

POSTED WORKERS IN THE EU: LOST BETWEEN CONFLICTING INTERESTS AND SINGLE MARKET OBJECTIVES

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Abstract: Over the course of twenty years, the practice of the temporary posting of workers from one Member State to another where the said workers do not integrate into the host country's labour market has become a widely discussed topic in the European Union that creates a split between its Member States. The paper considers the issue of posted workers within the EU, approaching it from the perspective of law, as well as politics. Through critical analysis of EU case law and legal documents, the authors identify an issue that goes well beyond the divide between 'old' and 'new' Member States, given that within each country there are different beliefs about the appropriate level of state (or EU) intervention in the market regarding the posting of workers. In order to prove this hypothesis, the authors use Croatia as a case study, where interviews were conducted with Croatia's most prominent opposing poles regarding this issue. Finally, the authors give a final evaluation of the issue at hand and underline the timeless conflict between workers' rights and business competitiveness.

Keywords: posted workers, European Union, EU single market, workers' rights, yellow card procedure.

*'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.
(Article 26 TFEU)*

1 Introduction

From its early years, the European Union, then known as the European Economic Community, dreamed of an internal market within its borders where goods, services, capital and people could move freely and where the necessary balance between economic, social and environmen-

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tal policies would be maintained.¹ The value that the market freedoms have for the EU shows in the fact that they are enshrined in the Treaty on the Functioning of the European Union (hereinafter: TFEU).² With the establishment of the Eurozone in 1999³ and the Schengen agreement in 1985,⁴ later incorporated within the Treaty framework, this promising dream was one step closer to becoming a functioning reality.

Nonetheless, over the last two decades, as its borders have grown, so has a wave of fear and self-interest. Politicians across the Union have used one of the most fundamental emotions, which rely on real concerns – fear (of losing a job, of losing identity) – in order to gain political power. ‘The Polish plumber’ was just one of the names given to workers coming from the eastern part of the Union. This reference represents cheap labour ‘threatening’ the jobs of Westerners. The phrase gained popularity after de Villiers, a French politician, used it in an effort to campaign against an EU law from 2004 that made free movement easier for workers all across the Union.⁵ ‘The Polish plumber’ is seen as such a threat that it was also used in the debates leading to the Brexit referendum.⁶ The practices associated with the cross-border provision of services, seen as unfair and illegal by the ‘old’ Member States, are viewed by the ‘new’ Member States as the only way to be able to compete in the single market. Even though ‘old’ Europe fears the cheaper Eastern European workforce, it seems that countries and regions in the geographical centre of Europe enjoy the strongest per capita gains from the single market and benefit much more than EU members in the south or east of the continent.⁷ In other words, not everyone profits equally from the single market.

¹ Opinion of the European Economic and Social Committee, ‘Threats and Obstacles to the Single Market’ (own-initiated opinion) rapporteur: Oliver Ropke (2016) <www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/threats-and-obstacles-single-market-own-initiative-opinion> accessed 23 November 2020 1-2.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, Art 26 (TFEU).

³ European Commission, ‘What Is the Euro Area?’ <https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en#relatedlinks> accessed 23 November 2020.

⁴ ‘Schengen Agreement’ (*Schengen visa info*, 1 October 2019) <www.schengenvisainfo.com/schengen-agreement/> accessed 10 May 2020.

⁵ Béatrice Houchard, ‘Comment le plombier polonaise a fait voter “non” au referendum de 2005’ (*L’Opinion*, 28 October 2013) <www.lopinion.fr/edition/politique/comment-plombier-polonais-a-fait-voter-non-referendum-2005-5531> accessed 23 November 2020.

⁶ Lauren Frayer, ‘If Britain Leaves the EU, What Happens to the “Polish Plumber”?’ (*NPR*, 14 May 2016) <www.npr.org/sections/parallels/2016/05/14/477685487/if-britain-leaves-the-eu-what-happens-to-the-polish-plumber?t=1581279346169> accessed 23 November 2020.

⁷ Katharina Gnath, ‘EU Single Market Boosts Per Capita Incomes by Almost 1,000 Euros a Year’ (*Bertelsmann Stiftung*, 8 May 2019) <www.bertelsmann-stiftung.de/en/topics/latest-news/2019/may/eu-single-market-boosts-per-capita-incomes-by-almost-1000-euros-a-year/> accessed 23 November 2020.

One area where these differences between the 'old' and the 'new' Member States or the 'richer' and the 'poorer' Europe are visible is the area of posted workers. This paper aims to present possible reasons for tensions in this area and to assess whether the new legislative solution – the new Posted Workers Directive – which came into force in July 2020, could solve the problem.

A 'posted worker' is an employee who is, temporarily, sent by his employer to carry out a service in another EU Member State that differs from the state in which he normally works, 'in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency'.⁸ What makes posted workers different from EU mobile workers is that, since they remain in the host Member State only temporarily, they do not integrate into its labour market.⁹ These workers (about 2.8 million) make up less than 1% of the entire workforce on the EU market.¹⁰ However, the annual increase in this practice,¹¹ as well as the psychological impact it has had on EU citizens, makes it one of the most controversial topics in today's European Union.

The usual explanation of the posted workers saga is that differences in the interests of low- and high-wage countries have led to disputes and legislative changes concerning posted workers. However, this, in our opinion, is a very one-sided point of view. The problem, we believe, is much more complicated.

The aim of the paper is, therefore, to discover the underlying reasons for these tensions. We expect to find that the posted worker problem does not, or does not only, arise from the gap between low- versus high-wage countries. The main reason for such a primary hypothesis is that, in our opinion, the entire problem of posted workers cannot be solely explained by the opposing interests of different countries, as the interests of different actors within each country also differ. In order to test this hypothesis, we will use Croatia as a test case. We expect to find, ultimately, that the discrepancy of interests within each country expressed as different actors' beliefs about the appropriate level of state (or EU) intervention in the market is an essential factor in the posted workers area, in addition to the reality of differences in wealth among EU countries.

⁸ European Commission, 'Posted Workers' <<https://ec.europa.eu/social/main.jsp?catId=471>> accessed 23 November 2020.

⁹ *ibid.*

¹⁰ Frederic De Wispelaere and Jozef Pacolet, 'Posting of Workers: Report on A1 Portable Documents Issued in 2017' (2018) European Commission – DG EMPL Brussels 9 <www.etk.fi/wp-content/uploads/Komissio-tilastoraportti-Posting-of-workers-2017.pdf>.

¹¹ Statistics show that between 2010 and 2017, the number of posted workers increased by 83%. See Case C-620/18 *Hungary v Parliament and Council* ECLI:EU:C:2020:1, Opinion of AG Sánchez-Bordona.

Our second research question is whether the newly adopted solution (the amended Posted Workers Directive) will respond adequately to the current issues of posting. We expect to show that the changes in regulation that are taking place will, in practice, reduce the number of posted workers. This, we believe, is a result that is not in line with the objectives of the single market.

As a means to prove our hypotheses, we will use a qualitative analysis. Such analysis aims to extrapolate various, as expected, opposing arguments that have been used during different stages of the posted workers debate and classify them appropriately to prove (or disprove) that the arguments are not exclusively those defending the positions from the point of view of lower- or higher-wage countries. We will approach the problem of posted workers from the angle of law, as well as politics. This research is based on relevant legal documents (the old and new Directive), but also encompasses other documents by means of which the positions of the countries and the EU institutions (primarily the European Commission) were declared during the legislative process leading to the amended Directive. The debate on appropriate regulation not only took place in the legislative procedure at the EU level but also in cases which reached the Court of Justice of the European Union (hereinafter: ECJ). We will therefore also analyse the ECJ case law to understand the arguments underlying the posted worker disputes. The other reason for such analysis will be to find out how the existing legislation was interpreted, as its consequences can only be understood in this way. The research will be backed by the insights of scholars published in academic journals and books.

In addition to using already existing data, we conducted a case study, using Croatia as a case model. For this purpose, and to verify our thesis that the problem is more complex than that of a conflict between high- and low-wage countries, we conducted a semi-structured interview¹² with two of Croatia's prominent actors in the posted workers decision-making process: the Union of Autonomous Trade Unions of Croatia (UATUC) and the Employers' Association. We expect that these will show that different positions concerning posted workers exist within the country and not only between countries. The conclusions drawn from the conducted interviews will be presented in section 5 of this paper.¹³

¹² Semi-structured interviews provide a more in-depth understanding of participants' perceptions, which is why they were chosen here as a method for conducting the interviews.

¹³ The transcripts of the interviews themselves will be made available by the authors upon request. While choosing a method that would best suit our research in demonstrating Croatia's perspectives in the given issue, we conducted an informal conversation with Ms Tatjana Briški, member of the Committee on European Affairs of the Croatian Parliament during the yellow card procedure in 2016, who participated in this process. Additionally, we

The paper is structured as follows. After we set the scene in section 2, the authors will describe the legislation, which currently regulates posted workers, as well as the case law that has interpreted it.¹⁴ Section 3 explains the political tensions in the posted workers area, especially as they have developed after the *Laval* decision of the ECJ. In order to provide greater insight into the problem of posting, section 3 will also present economic findings related to the difference in wages between local and posted workers. The mentioned tensions resulted in the adoption of a new Directive. Section 4 explains the changes that the new Directive introduces. The new Directive was adopted with great resistance, not only during the process of its adoption but also afterwards. Section 4 therefore deals with the challenges to the new regulation.

In section 5, we present the results of our case study conducted in Croatia, based on the interviews with the representatives of the two opposing poles: the Employers' Association and UATUC. Their arguments for and against the new legislation will be presented in that section. This will lead to the concluding section in which we elaborate how our findings reflect the starting position – that the cause of the posted workers problem is not only based on high- versus low-wage countries, but is also an ideological issue.

2 Posting of workers as a service

In 2017, there were 2.8 million people sent by their employers to carry out a service in another EU Member State on a temporary basis.¹⁵ These employees are also known as posted workers. Even though they make up less than 1% of the entire EU workforce, they constitute a significant percentage in sectors such as construction.¹⁶ With 86% of workers being posted to the EU-15,¹⁷ Member States such as Germany, France, and Belgium receive the most significant share.¹⁸ Despite their relatively low number,¹⁹ posted workers have become a symbol of social

discussed the best method for conducting a case study and the way to format our interviews most appropriately with Professor Ksenija Grubišić, Associate Professor in the Department of Sociology, Faculty of Law, University of Zagreb.

¹⁴ The research in this paper is based on relevant legislation and case law as it stood on 10 November 2020.

¹⁵ De Wispelaere and Pacolet (n 10) 9.

¹⁶ *ibid.*, 10. As much as 47% of posting occurs in the construction sector.

