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EXTENDING THE PRINCIPLE OF EQUAL TREATMENT TO POSTING OF WORKERS

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SUMMARY

Posting of workers remains a lacerating topic for the European political debate. While the global number of posted workers is limited when compared to the whole workforce, its concentrated nature, both in geographical and industrial terms, makes its effect particularly felt in some parts of the economy, such as the construction industry of several Member States. On the other hand, the free movement of workers in the European Union covers a much larger share of the workforce and has yet to attract a similar heated debate, apart from the specific discussions surrounding Brexit. From a legal perspective, the different treatment of "normal" mobile workers, covered by the principle of equal treatment, provides an explanation for this difference. As such, the whole legal framework regulating wages, employment conditions and social security of posted workers should be changed to make it more sustainable and contribute to the strengthening of the European project. Considering how posting practices are in fact used by undertakings in "high cost" Member States to have access to "cheaper" labour force, through legal constructions such as subcontracting chains, the reform of posting of workers should be framed not as a conflict between Member States, but as a tool to ensure a fairer division of the profits of economic activities between workers and their employers.

The present study formulates several proposals to ensure the application of the principle of equal treatment to posted workers, as well as to equalise social security contributions with those paid in the Host State and extend the social protection of posted workers. Concerning working conditions, the proposals aim at either a) changing the Posting of Workers Directive to apply all mandatory conditions to posted workers from day 1, while also modifying the legal base to include the free movement of workers and the chapter on social policy, or b) abrogating the Posting of Workers Directive to move the rules on posting of workers under the Regulation on Free Movement of Workers. In both scenarios, the principle of equal treatment with comparable local workers is introduced in the legislation. From the point of view of social security, the proposed changes implement the payment of contribution at the level of the Host State for the duration of the posting, with a mechanism of automatic transfer to the Home State at the end of the posting. This is completed by an extension of the protection of posted workers while in the Host State, allowing them to benefit from the social security system of that state for risks connected with their employment situation, such as sickness benefits and coverage in case of work accidents. These changes are coupled with proposals to simplify administrative practices and to create a European portal to access information related to wages and working conditions applicable to posted workers. The whole package of measures goes in the general direction of exchanging the strict application of equal treatment to posted workers with the simplification of posting.

1. INTRODUCTION

More than thirty years after the first decisions of the Court of Justice of the European Union in the field of posting of workers, the regulation of temporary labour mobility in the context of a provision of services remain a highly contentious issue in the European political debate. Looking at the more recent statistics, posting of workers covers a number of workers (around 1.8 millions) much lower than "typical" mobile workers, that is, those moving under the free movement of workers protected by the EU Treaties (around 17 millions)[1]. However, the spot occupied by the two phenomena in the European political debate is essentially reversed. Although the free movement of workers has been one of the main topics in the context of the political debate surrounding Brexit, it has been largely accepted in the rest of the EU. On the other hand, issues related to posting of workers have proved to be lacerating for the European political debate, at least since the role played by the figure of the "Polish plumber" in the French referendum over the EU constitutional Treaty (2005). In two occasion, national parliaments had recourse to the (otherwise rarely used) "yellow card" procedure[2] to manifest their opposition to a new legislation dealing, fully or partially, with posting of workers, namely the so-called "Monti II" proposal[3] and the revision of the Posting of Workers Directive.[4]

When considered from a legal perspective, this paradox can be explained by the different treatment reserved to these two situations. Workers' mobility in the framework of the free movement of workers is characterised by the application of the principle of equal treatment: when it comes in particular to working conditions, mobile workers cannot be treated differently than national workers.[5] On the other hand, posting of workers has been developed as a zone of exception with respect to this principle, as regards both the working conditions and the social security of posted workers. This has given rise to fears concerning the risks of unfair competition and race to the bottom in the field of labour and social rights, driven by companies using posted workers to undercut local labour standards and lower their social security contributions.

Though the official figures concerning the number of posted workers are likely to represent just the tip of the iceberg of the phenomenon, the continuous growth along the last decade which they show calls for urgent solutions. These should provide a more solid legal framework for posting of workers, thus contributing to the political resilience of the European project as a whole. The present study argues that such an objective can and should be pursued by extending the principle of equal treatment to posted workers, reinforcing their position when it comes to social security, and bringing the temporary mobility of labour back into the scope of the free movement of workers.

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1. F. DE WISPELAERE, L. DE SMEDT and J. PACOLET, Posting of workers - Report on A1 Portable Documents issued in 2018, European Commission, 2020, and Eurostat.
2. Protocol no. 2 on the application of the principles of subsidiarity and proportionality.
3. Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130, 21 March 2012.
4. Directive 2018/957/EU of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
5. See Article 7 of Regulation 492/2011/EU on freedom of movement for workers within the Union.

This study explores legal avenues to bring about these changes. To do so, after a presentation of the current situation and challenges, it includes several concrete proposals for amending the existing legislation covering posted workers. These proposals should not be considered as the only possible way forward, as different legal instruments can be used to pursue a similar political choice. Academic research and legal analysis are no substitutes for the point of view of stakeholders and democratic debate. Secondly, these proposals deliberately only focus on the substantial situation of posted workers, as well as on some technical aspects for the application thereof, and, as such, do not consider practical aspects linked with the difficulties of enforcement. Thirdly, the adoption of these reforms would also entail an important work of "legislative polishing" and coordination of other legal text, which would have been impossible to explore fully in the limited context of the present study.

2. WHAT IS POSTING OF WORKERS?

At its core, posting of workers represents a form of temporary labour migration. In fact, the OECD identifies it as the main form of temporary labour migration in the European Union.[6] The *main* piece of EU legislation concerning this form of mobility, namely the Posting of Workers Directive[7], identifies three situations which should be considered as covered under the concept of "posting":

- Transnational (sub)contracting: covering the situation of workers employed in the Home State by the posting undertaking who are then "sent" to the Host State in order to work directly under the direction of their employer in the context of a provision of services.
- Intra-group posting: covering the situation where one or more workers working in the Home State for the posting undertaking are then "sent" to the Host State in order to work in a different undertaking or establishment owned by the same group of the posting undertaking.
- Posting by temporary work agencies: covering the situation where a temporary employment undertaking or a placement agency hires out a worker to a user undertaking operating in the Host State.

Key concepts

Posting undertaking: an undertaking legally established in one Member State which intends to send its workers to perform work in a different Member State in the context of a provision of services.

Posted worker: a worker who is temporarily sent by their employer to a Member State other than the State in which they normally work to carry out their work in the context of a provision of services.

Home State: the Member State whose law is applicable to the contract of employment of the posted worker (normally the state of establishment of the posting undertaking).

Host State: the Member State where the work done by posted workers is carried out.

6. OECD, International Migration Outlook 2019, OECD Publishing, 18.

7. Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

When it comes to its legal framework, several pieces of legislation are relevant to determine the working conditions and social security situation of posted workers. These are in particular:

- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, as modified by Directive 2018/957/EU (applicable from 30 July 2020)[8];
- Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation');
- Regulation No 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (Rome I);
- Regulation (EC) No 883/2004 on the coordination of social security systems, and its implementing Regulation (EC) No 987/2009.

The interplay of these pieces of legislation determines a situation of mobility which is "**employer-driven**". The presence of the posted worker in the Host State is based of the business decision of their employer of carrying out a provision of services in a Member State other than the one where the undertaking is established.

What it matters here is that this specific legal construction places posted workers, when it comes to their employment conditions and social security, in a very different situation when compared to workers circulating under the free movement of workers (Article 45 TFEU). An Italian worker moving to France to start a new job (even a fixed term one) there will enjoy equal treatment *vis-à-vis* local workers and will be covered by the French system of social security. A worker moving between the same two Member States but doing so at the request of their Italian employer in order to carry out a provision of services in France will have their situation regulated by the abovementioned legislation. In the following paragraphs I will briefly outline their situation.

2.1. Wages and working conditions

The Rome I Regulation determines which law is applicable to contracts in case of possible conflict of law, such as in the case of transnational employment situation. The main rule (Article 8 of the Rome I Regulation) which is relevant for the situations of posted workers can be summarised as follows:

8. For the specific rules concerning the road transport sector see Directive (EU) 2020/1057 of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012.

- If the parties have not opted for a specific legislation to be applied to the employment contract, the contract shall be governed by the law of the country in which the employee habitually carries out his work;
- The country identified following the previous rule "shall not be deemed to have hanged if he is temporarily employed in another country".

The application of these rules would entail, for a situation where a worker is normally employed in the Home State and only temporarily posted to a different Member State, **the application of the employment conditions of the Home State**. It is important to stress already at this point that this would be the result of a simple abrogation of the Posting of Workers Directive.

Article 9 of the Rome I Regulation includes a deviation from this scheme, by providing **that overriding mandatory provisions** in the Host State should be applied to the abovementioned situation, irrespective of the law applicable to the employment contract. It goes without saying that the identification of these mandatory provisions leaves a large amount of leeway to the Host State, which was confirmed by the Court of Justice in one of its earliest decision on posting of workers:

> "[...] Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established" [9]

The Posting of Workers Directive can be understood as the instrument to **identify which provisions Member State should apply to posted workers.** Considering that the Directive reforming this instrument is now applicable, here I will only present the situation under the "reformed" Directive.

