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

Zagreb, 2020

Ovaj rad izrađen je na Katedri za europsko javno pravo (Pravni fakultet u Zagrebu) pod vodstvom prof. dr. sc. Tamare Čapete i predan je na natječaj za dodjelu Rektorove nagrade u akademskoj godini 2019./2020.

## LIST OF ABBREVIATIONS

AG	Advocate General
ECJ	European Court of Justice
EU	European Union
EESC	European Economic and Social Committee
MEP	Member of the European Parliament
PW	Posted Worker
PWD	Posted Worker Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

### Other abbreviations

art.	article
<i>ibid</i>	<i>ibidem</i> , in the same place
n.	number
p.	page
para.	paragraph

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

## 1. INTRODUCTION

From its early years, the European Union (further EU), then known as the European Economic Community, dreamed of an internal market within its borders where goods, services, capital and people could move freely and where the necessary balance between economic, social and environmental policies would be maintained.<sup>1</sup> The value that the market freedoms have for the EU shows in the fact that they are enshrined in the Treaty on the Functioning of the European Union (further TFEU).<sup>2</sup> With the establishment of the Eurozone in 1999<sup>3</sup> and the Schengen agreement in 1985<sup>4</sup>, later incorporated within the Treaty framework, this promising dream was one big step closer to becoming a functioning reality.

Nonetheless, over the last two decades, as its borders grew, so has a wave of fear and self-interest. Politicians across the Union have used one of our most fundamental emotions, which rely on real concerns – fear (of losing a job, of losing identity) – in order to gain political power. "The Polish plumber" was just one of the names given to workers coming from the eastern part of the Union. It represents cheap labour that is 'threatening' the jobs of Westerners. The phrase gained popularity after de Villiers, a French politician, used it in an effort to campaign against an EU law from 2004 that made free movement easier to workers all across the Union.<sup>5</sup> "The Polish plumber" is seen as such a threat that it was also used in the debates leading to the Brexit

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<sup>1</sup> Opinion of the European Economic and Social Committee, '*Threats and obstacles to the Single Market*' (own-initiated opinion) rapporteur: Oliver Ropke [2016] <<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/threats-and-obstacles-single-market-own-initiative-opinion>> accessed 11 May 2020 p1-2

<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 art.26 (TFEU)

<sup>3</sup> 'What is the euro area?' (*European Commission*) <[https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area\\_en#relatedlinks](https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en#relatedlinks)> accessed 10 May 2020

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

<sup>5</sup> Béatrice Houchard, 'Comment le plombier polonaise a fait voter "non" au referendum de 2005' (*L'Opinion*, 28 october 2013) <<https://www.lopinion.fr/edition/politique/comment-plombier-polonais-a-fait-voter-non-referendum-2005-5531>> accessed 10 May 2020

referendum.<sup>6</sup> The practices associated with the cross-border provision of services, seen as unfair and illegal by 'old' Member states, are recognised by the 'new' Member States as the only way of being able to compete in the single market. Even though 'old' Europe fears cheaper Eastern European workforce, it seems that countries and regions in the geographical centre of Europe see the strongest per capita gains from the Single market and benefit much more than EU members in the south or east of the continent<sup>7</sup>. In other words, not everyone profits equally from the single market.

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

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

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<sup>6</sup> Lauren Frayer, 'If Britain leaves the EU, what happens to the "Polish plumber"?' (*NPR*, 14 May 2016) <<https://www.npr.org/sections/parallels/2016/05/14/477685487/if-britain-leaves-the-eu-what-happens-to-the-polish-plumber?t=1581279346169>> accessed 10 May 2020

<sup>7</sup> Dr. Katharina Gnath, 'EU Single Market boosts per capita incomes by almost 1,000 euros a year' (*Bertelsmann Stiftung*, 8 May 2019) <<https://www.bertelsmann-stiftung.de/en/topics/latest-news/2019/may/eu-single-market-boosts-per-capita-incomes-by-almost-1000-euros-a-year/>> accessed 10 May 2020

<sup>8</sup> 'Posted workers' (*European Commission*) <<https://ec.europa.eu/social/main.jsp?catId=471>> accessed 10 May 2020

<sup>9</sup> *ibid.*

<sup>10</sup> According to: Frederic De Wispelaere and Jozef Pacolet, '*Posting of workers: Report on All Portable Documents issued in 2017*' [2018] European Commission – DG EMPL Brussels <<https://www.etk.fi/wp-content/uploads/Komissio-tilastoraportti-Posting-of-workers-2017.pdf>> p9

<sup>11</sup> Statistics show that between 2010 and 2017, the number of posted workers increased by 83%; see Case C-620/18, Action brought on 2 October 2018 – Hungary v European Parliament and Council of the European Union, Opinion of AG Sánchez-Bordona

## **1.1. The research questions**

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

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

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

## **1.2. The research methods**

As a means to prove our hypotheses, we will be using a qualitative analysis. Such analysis aims to extrapolate various, as expected, opposing arguments that were used during different stages of the posted workers debate and classify them appropriately to prove (or disprove) that the arguments are not exclusively those defending the positions from the point of view of lower or higher wage countries. We will approach the problem of posted workers from the angle of law, as well as politics. This research is conducted based on the relevant legal documents (the old and new Directive), but also encompasses other documents through which the positions of the countries and the EU institutions (primarily the European Commission) were given during the legislative process leading to the amended Directive. The debate on appropriate

regulation was not only taking place in the legislative procedure at the EU level but also in cases which reached the Court of Justice of the European Union (further ECJ). We will, therefore, also analyse the ECJ case law to understand the arguments underlying the posted worker disputes. The other reason for such analysis will be to find out how the existing legislation was interpreted, as its consequences can only be understood in this way. The research will be backed by the insights of scholars published in academic journals and books.