¹⁷ The EU-15 represents the number of member countries in the EU prior to the accession of ten candidate countries in 2004.

¹⁸ Rebecca Zahn, 'Revision of Posted Workers Directive: A Europeanisation Perspective' (2017) 19 *Cambridge Yearbook of European Legal Studies* 187, 187.

¹⁹ For more information on the number of posted workers by country, see Roberto Pedersini and Massimo Pallini, 'Posted Workers in the European Union' (2010) European Foundation

dumping.²⁰ Social dumping is defined as ‘the practice, undertaken by self-interested market participants of undermining or evading existing social regulations with the aim of gaining competitive advantage’.²¹

The practice of posting workers was first regulated in the 1990s, but early judgments of the Court of Justice in *Manpower*²² and *Van der Vecht*,²³ as pointed out by Houwezijl and Verschueren, show how this practice was already a phenomenon in the late 1960s and early 1970s.²⁴ Both of these cases tackled the issue of social security for migrant workers posted in another Member State by their employers. As stated in *Manpower*, a posted worker ‘shall continue to be subject to the legislation of the former Member State as though he were still employed in its territory, provided that the anticipated duration of the work which he is to perform does not exceed 12 months [...]’.²⁵ Nevertheless, not until the 1990s did posted workers become associated with social dumping where workers from low-wage Member States were sent to higher-wage Member States.²⁶

The groundbreaking judgment that set the course for future posted worker regulations was *Rush Portuguesa*²⁷ decided in 1990. This case post-dated the accession of Portugal to the EU.²⁸ Under the Accession Treaty with Portugal, for a duration of seven years, a transitional period was put forward to protect labour markets in the ‘old’ Member States due to ‘geographical proximity, income disparities, high unemployment and a tendency to migrate’ of nationals of the ‘new’ Member States (the new states then being Portugal and Spain).²⁹ This meant that the free movement of workers did not apply to Portugal immediately after it acceded to

for the Improvement of Living and Working Conditions 7-12 <www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union> accessed 23 November 2020; and De Wispelaere and Pacolet (n 10).

²⁰ Mijke Houwezijl and Herwig Verschueren, ‘Free Movement of (Posted) Workers’ in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019) 47, 50.

²¹ Monika Kiss ‘Understanding Social Dumping in the European Union’ (2017) European Parliamentary Research Service <[www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)599353](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599353)> accessed 20 November 2020 1.

²² Case 35/70 *SARL Manpower v Caisse primaire d’assurance maladie de Strasbourg* ECLI:EU:C:1970:120.

²³ Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van der Vecht* ECLI:EU:C:1967:49.

²⁴ Houwezijl and Verschueren (n 20) 77.

²⁵ *Manpower* (n 22) para 9.

²⁶ Houwezijl and Verschueren (n 20) 77.

²⁷ Case C-113/89 *Rush Portuguesa Lda v Office national d’immigration* ECLI:EU:123456789.

²⁸ Houwezijl and Verschueren (n 20) 77.

²⁹ Andrea Grgić, ‘Posting of Workers within the Framework of Free Movement of Services in the European Union Law’ (Doctoral thesis, University of Zagreb 2016) 42.

the EU. On the other hand, the Accession Treaty did not restrict the free movement of services in construction, as well as in other sectors.

2.1 Rush Portuguesa

Rush Portuguesa was a company governed by Portuguese law whose registered office was in Portugal. It specialised in building and public works. Rush had won a contract in France and, to carry out the works, brought its Portuguese workforce from Portugal. After the French Labour Inspectorate carried out checks of the sites Rush was working on, it notified Rush of a decision to impose a fine for employing foreign workers without a permit, which breached the provisions of the French Labour Code. In order to have the fine annulled, Rush argued in court that this was not a case of the free movement of workers but rather of the free movement of services. Therefore, its workers could not be prohibited from working in France, even without a work permit. Based on the fact that 'such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State',³⁰ the Court of Justice made a revolutionary ruling according to which the provisions on the free movement of workers do not apply to posted workers. Posted workers were placed within the freedom to provide services. Nevertheless, the Court also explained that

Community law does not preclude the Member States from extending their legislation, or collective labour agreements entered into by both sides of the industry, to any person who is employed, even temporarily within their territory, no matter which country the employer is established, nor does Community law prohibit Member States from enforcing those rules by appropriate means.³¹

In other words, according to the ECJ, domestic labour law may be extended to posted workers.

By determining that posted workers do not gain access to the labour market of the host Member State, the ECJ avoided judging on the rising conflict between the Community goal of a border-free EU internal market and national interests related to border control aimed at keeping immigrants out.³² Therefore, a regulation was needed.

³⁰ *Portuguesa* (n 27) para 15.

³¹ *ibid*, para 18.

³² Mijke Houwerijl, 'European Union Law and Dutch Labour Law: The Employment Protection of Posted Temporary Services Workers' (2006) Dutch Contribution to Theme 1 on 'Trade Liberalization and the Labour', XVIII World Congress of Labour and Security Law, Paris (5-8 September 2006) 4.

2.2 The 1996 Directive regulating posted workers

The first EU legislation on posted workers was adopted in 1996. After six years of intense political debate, negotiations and amendments, the European Council and Parliament adopted the so-called Posted Workers Directive³³ (hereinafter: 1996 PWD). The 1996 PWD, which was still in force until the end of July 2020 when it was replaced by new legislation, aimed to create a framework of rules for posted workers to avoid unfair competition and promote a true single services market. The ruling in *Rush Portuguesa* paved the way for the said legal framework.³⁴

The 1996 PWD consists of nine provisions. However, we will analyse only the first three since they are of greatest importance to our paper.³⁵ We will divide the given articles into two categories:

1. personal scope and definitions (Articles 1 and 2)
2. terms and conditions of employment for posted workers (Article 3).

2.2.1 Personal scope and definitions

The 1996 PWD defines 'posted worker' as: '[a] person who, for a limited time, carries out his or her work in the territory of an EU Member State other than the state in which he or she normally works'.³⁶

An example of a posted worker would be: 'A Polish national pipefitter employed at a construction firm in Poland [who] is sent by his employer to work on a water treatment plant construction for a client in France. His part of the project is expected to take three months'.³⁷

2.2.1.1 'Person'

While it is easy to associate a 'posted worker' as an EU citizen coming from a low-wage state who is sent to work in a higher-wage state, the 'person' referred to in this definition can include individuals employed in

³³ 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 [1996] OJ L18/1 (Directive 96/71/EC).

³⁴ *ibid.*

³⁵ For a more detailed analysis of the 1996 PWD, see Andrea Grgić, 'Posting of Workers within the Framework of Free Movement of Services in the European Union Law' (Doctoral thesis, University of Zagreb 2016) 92-149.

³⁶ Directive 96/71/EC, Art 2(1).

³⁷ Kent O'Neil, 'Do I Have a "Posted Worker (Part II)"?' (*Newland Chase*, 20 February 2019) <<https://newlandchase.com/do-i-have-a-posted-worker-part-ii/>> accessed 24 November 2020.

any European Economic Area (hereinafter: EEA) state or Switzerland³⁸ who is temporarily working in another EEA state or Switzerland.³⁹

2.2.1.2 'For a limited time'

This is a controversial part of this definition that was neither solved nor clarified by the Directive.⁴⁰ The potentially unlimited duration of the posting falls on the borderline between the free movement of workers and the freedom to provide services.⁴¹ Over the years, the ECJ has come across cases⁴² where an interpretation of 'limited period' was needed. In *Gebhard*,⁴³ the Court stated that 'the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity'.⁴⁴ However, in the case *Trojani*,⁴⁵ the ECJ held that an activity carried out on a permanent basis or without any foreseeable limit would not be considered a service within the meaning of Article 56 TFEU.⁴⁶ The contrasting interpretation given by the Court was of no help in providing a practicable definition of 'temporary'.

This issue was solved by neither case law nor national legislation, until the enactment of the latest Directive on posted workers, which we will discuss later.

2.2.1.3 'Carries out his or her work'

The PWD covers three different types of posting, as described in Article 1(3):

- a. posting to carry out service contracts in the context of transnational subcontracting (eg in the construction sector)

³⁸ See 'Posting Workers to Switzerland' (2019) MCH Group Ltd, Basel <www.mch-group.com/en-US/venues/basel/messe-basel/organisers-regulations.aspx> accessed 20 November 2020.

³⁹ Kent O'Neil, 'Do I Have a "Posted Worker"?' (*Newland Chase*, 20 February 2019) <<https://newlandchase.com/do-i-have-a-posted-worker/>> accessed 24 November 2020.

⁴⁰ *Houwezijl and Verschuere* (n 20) 89.

⁴¹ *Houwezijl* (n 32) 7.

⁴² Neither *Gebhard* nor *Trojani* was directly related to the topic of PW, although they still had a significant impact on the interpretation of the Posted Workers Directive of 1996.

⁴³ Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411.

⁴⁴ *ibid*, para 27.

⁴⁵ Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* ECLI:EU:C:2004:488.

⁴⁶ *ibid*, para 26.

- b. transnational intra-company transfers (eg the posting of key personnel)
- c. transnational temporary agency work.⁴⁷

2.2.1.4 'Other than the state in which he or she normally works'

As previously stated, the 1996 PWD applies to individuals whose usual place of work is within the borders of the EEA or Switzerland. However, some Member States, while adopting the Directive in their national legislation, have expanded their national requirements for posted worker notifications to include workers from a third country that are sent to the EU for temporary work.⁴⁸

2.2.2 *Terms and conditions*

Within Article 3, the 1996 PWD sets a base of mandatory labour standards that apply to the duration of work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, protective measures for pregnant women, for women who have recently given birth, for young people and children, and the equal treatment of men and women.⁴⁹ However, cases such as *Laval*, *Commission v Luxemburg* and *Rüffert* (which we will discuss later in the paper) made it clear that the Directive imposed not only a 'floor' but also a 'ceiling' concerning the application of host-state law.⁵⁰ In other words, any demand going beyond the set minimum standards of Article 3(1) would result in the foreign service provider losing its competitive advantage, which meant that additional demands were never made since they fell outside the mandatory scope of the mentioned Article 3(1).⁵¹

While the Directive does state in Article 3(10) that the Member States may impose the application of terms and conditions wider than those listed within Article 3(1) for the sake of public policy, the ECJ in *Commission v Luxemburg*⁵² decided on a strict interpretation of the given Article.⁵³ After this judgment, it became clear that the 'concept of pub-

⁴⁷ Directive 96/71/EC, Art 1(3).

⁴⁸ O'Neil (n 39).

⁴⁹ Directive 96/71/EC, Art 3(1).

⁵⁰ Houwezijl and Verschuere (n 20) 83.

