by 2014.

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[134] Barnard C., *EU Employment Law*, Oxford university press, 2012, p. 436.

[135] ECJ joined cases C-55/07 and C-56/07, *Michaeler*, 2008.

[136] See infra Barnard C. (2012), p. 437.

[137] Eurostat: Persons employed part-time, age group 15-64, 2014 (% of total employment).

Therefore, while part-time work continues to increase - not only in Europe but generally in all OECD countries - the debate grows as to whether this is a desirable trend or not. The main findings of the OECD employment outlook of 2010[138], are that part-time work promotes higher labour force participation.

According to this study, countries with a greater share of part-time work have lower inactivity rates. By contrast, despite regulatory changes to ensure equal treatment between part-time and full-time workers in terms of wages and working conditions, significant differences remain.

Not only are they less likely to have a permanent contract, but they also experience weaker coverage by unemployment insurance systems because of their shorter periods of work and shorter working hours, that make them less likely to meet the eligibility conditions for these insurance schemes.

Table 4: Persons working part-time or with a second job, compared data from 2004 to 2014

	Persons working part-time, age group 15–64			Persons with a second job, age group 15 and over		
	2004	2009 (¹)	2014 (²)	2004	2009 (¹)	2014 (³)
EU-28	16.7	18.0	19.6	3.6	3.8	4.0
Euro area (EA-19)	17.0	19.3	21.5	3.0	3.4	3.9
Belgium	21.5	23.2	23.7	3.8	4.0	4.3
Bulgaria	2.7	2.1	2.5	0.8	0.6	0.6
Czech Republic	4.4	4.8	5.5	2.5	1.9	2.2
Denmark	21.9	25.2	24.6	11.4	9.2	7.6
Germany	21.9	25.3	26.5	2.7	3.7	5.0
Estonia	6.9	9.4	8.3	3.6	4.2	4.7
Ireland	16.6	21.0	23.0	2.0	2.3	2.4
Greece	4.5	5.9	9.3	2.4	3.4	1.7
Spain	8.8	12.4	15.8	2.1	2.3	2.2
France	16.9	17.2	18.6	2.9	3.4	4.5
Croatia	6.5	6.5	5.3	3.1	2.7	2.4
Italy	12.4	14.1	18.1	2.1	1.5	1.3
Cyprus	7.5	7.5	13.5	6.9	3.9	3.7
Latvia	10.2	8.2	6.8	6.6	4.6	4.5
Lithuania	8.4	7.9	8.6	5.1	4.8	6.4
Luxembourg	16.3	17.6	18.5	1.5	3.2	3.2
Hungary	4.3	5.2	6.0	1.8	1.9	1.7
Malta	7.8	11.0	15.4	4.7	5.1	5.0
Netherlands	45.2	47.7	49.6	6.1	7.3	8.4
Austria	19.9	23.9	26.9	5.2	4.1	4.5
Poland	9.6	7.7	7.1	7.8	7.4	6.4
Portugal	8.2	8.5	10.1	6.2	6.5	4.5
Romania	9.2	8.5	8.7	3.4	3.0	1.9
Slovenia	8.3	9.5	10.0	3.1	3.5	4.0
Slovakia	2.5	3.4	5.1	0.9	1.0	1.0
Finland	12.8	13.3	14.1	4.0	4.4	5.3
Sweden	23.1	26.0	24.6	9.2	8.2	9.2
United Kingdom	25.1	25.0	25.3	3.8	3.9	3.9
Iceland	19.2	23.0	19.7	11.8	9.1	9.8
Norway	29.1	27.8	25.7	7.6	8.8	8.8
Switzerland	32.0	33.7	36.3	6.4	7.4	7.1
FYR of Macedonia	:	5.3	5.8	:	2.3	1.2
Turkey	:	10.6	11.1	:	2.7	3.2

(¹) 2004–09: break in series.
(²) Belgium, Bulgaria, the Czech Republic, Germany, France, the Netherlands, Poland, Portugal, Romania, Slovakia and Turkey: break in series.
(³) 2009–14: break in series.
Source: Eurostat (online data codes: lfsa_eppga, lfsa_e2gis and lfsa_egan)

1.4 Directive 99/70/EC on fixed term work

In the preamble of the Framework Agreement on part-time work, the contracting parties announced their intention to consider the need for similar agreements relating to other forms of flexible work. On 18 March 1999, the general cross-industry organisations (ETUC, UNICE and CEEP) concluded a Framework Agreement on fixed-term work, which was implemented by Directive 99/70/EC[139].

[138] OECD *Employment Outlook 2010*, Moving Beyond the Jobs Crisis, OECD 2010, p. 212-213.

[139] See Corazza L., *Il lavoro a termine*, pp. 1-34, in Del Punta R. and Romei R. (eds), *Il lavoro a termine nel diritto dell'Unione europea*, Giuffrè, 2013.

The Directive establishes minimum requirements relating to fixed-term work, in order to ensure equal treatment of workers and to prevent abuse arising from the use of successive employment contracts or relationships of this type.

The agreement applies to fixed-term workers except for those placed by a temporary work agency at the disposition of a user enterprise. It was the intention of the parties to consider the need for a similar agreement relating to temporary agency work.

Specifically, the agreement relates to the employment conditions of fixed-term workers, recognising anyway that matters relating to statutory social security are left for decision to Member States.

It's important to note that the parties of this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. With good reason, the Court of Justice has consequently judged that the contract of an indefinite duration is the general type and "it is a major element in the protection of workers, whilst the fixed-term contract may satisfy the needs of the employers as much as the workers in certain circumstances"[140].

As stated in the preamble of the Framework Agreement on fixed-term work, this agreement represents a further contribution towards achieving a better balance between "flexibility in working time and security for workers".

Whereas the contract of an indefinite duration is the general rule, the fixed-term contract must be considered as the exception. This exception must therefore be interpreted in a restrictive way and must be justified based on objective reasons. Thus, unlike the Part Time Work Directive, the dual purpose of the Fixed Term Work Directive (ensuring the application of the principle of non-discrimination and preventing abuse arising from the use of successive fixed-term employment contracts) is not so stark[141].

The Fixed Term Work Directive is considered as more about working protection, as recognised by the European Court of Justice in the *Adeneler* case[142]:

> the benefit of stable employment is viewed as a major element in the protection of workers (...), whereas it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers.

Indeed, under Clause 3 of the Agreement, it is clarified that the term "fixed-term worker" means a person having an employment contract entered directly between an employer and a worker where the end of the employment contract is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

The Court of Justice requires reasons to be appreciated based on precise and concrete circumstances which characterise the activity in question (such as seasonal working in agriculture), in order to justify the recourse to fixed-term contracts. Such specific justification is necessary, otherwise the beneficial effect of the framework agreement could be nullified.

The purpose of the agreement is to:

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[140] ECJ Case C-144/2004, *Mangold*, 22 November 2005.

[141] See infra Barnard, C., 2012, p. 438.

[142] ECJ Case C-212/2004, *Adeneler*, 2006, para. 62.

a. improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

b. establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

In respect of employment conditions, fixed-term workers may not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract unless different treatment is justified on objective grounds.

The concept of "employment conditions" referred to in Clause 4 must be interpreted as meaning that it can act as a basis for a claim, which seeks the grant to a fixed-term worker of a length-of-service allowance which is reserved under national law solely to permanent staff. Clause 4 precludes the introduction of a difference in treatment between fixed-term workers and permanent workers, which is justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer.

In the *Impact* case[143], the Court of Justice ruled that "employment conditions include pay". Indeed, the Court held that the Council, in adopting Directive 1999/70, in order to implement the Framework Agreement, relied on Article 155(2) TFEU, which provides that agreement concluded at a Community level are to be implemented for matters covered by Article 153 TFEU. Those matters include, in Article 153 TFEU, "working conditions". The Court affirmed that it cannot be determined from the wording of Article 153 TFEU alone, any more than from that of Clause 4 of the Framework Agreement. However, the aim of the Framework Agreement is the improvement of living and working conditions and the existence of proper social protection for fixed-term workers, as generally enshrined in Article 151(1) TFEU and Article 7 and Article 10(1) of the Community Charter of the Fundamental Social Rights of Workers to which Article 151 TFEU refers. In the Court's opinion, it follows that Clause 4 of the Framework Agreement must be interpreted as meaning that employment conditions within the meaning of that clause encompass conditions relating to pay and to pensions which depend on the employment relationship.

Indeed, it should be considered that Article 157(2) TFEU covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship then by considerations of social policy.

To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, the Framework Agreement provides that Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce, in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

a. objective reasons justifying the renewal of such contracts or relationships;

b. the maximum total duration of successive fixed-term employment contracts or relationships;

c. the number of renewals of such contracts or relationships.

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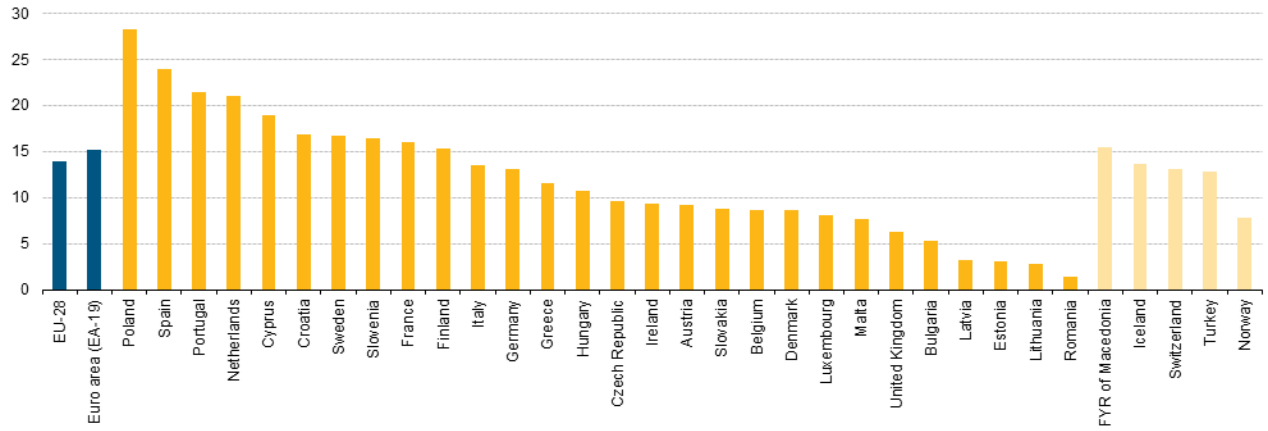
[143] ECJ Case C-268/2006, *Impact v. Minister for Agriculture and Food*, 15 April 2008.

Further, the statement of Clause 5(2) of the Framework Agreement and, by extension, Directive 1999/70, is intended to preclude employers to take the easy route of employing successive temporary personnel for permanent jobs. Such a system is contrary to the letter and the spirit of the law which is inspired by the principle that employment should be based on an indeterminate period and that it is only possible to offer temporary contracts if there are objective reasons.

Fixed-term employment has increased constantly during the past 20 years in the European Union. In 1983, 8.1% of the labour force was employed on a fixed-term contract whereas the figure for 2005 was 14.5%[144].

In 2014, the proportion of employees in the EU-28 with a contract of limited duration (fixed-term employment) was 14.0%[145].

The following Table 5 points at the proportion of employees with a contract of limited duration of total employees in 2014, considering the age group 15-64.



Source: Eurostat (online data code: lfsa_etpga)

The core elements of discussion on the Fixed-Term Work Directive's implementation are the concept of "employment conditions" and the definition of "objective reasons" justifying a difference in treatment between fixed-term workers and permanent workers.

As regards the concept of "employment conditions", the European Court of Justice in its case-law, particularly in the *Del Cerro Alonso*[146] and *Impact* cases, considered that normative clause, as including conditions relating to pay and to pensions which depend on the employment relationship and excluding conditions relating pensions which arise under a statutory social-security scheme.

However, wage differences between permanent and fixed-term contracts still exist across EU countries. According to data from the 2010 European Structure of Earnings Survey[147], Eurostat, after controlling for individual and job characteristics, workers on permanent contracts earn, on average, about 15% more than workers on fixed-term contracts with similar observable

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[144] EurWORK on fixed-term work, EUROFOUND, 3 April 2014.

[145] Eurostat, *Employment Statistics*, data from August 2015.

[146] ECJ Case C-307/05, *Del Cerro Alonso*, 2007; *Impact* case cit.

[147] Paper of the European Commission, Directorate-General for Economic and Financial Affairs, Dias da Silva A. and Turrini A., *Precarious and less well-paid? Wage differences between permanent and fixed-term contracts across the EU countries*, February 2015.

characteristics. As far as social security entitlement is concerned, fixed-term employment does not necessarily give rise to any fundamental problem compared with permanent workers. The problem only arises when there are gaps between several periods of fixed-term employment, leading to an increased risk of income insecurity both for a person's working life and, as a result for their lower pension contributions, once they have retired.

As regards the definition of "objective reasons" justifying a difference in treatment between fixed-term workers and permanent workers, the European Court of Justice gave a strict interpretation of that notion, first in the *Del Cerro Alonso* case and later in the *Gavieiro Gavieiro* case[148] of 2010.

In its case-law the Court held that the concept of objective grounds in Clause 4(1) must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement (*Del Cerro Alonso* case, paragraph 57). Indeed, the Court stated that the unequal treatment at issue should be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose (*Del Cerro Alonso* case, paragraph 58).

Nevertheless, some questions arose in relation to the principle stated by the Court in the *Mangold* and *Angelidaki*[149] cases, where it was clarified that there is no need for justification by objective reasons if there is a first and single fixed-term employment contract to agree on. The dangerous consequences of this last statement are "chain contracts", where successive workers for a fixed term contract succeed each other and perform permanent tasks.

1.5 Directive 2008/104/EC on temporary agency work

On November 2008, the long-time overdue Directive on temporary agency work was adopted. That it took more than twenty years, mostly because of the ideological differences relating to the role of the private sector on the labour market within Member States.

Employers and trade unions failed to conclude a collective agreement on this matter as it was for part-time and fixed-time work employment contracts.

In the preamble of the Directive, under paragraph 11, it is clarified that the European Parliament and the Council look to temporary agency work as a possibility to respond not only to undertakings' needs for flexibility but also to the need of employees to reconcile their working and private lives. Therefore, it shall contribute to job creation and to participation and integration in the labour market.

The Directive is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights of the European Union, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (preamble par. 1 of Directive 2008/104/EC).

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[148] ECJ Cases C-444/09 and C-456/09, *Gavieiro Gavieiro*, 2010; *Del Cerro Alonso* case cit.

[149] ECJ Cases C-378, 379 and 380/07, *Angelidaki*, 2009; *Mangold* case cit.

The European Parliament and the Council themselves stated that this process will be achieved by harmonising progress on these conditions, mainly in respect to forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.

It's clearly underlined how the so-called "flexible" forms of work need to be regulated in order to provide a complete protection in the actual labour market system as to promote flexibility combined with employment security and to reduce labour market segmentation.

The motto of "*flexicurity*" as the combination of flexibility and security that would contribute to adaptability, seeks to find in this Directive the equal balance between the diversity of labour markets and industrial relations, and the establishment of a protective framework for temporary agency workers meant to be non-discriminatory, transparent and proportionate.

The purpose of this Directive (Article 2) is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contribute effectively to the creation of jobs and to the development of flexible forms of work.

The Directive applies (Article 1):

- to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction;
- to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether they are operating for gain.

In coordination with the others directives on atypical work contracts, Article 3(2) states that Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency.

Thus the European Court of Justice clarified in its judgement in the *Della Rocca* case[150], that fixed-term workers placed by a temporary agency at the disposition of a user enterprise are not covered by the Framework Agreement of fixed-term work but by the Directive on temporary agency work.

Therefore, in order to determine whether a worker is protected by the Framework Agreement or by the Directive, the type of employer prevails over the type of contract that binds that employer to the employee.

For the purposes of this Directive:

- 'worker' means any person who, in the Member State concerned, is protected as a worker under national employment law;
- 'temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers to assign them to user undertakings to work there temporarily under their supervision and direction;

[150] C-290/12, *Della Rocca*, 11 April 2013.

- ‘temporary agency worker’ means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;
- ‘user undertaking’ means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
- ‘assignment’ means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;
- ‘basic working and employment conditions’ means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to: a) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; b) pay.

The scope of the Directive is wide and therefore, under Article 4, it is provided that prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

The core of the Directive is the principle of equal treatment as defined by Article 5. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

An exception can be made to the principle:

- where temporary agency workers have a permanent contract of employment with a temporary work agency and they continue to be paid in the time between assignments;
- provided that an adequate level of protection is guaranteed for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment (Article 5 paragraph 4).

Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged (Article 6) and temporary work agencies shall not charge workers any fees in exchange for this kind of arrangements.

Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency (Article 7).

The user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation (Article8).

The analysis of the specific situation of temporary agency workers sent to work in a Member State other than the one in which they stipulated a contract with a temporary work agency and were they usually live, it will be seen in the following paragraphs, in coordination with the normative framework on posted workers.

However, it should be noticed (as shown in Table 6) the great increase of temporary agency employment contracts within the European Union in the period of fifteen years between the date of adoption of the Posted Workers Directive and the aftermath of the implementation of the Temporary Agency Work Directive.

All the smaller and newer markets have at least come close to doubling their penetration rate or achieving more than double.

Table 6: Evolution of agency work penetration in Europe[151]

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	**2013**
Austria	0,4	0,5	0,6	0,7	0,8	0,9	0,8	1,0	1,7	1,7	1,5	1,6	1,6	1,4	1,6	**1,8**
Belgium	1,2	1,3	1,6	1,6	1,7	1,7	1,6	1,6	1,8	1,8	2,1	2,2	2,1	1,6	1,9	**1,8**
Bulgaria	-	-	-	-	-	-	-	-	-	-	-	-	0,1	0,2	0,3	**0,3**
Czech Republic	-	-	-	-	-	-	-	-	-	-	-	-	0,7	0,7	0,7	**0,9**
Denmark	0,2	0,2	0,3	0,3	0,3	0,4	0,4	0,4	0,5	0,6	0,7	0,7	0,7	0,7	0,8	**2,1**
Estonia														0,5	0,5	**0,6**
Finland	0,4	0,4	0,4	0,3	0,4	0,5	0,4	0,5	0,6	0,7	0,7	1,1	1,3	0,8	0,9	**1,1**
France	1,3	1,6	2,0	2,2	2,5	2,5	2,3	2,2	2,3	2,3	2,4	2,5	2,3	1,7	2,0	**2,0**
Germany	0,5	0,6	0,7	0,7	0,9	0,9	0,9	0,9	1,1	1,2	1,5	1,9	1,9	1,6	2,0	**2,1**
Greece	-	-	-	-	-	-	-	-	-	-	-	0,2	0,0	0,1	0,1	**0,2**
Hungary	-	-	-	-	-	-	0,8	1,0	1,3	1,4	1,4	1,4	1,4	1,2	1,8	**0,6**
Ireland	0,2	0,3	0,6	0,6	1,5	1,4	1,4	1,4	1,3	1,3	1,5	1,7	1,7	0,9	1,9	**1,4**
Italy	-	-	0,0	0,1	0,3	0,3	0,4	0,6	0,7	0,7	0,8	1,0	0,9	0,7	0,9	**1,2**
Latvia														0,2	0,2	**0,03**
Lithuania														0,2	0,2	**0,2**
Luxembourg	1,2	1,2	1,2	1,7	2,2	2,1	2,1	2,1	2,1	2,0	2,5	2,4	1,9	1,9	1,9	**2,5**
Macedonia	-	-	-	-	-	-	-	-	-	-	0,4	0,3	0,3	0,8	0,8	**0,9**
Netherlands	2,1	2,2	2,4	2,4	2,3	2,2	2,1	1,9	1,9	2,2	2,5	2,8	2,9	2,4	2,5	**2,5**
Norway	0,3	0,4	0,5	0,5	0,5	0,5	0,5	0,4	0,5	0,6	1,0	1,0	1,0	0,8	0,9	**1,2**
Poland	-	-	-	-	-	-	-	0,1	0,2	0,2	0,2	0,4	0,5	0,5	0,7	**1,2**
Portugal	0,6	0,6	0,7	0,9	0,9	0,9	0,9	0,9	0,9	0,9	0,9	0,9	1,6	1,6	1,7	**1,7**
Romania	-	-	-	-	-	-	-	-	-	-	-	-	0,3	0,3	0,5	**0,2**

[151] Data Source: Ciett national federations, 2012 Ciett Economic Report, *The Agency Work Industry around the World*, p. 25 evolution from 1996 to 2010. See also 2015 Ciett Economic Report, p. 29 average in 2013.

Slovakia	-	-	-	-	-	-	-	-	-	-	-	-	0,6	0,6	0,8	**0,8**
Slovenia	-	-	-	-	-	-	-	-	-	-	-	-	0,3	0,3	0,5	**0,5**
Spain	0,5	0,7	0,8	0,9	0,7	0,7	0,6	0,6	0,7	0,7	0,7	0,8	0,6	0,4	0,5	**0,5**
Sweden	0,2	0,3	0,4	0,6	1,0	0,9	0,8	0,7	0,7	0,7	0,8	1,3	1,3	1,0	1,3	**1,5**
United Kingdom	2,6	2,9	2,6	2,8	3,7	3,7	3,7	3,9	4,1	4,2	4,3	4,7	4,1	3,7	3,0	**3,9**

2. Directive 96/71/EC on the posting of workers

After a compound analysis of the three Directives on atypical work employment contracts, which were pulled together in the text for better understanding of the common intention of regulation of flexible contracts, it should be studied the connection between those directives and the subject of cross-border workers. Particularly it will be considered the relation between the Temporary Agency Work Directive and the Posting of Workers Directive, because of the specific critical issues related both to the triangular relation in posting situations between sending undertakings, hosting undertakings and posted workers and the triangular employment relationship between temporary agencies, users and temporary agency workers.

Even before the internal market project was launched, some decisions of the European Court of Justice - *Manpower* and *Van der Vecht* cases[152] - showed that posting employees abroad to perform work was already a phenomenon in the late 1960s and early 1970s. The practice of hiring (temporary agency) workers from a country with a "cheaper" social security scheme, with the sole purpose of posting them to a Member State with a more expensive social security regime, was at that time labelled abusive and as enacting "social dumping"[153].

In the context of the Delors' project "Europe 1992"[154], the proposal for a Directive on the Posting of Workers lead to fierce debates, in the European Parliament and Council, focused in particular on the extent to which Member States must be allowed, or should be required, to apply their mandatory wage provisions and other working conditions to workers posted to their territory.

At the time of the Proposal for a directive on the posting of workers, some questions and answers were discussed by the Council. The starting point was that "Everybody wants a free market in services in the European Union". Indeed, the Posted Workers Directive was aimed at reconciling the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU with the need to ensure a climate of fair competition and respect for the rights of workers (preamble para. 5 of the Posted Workers Directive).

In 1991 the tendency described by the Employment and Social affairs Council, was that under EU rules, companies based in one Member State were free to send (post) their workers to another Member State. This situation was clearly separated from cases in which: a) companies create subsidiaries in another Member State or b) individuals go to work in another Member State on their

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[152] C-35/70, *Manpower*; C-19/67, *Van der Vecht*.

[153] Van Hoek A. and Houwerzijl M., *'Posting' and 'Posted Workers': The need for clear definitions of two key concepts of the Posting of Workers Directive*, Cambridge Yearbook of European Legal Studies, Volume 14, 2011-2012, Research Project of the European Commission, Contract VC/2011/0096.

[154] See especially COM (91) 230 final, *Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services*, 1 August 1991.

own behalf. According to the Council, both of these situations were adequately dealt with at the time by the free movement Treaty provisions.

Specific problems on posting of workers arose where workers, notably in low wage countries, were posted to other countries. The Council identified three types of problems related to this issue: 1) lack of information and legal certainty as to what rules and regulations apply; 2) the emergence of many abuses where both employers and employees are being put at risk; 3) the creation of an exploitative market based on low-wage labour. An example of abuse, in absence of norms regulating these situations, was identified where "a dummy company was created in Portugal, sent workers to Berlin, took the money for workers' salaries and then disappeared"[155].

The Commission adopted a proposal for a directive on the posting of workers in June 1991, but the final draft was adopted only on 16 December 1996.

Although Directive 96/71 represented a big step forward in avoiding abuses in situations of posting, it should be clearly stated that this measures combats social dumping only to a certain extent, as not all working conditions are covered; nor does it contribute to greater convergence of working conditions in the Common Market.

Even though the fifth paragraph of the Directive's preamble, as above mentioned, states that "promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers", the primary objective is not to protect workers, but rather to enhance the freedom to provide services.

There is no intention of harmonisation, as clarified by the Council in its Proposal of 1991:

> Conditions of employment vary from country to country. Sometimes there are agreements between companies and unions. Sometimes conditions are set by national legislation. Sometimes conditions apply immediately someone arrives in a new country. Sometimes conditions apply after several months. Local conditions including minimum wages will continue to be applied. But under the Directive, everyone will know when and how they apply.

And further the Council affirmed that: "Social security has nothing to do with this Directive. Employees' social security contributions continue to be paid within the country from which they came for the duration of their posting abroad. This is a measure aimed at stimulating business and jobs".

Thus, one of the controversies of the Posting Workers Directive concerned its legal basis, which was to be found in the Treaty provisions establishing the freedom to provide services. In fact, in the *Rush Portuguesa* case[156] the European Court of Justice paved the way for this legal basis, even if this decision was made at the time when the transitional arrangements for Portuguese accession to the EC were in place. Which meant that the rules on freedom to provide services were in force but not those relating to the free movement of workers. Thus, Portuguese workers did not enjoy the rights of free movement and so for the Court they constitute third country nationals (see para. 4 of the judgement).

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[155] See ibid COM (91) 230 final.