In addition to using already existing data, we conducted a case study, using Croatia as a case model. For this purpose, and to verify our thesis that the problem is more complex than the conflict between high and low wage countries, we have conducted a semi-structured interview<sup>12</sup> with two of Croatia's prominent actors in the posted workers decision-making process: Trade Union and the Employers' Association. We expect that these will show that different positions concerning posted workers exist within the country and not only between countries. The conclusions drawn from the conducted interviews shall be presented in Chapter Eight of this paper, while the transcripts of the interviews themselves are attached as an appendix at the end of this paper. While choosing a method that would best suit our research in demonstrating Croatia's perspectives in the given issue, we conducted an informal conversation with Ms Tatjana Briški,<sup>13</sup> who participated in the yellow card process in 2016. Additionally, we discussed the best method for conducting a case study and the way to best appropriately format our interviews with professor Ksenija Grubišić.<sup>14</sup>

### **1.3. The structure of the paper**

The paper is structured as follows. After we set the scene in the Second Chapter, the authors will describe the legislation, which currently regulates posted workers as well as the case law that has interpreted it. The Third Chapter explains the political tensions in the posted workers area, especially as they have developed after the *Laval* decision of the ECJ. In order to give a greater insight into the problem of posting, Chapter Three will also present economic findings related to the difference in wages between local and posted workers. The tensions resulted in the adoption of a new

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<sup>12</sup> Semi-structured interviews provide a more in-depth understanding of participants' perceptions, which is why it was chosen as our method for conducting the interviews.

<sup>13</sup> Member of the Committee on European Affairs (the Croatian Parliament) during the yellow card process in 2016

<sup>14</sup> Associate professor at the Department of Sociology, Faculty of Law, University of Zagreb



Directive, not yet in force. Chapter Four explains the changes that it introduces. The new Directive was adopted with much resistance, not only during the process of its adoption but also afterwards. Moreover, Chapter Four deals with the challenges to the new regulation.

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

The research in this paper is based on relevant legislation in force on the 1<sup>st</sup> of July 2020.

## 2. POSTING OF WORKERS AS A SERVICE

In 2017, there were 2.8 million people who were sent by their employers to carry out a service in another EU Member State on a temporary basis.<sup>15</sup> These employees are also known as posted workers. Even though they make less than 1% of the entire EU workforce, they make a significant percentage in sectors such as construction.<sup>16</sup> With 86% of workers being posted to the EU-15<sup>17</sup> Member States such as Germany, France, and Belgium receive the most significant share.<sup>18</sup> Despite their relatively low number,<sup>19</sup> posted workers have become a symbol of social dumping.<sup>20</sup> Social dumping is defined as "the practice, undertaken by self-interested market participants

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<sup>15</sup> According to: De Wispelaere and Pacolet, '*Posting of workers: Report on AI Portable Documents issued in 2017*' (n10) p9

<sup>16</sup> *ibid*, p10; 47% of posting occurs in the construction sector

<sup>17</sup> EU-15 was the number of member countries in the EU prior to the accession of ten candidate countries in 2004.

<sup>18</sup> Rebecca Zahn, 'Revision of Posted Workers Directive: A Europeanisation Perspective' [2017] vol 19, 187-210 *Cambridge Yearbook of European Legal Studies* <<https://doi.org/10.1017/cel.2017.5>> accessed 11 May 2020 p1

<sup>19</sup> For more information on PW numbers according to each country see: Roberto Pedersini and Massimo Pallini, '*Posted workers in the European Union*' [2010] European Foundation for the Improvement of Living and Working Conditions <<https://www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union>> accessed 11 May 2020 p7 – 12 and Frederic De Wispelaere and Jozef Pacolet, '*Posting of workers: Report on AI Portable Documents issued in 2017*' [2018] European Commission – DG EMPL Brussels <<https://www.etk.fi/wp-content/uploads/Komissio-tilastoraportti-Posting-of-workers-2017.pdf>>

<sup>20</sup> Mijke Houwezijl and Herwig Verschueren, 'Free Movement of (Posted) Workers' in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia Ltd 2019) p50

of undermining or evading existing social regulations with the aim of gaining competitive advantage".<sup>21</sup>

The practice of posting of workers first became regulated in the 90s but early judgments of the Court of Justice in the cases *Manpower* and *Van der Vecht*,<sup>22</sup> as pointed out by M. Houwezijl and H. Verschueren, show how this practice was already a phenomenon in the late 1960s and early 1970s.<sup>23</sup> Both of these cases tackled the issue of social security for migrant workers posted in another Member State by their employers. As stated in the ruling of the *Manpower* case, a posted worker "shall continue to be the subject to the legislation of the former Member state as though he were still employed in its territory, provided that the anticipated duration of the work which he is to perform does not exceed 12 months...".<sup>24</sup> Nevertheless, not until the 1990s have posted workers become associated with social dumping where low wage Member States workers were sent to higher wage Member States.<sup>25</sup>

The groundbreaking judgment that set the course for future posted worker regulations was *Rush Portuguesa*<sup>26</sup> decided upon in 1990. This case postdated the accession of Portugal to the EU.<sup>27</sup> Under the Accession Treaty with Portugal, in a duration of 7 years, a transitional period was put forward to protect labour markets in the 'old' Member States due to "geographical proximity, income disparities, high unemployment and a tendency to migrate" of nationals of the 'new' Member States (the new states then being Portugal and Spain).<sup>28</sup> This meant that the free movement of workers did not apply to Portugal immediately after it acceded to the EU. On the other hand, the Accession Treaty did not restrict the free movement of services in the construction, as well as other sectors.