⁵¹ Daniel Carter, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive' (2018) 14 Croatian Yearbook of European Law & Policy 31, 43.

⁵² Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxemburg* ECLI:EU:C:1996:263.

⁵³ See: Carter (n 51) 40-41.

lic policy comes into play only where a genuine and sufficiently serious threat affects one of the fundamental interests of society and that it must be narrowly construed'.⁵⁴ This confirmed that the 1996 PWD, in reality, did impose a 'ceiling' on the application of the host-state law.

2.2.2.1 *Rüffert*

Trying to appease Denmark,⁵⁵ the 1996 PWD in Article 3(1) allowed the Member States without a system for declaring collective agreements universally applicable to apply generally applicable agreements, or agreements concluded by the most representative organisations.⁵⁶ While Article 3(8) gave a more in-depth insight into the previous Article, where, in order for a collective agreement to be considered universally applicable, it must be 'observed by all undertakings in the geographical area and in the profession or industry'.⁵⁷

Nevertheless, even with a greater insight provided by Article 3(8), an issue arose that resulted in the ECJ's ruling in *Rüffert*.⁵⁸ The issue at hand concerned Lower Saxony, which had a rule that obliged public authorities to award contract works only to undertakings paying wages laid down in the local collective agreement. However, the company that won the public tender contract only agreed to pay half of what was in the applicable collective agreement. With its ruling, the ECJ decided that the Lower Saxony collective agreement fell outside both paragraphs of Article 3(8) as well as Article 3(1), stating that the collective agreement had not been declared universally applicable according to the Directive since Germany did, in fact, have a system for declaring collective agreements universally applicable.⁵⁹ The Court also added that this agreement was not generally applicable to all similar undertakings in the geographical area and the profession or industry concerned.⁶⁰ With this decision, the ECJ narrowed the specific types of collective agreements that Article 3(1) applies to.⁶¹

⁵⁴ Houwezijl and Verschueren (n 20) 83.

⁵⁵ *ibid*, 82.

⁵⁶ Directive 96/71/EC, Art 3(1).

⁵⁷ *ibid*, Art 3(8).

⁵⁸ Case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189.

⁵⁹ *ibid*, para 27.

⁶⁰ *ibid*, para 28.

⁶¹ Carter (n 51) 44.

2.2.2.2 The favour principle

Another issue that arose was related to Article 3(7) in which it is stated that host labour standards only apply when working conditions in that Member State are more favourable than in the home state of the posted worker. This requires a comparison between host and home labour standards. This provision was added as a way of avoiding any drastic infringements to the freedom to provide services, as well as the freedom of contract, which an unconditional application of host state law would have done.⁶² However, since this so-called favour principle was never fully put into operation, the question of how it was to be decided and which working conditions were the most favourable was not answered.

In the preamble, the 1996 PWD declares its intention to promote the transnational provision of services, at the same time ensuring a climate of fair competition and guaranteeing respect for the rights of workers.⁶³ This raises the question – did the Posted Workers Directive achieve its intention?

3 The *Laval* case and its consequences

Just ten years after the making of the Posted Worker Directive in 1996, two ECJ rulings made an inevitable impact across the Union. The cases were the *Laval*⁶⁴ case and the *Viking*⁶⁵ case. *Viking* concerned the right of establishment, while *Laval* became the pivotal case for posted workers, which is why we shall discuss this case at greater length. For some, these rulings were seen as a ‘danger’ for social Europe and an opening for ‘wage dumping’ in the EU, while others saw them as crucial for preserving the freedom of movement and establishment throughout the internal market.⁶⁶ As will be shown later, the mentioned cases created a problematic interface between the two opposite stances.

⁶² Houwezijl and Verschueren (n 20) 85.

⁶³ Directive 96/71/EC Preamble, recital 5.

⁶⁴ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809.

⁶⁵ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OU Viking Line Eesti* ECLI:EU:C:2007:809.

⁶⁶ ‘European Social Model Challenged by Court Rulings’ (*Euractiv*, 27 February 2008) <www.euractiv.com/section/social-europe-jobs/news/european-social-model-challenged-by-court-rulings/> accessed 17 November 2020.

3.1 The *Laval* case

The *Laval* case concerned a Latvian company which, after having won a public tender in Sweden, posted there dozens of its workers. Estimates suggest that these posted workers earned around 40% less than their Swedish counterparts.⁶⁷ Fearing that the posting of cheap labour would threaten the position of Swedish construction workers, the Swedish trade unions encouraged Laval to comply with the local terms and conditions of employment laid down by the collective agreement.⁶⁸ However, these negotiations were unsuccessful, which resulted in the Swedish trade unions taking collective actions by blocking all Laval working sites. In response, Laval brought the case to the Swedish Labour Court. The case was referred to the ECJ, where it was considered in the context and alongside the *Viking* case. The latter also concerned the lawfulness of industrial action, in this case boycotting, which had the effect of placing restrictions on the freedom to provide services.

The opinion given by the Advocate General Paolo Mengozzi in *Laval* showed support for the Swedish trade unions' position and was well received by the European trade unionists and their supporters.⁶⁹ The central part of AG Mengozzi's opinion was that the actions taken by the trade union did not compromise the legal provisions set out in the 1996 PWD. He concluded his opinion by stating that the blocking of the Laval working site was acceptable as this was 'motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives'.⁷⁰ If the preliminary ruling had complied with the AG's opinion, this would have been a major step for trade unions all over the EU: 'This preliminary ruling could have represented an important precedent for other European trade unions to follow and an acknowledgment that trade unions' organisational horizons were no longer governed by national borders'.⁷¹

⁶⁷ Michael Whittall, 'Unions Fear ECJ Ruling in Laval Case Could Lead to Social Dumping' (*Eurofound*, 24 February 2008) <www.eurofound.europa.eu/publications/article/2008/unions-fear-ecj-ruling-in-laval-case-could-lead-to-social-dumping> accessed 17 November 2020.

⁶⁸ It is important to note that Sweden (like Denmark) does not have a statutory minimum wage nor a scheme for the extension of collective agreements in accordance with the 1996 PWD; for more information, see Melita Carević, Paula Kiš and Filip Kuhta, 'Minimum Wages as an Obstacle to the Free Provision of Services' (2008) 4 *Croatian Yearbook of European Law and Policy* 75, 84-88.

⁶⁹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:291, Opinion of AG Mengozzi.

⁷⁰ *ibid*, para 307.

⁷¹ Whittall (n 67).

However, the ECJ's ruling did not mirror the opinion of AG Mengozzi. The Court was of the opinion that the right to take collective action must be recognised as a fundamental right forming an integral part of the general principles of the Community law, stating that taking action against social dumping may, in fact, constitute a reason of public interest. Nevertheless, the action taken did represent a restriction on the freedom to provide services and thus made the services 'less attractive'.⁷² In the related *Viking* case, the Court held that the trade unions' right to take collective action might be limited by the employers' rights to freedom of establishment.⁷³

3.2 Political polarisation and the rise of populism

As stated in the opening of this section, the reaction to these cases was quite polarised. The Secretary-General of the European Trade Union Confederation, for example, stated that 'unions across Europe were now deeply concerned with defending their national systems' and also added that there is a risk of a 'protectionist reaction'.⁷⁴ Additionally, many Members of the European Parliament took stands on this issue. For example, the Danish MEP Poul Nyrup Rasmussen, President of the Party of European Socialists, said that the message that citizens of the EU might receive was that 'Europe is more interested in the competition between workers than in raising living standards for all families'.⁷⁵ On the other hand, there was MEP Philip Bushill-Matthews, employment spokesman for the UK Conservatives, who stated that 'it is good to see the European Court of Justice upholding a key principle of the single market: the trade union movement should stop trying to block progress in this area but should learn from this judgment to move with the time'.⁷⁶ According to BusinessEurope, a lobby group that represents enterprises of all sizes in the EU,⁷⁷ the judgment would contribute to 'improving the development of an internal market'⁷⁸ and provide 'legal clarity, which was greatly needed to achieve the correct implementation of the posting of workers directive'.⁷⁹

⁷² *Laval* (n 64) para 99.

⁷³ *Viking* (n 65) paras 88-89.

⁷⁴ 'European Social Model Challenged by Court Rulings' (n 66).

⁷⁵ 'Unions Frustrated at Court Ruling on Posted Workers' (*Euractiv*, 28 February 2012) <www.euractiv.com/section/social-europe-jobs/news/unions-frustrated-at-court-ruling-on-posted-workers/> accessed 20 November 2020.

⁷⁶ *ibid.*

⁷⁷ 'Confederation of European Business' (*Wikipedia*, 15 April 2020) <https://en.wikipedia.org/wiki/Confederation_of_European_Business> accessed 20 November 2020.

⁷⁸ 'European Social Model Challenged by Court Rulings' (n 66).

⁷⁹ Whittall (n 67).

As is apparent from comments made by people from different areas of expertise, such as those stated above, the issue that arises not only in an ECJ ruling but in the practice of posted workers in general is whether social rights, including workers' rights, and an internal market without limits can be in harmony with each other or whether one will always come before the other.

Regardless of the stances taken on this matter, one cannot ignore the impacts it has had and will have on the future of the EU. Over the last two decades, populism and Euroscepticism have risen in all parts of the Union. Whether or not we believe that the intensity of policy competition and migration is exaggerated or unfounded, we still cannot deny that it has produced fear of a cumulative 'race to the bottom'.⁸⁰

Today, one in three Europeans will cast their vote for a Eurosceptic party,⁸¹ which is believed to partially stem from outright rejection of European economic integration.⁸² The reasons behind this might be the lack of solutions for establishing common ground at the level of social protection between countries at different stages of economic development, especially after the accession of Eastern European countries.⁸³ Even those who do not vote for a Eurosceptic party still wish for a more social Europe, which is evident from the rulings regarding the Posted Workers Directive that sparked social outrage.

3.3 A fight for a more 'social Europe'

In the aftermath of the *Laval* case, the revision of the 1996 PWD was just one of many legislative ideas put forward by trade unions, companies and the Member States to introduce fundamental social rights in the EU's single market. As Belgian lorry drivers were protesting the 'stealing' of their work in the transport sector by Eastern Europeans who

⁸⁰ 'Race to the bottom' is a situation where companies compete with each other to reduce costs by paying the lowest wages or giving workers worse conditions; 'Race to the bottom' (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/race-to-the-bottom>> accessed 17 November 2020.

⁸¹ Eurasia Review, 'Tracking the Rise of Euroscepticism and Support for the Far-Right' (*Eurasia Review News & Analysis*, 3 March 2020) <www.eurasiareview.com/03032020-tracking-the-rise-of-euroscepticism-and-support-for-the-far-right/> accessed 24 November 2020.