The Posting of Workers Directive obliges Member State to extend **a list of specific protections** to posted workers, covering important employment conditions such as remuneration, maximum work periods, minimum paid annual leave, and health and safety measures[10]. The Directive identifies which legal instruments should be taken into account when determining these protections. These are:

1. Laws, regulations and administrative provisions;
2. Universally applicable collective agreements, meaning collective agreements which are legally binding on all undertakings in the geographical area and in the specific industrial sector or profession;

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9. CJEU, Case C-113/89, *Rush Portuguesa Ldª v Office national d'immigration*, 27 March 1990, §18. It should be noted that just a few years later the Court had already developed a more restrictive approach, only allowing the application of "legislation, or collective labour agreements entered into by both sides of industry *relating to minimum wages*" (my emphasis). See CJEU, Case C-43/93, *Raymond Vander Elst v Office des Migrations Internationales*, 9 August 1994, §23.

3. Generally applicable collective agreements, meaning collective agreements which are either a) generally applied[11] in the geographical area and in the specific industrial sector or profession or b) concluded by the most representative employers' and labour organisations at national level.

The application of collective agreements identified at point (3) can be done "in the absence of, or in addition to" collective agreements identified at point (2). This means, for instance, that a Member State characterised by both a national level of mandatory collective agreements and a regional level of collective agreements which are generally applicable in the given region and improve on the level of the national agreement, could opt for applying the latter ones to posted workers.

The Posting of Workers Directive also states that the application of the list of specific protections should not prevent application of **more favourable conditions** to workers[12]. The Court of Justice has interpreted this to only cover more favourable conditions which are applicable under Home State rules.[13]

2.2. Social Security

The European Union, all along its various denominations, has been coordinating national social security systems for 60 years. This is presently organised by Regulation 883/2004 (Coordination Regulation) and its implementing Regulation (No. 987/2009). This legal framework provides rules for determining *which* national system of social security will be applicable to the specific personal situation, operating, apart from certain specific exceptions, under the principle that only one national system should be applicable to a person. The so-called *lex loci laboris* (law of the place of employment) is the main principle to determine the applicable legislation.

The rules applicable to posted workers sacrifice the latter principle in the name of the former. In order to avoid the multiplication of applicable legislations, posted workers will be covered by the social security system of a Member State other than the place where they are carrying out their work. Notably, Article 12 of the Coordination Regulation establishes that **a posted worker shall continue to be subject to the social security legislation of the Home State**, provided that the (anticipated) duration of the posting does not exceed twenty-four months and that they are not sent to replace another posted worker. The Administrative Commission[14] has also stated that to fall under this Article, posted workers must have been subject to the legislation of the Home State for at least 1 month prior to the posting.[15]

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10. The full list included in Article 3(1) of the Posting of Workers Directive is: (a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

11. Generally applicable collective agreements should be intended as covering the great majority of undertakings in the occupation or industry concerned.

12. Article 3(7) of the Posting of Workers Directive.

13. Se CJEU, Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, 18 December 2007 (hereinafter, "Laval"), §80.

It is also important to point out that the scope of the concept of "posting" used in the Coordination Regulation is not identical to the one used by the Posting of Workers Directive. As we have seen, the latter only covers postings in the context of a transnational provision of services, whereas the former is applicable to all situations where a worker is "sent" to work in a different Member State on behalf of their employer (such as in the case of a business trip or the participation to a conference abroad).

In order to prove the affiliation to the social security system of the Home State, the posting undertaking must contact the competent social security institution in the Home State and request a **portable A1 document**. This document establishes the presumption that the holder is properly affiliated to the social security system of the Member State that has issued the certificate and, consequently, that it has no obligations to pay contributions in another Member State.

2.3. Key figures

The most authoritative source of data concerning the posting phenomenon is based on the abovementioned A1 documents. Researchers from the HIVA-KU Leuven compile a yearly report based on these documents which tries to provide a precise picture of the number of postings during a given year, as well as historical data.

The most recent report,[16] published at the end of 2019 and based on data from 2018, includes the following key figures:

- In 2018 there were around **1.8 million** of individual postings with an increase of 165 000 postings compared to 2017. This continues an upward trend which has been ongoing since 2011, where 1.1 million postings were recorded.
- The average duration of an A1 document is **91 days per year**
- Postings represent the **0.4% of total EU employment**
- 47% of A1 documents are issued in the **construction sector**
- Around **64% of A1 documents were issued by EU-15 Member States**[17] and **35% by EU-13 Member States**. Approximatively **84% of A1 documents were issued for a posting to EU-15 Member States** and only 8% for postings to EU-13 Member States.

14. The Administrative Commission includes a representative of the government of each Member State, as well as a representative of the Commission. It deals with administrative matters connected with the coordination of social security systems, as well as with questions of interpretation of the applicable regulations. Its tasks and functioning are regulated by Articles 71 and 72 of Regulation 883/2004.

15. Administrative Commission Decision A2 of 12 June 2009, concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State.

16. F. DE WISPELAERE, L. DE SMEDT and J. PACOLET, *Posting of workers* - Report on A1 Portable Documents issued in 2018.

It is important to highlight that data concerning posting of workers remains imprecise. The main weakness of these data derives from underreporting: posting undertaking might simply decide to skirt their obligation to request the A1 document for their worker, particularly in the case of short-term postings.

The second caveat to be kept in mind stems from the sectoral and concentrated nature of the phenomenon. It would be easy to discard it as rather irrelevant, due to the tiny fraction of the total EU employment which it comprises. However, the same A1 report indicates, in its 2019 publication,[18] how postings amount to around 26% of total employment in the construction sector in Luxembourg, and 20% in Belgium and Austria. The share is of course lower for bigger labour markets, but its impact is still visible with a share of 7.2% of total employment in construction in Germany and 5.7% in France. This concentrated nature also leads to the third caveat. When considering the economic and social impact of posting, one should push back against the erasure of the experience of the "losers" of globalisation (of which the EU internal market is one of the many faces). Indeed, an aggregate positive impact might hide a negative impact for specific groups of people and specific areas.[19] As an example, the same authors of the A1 Report indicate how, in 2012, Belgium experienced at the same time a slight decrease of employment in the construction industry and a slight increase of the number of incoming posted workers in the same sector.[20]

17. I use here the same terminology of the A1 Report. EU-15 Member States indicates Member States which joined the EU prior to 2004, whereas EU-13 Member State are those which joined the EU from 2004 onwards.

18. F. DE WISPELAERE, L. DE SMEDT and J. PACOLET, *Posting of workers - Report on A1 Portable Documents issued in 2018*, 37.

16. Mutatis mutandis, see J. PISANI-FERRY, *Why Are Voters Ignoring Experts?*, Social Europe, 5 July 2016, https://www.socialeurope.eu/voters-ignoring-experts : "experts should be more granular in their approach. They typically should examine policies' impact not only on aggregate GDP in the medium term, but also on how policies' effects are distributed over time, across space, and among social categories. A policy decision can be positive in the aggregate but severely harmful to some groups – which is frequently the case with liberalization measures".

20. F. DE WISPELAERE and J. PACOLET, An ad hoc statistical analysis on short term mobility – Economic value of posting of workers, 2016, 19.

3. TENSIONS AND ISSUES

As it was anticipated in the Introduction, the posting phenomenon and its legal framework has been the subject of a heated political debate ever since its appearance in the European scene. If the adoption of the Posting of Workers Directive followed the widening differentials in wages and social protection entailed by the accession of Spain and Portugal (in 1986), the topic received a renewed attention since 2004. The reasons for this are, of course, multifaceted but two main drivers can be identified. The first was the increase of distance between wages and labour costs entailed by the accession of the new Member States: the ratio between the lowest and the highest minimum wage went from 1:3 at the moment of the adoption of the Posting of Workers Directive to 1:10.[21]

The second driver was a series of decision delivered by the Court of Justice between the end of 2007 and 2008. These decisions have been widely debated and have left behind a sense of mistrust when it comes to the role of the Court of Justice in social matters. From the point of view of posting of workers, the effects of these decision can be summarised as follows:

1. Due to its legal basis, the Posting of Workers Directive should be interpreted as an instrument to facilitate the freedom to provide services;[22]
2. **The Posting of Workers Directive represents the maximum protection that Member states can apply to posted workers.** Applying conditions going above the minima provided by the Directive or beyond the list of subjects included in the same instrument constitutes a disproportionate restriction of the freedom to provide services;[23]
3. (Following from point n° 2) The use of collective action to conclude a collective agreement not included under those applicable following the Directive, or covering working conditions going above or beyond those included in the Directive constitutes a disproportionate restriction of the freedom to provide services;[24]

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21. F. DE WISPELAERE and J. PACOLET, *An ad hoc statistical analysis on short term mobility – Economic value of posting of workers*, 13.

22. CJEU, Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, 3 April 2008, §36.

23. *Laval*, §81, and CJEU, Case C319/06, *Commission v Luxembourg*, 19 June 2008, §47.

24. *Laval*, §99.

In the words of the 2010 Monti Report, these decisions revived "the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level"[25]. In particular, the situation emerging from the case law of the Court of Justice had two important consequences. First, national systems characterised by frequent company level agreements or practices providing better protection or higher wages when compared to the minimum standards would face pressure from posted workers, as these would end up being "cheaper" for posting undertakings than what would be normal at local level. Second, national systems of collective bargaining which do not feature mechanisms to make collective agreements legally binding, and rely instead on negotiations backed by the use of collective action by trade unions to guarantee minimum standards, found themselves unable to extend any of those to posted workers.