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<sup>21</sup> Monika Kiss 'Understanding social dumping in the European Union' [2017] European Parliamentary Research Service  
<[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599353](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599353)>  
accessed 11 May 2020 p1

<sup>22</sup> Case 35/70 *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* ECLI:EU:C:1970:120 and Case 19/67 *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht* ECLI:EU:C:1967:49

<sup>23</sup> Houwezijl and Verschueren (n 20) p77

<sup>24</sup> *Manpower* (n 22) para 9

<sup>25</sup> Houwezijl and Verschueren (n 20) p77

<sup>26</sup> Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* (ECJ, 27 March 1990)

<sup>27</sup> Houwezijl and Verschueren (n 20) p77

<sup>28</sup> Andrea Grgić, 'Posting of Workers within the Framework of Free Movement of Services in the European Union Law' (Doctoral thesis, University of Zagreb 2016) p42

## 2.1. *Rush Portuguesa*

Rush Portuguesa was a company governed by Portuguese law whose registered office was in Portugal. It specialised in building and public works undertaking. Rush had won a contract in France and to carry out the works brought its Portuguese workforce from Portugal. After the French Labour Inspectorate carried out checks of the sites Rush was working on, it notified Rush of a decision to pay a fine for employing foreign workers without a permit, which breached the provisions of the French Labour Code. In order to get the fine annulled, in court Rush argued that this was not the case of the free movement of workers but rather of free movement of services. Therefore its workers could not be prohibited from working in France, even without a work permit. Based on the fact that "such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State",<sup>29</sup> the Court of Justice made a revolutionary ruling according to which the provisions on the free movement of workers do not apply to posted workers. Posted workers were placed within the freedom to provide services. Nevertheless, the Court had also explained that the "Community law does not preclude the Member States from extending their legislation, or collective labour agreements entered into by both sides of the industry, to any person who is employed, even temporarily within their territory, no matter which country the employer is established, nor does Community law prohibit Member States from enforcing those rules by appropriate means".<sup>30</sup> In other words, according to the ECJ, domestic labour law may be extended to posted workers.

By determining that posted workers do not gain access to the labour market of the host Member state, the ECJ avoided judging on the rising conflict between the Community goal of a border-free EU internal market and the national interests related to border control aimed at keeping immigrants out.<sup>31</sup> Therefore, a regulation was needed.

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<sup>29</sup> *Portuguesa* (n 26) para 15

<sup>30</sup> *Portuguesa* (n 26) para 18

<sup>31</sup> Mijke Houwezijl, 'European Union law and Dutch labour law: The employment protection of posted temporary services workers' [2006] (forthcoming) p4

## 2.2. Current regulation of posted workers – 1996 Directive

The first EU legislation on posted workers was adopted in 1996. After six years of intense political debates, negotiations and amendments, the European Council and Parliament adopted the so-called Posted Workers Directive<sup>32</sup> (further 1996 PWD). The PWD, which is still in force and is to be replaced by new legislation by the end of July 2020, aimed to create a framework of rules for posted workers to avoid unfair competition and promote a true single services market. The ruling in *Rush Portuguesa* paved the way for the said legal framework.<sup>33</sup>

The 1996 PWD consists of nine provisions, however, being that the first three provisions are of great importance to our paper, we will only be analysing them,<sup>34</sup> by dividing the given articles into two categories:

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

### 2.2.1. Personal scope and definitions

The 1996 PWD defines "posted worker" as: "[a] person who, for a limited time, carries out his or her work in the territory of an EU Member State other than the state in which he or she normally works."<sup>35</sup>

An example of a posted worker would be: "A Polish national pipefitter employed at a construction firm in Poland is sent by his employer to work on a water treatment plant construction for a client in France. His part of the project is expected to take three months."<sup>36</sup>

#### 2.2.1.1. "Person"

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

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<sup>32</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1 (Directive 96/71/EC)

<sup>33</sup> *ibid.*

<sup>34</sup> For a more detailed analysis of the 1996 PWD see Andrea Grgić, 'Posting of Workers within the Framework of Free Movement of Services in the European Union Law' (Doctoral thesis, University of Zagreb 2016) p92-149

<sup>35</sup> Directive 96/71/EC art.2(1)

<sup>36</sup> Kent O'Neil, 'Do I Have a "Posted Worker"?' (*Newland Chase*, 20 February 2019) <<https://newlandchase.com/do-i-have-a-posted-worker/>> accessed 10 May 2020

(further EEA) state or Switzerland<sup>37</sup> who is temporarily working in another EEA state or Switzerland.<sup>38</sup>

### 2.2.1.2. "For a limited time"

This is a controversial part of this definition that was neither solved nor clarified by the Directive.<sup>39</sup> The potentially unlimited duration of the posting falls on the distinction line between free movement of workers and freedom to provide services.<sup>40</sup> Over the years, the ECJ came across cases<sup>41</sup> where the interpretation of a "limited period" was needed. In *Gebhard*,<sup>42</sup> it is stated by the Court that "the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity".<sup>43</sup> However, on the other hand, in the case *Trojani*,<sup>44</sup> the ECJ expressed that an activity carried out on a permanent basis or without any foreseeable limit would not be considered a service within the meaning of Article 56 of TFEU.<sup>45</sup> The contrasting interpretation given by the Court became of no help in giving a practicable definition of "temporary".

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

### 2.2.1.3. "Carries out his or her work"

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

- a. posting to carry out service contracts in the context of transnational subcontracting (for ex.: in the construction sector)
- b. transnational intra-company transfers (for ex.: the posting of key personnel)

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<sup>37</sup> See: 'Posting workers to Switzerland' [2019] MCH Group Ltd, Basel <<https://www.mch-group.com/en-US/venues/basel/messe-basel/organisers-regulations.aspx>> accessed 11 May 2020

<sup>38</sup> O'Neil, 'Do I Have a "Posted Worker"?' (n 36)

<sup>39</sup> Houwezijl and Verschueren (n 20) p89

<sup>40</sup> Houwezijl (n 31) p7

<sup>41</sup> Neither *Gebhard* nor *Trojani* were directly related to the topic of PW however they still had a significant impact in the interpretation of the Posted Workers Directive from 1996.