⁸² Jon Henley, 'Support for Eurosceptic Parties Doubles in Two Decades Across EU' (*The Guardian*, 2 March 2020) <www.theguardian.com/world/2020/mar/02/support-for-euro-sceptic-parties-doubles-two-decades-across-eu> accessed 24 November 2020.

⁸³ Olaf Cramme, 'Social Europe's New Battleground' (*Euractiv*, 22 March 2011) <www.euractiv.com/section/social-europe-jobs/opinion/social-europe-s-new-battleground/> accessed 24 November 2020.

were working for lower wages and with poorer working conditions,⁸⁴ the French were gathering allies across the EU in their fight against what they saw as social dumping.⁸⁵ As expressed by a French senator, Eric Bocquet, during an interview with EURACTIV France, the difference between France and Poland in social contributions that employers pay in the country of origin can amount to 30%.⁸⁶ This can result in employers deciding to hire a worker that would cost them much less in a wholly legal and systematic way, but can also result in an increase in xenophobia among the local workers who feel that their jobs have been stolen from them.

While countries like Belgium, Spain and to some extent Germany sided with France in wanting better control of the posted workers system, pre-Brexit UK and the Eastern European countries were firmly opposed to it⁸⁷ The Eastern European countries were declaring competition within the single market as their key counterargument, whereas in the UK, the then Prime Minister David Cameron used cheap labour workers as an argument to attract voters.⁸⁸ However, Cameron was not the only politician using this 'crisis' to his advantage. Just south of its borders, France's main far-right party, the Front National, led by Marine le Pen, was leading in the EU election polls which were just a few months away when all this was happening.⁸⁹ Even though posted workers make up less than 1% of the workforce, the psychological impact on voters was meaningful. Bearing this in mind, the French government started to push this issue forward at the European level. This consisted of 'tightening labour inspection controls in the affected sectors', which they believed were increasingly bypassed, 'preventing fraudulent arrangements and the strengthening of legislation'.⁹⁰ In the end, the Council of the European Union, responding to political unease, gave initial approval to

⁸⁴ 'Lorry Drivers Take Protests to Brussels on Monday' (VRT NWS, 23 September 2012) <www.vrt.be/vrtnws/en/2012/09/23/lorry_drivers_takeproteststobrusselsonmonday-1-1437591/> accessed 24 November 2020.

⁸⁵ Cécile Barbière, 'France Looks for EU Allies in Fight against Low-Cost Workers' (*Euractiv*, 7 November 2013) <www.euractiv.com/section/social-europe-jobs/news/france-looks-for-eu-allies-in-fight-against-low-cost-workers/> accessed 24 November 2020.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Aline Robert, 'Paris Pushes EU-wide Minimum Wage in Crusade against Social Dumping' (*Euractiv*, 2 December 2013) <www.euractiv.com/section/trade-society/news/paris-pushes-eu-wide-minimum-wage-in-crusade-against-social-dumping/> accessed 24 November 2020.

⁸⁹ Aline Robert, 'French EU Minister Seeks Solutions to Fight Social Dumping' (*Euractiv*, 18 November 2013) <www.euractiv.com/section/trade-society/news/french-eu-minister-seeks-solutions-to-fight-social-dumping/> accessed 24 November 2020.

⁹⁰ Robert (n 88).

tighten the rules regarding posting with an enforcement directive, without changing the provisions of the PWD. The aim of this Directive would have been to improve the supervision and enforcement of the rules of the 1996 PWD, with 'national control measures and joint and several liabilities in subcontracting chains'.⁹¹ However, at the request of the UK,⁹² these provisions were only to apply to the construction sector, which was a particular area of worry because of the great use of sub-contractors in the construction business that led to abuses of social law.⁹³ The proposal aimed to end this abuse by allowing 'posted workers to hold the contractor, of which the employer is a direct subcontractor, liable, in addition to or in place of the employer' regarding their rights as worker, mainly consisting of 'remuneration corresponding to the minimum rate of pay'.⁹⁴

3.4 The Enforcement Directive 2014

On 15 May 2014, the EU adopted the Enforcement Directive⁹⁵ that would be 'updating and improving the way the single market works, while safeguarding workers' rights'.⁹⁶ The Enforcement Directive 2014 (hereinafter: 2014 ED) is mainly the result of compromises between the states, those that were against and those supporting the strengthening of controls.⁹⁷ Knowing that workers sent to another Member State 'play an important role in filling labour and skill shortages in various sectors and regions like construction, agriculture and transport',⁹⁸ the goal of this Directive was to diminish fraud and abuse, such as that committed by companies that were artificially establishing themselves abroad to

⁹¹ Council of the European Union, 'Council Reaches General Approach on Posting of Workers Directive' Presse 562 (2013) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/139997.pdf> accessed 24 November 2020 2.

⁹² 'Labour Ministers Hammer out Agreement on Posted Workers' (*Euractiv*, 10 December 2013) <www.euractiv.com/section/social-europe-jobs/news/labour-ministers-hammer-out-agreement-on-posted-workers/> accessed 24 November 2020.

⁹³ *ibid.*

⁹⁴ Council of the European Union (n 91) 1.

⁹⁵ Directive 2014/67/EU of the European Parliament and of the Council of the 15 May 2014 on the enforcement of the Directive 96/71/2012 concerning the posting of workers in the framework of the provision of services and amending Regulation [2014] OJ L159/11.

⁹⁶ European Commission Press Release IP/12/267, 'Commission to Boost Protection for Posted Workers' (2012) <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_267> accessed 24 November 2020 1.

⁹⁷ Sébastien Richard, 'The Implementing Directive on Posted Workers: And What Now?' (*Robert Schuman*, 29 February 2016) <www.robert-schuman.eu/en/european-issues/0383-the-implementing-directive-on-posted-workers-and-what-now> accessed 24 November 2020.

⁹⁸ European Commission Press Release (n 96) 2.

benefit from lower levels of labour protection and lower levels of social security contributions⁹⁹ also known as letterbox companies.

However, not long after its adoption, the new text brought criticism from, among others, France, arguing that it did not do enough in terms of protecting workers or preventing abuse.¹⁰⁰ Consequently, France decided to take matters into its own hands, releasing the Macron bill to clamp down on the 300,000 illegally posted workers within the country.¹⁰¹

However unsuccessful the 2014 ED seemed to be to some, this was only the first step in an attempt to fight social dumping and fraud. The next phase was the revision of the 1996 PWD, causing a bipartisan reaction among EU nationals. BusinessEurope argued that this step was not necessary since the 2014 ED, at the time, was still not fully implemented, and that 'changing legislation would bring new uncertainty for business in Europe'.¹⁰² European small construction entrepreneurs counterargued¹⁰³ that the issues they were facing were not tackled by the 2014 ED, which is why, in their view, it was necessary to review the 1996 PWD to ensure a level playing field for construction enterprises and to protect the rights of posted workers.¹⁰⁴

Two years after the 2014 ED and twenty years after the 1996 PWD, a new Directive was adopted. The growing number of posted workers in the EU, which had increased by nearly 45% between 2010 and 2014,¹⁰⁵ was just one of the reasons that some countries, such as Germany, Austria, Belgium, France and the Netherlands, who also receive half of the workers, pushed for this new Directive.¹⁰⁶

⁹⁹ *ibid.*

¹⁰⁰ Florence Dupont-Fargeaud and Camilla Spira, 'New Directive on Posted Workers Ignores Member States' Objections' (*Euractiv*, 16 April 2014) <www.euractiv.com/section/social-europe-jobs/opinion/new-directive-on-posted-workers-ignores-member-states-objections/> accessed 24 November 2020.

¹⁰¹ Jean-Christophe Chanut, 'Le difficile combat contre la fraude au détachement des salaires étrangers' (*La Tribune*, 11 June 2015) <www.latribune.fr/economie/france/le-difficile-combat-contre-la-fraude-au-detachement-des-salaires-etrangers-483398.html> accessed 24 November 2020.

¹⁰² Daniela Vincenti 'Posted Workers Revision Gets off to Shaky Start' (*Euractiv*, 9 March 2016) <www.euractiv.com/section/social-europe-jobs/news/posted-workers-revision-gets-off-to-shaky-start/> accessed 24 November 2020.

¹⁰³ *ibid.*

¹⁰⁴ Statement given by European Builders Confederation president, Patrick Liebus.

¹⁰⁵ 'La révision de la directive sur le détachement des travailleurs' (*Robert Schuman*, 10 October 2016) <www.robert-schuman.eu/fr/questions-d-europe/0406-la-revision-de-la-directive-sur-le-detachement-des-travailleurs> accessed 24 November 2020.

¹⁰⁶ *ibid.*

3.5 Why are posted workers more affordable?

As one of its unintended effects, the 1996 PWD set out a practice of preference for posted workers over domestic workers, with the main reason being the difference in cost. Although employers are required to apply the mentioned terms and conditions set out by the 1996 PWD, firms still manage to obtain a cost advantage if social security contributions in the home state are considerably lower.¹⁰⁷ According to a study by E Voss, 'labour cost differences from savings in terms of social security contributions could be as much as 30%'.¹⁰⁸ Furthermore, if a posted worker is not placed correctly at the appropriate skill or qualification level, unlike his equally skilled colleague from the host country, he will be working on minimum pay and in poorer conditions. This, additionally, signifies both down-skilling and possibly brain waste.¹⁰⁹

In practice, posted workers are often paid and even prepared to work at the lowest official minimum wage, given that the pay is still much higher than the home country equivalent.¹¹⁰ A good example is a 2005 UK case where Hungarian posted workers were being paid around GBP 816 to 1,020 per month, which was below the standard rates and national minimum wage. As reported by a posted worker, in Hungary the equivalent wage would have been GBP 326.¹¹¹

Even France,¹¹² whose posting regulation, in theory, provided effective equality of direct wage costs for posted and French workers,¹¹³ reported in 2006 an estimated wage difference between foreign posted workers and their local workers to be around 50%.¹¹⁴ In Denmark, in the mid-2000s, a study of the construction sector reported that workers from

¹⁰⁷ Frederic De Wispelaere and Jozef Pacolet, 'An ad hoc Statistical Analysis on Short Term Mobility – Economic Value of Posting of Workers: The Impact of Intra-EU Cross-Border Services, with Special Attention to the Construction Sector' (2016) European Commission – DG EMPL Brussels 15.

¹⁰⁸ Eckhard Voss (in cooperation with Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicione), 'Posting of Workers Directive: Current Situation and Challenges' (2016) Policy Department A: Economic and Scientific Policy <[www.europarl.europa.eu/think-tank/en/document.html?reference=IPOL_STU\(2016\)579001](http://www.europarl.europa.eu/think-tank/en/document.html?reference=IPOL_STU(2016)579001)> accessed 24 November 2020 38.