The reform of the Posting of Workers Directive of 2018 provided some answers to the first kind of problems. With some degree of simplification, between the two sides, one pushing for more equal treatment between posted and local workers and the other for the application of (more) country of origin rules, the former scored a partial but significant victory. By replacing the concept of "minimum rates of pay" with "remuneration" it clarified that the wage applicable to posted workers could not simply the minimum possible rate applicable in the given Member State or sector. However, posting of workers still presents a series of tensions and challenges in the field of working conditions and social security, as well as for the future development of the broader European project, which I will summarise below. Before delving into the difficulties, it is worth noting that these deal with *legal* posting of workers, that is, posting of workers which respects the legal framework as set out by the European legislator and transposed by national Member States. The present study focuses on this situation.

However, because of it characteristics, the posting phenomenon is also prone to outright violations of the law and illegal practices, ranging from double payslips to undeclared work[26]. The phenomenon has proven to be a particularly difficult challenge for labour inspectorates all over Europe due to a series of characteristics, such as the temporary (and often short) presence in the Host State, the difficult cooperation between administrations in different Member States[27], and the necessity to apply a double set of standards to the same employment situation. Furthermore, as we saw before, posting of workers is concentrated in a sector (construction) which is in itself challenging, due to the dispersed nature of workplaces and the presence of subcontracting chains. Finally, posted workers themselves are characterised by many of the challenges which involve migrant *and* precarious workers, in terms of lack of knowledge of their rights, difficulty to access the justice system, and potential interest in self-exploitation[28].

25. A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

26. See in general J. CREMERS, In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers, CLR Studies, 2011; I. WAGNER, Workers without Borders: Posted Work and Precarity in the EU, Cornell University Press, 2018; T. NOVITZ and R. ANDRIJASEVIC, Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations, Journal of Common Market Studies, 2020, 1-17.

27. See the outcomes of the EURODETACHMENT project http://www.eurodetachement-travail.eu/ .

28. See E. ÇARO, L. BERNTSEN, N. LILLIE, and I. WAGNER, Posted Migration and Segregation in the European Construction Sector, Journal of Ethnic and Migration Studies, 41:10, 1600-1620.

3.1. Unfair competition

In the EU-15 Member States, a situation where a posting undertaking can provide a service in the Host State at a lower cost because of the application of lower social protections standards is often labelled as "social dumping". Though its use is common in political debates and in the generalist media, there are good reasons to avoid referring to this concept when it comes to posting of workers. From a legal perspective, the term has no clear definition. Thig vagueness is confirmed by academic literature, which has for instance proposed the following broad definition:

> "we define social dumping as the practice, undertaken by self- interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage"[29]

The second reason is that the term has become politically charged, a situation which has seeped even into the proceedings of the Court of Justice, where Advocate General Szpunar recently wrote, in an Opinion:

> "To put it bluntly, what is 'social dumping' for some is, quite simply, 'employment' for others"[30]

Because of these reasons, I would argue that the term "social dumping" presently retains little convincing power, be it legally or politically.

Again, starting from a legal perspective, an alternative is constituted by the concept of "unfair competition". In the infamous *Laval* decision, the Court of Justice has defined this concept as follows:

> "a situation [...] in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters [those covered by the Posting of Workers Directive], undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher"[31]

This is evidently a formalistic approach, where "unfair competition" can only derive from the violation of the Posting of Workers Directive, but it has two important merits. First, it allows for a target for legislators: changing this Directive, as it has happened with the 2018 reform, allows to fill the concept of "unfair competition" with new meaning and protections. Second, it includes the idea that profiting from different levels of social protection to gain in competitiveness vis-à-vis the undertakings established in the Host State is indeed "unfair".

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29. M. BERNACIAK, "Introduction: social dumping and the EU integration process", in M. BERNACIAK (ed), Market Expansion and Social Dumping in Europe, Routledge, 2015, 2.

30. Opinion of AG Szpunar in CJEU, Case C-16/18, *Michael Dobersberger v Magistrat der Stadt Wien*, 19 December 2019, §30.

31. *Laval*, §75.

Lisa Berntsen and Nathan Lillie have provided a useful taxonomy of the practices put in place by posting undertakings to try and obtain this unfair competitive advantage.[32] These are summarised as:

- **Regulatory evasion:** completely evading the application formal and informal rules. Example: undeclared postings, undeclared work.
- **Regulatory arbitrage:** carving out zones of exceptions to national rules on the basis of the specific regulations of posting of workers. Example: using posting to avoid the normal functioning of industrial relations in Membe States without systems for extending collective agreements (the Laval situation).
- **Regulatory conformance:** obtain cost advantages while formally respecting local rules. Example: before the reform of the Posting of Workers Directive, applying only the minimum wage to posted workers, whereas they would be entitled to additional allowances or higher wages in the Host State because of their functions.

Dutch worker		*Portuguese worker*		*Polish worker*	
Net salary	1,600	Net salary	1,600	Net salary	1,600
–/– soc. sec in NL	496	–/– soc. sec in Portugal	81	–/– soc. sec in Poland	350
–/– taxes in NL	81	–/– taxes in NL	81	–/– taxes in NL	81
Gross salary	**2,177**	**Gross salary**	**1,762**	**Gross salary**	**2,032**

The revision of the Posting of Workers Directive, by replacing the concept of "minimum rates of pay" with the one of "remuneration" has addressed some of the practices which led to regulatory conformance. As of today, leaving aside illegal practices, **the main source of labour costs savings for legal postings stems from differences in the level of social security contributions.**[33] These can vary greatly across Member States[34]. Brentsen and Lillie highlight this situation through the following simplified example:[35]

Differences in social security contributions are not included in the definition of unfair competition delivered by the Court of Justice. However, building on the idea that unfair competition derives from exploiting a lower level of social protection to gain a competitive advantage, the present study will offer a possible solution to this situation in Section 6.

32. For an overview see F. DE WISPELAERE and J. PACOLET, *Posting of workers: the impact of social security coordination and income taxation law on welfare states*, 2015, 10-11, https://www.mobilelabour.eu/wp-content/uploads/2017/06/Posting-of-workers-The-impact-of-social-security-coordination-and-income-taxation-law-on-welfare-states.pdf .

33. *Ibidem*, 12.

34. L. BERNTSEN and N. LILLIE, *Breaking the Law? Varietes of social dumping in a panEuropean labour market, in M. BERNACIAK (ed.), Market Expansion and Social Dumping in Europe*, 55.

35. See B. WAGNER et A. HASSEL, *Posting, subcontracting and low-wage employment in the German meat industry*, Transfer, 22(2), 2016, 163-178.

Regulatory arbitrage is, in its turn, more challenging to address at European level, as it often requires reforms of national systems. An example of this would be the situation in the German meat industry, where the absence of a minimum wage entailed the possibility of applying the country of origin rules on this point, leading incredibly low wages and an unsustainable situation[36]. This was, if not solved at least improved, by introduction a federal minimum wage and the negotiation of a sectoral one.

It should be noted at this point that governments which publicly hold a strong stance on the equal treatment of posted workers should be held accountable when it comes to internal social policies. The best example of these are reforms of collective bargaining which go in the direction of decentralisation, by reducing the importance of national and sectoral collective agreements in favour of company level agreements. The Court of Justice has already ruled that if a possibility of derogating from sectoral agreements via company agreements is available to local undertakings, posting undertakings are entitled to use it too[37]. In short, governments cannot make it legal for local undertakings to engage in "internal unfair competition" via company level agreements which offer lower wages and/or worse working conditions than national or sectoral standards and then demand that these same national or sectoral standards are applied to posted workers[38]. This also stems from the principle of equal treatment. **Comprehensive legally binding collective agreements at national and/or sectoral level remain the best instrument to avoid unfair competition.**

3.2. Access to information

The application of wages and working conditions of a different Member State, that is, the Host State, should not be considered as self-evident for posting undertakings. Moreover, the difficulty of accessing this information is clearly an obstacle for posted workers to know their rights. Under the Posting of Workers Directive Member States have an obligation to make "generally available" the conditions applicable to posted workers, including the constituent elements of remuneration[39]. This should be done through the single official national website[40]. However, the level of completeness and ease of access of these websites varies greatly across Member States.

Member States should also be working on improving the single national websites out of self-interest. Indeed, the reform of the posting of workers directive has included a provision which makes it compulsory to "take into account" the completeness of the information provided by these websites when determining penalties in case of infringements[41]. It seems very likely that sooner or later a case concerning the interpretation of this new paragraph will come in front of the Court of Justice. Though it is always difficult to make predictions as to the outcome of these procedures, it is a clear possibility that **the Court might conclude that sanctions applied to a posting undertaking for violations of the wages and working conditions applicable to posted workers are disproportionate** if these are not clearly indicated in the single national website.[42]

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36. See B. WAGNER et A. HASSEL, *Posting, subcontracting and low-wage employment in the German meat industry*, Transfer, 22(2), 2016, 163-178.

37. See CJEU, Case C-164/99, *Portugaia Construções Ld[a]*., 24 January 2002, §35.

38. Posting of Workers Directive, Article 4(3).

39. *Ibidem*, Article 3(1).

40. Enforcement Directive, Article 5(2)(a).

41. Posting of Workers Directive, Article 3(1).

In a political perspective, the accessibility and transparency of the conditions applicable to posted workers represent important arguments to underpin the push for more equal treatment. Taking away the argument of the difficulty of compliance is an important step on this path. It would contribute to clearly marking the distinction between the political objective of applying equal treatment to posted workers from the one of just making it harder to use posting of workers.