<sup>42</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411

<sup>43</sup> *ibid*, para 27

<sup>44</sup> Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* ECLI:EU:C:2004:488

<sup>45</sup> *ibid*, para 26

c. transnational temporary agency work.<sup>46</sup>

#### 2.2.1.4. "Other than the state in which he or she normally works"

As previously stated, the 1996 PWD applies to individuals whose usual place of work is within the border of the EEA or Switzerland. However, some member states while adopting the Directive in their national legislation have expanded their national requirements for posted worker notifications to include workers from a third country that are sent to the EU for temporary work.<sup>47</sup>

#### 2.2.2. Terms and conditions

Within Article 3, the PWD sets a base of mandatory labour standards that apply to the duration of work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, protective measures for pregnant women, for women who recently gave birth, for young people and children, and the equal treatment of men and women.<sup>48</sup> However, cases such as *Laval*, *Commission v. Luxemburg* and *Rüffert* (which we will discuss later in the text) made it clear that the Directive imposed not only a 'floor' but as well as a 'ceiling' concerning the application of host State law.<sup>49</sup> In other words, any demand going beyond the set minimum standards of Article 3(1) would result in the foreign service provider to lose their competitive advantage, which meant that additional demands were never given since they fell outside the mandatory scope of mentioned Article 3(1).<sup>50</sup>

While the Directive does state in Article 3(10) that the Member States may impose the application of terms and conditions wider than those listed within Article 3(1) for the sake of public policy, the ECJ in *Commission v. Luxemburg*<sup>51</sup> decided to a strict interpretation of the given Article.<sup>52</sup> After this judgment, it became clear that the "concept of public policy comes into play only where a genuine and sufficiently

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<sup>46</sup> Directive 96/71/EC art.1(3)

<sup>47</sup> O'Neil, 'Do I Have a "Posted Worker"?' (n 36)

<sup>48</sup> Directive 96/71/EC art.3(1)

<sup>49</sup> Houwezijl and Verschueren (n 20) p83

<sup>50</sup> Daniel Carter, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive' [2018] vol 14 (1), 31-68 Croatian Yearbook of European Law & Policy <<https://doi.org/10.3935/cyelp.14.2018.312>> accessed 11 May 2020 p43

<sup>51</sup> Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxemburg* ECLI:EU:C:1996:263

<sup>52</sup> See: Daniel Carter, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive' [2018] vol 14 (1), 31-68 Croatian Yearbook of European Law & Policy <<https://doi.org/10.3935/cyelp.14.2018.312>> accessed 11 May 2020 p40-41

serious threat affects one of the fundamental interests of society and that it must be narrowly construed".<sup>53</sup> This confirmed that the 1996 PWD, in reality, did impose a 'ceiling' on the application of the host State law.

### **2.2.2.1. Rüffert**

Trying to appease Denmark,<sup>54</sup> the 1996 PWD in Article 3(1) allowed the Member States without a system for declaring collective agreements universally applicable to apply generally applicable agreements, or agreements concluded by the most representative organisations.<sup>55</sup> While Article 3(8) gave a more in-depth insight on the previous Article, where in order for a collective agreement to be considered universally applicable it must be "observed by all undertakings in the geographical area and in the profession or industry".<sup>56</sup>

Nevertheless, even with a greater insight provided by Article 3(8), an issue arose that resulted in an ECJ ruling known as *Rüffert*<sup>57</sup>. The issue at hand concerned Lower Saxony, who had a rule that obliged public authorities to award contracts works only to undertakings paying wages laid down in the local collective agreement. However, the company that won the public tender contract only agreed to pay half of what was in the applicable collective agreement. With its ruling, the ECJ decided that the Lower Saxony collective agreement fell outside of both paragraphs of Article 3(8) as well as Article 3(1) stating that the collective agreement had not been declared universally applicable per the Directive since Germany did, in fact, have a system for declaring collective agreements universally applicable.<sup>58</sup> The Court also added that this agreement was not generally applicable to all similar undertakings in the geographical area and the profession or industry concerned.<sup>59</sup> With this decision, the ECJ narrowed the specific types of collective agreements that Article 3(1) applies to.<sup>60</sup>

### **2.2.2.2. The favour principle**

Another issue that arose was related to Article 3(7) in which it is stated that host labour standards only apply when working conditions in that Member State are more

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<sup>53</sup> Houwezijl and Verschueren (n 20) p83

<sup>54</sup> *ibid*, p82.

<sup>55</sup> Directive 96/71/EC art 3(1)

<sup>56</sup> *ibid* art 3(8)

<sup>57</sup> Case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189

<sup>58</sup> *ibid*, para 27.

<sup>59</sup> *ibid*, para 28.

<sup>60</sup> Carter (n 50) p44

favourable than in the home state of the posted worker. This requires a comparison between host and home labour standards. This provision was added as a way to avoid any drastic infringements to the freedom to provide services as well as the freedom of contract, what an unconditional application of host state law would have done.<sup>61</sup> However, since this so-called favour principle was never fully operationalised, the question of how is it to be decided, which working conditions are the most favourable was not answered.

In the preamble, the 1996 PWD declares its intention to promote the transnational provision of services, at the same time ensuring a climate of fair competition and guaranteeing respect for the rights of workers.<sup>62</sup> This begs for the answer to the question – did the Posted Workers Directive achieve its intention?