¹⁰⁹ Ninke Mussche, Vincent Corluy and Ive Marx, 'How Posting Shapes a Hybrid Single European Labour Market' (2017) 24(2) European Journal of Industrial Relations 113, 113.

¹¹⁰ De Wispelaere and Pacolet (n 107) 14.

¹¹¹ Jan Cremers, *In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers* (CLR Studies 2011) 41.

¹¹² *ibid*, 39.

¹¹³ Where each worker is paid according to the (minimum) gross wage corresponding to the rates of his qualification fixed by a collective agreement.

¹¹⁴ Voss (n 108) 37.

Eastern European countries were being paid on average 25-28% less than their Danish counterparts.¹¹⁵

To further demonstrate the cost difference between local and posted workers,¹¹⁶ we will use a table created by E Voss, which provides an ‘approximate illustration of the cost savings that are achieved through posting’. This example uses three fictive workers from the Netherlands, Poland and Portugal and uses the assumption that income tax is paid in the host state where, in fact, in most situations, this is not the case. The reason being the ‘183 days rule’ which stipulates that the posted worker will be subject to income tax in the home state if they work fewer than 183 days within a period of 12 months in the host state. Hence, since most postings do not last more than 183 days, the home country usually levies the income tax. Therefore, the cost savings can be even higher in most cases, given that there are significant differences in the income tax level in each Member State.

Table 1: Savings (in EUR) made by companies through posting

	Dutch worker	Posted worker from Portugal	Posted worker from Poland
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 days)	81	81	81
Gross salary	2,177	1,762	2,032
Percentage saving as compared to a Dutch worker		19.1%	6.7%

Source: Voss (n 108) 27.

As is evident from Table 1, there is a significant percentage difference in costs between workers coming from different countries. This makes it even easier to understand why employers prefer posted workers compared to domestic ones and also to understand why a new PWD came into being.

¹¹⁵ *ibid.*

¹¹⁶ For additional examples, see Roberto Pedersini and Massimo Pallini, ‘Posted Workers in the European Union’ (2010) European Foundation for the Improvement of Living and Working Conditions <www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union> accessed 24 November 2020 13.

4 Resistance towards the 2018 PWD proposal

The new Posted Workers Directive 2018 was adopted on 21 June 2018.¹¹⁷ This was a result of long negotiations. The process of its creation was a challenge that stands as an example of evaluating the importance of conflicting interests, such as competitiveness on the one hand, and the suppression of social dumping and unfair competition on the other.¹¹⁸

4.1 The last line of defence – Hungary’s and Poland’s lawsuit

Even after its adoption, the challenge to the 2018 PWD continued. Hungary¹¹⁹ and Poland¹²⁰ filed lawsuits demanding its annulment. Although the cases were still pending while this paper was written,¹²¹ AG M Campos Sanchez-Bordona published his opinion in which he gives a detailed answer to the arguments laid out by Hungary.¹²² While the AG’s opinion does not bind the ECJ, it still gives us a possible insight into the future actions of the Court regarding the filed lawsuits. In its application, Poland expressed the view that the main objective of the 2018 PWD was to restrict the freedom to provide services by increasing the burden on service providers, which would result in a reduction of competitiveness.¹²³ It also considered that the provisions of the Directive were discriminatory and contrary to the principle of proportionality due to insufficient justification.¹²⁴

On the other hand, Hungary raises five pleas in law, of which we will, for relevance to our study, examine only the first three.¹²⁵ Firstly, Hungary considers that the 2018 PWD is based on the wrong legal basis and should have been adopted on the basis of Article 153 TFEU, which

¹¹⁷ European Council, ‘Posting of Workers: Council Adopts the Directive’ (*European Council*, 21 June 2018) <www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/> accessed 24 November 2020.

¹¹⁸ ‘Upućivanje radnika u okviru pružanja usluga’ [‘Posting of Workers within the Provision of Services’] (2016) Croatian Parliament, European Affairs Committee (document on file with the authors) 2.

¹¹⁹ Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:2020:1001.

¹²⁰ Case C-626/18 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:2020:1000.

¹²¹ As of 8 December 2020, the actions taken by Hungary and Poland are no longer pending since the ECJ dismissed both of the lawsuits.

¹²² Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:2020:1, Opinion of AG Sánchez-Bordona.

¹²³ *Republic of Poland v European Parliament* (n 120) para 3.

¹²⁴ *ibid.*

¹²⁵ For the other two pleas, see Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:2020:1001.

deals with certain aspects of the EU's social policy.¹²⁶ The AG disagreed, pointing out that an act amending another earlier act generally has the same legal basis as the latter.¹²⁷ Secondly, Hungary considers that the Union has no legislative power to regulate the issue of remuneration in the field of labour relations.¹²⁸ AG Sanchez-Bordona refuted this argument, stating that the EU only harmonises the application of the rules of operation of the host country and country of origin.¹²⁹

Additionally, AG Sanchez-Bordona stated that the 2018 PWD does not, in any case, specify the amount of salary to be paid.¹³⁰ In the end, he considered the argument of violation of the principle of proportionality, which both Hungary and Poland called upon, unfounded, since it was necessary for the new Directive to protect workers' rights and thus restore the disturbed balance.¹³¹ Given all the above, the AG recommended that the ECJ dismiss these actions in their entirety.¹³²

4.2 National parliaments' third yellow card

The challenge by Hungary and Poland is only the last line of defence against the 2018 PWD. While its adoption was still pending in 2016, the countries dissatisfied with the proposal felt that the Commission should either reject or amend the given proposal. In this regard, the yellow card procedure,¹³³ the system established with the Lisbon Treaty, was used as the primary resistance mechanism.¹³⁴

In order to explain the yellow card system, we must first highlight one of the key principles of the EU – the principle of subsidiarity which is defined in TEU¹³⁵ as well as in the Protocol on the application of the

¹²⁶ *Hungary v European Parliament* (n 119) para 1.

¹²⁷ Court of Justice of the European Union Press Release No 63/20 'Advocate General Sánchez-Bordona Proposes that the Court of Justice Should Dismiss the Actions for Annulment Brought by Hungary and Poland against the Directive Strengthening Posted Workers' Rights' (2020) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200063en.pdf>> accessed 24 November 2020 1.

¹²⁸ *Hungary v European Parliament* (n 119) para 2.

¹²⁹ ECJ Press Release: AG Sánchez-Bordona Opinion (n 127) 2.

¹³⁰ *ibid.*

¹³¹ Opinion of AG Sánchez-Bordona (n 122) para 108.

¹³² ECJ Press Release: AG Sánchez-Bordona Opinion (n 127) 2.

¹³³ See: Tatjana Briški and Jelena Piljak, 'Indirect Inclusion of National Parliaments in the European Lawmaking Process: Croatian Parliament Priorities in European Affairs' (2014) 7 (1) *Suvremene teme* 7-28.

¹³⁴ 'Subsidiarity Control Mechanism' (European Commission) <https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_hr> accessed 24 November 2020.

¹³⁵ Consolidated version of the Treaty on European Union [2012] OJ 326/13.

principle of subsidiarity and proportionality.¹³⁶ The principle stipulates that Member States have competence in non-explicit areas of the Union, but at the same time the principle opens the possibility for the EU to take over the regulation of a specific problem if the Member States cannot achieve the objectives of the action entirely or if this can be achieved with better results at the Union level.¹³⁷ From this definition, we can identify the potential issues of dispute that can arise between national parliaments and the European Union in relation to the competence to resolve a particular issue, as was the case with the adoption of this Directive.

For the sake of protecting Member States from potential violations of the subsidiarity principle, in 2009 the Treaty Protocol introduced the possibility of submitting ‘yellow cards’, defining them as a procedure under which national parliaments of EU Member States can object to a draft legislative act on the grounds of the previously mentioned principle of subsidiarity.¹³⁸ They are part of an ‘early warning’ procedure in which any national parliament or any chamber of a national parliament can in eight weeks from the date when a draft legislative act was forwarded to it send to the Presidents of the EU Parliament, the Council or the EU Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.¹³⁹ After this, the institution that produced the objected draft may decide to maintain, amend or withdraw it, while giving reasons for that decision.¹⁴⁰ Since their introduction, the yellow cards have only been used on three occasions,¹⁴¹ one of them being against the proposal for a revision of the Directive on the posting of workers. The reason for its rare use is the fact that to set the process in motion the objection has to be raised by at least one-third of all votes of national parliaments, which is indeed very difficult.¹⁴²

¹³⁶ Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Protocol (2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115/01.

¹³⁷ TEU Art 5(3).

¹³⁸ ‘Yellow Card Procedure’ (*Eurofound*, 27 November 2017) <www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/yellow-card-procedure> accessed 24 November 2020.

¹³⁹ ‘The Principle of Subsidiarity’ (2020) European Parliament facts sheets <www.europarl.europa.eu/ftu/pdf/hr/FTU_1.2.2.pdf> accessed 24 November 2020 1.

¹⁴⁰ ‘Yellow Card Procedure’ (n 138).

¹⁴¹ Two of which concern matters regarding employment and industrial relations.

¹⁴² ‘Subsidiarity Control Mechanism’ (n 134).

4.2.1 *National parliaments' reasoned opinions and the responses of the European Commission*

In 2016, Croatia was one of 11 countries whose parliament submitted a reasoned opinion,¹⁴³ also known as a yellow card.¹⁴⁴ In its reasoned opinion, the Croatian Parliament – Sabor – highlighted four critical objections to the proposal for the revision of the 1996 PWD. The Committee on European Affairs of the Croatian Parliament highlighted a breach of Article 56 of the TFEU, arguing that ‘the proposal for a directive violates the freedom to provide services with the Union’, emphasising that ‘labour costs are a legitimate element of competitiveness in the internal market’.¹⁴⁵ The Republic of Croatia also firmly believed that proposing a revision of the 1996 PWD, while the process of the implementation of the 2014 ED was still going on, created overregulation and contributed to legal uncertainty for workers and employers.¹⁴⁶ Lastly, the Committee concluded that this was ‘an unnecessary entry into the area of employer and trade union autonomy and that the issue of posted workers should be addressed through collective bargaining’.¹⁴⁷ Given all the above, Croatia’s parliament took the view that the proposal to amend the 1996 Directive was contrary to Article 5 of Protocol no 2 on the application of the principles of subsidiarity and proportionality.¹⁴⁸

Once initiated, the yellow card procedure obliges the EU Commission to reconsider the proposal.¹⁴⁹ While reviewing the proposal for amendments to the PWD, the Commission considered all reasoned opinions received from national parliaments, classified them into four sets of conclusions and responded to each of them.