[156] ECJ Case C-113/89, *Rush Portuguesa*, para. 15: "an undertaking established in one Member State providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from its own Member State for the duration of the work in question" and para. 18: "Community Law does not preclude Member States from extending their legislation, or collective labour agreements, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established".

The case involved a Portuguese-owned public works company which had been subcontracted to build a railway line in France, and arranged for Portuguese workers to come to France to carry out the work. The French National Immigration Board challenged the company's right to use its own workers on French soil without first obtaining authorisation to do so. The ECJ ruled that the Portuguese company had the right - based on freedom to provide services guaranteed by the Treaty of Rome - to carry out the contract using its own workers. However, the Court also ruled that France had the right to force the company to comply with French social and labour legislation during the period of the contract.

Another fundamental aspect which emerged during the adoption of the Posted Workers Directive relates with the fact that Directive 96/71 should be analysed as a whole with the Convention on the Law Applicable to Contractual Obligations of 1980, which was replaced by Regulation No. 593/2008 on the law applicable to contractual obligations (known as Rome I). Convention Rome I indicates in its Recital 34 that "The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC (...)". This means that only for those provisions which are not covered by Directive 96/71, Convention Rome I applies and particularly the principle that the law of the place of work should apply to contracts of employment (*lex loci laboris*).

The position of workers who are posted to another Member State in the framework of the provision of services has thus been a European concern for a considerable time.

Looking at its scope of application, Directive 96/71/EC applies to undertakings, established in a Member State, which post workers for a limited period (Article 2 para.1) in the framework of transnational services to the territory of a Member State (Article 1 para. 1) other than the Member State in which the worker works normally.

The Directive covers employees being sent to another Member State in three situations:

- When an employer posts a worker to another Member States on his own account and under his direction, under a contract which the employer has concluded with the party in the State for whom the services are intended (subcontracting of workers);
- When an employer posts a worker to an establishment or to an undertaking owned by the group in the territory of a Member State (intra-company or intra- group secondments);
- When the employer, being a temporary employment undertaking or placement agency, hires out a worker to a user undertaking established or operating in another Member State, if there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting (temporary work for a user).

The third situation covered by the Directive relates to the activity of temporary-work agencies to post workers from a Member State to another[157].

The main problem in these situations was - and still is - that some temporary agencies based in a specific country could open a subsidiary in another country, where social security contributions paid by employers are low, and then send temporary workers to work in a third country or the agency's country of origin. The agency thus benefits from the less favourable conditions for workers which apply in the country where the subsidiary is based. Such practices were considered as contrary to the spirit of Community law.

[157] See Eurofound, EurWORK, *Posted workers and the implementation of the Directive*, 27 September 1999.

To understand interactions between the Posted Workers Directive and the Directive on Temporary Agency Work, which was adopted only at a later date, it's useful to compare the different legal basis and aims of the two legal instruments.

In the Proposal for a Directive of the European parliament and the Council on working conditions for temporary agency workers[158], as a justification for the initiative it was stated that the proposal for a directive was intended to clarify and harmonise the conditions for posting workers at national level. At the same time, a specific directive on temporary agency workers was seen as an extension of arrangements already in force for transnational posting of temporary workers. In the Proposal (para. 3 (1) (c) of the text) it was affirmed that "in a proper internal market, it is only logical for the rules for posting temporary workers to be aligned with each other, irrespective of whether a posting is national or transnational". The two Directives have thus different legal bases, for the Posted Workers Directive the legal basis is represented by the provisions on the freedom to provide services while the Temporary Agency Work Directive was adopted in the framework of the provisions on the free movement of workers.

As an example, in a national case of temporary agency workers sent to an undertaking established in the same country, solely Directive 2008/104 will apply. Transnational posting of temporary agency workers instead comes within the scope of Directive 96/71. Nevertheless, according to Article 3(9) of Directive 96/71/EC temporary work agencies "must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out". In this sense, even in cases of cross-border services, principles and conditions referred to in the Temporary Agency Work Directive should apply, without altering the scope of, or the possibilities for exemptions from, the Directive on the posting of workers.

As it will be seen beyond, the application of the principle of equal treatment to posted temporary agency workers was not always correctly implemented. Thus, a clarification on this point is one of the requests of discussion within the 2016 Targeted Revision project of Directive 96/71.

As regards the definition of 'posted worker', this is contained in Article 2 (1) of the Directive. However, the notion of worker referred by the Directive is that which applies in the law of the Member State to whose territory the worker is posted (Article 2 para. 2). It follows that the variety of Member States' systems remains as it is.

One of the objectives of the Directive is to avoid social dumping (which is in place where foreign service providers can undercut local service providers because their labour standards are lower) between companies from the various Member States and ensure that a minimum set of rights are guaranteed for workers posted by their employer to work in another country. The basic principle is that working conditions and pay in effect in a Member State should be applicable both to workers from that State, and those from other European Union countries, posted to work there.

Working conditions which apply and shall be guaranteed to posted workers are those laid down by: 1) governmental rules; 2) collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8[159], insofar as they concern building

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[158] *Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*, COM/2002/0149 final - COD 2002/0072, Official Journal 203 E, 27/08/2002.

[159] "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

work[160] or other activities indicated by the Member States. Thus, in the construction sector, where the core conditions of employment listed beyond are laid down by collective agreements or arbitration awards that have been declared universally applicable, Member States are also obliged to ensure the application of these conditions to posted workers. For activities other than construction, Member States are left the choice of imposing terms and conditions of employment laid down by collective agreements or arbitration awards which have been declared universally applicable.

The core conditions of employment concern (Article 3 paragraph 1):

a. working time (maximum work periods and minimum rest periods);

b. minimum paid annual holidays;

c. minimum wage (the minimum rates of pay, including overtime rates, but excluding supplementary occupational retirement pension schemes);

d. the conditions of hiring-out of workers, notably the supply of workers by temporary employment undertakings;

e. health, safety and hygiene at work;

f. protection of motherhood, children and youngsters (protective measures regarding 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.

These are minimum conditions which can obviously be improved upon Article 3(7) with the application of terms of conditions of employment which are more favourable to workers. A key point of Directive 96/71 in order to comprehend the level of protection of posted workers is the notion of minimum wage. Indeed, for the purpose of the Directive, the notion of minimum wage is the wage as defined by law or practice of the posted Member State (Article 3 para. 1).

Further, allocations which go along with the posting are considered to be "pay", except for the case when they concern the payment of expenses made, such as for travel, housing and catering (Article 3 para.7).

In the *Commission v. Germany* case[161], the Court of Justice decided that:

> By failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by the employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71.

Using an *a contrario sensu* interpretation of the Court decision, it could be stated, in order to verify the correct application of the equal treatment principle in regard to minimum wage, that bonuses and allocations like a thirteenth and a fourteenth month, as well as vacation pay, quality bonuses

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[160] As specified by the *Annex*, the building activities include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings.

[161] ECJ Case C-341/02, *Commission v. Germany*, 14 April 2005.

and bonuses for dirty, heavy and dangerous work should be treated as constituent elements of the minimum wage.

However, based on the words of the Directive, it remains within the Member States to define retribution and its different economic components. This will surely be another point of discussion within the 2016 Targeted Revision project of the directive.

According to Eurofound in January 2016[162], 22 out of 28 European Union countries apply a generally binding statutory minimum wage, which means that various legal restrictions of the lowest rate payable by employers to workers apply. By contrast, in most Member States (Austria, Denmark, Finland, Italy and Sweden), where there is no statutory minimum wage, the minimum wage level is de facto set in (sectoral or generally binding) collective agreements. These agreements can become generally binding - for example, in Finland, a public commission under the Ministry of Social Affairs and Health formally decides whether collective agreements are generally binding. Another example is Italy, where while such agreements only apply to enterprises and workers that are members of the bargaining social partners, case law adopts collectively agreed minimum wages as a reference for other employees as well, significantly sensitising their adoption by employers which are not affiliated to signatory employer organisations.

In the field of the different legal restrictions of the lowest rate payable to employees, discussions arose concerned the perceived - too low or too high - level of the statutory minimum wage within the Member States. As explains the European Observatory of working life in its article of January 2016[163], "trade unions often perceived the minimum wages to be too low while the employers argued that higher levels could lead to loss of employment and competitiveness". The debate also concerned possible changes of scope of the statutory minimum wage and other issues such as compliance with the minimum wage or relating other benefits, subsidies and fees to the minimum wage.

Looking at the Directive provisions, it should be further considered that whereas a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's period of posting (Preamble para. 14), the Directive provides that there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays. When the length of the posting is not more than one month or the amount of work to be done is not significant, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements (Article 3 para. 4 and 5).

Furthermore, the Posting Workers Directive lays down the obligation for Member States to cooperate among themselves and to grant public access to information on national employment conditions (Article 4).

This covers the following points:

- Member States indicate one or more liaison offices and inform the other Member States and the Commission;
- Member States provide for cooperation between administrations competent for the surveillance of the working conditions stated in Article 3, especially regarding information

[162] Eurofound, EurWORK, *Statutory minimum wages in the EU 2016*, January 2016.

[163] See ibid Eurofound, EurWORK, *Statutory minimum wages in the EU 2016*, January 2016.

on the transnational supply of workers including manifest abuses or possible cases of unlawful transnational activities;

- Member States and the Commission look closely at the equal treatment of enterprises;
- Member States must see to it that the information concerning working conditions is "generally available".

Under Article 5 it is stated that Member States shall take appropriate measures in the event of failure to comply with the Directive. They shall, in particular, ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this directive. As the Court of Justice ruled in the *Wolff and Müller* case[164], a possible measure is the obligation on an undertaking to act as guarantor in respect of the minimum remuneration of workers employed by a subcontractor.

Lastly, in order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State (Article 6).

2.1 A case-by-case balance between free movement of services and the application of the principle of equal treatment to posted workers

It was stated earlier that once established the law applicable to posted workers, the issue was to find a case-by-case balance between the provision of services and the national labour law applicable. Indeed, within the evolution of the case law of the European Court of Justice and the new normative instruments, it was clear that restrictions which discriminate neither directly or indirectly against an incoming services provider, or a worker, must be abolished.

An extensive interpretation of the principle of non-discrimination to ensure its *effet utile*, from the ECJ case *Säger* onwards, arrived to require:

> Not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services[165].

According to the same case-law, such restrictions or obstacles may nonetheless be justified by overriding reasons in the general interest, in so far as:

- that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State where he is established;
- the restriction is suitable for securing the attainment of the objective which it pursues;
- the restriction does not go beyond what is necessary in order to attain its objective, which can therefore not be attained in a less restrictive manner;

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[164] ECJ Case C-60/03, *Wolff and Müller*, 12 October 2004.

[165] See, e.g., ECJ Case C-76/90, *Säger*, 1991; C-275/92, *Schindler*, 1994; C-384/93, *Alpine Investments*, 1995.

- the restriction is applied in a non-discriminatory manner.

Because of this extensive interpretation of the principle of non-discrimination, the application of national labour law to posted workers was intrinsically "liable to prohibit, impede or render less advantageous the activities of a provider of services". Further, considering that the European Court of Justice has always been hesitant to develop labour exemptions to the internal market principles and has typically gone for a balancing approach[166], the result is a no more unconditional application of national labour standards, in specific case of intra-EU workers' mobility.

In the Court's view, thus, all national provisions represent a derogation from the main principle of free movement, and Member States should provide hard evidence that such measures are necessary and proportionate. The outcome of the need for a genuine and sufficiently serious threat to a fundamental interest of the country, in order to derogate from the free movement principle, is that - with the exemption of the prohibition of slavery - any national labour law will meet that criterion[167].

Starting with the *Vander Elst* case[168], it has been rephrased the decision of the *Rush Portuguesa* case as to apply to minimum wages only. However, the Court stated that even the application of the local minimum wage can only be accepted if it does indeed meet the standards of justification in the light of all the factors of the particular case. The application of national labour law standards can hardly be maintained as a viable overriding interest to the extent that they do not also protect the incoming posted workers, they will therefore have to be justified as protection of the incoming posted workers and be limited to the hard-core provisions covered by Directive 96/71.

The Court acknowledges that, in principle, the application by the host Member State of its minimum wage to providers of services established in another Member State pursues an objective of public interest, namely the protection of the posted employees. But even that principle may suffer an exception if, considering all the factors of the case, the application of the local minimum wage appears not necessary or proportionate for the protection of the workers concerned.

For example, a services provider that has paid such allowances and supplements to his posted workers under the rules of the country of origin should be allowed to rely on that payment in assessing the respect of the minimum wage in the host country.

Every situation should be analysed under a case-by-case study.

2.2 European freedoms of movement and fundamental rights

With the cases *Laval* and *Viking*[169], the Court considered the interaction between free movement of services and free movement of workers, as established in previous case law, going further from the application of the justification test, considering the implementation of labour law standards, and particularly the right to strike, not to posted workers but to national workers.

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[166] See De Vos, M., *European Social Dialogue and European Competition Law: an Inherent Contradiction?*, in: M. De Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, 2003, 53-87.

[167] Barnard, C., *The UK and Posted Workers: The Effect of Commission v. Luxembourg on the Territorial Application of British Labour Law*, Industrial Law Journal, 2009, 38, 2, pp. 122-132.

[168] ECJ Case C-43/93, *Vander Elst*, 1994.

[169] See ECJ Case C-438/05, *Viking*, 11 December 2007 and C-341/05, *Laval*, 18 December 2007.

In these cases, the European Court of Justice held that where industrial action infringes an employer's free movement rights under Article 49 TFEU (freedom of establishment) and Article 56 TFEU (freedom to provide services), respectively, these Treaty provisions can have horizontal direct effect against the unions organising the action. Unions may defend themselves against these claims by asserting a right to strike (which the Court recognised as a fundamental right within Community law) but only where they are acting proportionately in the exercise of that right.

Here finally was underlined, a more fundamental mismatch between the Posted Workers Directive and EU constitutional principles. The Lisbon Treaty that came into force in 2009 has established a legally binding catalogue of fundamental rights for the European Union - when the Charter of Fundamental Rights of the European Union became legally binding on the EU institutions and on national governments - which involves explicit guarantees of social and labour rights.

Thus, and in contrast to earlier constitutional phases, social and economic objectives according to the Lisbon Treaty are regarded as equally important.

Against this, the question arises whether the provisions of the Posted Workers Directive, to withhold the right of equal treatment to posted workers, would be in line with the Treaty. As it was seen in the cases *Viking* and *Laval*, but also in more recent cases such as case *Poclava*[170], the Court has taken the position of a rather limited impact of the Charter of fundamental rights on national legislation and subject to the limits of the extensive interpretation of the principle of non-discrimination for services providers.

In Poclava, the Court underlined that "it emerges in essence from the settled case-law of the Court that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations" (paragraph 29 of the judgment). In this case, the Court stated that it does not had jurisdiction to answer the question put by the referring court, because the situation at issue in the proceeding did not fall under the scope EU law.

These cases implied a significant narrowing of the scope for national measures and industrial action against low-wage competition and unequal treatment of posted workers, thus strengthening the competitive advantage of foreign services providers coming from new Member States[171].

However, the survival of national labour standards to the requisite balancing, or even the compatibility with the Charter of Fundamental Rights, represents a non-clear or predictable situation, but one that leaves room for flexibility, with great implications for Member States' labour market and the protection of workers' rights.

The real problem of possible impacts of the rights enshrined in the Charter of Fundamental Rights of the European Union, seems to be the wide condition, set in Article 28 of the Charter, "in accordance with EU law". Fundamental human rights are thus, subject to a proportionality test and limited to their proper purpose, as reframed in the EU context. The entering into force of the Lisbon Treaty in December 2009 did not change the situation as it was in the past and surely the Charter did not change the powers and competences of the European Union. Within the case law of the European Court of Justice, the recognition of fundamental rights as "higher objectives", which could be used to derogate from the internal market rules, shows its drawback in the need for the Court to balance the fundamental rights with the four freedoms. Further, the Court "may be called

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[170] See ECJ Case C-117/14, *Nisttahuz Poclava*, 5 February 2015.

[171] Dølvik, J.E. and Visser, J., *Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?*, Industrial Relations Journal, 40:6, pp. 522-525.

upon to review human rights standards in national measures even in areas which do not, strictly speaking, fall within the ambit of Community law"[172].

In this scenario, what it is going to be analysed in the next chapters, is the impact of this problems of interaction between social rights and the law of economy on the area of posted workers, particularly by temporary work agencies, as affected by principles of labour market flexibility.

Flexible labour, such as temporary employment contracts, is often labelled as atypical work. Nevertheless, in selected sectors and, especially, for certain groups of employees, such as low-skilled employees or women, atypical work can be now defined as a common practice.

The emergence of new kind of employment contracts, in the actual frame of the European labour market, causes the necessity to look at the exceptional working conditions surrounding these workers, given that they differ from 'standard' employment contracts by a lot of aspects.

2.3 Commission's services report on the implementation of directive 96/71/EC and the 2014 Enforcement Directive

In the Commission's services reports on the implementation of the Posted Workers Directive, the core issues regarded restrictions still in place in the Member States which were contrary to the free provision of services and the lack of protection of posted workers' rights which needed to be fostered.

On one hand, in the Parliament's resolution evaluating the content of the Communication, many issues of particular importance need to be looked at more closely. These questions include: the effect of the optional exemptions provided for in the Directive in order to prevent unfair competition; the concept of "relevant workers"; the (ultimate) liability for the obligations of subcontractors towards their workers; mutual recognition and enforcement of financial penalties; the clarity of some terms and definitions used in the Directive (such as "minimum rates of pay, including overtime rates", "minimum paid annual holidays" and the "hiring-out of workers"); the implementation of the Directive by means of collective agreements; the impact of enlargement on the application of the Directive; transparency and accessibility of the material terms and conditions of employment; and administrative cooperation[173].

On the other hand, in COM(2006)[174] the Commission reported that of the measures implemented by certain Member States, the following urgently required clarification on the basis of the case law of the Court of Justice based on Article 56 TFEU:

- the requirement to have a representative on the territory of the host Member State;
- the requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation;

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[172] Govaere, I., *The future direction of the EU internal market: on vested values and fashionable modernism, Conference: Internal Market and Other Policies: Potential Clashes and Crossroads*, 24 January 2008, pp. 79-80.

[173] See European Parliament's Resolution P5_TA(2004)0030 and the Commission's Communication COM(2003) 458.

[174] Brussels, 4 April 2006, Communication from the Commission COM(2006), on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, the report was intended to respond to the European Parliament's and the Economic and Social Committee's call of 2003-2004 for more information on the practical implementation of the Directive in the Member States.

- the requirement to make a declaration;
- the requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory.

As general information regarding the implementation of the Posted Workers Directive, in COM(2006), it was at first criticised the absence of reliable data on posted workers. The Commission underlined that "given the large variety in the duration and nature of the provision of services - and thus also the posting of workers in the context of the provision of services - it is very difficult to estimate the total number of posted workers within the European Union". Further, it stated that "most Member States were unable to provide figures or reliable estimates and in the Member States where data have been collected, the figures were often based solely on a statistical analysis of mandatory posting declarations, and a degree of caution is thus advisable when assessing the significance of this information".

As regards "requirements for posting" largely used between the host Member States in case of cross-border activities, the reasoning of the Commission was mostly based on the case law of the European Court of Justice.

With respect to the requirement to have a Representative established on the territory of the host Member State, the Court established that this would be "the very negation of the free provision of services". Pursuant to current case law, it was concluded that the requirement made by a Member State that companies posting workers on its territory have a representative domiciled in that host Member State is disproportionate for monitoring the working conditions of these workers. The appointment of a person from among the posted workers to act as the link between the foreign company and the labour inspectorate, should suffice.

Secondly, according to the established case law of the Court of Justice, national rules which stipulate that the provision of services on national territory by a company established in another Member State is subject, as a general rule and for all activities, to obtaining an administrative authorisation, constitute another restriction of the free provision of services within the meaning of Article 56 TFEU.

Further, on the basis of the Court of Justice case law, the Commission considered that the host Member State, in order to monitor compliance with the conditions of employment laid down in the Directive, should be able to demand, in accordance with the principle of proportionality, that the service provider submit a declaration, by the time the work starts, at the latest, which contains information on the workers who have been posted, the type of service they will provide, where, and how long the work will take.

Indeed, to justify the difference in treatment between posted workers (core protection) and migrant workers (equal treatment, also with regards to social security schemes to be applied), posting should be of temporary nature. If the duration of the posting is excessive, and becomes permanent, the presumption behind the difference, at the European level, in legal status between these two categories of workers is no longer valid. The same situation occurs if the same or different employees are repeatedly recruited by an undertaking with the purpose of being posted to another Member State for carrying out the same job (rotational postings).

As it was stressed by the Commission Staff Working of 2012[175], the problem is mainly driven by the absence of criteria which would enable Member States authorities to determine if a posting is of

[175] See Commission Staff Working Document of the impact assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and Proposal for a Council Regulation on the exercise

temporary nature. The Directive defines the 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. There is however no indication as to the temporary nature of the posting. The Directive neither provides for a fixed time limit nor other criteria to determine the temporary character of the stay in the host State. There is no reference either to the possibility of repeated posting for the same job. However, the social security legislation applying to posted workers[176] sets a time limit of two years for posting and excludes the possibility of repeated postings for the same job.

Another problem stressed by the Commission Staff Working of 2012, is the unclear level of protection regarding the notion of "minimum rates of pay".

Sure enough it is legally unclear which components of "wage" form part of the concept of minimum rates of pay to be guaranteed in the host Member State. The definition of minimum rates of pay is in principle a matter for the host Member State, how it is explicitly referred to in the last sentence of Article 3(1). The definition may thus vary from one Member State to another. However, Member States may determine the various allowances and bonuses which are included in the minimum pay applicable to posted workers. Some Member States restrict it to the minimum wage as such, others include different kinds of bonuses, allowances or contributions to funds.

Lastly, the Commission in its reports on the implementation of Directive 96/71/EC have considered the case law of the European Court of Justice in which it has been expressed an important opinion on the obligation to keep and store social security documents on posted workers in the host Member State.

Since the *Arblade et al.* case[177] and the *Finalarte* case[178], it must be concluded that, in order to be able to monitor compliance with the conditions of employment laid down in the Directive, the host Member State must be able to demand, in accordance with the principle of proportionality, certain documents to be kept in an accessible and clearly identified place in the territory of the host Member State. This is necessary particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71/EC.

Nevertheless, the host Member State cannot demand a second set of documents if the documents required under the legislation of the Member State of establishment, taken as a whole, already provide sufficient information, to allow the host Member State to carry out the checks required.

In this scenario, amendment of Directive 96/71/EC seemed to be required.

As above mentioned, the Commission evaluated the implementation and application of the Directive and adopted a report in 2003. This report identified several deficiencies and problems of incorrect implementation and/or application of the Directive in specific Member States. Furthermore, the Commission adopted in 2006 guidelines aimed at clarifying the extent to which certain national control measures could be justified and proportionate in view of prevailing EU law as interpreted in the Court's jurisprudence. In a second Communication in 2007 several

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of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, SWD/2012/0064 final - APP/2012/0064.

[176] See Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[177] ECJ Case C-369/96, *Arblade et al.*, 23 November 1999.

[178] ECJ Case C-49/98, *Finalarte*, 25 October 2001.

shortcomings were highlighted about the way controls were carried out in some Member States and the poor quality of administrative cooperation and access to information.

Within this period of reports on Directive 96/71 considering the necessity for its review, attention should be paid to the judgements of the European Court of Justice in the *Viking-Line, Laval, Rüffert* and *Commission v Luxembourg* cases[179], which triggered an intense debate among EU institutions, academics and social partners. This focused on two major issues[180].

The first concerned how to set the right balance between the exercise by trade unions of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the TFEU, the freedom of establishment and the freedom to provide services. The second was how to interpret some key provisions of Directive 96/71/EC, such as the concept of public policy, the material scope of the terms and conditions of employment imposed by the Directive and the nature of mandatory rules, in particular the minimum wage.

The report on the relaunch of the Single Market[181], submitted by Professor Monti on 9 May 2010, also addressed some concerns. He recognised that the controversy fuelled by the rulings "has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration". He further added that "the Court's cases have exposed the fault lines that run between the Single Market and the social dimension at national level".

Recognising the controversy fuelled by the Court rulings in his report 'A new Strategy for the Single Market', Professor Monti recommended to:

- Clarify the implementation of the Posting of Workers Directive and strengthening dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services;
- Introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called Monti Regulation), and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

Nevertheless, the worsening of the economic crisis complicated enormously the possibility to initiate organic institutional reforms in this field, emphasising the risk of marginalisation of social and employment policies[182].

The EU's Council of Ministers finally adopted the new Enforcement Directive to increase the protection of workers temporarily posted abroad and enhance legal certainty, on 13 May 2014.

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[179] ECJ Cases C-438/05, Viking case and C-341/05, Laval case, cases of 11 December 2007; C-346/06, Rüffert case, 3 April 2008; C-319/06, Commission v Luxembourg, 19 June 2008.

[180] See COM(2012)131 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 21 March 2012.

[181] Report to the President of the European Commission, José Manuel Barroso, by Mario Monti, *A new strategy for the single market at the service of Europe's Economy and Society*, 9 May 2010.

[182] See for further analysis Sciarra S., *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Editori Laterza, 2013.

Directive 2014/67/EU (the so-called 'Enforcement Directive') aims to strengthen the practical application of the rules on posting of workers by addressing issues related to fraud, circumvention of rules, and exchange of information between the Member States.

The European institutions believed as necessary to improve prevention and sanctioning of any abuse of the applicable rules, to raise awareness and increase transparency in this field, as to enhance administrative cooperation.

In 2012, László Andor, EU Commissioner for Employment, Social Affairs and Inclusion said, as regarding the posting of workers, that: "Temporarily posting workers should be a win-win for EU labour markets and for businesses, but it cannot be used as a way to sidestep minimum social standards".