### 3. THE LAVAL CASE AND ITS CONSEQUENCES

Just ten years after the making of the Posted Worker Directive in 1996, two ECJ rulings made an inevitable impact across the Union. The cases referred to are the *Laval*<sup>63</sup> case and the *Viking*<sup>64</sup> case. As *Viking* concerned the right of establishment, *Laval* became the pivotal case for posted workers, which is why we shall discuss this case at more length. For some, these rulings were seen as a "danger" for social Europe and an opening to "wage dumping" in the EU, while others saw them as crucial for preserving the freedom of movement and establishment throughout the internal market.<sup>65</sup> As will be shown later on, the mentioned cases created a problematic interface between the two opposite stances.

#### 3.1. The *Laval* case

The *Laval* case concerned a Latvian company, that, after having won a public tender in Sweden, posted there dozens of its workers. Estimates suggest that these

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<sup>61</sup> Houwezijl and Verschueren (n 20) p85

<sup>62</sup> Directive 96/71/EC preamble 5

<sup>63</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809

<sup>64</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* ECLI:EU:C:2007:809

<sup>65</sup> 'European social model challenged by Court rulings' (*Euractiv*, 27 February 2008) <<https://www.euractiv.com/section/social-europe-jobs/news/european-social-model-challenged-by-court-rulings/>> accessed 10 May 2020



posted workers earned around 40% less than their Swedish counterparts.<sup>66</sup> Fearing that the posting of cheap labour would threaten the position of Swedish construction workers, the Swedish trade unions encouraged Laval to comply with the local terms and conditions of employment laid down by the collective agreement.<sup>67</sup> However, these negotiations were unsuccessful, which resulted in the Swedish trade unions taking collective actions by blocking all Laval working sites. In response, Laval brought the case to the Swedish Labour Court. The case was referred to the ECJ, where it was considered in the context and alongside the *Viking* case. The latter also concerned the lawfulness of industrial action, in this case boycotting, which had the effect of placing restrictions on the freedom to provide services.

The opinion given by the Advocate General (further AG) Paolo Mengozzi in *Laval* showed support for the Swedish trade unions' position and was well received by the European trade Unionists and their supporters.<sup>68</sup> The central part of AG Mengozzi's opinion was that the actions taken by the trade union did not compromise the legal provisions set out in the 1996 PWD. He concluded his opinion by stating that the blocking of the Laval working site was acceptable as this was "motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives".<sup>69</sup> If the preliminary ruling had complied with AG's opinion, this would have been a major step for trade unions all over the EU. "It would have made a never before seen precedent and an acknowledgement that trade unions were no longer only governed by national authority but would require them to improve on their cross border communication channels".<sup>70</sup>

However, the ECJ's ruling did not mirror the opinion of AG Mengozzi. The Court was of the opinion that the right to take collective action must be recognised as a fundamental right forming an integral part of the general principles of the Community

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<sup>66</sup> Michael Whittall, 'Unions fear ECJ ruling in Laval case could lead to social dumping' (*Eurofound*, 24 February 2008) < <https://www.eurofound.europa.eu/publications/article/2008/unions-fear-ecj-ruling-in-laval-case-could-lead-to-social-dumping>> accessed 10 May 2020

<sup>67</sup> It is important to note that Sweden (like Denmark) does not have a statutory minimum wage nor a scheme for the extension of collective agreements in accordance with the 1996 PWD; for more information see Melita Carević, Paula Kiš and Filip Kuhta, '*Minimum Wages as an Obstacle to the Free Provision of Services*' [2008] vol 4 (1), 75-100 *Croatian Yearbook of European Law and Policy* <<https://hrcak.srce.hr/28576>> p84-88

<sup>68</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, Opinion of AG Mengozzi

<sup>69</sup> *ibid*, para 307.

<sup>70</sup> Whittall, 'Unions fear ECJ ruling in Laval case could lead to social dumping' (n 66)

law, stating that taking action against social dumping may, in fact, constitute a reason of public interest. Nevertheless, the action taken did represent a restriction on the freedom to provide services and by that made the services "less attractive".<sup>71</sup> In the related *Viking* case, the Court held that the trade unions' right to take collective action might be limited by employers' rights to freedom of establishment.<sup>72</sup>

### 3.2. Political polarisation and the rise of populism

As stated in the opening of this Chapter, the reaction to these cases was quite polarised. The Secretary-General of the European Trade Union Confederation, for example, stated that "unions across Europe were now deeply concerned with defending their national systems" and also added that there is a "protectionist reaction".<sup>73</sup> Additionally, many Members of European Parliament (further MEP) took stands on this issue such as Danish MEP Poul Nyrup Rasmussen, President of the Party of European Socialists, who said that the message that citizens of the EU might receive was that "Europe is more interested in the competition between workers than in raising living standards for all families".<sup>74</sup> On the other hand, we had MEP Philip Bushill-Mathews, employment spokesman for the UK Conservatives stating that "it is good to see the European Court of Justice upholding a key principle of the single market: the trade union market should stop trying to block progress in this area but should learn from this judgment to move with the time".<sup>75</sup> According to BusinessEurope, a lobby group that represents enterprises of all sizes in the EU,<sup>76</sup> the judgment will contribute to "improving the development of an internal market"<sup>77</sup> and provide "legal clarity, which was greatly needed to achieve the correct implementation of the posting of workers directive"<sup>78</sup>.