¹⁴³ The other countries, beside Croatia, were Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.

¹⁴⁴ ‘Obrazloženo mišljenje o prijedlogu direktive Europskog parlamenta i Vijeća o izmjeni Direktive 96/71/EZ Europskog parlamenta i Vijeća od 16. prosinca 1996. o upuivanju radnika u okviru pružanja usluga COM (2016) 128’ [‘Reasoned opinion on the 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’] (2016) Croatian Parliament, European Affairs Committee <www.sabor.hr/sites/default/files/uploads/inline-files/OM%20Hrvatski%20sabor%20COM%20%282016%29%20128%20%2810%29.pdf> accessed 24 November 2020.

¹⁴⁵ *ibid.*, 3.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ ‘Bilješka s međuparlamentarnog sastanka “Ciljana revizija pravila za upuivanje radnika” [‘Note from the inter-parliamentary meeting “Targeted revision of the rules for posting workers”] (2016) Croatian Parliament, European Affairs Committee (document on file with the authors) 1.

¹⁴⁹ ‘The Principle of Subsidiarity’ (n 139) 3.

As a first objection to the proposal, some of the national parliaments stated that the existing regulations were sufficient and appropriate.¹⁵⁰ The background to this view is the fear of a possible reduction in competitiveness, which the Croatian parliament also pointed out in its reasoned opinion, although this particular objection could not be a sufficiently good reason to invoke a breach in the subsidiarity principle. The Commission did not take this view into account, pointing out that:

the objective of this proposal is to provide a more level playing field between national and cross-border service providers and to ensure that workers carrying out work at the same location are protected by the same mandatory rules, irrespective of whether they are local worker or posted workers, in all sectors of the economy.¹⁵¹

States have abused the possibility of whether or not to apply collective agreements in non-construction sectors and have thus consciously contributed to the creation of conditions in which posted workers were paid less than domestic workers. In order to truly reduce social dumping, it was necessary to impose an obligation on States to extend the application of collective agreements to sectors other than construction.¹⁵²

All national parliaments that initiated the yellow card procedure argued that the question at hand should be dealt with at the national level, adding that the Commission had not sufficiently demonstrated that the issue should be handled at the Union level.¹⁵³ The Commission denied the latter. This issue was further deepened when countries such as Spain, Portugal, France, the UK and Italy submitted their response, stating that the proposal did not violate the subsidiarity principle, and thus supported the Commission's stances.¹⁵⁴ The Commission considered that 'individual measures could not achieve legal harmonisation in the internal market and clarity of the legal framework of posted workers equally effectively'.¹⁵⁵

The Danish parliament also expressed concerns about a violation of the principle of subsidiarity. Denmark was the only high-wage country that joined the yellow card procedure. This country was worried that, unlike the 1996 PWD, the proposal for a new Directive did not explicit-

¹⁵⁰ 'Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Proposal for a Directive amending the Posting of Workers Directive, with regard the principle of subsidiarity, in accordance with Protocol No 2' (2017) European Commission 5 (Communication from the Commission).

¹⁵¹ *ibid.*, 6.

¹⁵² *ibid.*, 5.

¹⁵³ *ibid.*, 6.

¹⁵⁴ Note from the inter-parliamentary meeting (n 148) 1.

¹⁵⁵ Communication from the Commission (n 150) 7.

ly state the competence of states to determine wages and conditions of employment.¹⁵⁶ The Commission tried to appease their position of those submitting reasoned opinions, arguing that it was not about regulating remuneration and working conditions, but merely preventing discrimination between domestic and posted workers.¹⁵⁷

The yellow card procedure can be used to present an existing division between the 'richer' and the 'poorer' Member States of the EU, where, to maintain their competitiveness in the market, countries like Croatia filed complaints that did not relate to a violation of the subsidiarity principle. At the same time, the views of the 'richer' countries that called for the prevention of social dumping were reflected in the Commission's responses in 2016. However, even the yellow card procedure, which at first glance seemed like a dispute between the 'rich' and the 'poor', has also revealed different additional interests. Thus, arguments opposing intervention on the market were heard. Some generally opposed market regulation, and others, as in the case of Denmark, opposed EU intervention in the Danish labour market.

The Commission, while reacting to all arguments in the reasoned opinions, remained in favour of the proposal, considering it was not in breach of the principle of subsidiarity or proportionality. The amended Directive was in the end adopted. The majority of countries that had started the yellow card procedure did not vote against the new Directive.¹⁵⁸ Why many countries, including Croatia, changed their positions concerning what they had expressed in the yellow card procedure is not quite clear.

One argument might be that the position in the Council is influenced by what countries expect to happen in Parliament. The most prominent parliamentary groups, EPP and S&D,¹⁵⁹ supported the proposal. Since the vote in Parliament predominantly supported the amended Directive,¹⁶⁰ it would have been difficult for those opposed to the pro-

¹⁵⁶ *ibid.*, 7.

¹⁵⁷ *ibid.*, 7.

¹⁵⁸ Countries that voted against the amended Directive were Hungary and Poland, the countries that abstained were Croatia, Latvia, Lithuania and the UK, while the other 22 countries voted in favour of the new Directive. See 'Voting Results' (Council of the European Union) <www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/?meeting=3625> accessed 24 November 2020.

¹⁵⁹ European People's Party and Socialists & Democrats.

¹⁶⁰ The revised rules were approved by 456 votes to 147, with 46 abstentions; 'Posting of Workers: Final Vote on Equal Pay and Working Conditions' (*News European Parliament*, 29 May 2018) <<https://www.europarl.europa.eu/news/en/press-room/20180524IPR04230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>> accessed 24 November 2020.

posal to ‘mobilise enough MEPs to block it’.¹⁶¹ By not having a majority in Parliament, the opponents of the 2018 PWD would have lost in that institution, and possibly also in the Council. This might be one of the reasons why they also changed their positions within the Council. Such political constraints might be part of the explanation. However, it is also possible that during the negotiation process, the states also realised that other arguments, and not only those regarding competitiveness, should be taken into consideration. In Croatia’s case, whereas all the arguments in the yellow card procedure reflected the interests of the businesses that provided services across the border, the change in its position in voting for the Directive might have been motivated by the arguments put forward by the trade unions.¹⁶² Therefore, divided interests at home might have made governments more cautious in simply rejecting the amended proposal. The following section discusses this divergence of interests and arguments within a country, taking Croatia as a case study.

4.3 The new posted workers Directive

After protracted negotiations, elaborated above, the Revised Posted Workers Directive 2018¹⁶³ was finally adopted.

As we have already explained the main features of the 1996 PWD, here we will pay attention only to the main changes introduced by the new Directive and which are relevant to our paper.

In its opening statements, the 2018 PWD states that ‘in a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof’.¹⁶⁴ In other words, enterprises should strive to compete in the EU market on bases that do not include the wages of workers. Below, we shall assess two points from the 2018 PWD: remuneration and the duration of the posting.

¹⁶¹ Diane Fromage and Valentin Kreilinger, ‘National Parliaments’ Third Yellow Card and the Struggle over the Revisions of the Posted Workers Directive’ (2017) 10(1) *European Journal of Legal Studies* 125, 158.

¹⁶² The European Trade Union Confederation had written a letter to Commissioner Thyssen demanding that the ‘yellow card’ procedure be rejected. In addition, the General Secretary of the ETUC stated that ‘All trade unions in Europe, including countries where parliaments have supported the yellow card procedure, strongly support the revision of the Posting of Workers Directive’. See ‘No To the Yellow Card on Posted Workers’ (ETUC, 13 May 2016) <www.etuc.org/en/pressrelease/no-yellow-card-posted-workers> accessed 24 November 2020.

¹⁶³ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.

¹⁶⁴ Directive (EU) 2018/957 (n 162) Preamble, recital 16.

4.3.1 Remuneration

When it comes to remuneration, the 2018 PWD would oblige employers to treat posted workers according to the same rules as local workers as set out by law or, if applicable, by a universally binding collective labour agreement of the host country.¹⁶⁵

Additionally, the same advantages, such as bonuses, allowances or pay increases according to seniority, and overtime rates, should also be offered.¹⁶⁶ Unfortunately, the 2018 Directive leaves some uncertainty about sick pay, maternity pay, compensation for unfair dismissal, and redundancy pay, which we believe might cause future disputes.¹⁶⁷ Besides, the phrase 'equal pay' is still very vague and does not imply that a posted worker is entitled to an identical salary and a benefits package that his local colleagues might be entitled to, such as lunch allowances and a company car.¹⁶⁸ Regardless of the remuneration, employers are obliged to separately reimburse travel and board and lodging expenditures when workers are required to travel for professional reasons.¹⁶⁹

4.3.2 Duration of the posting

Under the new provisions, a limit of 12 months of posting is introduced, which can be extended to 18 months if the service provider gives an acceptable justification. After these 18 months, the employment conditions of the host Member State will apply to the posted worker if they are more favourable than the home Member State's employment laws¹⁷⁰ This calculation of the period of stay is based on the cumulative stay of an individual worker. This added provision was a way of ensuring alignment with the rules on coordination of the social security systems¹⁷¹ and, at the same time, a means to fill the gaps left by the previous 1996 PWD where there was no clear interpretation of the words 'limited period' concerning the duration of posting.¹⁷²

¹⁶⁵ Voss (n 108) 46.

¹⁶⁶ *ibid.*

¹⁶⁷ Paul Minderhoud, 'Revised Posted Workers Directive: In the Service of Fair Labour Mobility?' (MoveS Seminar Croatia, Zagreb, 25 October 2019) 58.

¹⁶⁸ *ibid.*, 59.

¹⁶⁹ *ibid.*, 60.

¹⁷⁰ Sara Fekete, 'Revision of EU's Posting of Workers Directive: Blessing or Curse to Business?' (*Fragomen*) <www.fragomen.com/insights/blog/revision-eus-posting-workers-directive-blessing-or-curse-business> accessed 24 November 2020.

¹⁷¹ Which limits the duration of stay under home social security to a maximum duration of 24 months, which can be extended under the consent of home and host state.

¹⁷² Fekete (n 170).

Besides, it is essential to note that the 2018 PWD is entirely complementary to the 2014 ED as it mainly only addresses areas and problems that were not touched upon in 2014.¹⁷³ With the revision of the PWD, we can further argue that while it made improvements that relate to the clarification of certain areas of its original version (eg the definition of 'remuneration'), it introduces stricter requirements for all services providers active in transnational business, which may make it more difficult for cross-border transactions to take place.