As followed the aims of the Enforcement Directive, which will need to be transposed by the Member States into national law by 18 June 2016, are:

- to increase the awareness of posted workers and companies about their rights and obligations;
- to improve cooperation between national authorities in charge of posting;
- to address 'letter-box' companies that use posting to circumvent the law;
- to define Member States' responsibilities to verify compliance with the rules on posting of workers;
- to set requirements for posting companies to facilitate transparency of information and inspections;
- to empower trade unions and other parties to lodge complaints and take legal and/or administrative action against the employers of posted workers, if their rights are not respected;
- to ensure the effective application and collection of administrative penalties and fines across the Member States if the requirements of EU law on posting are not respected.
- to provide measures ensuring that posted workers in the construction sector can hold the contractor in a direct subcontractor relationship liable for any outstanding net remuneration to the minimum rates of pay, in addition to or in place of the employer.

The Enforcement Directive provides national authorities with effective tools to distinguish genuine posting from abuses and circumvention. For example, the authorities of a receiving Member State can request the authorities in the sending Member State to verify that the posting company genuinely performs substantial activities, other than pure administrative activities, in that country. Whether posted workers are recruited in that country is one of the relevant criteria to be taken into account.

The new Directive also obliges Member States to introduce subcontracting liability, or other appropriate enforcement measures, in the construction sector as part of a comprehensive approach to better enforcement and because protection of posted workers' rights in situations of subcontracting is a matter of particular concern. There is evidence that, in several cases, posted workers have been exploited and left without payment of wages or part of the wages they are entitled. There have also been situations where posted workers were unable to enforce their wage claims against their employer because the company had disappeared or never really existed.

Nevertheless, this new text has already been criticized by several European Member States. One of the main criticisms concerns the absence of provisions governing the social security treatment of posted workers and the definition of minimum rates of pay, both in the 1996 Directive, and the new directive.

Indeed, the posted worker remains affiliated to the regime of the posting company's home country by virtue of European regulations (in particular Regulation No. 1408/71) and this situation represents one of the main reasons for social dumping.

Further, in countries where minimum wages are set by law or by universally applicable collective agreements, their application to posted workers is straightforward, but often debated, because of the differences of the minimum standards between Member States. And in countries where no such tools exist, an uncertain situation is created for undertakings and workers.

Within this normative framework and considering the increasing resort to posted workers throughout Europe, it seems necessary a clearer definition of those terms such as worker, remuneration and social rights.

In its political guidelines, the Commission itself committed to a targeted review of the 1996 Directive to ensure that social dumping has no place in the European Union.

Indeed, under Article 24 of the Enforcement Directive, it is stated that "No later than 18 June 2019, the Commission shall present a report on its application and implementation to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications".

Based on this review, including stakeholder consultation and impact assessment, the Commission announced in its Work Programme 2016 a targeted legislative revision of the Posting of Workers Directive to address unfair practices.

The announced legislative initiative has been delivered upon in March 2016.

2.4 A targeted revision of the rules on posting of workers

> "I have said from day one of my mandate that we need to facilitate labour mobility, but that it needs to work in a fair way. Today's proposal will create a legal framework for posting that is clear, fair and easy to enforce"[183].

As set out in the 2016 Commission Work Programme, the European Commission presented a targeted revision of the rules on posting of workers, which is - in the words of the European Commissioner for Employment, Social Affairs and Labour Mobility - clear, fair and easy to enforce. This revision translates a commitment of the Political Guidelines for the Commission to promote the principle that "the same work at the same place should be remunerated in the same manner".

Since 1996, the economic and labour market situation in the European Union has changed considerably. In the last two decades, the Single Market has grown and wage differences have increased, thereby creating unwanted incentives to use posting as a mean to exploit these differences. The legislative framework put in place by the 1996 Directive no longer fully replies to these new realities.

[183] Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, 8 March 2016.

In addition, since posting companies must comply only with the minimum rates of pay of the host Member State, this frequently leads to stark wage differences between posted and local workers, especially in Member States with relatively high wage levels. Posted workers, as stated by the Commission, are reported to earn up to 50% less than local workers in some sectors and Member States.

Significant wage differences distort the level-playing field between companies, thus undermining the smooth functioning of the Single Market. Updating the rules on posting of workers to current economic and social conditions is therefore necessary both from an economic and social point of view.

The aim of the proposal, as announced by the 2016 Commission Work Programme, is to facilitate the posting of workers within a climate of fair competition and respect for the rights of workers, who are employed in one Member State and sent to work temporarily in another by their employer. More specifically, the initiative aims at ensuring fair wage conditions and a level playing field between posting and local companies in the host country.

The proposal sets out that posted workers will generally benefit from the same rules governing pay and working conditions as local workers. An average hour of work costs an employer €40 in Denmark and €39 in Belgium, but only €3.80 in Bulgaria, €4.60 in Romania and €8.40 in Poland, according to Eurostat data for 2014.

Commission President Jean-Claude Juncker has advocated that same pay should apply “for the same job at the same place”, meaning that a Polish or a Bulgarian worker in Belgium should be paid the same salary as his Belgian colleagues.

The Commissioner underlined that this will be done in full respect of the principle of subsidiarity and the way these conditions are set by the public authorities and/or social partners in the Member State in question. Currently, posted workers are already subject to the same rules as host Member State employees in certain fields, such as health and safety. However, the employer is not obliged to pay a posted worker more than the minimum rate of pay set by the host country. This can create wage differences between posted and local workers and potentially lead to unfair competition between companies. This means that posted workers are often remunerated less than other workers for the same job, due to the differences - as above mentioned - between Member States about the definition of minimum rates of pay and the inclusion or not in that definition of various components.

After the new targeted revision of the Posted Workers Directive, it is announced that remuneration will not only include the minimum rates of pay, but also other elements such as bonuses or allowances (e.g. Christmas bonus, thirteenth and fourteenth month) where applicable. Member States will be required to specify in a transparent way the different elements of how remuneration is composed on their territory. Rules set by law or universally applicable collective agreements will become mandatory for posted workers in all economic sectors, while currently, this is only applicable to the construction sector and Member States can choose whether to apply universally applicable collective agreements to posted workers to other sectors.

The proposal also gives the possibility to Member States to provide that subcontractors need to grant their workers the same pay as the main contractor. Nevertheless, this can only be done in a non-discriminatory way: the same rule must apply to national and cross-border subcontractors.

The proposal will also ensure the principle of equal treatment with local temporary agency workers to be applied to posted temporary agency workers, thereby aligning the current legislation on domestic temporary agency work.

The Temporary Agency Work Directive already establishes that in a domestic context, workers hired out by a temporary work agency must be subject to the same employment and working conditions as their colleagues in the company they work in. So far, this principle did not necessarily apply to workers posted by a temporary agency from another Member State. Even if this could have been done by a proper interpretation of Article 3(9) of Directive 96/71.

The proposal would therefore ensure equal treatment on remuneration also for posted temporary agency workers and some Member States will need to modify their national law to integrate this principle. Further, it is proposed by the Commission that if a temporary worker is posted to a company bound by a collective agreement not universally-applicable (for instance a company level collective agreement), the more favourable terms and conditions will now have to be applied to the temporary agency workers posted by an agency established in another Member State.

Finally, if the duration of posting exceeds 24 months, the labour law conditions of the host Member States should be applied, where this is favourable to the posted worker. Currently, all posted workers are already covered by many important labour law provisions of the host Member State, such as on health, safety and hygiene or equal treatment between men and women. However, for other matters - such as protection against unfair dismissal - the labour law of the *home* Member State applies. With the proposed change, long-term posted workers would be treated the same as a local worker in the *host* Member State on most aspects of labour law. This will apply from day one where it can be anticipated that the worker will be posted for more than 24 months. In all other cases, it will apply as soon as the duration of posting exceeds 24 months.

Ministers from low-wage and high-wage countries have debated the President Juncker's 'equal pay' proposal. In 2015 two groups of ministers sent letters to the European Commission expressing their views on the proposal. The labour Ministers of several high-wage European Countries pointed out in June 2015 that fair intra-European competition is threatened because employers of posted workers have an unfair advantage compared to employers in host countries. They affirmed that they highly welcomed "the initiative of the European Commission to start a 'targeted review' of the Posting of Workers Directive in a context of preventing social dumping and abuse of the free movement of services"[184]. They highlight that the maximum duration of posting is not defined in the directives, and on several occasions the 'temporary' posted positions become so long that they resemble a permanent job in the host country.

They draw the attention to the improper and abusive use of the Posting of Workers Directive and while they welcome the 2014 Enforcement Directive, they demand the "*modernisation*" of the directive to ensure "*equal pay for the equal work at the same place*". They also ask whether the current regulations concerning social security contributions (whereby posted workers continue to pay their contributions at home) is justified.

The labour Ministers of nine European Countries[185], instead, argued that the 2014 Enforcement Directive already provides clear safeguards to protect the rights of posted workers and respect fair competition. Given that the Enforcement Directive has been agreed recently and not yet been implemented fully, a revision would be premature and divisive. Indeed, the deadline for the transposition period was set by 18 June 2016 and Article 24 of the Enforcement Directive stated that no later than 18 June 2019 the Commission shall present a report on its application and implementation to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications.

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[184] From the consolidated version letter to Commissioner Thyssen, 18 June 2015.

[185] Letter to Commissioner Thyssen of August 2015, signed by Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovak Republic.

Those Member States argue that pay rate differences do not constitute a means of unfair competition, but are just a structural feature of a union of heterogeneous countries and result from different levels of economic development, tax systems, labour law regulations and social welfare systems.

The central European ministers argue that any reference to "*equal pay for the equal work at the same place*" is misguided and incompatible with a genuine single market. As regards payments of social security contributions, they highlight the importance of the home country principle, because thereby posted workers will retain a continuous insurance history in their home country to which they will return when the posting position is ended. Business Europe, the association of national business federations of 34 European countries, also joined the letter-thread. In autumn 2015 Director General Markus J.Beyrer and President Emma Marcegaglia argued that the Posting Workers Directive and its Enforcement Directive provided the correct framework, while a possible reopening would stop the process of implementation. They also expressed the strong opposition of their member federations to the principle of 'Equal pay for the equal work at the same place'.

Pending the revision of the Posting of Workers Directive, it's necessary to analyse the average rate of posted workers in the European Union.

Considering that between 2010 and 2014 the number of postings has increased by almost 45% and that in 2014, around 1.9 million European workers were posted to other Member States. Despite its small size as compared to the overall workforce, the posting of workers plays an important role in the cross-border provision of services, in specific sectors and further the specific case of posting is intensely debated and generates diverging political opinions.

The actual situation on posting of workers, and particularly through temporary agencies, is a more and more frequent in the construction sector (44% of construction workers are posted in another European Union country than their own), in the manufacturing industry and in service sectors such as personal services (education, health and social work) and business services (administrative, professional, and financial services).

The only data available are those related to posting for up to 24 months to another country.

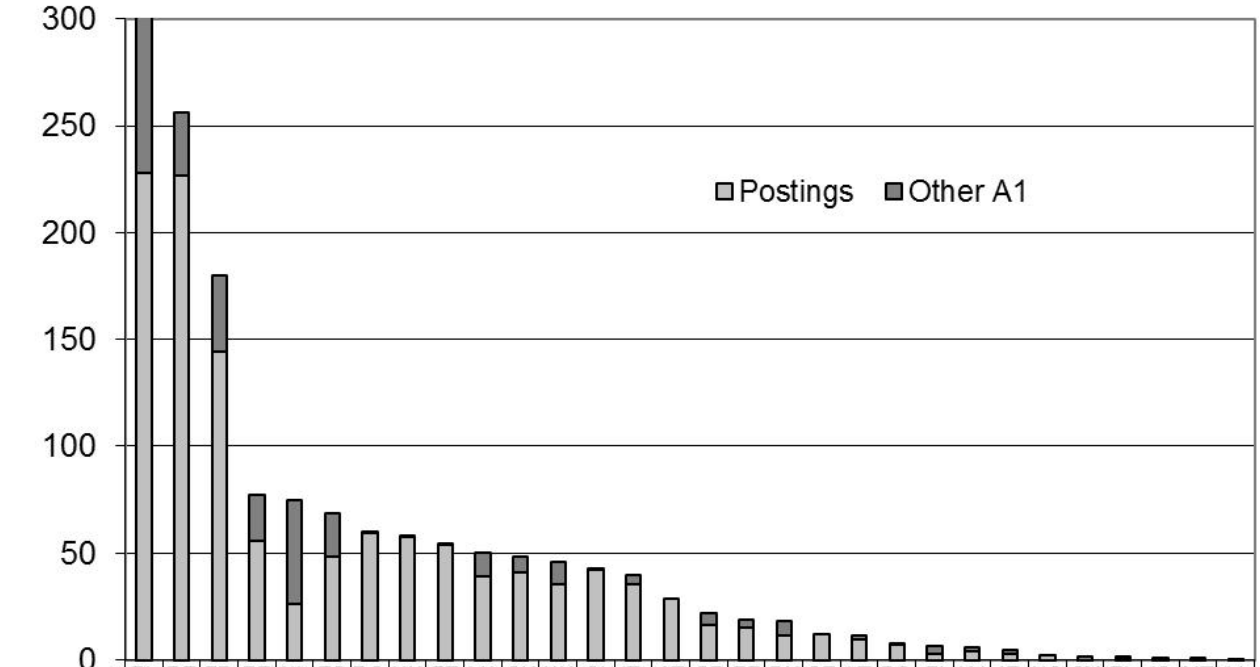
In these situations, the undertaking of the sending country is subject to additional conditions being fulfilled, a "portable document A1" (PDA1, previously known as E101) is issued to certify which social security legislation applies to the holder.

The last data available (as shown in Table 7) are based on the number of PDA1 issued, in 2011, and the main sending countries of posted workers were Poland, Germany and France followed by Romania, Hungary, Belgium and Portugal.

Significant gaps between national and European figures show that an underestimation of the real number of posted workers is very likely[186].

[186] See Dhéret C. and Ghimis A., *The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, European Policy Centre, Discussion Paper 20 April 2016.

Table 7



	PL	DE	FR	BE	NL	ES	RO	HU	PT	LU	SK	UK	SI	IT	AT	CZ	EE	DK	SE	LT	BG	FI	LV	IE	NO	CY	EL	IS	MT	LI
Other A1	82	29	36	22	49	20	1	0	0	10	8	10	0	4	0	6	4	7	0	2	0	4	2	2	0	1	0	0	0	0
Postings	228	227	144	56	26	48	59	58	54	39	41	35	42	36	29	16	15	11	12	10	7	3	4	3	2	0	1	0	0	0

Source: Administrative data from EU Member States, IS, LI and NO on PD A1 issued, according to Council Regulation (EC) No 883/2004 on the coordination of social security system.

Nevertheless, the enthusiasm of the Commission within the 2016 Work Program has been rapidly tackled by the "yellow card" issued by a group of Member States contrary to the targeted revision of Directive 96/71/EC.

Indeed, the Lisbon Treaty provides that national parliaments can (temporarily) block a Commission proposal by issuing a yellow card. This procedure requires at least ten parliaments to file a "reasoned objection" within eight weeks of a Commission proposal being published. This is a high threshold and the procedure has only been used twice before, but by the 10 May deadline the parliaments of Estonia, Hungary, Bulgaria, Croatia, Czech Republic, Denmark, Latvia, Lithuania, Poland and Romania had all filed objections.

Thus, even if there are no draft documents of the new Enforcement Directive yet, the positions expressed by the Member States - as by the national representative Unions - on the Commission's proposal are controversial and it will surely be at the centre of a forthcoming political and economic debate.

Trying to figure out what consequences, on intra-EU mobility trends, followed the 1996 Posted Workers Directive and the 2008 Temporary Work Agencies Directive, as combined with the minimum rates of pay of different Member States, the next Table 8[187] can be helpful.

[187] The Table was realised by the author, using the following data sources: The minimum and average wage data are based on Eurostat [lc_ncost_r2] and [earn_mw_cur]. The annual growth rates of PDs A1 for posted workers, received and issued by Member States, are based on Administrative data PD A1 Questionnaire 2015 and previous years. Non-available data are indicated with n.a.

Table 8: Comparison of annual growth rates of PDs A1 for posted workers received and issues by Member States, with attention to statutory minimum wage and average wage per month established in different countries within the "construction sector"

Country groups	Member States	Annual growth rate of PDs A1 for posted workers received by receiving Member States, from 2010 to 2014	Annual growth rate of PDs A1 for posted workers issued by sending Member States, from 2010 to 2014	Statutory Minimum wage per month of the Member State (in €), 2012, construction sector	Average wage (with bonuses and allowances) per month of the Member State (in €), 2012, construction sector
EU15	Austria	From 59,642 to 101,034 (+14.1%)	From 25,957 to 41,114 (+12.2%)	n.a.	2,968
	Belgium	From 90,540 to 159,753 (+15.3%)	From 49,862 to 58,611 (+4.1%)	1,472	2,186
	Denmark	From 9,608 to 10,869 (+3.1%)	From 9,262 to 3,869 (-19.6%)	n.a.	3,794
	Finland	From 20,205 to 16,589 (-4.8%)	From 2,187 to 2,786 (+6.2%)	n.a.	3,035
	France	From 160,532 to 190,848 (+4.4%)	From 133,896 to 119,727 (-2.8%)	1,426	2,360
	Germany	From 250,054 to 414,220 (+13.4%)	From 201,436 to 232,776 (+3.7%)	n.a.	2,426
	Greece	From 10,656 to 4,744 (-18.3%)	From 642 to 2,325 (+38.0%)	684	1,433
	Ireland	From 5,014 to 3,973 (-5.7%)	From 1,935 to 3,261 (+13.9%)	1,462	3,267
	Italy	From 60,460 to 52,485 (-3.5%)	From 35,430 to 69,279 (+18.3%)	n.a.	2,068
	Luxembourg	From 27,730 to 21,763 (-5.9%)	From 55,852 to 50,345 (-2.6%)	1,801	2,653
	Netherlands	From 91,560 to 87,821 (-1.0%)	From 15,190 to 37,775 (+25.6%)	1,456	3,250
	Portugal	From 12,193 to 12,833 (1.3%)	From 58,923 to 74,735 (+6.1%)	566	1,244
	Spain	From 63,304 to 44,826 (-8.3%)	From 44,087 to 76,286 (+14.7%)	748	1,970
	Sweden	From 19,464 to 33,019 (14.1%)	From n.a. to 4,182 (-22.8%)	n.a.	3,248
	United	From 34,321 to	From 32,109 to	1,244	3,163

	Kingdom	50,900 (10.4%)	23,501 (-7.5%)		
2004 enlargement countries	Czech Republic	From 15,892 to 17,165 (+1.9%)	From 15,829 to 10,380 (-10.0%)	312	904
	Estonia	From 1,235 to 2,961 (24.4%)	From 13,580 to 7,147 (-14.8%)	290	1,012
	Cyprus	From 1,702 to 944 (-13.7%)	From 81 to 114 (+8.9%)	n.a.	1,710
	Latvia	From 1,851 to 1,504 (-5.1%)	From 3,424 to 1,655 (-16.6%)	287	622
	Lithuania	From 1,850 to 1,930 (1.1%)	From 6,462 to 16,683 (+26.8%)	232	499
	Hungary	From 8,457 to 8,966 (1.5%)	From n.a. to 24,060 (n.a.)	323	640
	Malta	From 1,308 to 1,063 (-5.1%)	From 442 to 145 (-24.3%)	680	1,306
	Poland	From 12,877 to 14,521 (3.0%)	From 221,126 to 266,745 (+4.8%)	353	767
	Slovenia	From 3,391 to 6,550 (17.9%)	From 23,944 to 102,920 (+44.0%)	763	1,354
	Slovakia	From 8,692 to 7,648 (-3.1%)	From 28,245 to 73,810 (+27.1%)	327	764
2007 and 2013 enlargement countries	Bulgaria	From 4,483 to 3,267 (-7.6%)	From 5,734 to 13,275 (+23.4%)	148	323
	Romania	From 9,445 to 9,717 (+0.7%)	From 29,730 to 57,194 (+17.8%)	157	358
	Croatia	From n.a. to 4,561 (n.a.)	From n.a. to 10,851 (n.a.)	374	777

The recourse to posted workers, as showed by Table 8, generally seems to be a growing competitive argument in favour of EU employers. The reason is to be found within labour costs as a whole, including the level of wages and, specifically, the social security employer's contributions, which vary markedly across Member States, as before mentioned. The increased or decreased inflows and outflows of posted workers, as it has been previously said in the first chapter about trends in movement of workers, have not univocal causes. The accession to the European Union of new countries with low labour costs constitutes one of these reasons but the economic and social situation of the different receiving countries shall be also taken into account, as well as language and family ties of previous migration flows.

The relevant differences between statutory minimum wage and average wage per month in this field, which have been considered because of the increasing number of posting activities in the construction sector and because of interesting available data (but could have been carried out, with similar outcomes, also in other fields such as the transport or agricultural sectors), represent one of the most delicate issues of posting. The minimum standards to be guaranteed to posted workers as

established by Directive 96/71/EC have been recently considered for renewal under the 2016 Commission project because of the negative consequences on fair competition and workers' right to fair and just conditions. Indeed, one of the major elements of discussion on the European Commission's proposal to revise the Posted Workers Directive, regards the obligation for Member States to apply "remuneration" instead of "minimum rates of pay" to posted workers. As shown by the data recalled in Table 8 this is a matter of the utmost importance in order to avoid social dumping, especially as regards workers posted from Member States of the 2004 and 2007 enlargement process. These aspects will be further deepened in the next chapters when studying the employment and working conditions applied to posted workers.

Chapter III
The implementation of the Temporary Agency Workers Directive and its relationship with the Posted Workers Directive

1. Standard and non-standard employment relationships

The intention of this chapter is to find out and analyse the critical issues related to the implementation of the Directive on Temporary Agency Work in different Member States and, specifically, to examine the core elements of the legislation which cause a lack of protection of temporary agency workers.

This analysis will also focus on the relationship between the Temporary Agency Workers Directive and the Posted Workers Directive, mostly with respect to limits and difficulties in making the distinction between one category of posting (such as subcontracting) and another (such as supply of manpower by temporary agencies). It will be underlined which consequences, in terms of rights' protection, will derive on posted workers depending on the normative framework "chosen" by undertakings.

As appeared from the analysis of the European Directives on atypical work employment contracts, for each "non-standard" employment relationship, legislation has been adopted to ensure "equal treatment" with the comparable standard workforce. The aim of European legislation in this field was to solve a practical need through labour law mechanisms. Simultaneously this legislation would be an answer to dominant economic and social forces, demonstrating its efficiency and flexibility. The challenge of the new normative framework on atypical employment contracts was to give a multiple answer to different needs using a sole legal instrument and by avoiding the risk of putting workers in more uncertain or vulnerable situations.

The main issue regards the identification of clear enforceable rights that define European citizenship, especially in the field of posted workers when someone is sent to another country to carry out an employment activity on behalf of his/her employer.

Arguably the first link between a situation of vulnerability - need for protection - and labour law, is enshrined in the fundamental argument that labour "is not a commodity"[188].

The first half of labour law's traditional theory of justice recognises that workers are foremost people than simple commodities to be bought and sold in the labour market. This recognition determines that regulation should aim to imbue the human subject of labour law with dignity so that "all forms of work can be a source of personal well-being and social integration"[189].

The second half of labour law's traditional theory of justice is based upon the argument that employees need protection because they suffer from an "inequality of bargaining power" vis-à-vis their employers. This means that the set of rules of market ordering needs to be limited to ensure

[188] International Labour Organisation Constitution, Annex I concerning the aims and purposes of the ILO.

[189] Rodgers, G., Lee, E., Swepston, L. and van Daele, J., *The ILO and the Quest for Social Justice 1919-2009*, International Labour Office, 2009.

that the worst excesses of labour market exploitation are avoided (through law or collective bargaining processes).

Recently, these foundational aspects of labour law have been challenged, both under the definition given to the employment relationship and the stereotype of the "standard employment relationship". In particular, the literature on precarious work developed some criticisms of the traditional theory of labour law starting from the deterioration of the standard employment relationship. General political dissent grown rapidly because posting of workers, such as posting through temporary agencies, is a "policy anomaly"[190] with possible wider implications on the functioning of national labour markets and/or on the social rights' national systems.

While cases of illegal work still represent the "elephant in the room of labour market" and need to be tackled, given that they fundamentally violate the rights of migrant workers, partial enforcement of national and EU law and lack of controls or social security coordination within Member States, are similarly disquieting.

By using triangular employment relationships and other atypical work arrangements, employers around the world have been successful in avoiding specific responsibilities, even for workers - as it has been discussed in the first chapter - who are considered employees[191]. Such employees may come within the scope of labour law, in the sense that the principle of equal treatment, minimum wage laws and other protective regulations, such as those related to motherhood and young people, shall apply to them.

However, and increasingly in the field of transnational posting, migrant workers often do not enjoy the same employment and working conditions which apply to national workers employed in the same workplace. Further, a general "lack of clarity of labour market rules in the country of destination is also considered a relevant hindrance to cross-border service provision", as the Commission itself outlined during the 2016 Commission Work Programme for the renewal of Directive 96/71/EC[192] and clearly this has negative effects on the implementation of migrant workers' rights during their period of posting abroad.

1.1 Temporary agency work within a network of legal orders

From a worldwide perspective, private employment agencies[193], both private employment placement agencies (which try to match jobseekers' qualifications and skills to those required by employers for specific job openings) and temporary-work agencies (which provide temporary employees to user enterprises), are entangled in a network of legal orders: the WTO, the ILO and the EU.

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[190] Dhéret C. and Ghimis A., *The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, European Policy Centre, Discussion Paper 20 April 2016, p. 3.

[191] Davidov, G. and Langille, B., *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of work*, Hart, 2006.

[192] See COM(2016) 128 final, 2016/0070 (COD), *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*, Strasbourg, 8.3.2016, p. 3.