As it is apparent by reading comments given out by people from different areas of expertise, as the ones stated above, the issue that arises not only by an ECJ court

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<sup>71</sup> *Laval* (n 63) para 99

<sup>72</sup> *Viking* (n 64) paras 88-89

<sup>73</sup> 'European social model challenged by Court rulings' (n 65)

<sup>74</sup> 'Unions frustrated at Court ruling on posted workers' (*Euractiv*, 28 February 2012) <<https://www.euractiv.com/section/social-europe-jobs/news/unions-frustrated-at-court-ruling-on-posted-workers/>> accessed 10 May 2020

<sup>75</sup> *ibid.*

<sup>76</sup> 'Confederation of European Business' (*Wikipedia*, 15 April 2020) <[https://en.wikipedia.org/wiki/Confederation\\_of\\_European\\_Business](https://en.wikipedia.org/wiki/Confederation_of_European_Business)> accessed 11 May 2020

<sup>77</sup> 'European social model challenged by Court rulings' (n 65)

<sup>78</sup> Whittall, 'Unions fear ECJ ruling in Laval case could lead to social dumping' (n 66)

ruling but by the practice of posted workers, in general, is whether social rights, one of them being workers' rights, and an internal market without limits can be in harmony with each other or will one always come before the other.

Regardless of what one's stances are on this matter, one cannot ignore the impacts it has had and will have on the future of the EU. Over the last two decades, populism and Euroscepticism have risen in all parts of the Union. Whether we believe that the intensity of policy competition and migration is exaggerated and unfounded or not, we still cannot deny that it has brought out the fear over a cumulative "race to the bottom"<sup>79</sup>.

Today one in three Europeans will give their vote to a Eurosceptic party,<sup>80</sup> which is believed to partially stem from outright rejection of European economic integration.<sup>81</sup> The reasons behind this might be a lack of solutions for establishing common ground on the level of social protection between countries in different stages of economic development, especially after the intake of Eastern European countries.<sup>82</sup> Even those who do not vote for a Eurosceptic party still wish for a more Social Europe, which is evident with the rulings regarding the Posted Workers Directive sparking social outrage.

### **3.3. A fight for a more 'Social Europe'**

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

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<sup>79</sup> 'Race to the bottom' is a situation in which companies compete with each other to reduce costs by paying the lowest wages or giving workers the worst conditions; 'Race to the bottom' (*Cambridge Dictionary*, unknown date) <<https://dictionary.cambridge.org/dictionary/english/race-to-the-bottom>> accessed 10 May 2020

<sup>80</sup> Eurasia Review, 'Tracking the Rise of Euroscepticism and Support for the Far-Right' (*Eurasia Review News & Analysis*, 3 March 2020) <<https://www.eurasiareview.com/03032020-tracking-the-rise-of-euroscepticism-and-support-for-the-far-right/>> accessed 11 May 2020

<sup>81</sup> Jon Henley, 'Support for Eurosceptic parties doubles in two decades across EU' (*The Guardian*, 2 March 2020) <<https://www.theguardian.com/world/2020/mar/02/support-for-eurosceptic-parties-doubles-two-decades-across-eu>> accessed 11 May 2020

<sup>82</sup> Olaf Cramme, 'Social Europe's new Battleground' (*Euractiv*, 22 March 2011) <<https://www.euractiv.com/section/social-europe-jobs/opinion/social-europe-s-new-battleground/>> accessed 11 May 2020

conditions,<sup>83</sup> the French were gathering allies across the EU in their fight against what they saw as social dumping.<sup>84</sup> As expressed by a French senator, Eric Bocquet, during his interview with EURACTIV France, the difference between France and Poland in social contributions that employers pay in the country of origin can reach up to 30%.<sup>85</sup> This can result in employers deciding on hiring a worker that would cost them much cheaper in a wholly legal and systematic way, but can also result in an increase in xenophobia among the local workers who feel like their jobs have been stolen from them.

While countries like Belgium, Spain and to some extent Germany sided alongside France in wanting better control of the posted workers system, the pre-Brexit UK and the Eastern European countries were firmly opposed to it.<sup>86</sup> The Eastern European countries were declaring competition within the Single market as their key counter-argument, whereas in the UK, then Prime Minister David Cameron (further PM) used cheap labour workers as an argument to attract voters.<sup>87</sup> However, former PM Cameron was not the only politician using this 'crisis' to his advantage. Just south of its borders, France's main far-right party, the Front National, lead by Marine le Pen, was leading in the EU election polls which were just a few months away when this was all happening.<sup>88</sup> Even though posted workers make less than 1% of workers, the psychological impact that was made on voters was meaningful. Bearing that in mind, the French government started an initiative to push this issue forward at European level. This consisted of "tightening labour inspection controls in the affected sectors, which they believed were increasingly bypassed, preventing fraudulent arrangements and the strengthening of legislation".<sup>89</sup> In the end, the Council of the European Union gave initial approval to tighten the rules regarding posting with an enforcement directive, without changing the provisions of the PWD, responding to political

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<sup>83</sup> 'Lorry drivers take protests to Brussels on Monday' (VRT NWS, 23 September 2012) [https://www.vrt.be/vrtnws/en/2012/09/23/lorry\\_drivers\\_takeproteststobrusseelsonmonday-1-1437591/](https://www.vrt.be/vrtnws/en/2012/09/23/lorry_drivers_takeproteststobrusseelsonmonday-1-1437591/) accessed 11 May 2020

<sup>84</sup> Cécile Barbière, 'France looks for EU allies in fight against low-cost workers' (Euractiv, 7 November 2013) < <https://www.euractiv.com/section/social-europe-jobs/news/france-looks-for-eu-allies-in-fight-against-low-cost-workers/>> accessed 11 May 2020

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> Aline Robert, 'Paris pushes EU-wide minimum wage in crusade against social dumping' (Euractiv, 2 December 2013) < <https://www.euractiv.com/section/trade-society/news/paris-pushes-eu-wide-minimum-wage-in-crusade-against-social-dumping/>> accessed 11 May 2020

<sup>88</sup> Aline Robert, 'French EU minister seeks solutions to fight social dumping' (Euractiv, 18 November 2013) < <https://www.euractiv.com/section/trade-society/news/french-eu-minister-seeks-solutions-to-fight-social-dumping/>> accessed 11 May 2020