3.3. Lack of protection in the Host State

The recent crisis brough about by the covid-19 pandemic has highlighted the gaps in the social protection of posted workers in the Host State. As it was explained in Section 2, posted workers remain affiliated to the social security system of the Home State. This means that they are covered by that system for most risks.

Sick pay is notably not covered by the list of conditions included in the Posting of Workers Directive. As such, workers having to respect quarantine periods in the Host State during the pandemic, would only receive the sick pay to which they are entitled under Home State rules. This could prove completely insufficient when compared with the cost of living in the Host State. It goes without saying that this also had public health consequences, as posted workers would be frightened by economic consequences of having to quarantine themselves during their posting.

Furthermore, schemes of temporary unemployment introduced during the pandemic were sometimes not applicable to posting undertakings, as they would not have paid contributions in the Host State. This left posted workers, possibly blocked in the Host State because of travel restrictions, in a vacuum of protection at a most difficult time.[43]

While these gaps has emerged in a (hopefully) very specific context, the lack of protection of posted workers when it comes to event taking place during the posting (such as sickness) calls into question the legal construct

42. This conclusion is reinforced by the fact that the Court of Justice has already struck down sanctions inflicted by certain Host States on posting undertaking because it found those to be "disproportionate", meaning that the Court found them to be excessive when compared to the violations at stake. See in particular CJEU case C-64/18, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*, 12 September 2019, and CJEU, case C-33/17, *Čepelnik d.o.o. v Michael Vavti*, 19 December 2018.

43. See ETUC, *Note on Posted Workers* and the COVID-19 Outbreak, 20 May 2020, https://www.etuc.org/en/document/etuc-note-posted-workers-and-covid-19-outbreak .

4. BRINGING TEMPORARY LABOUR MOBILITY BACK TO EQUAL TREATMENT

The theoretical framework of the proposals included in this study is the inclusion of posting of workers under the free movement of workers and the application of equal treatment to posted workers. This is grounded on an historical reading of the present legal framework, which is instead, as it was mentioned before, built upon the freedom to provide services. Before introducing this discussion, it is useful to approach an argument which is often deployed by the opponents of equal treatment, notably the argument that the application to posted workers of the same remuneration and working conditions than local workers would have a protectionist effect. This position can be found in some of the reasoned opinions adopted by national parliaments to oppose the adoption of the reform of the Posting of Workers Directive:

> "by introducing the principle of equal pay for local and posted workers, posting companies are placed in a less favourable position than local companies, which not only does not contribute to fair competition but even threatens it"[44]

> "It is doubtful whether the principle of equal pay for equal work in one and the same location is in conformity to the principles of a common market, because the difference in the rates of pay is one of the legitimate elements of the competitive advantage of service providers"[45]

Here I will not address this argument from an economic perspective, focusing instead on its legal ramifications. In this sense, it should be clear that arguing that the application of equal treatment for the same job in the same Member State is in any way "protectionist" is not an argument in favour of one or another Member State. Instead, it is an argument against the very existence of labour laws and collective agreements. Indeed, if one can construe a right to exploit a competitive advantage

44. Reasoned Opinion of the European Affairs Committee of the Saeima, 5 May 2016.

45. Reasoned Opinion of the Riigikogu, 10 May 2016.

on the basis of accepting lower wages and worse working conditions than those applicable in the given situation, why would an unemployed person in the Host State not be entitled to have recourse to the same argument? Therefore, **one should push back against the "protectionism" argument not in the name of the defence of the supposed national interests of any given Member State, but in the name of the very nature of labour laws and collective bargaining**. After all, the European Union still defines itself as a "social market economy". Finally, the idea that equal treatment would somehow reduce the economic opportunities for posting undertakings goes against findings which highlight[46] time and again how labour and skill shortages are one the main drivers for the recourse to posting.

In legal terms, this is underpinned not only by the extensive protection of the principle of equal treatment in the field of labour mobility, to which I will come back in paragraph 4.2, but also by the commitment of the European Union to the harmonisation of working and living conditions "while the improvement is being maintained", enshrined in 151 TFEU. In political terms it is worth reminding that the supposed benefits of accessing the labour market through lower wages and worse working conditions are often captured by companies *in the EU-15*, who use subcontracting to circumvent labour regulations which are applicable in their own country of establishment.

One can find the perfect illustration of this situation in the recent *Dobersberger* case[47] decided by the Court of Justice. In that case, an Austrian undertaking obtained a contract for services, which then it subcontracted to a Hungarian undertaking. The latter company would perform the service through workers posted to Austria. However, the Hungarian undertaking in question is fully owned by the Austrian one, so that all the benefits of the operation, minus the wages paid to the Hungarian workers, would come back to Austria. As such, **the application of the principle of equal treatment in the field of posting should be framed not as a conflict between Member States, but as a tool to ensure a fairer division of the profits of economic activities between companies and workers in Europe.**

4.1. An accident of birth

The first decision of the Court of Justice dealing with the employment conditions of posted workers, *Rush Porutuguesa*, is considered as one the main drivers which led to the adoption of the Posting of Workers Directive.[48] In that case the Court analysed the situation of Portuguese workers posted to France. Importantly, the case concerned a situation falling under the transitional provisions laid down in the Act of Accession which limited the access of Portuguese workers to the free movement of workers.[49] As such, the Court of Justice, in order to uphold the right of the Portuguese undertaking to provide services in France had no other choice than to include these workers under the freedom to provide services. This decision acted as an agenda setter, by creating an "inertia" in favour of the status quo.[50] This was reinforced by the fact that adopting the Posting of Workers Directive through the legal basis of the freedom to provide services would allow to circumvent

46. See, among many, ISMERI, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services*, European Commission –DG EMPL, 2012, 86; IDEA Consult and ECORYS Netherlands, *Study on the Economic and Social Effects Associated with the Phenomenon of Posting of Workers in the EU*, 2011, 134.

47. CJEU, Case C-16/18, *Michael Dobersberger v Magistrat der Stadt Wien*, 19 December 2019.

48. CJEU, Case C-113/89, *Rush Portuguesa Ldª v Office national d'immigration*, 27 March 1990.

49. *Rush Portuguesa*, §§8-9.

50 See on this point the recent analysis of A. LUBOW and S. K. SCHMIDT, *A hidden champion? The European Court of Justice as an agenda-setter in the case of posted workers*, Public Administration, 2020, 1-14.

the veto of the UK due to different majority rules. **These two completely contingent situations have had a disproportionate impact on the choice of the legal basis for posting of workers.**

One can fin several traces of the path-breaking nature of this choice. The first can be found in the reasoning delivered by AG Van Gerven in his Opinion on the *Rush Portuguesa* case:

> "In the present case, we are in a way one stage further : the freedom to provide services is already fully applicable but encounters restrictions flowing from a (temporary) incomplete application of the freedom of movement of (Portuguese) workers"[51] (my emphasis)

It is apparent from this formulation that the AG regarded posted workers as normally falling within the scope of free movement of workers, although this was at the time not applicable to Portuguese workers.

To find further proof of the original understanding of posted workers as belonging under the free movement of workers one can look at Recital n° 5 of the Regulation on the *freedom of movement for workers*[52] which still states that the right to free movement "should be enjoyed without discrimination by permanent, seasonal and frontier workers *and by those who pursue their activities for the purpose of providing services*" (the emphasis is mine).

These elements make clear that the original understanding of the free movement of workers was that of a general legal basis for all circulation of economically active natural persons.

The difficulty of reconciling the newly invented basis for circulation of workers under the freedom to provide services with the reality of the phenomenon has brought the Court of Justice to some convoluted justifications. In *Rush Portuguesa* the Court famously considered that posted 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"[53], a notion which flies in the face of the impact that these workers can have on the labour market of the Host State. The Court had then to distinguish this approach in *Vicoplus*, where it considered that transitional provisions could also limit the circulation of posted workers when these are posted by temporary work agencies, and this because these workers would be "typically assigned, during the period for which he is made available, to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking"[54]. As such, one of the scenarios of posting, presented in Section 2, has been assimilated by the Court to a situation of circulation of workers, confirming that **the distinction on the basis of a supposed lack of access to the labour market of the Host State is artificial and unable to capture the reality of the phenomenon.**

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51. Opinion of AG Van Gerven in *Rush Portuguesa*, §16.

52. Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union.

53. *Rush Portuguesa*, §15.

54. Joined Cases C-307/09 to C-309/09, *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo, Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid*, 10 February 2011, §31.

4.2. Decoupling social rights and employment conditions from the freedom to provide services

The main argument that emerges from the previous consideration is that the framing of posting of workers, when it comes to the working conditions and social security of posted workers, in the context of the freedom to provide services should not be considered as a given and it is not set in stone. Therefore, **the European legislator should not feel constrained by the agenda setting of the Court or the inertia of the legal construction when reimagining this field**. While changing the Treaties themselves is rightfully considered as a very unlikely scenario, this is not needed to operate the shift in perspective that will be put forward by the present study. This is meant to sidestep what is called a "court decision trap"[55], that is, a situation where the interpretation provided by the Court of Justice of a provision of the Treaties is almost impossible to modify due to the unanimity requirement.