[193] "Any enterprise or person, independent of the public authorities, which provides one or more of the following labour market functions: (a) services for matching offers of and applications for employment; (b) services for employing workers with a view to making them available to a third party ("user enterprise"); and/or (c) other services relating to job-seeking, such as the provision of information, that do not aim to match specific employment offers and applications. Agencies cannot charge workers for finding work." (*ILO 2009:1*).

Furthermore, they are affected by domestic legislation that is inevitably influenced by potentially conflicting international standards that countries have ratified or need to respect due to their affiliation to these international organisations.

Looking at the relationship between the three-major international and supranational legal orders, it should be firstly noticed that the European Union is directly bound by standards of the World Trade Organisation. While, due to Article 351 of the Treaty on the Functioning of the European Union, Member States have could invoke International Labour Organisation standards ratified prior to 1 January 1958 in order not to be affected by the Treaty provisions of the TFEU.

In particular, ILO Convention No. 181 (the so called Private Employment Agencies Convention) was concluded after 1958, and thus, Member States that have ratified this Convention will not be able to invoke Article 351 TFEU in a case of conflict between these standards and the EU provisions regarding the freedom to provide services and the freedom of competition. Nevertheless, this ILO Convention seems to have been adopted under the pressure of the case law of the European Court of Justice, and Directive 2008/104/EC itself is indebted to the overall approach of ILO Convention No. 181. Both instruments adopt a positive approach to the role that private employment agencies can play in mediating the supply and demand in labour markets. However, national governments' concerns upon temporary work agencies has been the cause of the slowness of implementation of rules on private employment agencies in national systems. As it will be considered in the next paragraphs, during the analysis of the Italian normative framework regulating the supply of workforce by temporary work agencies, the aversion to the use of intermediaries of any kind in the hiring of employees was followed by a long period of protective political rationale.

Even at the international and supranational level, two different approaches towards the regulation of private employment agencies were adopted. The most evident distinction between the EU and ILO approach, even if this situation does not necessarily create a legal conflict given that both instruments are construed as providing a minimum floor of protection, is related to the applicable conceptual framework. Whereas the ILO approach is obviously determined by a suspicion against the commodification of labour and a concern to promote full employment, the conceptual framework of the EU is multifaceted. It is partially determined by a wish to improve the working conditions of agency workers (security) and partially by employment policy objectives (flexibility), as well as by legal principles of European economic law (freedom to provide services and freedom of competition)[194].

Whereas the WTO standards are solely inspired by an intention to promote free trade which come from the WTO Agreements and particularly, the field of services supplied by private employment agencies, is regulated by the General Agreement on Trade in Services (GATS). During the Uruguay Round of negotiations (1986-1994), participating countries made market-access commitments and exemptions on a number of services sectors at the same time. These commitments and exemptions are contained in their original services schedules which are included within the GATS and that are binding under international law.

Two main GATS obligations apply to all WTO members and all services.

First, every WTO member must treat services and service suppliers of any other WTO member in a way no less favourable than the services and service suppliers of any other country and is not allowed to discriminate between foreign service providers (i.e. Most-Favoured-Nation Treatment, Article II.1 GATS). Second, every member must publish all relevant measures of general

[194] Study on *The Role and Activities of Employment Agencies*, requested by the European Parliament's Committee on Employment and Social Affairs (June 2013), 47-49.

application affecting trade in services (e.g. in the Official Journal) and inform other WTO members of such measures (i.e. Transparency Requirement, Article III GATS).

The overview shows that temporary work agencies were not explicitly or fully covered by international and supranational instruments from the outset, and it took until the adoption of ILO Convention No. 181 and EU Directive 2008/104/EC to provoke such a shift. Whereas international binding commitments were stated alongside by the WTO Agreements bringing rules on services into the multilateral trading system.

1.2 Temporary work agencies within European law. The relationship between the Posted Workers Directive and the Temporary Agency Workers Directive

As previously highlighted, temporary work agencies constitute a specific kind of private employment agencies. Contrary to the notion of private employment agencies, European legislature has defined the notion of temporary work agencies in Directive 2008/104/EC, defining the latter as:

> "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction" (Article 3 para.1b of the Directive).

At the European level, the normative framework on temporary agency workers should be analysed combining different legislations. Indeed, insofar as temporary agency workers are being posted by a temporary work agency offering its services to a user firm in another Member State, such an operation has to be qualified as posting within the meaning of the European Directive 96/71/EC, concerning the posting of workers in the framework of the provision of services. The Posting Workers Directive is applicable to the extent that temporary employment undertaking or placement agencies:

> "hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting" (Article 1 para. 3 (c) of the Directive).

The relationship between the two Directives is clarified by the 22nd Recital of the Temporary Agency Work Directive which states that EU Directive 2008/104/EC needs to be implemented without prejudice to Directive 96/71/EC. Given that the minimum protection afforded to temporary workers is more far reaching than the maximum protection under the Posting of Workers' Directive, a conflict between both Directives seems to be inevitable[195]. However, according to Article 3 (9) of Directive 96/71/EC temporary work agencies "must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member States where the work is carried out".

This means that in a case of transnational supply of workforce by temporary work agencies, there is no formal objection against the application of the principles and rules enshrined in Directive 2008/104/EC, particularly with regards to the application of the principle of equal treatment between temporary agency workers and national workers who are recruited by the user company, in terms of basic working and employment conditions.

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[195] See ibid the Study on *The Role and Activities of Employment Agencies*, p. 46.

Nevertheless, this was seen as one of the point in need of clarification within the 2016 Commission Work Programme for an improvement of working conditions for posted workers, insofar there was no one-sided interpretation within Member States.

Further, it should be considered the difficulty in distinguishing between different cases of posting and even to identify genuine cases of posting from situations of abuse and circumvention of EU directives, when coming to recognise practical situations of transnational supply of workforce. Indeed, the increasing use and misuse of subcontracting and outsourcing practices, rather to hire direct employees, have created a scenario - at national and supranational level - in which there is no clear distinction between subcontracting activities, supply of workforce by temporary work agencies and long chains of interconnected companies.

In the preamble (7) of the Enforcement Directive 2014/67/EU it was underlined that:

> In order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC, the implementation and monitoring of the notion of posting should be improved and more uniform elements, facilitating a common interpretation, should be introduced at Union level.

However, as it has been specified during the most recent meeting[196] organised by the Italian Ministry of Labour and Social Affairs on the prevention and combating of illegal transnational posting, European undertakings mostly supply workforce rather than provide services, in absence of any authorisation to do so. The transnational supply of workforce has become the main task of chains of interconnected companies which can supply workers from one company - established in a country with low labour costs and which employed a person with the sole intention of posting him/her - to another company, established in a country with higher labour costs. The posting of workers, in these cases, represents an illegal supply of workforce because there is no genuine intention to provide services and the supply of workforce represents itself the economic activity carried out by the company. Temporary work agencies, if anything, could supply workers as the fundamental element of their provision of services.

These ambiguous situations of posting have increased, even at national level[197] without cross-border movement element, and represent one of the main issues to be considered when coming to coordination between different kind of posting.

The renewal of the Posting Workers Directive, it is therefore of the utmost importance under the circumstances that, as regards the relationship between Directive 2008/104/EC on temporary agency work and Directive 96/71/EC on the posting of workers, recital 22 of Directive 2008/104/EC states that the Directive should be implemented in compliance with the provisions of the Treaty on the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC.

Generally, it can be stated that the Directive on temporary agency work in principle covers national situations, whereas the Directive on the posting of workers isspecifically aimed at cross-border

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[196] Ministero del Lavoro e delle Politiche Sociali, Direzione generale per l'attività ispettiva, *Prevenzione e contrasto dei comportamenti elusivi della normativa in materia di distacco transnazionale alla luce del D.lgs. n. 136/2016*, Venice, 7 October 2016, rapporteur Sonia Calantonio.

[197] See the situation of supply of workers by chains of cooperatives, Interpello 15/2007, Ministero del Lavoro e della Previdenza Sociale, Direzione Generale per l'attività ispettiva, Roma, 12 March 2007.

situations. However, the result of this elaborate normative framework should create a more protected environment of posted worker's rights.

In the end, the relationship between temporary agency workers and the freedom to provide services is clarified by Article 2 (2) (e) of the Services Directive[198] (2006/123/EC) which stated unambiguously that it "shall not apply to services of temporary work agencies".

2. The implementation of Directive 2008/104/EC in different national legislations

The combined and different normative framework of temporary agency work, within the European Union, at the time of implementation of Directive 2008/104/EC, it was clearly taken into consideration in the preamble of the Directive under paragraph 10 where it was stated that: "There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union".

Therefore, the Directive on Temporary Agency Workers required, despite the considerable differences above mentioned, all European Member States to amend national legislation, in order to provide a common level of protection for temporary agency workers by the 5th of December 2011. The Directive's implementation had different impacts on each European country and a complete overview of this process has been provided for in the Commission's reports on the application of Directive 2008/104/EC and particularly in the final report of 21th March 2014[199].

Under Article 11 (1) of the Directive, Member States were under duty to transpose the Directive into national law, either by adopting and publishing the laws, regulations and administrative provisions necessary to comply with it, or by ensuring that social partners introduced necessary provisions by way of an agreement.

As the Commission considers in its report, transposition was carried out in a variety of different ways. This is linked to the fact that before the Directive became applicable, temporary agency work was regulated by law in some Member States, mainly through collective agreements in others, or by a combination of both. Some Member States did not have a legal framework applicable to temporary agency work, so they specifically regulated this form of work for the first time while transposing the Directive (as shown in Table 9).

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[198] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. On the exclusion from the scope of Services Directive of services provided by temporary-agency workers, see COM(2014) 176 final, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work.

[199] COM(2014) 176 final, Brussels 21.3.2014, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work.

Table 9 on the date of adoption of principal Temporary Agency Workers legislation, EU15 and Norway

Country	First law	Amendments	Revisions
NL	1965		1998, 1999: Liberalisation
DK	1968		1990: All regulation removed (shift to collective agreements)
IE	1971		
DE	1972	Successive increases to TA duration	2002: Major revision
FR	1972	Successive changes to permissible reasons and contract duration 2005: Wider role for TWAs	
UK	1973	1976: Enforcement inspectorate 1994: Licensing requirement removed 2003: Simplification and worker rights	
BE	1976	1987: Law adopted based on 1976 temporary law 2000: TWA role in placing long-term unemployed people	
NO	1977		2000: TAW allowed alongside other temporary employment 2005: Wider scope for temporary/TA employment
AT	1988	2002: Health and safety 2005: Permitted in nursing	
PT	1989	1996: Unspecified minor amendments	1999: Increased duration; training; health/safety protection
SE	1993		
ES	1994		1999: Limitations and pay parity
LU	1994		
IT	1997	2003: Wider scope for usage	
FI	2001		
EL	2001	2003: Social dialogue input	

Source: Study carried out by the European Foundation for the Improvement of living and working conditions, March 2006, p. 23 of the report.

Some Member States amended one piece of legislation, while others modified several legal texts. Three Member States (France, Luxembourg and Poland) considered that their national provisions already complied with the Directive and did not required any amendment on its entry into force.

It should be noticed that the EU Directive on Temporary Agency Work (2008/104/EC) is currently being reviewed by the European Commission. The existing Directive allows for divergences by granting a set of options that can be lifted by the Member States. The current Directive deals with temporary agency work in a very broad sense and recognises the significant differences between the countries. In this context, it also leaves Member States sufficient room to improve the conditions for temporary agency workers on their own. Nevertheless, owing to the lack of comparable data, the academic debate on temporary agency work has not yet produced a clear-cut result. Therefore, it is essential to gather and harmonise data between EU Member States to facilitate a more detailed assessment of this comparatively new bridge into the European labour market, which however is clearly surging in number within the EU.

Furthermore, better empirical information is relevant for monitoring working conditions of temporary agency workers, particularly in the case of migrant workers[200], where is worth considering differences in treatment between permanent and temporary workers.

The aim of the following paragraphs will be to identify different political and legislative methods chosen by Member States during the period of implementation of Directive 2008/104/EC and to compare the results of this process in national legislations on behalf of the most recent data and reports available.

2.1 The ambiguity of different meanings given to the main notions used in the Directive: a contract of employment and a contract of its own kind

Article 3 (1) (a) to (e) provides the definition of many the principal notions used in the Directive: 'worker', 'temporary-work agency', 'temporary agency worker', 'user undertaking' and 'assignment'.

The 2014 Commission's report[201] outlined that several Member States (*Cyprus, Greece, Hungary, Ireland, Italy, Lithuania, Malta, Portugal, Sweden and United Kingdom*) have provided definitions of at least some of these notions in their transposing legislation, by using wording that in most cases is very similar to that used in the Directive.

This technical option usefully clarifies the scope of the national implementing measures. However other Member States have not adopted such definitions.

Starting from the notion of the tripartite working relationship in temporary workers' employment contracts, it is essential to recognise the juridical framework of each situation created by this kind of employment. From the analysis of Directive 2008/104/EC, temporary agency work is indeed characterised by a tripartite working relation, which is based on three contracts.

- The temporary agency worker has a traditional working contract only with the conferrer.
- There is a second contract between the conferrer and the user firm that specifies the conditions of the conferral of the worker, an economic contract.
- And the third contract relates to the use of the temporary agency worker in the user firm.

As it will be explained below, while the definition of the relationship between the temporary-work agency and the temporary agency worker is clarified as being an employment contract (with the exception of the *United Kingdom*, which provides also for the supply of autonomous workers), following national and European Law, the nature of the relationship between the user firm and the temporary agency worker is instead mostly debated and it has been even considered as a 'hidden contract'[202] or a contract of its own kind.

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[200] See ibid the Study on *The Role and Activities of Employment Agencies*.

[201] See ibid COM(2014) 176 final.

[202] Blanpain, R. and Hendrickx, F., *Labour Law between Change and Tradition*, Wolters Kluwer, 2001, pp.12-20.

2.1.1 Different kind of employment contracts between the temporary work agency and the temporary agency worker: two approaches to the case of temporary self-employed persons

The Directive describes the contractual link between the temporary work agency and the temporary agency worker with an open textured definition. Indeed, this relationship is defined by Article 1 (1) and by Article 3 (1) as a 'contract of employment' or 'employment relationship', between a worker and a temporary work agency with a view of being assigned to a user undertaking to work temporarily under its supervision and direction.

Therefore, it seems acceptable the solution of some states like the *United Kingdom* to regulate[203] the employment contract between the temporary work agency and the temporary agency worker, as possibly both a contract of service (which considers the worker as an employee) and a contract for service (which considers the worker as a self-employed person). In most Member States the employment relationship between agencies and workers is characterised by an employment contract, with a mutuality of obligations and a number of working conditions surrounding it, but there are some cases of national legislation - as above mentioned - which provide for the supply of self-employed persons.

In *England*, *Wales* and *Scotland*, the Directive was implemented via the Agency Workers Regulations of 2010 ("the Regulations") which came into force on 1st October 2011.

In the Agency Workers Regulations of 2010, under paragraph 3 (1), "agency worker" means an individual who: a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and b) has a contract with a temporary work agency which is: i) a contract of employment with the agency, or ii) any other contract to perform work and services personally for the agency.

Therefore, it can be generally stated that agencies are enabled to engage their workers under a contract for services rather than on contracts of employment. As consequences of this choice workers who are not identified as employees do not enjoy the full range of employment rights which include: maternity, paternity and adoption leave; leave of absence to deal with family emergencies; protection from unfair dismissal and statutory minimum notice periods on termination of employment; the right to a statutory redundancy payment when the employee is made redundant; access to a stakeholder pension scheme to be provided by the employer and more over. In this way labour costs can be undercut when posting self-employed workers abroad to carry out an employment activity and the effects of social dumping become even more clear when the origin and the receiving country have relevant different wages and working conditions.

The interpretation of this legislation, which was at first debated in front of the English Courts, is that unlike an employment contract, there is no "mutuality of obligations" between the parties in a contract for service. In that the agency is not obliged to provide work and the agency worker is not obliged to take work when offered it. This situation was subject matter for discussion of many judicial decisions[204] which tried to identify the existence of an implied mutuality of obligations

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[203] Regulation 15, The Conduct of Employment Agencies and Employment Business Regulations, 2003 and confirmed by Regulation 3, Agency Workers Regulations, 2010.

[204] See as one of the first cases on this matter *McMeechan v. Secretary of State of Employment*, 1997, English Court of Appeal. The Court of Appeal decided that the agency is the individual's employer, so far as any particular assignment is concerned, so that every time the individual accepts a particular assignment with a single end-user, he will be the agency's employee for the duration of that assignment.

between the work seeker and the temporary agency worker and thus considering the temporary agency worker as an employee. Nevertheless, this position as expressed by *McMeechan v. Secretary of State of Employment*, it is now one confined to its own facts.

After *McMeechan*, in *Franks v Reuters Ltd*[205], the Court of Appeal suggested that, in certain circumstances, an implied contract will arise between "the individual and the end-user". This was seized upon by the majority of a differently constituted Court of Appeal in *Dacas v Brook Street Bureau*[206], who decided that in most cases where the individual has been engaged through an agency for more than one year, he will be the end-user's employee and will not be the agency's employee. However, even this last case law has been criticised by doctrine and jurisprudence because of the identification of an implied contract between the agency worker and the hirer which has no equal provision in the English legal framework. It was claimed that the Court of Appeal re-wrote the law of contract, in that they found there was, or might be, an implied contract between the end-user and the individual in circumstances where there was no need to imply one in order to account for the parties' action.

Considering that probably what is needed is a clear statement of the law, the actual Regulations still provide the possibility for temporary-work agencies to hire agency workers under a contract for services rather than on contracts of employment.

By contrary, in *Latvia* the transposing legislation expressly states that the temporary-work agency shall be regarded as the employer of the temporary agency worker. This provides a useful clarification in compliance with the definitions in Article 3 (1), according to which a temporary agency worker has an employment relationship with a temporary-work agency with a view of being assigned to a user undertaking to work temporarily under its supervision and direction[207].

2.1.2 The relationship between temporary agency workers and user undertaking

This second "contract", in most European countries, typically it is not put down in writing and it seems to reflect a common choice not to regulate the relationship between the temporary agency worker and the user undertaking. Therefore, it is highly discussed amongst legal scholars if there is any contract or not and how this situation could have an impact on the traditional pillars of labour law legislation.

Whereas it is also criticized that the user firm is instead himself the employer (or second employer) of the temporary agency worker because of a lot of obligations vis-à-vis each other, like the right to define the actual employment activity which should be done and the duty to carry it out, the care for the health and safety of the temporary agency worker.

After all, as it appears, there is no obligation within the provisions of Directive 2008/104/EC under which Member States shall provide for a qualification of the relationship between the user firm and the temporary agency worker. Article 3 (1) (e) defines the "assignment" as the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.

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[205] Case *Franks v Reuters Ltd and other*, 2003 English Court of Appeal.

[206] Case *Dacas v Brook Street Bureau*, 2004 English Court of Appeal.

[207] See ibid COM(2014) 176 final, Brussels 21.3.2014.

Further Article 6 (2) states that Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void. Therefore, at first approach European legislation seems to define the relationship between the agency worker and the user undertaking as an "assignment" and the transformation towards an employment contract it is provided only as a possibility after the first worker's assignment.

Once again, the Directive uses the language of "workers"; and once again reference is made to national systems. Article 3 (1) (a) says that worker means any person who, in the Member State concerned, is protected as a worker under national employment law. Article 3 (2) adds that the Directive is without prejudice to national law as regards the definition of "contract of employment, employment relationship or worker", although the Directive does provide that Member States must not exclude from the scope of the Directive "workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency".

As stated above, the question on "who is a worker" is significant because it is related to the possibility of circumvent obligations as employers.

Nevertheless, within the Member States prevails the idea of a juridical formalism - even if not expressed as an employment contract - related to the relationship between the user undertaking and the agency worker.

Generally, the solution given to frame the relationship between agency workers and users was the sharing and division of those matters governing the essential terms and conditions of employment. The agencies are conferred with the responsibilities related to the organisation of the necessary means for the supply of workers. The users are conferred with the responsibilities linked to the supervision and direction of the agency workers.

Further, under the new provisions of the Enforcement Directive 2014/67/EU concerning the posting of workers it is stated that compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of specific concern in subcontracting chains and should be ensured through appropriate measures. Such measures, as introduced in the preamble (paragraph 36) may include the introduction on a voluntary basis, after consulting the relevant social partners, of a mechanism of direct subcontracting liability, in addition to or in place of the liability of the employer, in respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreement in so far as these are covered by Article 3 (1) of Directive 96/71/EC.

The other field of typical employer's duties extended to the user firm are defined by Directive 91/383/EEC (the so-called Health and Safety Directive) as amended by Directive 2007/30/EC.

This Directive specifically applies also to temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking or establishment making use of his services. Its purpose is to ensure that workers with an employment relationship as referred to in Article 1 are afforded, as regards safety and health at work, the same level of protection as that of other workers in the user undertaking or establishment. Article 8 (1) clarifies that without prejudice to the responsibility of the temporary employment business as laid down in national legislation, the user undertaking or establishment are responsible, for the duration of the assignment, for the conditions

governing performance of the work, which shall be limited to those connected with safety, hygiene and health at work.

The implementation in different national legislations of this joint employer status in triangular employment relationships has been uniform as related to the provisions of information to workers. By contrast the provisions related to the health and safety protection of workers reflect the problems of identification of who is the actual employer as analysed before. Nevertheless, even if there is ambiguity in some national legislations, generally it is provided for the user undertakings to have a general duty to ensure, so far as it is reasonably practicable, the health, safety and welfare at work. Further, in some Member States such as Italy, the user undertaking and the temporary work agency (in the event of default) are both liable to pay the worker directly[208].

2.1.3 The application of equal treatment as regards basic working and employment conditions

Once analysed the definition and content of the employment relationship which characterise temporary agency work, it follows the necessity to examine the meaning given by Member States to the principle of equal treatment.

Article 5 (1) of Directive 2008/104/EC lays down the application of the principle of equal treatment in user undertakings. According to this principle, from the first day of their assignment, agency workers must have the basic working and employment conditions that would apply if they were recruited directly by the user firm to occupy the same job. These conditions cover pay, as well as the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays. This is a compulsory list from which no derogation is possible. They must be applied to agency workers to the extent that they constitute binding general provisions in force in the user undertaking. The conditions must also comply with European and national rules in force in the user undertaking on protection of pregnant women and nursing mothers, protection of children and young people, as well as equal treatment for men and women and any anti-discrimination measure[209].

Certain derogations - or “exemptions” as identified in the words of the Directive - from the principle of equal treatment may be applied in particular situations. However, the Directive defines strict conditions for these derogations to be applicable and further measures shall be considered in order to ensure that they do not prejudice the overall protection of temporary agency workers.

The first possible derogation provided by the Directive is laid down in accordance to Article 5 (2) and it is defined as the so called *German* or *Swedish derogation*[210]. Member States may, after consulting the social partners, provide for an exemption from equal pay if temporary agency workers who have a permanent contract of employment with a temporary work agency continue to

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[208] See Legislative Decree 276/2003, Article 21.

[209] Compliance with *Council Directive 92/85/EEC* of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *Directive 2006/54/EC* of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *Council Directive 2000/43/EC* of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and *Council Directive 2000/78/EC* of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[210] Germany was one of the promoters of this derogation’s draft during the negotiation period of the Directive; the *Swedish derogation* is the way in which this derogation is called in the United Kingdom.

be paid in the time between assignments. As reported by the Commission in the 2014 final report[211], most Member States do not apply this derogation.

However, *Hungary, Ireland, Malta, Sweden* and the *United Kingdom* provide for the possibility to derogate from equal pay during assignments for agency workers with an open-ended contract of employment who are paid between assignments, i.e. during periods in which they are out of work. These five Member States do derogate from the principle of equal pay during periods in which the agency workers are assigned to user undertakings. Without prejudice to applicable minimum wages, none of them has adopted rules limiting the extent of the derogation during assignments, for instance, by setting a specific minimum level of pay. Indeed, as regards periods between assignments, *Hungary*, *Malta* and *Sweden* have not set minimum levels of pay to be respected, with clear consequences on workers' rights protection against social dumping. However, in *Malta*, agency workers are entitled to the same level of pay during and between assignments.

Similar provisions apply in the *United Kingdom*, where the Agency Workers Regulations of 2010 state that in time between assignments, agency workers are entitled to a minimum of 50% of the basic pay paid to them during the last 12 weeks of the previous assignment and, in any event, to the national minimum wage.

As a derogation from the principle of equal treatment, Article 5 (2) is to be interpreted restrictively. It does not concern temporary agency workers on fixed-term contracts, and can only be applied to those working under a permanent or open-ended contract of employment.

In the light of national implementation of Article 5 (2), this derogation raises several questions of interpretation, notably as to whether pay level of agency workers during and between their assignments may legally be as low as the applicable minimum wage, if any, while minimum wages are not subject to any lower limit. Measures intended to prevent misuse of the "exemptions" have been recently considered in the Enforcement Directive 67/2014/EU.

The second derogation from the application of the principle of equal treatment is provided by Article 5 (3) and it is defined as the so called *Nordic derogation*.

According to this provision, Member States may, after consulting the social partners, enable them to conclude or uphold collective agreements on working and employment conditions of temporary agency workers derogating from the principle of equal treatment, providing that the overall protection of agency workers is respected.

Article 5 (3) should be read in the light of Article 2 (2) of Directive 91/383/EEC on the Safety and Health at work of workers with a fixed-term or a temporary employment relationship, because with respect to working conditions regarding the protection of safety and health at work, no different treatment is justified.

The outcome of the 2014 Commission's final report is that most Member States have chosen not to apply the derogation of Article 5 (3). Nevertheless, this provision provides for a degree of flexibility and considers the fact that in certain Member States, temporary-agency work has traditionally been regulated mainly by collective agreements. Ten Member States (*Austria, Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, Italy, the Netherlands* and *Sweden*) have adopted provisions allowing collective labour agreements deviating from equal treatment of agency workers. The necessity is for the "overall protection of temporary agency workers" to be properly ensured by these collective agreements.