<sup>89</sup> Robert, 'Paris pushes EU-wide minimum wage in crusade against social dumping' (n 87)

unease. The aim of this Directive would have been to improve the supervision and enforcement of the rules of the 1996 PWD, with "national control measures and joint and several liabilities in subcontracting chains".<sup>90</sup> However, at the request of the UK,<sup>91</sup> these provisions were only to apply to the construction sector, which was a particular area of worry because of great use of sub-contractors in the construction business that led the way to abuses of social law.<sup>92</sup> The proposal aimed to end this abuse by allowing "posted workers to hold the contractor, of which the employer is a direct subcontractor, liable, in addition to or in place of the employer" regarding his rights as a worker mainly consisting of the "remuneration corresponding to the minimum rate of pay".<sup>93</sup>

### 3.4. The Enforcement Directive 2014

On the 15<sup>th</sup> of May 2014, the EU adopted the so-called Enforcement Directive<sup>94</sup> that will be "updating and improving the way the single market works, while safeguarding workers' rights".<sup>95</sup> The Enforcement Directive 2014 (further 2014 ED) is mainly the result of compromises between the States, the ones that were against and the ones that supported a strengthening of controls.<sup>96</sup> Knowing that workers sent to another Member State "play an important role in filling labour and skill shortages in various sectors and regions like construction, agriculture and transport",<sup>97</sup> this Directive's goal was to diminish frauds and abuses such as companies that were artificially establishing themselves abroad, to benefit from lower levels of labour

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<sup>90</sup> 'Council reaches general approach on posting of workers Directive' Presse 562 [2013] Council of the European Union <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lisa/139997.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/139997.pdf)> accessed 11 May 2020 p2

<sup>91</sup> 'Labour ministers hammer out agreement on posted workers' (*Euractiv*, 10 December 2013) <<https://www.euractiv.com/section/social-europe-jobs/news/labour-ministers-hammer-out-agreement-on-posted-workers/>> accessed 11 May 2020

<sup>92</sup> *ibid.*

<sup>93</sup> Council of the European Union, 'Council reaches general approach on posting of workers Directive' (n 90) p1

<sup>94</sup> Directive 2014/67/EU of the European Parliament and of the Council of the 15 May 2014 on the enforcement of the Directive 96/71/2012 concerning the posting of workers in the framework of the provision of services and amending Regulation [2014] OJ L159/11

<sup>95</sup> 'Commission to boost protection for posted workers' [2012] European Commission Press Release IP/12/267 <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_267](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_267)> accessed 10 May 2020 p1

<sup>96</sup> Sébastien Richard, 'The implementing directive on posted workers: and what now?' (*Robert Schuman*, 29 February 2016) <<https://www.robert-schuman.eu/en/european-issues/0383-the-implementing-directive-on-posted-workers-and-what-now>> accessed 11 May 2020

<sup>97</sup> European Commission Press Release, 'Commission to boost protection for posted workers' [2012] European Commission Press Release (n 95) p2

protection and lower levels of social security contributions,<sup>98</sup> also known as letterbox companies.

However, not long after its adoption, the new text raised criticism, among others from France, arguing that it did not do enough in terms of the protection of workers or the prevention of abuses.<sup>99</sup> Because of this, France decided to take matters in its own hands, releasing the Macron bill to clamp down on the 300,000 illegally posted workers within the country.<sup>100</sup>

Alas, however unsuccessful this 2014 ED seemed to some, this was only the first step in an attempt to fight social dumping and fraud. The next phase was the revision of the 1996 PWD, causing a bipartisan reaction among EU nationals. BusinessEurope argued that this step was not necessary since the 2014 ED, at the time, was still not fully implemented, and that "changing legislation would bring new uncertainty for business in Europe".<sup>101</sup> European small construction entrepreneurs counter-argued<sup>102</sup> that the issues they were facing were not tackled by the 2014 ED, which is why, in their view, it was necessary to review the 1996 PWD to ensure a level playing field for construction enterprises and to protect the rights of posted workers.<sup>103</sup>

Two years after the 2014 ED and twenty years after the 1996 PWD, a new directive was adopted. The rising number of posted workers in the EU, which had increased by nearly 45% between 2010 and 2014,<sup>104</sup> was just one of the reasons some countries such as Germany, Austria, Belgium, France and the Netherlands, who also receive half of the workers, pushed for this new Directive.<sup>105</sup>

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<sup>98</sup> *ibid.*

<sup>99</sup> Florence Dupont-Fargeaud and Camilla Spira, 'New directive on posted workers ignores member states' objections' (*Euractiv*, 16 April 2014) < <https://www.euractiv.com/section/social-europe-jobs/opinion/new-directive-on-posted-workers-ignores-member-states-objections/>> accessed 11 May 2020

<sup>100</sup> Jean-Christophe Chanut, 'Le difficile combat contre la fraude au détachement des salariés étrangers' (*La Tribune*, 11 June 2015) < <https://www.latribune.fr/economie/france/le-difficile-combat-contre-la-fraude-au-detachement-des-salaries-etrangers-483398.html>> accessed 11 May 2020

<sup>101</sup> Daniela Vincenti 'Posted workers revision gets off to shaky start' (*Euractiv*, 9 March 2016) < <https://www.euractiv.com/section/social-europe-jobs/news/posted-workers-revision-gets-off-to-shaky-start/>> accessed 11 May 2020

<sup>102</sup> *ibid.*

<sup>103</sup> Statement given by European Builders Confederation president Patrick Liebus.