The proposal, which will be put forward in the next Section, redefines the legal basis of the Posting of Workers Directive to include the free movement of workers and extends the **application of the principle of equal treatment to posted workers**. This principle has been defined by Contouris and Englebom as "the foundational principle underpinning the freedom of EU workers to 'access' and 'participate' in the labour markets of EU MSs other than their own"[56]. It has been enshrined in both primary[57] and secondary law[58] and entails the right of workers of any Member State not to be treated differently from national workers by reason of their nationality in respect of any conditions of employment and work. This principle is also enshrined in other international legal orders[59] and it is important to note that precisely the exclusion of posted workers, organised by the EU legal framework, from this principle has been condemned by the European Committee of Social Rights[60] in 2013:

> "[...] the Committee considers that, for the period of stay and work in the territory of the host State, **posted workers** are workers coming from another State and lawfully within the territory of the host State. In this sense, they fall within the scope of application of Article 19 of the Charter and they **have the right, for the period of their stay and work in the host State to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining**" (my emphasis)

55. G. FALKNER, *The EU's decision traps and their exits*, in G. Falkner (ed.), The EU's Decision Traps: Comparing Policies, Oxford University Press, 2011, 1–17.

56. N. COUNTOURIS and S. ENGBLOM, 'Protection or Protectionism?': A Legal Deconstruction of the Emerging False Dilemma in *European Integration, European Labour Law Journal*, 6(1), 2015, 23.

57. Article 45 TFEU.

58. Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, Article 7.

59. See for instance Article 19 of the European Social Charter.

60. The European Committee of Social Rights ensures the monitoring of the application of the European Social Charter, adopted in 1961 and revised in 1996 in the context of the Council of Europe. It is composed of 15 independent experts.

Although the reform of the Posting of Workers Directive has slightly improved the situation, by not extending the principle of equal treatment to posted workers the European Union is (still) presently requiring Member State to violate the European Social Charter. This is notably the case in the context of those Member States characterised by company-level bargaining backed up by the pressure of trade unions and collective actions. Under the present case law of the Court of Justice (the *Laval* case), a strike aimed at concluding a collective agreements falling outside those identified by the Posting of Workers Directive remain an unjustified restriction of the freedom to provide services. Therefore, workers being posted to these Member States will not enjoy the same level of protection of local workers, due to their exclusion from the benefits of collective bargaining.

The inclusion of posted workers under the free movement of workers is based on the deliberate decoupling of two aspects of posting of workers. On the one hand, the part which belongs under the freedom to provide services, namely the right of undertakings established in a Member State to provide services in another Member State. This includes the right to "send" their workers to perform such a service and entails a prohibition for the Host State to deny access to their territory to these workers. **On the other hand, the regulation of the employment conditions and social security of these workers, which belongs under the free movement of workers** (and the Treaty chapter on social policy). It should be noted that at the time of writing, two actions for annulment of the reform of the Posting of Workers Directive, brought by the Polish and Hungarian governments, are currently pending in front of the Court of Justice.[62] Both these actions are mainly grounded on the premise that the reform is in violation of the legal basis of the Directive. Although the Opinions of AG Sanchez Bordona in both cases have rejected the annulment, a different legal basis would provide a more solid ground for the Directive in case of future challenges, particularly so in case of a reinforced emphasis on equal treatment.[63]

61. European Committee of Social Rights, Decision on Admissibility and the Merits, 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, Complaint No 85/2012, §134.

62. Cases C-626/18, *Poland v Parliament and Council*, and C-620/18, Hungary v Parliament and Council.

63. This statement should not be interpreted as supporting in any way the arguments put forward by the annulment actions. As the Court of Justice has for more than 20 years accepted to apply the Posting of Workers Directive based on the freedom to provide services there is no valid legal reason why it should modify its approach following the limited changes apported by the reform.

5. WAGES AND WORKING CONDITIONS

The starting point of an intervention on the substantive aspects of the regulation of wages and working conditions of posted workers is to appreciate how the reform of the Posting of Workers Directive has already laid down the groundwork for a more equal treatment between posted workers and local ones.

Having closed the loophole allowed by the concept of "minimum rate of pay", by opting for the broader one of "remuneration", **the present version of the Posting of Workers Directive brings the working conditions that have to be applied to posted workers essentially in line with those which are mandatorily applied to local workers.**

Important differences remain when it comes to two areas: a) Member State without a system for extending the legal binding force of collective agreement and relying on voluntary negotiations backed by the possibility of collective action, and b) Differences stemming from company level agreements. Point b) remain difficult to address, since after all company level agreements differ also between local undertakings. Point a) stems partly from the interpretation of the Treaties delivered by the Court of Justice, notably when it comes to the conflict between fundamental social rights (such as the right to take collective action) and so-called fundamental freedoms of the internal market. This issue is broader than the field of posting of workers and would require either an unlikely change of stance by the Court of Justice or a change of the Treaties. Because of this, the present study will not address this broader issue. **The proposal of the ETUC for a Social Progress Protocol**[64] already provides a perfect source of inspiration for those looking for a Treaty reform in this sense. Still, the proposals presented in this Section might have an impact on this aspect too, as it will be presented in the Explanations below.

Key concepts

- Wages and working conditions of posted workers are part of the **free movement of workers.**
- Posted workers are covered by the principle of **equal treatment.** All mandatory provisions of the law and applicable collective agreements should be applied to them, **unless better conditions are applicable in the Home State.**

64. See ETUC, *Proposal for a Social Progress Protocol*, https://www.etuc.org/en/proposal-social-progress-protocol .

For the rest, the proposals aim at completing this picture, **by providing a more solid legal basis for the Directive and by introducing the principle of equal treatment for posted workers**. From a political point of view, the fact that the actual changes from the situation under the present (post-reform) legal framework are limited would make it easier to present the proposed changes as limited, taking just one step forward on the same path carved by the reform.

It is important to note that changing the Posting of Workers Directive would also have an impact on those situations which refer to it. This means that the new rules would be applicable in these situations without the need to change these other instruments, though some work of coordination of the legal texts might be required. For example, the Directive concerning the posting of drivers in the road transport sector,[65] part of the Mobility Package, refers to Directive 96/71 when it comes to the conditions applicable to the drivers.[66]

The present study focuses exclusively on posting of workers. However, it is important to keep in mind that, intervening on this field might entail a reconfiguration of business practices with the aim of escaping the new regulations. When it comes to wages and working conditions, the most evident path to circumvent those is the use of (potentially, bogus) self-employed and self-posting. As such, a specific attention to this field would be warranted if these amendments are adopted.

I will start by presenting two options for intervention, depending on whether there is a political objective of completely abrogating the posting of workers Directive. As it was stated in the Introduction, these proposals are by no means the only possible way to go for reforming or replacing the Posting of Workers Directive. For example, in the preparation of this study, another possibility was considered but ultimately discarded. This would have entailed a change in the Rome I Regulation (Article 8) stating clearly that the law applicable in case of a temporary change of the Member State where the work is performed would be the one of the Host State. This option was considered more complex and potentially open to legal challenges. The complexity stems from the fact that article 8 of the Rome I Regulation[67] has a broader scope than posting of workers, also covering business trips or conferences abroad. It would also make it harder to justify the inclusion of the clause allowing for the application of conditions more favourable to the worker, having severed the link with the Home State. The potential for legal challenges lies in an action of annulment for an excessive restriction of the freedom to provide services, much in line with the actions presently pending in front of the Court of Justice against the reform of the Posting of Workers Directive.

65. Directive (EU) 2020/1057 of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012.

66. Although some kind of operations remain excluded from the scope of posting, such as international the transit through a Member State without loading of unloading operations.

67. Regulation No 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (Rome I).

5.1. Scenario 1: Amending the posting of workers directive

5.1.1 Proposal 1: Clarifying the legal basis and the social policy objectives of the PWD (and of the Enforcement Directive)

Directive 96/71	AMENDMENT
Preamble:	Preamble:
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof,	***Having regard to the Treaty on the Functioning of the European Union establishing the European Community, and in particular Articles 46, 53(1), 62, 153(1) points (a) and (b), and 153(2) thereof.***

Directive 2014/67/EU	AMENDMENT
Preamble:	Preamble:
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof	***Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 46, 53(1), 62, 153(1) points (a) and (b), and 153(2) thereof.***

Explanation

These amendments modify the legal basis of both the Posting of Workers Directive and the Enforcement Directive, to include the free movement of workers and the chapter on social policy. As it was stated before, the objective here is largely one of ensuring a change in the interpretation delivered by the Court of Justice, moving away from simply considering the facilitation of the circulation of services as the aim of these instruments. The inclusion of this legal basis is also important to strengthen the new regime from challenges based on the freedom to provide services, such as the ones which are presently pending against the reform of the Posting of Workers Directive.

The inclusion of the Articles on social policy, notably Article 153(1) points (a) and (b), and 153(2), was already considered as possible by the Committee on Legal Affairs of the European Parliament in its Opinion concerning the reform of the Posting of Workers Directive.[68] This change was also included in the 2010 proposals from the ETUC Expert Group on Posting.[69]

On the other hand, Article 46 was discarded as it was considered only to be appropriate for proposals aimed at "facilitating the functioning of a common labour market". However, Article 46 itself refers to the adoption of directives (or regulations) "to bring about freedom of movement for workers, as defined in Article 45". Although the same Article then enumerates ("in particular") a series of subjects which pertain to the functioning of the labour market, **the reference to Article 45 suggests that a proposal aimed at bringing about the principle of equal treatment between "mobile" and local workers would be appropriate under this legal basis.**

5.1.2. Proposal 2: Applying the principle of equal treatment to posted workers

Directive 96/71	AMENDMENT
Article 3 paragraph 1:	Article 3:
1. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:	***1. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:***
— by law, regulation or administrative provision, and/or	***— by law, regulation or administrative provision, and/or***
— by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8:	***— by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8.***

68. Opinion on the legal basis of the Commission proposal for a Directive concerning the posting of workers (COM(2016)0128 – C8-0114/2016 – 2016/0070(COD)).