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[211] See ibid COM 2014, 176 final report, Brussels 21.3.2014.

The third derogation from the principle of equal treatment is the so called *British derogation*. According to Article 5 (4), Member States in which there is no system for declaring collective agreements universally applicable or no system for extending their provisions to all similar undertakings in a certain sector or geographical area may, on the basis of an agreement concluded by the national social partners, derogate from equal treatment as regards the basic working and employment conditions of temporary agency workers, provided that they enjoy an adequate level of protection. Only the *United Kingdom* and *Malta* have resorted to Article 5 (4). In the *United Kingdom*, agency workers are entitled to full equal treatment at the user undertaking once they have completed a 12-week qualifying period in the same job with the same hirer. In *Malta*, the principle of equal treatment, insofar as it relates to pay, does not apply for the first four weeks of an assignment if that assignment lasts 14 weeks or more.

Moreover, Article 5 (5) requires Member States to take appropriate measures to prevent misuse in the application of Article 5 and, in particular, successive assignments designed to circumvent the provisions of the Directive.

Indeed, in these cases of implementation of the principle of equal treatment and equal pay within exemptions and possible successive assignments, the risk of circumvention of the principles is particularly high if they are not applied from the first day of the agency workers' assignments, but only after a qualifying period. Further problems related to the definition of pay and the different legal bases of nationals' minimum pay rates, will be analysed in the next chapter considering also the evolution of the case law of the European Court of Justice.

2.1.4 Restrictions and prohibitions on the use of posted temporary agency work

After the study on the actual implementation of the principle of equal treatment by the Member States, different cases of justification on the application of possible prohibitions or restrictions on the use of temporary agency workers have to be considered.

Article 4 of Directive 2008/104/EC states that prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating particularly to: the protection of temporary agency workers; the requirements of health and safety at work; the need to ensure that the labour market functions properly; the need to ensure that abuses are prevented.

Member States were under an obligation, after consulting the social partners, to review these prohibitions and restrictions, to verify whether they were justified on grounds of general interest and to inform the Commission of the results of this review by the end of the transposition period (5 December 2011).

Nevertheless, it should be noticed that Article 4 (4) makes it clear that the provisions of Article 4 itself are without prejudice to national requirements regarding registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies. Consequently, the requirements falling under one of these categories, which relate to market access and the exercise of activities of temporary work agencies, remain outside the scope of the obligation to review restrictions and prohibitions.

Reports on the results of the review of restrictions and prohibitions provided by the Member States mostly implied specific choices in terms of employment policies that all Member States have made in the context of the transposition of the Directive. Four Member States (*Ireland, Luxembourg, Malta* and the *United Kingdom*) stated that no restrictions or prohibitions were in place. Consequently, no review has been carried out in these Member States.

Looking at the justifications of the prohibitions and restrictions on grounds of general interest referred by Member States, overall and with few exceptions, the Commission was informed only of very general justifications for restrictive provisions in force. In particular[212], a number of Member States (notably *Belgium, Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Slovenia*) referred to "the protection of temporary agency workers" to explain and provide a justification for certain prohibitions or restrictions in place.

The "requirements of health and safety at work" were cited by many Member States (notably *Belgium, Bulgaria, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal, Slovenia* and *Spain*) to justify either restrictions to, or an outright ban on the use of agency workers to carry out tasks involving special risks to the health and safety of workers. Certain Member States have resorted to this justification in combination with other justifications listed in Article 4 (1), in particular the protection of temporary agency workers (*Croatia, Portugal, Slovenia*).

Various Member States (notably *Belgium, Bulgaria, the Czech Republic, France, Italy, Poland, Portugal, Romania and Sweden*) referred to "the need to ensure that the labour market functions properly" to justify restrictive measures, such as a limitative list of reasons for using agency workers (*France, Italy, Poland*), limitations on the number or proportion of agency workers who may be used in a user undertaking (*Belgium, Italy*), or the obligation for the employer to negotiate with a workers' organisation before using agency workers (*Sweden*).

Several Member States (*Belgium, Bulgaria, Czech Republic, Germany, Greece, Italy, Poland, Sweden*) justified certain prohibitions or restrictions on the use of agency work by "the need to ensure that abuses are prevented". This justification has been resorted to with respect to measures as diverse as restrictions on the nature of the tasks that may be assigned to agency workers (*Italy, Poland*), the possibility for national collective agreements to set quantitative limits on the use of fixed-term contracts for temporary work (*Italy*), or the need, in certain cases for the user undertaking to obtain the consent of its union delegation before using agency workers (*Belgium*).

Taking into consideration the information as reported to the Commission, although a few restrictions and prohibitions on the use of temporary agency work have been removed, it appears that the review has not so far led to major changes in the extent of restrictive measures applied by Member States.

The review of restrictions and prohibitions is therefore still work in progress in several Member States (e.g.*Belgium, Greece* and the *Netherlands*).

Nevertheless, by stating that prohibitions or restrictions are justified only on grounds of general interest, Article 4 (1) authorises Member States to continue to apply many prohibitions or restrictions that are based on such grounds. In the Commission's view, to the extent that these restrictive measures are the result of policy options based on legitimate grounds and are proportionate to their aim, they would appear to be justified on grounds of general interest, without prejudice to a more in-depth examination of those prohibitions and restrictions on a case-by-case basis.

In this field, and the same can be generally affirmed on the overall implementation of Directive 2008/104, few judgements have been issued by the Court of Justice.

[212] See ibid COM(2014) 176 final, Brussels 21.3.2014.

The Court had previously clarified in the *Della Rocca* case that fixed-term workers placed by a temporary work agency at the disposition of a user enterprise are not covered by the Framework Agreement on fixed-term work but by the Directive on temporary agency work[213].

In order to determine whether a worker is protected by the Framework Agreement or by the Directive, the type of employer prevails over the type of contract that binds that employee to the employer.

Further, in March 2015 the Court (Grand Chamber) ruled in a case[214] that related to the permissibility of prohibitions and restrictions on temporary agency work, clarifying the scope of the obligations stated in Article 4 (1) of the Temporary Agency Work Directive. The Court of Justice found that the Directive does not prevent national courts from applying the restrictions and prohibitions on temporary agency work contained in collective bargaining agreements even where the prohibitions or restrictions would not be justified as required by the Directive.

3. The Italian legislation on temporary agency work

The Italian legal system has traditionally prohibited the use of intermediaries in the labour market. The Civil Code clearly banned under article 2127 the so called 'cottimo collettivo autonomo', or collective piecework, that is a situation in which a group of workers is hired and paid together by an intermediary, to perform a detailed task for an employer. Problems arose from this article, however, concerning its effectiveness and scope of application. Afterwards law n. 1369 of 1960 was approved. This has been one of the most important pieces of legislation in the field of workers' protection until recent years and provided a general ban for all employers to use intermediaries of any kind in the hiring of employees. Sanctions for breach were both civil and criminal[215]. Under the civil law regime, the consequence for hiring through an intermediary was that law implied a contract of employment between the worker and the end user, meaning that the civil law punished the stronger party, the end-user. At criminal law, by contrast, both the end-user and the intermediary were held to be responsible. The policy rationale, which was a protective one, shaped internal labour market and limited firms' freedom to contract out. In fact, firms were required to contract with reliable subjects, which had to be "true" entrepreneurs, not just hirers of the workforce, using appropriately machinery and means of production. Thus, the law imposed restraints on the constitutional freedom of enterprises (article 41 Cost.), this value being balanced with employees' right not to be exploited, an interesting outcome if we look at the more recent ECJ decisions on the balance between the freedom to provide cross-border services and workers' social rights[216]. At the same time, public intervention in the economy was so strong that only the public placement service could collect job seekers to be hired by employers.

The effect of this scenario was a significant monopoly of public services. New forms of service contract in fact challenged the effectiveness of Law 1369/1960, whenever contractors were "real" entrepreneurs, albeit not in the sense of relevant capitalists or massive users of machinery.

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[213] ECJ Case C-290/12, *Della Rocca*, 11 April 2013 (paragraph 36).

[214] ECJ Case C-533/13, *AKT*, 17 March 2015.

[215] See Ratti L., *Agency Work and the idea of Dual Employership: A Comparative Perspective*, WP C.S.D.L.E. "Massimo D'Antona". INT, 68/2009, p. 10-16.

[216] See, on the analysis of the Laval, Viking and Rüffert ECJ cases, Dhéret C. and Ghimis A., *The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, European Policy Centre, Discussion Paper 20 April 2016.

This was the advent of so-called labour intensive contractors, such as cleaning services and IT consultants, in which the contribution of capital was not fundamental for the business. The jurisprudence tried to expand the concept of means of production, thus including organisational skills and specific know-how, in coping with this restrictive legal framework. The difficult dialogue between courts and the legislation could not last, nor could the public monopoly of placement services meet labour market needs.

In 1997, the European Court of Justice with the *Job Centre II* case[217], which dealt with the European discourse about freedom of competition, held that public employment services were no longer entitled to exist as a monopoly, one of the reasons being that they were not capable of efficiently satisfying the needs of job seekers in the labour market. Public employment services were to be considered just like other economic activities, meaning that Italy was required to allow private companies to enter the labour market as intermediaries. Indeed, statutes prohibiting the placement of workers by private companies made it impossible to perform placement within or outside the state.

In the spectrum of the ECJ ruling and the propitious time for liberalization in the field, a new law was approved, Law n. 196 of 1997 (the so-called "Treu Package"), albeit not repealing the law of 1960 but setting up a derogatory scheme by which the Ministry of Labour licenses certain undertakings to supply temporary workforce.

Although it injected greater flexibility into the system, Law 196/97 confirmed the regulatory model used for fixed-term contracts, introducing into the Italian system the regulation of temporary agency work, with rather strong characteristics of rigidity, compared with other European countries[218].

But a "hole in the wall" was made[219]: some private agencies were permitted to hire workers and temporarily supply them to end user firms, and an exhaustive discipline was set up to regulate the position of each and every person within this triangular work relationship and to regulate the authorising process for the agencies[220].

Within the legal framework of Law 196/97, while aiming to preserve the central role of the permanent work contract, typical legal circumstances in which it was possible to have recourse to temporary work were established. Mainly the cases addressed by the law were situations in which there was a temporary use of workers for tasks not forming part of company's normal production arrangements, or in cases of temporary workers used to replace absent employees and in the circumstances permitted under the national agreement for the industry to which the user enterprises belong, concluded by the comparatively most representative unions (Article 1 of Law 196/97).

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[217] ECJ Case C-55/96, *Job Centre II*, 1997, on the evolution of the hiring system which arrived to the abolition of the state monopoly see Sciarra S., *Job Centre: an Illustrative Example of Strategic Litigation*, in Sciarra S. (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, Hart Publishing, 2001, p. 241, where it is stressed, in particular, the 'political pressure' exercised by Court's ruling upon the national Parliament, so that «the attempts to reform the Italian placement system, exposed as they were to critical public evaluation, became as much an embarrassment for law-makers as a challenge for academics».

[218] Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. and Zappalà, L., *Transnational Labour Organisation*, PIE Peter Lang, 2008, p.100.

[219] Ichino P., *Il lavoro interinale e gli altri varchi nel "muro" del divieto di interposizione*, Giornale di Diritto del Lavoro e delle Relazioni Industriali, 1997, p. 503.

[220] See Ratti L., *Agency Work and the idea of Dual Employership: A Comparative Perspective*, WP C.S.D.L.E. "Massimo D'Antona". INT, 68/2009, p. 10-16.

Temporary work agencies enabled to provide services were only those who respected the requirements described under Article 2 of Law 196/97. To be signed on the special register held by the Ministry of Employment and Social Policy, a prior provisional authorisation to engage in the supply of temporary labour was needed and it was related to the verification of the existence of some legal requirements.

These requirements, as stated under Article 2 (2), were mainly related to the company's society form as a corporation or a cooperative, including in the company name the reference to the temporary work supply activity, and the possession of a capital as a guarantee for workers' payment.

Further, social partners were given important tasks within the regulation of the specific balance between company's needs and workers protection: trade unions were required to regulate the maximum number of extension and the maximum duration of temporary employment relationship, as well as the provision of training for temporary workers financed by a special fund to which agencies were obliged by law to contribute (as provided under Article 5 of the law).

In 2003, the Italian Government decided to modify the 1997 regulation on temporary work and introduced a new form of agency work, now called "somministrazione di lavoro" to cope with firms' demands of long term agency workforce. Meanwhile, the 1960 law was repealed although arrangements which fall outside the legal paradigm were still considered as outlaw, thus implying the persistence of the old principle[221].

The new Legislative Decree n. 276/2003, the so-called "Biagi Law", envisaged two kind of contracts: a) a labour supply contract, which is a commercial contract between a temporary work agency and a user firm, and which can be either a fixed-term contract or an open-ended contract (which entails staff leasing); b) a subordinate employment contract between a temporary work agency and a worker, which may be a fixed-term contract or an open-ended one; but if the contract is of unlimited duration, the agency must provide an income guarantee for those periods where no assignments are available; c) there is a relationship between the user undertaking and the worker which is not however regulated by a contract as the other two previous relationships.

As provided by Law 196/97, also within the provisions of Legislative Decree 276/2003, it is established that labour supply contracts can only be signed with agencies authorised by the Ministry for Employment and Social Policy and therefore registered when they met certain legal and financial requirements. Those restrictions concern organisational structure, minimum capital requirements, and professional qualification of its employees. Article 20 (3) of the Legislative Decree lists the different areas in which supply of personnel based on an open-ended contract is authorised. While Article 20 (4) states that an agency authorised by the Ministry of Labour and a company, called the user, are allowed to stipulate a fixed-term labour supply contract "for reasons of a technical, production, organisational or substitutive nature". Thus, as specified by the provision, the only remaining form of trade union control lies in the fact that collective bargaining is assigned the task of identifying the quantitative, possibly not always uniform (as specified by the wording of the Legislative Decree), limits to the use of temporary work, that is, the proportion of workers who can be hired on this kind of contract as compared to the number of permanent employees working for a firm.

Further there are also circumstances in which employers are not allowed to make use of "supply workers". These circumstances specifically include the need to replace striking workers; when the

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[221] Carinci, M. T., *Utilizzazione e acquisizione indiretta del lavoro: somministrazione e distacco, appalto e subappalto, trasferimento d'azienda e di ramo. Diritto del lavoro e nuove forme di organizzazione dell'impresa*, Giappichelli Editore, 2008, p. 38.

employer has implemented collective dismissals during the previous six months or has introduced shorter working hours affecting employees performing the tasks for which temporary work is being requested; and when the employer does not comply with legal requirements relating to health and safety in the workplace (Article 20 para. 5).

Moreover, under Article 21 of the Legislative Decree it is stated that the commercial contract between the agency and the user must be in written form and must provide information regarding the reasons for recourse to temporary work; the official registration of the agency; the number of workers requested; the tasks involved and the relevant and the relevant job classification; and so on. It must also expressly contain the obligation on the part of the agency or, in the event of default, on the part of the user enterprise, to pay the worker directly.

Finally, regarding the working conditions of agency workers Article 23 (1) establishes that agency workers are entitled to "financial and regulatory treatment that is in no way inferior to that offered to comparable workers employed by the user firm". This principle, which is considered of central importance, means that the agency should apply to agency workers the same conditions fixed by the collective agreement of the user firm. However, as individual conditions are excluded from this equality, the existence of the principle of equal treatment in the Italian legal system doesn't mean that agency workers have the same conditions as the other user's employees.

Besides the principle of equal treatment, a further provision to protect agency workers is represented by the principle of solidarity between the agency and the user firm for wages and social security contributions (Article 23 para. 3 of the Legislative Decree).

However, new considerations shall be made on the effectiveness of these clauses because of possible application of sectoral agreements with detrimental exceptions from the national collective agreements of reference. Following the *Laval* case the European Court of Justice, it derived a restrictive interpretation of the possibility to cite grounds of public policy in order to apply a collective agreement to posted workers by means of collective action because of trade unions not being bodies governed by public law[222]. After the *Commission v. Luxembourg* case, this interpretation seemed to be contested while the Court affirmed a distinction between collective agreements applied by trade union through collective action and general binding applicable collective agreements as recognised by national law. At first sight, this position guaranteed for an opportunity to apply to undertakings posting workers to its territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) of Directive 96/71. Nevertheless, derogations from the principle of freedom to provide services must be interpreted strictly and must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated[223]. Thus, sectoral agreements establishing higher levels of protection from the minimum standards provided by the Posted Workers Directive, could not be applied without interfering with the freedom to provide services.

Mainly the Italian political debate on agency workers continued, years after the "Biagi Law", on issues related to the regulation of the open-ended contract called 'somministrazione di lavoro a tempo indeterminato' and on the restrictions on the use of agency workers supply.

In 2007 the centre-left Government decided to repeal under Article 1 (46) the open-ended contract called 'somministrazione di lavoro a tempo indeterminato' (Law n. 247 of 2007), permitting

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[222] ECJ Case C-341/05, *Laval*, 18 December 2007, para. 84 of the judgment.

[223] ECJ Case C-319/06, *Commission v. Luxembourg*, 19 June 2008, para. 49-51.

agencies to supply workforce using fixed term contracts only, and after having verified the existence of objective economic needs of the user firm.

Nevertheless, within the 2010 Financial Act (Law n. 191 of 2009) under Article 2 (143) (b) the open ended contract for agency workers was introduced again in the legal framework and the list of matters in which it could be used was integrated with the care and personal assistance.

Again, the Legislator crackled more and more the centrality of the rule of Article 20, par. 4, Legislative Decree No. 276/2003 in its original version, providing additional means of access to the temporary agency work. First, in 2009, paragraph 5bis was added: it extended to temporary agency employment, the benefits laid down by Article 8 (2), L. n. 223/1991 for hiring fixed-term redundant workers.

Paragraphs 5 ter and 5 quater were then inserted (by Legislative Decree No. 24/2012): two further exceptions to the need of technical, organisation, production and replacement related reasons were established, using temporary agency contract with no substantive reason, regarding some subjective requirements of temporary agency employees. The picture was then drawn adding Law 92/2012, with the possibility to conclude an up to 12 month fixed-term contract with no substantive reasons, also for temporary employment agency (Art. 1, par. 1bis, Legislative Decree No. 368/2001); and, finally, Law Decree 34/2014, that adds to the much discussed "staff leasing" repealed, in 2007, by L. 247/2007 and reintroduced, in 2009, by L. 191/2009 as above mentioned, the possibility to make use of the temporary agency work with no substantive reason.

Moreover, Legislative Decree No. 81 of 2015 completely revised the regulation of work relationships in Italy, also with regards to temporary agency workers.

Articles 30 to 40 of the Legislative Decree consolidated, with some modifications, the regulation of temporary agency work contracts already provided by Legislative Decree No. 276 of 2003 as modified by Legislative Decree No. 34 of 2014.

Within the new normative framework, an authorised temporary work agency may provide a user undertaking with one or more employees on a fixed-term or for an indefinite term, who perform work under the user's control. It is specified that only workers hired indefinitely by the temporary work agency may conclude an indefinite contract and that temporary agency work contracts may not be used by public administrations. The new Legislative Decree provided for a quantitative restriction on the use of open-ended contracts for agency workers in the user company which shall not exceed 20% of the indefinite employment relationship in place on 1st January of each year, if not otherwise provided by collective agreement. While no restriction has been provided for agency workers working on a fixed-term contract. Indeed, the maximum number of agency workers working on fixed-term contract shall be determined by the collective agreement applied by the user, in a scenario of absence of substantive qualitative restrictions on the possibility to make use of agency workers as already provided by Legislative Decree 34/2014.

A regards the transposition of EU Directives on posted workers and - more specifically - on temporary agency workers, the Italian legislator with Legislative Decree 72/2000 implemented Directive 96/71 and with Legislative Decree 24/2012 implemented Directive 2008/104. Most of the issues discussed before on the implementation of the Temporary Agency Work Directive relates on the pivotal role of temporary agencies, which takes part both in the commercial contract with the user and in the peculiar contract with the worker. To tackle the problem of the status of agency workers, Italian law includes this latter contractual relationship within the category of the contracts

of employment. This means that the typical role of the employer is played by a subject which is supposed to be reliable in the contractual obligation towards its employees[224].

Nevertheless, other issues related to the application of the principle of equal treatment and on the definition of "same employment and working conditions" which should be applied to agency workers posted to Italy as compared to the user's employees are still at the centre of the debate. Foremost reasons against the actual supply of agency workers relates to the capacity of the legal system to protect workers from labour intermediaries' exploitation of the "used" workers, regarding a substantial inverse proportionality of the intermediary's earnings in respect of the wage paid to agency workers. These considerations and analysis about agency workers posted in Italy from other EU Member States will be further deepened in the next chapter.

The Italian legislation on temporary workers, as compared above to other national legislations, shows a very heterogeneous set of workers' rights within the European Union. Within the current situation of intra-EU mobility of workers there is a de facto asymmetry between the increasingly developed internal market and the variety of labour and social rights. As stressed by Guillaume Balas (S&D Member of the European Parliament) with his own initiative report[225] on social dumping in the European Union - which is currently discussed in the European Parliament's Employment and Social Affairs Committee - "this paradox has encouraged inter-corporate rivalry, since European workers are far from all enjoying the same social obligations or the same social rights". These situations, continuous the report, of unfair economic and social competition also represent an obstacle to maintaining a high level of social protection in Europe: thus increased competition between economic operators encourages them to reduce spending related to labour costs; this is leading to a weakening of the social standards in force in the various Member States of the Union, is gradually undermining all the rights enjoyed by European employees and, finally, is reducing the financial resources necessary for the various social protection systems.

The rapporteur emphasises the significance of social issues, in certain unfair social competition among our European fellow-citizens. He underlines the importance of the European Parliament having a strong voice and a high profile in helping to build a more social Europe, a Europe which will therefore enjoy greater support from the peoples of Europe.

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[224] See ibid Ratti L., *Agency Work and the Idea of Dual Employership: A Comparative Perspective*, p. 16.

[225] Balas G. (Rapporteur), Draft Report on social dumping in the European Union (2015/2255(INI)), Committee on Employment and Social Affairs, 7.1.2016, p. 8-9.

Chapter IV
A case study on illegal posting by temporary work agencies. Between the use and abuse of European law

1. Legal ambiguities and improper implementation of European and national rules: a system of posting of workers which allows cheap labour costs competition

The evolution of European legislation on posting of workers is included in the normative framework of labour law even though, as seen in the previous chapters, it is formally adopted in the field of free movement of services (Article 53 and 62 TFEU). At the time, the reason for choosing this legal basis, was to circumvent the lack of competence for European Union institutions in the social field, even if no further changes were made while adopting the 2014 Enforcement Directive. It is important to note that, in 1996 by using the competence for the free movement of services, the Directive has been adopted through qualified majority voting, instead of demanding unanimous agreement in the Council. The latter alternative was not available since the UK and Portugal were opposing the Directive.

This contradiction between institutional intentions to create "a climate of fair competition and measures guaranteeing respect for the rights of workers" (para. 5 of the preamble, Directive 96/71/CE) and the legal basis chosen, is well expressed by the interpretation of national legislators to attribute a social dimension to Directive 96/71/EC and by the claim for application of a general principle of equal treatment to workers posted in their countries. Most Member States[226] consider their national labour system to be extended to posted workers while implementing the European Directive. Nevertheless, this seems more as a driven interpretation in order to reinstate some space for national sovereignty rather than a literal application of the Directive's wording. Indeed, the Posted Workers Directive states that only a list of hard core elements of workers' protection should be applied during the assignment in another country.

Particularly the Directive lays down "a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided"[227].

The concept of minimum rates of pay may, according to the Directive, be defined by national law and/or practice of the host state (Article 3 para 1).

The European Court of Justice in its case law answered to the question on whether the Directive should be interpreted as providing a floor of protection that the host states must extend to posted workers or as establishing a ceiling of employment conditions that host states are allowed to extend

[226] See as an example the implementation of Directive 96/71/EC in the Italian system by Legislative Decree 72/2000.

[227] Directive 96/71/EC, para 13 of the preamble.

to posted workers[228]. Thus, the so-called *Laval-quartet of cases* has in many respects clarified the interpretation of Articles 43 and 56 TFEU and the Posting of Workers Directive.

The answer given by the Court was to interpret the Directive almost as an exhaustive coordination of the national measures for protecting workers in posting situations. The Court's interpretation thus comes rather close to an understanding of the Directive as a ceiling. It is true that the Directive does not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law. On the next paragraphs, it will be analysed the definition of pay and the possibility to convert costs that a national employer has, according to national law or collective agreements, into a fixed sum of cash. Now it shall just be recalled the importance of the application of what retribution means as a whole within national legislation, because otherwise there would not be any equality between what is paid to posted workers and what a national employer has to pay for its national employees.

Further, Member States may also extend conditions of employment on matters other than the nucleus of mandatory rules if they concern public policy provisions (Article 3 para 10). However, the concept of public policy provisions is interpreted strictly[229] and this possibility is not open to trade unions, since they are not bodies governed by public law[230].

Even considering the above-mentioned possibilities for national action, as a consequence of the Court case law the idea of equal treatment of domestic and foreign service providers, as regards wages and employment conditions, has been rejected in favour of a principle of minimum protection. Thus, a case of posting is not considered a situation of unacceptable social dumping so long as the hard nucleus of the host State is applied. Other differences in labour standards between the host State and the State of origin are not regarded as unfair competition, according to this interpretation of the Directive, even if driven (and resulting in fact) by the intention of low cost workers' exploitation.

The interpretation of the Posting of Workers Directive as a "maximum free movement of services directive" had extensive consequences, especially in some Member States such as Denmark and Sweden whose industrial relations regimes are based on the autonomous collective bargaining model. In this model, it is overall the exclusive responsibility of trade unions to safeguard rather high average, flexible, levels of wages and employment conditions for all different categories of employees. Both in Denmark and Sweden it was, immediately after *Laval* and *Viking* cases, considered necessary to review the legislation to comply with the new case law, while still preserving the autonomous collective bargaining model.