5 Case study – Croatia

Since the 2018 PWD had to be implemented by July 2020,¹⁷⁴ it is not possible as yet to predict the specific consequences that it will have on the competitiveness of the countries that launched the yellow card procedure. In order to better answer our hypotheses, the authors of this paper have decided to present and analyse, in the form of a case study, the anticipated impact of the 2018 PWD as per the views of the Union of Autonomous Trade Unions of Croatia and the Croatian Employers' Association. The interviews were conducted with Agata Daj i (member of BusinessEurope and the Croatian Employers' Association) and Ana Mili evi Pezelj and Sun ica Brnardi (representatives of UATUC).¹⁷⁵

The aforementioned institutions were selected because of their familiarity with the subject matter of the Directive and their role in the yellow card procedure, where their views were of great importance in forming a reasoned opinion of the Croatian parliament.¹⁷⁶ They also reflect opposing interests – on the one hand, there is a need to improve the socio-economic status of posted workers (represented by the unions), and on the other hand to fight against the loss of competitiveness which results in a decrease in work (the Employers' Association). Additionally, the differences in their views on the 2018 PWD indicate that the divide goes much deeper than the apparent rift between the yellow card initiators and the countries that initiated the Directive. In other words, a division is formed inside states as well.

¹⁷³ Voss (n 108) 46.

¹⁷⁴ Directive (EU) 2018/957, Art 3.

¹⁷⁵ During the interviews with the representatives of the institutions mentioned above, a semi-structured interview method was used where the respondents were asked to provide answers to pre-set open-ended questions.

¹⁷⁶ We also attempted to reach the Croatian representatives of the EU Economic and Social Committee, but did not receive a response to our correspondence.

5.1 Croatian Employers' Association – 'The issue of posted workers should be regulated by the market'

The Association was founded in 1993 in order to protect and promote the rights and interest of its members.¹⁷⁷ From its beginnings, it has been a member of BusinessEurope¹⁷⁸ and has worked with other prominent international organisations such as the ILO¹⁷⁹ and IOE.¹⁸⁰ Moreover, the Employers' Association has participated in the work of the EU's consultative body, the EESC, which is composed of employers, employees and representatives of various interest groups.¹⁸¹

The Croatian Employers' Association was selected as the first subject of the analysis as there was congruence between their point of view and the opinion of the Croatian parliament. The Croatian Employers' Association and the Croatian parliament both emphasised that the issue of reduced competitiveness was the central issue of this Directive and that its implementation would further hamper the position of Croatian companies in the European market.¹⁸²

The Croatian Employers' Association¹⁸³ expects that the additional cost, as a result of the equalisation of the gross wages of domestic workers and posted workers in the same posts, would be a leading cause of the reduction of competitiveness of Croatian service providers.¹⁸⁴ The need for future contributions to be calculated from the gross wage earned abroad would significantly increase the cost of the posted worker and reduce the employer's profit to such an extent that it would be unprofitable for the employer to continue to post workers or to apply for tenders. These arguments are backed up by an example of calculations of the accounting and counselling company from Germany prepared for the Tehnomont Shipyard Pula on 22 April 2016.¹⁸⁵ Based on this calcu-

¹⁷⁷ 'About Us' (HUP) <www.hup.hr/en/about-us.aspx> accessed 27 November 2020.

¹⁷⁸ 'BusinessEurope' (HUP) <www.hup.hr/en/businesseurope.aspx> accessed 24 November 2020.

¹⁷⁹ 'International Labour Organisation (ILO)' (HUP) <www.hup.hr/en/international-labour-organisation-ilo-and-international-labour-conference-ilc.aspx> accessed 27 November 2020.

¹⁸⁰ 'The International Organisation of Employers (IOE)' (HUP) <www.hup.hr/en/the-international-organisation-of-employers-ioe.aspx> accessed 27 November 2020.

¹⁸¹ 'European Economic and Social Committee (EGSO)' (HUP) <www.hup.hr/en/international-affaris.aspx> accessed 27 November 2020.

¹⁸² See (n 144).

¹⁸³ Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020).

¹⁸⁴ Directive (EU) 2018/957, Preamble recital 18.

¹⁸⁵ 'Anketa za tvrtke – procjena učinaka u slučaju provedbe ciljane revizije Direktive o izaslanim radnicima 96/71/EZ EP (gubitka vrijednosti posla i broja radnih mjesta)' ['Survey

lation, it is shown that the average cost per worker would increase from EUR 1,000 to EUR 1,500 per worker per month. Given that Tehnomont Shipyard sends 250 workers to Germany, there would be an increase in costs of approximately EUR 3 to 4 million each year, which would cause the closure of its operations in Germany. The only solution to the increased costs would be to increase the prices of services offered by the Croatian employers in foreign countries. As a result, Croatian competitiveness would be reduced as the companies would lose the advantage of obtaining jobs on account of cheaper labour and would face the practice of jobs going more frequently to domestic workers.¹⁸⁶

Although the previously mentioned example of the shipyard indicates the danger of the complete termination of the posting of workers from the Republic of Croatia in the future, the Employers' Association believes that, due to the tradition of doing business in foreign countries and proper preparation, larger companies would still be able to continue to provide their services. Smaller companies are the ones that would face the biggest problems, which, in the opinion of the authors, could have negative impacts, such as layoffs or even the collapse of the company as a whole.

Another question that arose during our interviews was the situation with companies in the countries that were the initiators of the 2018 PWD, those that receive the largest number of posted workers and those that sought, through this Directive, to reduce the problem of social dumping. Our interviewee points out that the Directive will have a negative impact on large foreign companies that have been interested in posting due to a lack of workforce.¹⁸⁷ They may be forced to relocate their production to areas where they would be able to find cheaper labour if posting becomes unprofitable.¹⁸⁸ The sole beneficiaries of the whole situation would be small and medium-sized enterprises in the recipient countries. Posting was not very important to them because of the small number of workers they need and the negligible differences in the costs of labour, since these were less profitable jobs. It is precisely these companies that could attract workers from poorer countries and recruit them permanently if the predicted reductions in the numbers of posted workers prove correct in the future.¹⁸⁹ This means, according to our interviewee, that small and

for Companies – Impact Assessment in the Case of the Targeted Revision of the Directive on Posted Workers 96/71/EC EP (Loss of Value and Number of Jobs)] (2016) Tehnomont shipyard Pula d. o. o. (document on file with the authors).

¹⁸⁶ Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020).

¹⁸⁷ *ibid.*

¹⁸⁸ The Association's representative was referring to non-European countries.

¹⁸⁹ Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020).

medium businesses might employ foreign workers if the reduction in the numbers of posting means that they cannot find jobs as posted workers.

Finally, the Croatian Employers' Association considers that the Directive was adopted to favour wealthier countries rather than to address social dumping. Reducing the ability of employers to continue posting workers will lead to higher numbers of departures of 'our'¹⁹⁰ workers to countries with higher social status and their permanent employment in foreign companies. Therefore, the solution to the regulation of posted workers should, according to the Employers' Association, be left to the market and in line with the 1996 PWD, which, in its opinion, regulated this matter thoroughly. Due to the mobility of workers inside the European Union,¹⁹¹ Croatian employers would still be forced to raise the wages of their workers without this Directive to retain them. This would increase the standard of living of workers without compromising competitiveness.¹⁹²

5.2 The Union of Autonomous Trade Unions of Croatia – 'The question of posted workers should be viewed from the point of view of society, not of the individual'

The Union of Autonomous Trade Unions of Croatia is an independent and voluntary interest organisation founded in 1990¹⁹³ It consists of 20 unions and a total of 99,682 members,¹⁹⁴ making it one of the most prestigious associations in the country. Much like the Employers' Association, the trade unions have worked alongside prominent groups such as the EESC.¹⁹⁵ One of its projects, most crucial to the issue of posting, is a specialised advisory office for the rights of posted workers, where these workers can come and receive information about the rights granted to them by the Posted Workers Directives.¹⁹⁶

Unlike the Croatian Employers' Association, the representatives of UATUC did not agree with the reasoned opinion sent by the Croatian parliament in the yellow card procedure.¹⁹⁷ The representatives of

¹⁹⁰ The Association's representative was referring to Croatian workers.

¹⁹¹ Which has become rather simpler for Croatians since joining the EU in 2013.

¹⁹² Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020).

¹⁹³ 'About Us' (SSSH) <www.sssh.hr/en/static/uatuc-1> accessed 27 November 2020.

¹⁹⁴ *ibid.*

¹⁹⁵ 'EESC Info' (SSSH) <www.sssh.hr/hr/vise/0-0/egso-info-787> accessed 24 November 2020.

¹⁹⁶ 'Pravno savjetovalište za upućene radnike' (SSSH) <www.sssh.hr/hr/static/podrucja-rada/radno-pravo/pravno-savjetovaliste-za-upucene-radnike-100> accessed 24 November 2020.

¹⁹⁷ Interview with Ana Miličević Pezelj and Sunčica Brnardić, representatives of UATUC (Zagreb, Croatia, 6 March 2020).

UATUC are of the opinion that the parliament does not fully understand the wage discrimination issue and social dumping and that by initiating the yellow card procedure, parliament diminishes the significance of the problem.

Its argumentation is based on the complaints received (mostly from workers in the construction sector), as well as seeing the practice of posted workers so far, as a ground for exploiting and circumventing the rules. According to the UATUC representatives, in the current situation, only temporary work agencies and so-called letterbox companies, set up to circumvent social security, collective agreements and taxes, are profiting.¹⁹⁸ This allows employers to seek less for the same job and thus become more competitive in the foreign market. It is because of this practice that the countries of 'Eastern Europe', including the Republic of Croatia, contribute to social dumping within the European Union. Although countries like Croatia contribute to social dumping, they state that this problem arose long before Croatia's accession to the EU and that the accession of low-income countries only further intensified the pay gap among workers who do the same job.

Furthermore, the representatives of UATUC consider that Croatia has neglected that the Directive also protects its workers from lower labour costs caused by the arrival of workers from EU countries with a lower standard of living than Croatia's.¹⁹⁹ They notice positive sides to the protection of Croatian workers against unfair competition, but point out that a new problem is opening up which is the growing employment of third-country nationals where quota numbers are set. This Directive does not regulate the employment of these workers.

One of the positive consequences of the 2018 PWD, when it is implemented, might perhaps be the increase in workers' efficiency due to better working conditions and higher wages.²⁰⁰ This statement is based on research conducted in 2018 on the primary motivators for employee satisfaction, where workers' wages and income security are cited as one of the critical points for greater motivation and therefore for better

¹⁹⁸ See 'Europski parlament za pravedne uvjete upućivanja radnika' ['European Parliament on Fair Conditions for Posting Workers'] (SSSH) <www.sssh.hr/hr/vise/aktivnosti-75/europski-parlament-za-pravedne-uvjete-upucivanja-radnika-3462> accessed 24 November 2020.