69. See ETUC, *Revision of the Posting Workers Directive: Eight proposals for improvement*, https://www.etuc.org/sites/default/files/final_report_ETUC_expert_group_posting_310510_EN_1.pdf

(a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work. For the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.	***A posted worker may not, in the Member State where the work is carried out, be treated differently from workers employed in that Member State by reason of his status of posted worker in respect of*** ***a) remuneration and other employment and working conditions*** ***b) trade union membership and the enjoyment of benefits of collective bargaining.*** ***The first and second subparagraphs of this paragraph shall not apply to supplementary occupational retirement pension schemes.*** ***For the purposes of this Directive, the remuneration applicable to posted workers shall be determined, on the basis of equality of treatment, by the national law and/ or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.***

Article 3 paragraph 1a

Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:

— by law, regulation or administrative provision, and/or

— by collective agreements or arbitration awards which have been declared universally applicable or otherwise

apply in accordance with paragraph 8.

The first subparagraph of this paragraph shall not apply to the following matters:

(a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;

(b) supplementary occupational retirement pension schemes.

Where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months.

Where an undertaking as referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned.

The concept of "the same task at the same place" referred to in the fourth subparagraph of this paragraph shall be determined taking into consideration, inter alia, the nature of the service to be provided, the work to be performed and the address(es) of the workplace.

Explanation

This amendment includes two main changes.

The first one is to eliminate the list of conditions applicable to posted workers and to move in its place the provision presently applicable for postings lasting more than 12 months (plus a possible extension of 6). This means that **all wages and working conditions laid down in legislation and in universally/generally applicable collective agreements will be applicable to posted workers from day 1**. Though this appears like a major change, it is in fact rather limited, as conditions outside the list presently included in Article 3(1) are not many. Furthermore, businesses using posting of workers will have already had time to adapt their practices to the reform of the Posting of Workers Directive and at least faced the possibility of having to apply the provision for longer postings. As such, the new regime would entail a very minimal adaptation of business models and practices.

The second change introduced by the amendment is the inclusion of a provision on equal treatment directly inspired by Article 7 of the Regulation on free movement of workers.[70] This ensures that posted workers are not treated differently than local workers in a comparable situation. The principle equal treatment is specifically addressed to the areas of a) wages and working conditions, and b) trade union membership and the enjoyment of benefits of collective bargaining. While the first part complements the first change described before, the second is particularly important to ensure that posted workers in the Host State can be covered by negotiations to conclude a company level agreement (the *Laval* situation) on the basis of equal treatment. **The introduction of this provision also brings the EU legal order in conformity with the European Social Charter as interpreted by the European Committee of Social Rights in its 2013 decision.**[71] The reference to equal treatment also ensures that collective action is not use to discriminate *against* posted workers, for instance in case of actions based on nationalistic or outright racist motivations. Again, this is in line with the decision of the European Committee of Social Rights which has stated that the prohibition of collective actions "to prevent initiatives aimed at achieving illegitimate or abusive goals (e.g. goals which do not relate to the enjoyment of labour rights, or relate to discriminatory objectives)" is compatible with the European Social Charter.

The amendment also eliminates the exclusion of "procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses" from the conditions applicable to posted workers.

70. Regulation (EU) No 492/2011.

71. European Committee of Social Rights, Decision on Admissibility and the Merits, 3 July 2013, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No 85/2012.

5.2. Scenario 2: Abrogating the posting of workers directive

5.2.1. Proposal 3: Bringing the working conditions of posted workers under the Regulation on free movement of workers

REGULATION (EU) No 492/2011	AMENDMENT
	Article 7bis: ***1. A worker who, for a limited period and in the framework of the transnational provision of services, carries out his work in the territory of a Member State other than the State in which he normally works may not, in the Member State where the work is carried out, be treated differently from workers employed in that Member State in respect of:*** ***a) remuneration and other employment and working conditions*** ***b) trade union membership and the enjoyment of benefits of collective bargaining.*** ***2. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings guarantee, on the basis of equality of treatment, to the workers identified by paragraph 1 all the applicable terms and conditions*** ***of employment which are laid down in the Member State where the work is carried out:*** ***— by law, regulation or administrative provision, and/or*** ***— by collective agreements or arbitration awards which have been declared universally applicable and/or*** ***— by collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or*** ***— by collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory.***

	For the purposes of this Article, the concept of remuneration shall be determined by the national law and/or practice of the Member State where the work is carried out and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards identified by this paragraph. Allowances specific to the transnational provision of services shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred, such as expenditure on travel, board and lodging. The employer shall reimburse the worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship. ***3. Paragraphs 1 and 2 shall not prevent application of terms and conditions of employment which are more favourable to workers.*** ***Paragraphs 1 and 2 shall not apply to supplementary occupational retirement pension schemes.***

Explanation

This second scenario is based on the complete abrogation of the Posting of Workers Directive. I have already stated in the Introduction that amendments would necessarily give rise to the need of legislative "polishing" and coordination. This holds particularly true for this option, as many legal texts refer to the Posting of Workers Directive or to specific Articles thereof.

The amendment follows the logic of Recital n° 5 of Regulation 492/2011 on free movement of workers, by bringing workers "who pursue their activities for the purpose of providing services" under its scope. As such, **an Article is added to Regulation 492/2011 covering the specific situation of posted workers**. This Article mirrors much of the content which has been presented in the previous option, namely a) the extension to posted workers from day 1 of the situation presently applied after 12 months (plus optional 6) and b) the extension to posted workers of the principle of equal treatment.

72. Article 3(2) of the Posting of Workers Directive.

This option presents some evident drawback in terms of legal and strategic complexity. I have already highlighted the need for an important work of coordination. Furthermore, it will be important to pay attention in order to avoid that important protections presently included in the Posting of Workers Directive are "lost" after the abrogation. Some of these are covered by the amendments below. Finally, the need to re-open several different legal instruments might come with its own difficulties, as different political negotiations might easily overlap, and different compromises might be necessary.

On the other end, the option has also some advantages. From a political perspective, the abrogation of the Posting of Workers Directive might be **a more visible achievement** if compared to the simple legal tinkering with its content, important it might be, proposed with the previous option. From a legal one, the clear and unequivocal inclusion of posted workers in an instrument solely devoted to guaranteeing the free movement of workers would **provide an even stronger message for the Court of Justice** when it comes to the interpretation of these provisions.

As formulated, the amendment does not include the exceptions provided by the present text of the Posting of Workers Directive, such as the exclusion of activities of initial installation of a good.[72] These would fit difficultly with the logic of free movement of workers and equal treatment, which do not include any minimum threshold for their application.

DIRECTIVE 2008/104/EC	AMENDMENT
	Article 5:
	6. Member States shall provide that temporary employment undertakings or placement agencies, which hire out a worker to a user undertaking established or operating in the territory of a Member State, guarantee to these workers the terms and conditions of employment which apply pursuant to the present Article to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out.
	The user undertaking shall inform the undertakings of the terms and conditions of employment that it applies regarding the working conditions and remuneration.

DIRECTIVE 2014/67/EU	AMENDMENT
Article 3	Article 3
For the purposes of this Directive, Member States shall, in accordance with national law and/or practice, designate one	***Cooperation on information***
or more competent authorities, which may include the liaison office(s) as referred to in Article 4 of Directive 96/71/EC.	***1. For the purposes of this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies. When designating their competent authorities Member States shall have due regard for the need to ensure data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in place appropriate mechanisms in this respect.***
When designating their competent authorities Member States shall have due regard for the need to ensure data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Member States shall	***2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 7bis of Regulation 492/2011. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.***
remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in	***The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 7bis of Regulation 492/2011.***
place appropriate mechanisms in this respect.	***Mutual administrative assistance shall be provided free of charge.***
Member States shall communicate the contact details of the competent authorities to the Commission and to the other	***3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 7bis of Regulation 492/2011 generally available.***
Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison	***4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.***
offices.	***Other Member States and Union institutions shall respect each Member State's choice of competent authorities.***
Other Member States and Union institutions shall respect each Member State's choice of competent authorities.	

Article 5	Article 5 ***6. Where the information on the single official national website does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account, in accordance with national law and/or practice, in determining penalties in the event of infringements of the national provisions related to these terms and conditions of employment, to the extent necessary to ensure the proportionality thereof.***

Explanation

These amendments are meant to exemplify the legislative coordination which would be needed in case of abrogation of the Posting of Workers Directive.

The first moves the protection for workers being posted by temporary work agencies to the relevant Directive for this kind of work.[73] This seems to be the most coherent destination as the provision is meant to clarify the scope of application of this Directive.

The second amendment coordinates the Enforcement Directive so as to include the provisions on administrative cooperation previously included in the Posting of Workers Directive. It also includes the provision concerning the necessity to take into account the accessibility of single official national websites when it comes to imposing sanctions on posting undertakings for failures to respect wages and conditions of employment applicable to posted workers. This remains a necessary incentive for Member States to improve the quality and completeness of the information provided through these websites. This information is particularly relevant when it comes to the ability of posted workers themselves to know their rights.