There has been a huge debate concerning the *Laval-quartet* also in other Member States. However, it seems as if this debate has not resulted in any new or amended legislation in the laws on posting of workers or the laws on collective action. This is for instance the case in Belgium, Finland, Italy, Poland and the UK.

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[228] Malmberg J., *The impact of the ECJ judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collecting bargaining and the effectiveness of social action*, document required by the European Parliament's Committee on Employment and Social Affairs, May 2010, p. 7-8.

[229] See ECJ Case C-319/06, *Commission v. Luxembourg*.

[230] See ECJ Case C-341/05, *Laval*, judgement of the ECJ (Grand Chamber),18 December 2008, para. 84 of the decision: "not being bodies governed by public law, they (trade unions) cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law".

Lastly, in the following paragraphs, are going to be considered the problems arising by the (ab)use of European legislation on posting of workers in the field of the provision of services. Starting from the ECJ's interpretation of the Posted Workers Directive and the definition given to the notion of unfair competition, it shall be analysed which space remains to national criminal law in order to address "unlawful" cases of cheap workers' exploitation. The (ab)use of posting creates a sophisticated form of interposition of labour where, however, the focus of interest is moved from the posted workers to the legislation of the country of origin of those workers.

Indeed, the exemption from the application of the principle of equal treatment to posted workers established by Regulation 883/04 on the coordination of social security systems, allows competition between social security systems. Posted workers continue to pay social security contributions in their home country, while they are working in another Member States.

Thus, the weak application of minimum rates of pay and other core elements of employment conditions to posted workers, appears to be even more weakened in its intention to balance social dumping based on national difference of wages, because of the application of the social security system of the country of origin, which (in order to have a profit from labour costs differentials and legal regime to be applied) is quite always cheaper than that in force in the host country where the work is carried out.

1.1 Applicable employment conditions to posted temporary agency workers

It is particularly important considering the discussion on the application of the principle of equal treatment, as opposed to that of minimum protection to be applied to posted workers, with regards to the regulation of posted temporary agency workers.

Starting from the provision of the Posted Workers Directive which relates to the working and employment conditions applicable to posted temporary agency workers, Article 3 para. 9 of Directive 96/71/EC allows Member States to go beyond the minimum requirements for general cases of posting as stated by Article 3 para 1. The Article, as seen before, seeks to apply the same conditions and terms of employment as comparable agency workers in the destination country. This means that the applicable regulation on equal pay should be the same as that which is applied to agency workers who are assigned at national level. This is defined by Article 5 of the Directive 2008/104/EC on temporary agency work, which includes the options of derogations from equal pay and particularly, derogations made by collective labour agreements[231].

Article 3(1) (f) of Directive 2008/104/EC refers to working and employment conditions that have been set out by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking. These aspects all relate to: i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and ii) pay. Thus, the concept of "terms and conditions of employment" seems to be wider than the corresponding provision of the Posted Workers Directive. This is because it also encompasses provisions laid down by any kind of collective agreement. It therefore seems possible to guarantee that company level agreements are respected and that they can also be applied to posted agency workers. However, even within the normative framework of the Temporary Agency Work Directive, the application of the principle of equal treatment between posted temporary agency

[231] For an overview of the issues which relates to the implementation of the Posted Workers Directive see Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016.

workers and national workers it is not strongly affirmed and neither implemented by Member States. Indeed, as Article 3 para. 9 of Directive 2008/104/EC is only an option, rather than a legal obligation, Member States are also free to apply only the hard core of rights established by the Posted Workers Directive. This includes minimum rates of pay, but not full equal treatment. As showed by a recent Study for the EMPL Committee (Table 10), there are currently 15 Member States that apply the equal treatment provisions of the Temporary Agency Work Directive, while 13 Member States are yet to set any specific provisions for posted agency workers.

Table 10: National regulation of temporary agency work in the context of posting

Equal treatment between local and cross-border temporary agency workers	Belgium, Bulgaria, Croatia, Czech Republic, Germany, Denmark, Spain, France, Italy, Luxembourg, Malta, Netherlands, Romania, Sweden and UK
Application of the hard core only	Austria, Cyprus, Estonia, Greece, Finland, Croatia, Hungary, Ireland, Latvia, Poland, Portugal, Slovenia, and Slovakia

Data Source: EU Commission 2016, Impact Assessment, Annex VI.

This elaborate normative system has been addressed also by the European Confederation of Private Employment Services (Eurociett) as in need of clarification. Eurociett calls for an in-depth legal analysis on the interrelation between the Directive 2008/104/EC on temporary agency work and the Directive 96/71 on the posting of workers in the context of the provision of services, as both Directives address the employment and working conditions of agency workers[232].

1.2 Social security rights and tax payment of posted temporary agency workers: the effects on labour costs

As underlined in the previous chapters, normally, under EU law applies the *lex loci laboris* rule, the principle according to which any worker who works in a given Member State is subject to the whole body of legislation of that State to ensure equal treatment and non-discrimination (host country principle). Posting of workers - and thus posting of temporary agency workers -, however, constitutes a derogation from this principle, as posted workers remain attached to the social security system of their home country. The reason for derogation was that, in case of posting, the full application of host country control principle would have led to a very complicated system to be implemented. The fear was that workers who may have been posted for very short periods of time to different member states would have to adhere to the social security systems of all countries. Consequently, European policy makers considered that such "unnecessary and costly administrative and other complications (...) would not be in the interest of workers, companies and administrations (...) in order to give as much encouragement as possible to the freedom of movement of workers and services"[233].

In case of posted temporary agency workers this means that migrant workers need to adhere to the social security system of the country where the temporary work agency, of whom thy are employees and which sent them to another State to carry out an employment activity, it is established.

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[232] See Eurociett Position Paper, *EU Labour Mobility Package: Posting of agency workers and the cross-border provision of services*, 9 November 2015, p. 5.

[233] European Commission, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, December 2013, *op.cit.* p. 7/53.

Indeed, these provisions are not treated in Directive 96/71/EC or in Directive 2008/104/EC, but are encoded in three regulations concerning social system coordination[234].

According to the social security coordination rules, as mainly set out in Regulation 883/2004 and the implementation Regulation 987/2009, social security contributions concerning posted workers need to be paid in the State where the employer normally carries out the activity.

By the same token, posted workers can claim social security benefits (such as those related to unemployment, pensions and work accidents) in the country where they are insured[235]. Access to health system via the European Health Insurance Card (EHIC) is the sole right the posted worker can enjoy in the host state where the employment activity is carried out.

For the purposes of social security coordination, workers are posted "by companies that normally carry out their activity in the home Member State, to perform paid work on behalf of their employer, for a limited duration of time"[236]. This means that, under this more concrete definition of posting than that of Directive 96/71/EC, the sending company must conduct a substantial part of its activity in the Member State where it is established. Furthermore, there must be a direct relationship between the posted worker and the sending company.

Finally, according to Regulation 883/2004, the duration of posting cannot exceed 24 months. Even if this maximum limit can be derogated by longer periods of posting (of up to five years), if it is based on agreements between sending and receiving Member States (Article 16 of Regulation 883/2004), this is an example of relevant differences from the Posted Workers Directive, where the temporariness of posting remains undefined.

Indeed, the Posted Workers Directive expressly requires the temporariness of the posting of individual employees (Article 2 para. 1). However, the wording of Article 2.1, which refers to "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", does not contain any indication as to clearly define the temporary nature of the posting of workers. It must be underlined that the limited period must be defined with respect to the duration of the employment relationship with the employer. In fact, the general rules to select the law applicable to the employment contract are stated in Regulation (EC) No. 593/2008, the Rome I Regulation on the law applicable to contractual obligations. The Rome I Regulation clarifies that, with regards to an individual employment contract, work carried out in another country should be regarded as temporary, if the employee is expected to resume working in the country of origin after carrying out his tasks abroad[237].

Further, as regards the payment of taxes, it has to be noticed that there are no coordination rules determining which Member State will tax labour income in the context of posting. In the absence of

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[234] Regulation 1408/71/EEC of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation 883/2004/EC of the European Parliament and of the of Council of 29 April 2004 on the coordination of social security systems; and the implementation Regulation 987/2009/EC of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation 883/2004/EC on the coordination of social security systems (text with relevance for the EEA and for Switzerland.

[235] See ibid Voss E., Faioli M., Lhernould J. and Iudicone F., pp. 25-27.

[236] Maslauskaite K., *Posted Workers in the EU: state of play and regulatory evolution*, policy paper 107, Notre Europe Jacques Delors Institute, 24 March 2014, p. 10.

[237] See for further analysis the Final Report of March 2012, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services,* Ismeri Europa, p. 18-20.

a specific regulation, the general principle that income tax is paid in the country in which the income is earned applies.

Indeed, the OECD Model Tax Convention on Income and on Capital[238] stipulates that the posted worker will be subject to income tax in the sending country on the basis that they work for less than 183 days within a period of 12 months in the receiving country.

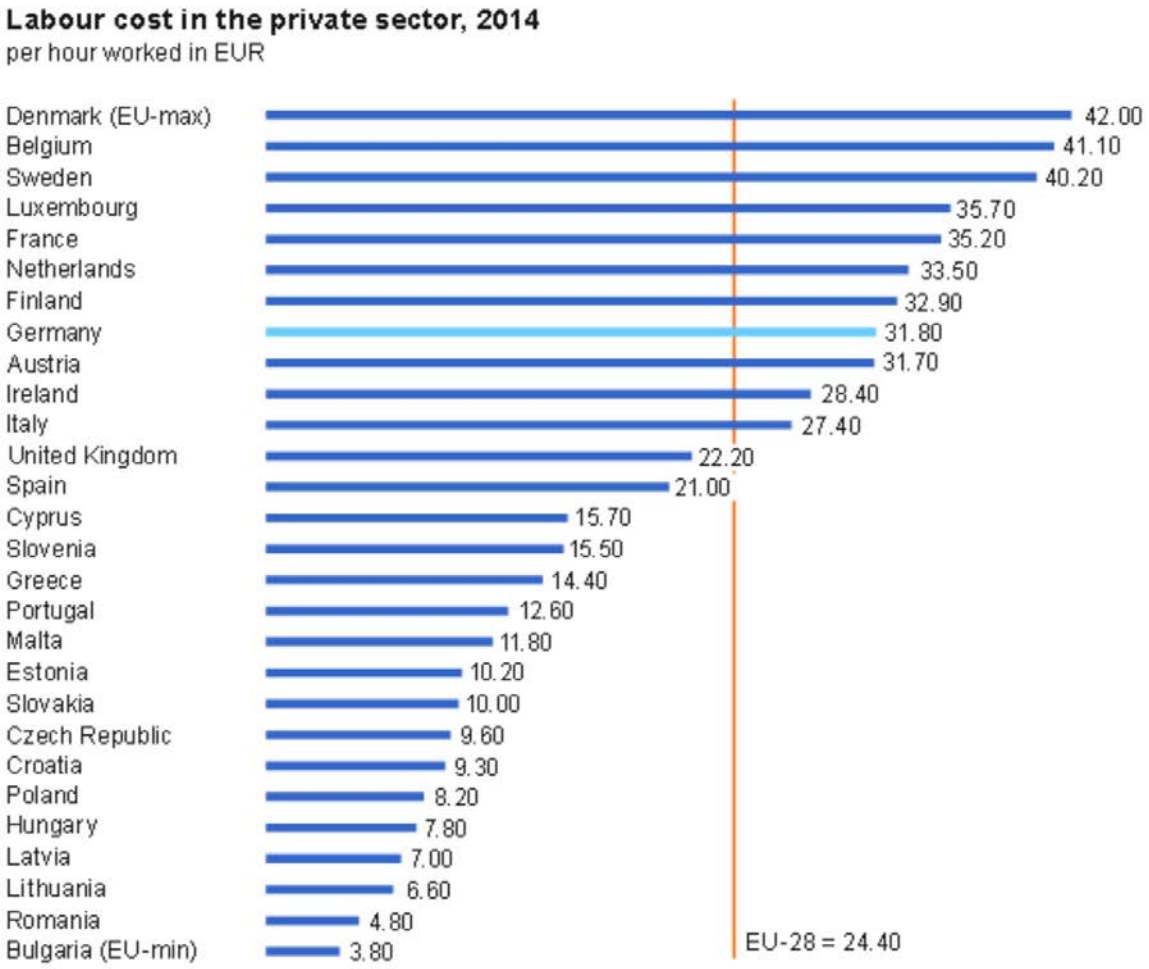
For periods longer than 24 months, the receiving Member State has the competence to levy both taxes and contributions. While for periods between 183 days and 24 months, income tax is levied by the receiving Member State and social security contributions are levied by the sending Member State.

The differences on income tax and social security contributions between EU Member States, as shown below in Table 11, makes room for companies providing cross-border services to have a cost advantage when social security contributions and income taxes are lower in the sending country than in the receiving country.

Further, it will be considered how, because of these differences in labour costs levels within Member States, even if the net salary of posted workers is the same of nationals, posting a worker from a Member State with social security contributions and income taxes lower than the receiving country, saves an employer a significant amount of labour costs.

[238] See Working Party No. 1 of the OECD's Committee on Fiscal Affairs. Updates were published in 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2015. The next update of the OECD Model Tax Convention is tentatively scheduled for mid-2017.

Table 11[239]. Labour costs consist of gross earnings and non-wage costs, where the main component of the latter is the employer's social contributions.



The reasoning made by the European Commission in the 2016 Proposal for a revision of the Posted Workers Directive, was that even if rules and provisions of the Directive are fully applied, labour costs of posted workers are lower, mainly due to different social security contribution levels. Indeed, as seen before, these are regarded as the major motivation of companies in the receiving countries to employ posted workers in their undertaking.

The following Table 12 shall be useful to comprehend the actual differences in labour costs throughout Europe.

Table 12: Savings made by companies through posting[240]

	Dutch worker	Posted worker from Portugal	Posted worker from Poland

[239] Source: Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, Annex 4 Figurep.75.

[240] See ibid *Posting of Workers Directive - current situation and challenges*, p.27.

Net salary	1,600	1,600	1,600
-/- social security (paid in the sending country)	496	81	350
-/- taxes (paid in the receiving country, i.e. after the 183-day period)	81	81	81
Gross salary	**2,177**	**1,762**	**2,032**
Percentage saving as compared to a Dutch worker		**19.1%**	**6.7%**

The examples made using a hypothetical case of posted workers from Portugal and Poland, could be easily transposed to other cases of posting and the result will always underline a percentage of savings made by companies when posting workers from a country with labour costs higher than the State of origin of the company. Even if regulations on social security coordination and income tax rules allow companies to pay these kinds of non-wage labour costs in the State of origin and to be competitive in the market, at least some of the legal uncertainties and regulation loopholes of the normative framework of posted workers shall be reviewed in order to guarantee the correct implementation of the principle of equal treatment to posted workers.

A first improvement in this direction, as it will be stressed in the next paragraphs, is represented by the provision contained in the new Proposal for a Directive amending the Posted Workers Directive[241] under Article 1 paragraph 2 of the proposal, which replaces the reference to "minimum rates of pay" by a reference to "remuneration" and it provides a new sub-paragraph by replacing Article of Directive 96/71, imposing on Member States an obligation to publish information on the constituent elements of remuneration.

The specification of components of minimum rates of pay has been already deal with by some Member States, in order to solve national issues on the application of the principle of equal treatment. The Italian Ministry of Labour and Social Affairs, for example, has answered the questions asked by the Italian Confederation of Transport, Shipping and Logistics within Consult N. 33/2010[242]. The Ministry underlined that the expression used by Article 3 (1) of Legislative Decree 72/2000, of "same working conditions", must be read in conjunction with Article 3 of Directive 96/71which states the hardcore of protection to be guaranteed to posted workers. The Commission, with communication N. 304/2007, also confirmed that Member States are required to verify the equivalence of working conditions and in particular, the application of minimum wages, including overtime payments, irrespective of the country of origin of the employer (in case of posting of third country nationals by extra-EU companies, in absence of a bilateral agreements, the Italian Court of Cassation ruled that the principle of the country of origin, in the field of social security contributions and taxes, shall no longer apply[243]). The Ministry thus stated that, as part of the expression "minimum rates of pay", should be considered seniority, when clearly provided by the

[241] See *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services* - COM(2016)128.

[242] See Interpello 33/2010, Ministero del Lavoro e delle Politiche Sociali, Direzione Generale per l'Attività Ispettiva, Prot. 25/I/0017136.

[243] See the Italian Court of Cassation decision n. 16244/-25 September 2012.

relevant collective agreement (see Constitutional Court Decision N. 697/1988) and all kind of capital disbursements which rely on the worked period, considering the gross salary.

The intention is to avoid a comparison between different national labour systems as regards each single constituent elements of pay, which would be impossible to achieve, and rather to consider the minimum rates established by collective agreements as the gross amount.

Further information upon the Italian definition of the constituent elements of retribution, even if the specific definition of salary remains within the provisions of applicable collective agreements[244], will be published every year by the Ministry of Labour, as announced by Legislative Decree 136/2016 which implemented the Enforcement Directive within the Italian legal system and provided specifically by Article 7 (1).

Nevertheless, these clarifications made by the Italian Ministry of Labour do not safeguard posted workers from gaining an overall gross salary lower from that of national workers. Indeed, as it has been said before, social security contributions and taxes remain regulated by the country of origin principle (see Article 12 of Regulation 883/04/EC) and this situation allows great savings in labour costs, even when minimum rates of pay of the receiving country are respected. Furthermore, the identification of the tax and contribution base, is regulated by the country of origin rules. Thus, what usually happens, is that the part of salary higher than the salary normally paid for the same employment in the country of origin, is not considered as part of the tax base and is instead ascribe as indemnity allowance or travel expenses, which are completely tax free for the employer[245].

In the next paragraphs, the application of the rules on posting will be analysed, distinguishing between cases of incorrect identification of the national definition of minimum rates of pay (such as the case of Romanian contracts), cases of national temporary work agencies which try to supply workers using European rules even if not applicable in order to be competitive with foreign agencies and lastly, cases of illegal posting which are based on the complete abuse of the institute of posting of workers and which represent a new frontier of labour exploitation.

2. A case study on “Romanian contracts” publicised in Italy by temporary work agencies

Practical consequences of the choices made while regulating the situation of posting, will now be described by considering some debated Italian cases on the “use” (in the next paragraphs, the possibility to define these situations as an abuse of law, will be analysed) of EU legislation as a legal way to circumvent national laws and gain access to the labour market with lower costs while exercising the freedom to provide services.

A first case of “Romanian contracts” deals with a recent advertisement publicised in Emilia Romagna, in March 2015, by the Work Support Agency, a temporary work agency established in Romania. The advertisement, which has to be framed in a well-known pathology of the European legislation on road haulage sector[246], openly challenged the economic advantages which enterprises could benefit from using posted workers through Romanian temporary work agencies.

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[244] As it was specified by the Italian Ministry of Labour and Social Affairs in its report upon the Directive Proposal.

[245] See Orlandini, G., *Mercato unico dei servizi e tutela del lavoro*, Diritto del Lavoro nei sistemi giuridici nazionali, integrati e transnazionali, Franco Angeli Edizioni, 2013, pp. 72-73.

[246] See Bano F., *La territorialità del diritto: distacco transnazionale di manodopera a basso costo*, Lavoro e Diritto, 4/2015, pp. 583-602, DOI: 10.1441/81920. See also on the critical issues relate to the road haulage sector, COM (2014)

The leaflet[247] was aimed to the attention of enterprises of the Province of Modena and foreshadowed a downward trend on labour costs to defeat the grip of economic crisis.

It was specified a clear cut of 40% of labour costs while promising maximum flexibility of temporary agency workers. The absence of labour and social security contributions to be paid to the Italian Institutions in case of posting to this country, was openly publicised as a way to circumvent high work-related costs currently existing in this country. Further it was stated no responsibility for the user in cases of on-the-job injuries or posted workers' illnesses.

Lastly, as it will be examined below, some of the fundamental components of retribution, as they are considered by the Italian legislation (for example additional monthly payments and severance pay) were excluded from the lists of labour costs as if they were not part of the notion of minimum wage which should be ensured to posted workers. Immediately after the full media coverage of the leaflet, then came the reaction of trade unions' representatives[248] and the answer given by the Ministry of Labour with an official statement. According to the Ministerial Memorandum (Circular n. 14/2015) the problem of "Romanian contracts" has to be strongly opposed not to let unfair competition based on the restriction of workers' rights to get access to the Italian labour market. It was, above all, underlined how, during inspection activities, attention should be given to elusive practices used by temporary work agencies and it should be clarified which is the proper applicable normative framework in such cases of posting. Thus, the focus of the Memorandum concerns the regulatory system applicable to posted workers, mainly asking for the correct implementation of the law in force in the place where the work is carried out, as specified by the Posted Workers Directive. Workers, continues the Ministry, who are posted from one State to another of the European Union, by a temporary work agency, should be granted the same working and employment conditions as provided by the law in force in the host country. When the activity is carried out in Italy, the core conditions of employment applicable to posted temporary agency workers are those set by Legislative Decree 276/2003 (and its successive amendments) and by collective agreements.

The complete disapproval of the leaflet's content both from the Ministry of Labour and trade union's representatives, should be diminished considering that part of workers' labour conditions, as promised by the Work Support Agency, were indeed accepted under EU law, even if still debated by Members States (such as the rules governing the payment of social security contributions). The rest of the leaflet was promising working conditions which were rightly condemned as unlawful, but which were still representing a huge and spread problem of the application of the principle of equal treatment as regards minimum wages to posted temporary agency workers (which is often not respected or, were applied, strictly interpreted).

Another interesting case of the so-called "Romanian contracts", this time in the hotel and catering industry, has been identified in July 2013 at the military base of Colle Isarco during an inspection of the INPS Labour Inspectorate. The Inspectors inflicted a fine of € 120,000 to the Marconi Group, a company that manages the logistic base of Colle Isarco and other similar facilities in Italy, for

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222 final, Report from the Commission to the European Parliament and the Council on the State of the Union Road Transport Market, Brussels, 14.4.2014.

[247] See Work Support Agency: "*Vinci la crisi con lavoratori interinali a contratto rumeno. Cosa stai ancora aspettando: risparmia il 40% e beneficia della massima flessibilità! Ed in più: Niente Inail - Niente Inps - Niente malattia - Niente infortuni - Niente TFR - Niente consulenti - Niente tredicesima - niente 14ª - No problems! Alla Tua Azienda non rimane che pagare 11 mensilità e non 14 più Tfr (e contributi) come stai facendo...ed in più: Niente anticipo di Iva perché le nostre fatture sono comunitarie*".

[248] See Cgil Emilia Romagna, *Contratti rumeni, Cgil Emilia Romagna: il Governo si muove*, Rassegna Sindacale, 10 April 2015.

failure to comply with labour law standards. Even in this case, a temporary work agency established in Romania, the Agentia Roma Srl, supplied Romanian workers to the Marconi Group. A long list of infringements was alleged against the company by the Labour Inspectorate, first of all because workers were paid in part with Romanian currency on a rechargeable credit card and in part with an additional amount of money, reaching the monthly average of € 900 net, which included also severance pay and thirteen-month payment. Conversely, the minimum rate of pay stated by the applicable collective agreement, provided for a monthly pay of € 1,350 net for an employment contract of 40 hours a week. After interviewing the temporary workers involved, they further denied to have received any other additional payment, even if a down payment given in advance to employees was indicated in the payroll. Thus, these documents have been turned to Fiscal police and to the Public Prosecutor of Bolzano, in order to make further investigations. The list of infringements continues with the failure to comply with the supplementary provincial payment of € 50 per month, the omission of recording work's hours and of payments as regards social security contributions.

Trying to shortly summarise what it is provided, under EU law, to be granted by the employer of temporary agency workers, it could be helpful in order to compare this legal framework to the case of Romanian contracts and finding out disputable aspects.

Under EU law the agency is the employer and, as employer, must guarantee, in agreement with the user undertaking, a wage that is not lower than that paid to ordinary workers of the same level employed by the user undertaking. Thus, posted workers must receive appropriate training for the job to be performed and appropriate information on health and safety in the workplace. Temporary work agencies have the following obligations towards their employees: a) agencies must pay remuneration at least equivalent to that to which comparable employees of the user enterprise are entitled; b) in the case of those employed under an open-ended contract, agencies must continue to pay employees during periods when they are not working; c) agencies must pay the required insurance and social security contributions; d) they must grant paid annual holidays; e) they must pay the end-of-service allowance on termination of an open-ended employment contract; f) they must pay for employee insurance against accidents at work and occupational illness[249].

What remains to be further analysed of the employment conditions of posted temporary agency workers are those elements which are strictly interpreted by the leaflet of the Work Support Agency so that employment conditions of posted workers become obviously far from being equal to that of the user's comparable workers.

2.1 The core elements of minimum rates of pay

Within the provisions of Directive 96/71/EC it is unclear, solely on the basis of the wording of the text, as to which components of wage should be regarded as those constituent elements of the minimum rates of pay which have to be paid to posted workers in the host country. Considering that, according to Article 3 para. 1 of the Posted Workers Directive, "the concept of minimum rates of pay (...) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.", this ambiguity has led to relevant uncertainties at national level and to different approaches defining minimum rates of pay in the European Union.

As regards the regulation of posting by temporary work agencies, it has to be underlined how ambiguities caused by the flexible definition of minimum rates of pay within the more general

[249] Blanpain R. and Graham R. (eds), *Temporary Agency Work and the Information Society*, Kluwer Law International, 2004, p. 143-157.

regulation of posting, remains. Indeed, as above mentioned, even if in case of posting by temporary work agencies, Article 3 para 9 of Directive 96/71/EC allows Member States to go beyond the minimum requirements for general cases of posting as stated by Article 3 para 1, this is only an option. Article 3(1)(f) of Directive 2008/104/EC generally refers to equal pay for posted temporary agency workers, but this approach was followed only by some Member States. Thus, in order to consider the employment conditions really applied to every posted worker, it is essential to analyse the definition of minimum rates of pay as the common ground of protection of worker's rights.