¹⁹⁹ 'Rastu duplo brže od nas: Hrvatsku bi po visini plaća uskoro mogle prestići Rumunjska i Bugarska' (*Poslovni.hr*, 29 April 2020) <www.poslovni.hr/hrvatska/hrvatsku-bi-po-visini-placa-uskoro-mogle-prestici-sve-srednjoeuropske-zemlje-352598> accessed 24 November 2020.

²⁰⁰ Interview with Ana Miličević Pezelj and Sunčica Brnardić, UATUC representatives (Zagreb, Croatia, 6 March 2020).

results.²⁰¹ However, the worker is not the only one responsible for the efficiency and organisation of the work, as management roles are a vital component contributing to the overall work environment and efficiency.²⁰² Countries like Norway, where the society's value system is different and where employers are proud of social equity in payment within the community, as well as the ability of all to live off their work, is cited as a positive model.²⁰³

Finally, our interviewees referred to the opinion concerning reduced competitiveness, as a central position of the Employers' Association. They point out that the new, amended Directive has positive aspects for employers as well, such as the fact that it will help those who comply with the rules and do not violate workers' rights and that non-compliant companies that pose unfair competition will have to operate under the same rules imposed by the 2018 PWD. Therefore, the provisions of this Directive will contribute to the more transparent and better-performing business of compliant employers. As a solution to increased labour costs caused by the Directive, they emphasise the role of the state in the issue of posted workers. The Republic of Croatia should provide access to cheaper financial resources for employers and provide incentives to ensure their liquidity and prevent layoffs. With the help of the state, as an underlying condition for competitiveness, it is necessary to achieve more efficient public administration and better digitalisation of the whole workers' posting system.²⁰⁴

At the end of their review of the 2018 PWD, they pointed out that reliance on the market model of regulation is not reasonable as it is precisely this model of regulation that has led to the problems encountered by workers and that it is crucial to look at this issue from the point of view of society and to raise the quality of life of workers. They see the solution in a bipartite model in which unions, alongside employers, will help regulate this issue.

5.3 Case study analysis

Following the interviews with the representatives of the Employers' Association and UATUC, the authors conclude that the 2018 PWD has caused wide divisions within the Republic of Croatia. The views of both sides are products of their thorough analysis and indicate the complexity

²⁰¹ Union of Autonomous Trade Unions of Croatia, '*Rad po mjeri čovjeka*' (2018) <www.sssh.hr/upload_data/site_files/rad-po-mjeri_brosura.pdf> accessed 24 November 2020.

²⁰² Interview with Ana Miličević Pezelj and Sunčica Brnardić, UATUC representatives (Zagreb, Croatia, 6 March 2020).

²⁰³ *ibid.*

²⁰⁴ *ibid.*

of the issue of regulating posted workers. As a fundamental argument, the Croatian Employers' Association points out that countries such as Croatia will lose competitiveness in the EU market due to the adoption of this Directive. However, a loss of competitiveness of the 'poorer' countries could also become a problem for the European Union itself. The work of two authors, F De Wispelaere and J Pacolet, who have analysed the economic importance of posted workers in the EU based on statistical data collected from the Member States, will serve to explain this claim.²⁰⁵ According to De Wispelaere and Pacolet, one of the benefits of posting is its impact on the free movement of labour within the EU. They state that in 2014 there were 1.45 million A1 permits issued for posted workers and that the number is increasing each year.²⁰⁶ Luxembourg²⁰⁷ is given as one of the examples where the number of posted workers is as high as 20.7%, or Belgium²⁰⁸ where 30% of all employees in the construction sector are posted workers.

Furthermore, they emphasise the importance of posting in stimulating intra-EU competitiveness as well as in increasing the household income of posted workers. The increase in income is due to the vast difference in the minimum wage among the EU countries. Even the obligation for employers to pay minimum wages in the countries where the workers are posted²⁰⁹ often results in the fact that the workers earn more than an average wage²¹⁰ in their sending country.²¹¹ This means that even when receiving a minimum wage, there is still an increase in living standards for posted workers since their home country's average wage is most likely to be much lower.

All of the stated benefits for the receiving countries as well as for the sending countries could be jeopardised by the increase in costs for employers from the sending countries. Therefore, according to De Wispelaere and Pacolet, it is crucial to determine whether the 2018 PWD will cause a loss of competitiveness. The most crucial aspects that have an impact on the ability of employers from poorer countries to offer their services at a lower cost and as such to be competitive in the market are the amount of taxes they pay in their home country, the amount of social security contributions paid by employers, and gross wages.²¹² In gener-

²⁰⁵ De Wispelaere and Pacolet (n 107).

²⁰⁶ *ibid.*, 10.

²⁰⁷ *ibid.*, 11.

²⁰⁸ *ibid.*, 20.

²⁰⁹ *ie* Denmark where the average salary is 39% above the EU average.

²¹⁰ *ie* Bulgaria with an average wage 52% below the EU average.

²¹¹ De Wispelaere and Pacolet (n 107) 15.

²¹² *ibid.*, 12.

al, social security contributions and income taxes²¹³ are lower in most sending countries than in the recipient countries.²¹⁴ Therefore, although the obligation of Croatian employers to pay the minimum gross wage of the recipient country would cause a substantial increase in the cost of labour, they could still offer their services more cheaply.

Nevertheless, our opinion aligns with that of Croatia's UATUC, in which commercial gain should not be obtained by curtailing workers' rights. Given the research conducted by J Cremers on good practices conducted by countries to maintain a fraud-free environment, we believe that cooperation between the Member States might help in implementing the rules set out by the recent 2018 PWD and in this way diminish fraudulent behaviour and at the same time guarantee working rights. Some of these good practices are the use of e-government, as well as the use of different databases through data sharing, matching or mining, strengthening of the labour inspectorate and requirements for identity cards for all workers on construction sites.²¹⁵ Furthermore, a universal, EU-wide monitoring system could lower the burden on firms and also reduce the problems of differential treatment in the Member States.²¹⁶

As a conclusion to this case study analysis, the authors of this paper believe that the changes introduced by this Directive will have a dual effect. On the one hand, the socio-economic status and rights of workers will be improved. In contrast, in countries such as Croatia, fewer workers will be posted due to the increased costs that will cause some employers to become unprofitable, which confirms the second hypothesis of this paper that the increase in regulation will decrease the number of posted workers.

6 Conclusion

During the revision of the 1996 PWD, the Commission highlighted that the old legislation 'no longer replies to new realities within the single market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition'.²¹⁷ This statement is connected to the fact that in the year the original PWD was

²¹³ OECD, *OECD EC Tax and Benefits Indicator*.

²¹⁴ *ibid*, 12.

²¹⁵ Cremers (n 111) 43.

²¹⁶ Roberto Pedersini and Massimo Pallini, 'Posted Workers in the European Union' (2010) European Foundation for the Improvement of Living and Working Conditions <www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union> accessed 24 November 2020 33.

²¹⁷ Voss (n 108) 45.

adopted there were only 15 Member States.²¹⁸ As of February 2020, there are 27 Member States that make up the European Union.²¹⁹ Even if we only address the changing number of Member States, we can agree that the single market in the mid-1990s is quite different from the situation existing in today's market, which means that a revision of the 1996 PWD was necessary to adapt the previous regulations to the changing single market.

That said, after a thorough analysis of the issue of posted workers, we believe that the question of whether or not the 2018 PWD will improve the posting of workers is clearly not black or white. Rather, it is a very complex issue that goes much deeper than the surface divide between 'old' and 'new' Member States or 'richer' and 'poorer' EU countries. Using a case study method, we have shown that the division is mostly based on the difference of interests that exist within each country. These interests are in the legislative process often articulated as ideological beliefs of higher or lesser public intervention in the market. This forms a conflict inside each country between those who believe the state (or the EU) should limit the amount of intervention it could have on the market and those who believe the opposite. Therefore, proving our primary hypothesis, the posted workers dispute is much more complicated than the opposition between 'richer' and the 'poorer' European countries.

The same arguments remain in assessing the relevance of the new 2018 PWD. As these arguments are partly ideological, the influence of the new, amended Directive cannot be evaluated neutrally but is ideology dependent. Those who are against market intervention will see it as a problem. In contrast, those who believe that the protection of individual worker's interests requires public intervention in the market will see it more positively.

It is still early to predict the real influence of the new legislation on the internal market, given that the implementation period only expired in July 2020. However, based on the presented predictions, we can expect a rise in costs for companies engaged in the posting of workers, making it unprofitable for some firms who have based their earnings on being able to post low-income workers to other 'richer' Member States to remain in this market. This may result in a reduction of posted workers overall. One of the objectives of the internal market is to increase cross-border movements. Therefore, the new legislation might end up having consequences that are contrary to the goals of the internal market. There are, consequently, already indications that our secondary hypothesis might

²¹⁸ 'The 27 Member Countries of the EU' (*Europa*) <https://europa.eu/european-union/about-eu/countries_en> accessed 24 November 2020.

²¹⁹ *ibid.*

prove correct. This can, in turn, raise concerns about the legitimacy of the new legislation from the point of view of the EU internal market policy. In principle, the EU has competence only to pursue those measures that enhance the functioning of the internal market.²²⁰ As the new Directive might go in a different direction, this may lead to the conclusion that the EU is no longer just a market-building project, but instead a social project as well. These might be the ‘new realities of the single market’ of which the Commission spoke in the statement we reproduced at the beginning of this concluding section. Therefore, the balance between market enhancing measures and the protection of social interests might be different in the current EU than at the time of the *Laval* judgment. If so, even if the new legislation leads to a decrease in the movement of posted workers, it might still be seen as legitimate, as it balances between the two goals of the EU integration process – building an internal market, but also caring for a social Europe.

Besides, we can assume that countries that have been most opposed to the new Directive will also have the greatest problems in implementing it. As several studies show,²²¹ areas such as food regulation, transport regulation and social policy regulation have ‘a lot of conflicting interests and, therefore, potential resistance in implementation.’²²² Resistance in implementation from opposing forces usually leads to a delay in the implementation of a directive.²²³ This time, delay, we believe, can be anticipated in Croatia as well as in other countries that have participated in the yellow card procedure. Consequently, the analysis of the posted workers issue shows us the timeless conflict between workers’ rights and business competitiveness, which can best be summed up with the phrase ‘one person’s social dumping is another’s competitive advantage’.²²⁴



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²²⁰ Case C-376/98 *Germany v the European Parliament and the Council (Tobacco Advertising)* ECLI:EU:C:2000:544.

²²¹ See: Brigitte Unger, *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy* (Edward Elgar 2014) 50.

²²² *ibid.*, 50.

²²³ *ibid.*

²²⁴ Carter (n 51) 49.