73. Directive 2008/104/EC of 19 November 2008 on temporary agency work.

6. SOCIAL SECURITY

Coming to social security aspects, there should be no doubt that this represents the most complex subject to reform. This stems only partially from legal obstacles, though these do play a role. The main obstacles stem from the political difficulty of changing the present rules and from the persisting important differences in the organisation of the social security systems of Member States.

Key concepts

- Posting undertakings pay for social contributions **at the level of the Host State.**
- These contributions are **paid to the institutions of the Host State** and transferred to those of the Home State at the end of the posting.
- Posted workers can opt to **be covered by the social security system of the Host State** for temporary risks and for the duration of the posting.

Because of this, proposals in this Section will necessarily have to be situated at a rather "high level", without including detailed reforms of specific aspects. Therefore, the legal text will certainly need to be refined and coordinated to provide a smooth functioning of the envisaged system. Particularly, the proposed amendments refer to concepts, such as "social security contributions" which are not defined in the Coordination Regulation and might have different (or no) meaning across different Member States.

As it was highlighted in Section 3, differences in social security contributions constitute, after the coming into force of the reform of the Posting of Workers Directive, **the main difference in labour costs when it comes to posted workers.** Expanding on the reasoning of the Court of Justice regarding unfair competition, which stems from the application of country of origin rules "if the level of social protection in the host Member State is higher", **the proposal articulated in this Section aims at equalising social security contributions paid by posting undertakings with those applicable to local ones**[74], while the payment would be suspended in the Home State for a corresponding period. While this idea has already emerged in European debates in recent years, its present iteration improves on it with the aim of making it legally and politically more robust. In particular, the **social security contributions paid by posting undertakings to the competent institutions Host State would be transferred to the competent institutions of the Home State at the end of the period of posting**, unless this lasts for more than 24 months (or a lower duration, following the ongoing reform of the Coordination Regulation). **The Home State**

74. Social security contributions would be calculated as a global amount, without requiring payment for the specific list of items applicable in the given situation.

would retain its complete autonomy when it comes to the destination of these revenues, thus respecting the lack of competences at EU level when it comes to the organisation of national systems of social security. While these flows would enable upward convergence in level of social protections,[75] the scheme would also avoid incentives for a "race to the bottom" when it comes to social security contributions.[76] The suspension of the payment of contributions in the Home State during posting might be criticised as a violation of the exclusive competence of Member States to organise their social security systems. However, I would argue that this intervention follows the same logic of the present rule of Article 12, which mandates the affiliation in the Host State when the posting lasts for more than 24 months.

The second leg of this approach is the extension of protection for posted workers under the social security system of the Host State. This would imply the **possibility to access the Host System benefits for risks related to the employment situation during the period of posting**, such as **sicnkess benefits, work accidents** and schemes for **temporary unemployment** or reduced working time. This second leg is a necessary complement of the first, both for political and legal reasons. From the political perspective, the extension of the protection of posted workers is meant to **share the cost of the reform**, with the Host State bearing the costs for the some of the added protection of posted workers. From a legal perspective, the Court of Justice has held in *Finalarte* that measures aimed at improving the protection of workers can constitute a justified restriction of the freedom to provide services if they "confer a genuine benefit on the workers concerned".[77]

This reform would also allow to move away from more restrictive approaches when it comes to the social security of posted workers. As social security contributions would be paid in the Host State and cover the duration of posting, the need for a period of affiliation of one month before the posting would be greatly reduced. In time, this could also open new avenues of simplification, for instance waiving the need for the A1 portable document. This approach, **exchanging equality for simplification** might prove more interesting for posting undertaking than the current direction pursued in the ongoing negotiations over the reform of the coordination of social security, which seems to be headed in the direction of a tightening of the existing rules. In the same context, Member States are presently discussing the introduction a form of prior notification of posting to social security institutions. This would be easily integrated in the system proposed here, with the payment of social security contribution doubling up as a notification.

As for the previous Section, other reform options were considered but discarded. The first of these is the creation of an autonomous European system of social security aimed at mobile workers, sometimes called the "13th State proposal", from the original idea put forward by Danny Pieters.[78] This option is considered to be even more difficult to achieve than the proposal included in this Section. Without going through the political and legal difficulties that this would face, one should also add that the credentials of the European Union in dealing with social security have

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75. F. DE WISPELAERE and J. PACOLET, *Posting of workers: the impact of social security coordination and income taxation law on welfare states*, 14.

76. By granting a competitive advantage on the basis of lower social security contributions, the present legal framework does in fact provide an incentive for sending Member States to keep their contributions as low as possible, introduce ceilings for the calculation of these or shift them on the worker as much as possible.

77. Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte Sociedade de Construção Civil Ld.a and others*, 25 Ocober 2001, §42.

78. D. PIETERS and S. VANSTEENKISTE, *The Thirteenth State. Towards a European Community Social Insurance Scheme for Intra-Community Migrants*, Acco 1993.

somewhat suffered after the management of the previous financial crisis. A second discarded option is the direct affiliation of posted workers in the Host State. Such an option is surely worthy of consideration in a longer-term perspective but was ultimately considered too complex in the present political and legal context. Politically speaking this would entail a transfer of resources, compared to the present system, from the Home State to the Host State, as the latter would "lose" the social contributions of posted workers. Also, severing the link with the Home State would create a different set of problems for posted workers going from a Member State characterised by a strong system of social protection to one with weaker system. From the perspective of posted workers this could also result in a less effective system as these have, at least in theory, an interest in being affiliated in their own Member State. This last argument can however be called into question where the connection with the Home State is artificial (at best), such as the one which emerged in the recent *Vueling* case, where workers supposedly posted from Spain to France had never lived in the former country.[79] If, in the future, the legal and political context would allow for the exploration of this policy option, the reform proposed in the present Section could constitute a first step in that direction, allowing business practices to already integrate the obligation to pay social security contributions in the Host State.

Finally, as it was highlighted in the previous Section for working conditions, also for social security one should be aware that intervening on the rules for posting of workers will most likely cause a switch in business practices towards other forms of mobility. The main phenomenon to be aware of in this context is the increased importance of what is often referred to as "pluriactivity", covered by Article 13 of the Coordination Regulation. This Article is applicable to **persons who pursue an activity as an employed/self-employed person in two or more Member States**, and identifies the Member State competent for their social security on the basis of two rules: a) the state of residence of the worker will be competent if they pursue a substantial part of their activity in that state or if they are employed by various employers established in different Member Sates, or b) if they do not pursue a substantial activity in their Member State of residence, they state of establishment of their employer. The use of this legal construction has become increasingly common in recent years, with the A1 report highlighting a growth from 168,279 A1 documents issued under Article 13 in 2010 to around 1.1 million PDs A1 issued in 2018.[80] Although this study does not cover this situation, it is again important to closely monitor this evolution since being able to present a situation as one of "pluriactivity" allows to completely sidestep whatever rules will be applicable to posted workers. The implementation of a European single social security number[81] would be an important step to allow an easier verification of reality of the activities carried out in other Member States.

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79. See Cases C-370/17 and C-37/18, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines SA, and Vueling Airlines SA v Jean-Luc Poignant (C-37/18)§19*, 2 April 2020.

80. F. DE WISPELAERE, L. DE SMEDT and J. PACOLET, *Posting of workers - Report on A1 Portable Documents issued in 2018*, 37.

81. See further, European Commission, European Social Security Number, Inception Impact Assessment, Ares(2017)5862503, 30 November 2017, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1222-European-Social-Security-Number .

6.1. Proposal 4: Ensuring equality of contributions and improving the protection of posted workers in the Host State

	AMENDMENT
Article 12	Article 12
1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.	***1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is sent by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.***
2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months.	***2. Employers referred to in paragraph 1 which post workers to another Member State pursuant Article 1(3) of Directive 96/71/EC shall, for the duration of the posting, be liable for the payment of social security contributions to the institution of the place of stay of these workers. These contributions shall be set by the Member State where the work is carried out, on the basis of equal treatment, at the same level applicable to a comparable worker employed in the same Member State.***

	Member States shall ensure that these contributions are calculated as a single global amount and based on the remuneration applicable to the posted worker pursuant Article 3(1) of Directive 96/71/EC. ***These contributions shall be paid at the latest before the first day of posting. If the anticipated duration of posting exceeds one month, these contributions shall be paid at the latest before the first day of posting for the remaining duration of the current month and shall be paid monthly, before the start of each new month, for the remaining duration of the posting.*** ***The competent institution in the Member State identified under paragraph 1 shall, for the duration of posting, reduce the contributory obligation of these employers by an amount equivalent to the contributions identified under the present paragraph, up to a minimum of 0 (zero) euro.*** ***At the end of the period of posting the institution of the place of stay shall transfer all the contributions paid by the posting employer to the competent institution in the Member State identified under paragraph 1. If the duration of posting exceeds the duration set out in paragraph 1, contributions shall be retained by the institution of the place of stay.*** ***3. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months.***

Article 21 **Cash benefits**	Article 21 ***Cash benefits*** ***3. An insured person posted pursuant the second paragraph of Article 12 to a Member State other than the competent Member State shall be entitled, for the duration of posting, to cash benefits provided by the institution of the place of stay in accordance with the legislation it applies.*** ***Alternatively, this person shall be entitled to choose to receive these benefits provided by the competent institution identified pursuant the first paragraph of Article 12. If he so chooses, the insured person shall immediately communicate his choice to the institution of the place of stay.***
	Article 63bis ***Special rules on posted workers and temporary unemployment benefits for extraordinary events*** ***1. Workers posted to a Member State other the competent Member State pursuant the second paragraph of Article 12, shall be entitled to receive, on the basis of equal treatment and for the duration of their initial period of posting, temporary unemployment benefits in case of complete or partial stoppage of production caused by extraordinary events or circumstances. If these events or circumstances do not allow the posted worker to return to the competent Member State, the initial period of posting shall be renewed until such return is possible.*** ***Alternatively, this person shall be entitled to choose to receive these benefits provided by the competent institution identified pursuant the first paragraph of Article 12. If he so chooses, the insured person shall immediately communicate his choice to the institution of the place of stay.***

	2. The institution of the place of stay shall, to the extent necessary, take into account periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies. ***However, when the applicable legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation.***

Explanation

The first of these amendments set up the obligation for posting employers to pay social contributions in the Host State at the level which would be applicable to comparable local workers. In doing so, it clarifies the application of the system to the specific situation of posted workers, thus differentiating them from other forms of temporary labour mobility outside the provision of services (business trips, conferences abroad).