After all, the principal ambition of the regulation of posting was the promotion of transnational provision of services in "a climate of fair competition and measures guaranteeing respect for the rights of workers" (para. 5 of the preamble of Directive 96/71/EC). Therefore, a detailed study of what are the components of the payroll of posted workers, it is a useful test in the supervision of social dumping. This study is necessary even more in time of revision of the legislation on posting. The European Commission recently stated, in its Impact Assessment 2016[250], how "In light of EU labour market conditions, including wage differentials and diversity of wage-setting regimes, in the context of an enlarged European Union, the balance struck by the 1996 Directive to establish a climate of fair competition has changed considerably. (...) The gap between Member States on minimum wages has constantly increased since 1996, from a ratio between the lowest and the highest minimum wage of 1:3 to 1:10."

The unclear definition made by the Posted Workers Directive of "minimum rates of pay", caused lots of uncertainties and variety in the composition of its meaning. There is only a narrow area of well-settled solutions that can be reminded. "The minimum rates of pay refer to the gross salary and they include overtime rates"[251].

Nevertheless, there is no tangible solution in many other cases, based on which posted workers are paid different rates depending on whether Member States include, for example, bonuses, allowances, mobility-related costs, holiday pay or social protection advantages, in the definition of minimum rates of pay. Further it should be considered if, in the host Member State, the matter of the constituent elements of minimum rates of pay is addressed to collective agreements or to the law.

In 22 out of 28 Member States[252], there is a generally applicable statutory minimum wage. In most EU Member States (Austria, Denmark, Finland, Italy and Sweden), where there is no statutory minimum wage, as the lowest rate payable by employers to workers, the minimum wage level is set by sectoral collective agreements. These agreements can either be generally binding (like in Finland) or not.

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[250] See EU Commission, Commission Staff Working Document, Impact Assessment accompanying the document "*Proposal of the European Parliament and 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 service"*, Strasbourg, 8 March 2016, SWD(2016) 52 final, p. 13.

[251] See FGB Study on Wage Setting 2015, p. 16, in Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, p. 32.

[252] See Fric K., *Statutory minimum wages in the EU 2016*, Eurofound, 29 January 2016, Table 1 where are listed EU countries which do apply generally binding statutory minimum wage as of 1 January 2016 (Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom) and EU countries which do not (Austria, Cyprus, Denmark, Finland, Italy and Sweden).

In Italy, for example, while such agreements only apply to "enterprises and workers that are members of the bargaining social partners, case law adopts collectively agreed minimum wages as a reference for other employees"[253].

As the following overview in Table 13 shows, this has resulted in a significant variety of national concepts as to different types of expenses, allowances or bonuses being an element of minimum rates of pay or not.

Table 13: Elements of minimum rates of pay in EU Member States[254]

Country	Seniority allowance	Allowances/Supplements for dirty, heavy, dangerous work	Quality bonus	13th month bonus	Travel expenses
Austria	Yes	Yes	No	Yes	No
Belgium	Yes	Yes	Yes	Yes	No
Bulgaria	No	No	No	No	
Croatia	n.a.	n.a.	n.a.		
Cyprus	No	No	No	No	No
Czech Rep.	No	No	No	No	No
Denmark	n.a.	n.a.	n.a.		
Estonia	No	Yes	Yes	No	No
Finland	n.a.	n.a.	n.a.		
France	X	x		x	No
Germany	Yes	No	No	No	No
Greece	Yes	Yes	No	Yes	No
Hungary	No	No	No	No	No
Ireland	No	No	No	No	No
Italy	Yes	Yes	No	Yes	No
Latvia	No	No	No	No	No
Lithuania	No	No	No	No	No
Luxembourg	X	X	X	X	
Malta	No	No	No	No	
Netherlands	No	No	No	No	No
Poland	Yes	Yes	Yes	Yes	No
Portugal	No	n.a.	n.a.		
Romania	No	n.a.	n.a.		
Slovenia	Yes	Yes	Yes	No	
Slovakia	No	No	No	No	No
Spain	No	Yes	Yes	Yes	No
Sweden	n.a.	n.a.	n.a.		
UK	n.a.	n.a.	No	No	No

Source: FGB 2015, EU Commission, Impact Assessment

Looking at the rulings of the European Court of Justice, no further clearness is given to the definition of a common notion of minimum wages.

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[253] See ibid Fric K., Eurofound, 29 January 2016, p. 1.

[254] See ibid Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, p. 33, Table 6.

However, in the case *Commission vs. Germany*[255] the Court has stated that "allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind". Some guidance though has been given by the Court as to which specific components of the wage payments should be considered part of those minimum rates of pay which should be granted in accordance to the Posted Workers Directive.

What appears from the case law of the Court is an uphold of the PWD approach that the definition of "minimum rates of pay" should rest totally with national law and/or the practice of the Member State to whose territory the worker is temporarily posted. This was also stressed very clearly by a recent case, *Sähköalojen ammattiliitto ry*[256], where the Court stated that the task of defining what are the constituent elements of the minimum wage, for the application of that Directive, is a matter for the law of the Member State of the posting, "but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States". The flexible nature of the concept of minimum rates of pay is thus set out by the law and by the rulings of the European Court of Justice while the question of how to define it in practice is left to the Member States.

This current situation, characterised by lack of clear standards, was addressed by the Impact Assessment accompanying the 2016 Proposal of the European Commission for a revision of the Posted Workers Directive, as generating "uncertainty about rules and practical difficulties for the bodies responsible for the enforcement of the rules in the host Member State; for the service provider when determining the wage due to a posted worker; and for the awareness of posted workers themselves about their entitlements"[257].

This has led the Commission to include in the proposal for a revision of the Posted Workers Directive, under Article 3(1), the substitution of the requirement that posted workers are subject to the minimum rates of pay by the new provision that the same rules of remuneration, laid down by law or by universally applicable collective agreements, as those of the hosting Member State, would also apply for posted workers. In accordance with the Proposal, as the reference is made to "remuneration" and no more to "minimum rates of pay", posted workers should be treated according to the same rules as local workers and employers will have to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, to posted workers as to national ones.

The outcome of such differences between Member States defining the components of the minimum rates of pay, is a great variety between EU countries of the rates' level. According to the most recent studies[258] on the levels of statutory minimum wage (no records have been gathered on the levels of minimum wage stated by collective agreements) applicable in the Member States shows

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[255] ECJ Case C-341/02, *Commission vs. Germany* and see also on other specific components of the wage payment ECJ Case C-522/12, *Isbir*.

[256] ECJ Case C-396-13, *Sähköalojen ammattiliitto ry*.

[257] See EU Commission, *Proposal for a Directive of the European Parliament and 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*, Strasbourg, 8.3.2016 COM(2016) 128 final, p. 11.

[258] See on the more recent levels of statutory minimum wages Fric K., *Statutory minimum wages in the EU 2016*, Eurofound, 29 January 2016, p. 2.

that the lowest minimum wages (less than 500 EUR per month) can be found in the new Member States. Bulgaria (420 BGN/around 214 EUR per month) and Romania (1,050 RON/around 276 EUR per month) apply the lowest minimum wages in the European Union. Malta and Slovenia, together with Portugal, Greece and Spain, form a middle group with minimum wages between 500 and 1,000 EUR per month. Other countries within the western European countries have the highest minimum wages with rates exceeding 1,000 EUR per month.

2.1.1 The Italian definition of minimum rates of pay

Once analysed the current uncertain notion of minimum rates of pay given by the Posted Workers Directive and confirmed by the case law of the European Court of Justice, it seems essential to examine the national definition of minimum rates of pay considering that how to define it is left to the Member States. Particularly it has to be observed the Italian definition of minimum rates of pay, in order to answer the question on the suppose illegitimacy of cheap labour supply such as that promoted by the Work Support Agency in the case of "Romanian contracts" in the field of posted agency workers in Italy.

As before mentioned, the definition of minimum rates of pay in Italy is set by collective agreements.

In case of posted temporary agency workers from other Member States in Italy, the regulation of the employment conditions is contained both in the generally applicable collective agreement on work supply and in the sectoral collective agreement which apply to the national workers of the same level of the posted ones employed by the user undertaking. Thus, the level of minimum rates of pay per hour and/or per month are stated by the collective agreement generally binding in the working sector, depending on their professional qualifications, of posted workers. Nevertheless, the general employment and working conditions which apply to all cases of supply of work by temporary work agencies in Italy are stated by another collective agreement, which was lastly updated in 2014.

To this latter collective agreement referred the Ministerial Memorandum (Circular n. 14/2015) when addressed as illegal the supply of workers as publicised by the pamphlet of the Work Support Agency. Indeed, the promised cut in labour's costs included the avoidance of the payment of some constituent elements of pay as stated by the national collective agreement on the supply of work. The general exclusion from the payment of the thirteen month and of the employee severance indemnity (TFR) for Romanian temporary agency posted workers is not in compliance with Italian law provisions. Those are elements which were included in the national definition of minimum rates of pay as defined by collective agreements since the Presidential Decree n. 1070/1960 which declared as generally binding the Labour Agreement in the manufacturing sector of 20 October 1946. It is true that Romanian temporary posted workers are officially considered as employees of the temporary work agency which hired them and that, when posted to a country other than that where they live and usually work, they remain covered by the contract they signed under the Agency. Nevertheless, European legislation on posting of temporary agency workers states that the working and employment conditions, including pay, which should be applied to them, are the same of the national workers employed by the undertaking of the country where those workers are temporarily posted. The thirteen month and the employee severance indemnity are part of the definition of minimum rates of pay which should be granted to posted workers and paid on a monthly basis depending on, and in proportion of, the hours worked. The procedure of payment of those elements of retribution are however prescribed in the sectoral collective agreement which applies to national workers, employed in the same sector and of the same professional level of

posted workers[259]. Therefore, the identification of the rules to be applied in case of posting in Italy are stated by an intricate framework of rules set by collective agreements, which make appropriate and effective checks and monitoring mechanisms to be essential to avoid illegitimate cases of posting. Furthermore, this intricate normative framework should include the recent provision of Article 8 of Law 148/2011, which allows sectoral agreements of all levels to derogate from national generally binding collective agreements. The effects of this process of decentralisation on social dumping, are not still clear, especially about the possibilities of derogation from the minimum rates of pay established by national collective agreements by sectoral agreements. Nevertheless, it will be essential to control future developments in this direction.

The temporary work agency is responsible for the payment of retribution and thus the provisions on the working and employment conditions which should be granted to posted workers, need to be clearly specified in the employment contract. In this sense, it is important to notice the introduction of a liability clause for the payment of retribution in case of posting made by the Enforcement Directive in cases of subcontracting chains. The Italian legislator introduced a provision even more effective, applicable in all cases of supply of workers, which stated a general possibility for the user undertaking to be held liable, in place of the agency, by the posted workers[260].

As clarified by the 2010 Vademecum on Posting of Workers within the European Union[261], temporary work agencies established in another Member State should apply, in case of posting of temporary agency workers in Italy (and according to Article 4 of Legislative Decree 72/2000), the Italian normative framework which regards the supply of work by temporary work agencies. Particularly, the provisions which apply both to temporary work agencies established in Italy or established in another country, are stated by Articles 20-28 of Legislative Decree 276/2003, which was recently replaced by Articles 30-40 of Legislative Decree 81/2015.

The 2010 Vademecum underlined that posted temporary agency workers must have the same normative and economic treatment, as was provided at the time by Article 23 para 1 of Legislative Decree 276/2003 (which was modified by Legislative Decree 24/2012 which implemented the Temporary Agency Work Directive and that changed the wording in "same working and employment conditions"), and further that the user undertaking had a shared liability with the agency for the payment of retribution and social security contribution.

With regards to the definition of minimum rates of pay, the Italian Ministry of Labour had answered to consult n. 33/2010 stating that in the concept of pay must be included seniority pay increases and all the financial disbursements regarding the period of assignment of the posted worker, without detracting any deduction or contribution (i.e. the gross salary). The Italian Ministry of Labour considered as relevant the definition of "employment income" under national law as stated by Article 51 TUIR[262], used for tax purposes, which includes all bonuses and allowances deriving from

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[259] See Italian Ministry of Labour and Social Policies, Statement 9 April 2013, p. 4.

[260] See Article 23 para. 1 and 3 of the Legislative Decree n. 276/2003 and the Legislative Decree n. 81/2015, Articles 30-40.

[261] Istituto Guglielmo Tagliacarne, Ministry of Labour and Social Affairs of Italy and Labour Inspection Romania (eds by), *Vademecum on Posting of Workers within the European Union, at the use of Labour Inspectors and Enterprises*, EMPOWER project "Exchange of Experiences and Implementation of actions for Posted Workers", Pilot project on working and living conditions of posted workers, 2010, p. 27.

[262] Article 51 TUIR, Italian Presidential Decree 22 December 1986 n. 917, states that "Il reddito di lavoro dipendente è costituito da tutte le somme e i valori in genere, a qualunque titolo percepiti nel periodo d'imposta, anche sotto forma di erogazioni liberali, in relazione al rapporto di lavoro. Si considerano percepiti nel periodo d'imposta anche le somme e i valori in genere, corrisposti dai datori di lavoro entro il giorno 12 del mese di gennaio del periodo d'imposta successivo a quello cui si riferiscono".

the employment activity, without drawing a comparison of every single element of pay rates between the sending and the hosting State, which would still be impossible considering the different regulatory regimes applicable in the European Union. The limits of this definition, even if considering its merits of transparency, have been underlined before as regards the generally lower labour costs based on different social security and tax systems.

2.2 Italian temporary work agencies using employment contracts made upon the Romanian pattern

An interesting evolution of the Romanian model of posted temporary agency workers employment contracts, is represented by a recent case of illegal supply of workforce which involved a temporary work agency established in Italy, thus outside the scope of protection of European transnational supply of workers. In this situation, there was indeed no cross-border element characterising the activity of the agency to provide services, because the agency was established in Italy and stipulated Italian contracts with national workers.

Nevertheless, as shown by the documents provided for by trade unions' representatives to the Italian Ministry of Labour and Social Affairs and the Labour Inspectorate, the alluring promises, of severe cuts in labour costs, made to Italian undertakings by the agency, were the same as publicised by the pamphlet of the Romanian Work Support Agency.

The Easy Work Srl established in Vicenza, in September 2016, was accused by trade union representatives[263] to be carrying out an illegal activity of supply of workers. The agency was offering its services to companies of the municipalities of Veneto, Emilia Romagna, Lombardia, Friuli Venezia Giulia and Trentino Alto Adige, claiming the possibility to hire from the agency itself qualified manpower (carpenters, electricians, plumbers, quality control, and so on), at inflated and highly competitive prices to help companies facing the current crisis in the market. Local firms, received such proposals, mostly, via email, in which the agency offered an hourly labour cost ranging from € 13,50 to € 16,50, depending on the type of staff required, ensuring that the cost remained unchanged for hours of overtime work. Moreover, this low price included injury, illness, vacations and thirteen month costs, also claiming that commissions, charges and other personnel costs, were all being borne by the Easy Work Srl. This situation of fraudulent supply of manpower, was strongly condemned and reported to competent authorities by trade unions. Indeed, even if this agency tried to propose undertakings the same low labour costs as foreign temporary work agencies, the equal work and employment conditions between temporary workers and workers directly hired by the user undertaking, should have been guaranteed. The principle of equal treatment to temporary workers should apply both in cases of supply of workers by national temporary work agencies and by foreign temporary work agencies, at least for the minimum employment conditions provided by the Posted Workers Directive and having special consideration for minimum rates of pay (defined as gross salary) established by the relevant collective agreements. Nevertheless, the illegal activity carried out by the Easy Work Srl, was easier to track down and indeed, it was immediately stopped, because social security contributions, administrative burdens of registration and taxes had to be all paid under Italian legislation.

This situation shows clearly how a coordinated system of controls organised by the Labour Inspectorates and different national authorities - and now enacted by the recent Enforcement Directive, implemented in Italy by Legislative Decree 136/2016 - is necessary in order to being able to find out irregularities in cases of transnational supply of workforce.

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[263] See Comunicato stampa Nidil e Cgil Modena, 16 September 2016.

It should be reminded that the administrative burden of prior registration and authorisation - stated by Article 4 of the Legislative Decree 276/2003 - for temporary work agencies which supply workers in Italy, is not required for agencies established in another European Member State. As it has been clarified by the Italian Ministry of Labour with Circular N. 7/2005, there is no need for additional authorisation when the agency has already been authorised by the qualified authorities of the State of origin. Furthermore, with respect to economic requirements of temporary agencies, aimed at workers' protection in any case of non-fulfilment and stated by Article 5 paragraph 2 of Legislative Decree 276/2003, it has been clarified, by the above mentioned Ministerial Circular, that temporary work agencies can be exempted from the payment of those security deposit and the signing of a bank guarantee, where they have fulfilled similar obligations in the State of origin.

2.3 From the Posted Workers Directive's distortion to the exploitation of migrant workers: trade union reports

The cases analysed in the previous paragraphs show different levels of distortion of the rules on posting. In some situations, there is a restrictive or irregular application of the principle of equal treatment as regards working conditions. In other situations, infringements of EU and national law, concern both equality in retribution and employment conditions, such as maximum working hours and overtime work's payment, and further it was at stake the proper payment of social security contributions and taxes in the country of origin. This cases of illegal posting are not easy to identify, even if new instruments of administrative coordination were provided by the Enforcement Directive 2014/67/EU and adequate sanctions are not always set by Member States.

In this scenario, cases of illegal posting are becoming the new front used by companies for hiding serious migrant workers' exploitation. As it will be shown by some recent cases, posting of workers in situations of subcontracting or supply of manpower by temporary work agencies, are increasingly used as ways to circumvent controls, or at least making it harder to obtain verifications. Illegal posting based upon exploitation of workers, allows the highest savings on labour costs by using unfair competition and abuse of workers' rights. Administrative sanctions in these cases are quite useless, even if they are remarkably high such it was in the Italian case of Roma Srl 2003 discussed before. New ways to prevent and punish such situations are needed and maybe, even under the already existing provisions against human trafficking, some protection could be given to migrant workers.

Within Europe, foreign workers are increasingly being abused in the construction and transport sectors, but also in other fields such as farming. Trade unions and Labour Inspectorates try to report and combat this new grey economy in the labour market, some examples will be analysed in the aftermath.

In Finland[264], both Finland's blue collar union federation, the SAK, and the Finnish Service Union United (PAM), denounced complaints concerning overtime and underpayment. Not only workers have been paid half of what the collective agreement calls for, but employees have even been housed in the middle of a construction waste dump. Further, there have been cases where foreigners have been forced to work overtime under the threat of being dismissed if they refuse. In these case, employees were Intra-EU migrant workers or even third country national, employed by temporary work agencies established in a EU country and then using the posting of workers rules to supply vulnerable workers to companies around Europe. Indeed, when a temporary work agency is established in a EU country, the normative framework of posted workers applies irrespective of the

[264] See Unions: Foreign workers often underpaid, overworked.

worker's nationality, if the transnational supply of workforce takes place within the European Union. As a common situation, few claims were collected by trade unions, because of the fear of employer's retaliation, but it clearly underlines the widespread hidden phenomenon of exploitation of temporary workers used to achieve lower labour costs.

In Germany[265], migrant workers in construction industry are increasingly faced with abusive posting practices. More and more construction and public works companies are turning to labour subcontractors. Thus, a whole host of firms has sprung up specialising in the supply of cheap labour for construction projects. In most cases, these companies are not genuine construction firms, they look like it on paper, but their only activity is, in fact, to supply labour at a low cost. They usually only pay wages for the first few months and then stop paying and expect the workers to keep going until the job is finished, in the hopes that they will be paid at the end of the contract.

Some irregular situations were presented to German unions representing construction workers, which defended workers who had not been paid for months. In autumn 2014, a group of around thirty Romanian workers turned to the posted workers' advice bureau of the German trade union confederation Deutscher Gewerkschaftsbund (DGB), because they had worked on a mall's construction for weeks and were still owed several months' wages. Even in this case, workers used to sleep in one of the construction site containers, were paid above the minimum rates of pay for the same work in Germany and most of the time they were not even paid. The investor in charge of the shopping centre has shifted all responsibility for the situation on to the subcontractors that hired the workers. The general contractor has done the same. The latter, moreover, filed for bankruptcy in December. In March 2014, the German union representing construction workers, Industriegewerkschaft Bauen-Agrar-Umwelt (IG-BAU), took on a similar case, defending 50 building workers in Frankfurt who had not been paid for months. The company was finally forced to pay the € 100,000 in wage arrears.

In Italy[266], in the agriculture field and mostly with seasonal employment contracts, temporary agency workers irregularly posted from Romania and Poland were reported to be exploited by the Labour Inspectorate of Treviso. Migrant workers employed in Italian fields and vineyards, were abused as regards work hours and the application of minimum rates of pay established by collective agreements. Further, in September 2014, the same situation has been reported during the Flai-Cgil campaign against the exploitation of workers in the agricultural sector. Workers employed in this field in Piedmont[267] - both Italians, Intra-EU and Third-country national workers -, were at the time over 70,000 and about 20,000 of these workers were foreigners: 5,500 Romanians, 2,300 Albanians and then Moroccans, Poles, Indians and Bulgarians. The municipality with the higher numbers of foreign workers were employed in Cuneo, where almost 11,000 workers were employed, just over half of the overall number.

Today in Italy the victims of illegal hiring and supply of manpower are about 430,000, between Italians and immigrants (European and Third-Country nationals), and among these more than 100,000 are in a state of severe exploitation and vulnerability from the housing perspective. The practices of "caporals" can be summarised in the non-implementation of collective agreements, a salary ranging between € 22 and 30 per day, work hours between 8 and 12 hours per day, use of violence and blackmail, theft of documents and the imposition of a dwelling. These data were indicated by the *Third Report on Agromafie and Caporalato* (illegal hiring) made by the Placido

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[265] See Rachel Knaebel, *Exploitation of migrant workers: the hidden face of Germany's construction sites*, 27 March 2015.

[266] See Prosecco vino "sottopagato": nelle vigne braccianti sfruttati.

[267] See Campagna Flai Cgil Piemonte contro il caporalato in agricoltura.

Rizzotto - Flai CGIL observatory[268]. Flai and CGIL, along with other organisations, have recently submitted the national campaign to stop illegal hiring, by launching a petition for the immediate approval of the bill (draft bill 2217) against the exploitation of labour in agriculture, with new penalties and sanctions appropriate to the seriousness of the offense.

Situations of severe exploitation of workers have been characterised by tangled employment relationships both between workers and employers and between workers and caporals, who recruit them to be supplied and allocated to the collection of agricultural products. The working conditions are always precarious and indecent. This kind of infringements have been identified also when employment intermediaries were get involved, mostly temporary work agencies or apparently legal cooperatives which hide activities of illegal supply of workforce (the so called "landless cooperatives" used to create fictitious employment relationships and avoidance of contractual rules, which were at first condemned by the Ministry of Labour and Social Affairs in 2007[269]).

As it has been said before, within the haulage sector two kinds of illegal posting have been reported to the authorities after posted worker's claims. By the interview carried out to some representatives of Filt-Cgil of Liguria and Piedmont[270], it appeared clear the merciless service activity carried out by several temporary work agencies in this field. First, it was underlined the increasing number of foreign agencies which resort to Italian workers fired by Italian undertakings, who appeared to be then employed by the agencies and newly posted to the same company that previously fired them. Usually dismissed Italian workers are asked to reside for some months in the State of origin of the temporary work agency, in order to comply with administrative procedures and to be employed by the agency with a foreign contract of employment. Those workers are successively posted again to Italy, and often to the same company for which they worked before, and employed to provide an employment activity as officially temporary agency workers, with all the consequences in terms of remuneration, social security contributions and taxes connected to foreign temporary employment contracts. Though there is a lack of reliable data on the extent of subcontracting in the context of cross-border service provision and posting, there has been plenty of evidence arising from research studies, and sector-specific experiences, such as those reported by Italian trade unions, which have highlighted that sub-contracting - often with the involvement of employment agencies- is an extensive practice in the building and construction sector as well as in transport, shipbuilding, hotels and restaurants, and other service sectors within Europe.

Not only in Italy but also in other EU countries this practices were reported. For example:

> A Belgian food processing undertaking dismissed its workers and concluded a service contract with a Dutch 'posting agency', which posted a considerable number of German-Polish workers to the Belgian undertaking. They were paid on average 10 Euros less than the company's dismissed Belgian workers before. Trade unions called for strike because of the dismissal[271].

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[268] See the report on the website of Flai (Federazione Lavoratori AgroIndustria) and Cgil.

[269] See Interpello n. 15/2007, Roma, 12 March 2007.

[270] Thanks to all of Filt-Cgil and Flai-Cgil representatives for the informations given during my research on actual issues related to temporary posted workers in Italy and in particular, to Giovanni Mininni, Rodolfo Giorgetti and Professor Giovanni Orlandini for valuable contacts who allowed further detailed studies and because of their opinions on my thesis.

[271] Source: Van Hoek, A., and Houwerzijl, M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 58, in Posting of Workers Directive - current situation and challenges, pp. 39-40.

Another commonly used technique, aimed at minimising labour costs, is the creation of the so-called "letter-box companies", or affiliates in Member States where social security contributions and taxes are lower[272]. Such companies do not carry out significant economic activity in their country of origin. Their primary purpose is to post workers abroad while taking advantage of lower social security contributions. In addition, these companies are often constructed as a complex multi-level net work in different Member States or even involving workers from third countries. Some examples of these practices can be given by the transport sector:

> In 2011, several transport companies in the Benelux countries received the offer to transfer their workforces to intermediate companies located in Cyprus and Liechtenstein, and to hire the staff through these intermediate service suppliers. With reference to the changes in the coordination of social security as a result of Regulations 883/2004 and 987/2009, the intermediates offered to act as employers for the workforce. The original employer of the truck drivers would become the 'client' and would receive an invoice for supply of services, whilst the truck drivers would continue to work de facto for the original employer. By opening an office abroad - for instance in Cyprus - the intermediates claimed that it was justifiable to offer a Cypriot employment contract to the truckers, even though they did not live there and had never visited the island.