The explicit identification of the basis for calculating these contributions is important in order to avoid situations where the Home State would limit the payment for social security contributions through a "ceiling" for the remuneration to be taken into account. The system set up by this amendment should also be read in conjunction with the creation of national website to allow for a seamless payment of these contributions by digital means (see Proposal 5 below).

The second and third amendments extend certain protections to posted workers, notably as regards cash payment for sickness or maternity leave, as well as special unemployment schemes for extraordinary situations (such as those put in place during the covid-19 crisis). Importantly, these amendments include the possibility for posted workers to opt to receive benefits from the Home State institutions. This is necessary in order to allow for situations where a posted worker goes from a Member State characterised by a stronger social protection to one where the protection is weaker.

As it was mentioned in the opening of the Section, these amendments are meant to provide guidance for a possible implementation of this system. Compared to those included in other Sections, these would require a more important work of harmonisation with the rest of the Coordination Regulation, as well as, possibly, of the implementing acts.

7. MONITORING AND CONTROL

The last aspect of posting of workers which will be covered in this study is the one regarding measures of monitoring and control. As it was highlighted in the Introduction, the present study does not explore the issues related to illegal posting and undeclared work. Therefore, I will only address monitoring and control measures in connection with the proposals made in the previous Sections and in continuation thereof.

Key concepts

- Single official national websites allow for the **payment of social contributions.**
- Proof of this payment **replaces other forms of prior notification.**
- The European Labour Authority, with the support and input of Member States, builds a **single European website** accessing the information related to wages and working conditions applicable to posted workers.

The general political point which should be advanced by these changes is **an exchange between stronger protection for posted workers, through the strict application of the principle of equal treatment, and a simplification of the procedures for posting legally** to another Member State. In particular, the access to information related to the wages and working conditions applicable to posted workers should be made easier and more transparent and, eventually, automated.

The objective of simplification can only be addressed partially through changes in secondary legislation. These will be covered by the explanations below. At the same time, implementing acts and other forms of technical intervention should strive **to provide innovative solution based on digital tools to automate typical operations involved in determining the conditions applicable to posted workers.** These should facilitate posted workers and posted undertakings, based on the data provided by them, to identify sector-specific working conditions, as determined by the relevant legislation and collective agreement in the Host State. The same tool should integrate the possibility of sending prior notification to the competent authorities and, if adopted, to pay the applicable social contributions. It goes without saying that these tools would require an important amount of work in the initial phase, for the digitation and extraction of the relevant information across legislation and (especially) collective agreements. After this initial effort however, the maintenance of the

information would often require simple changes of numerical values. **Allowing for a seamless way to post workers to another Member State, where they will be strictly covered by the principle of equal treatment and equal contributions, should represent the final objective of these reforms.**

1. Proposal 5: Creating national one stop portals

DIRECTIVE 2014/67/EU	AMENDMENT
Article 5	Article 5 ***(g) ensure that the single official national website allows employers of posted workers to fulfil, by electronic means, its obligation regarding the payment of contributions as required by the second paragraph of Article 12 of Regulation 883/2004. Upon payment, the single official national website shall provide the employer with a proof of payment.*** ***The document obtained from the single official national website shall allow authorities in the host Member State to access by electronic means the information required pursuant letter a) of Article 9.***

Article 9	Article 9
(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the	(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the
official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State,	official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State,
containing the relevant information necessary in order to allow factual controls at the workplace, including:	containing the relevant information necessary in order to allow factual controls at the workplace, including:
(i) the identity of the service provider;	(i) the identity of the service provider;
(ii) the anticipated number of clearly identifiable posted workers;	(ii) the anticipated number of clearly identifiable posted workers;
(iii) the persons referred to under points (e) and (f);	(iii) the persons referred to under points (e) and (f);
(iv) the anticipated duration, envisaged beginning and end date of the posting;	(iv) the anticipated duration, envisaged beginning and end date of the posting;
(v) the address(es) of the workplace; and	(v) the address(es) of the workplace; and
(vi) the nature of the services justifying the posting;	(vi) the nature of the services justifying the posting;
	Member States shall avoid the duplication of administrative obligations, by ensuring that the fulfilment of the obligation provided by the second paragraph of Article 12 of Regulation 883/2004 replaces the obligation to introduce the simple notification pursuant the previous paragraph.

In case of abrogation of the Posting of Workers Directive (and similarly along the text):

DIRECTIVE 2014/67/EU	AMENDMENT
Article 1	Article 1
1. This Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of Directive 96/71/EC. This Directive aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided in accordance with Article 3 of Directive 96/71/EC, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market.	1. This Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice ***of Article 7bis of Regulation 492/2011***, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of Article 7bis of Regulation 492/2011. This Directive aims to guarantee respect for an appropriate level of protection of the rights of ***workers in the context of cross-border provision of services***, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided in accordance with ***Article 7bis of Regulation 492/2011***, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market.

Explanation

The second amendment represents an example of the needs for legislative coordination entailed by the choice of Scenario 2 in Section 5 (the abrogation of the Posting of Workers Directive).

The first amendment modifies the Enforcement Directive to mandate the creation of **national websites to allow for the digital payment of social contributions** following the amendments proposed in the previous Section. It also ensures that this payment a) replaces the obligation for a prior notification, as the payment will include the information related to the duration of posting in the Host State, and b) includes the technical possibility for the authorities in the Host State to directly access the information introduced by the posting undertaking at the moment of the payment of contributions. This could be done by digital tools, such as the inclusion of a sufficiently secure QR code instrument, or by including the information directly in the document.

A further development the has not been included in the proposal at this time is to continue along the path of simplification. The choice of digital tool would allow, in time, to simplify the documents to be retained during posting, so that the posting undertaking would have to submit them at the moment of the payment of social contribution on the national website. **The QR code (or similar technology) on the document would then allow authorities, such as labour inspections, in the Host State to access these documents without the need to retain paper copies at the workplace or in the Host State.**

7.2. Proposal 6: Creating a single European portal

Regulation (EU) 2019/1149	AMENDMENT
Article 5 Information on labour mobility (c) support Member States in complying with the obligations on the access to and dissemination of information relating to the free movement of workers, in particular as laid down in Article 6 of Directive 2014/54/EU and in Article 22 of Regulation (EU) 2016/589, to social security coordination as laid down in Article 76(4) and (5) of Regulation (EC) No 883/2004, and to the posting of workers as laid down in Article 5 of Directive 2014/67/EU, including by means of reference to national information sources such as the single official national websites;	Article 5 Information on labour mobility (c) support Member States in complying with the obligations on the access to and dissemination of information relating to the free movement of workers, in particular as laid down in Article 6 of Directive 2014/54/EU and in Article 22 of Regulation (EU) 2016/589, to social security coordination as laid down in Article 76(4) and (5) of Regulation (EC) No 883/2004, and to the posting of workers as laid down in Article 5 of Directive 2014/67/EU, including by means of reference to national information sources such as the single official national websites; ***To this end, the Authority shall, in the four years following the coming into force of the present text, set up a single Union-wide website acting as a single portal for accessing information regarding applicable terms and conditions of employment pursuant Article 3 of Directive 1996/71/EC.*** ***Member States shall provide the Authority with the necessary information to be included in the single Union-wide website and ensure that the updated information is transmitted to the Authority. Failure to provide this information will be taken into account pursuant Article 5 of Directive 2014/67/EU.*** ***The Authority shall support Member States in providing this information in the most relevant languages taking into account the demands of their labour market.***

Explanation

This amendment tasks the European Labour Authority with the creation of a single European website allowing posted workers and posting undertakings to access the information regarding wages and working conditions applicable in case of posting to a given Member State. This would go beyond the simple reference (that is, hyperlinking) to national websites which is presently envisaged by the Funding Regulation of the Authority. Although the creation of the portal would be carried out by the Authority, the information to be included will have to be provided by Member States, knowing that failure to provide these information would be taken into account in case of sanctions inflicted for breach of posting rules.

Considering the amount of work that this would entail, it seems pointless to propose further development at this initial stage. However, the creation of this portal should be understood as the **first step to develop a single European posting portal**, where posting undertaking would be able to introduce prior notifications and/or pay social contributions (following the proposal developed in Section 6) and **automatically obtain the information as regards applicable wages and working conditions upon submitting the necessary information.** Apart from the general benefits in terms of simplification and accessibility of information, using a single website for the whole Union would allow for a single prior notification to cover multiple Member States, such as in the case of live performance touring.

APPENDIX

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