There are other situations in which workers, even third-country nationals, were employed by temporary work agencies with the solely intention to post them to another EU country with higher labour costs.

> An example of this practice, which became prominent in Denmark, Sweden and Germany in 2013, is the case of the German-Latvian agency Dinotrans[273]: The company recruited workers from the Philippines, who were in fact third-country workers that were not entitled to enter the EU. However, they were recruited using the argument of 'a shortage of skilled labour for international trucking' in Latvia, this being one of the justifications upon which permission for such workers to enter the EU may be granted. As soon as they entered Latvia, the drivers in question were hired out to other undertakings in Europe. The company's own financial statements recorded that the haulage contractor was paying these drivers approximately €2.36 per hour, making this practice tantamount to slave labour.
>
> Another example could be found in the Hungarian transport sector as several drivers, mainly Hungarians, were on the payroll of a Hungarian subsidiary based in one of the premises of PricewaterhouseCoopers in Budapest, although they were mainly working for the Dutch headquarters. The Hungarian subsidiary only had one part-time administrative employee on parental leave. These arrangements often involve very complex, multi-level arrangements between several companies established in different Member States, which makes any control very difficult[274].

In addition to these cases of abuse, circumvention and illegal behaviour within the European framework of posting and transnational supply of workers, it has been clarified by interviewed trade union representatives of Filt-Cgil Liguria that, even in cases of apparently correct implementation

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[272] See Cremers, J., *Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping*, ETUI, Brussels, 2014.

[273] See: Drivers working for slave wages at Sia Dinotrans, 20/08/2013.

[274] See ibid Cremers, J., ETUI, Brussels, 2014.

of European and national statutory legislation - at least as regards the results of controls made upon net retribution of posted workers -, difficulties in the verification of the effective payment of taxes and social security contribution in the agency's country of origin and the ambiguous constituent elements of minimum rates of pay, throw the legitimacy of most posting activities into uncertainty.

Indeed, it has been confirmed by trade unions that even when the net salary in the payroll is equal between direct employees of a company and posted temporary workers, it should be paid attention to the constituent elements of net salary of the latter group of employees. It has been reported that posted workers are guaranteed minimum rates of pay of the level and qualification provided by the applicable collective agreement of the specific sector of employment, but this minimum rate includes an illegal division into instalments (which can be applied only if allowed by the collective agreement of reference[275] and it is forbidden for TFR) of TFR, thirteen and fourteen months' payments and leaves. Further, travel indemnities and overtime payments appeared to be paid as a daily allowance, completely tax-free and included as a constituent element of net salary.

Thus, as it was stressed before considering social security contribution and tax payments, the apparently equal net salary between posted workers and national employees, is instead lower for temporary posted workers. To let these situations to be comprehensible and easily targeted by Labour Inspectors, posted workers claims to trade unions and authorities are of the utmost importance and reports on the illegal cases of supply of manpower are still the pick of the iceberg of a corrupted labour market.

3. Illegal posting by temporary work agencies and possible solutions under Italian and European legislations

In the event of non-compliance with the provisions of Directive 2008/104/EC by temporary work agencies or user undertakings, Article 10 of the Directive states that Member States shall provide for appropriate measures, ensuring that adequate administrative or judicial procedures are available, to enable the obligations to be enforced. Further, Member States shall lay down rules on penalties, which must be effective, proportionate and dissuasive, applicable in case of infringements of national provisions implementing the Directive. The same was provided by Article 5 of the Posted Workers Directive, which stated that Member States shall ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

As regards jurisdiction, Directive 96/71/EC under Article 6 generally states that, in case of irregular posting in violation of Article 3 of the Directive (terms and conditions of employment), judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right under existing international conventions on jurisdiction, to institute proceedings in another State. Indeed, this provision states a specific clause of jurisdiction in favour of irregular posted workers within the European Union, which should be considered in addition to what is provided by Regulation 44/2001/CE on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Further, in order to assess the state of administrative cooperation and other aspects of enforcement of the Posted Workers Directive, the aim of Directive 2014/67/EU (which was implemented in Italy by Legislative Decree 136/2016) was to establish a common framework of of competent authorities

[275] See Italian Court of Cassation n. 8255/2010, which confirmed the possibility to divide into installments thirteen month and leave payments if provided by the applicable collective agreement as a "patto di conglobamento".

and liaison offices in order to set appropriate provisions, measures and control mechanisms necessary for a better and more uniform implementation, application and enforcement (Article 3).

It is states that Member States are obliged to take the appropriate measures to ensure that the information on terms and conditions of employment is made generally available (Article 5) and the necessity to improve and enhance administrative cooperation between national authorities to exchange information (Articles 6-8). It is given an indicative list of information that Member States may request from service providers to ensure effective monitoring of compliance with the obligations set out in the Posted Workers Directive, but it should be provided that these are justified and proportionate in accordance to EU law (Articles 9-10). The need for a proportionality test about portable documents and communications, was influenced by the case law of the European Court of Justice. With the case *Santos Palhota*[276] the Court clarified that:

> Articles 56 TFEU and 57 TFEU do not preclude national legislation requiring an employer, established in another Member State and posting workers to the territory of the first Member State, to keep available to the national authorities of the latter, during the posting, copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period (para. 61 of the judgment).

As regards the prior declaration of secondment, under paragraph 51 of the judgment, it was stated that:

> the Court has already held that a measure which would be just as effective whilst being less restrictive than a work licensing mechanism, prior checks or a confirmation of posting, would be an obligation imposed on an employer established in another Member State to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment. Such an obligation would enable those authorities to monitor compliance with the social welfare and wages legislation of the host Member State during the deployment while at the same time taking account of the obligations by which the employer is already bound under the social welfare legislation applicable in the Member State of origin (see *Commission v Luxembourg*, paragraph 31; *Commission v Germany*, paragraph 45, and *Commission v Austria*, paragraph 52[277]).

Furthermore, Directive 2014/67/EU confirmed the possibility for trade unions and other parties to lodge complaints and take legal and/or administrative action against the employers of posted workers if their rights are not respected (Article 11) and subcontracting liability (Article 12). The time line for transposition into national law of the Enforcement Directive was 18 June 2016, thus more time is needed to evaluate improvements in administrative cooperation and exchange of information about posting workers.

The “appropriate measures to enable the obligations” of the EU Directives on the posting of workers to be enforced, were taken by the Italian legislator under Legislative Decree 276/2003, which were both criminal and administrative sanctions established by Articles 18 and 19 of the Decree, as modified by Law 78/2014, but only as regards temporary agency work. Indeed, there are still no specific measures, criminal or administrative, addressing illegal cases of posting within the Italian legal system.

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[276] ECJ Case C-515/08, *Santos Palhota*, 7 October 2010.

[277] ECJ cases C-490/04, *Commission v. Germany* and C-319/06, *Commission v. Luxembourg*.

Nevertheless, after a recent amendment made by Legislative Decree 8/2016, those sanctions were decriminalised as regards the case of illegal subcontracting (in violation of Article 29 para 1), or illegal posting of workers made by enterprises and the supply of workers made by non-authorised work agencies. Thus, the previous measures applicable in case of infringements of national law regulating the supply of employees made by work agencies, which were a financial penalty of 50 EUR (before Law 78/2014 the financial penalty was only of 5 EUR) per worker supplied by non-authorised agencies (Article 18 para 1) and per worker employed by an undertaking (Article 18 para 2), were transformed in administrative sanctions. The only penalty sanction which remained was the one provided for cases of supply or employment of under-age workers.

Further measures for cases of irregular supply of workers by temporary work agencies, are established by Article 38 of Legislative Decree 81/2015. It is first provided that in the event of absence of a written contract of employment between the agency and the user undertaking, the workers irregularly supplied shall be considered as user's employees. Secondly, in case of irregular supply of workers, as provided by Articles 31 para 1 and 2, 32 and 33 paragraph 1 letters a), b), c) and d) of Law Decree 81/2015, the supplied worker can ask to officially become a user's employee.

Nevertheless, since the transposition of the Posted Workers Directive into national law, there was a lack of provisions enabling verifications and inspection on the effective enforcement of the obligation to guarantee equal treatment to posted workers. Indeed, only on 26 October 2016 the Italian Ministry of Labour and Social Affairs published the definition of operational standards and prior declaration of secondment, borne to service providers who post workers in Italy, as required by Article 10 para. 1 of Legislative Decree N. 136/2016.

The, only, applicable administrative sanctions established in case of illegal posting of workers, shall be notified to the employer within the meaning of Article 33 of Law 183/2010 (the so-called "diffida"). When the employer is reachable and identifiable in its State of origin, if applicable, the European Convention on the Service Abroad of Documents relating to Administrative Matters of 1977 shall apply[278]. Nevertheless, employers can be subject to sanctions for the non-compliance with payment of posted workers' salaries, only if charges are directly pressed by abused workers and this is one of the main reasons of the small number of sentences.

Within the Italian criminal legal system there is another provision providing criminal sanctions for cases of illegal recruitment of workers. The provision of Article 603 bis of the Italian penal code, introduced by Law 148/2011, refers particularly to illegal recruitment of agricultural workers (the so called "caporalato") who mostly are illegal migrants and third country nationals.

The new provision was inserted in the first section of Chapter III of Title XII of the Italian penal code, within the special part of the code devoted to crimes against individual freedom and it has been recently renewed with Law 199/2016[279]. The right protected by the provision is human dignity[280], offended by the deprivation of liberty and the commodification of the human being.

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[278] If the State of origin of the employer has not signed or ratified the 1977 Convention of Strasbourg, it generally applies Article 142 of the Italian civil procedural code and Articles 30 and 75 of Presidential Decree 200/1967 (this is the case, for example, of Romania).

[279] Law 19/2016, 29 October 2016 replaced Article 603 bis of the Italian penal code as introduced by Article 12 of Law 148/2011. Here follows the text of the new provision: "*Salvo che il fatto costituisca più grave reato, è punito con la reclusione da uno a sei anni e con la multa da 500 a 1.000 euro per ciascun lavoratore reclutato, chiunque: 1) recluta manodopera allo scopo di destinarla al lavoro presso terzi in condizioni di sfruttamento, approfittando dello stato di bisogno dei lavoratori; 2) utilizza, assume o impiega manodopera, anche mediante l'attività di intermediazione di cui al numero 1), sottoponendo i lavoratori a condizioni di sfruttamento ed approfittando del loro stato di bisogno. Se i fatti sono commessi mediante violenza o minaccia, si applica la pena della reclusione da cinque a otto anni e la multa da 1.000 a 2.000 euro per ciascun lavoratore reclutato. Ai fini del presente articolo, costituisce indice di sfruttamento*

Forced labour, as recognised authoritatively it is still an underestimated phenomenon and characterised by low numbers of charges and reports, but to unanimous opinion is also the most widespread form of modern slavery and less perceived. One possible explanation, lies in the fact that, beyond the most extreme forms in which there is a substantial loss of freedom of movement and action of abused workers through coercive and violent methods, labour exploitation occurs in submerged, thus in difficult context to be monitored by competent authorities.

Nevertheless, cases of illegal posting of workers by temporary work agencies when workers are exploited especially because of their retribution and employment conditions, such as the case of Romanian contracts stipulated with the Work Support Agency, could be covered by this criminal provision. However, the emergence of these forms of forced labour or severe labour exploitation is difficult because of the vulnerability and fear of the victims, the complicated investigations and sometimes the absence of valid legal instruments, both in terms of assistance of the victims and repression of the illegal activities[281].

One of the elements considered by Article 603 bis like an indicator of the exploitation of workers, is precisely a systematic payment of salary patently dissimilar to what is stated by law or by collective agreements, or otherwise disproportionate to the quality and quantity of work supplied. In the absence of a clear definition of what should be defined as a salary patently dissimilar to law or collective agreements, it is for the Italian Courts to find a clear application of this term to the various scenario of grey labour market.

Further, as regards the mental element of the offence, as necessary for Article 603 bis to be applicable in a specific situation, a generic intent is required. It is therefore essential that the agent, in addition to the intention to behave in the way defined by the provision, shall be aware and decides to take advantage of the state of need of abused workers.

Another essential element for the illegal recruitment of workers to be addressed as a criminal conduct punishable under Article 603 bis of the Italian criminal code, is the advantage taken by the employer from the state of need ("stato di bisogno o di necessità") of supplied workers. Those are elements characterising the situation of the illegally employed workers, which cannot be easily proved except for people who live in deprivation or mortal danger.

Indeed, it is clearer the definition of position of vulnerability, which concerns a "situation in which the person has no real or acceptable alternative but to submit to the abusive involved", as defined by

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la sussistenza di una o più delle seguenti condizioni: 1) la reiterata corresponsione di retribuzioni in modo palesemente difforme dai contratti collettivi nazionali o territoriali stipulati dalle organizzazioni sindacali più rappresentative a livello nazionale, o comunque sproporzionato rispetto alla quantità e qualità del lavoro prestato; 2) la reiterata violazione della normativa relativa all'orario di lavoro, ai periodi di riposo, al riposo settimanale, all'aspettativa obbligatoria, alle ferie; 3) la sussistenza di violazioni delle norme in materia di sicurezza e igiene nei luoghi di lavoro; 4) la sottoposizione del lavoratore a condizioni di lavoro, a metodi di sorveglianza o a situazioni alloggiative degradanti. Costituiscono aggravante specifica e comportano l'aumento della pena da un terzo alla metà: 1) il fatto che il numero di lavoratori reclutati sia superiore a tre; 2) il fatto che uno o più dei soggetti reclutati siano minori in età non lavorativa; 3) l'aver commesso il fatto esponendo i lavoratori sfruttati a situazioni di grave pericolo, avuto riguardo alle caratteristiche delle prestazioni da svolgere e delle condizioni di lavoro".

[280] See for the interpretation of situations of serious labour exploitation as a breach of a fundamental human right, Italian Court of Cassation section V, 24 September 2010, n. 40045 and section V, 13 November 2008, n. 46128, regarding Article 600 and 601 of the penal code.

[281] See David Mancini, *La tutela dal grave sfruttamento lavorativo ed il nuovo articolo 603bis c.p.*, 26/09/2011.

Article 2 para 1 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[282]. Under EU law, it is stated that:

> "Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs" (Article 2 para 3 of Directive 2011/36/EU). Furthermore, "the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used" (Article 2 para 4 of Directive 2011/36/EU).

The term "exploitation" however, denotes a range of work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment. The definition of the term "severe" is thus of the utmost importance in order to cover situations of labour exploitation which cannot be identified as slavery or cannot be related to trafficking activities. Generally it can be said that this term refers to forms of exploitation of workers which are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, at first severe labour exploitation includes coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour and trafficking (Article 5 of the Fundamental Rights Charter), as well as severe exploitation within the framework of an employment relationship when, for example, the right to fair and just conditions is not respected (Article 31 of the Fundamental Rights Charter).

In these cases - and because of an accumulation of different risk factors -, Member States are entitled to protection measures adopted by their competent authorities.

The issue then is about finding a case of posting by temporary work agencies which could be brought in front of the Court as representing a case of illegal recruitment and exploitation of in need workers. The limited number of cases decided by Courts under Article 603 bis of the Italian penal code is quite disquieting. An interesting case have been brought in front of the Court of Cassation[283] regarding the exploitation of posted workers by an entrepreneur, who was working in the reconstruction of buildings in the city of Aquila. Even if workers were found to be paid above minimum standards established by collective agreements, they had no right to holidays or illness leaves and were performing working hours up to 13 hours daily, the absence of clear elements of violence and abuse was one of the reasons discussed by the Court in order to decide on the application of Article 603 bis of the Italian penal code, to these violations. After the recent amendment of the criminal provision however, the violence, menace or abuse does not constitute an essential element for application, but instead an aggravation of the sanctions provided. Thus, the few cases decided by the Italian Court of Cassation which were based on the absence of these elements of the criminal conduct, could be open to better scenarios after the amendment.

It must be recalled that, given the dangers of exploitative working conditions which are increasingly reported to be applied in posting situations, Member States have obligations of due diligence. The European Union and its Member States should rise awareness among citizens of the existence of a variety of forms in which severe labour exploitation takes place when people move either within or

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[282] See Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

[283] Case n. 16737, 21 April 2016, section V of the Italian Court of Cassation and also Case n. 14591/2014, section V of the Court of Cassation.

into the EU and “efforts to promote a climate of zero tolerance of exploitation of such workers”[284] should be further increased.

[284] European Union Agency for Fundamental Rights, Severe labour exploitation: workers moving within or into the European Union, Luxembourg, Publications Office of the European Union, 2015, p. 15.

Conclusions

The effectiveness of the implementation process of the Posted Workers Directive[285], aiming at the creation of fair competition conditions within the internal market and at the protection of workers from illegal practices and exploitation, has been at the centre of European debate since the early stages of its application. Although Directive 96/71/EC represented a big step forward in avoiding abuses in situations of posting, it should be clearly stated that these measures combat social dumping only to a certain extent, as not all working conditions are covered and "minimum rates of pay" was chosen over "remuneration" as defined by law and collective agreements of each Member States; nor does it contribute to greater convergence of working conditions in the European labour market. Noted that the phenomenon of the posting of workers in the European Union has grown in recent years[286], even if specific data are not available except for those related to posting for up to 24 months to another country because in these situations the undertaking of the sending country is subject to additional conditions being fulfilled with a "portable document A1", there was a need to adopt a Community instrument that could both harmonise enforcement of the implementation process of existing rules and address fundamental issues that have arisen from the judgments of the European Court of Justice, which have led to a restrictive interpretation of Directive 96/71/EC.

Directive 2014/67/EU[287] (the so-called 'Enforcement Directive') was thus adopted with the aim to strengthen the practical application of the rules on posting of workers by addressing issues related to fraud, circumvention of rules, and exchange of information between Member States. European institutions believed as necessary to improve prevention and sanctioning of any abuse of the applicable rules, to raise awareness and increase transparency in this field, as to enhance administrative cooperation. The Directive addressed Member States' ability to verify the correct application of working conditions and listed qualitative criteria characterising the existence of a genuine link between the employer and its country of establishment.

However, even after the adoption of the Enforcement Directive, the regulation of the posting of workers remained a matter of debate. It appeared necessary to review Directive 96/71/EC in order to deal with all the substantive issues raised by case-law, especially those related to the extension of collective agreements, the definition of the term "minimum rates of pay" and the extension of this core set of applicable rules, the use of a host country's more favourable provisions, the clarification on the temporary nature of the posting activity and respect for fundamental labour and social rights such as the right to strike.

Simultaneously, considering that fundamental rights concerning human dignity have been consolidated with the recognition of the Charter of Fundamental Human Rights as legally binding,

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[285] 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.

[286] According to the European Commission, one million workers are posted each year by their employer from one Member State to another, emphasises also that the number of posted workers varies greatly both in terms of Member States of origin and host Member State of the posting, see C 17/67, 19 January 2013, Opinion of the Committee of the Regions on the posting of workers in the framework of the provision of services. Further, in 2014 (latest data available), there were over 1.9 million postings in the EU (representing 0.7% of a total EU labour force), up by 10.3% as compared to 2013 and by 44.4% with respect to 2010, see COM(2016) 128 final.

[287] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

the case-law of the Court of Justice on the posting of workers[288] led to a growing discussion on the relationship and balance (if accepted the application of the proportionality test to fundamental rights) between economic freedoms, such as the right to provide services and the right of establishment, and fundamental labour and social rights.

To meet these needs, the European Commission - on the 8 of March 2016 - proposed a revision on the rules of the posting of workers[289], whereas:

> Almost twenty years after its adoption, it is necessary to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers" (paragraph 4 of the preamble's proposal).

The analysis on the normative framework of the posting of workers and its coordination with the regulation of flexible work contracts, such as in particular temporary agency work, showed that many irregularities are still in place in posting situations. Main attention was given to different definitions of "minimum rates of pay" throughout Europe, as regards the inclusion or not of some constituent elements of pay within the core of protection to be guaranteed to posted workers.

The outcome of such differences between Member States defining the components of minimum rates of pay, is a great variety between EU countries of the rates' level. According to the most recent studies[290] on the levels of statutory minimum wage (no records have been gathered on the levels of minimum wage stated by collective agreements) applicable in EU Member States, shows that the lowest minimum wages (less than 500 EUR per month) can be found in the new Member States. Bulgaria (420 BGN/around 214 EUR per month) and Romania (1,050 RON/around 276 EUR per month) apply the lowest minimum wages in the European Union. Malta and Slovenia, together with Portugal, Greece and Spain, form a middle group with minimum wages between 500 and 1,000 EUR per month. Other countries within the western European countries have the highest minimum wages with rates exceeding 1,000 EUR per month.

It has been underlined how different social security contribution levels between Member States, are regarded as the major motivation of companies in the receiving countries to employ posted workers in their undertakings and of sending temporary work agencies, or single branches of a group of companies, established in countries with low social security levels, to post workers abroad. The result of comparison between sending and receiving Member States will always show a percentage of savings made by companies when posting workers from a country with labour costs higher than the State of origin of the company, which is however the only way to gain from labour costs' differences considered that Article 3 (7) of the Posted Workers Directive was reinterpreted by the Laval judgment of 2007 so that "more favourable conditions" only referred to the home Member State, not the host Member State. Even if regulations on social security coordination and income tax rules allow companies to pay these kinds of non-wage labour costs in the State of origin and to be competitive in the market, at least some of the legal uncertainties and regulation loopholes of the normative framework of posted workers should be reviewed in order to guarantee the correct implementation of the principle of equal treatment to posted workers.

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[288] See in particular, Viking (C-438/05), Laval (C-341/05), Rüffert (C-346/06) and Commission v. Luxembourg (C-319/06).

[289] COM(2016) 128 final, *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliamnet and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, Strasbourg, 8 March 2016.

[290] See on the more recent levels of statutory minimum wages Fric K., *Statutory minimum wages in the EU 2016*, Eurofound, 29 January 2016, p. 2.

Indeed, practical consequences of the choices made while regulating the situation of posting, have been described by taking into account some debated Italian cases on the "use" of EU legislation as a legal way to circumvent national laws and gain access to the labour market with lower costs while exercising the freedom to provide services.

The cases analysed in the last chapter, showed different levels of distortion of the rules on posting. In some situations, there was a restrictive interpretation or irregular application of the principle of equal treatment as regards working conditions. In other situations, infringements of EU and national law, concerned both equality in retribution and employment conditions, such as maximum working hours and overtime work's payment, and further it was at stake the proper payment of social security contributions and taxes in the country of origin. As it has been clearly stated, these cases of illegal posting are not easy to identify, even if new instruments of administrative coordination have been provided by the 2014 Enforcement Directive and adequate sanctions are not always set by Member States.

In particular it has been analysed the relationship between the Posted Workers Directive and the Temporary Agency Work Directive, because temporary agency workers can claim more favourable terms than other posted workers as regards the application of the principle of equal treatment, but the ambiguities of coordination of the two directives and the triangular employment relationship characterising temporary agency work, create even more possibilities of circumvention of legal provisions on equal terms and conditions of employment than in cases of subcontracting or chain companies.

In this scenario, cases of illegal posting are becoming the new front used by companies for hiding severe migrant workers' exploitation. Posting of workers in situations of subcontracting or supply of manpower by temporary work agencies, are increasingly used as ways to circumvent controls, or at least making it harder to obtain verifications. Illegal posting based upon exploitation of workers, as shown by the increasing numbers of recourse to temporary posted workers in the agricultural, construction and transport sectors, allows the highest savings on labour costs by using unfair competition and abuse of workers' rights. Administrative sanctions in these cases are quite useless, even if they are remarkably high such it was in the Italian case of Roma Srl 2003.

New ways to prevent and punish these situations are needed and as it was proposed, even under the already existing provisions against human trafficking and severe exploitation of workers, some protection could be given to Intra-EU migrant workers. Starting from the study of the application of the posting of workers' legislation in Italy and from the examination of specific cases which were at the centre of political and societal debate in recent years, it was suggested an interpretation of national penal code provisions on illegal practices carried out by employment intermediaries and labour exploitation, which could comprehend the criminalisation of illegal posting.

Nevertheless, after a recent amendment made by Legislative Decree 8/2016, the sanctions provided by Legislative Decree 276/2003, which were both criminal and administrative sanctions established by Articles 18 and 19 of the Decree, as modified by Law 78/2014, were decriminalised as regards the case of illegal subcontracting (in violation of Article 29 para 1), or illegal posting of workers made by enterprises and the supply of workers made by non-authorised work agencies. Thus, the previous measures applicable in case of infringements of national law regulating the supply of employees made by work agencies, which were a financial penalty of 50 EUR (before Law 78/2014 the financial penalty was only of 5 EUR) per worker supplied by non-authorised agencies (Article 18 para 1) and per worker employed by an undertaking (Article 18 para 2), were transformed in administrative sanctions. The only penalty sanction which remained in this field was the one provided for cases of supply, or employment, of under-age workers and that established by Article 603 bis of the Italian penal code, when - and if - applicable.

The question upon the effective protection of posted workers' rights risks to be unsolved if cases of posting by temporary work agencies will not be brought in front of the Court as representing a case of illegal recruitment and severe exploitation of in need workers, for example considering one of the indicators of the exploitation of workers, which is defined as a systematic payment of salary patently dissimilar to what is stated by law or by collective agreements, or otherwise disproportionate to the quality and quantity of work supplied.

In the absence of a clear definition of what should be defined as a salary patently dissimilar to law or collective agreements, as well as the recognition of severe exploitation to widespread cases of illegal posting, it is of the utmost importance to revise legal instruments and mechanisms with a view to enhancing their effectiveness and broadening their scope of application to cases of severe labour exploitation hiding behind this scenario of grey labour market.

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