<sup>104</sup> 'La révision de la directive sur le détachement des travailleurs' (Robert Schuman, 10 October 2016) < <https://www.robert-schuman.eu/fr/questions-d-europe/0406-la-revision-de-la-directive-sur-le-detachement-des-travailleurs>> accessed 11 May 2020

<sup>105</sup> *ibid.*

### 3.5. Why are posted workers more affordable?

As one of its unintended effects, the 1996 PWD set out a practice of preference for posted workers over domestic workers. The main reason being the difference in cost. Although employers are required to apply the mentioned terms and conditions set out by the 1996 PWD, firms still manage to obtain a cost advantage if social security contributions in the home State are considerably lower.<sup>106</sup> According to a study written by E. Voss, "labour cost differences from savings in terms of social security contributions could be as much as 30%".<sup>107</sup> Furthermore, if a posted worker is not placed correctly on the appropriate skill or qualification level, unlike his equally skilled colleague from the host country, he will be working on minimum pay and conditions. This additionally, signifies both down-skilling and possibly brain waste.<sup>108</sup>

In practice, posted workers are often paid and even prepared to work at the lowest official minimum wage rate level, being that the pay is still much higher than the home country equivalent.<sup>109</sup> A good example is a 2005 UK case where Hungarian posted workers were being paid around 816 to 1,020 pounds per months, which was below the standard rates and national minimum wage. Where, as reported by a posted worker, in Hungary the equivalent wage was 326 pounds.<sup>110</sup>

Even France,<sup>111</sup> whose posting regulation, in theory, provided effective equality of direct wage costs for posted and French workers,<sup>112</sup> reported in 2006 an estimated wage difference between foreign posted workers and their local workers to be around 50%.<sup>113</sup> In Denmark, in the mid-2000s, a study of the construction sector reported

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<sup>106</sup> Frederic De Wispelaere and Jozef Pacolet, 'An ad hoc statistical analysis on short term mobility – Economic value of posting of workers: The impact of intra-EU cross-border services, with special attention to the construction sector' [2016] European Commission – DG EMPL Brussels p15

<sup>107</sup> Eckhard Voss (in cooperation with Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicione), 'Posting of Workers Directive: current situation and challenges' [2016] Policy Department A: Economic and Scientific Policy <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2016\)579001](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)579001)> accessed 10 May 2020 p38

<sup>108</sup> Ninke Mussche, Vincent Corluy and Ive Marx, 'How posting shapes a hybrid Single European Labour Market' [2017] vol 24(2), 113-127 European Journal of Industrial Relations <<https://doi.org/10.1177/0959680117708374>> accessed 11 May 2020 p3

<sup>109</sup> De Wispelaere and Pacolet, 'An ad hoc statistical analysis on short term mobility – Economic value of posting of workers: The impact of intra-EU cross-border services, with special attention to the construction sector' (n 106) p14

<sup>110</sup> Jan Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (CLR Studies, 2011) p41

<sup>111</sup> *ibid*, p39

<sup>112</sup> Where each worker is paid according to the (minimum) gross wage corresponding to the rates for his qualification fixed by a collective agreement.

<sup>113</sup> Voss (n 107) p37

that, workers from Eastern European countries were being paid on average 25-28% less than their Danish counterparts.<sup>114</sup>

To further demonstrate the cost difference between local and posted workers,<sup>115</sup> we will be using a table, created by E. Voss, that provides an "approximate illustration of the cost savings that are achieved through posting". This example uses three fictive workers from the Netherlands, Poland and Portugal and uses the assumption that income tax is paid in the host State where, in fact, in most situations, this is not the case. The reason being the "183 days rule" which stipulates that the posted worker will be subject to income tax in the home State if they work less than 183 days within a period of 12 months in the host State. Hence, since most postings do not last more than 183 days, the home country usually levies the income tax. Therefore, the cost savings can be even higher in most cases, given that there are significant differences in income tax level in each Member States.

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

	Dutch worker	Posted worker from Portugal	Posted worker from Poland
<b>Net salary</b>	1,600	1,600	1,600
<b>-/- social security</b> (paid in the sending country)	496	81	350
<b>-/- taxes</b> (paid in the receiving country, i.e. after the 183 days)	81	81	81
<b>Gross salary</b>	<b>2,177</b>	<b>1,762</b>	<b>2,032</b>
<b>Percentage saving as compared to a Dutch worker</b>		<b>19.1%</b>	<b>6.7%</b>

**Source:** Voss, Posting of Workers Directive - current situation and challenges, 2016, p. 27, based on Berntsen, L. 2015: Social dumping at work: uses and abuses of the posted work framework in the EU, ETUI Policy Brief, Brussels, p. 3

As it is evident from Table 1., there is a significant percentage difference in cost between workers coming from different countries. Making it even easier to understand why employers prefer posted workers compared to domestic ones as well as understanding why a new PWD came to be.

<sup>114</sup> *ibid.*

<sup>115</sup> For additional examples see: Roberto Pedersini and Massimo Pallini, '*Posted workers in the European Union*' [2010] European Foundation for the Improvement of Living and Working Conditions <<https://www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union>> accessed 11 May 2020 p13



## 4. RESISTANCE TOWARDS THE 2018 PWD PROPOSAL

The new Posted Workers Directive 2018 was, adopted on the 21<sup>st</sup> of June 2018.<sup>116</sup> This was a result of a long process of negotiations. The process of its creation was a challenge that stands as an example of evaluating the importance of conflicting interests, the likes of competitiveness on the one hand, and the suppression of social dumping and unfair competition on the other.<sup>117</sup>

### 4.1. The last line of defence – Hungary's and Poland's lawsuit

Even after its adoption, the challenge to the 2018 PWD continued. Hungary<sup>118</sup> and Poland<sup>119</sup> filed a lawsuit demanding its annulment. Although the cases are still pending, while writing this paper, AG M. Campos Sanchez-Bordona published his opinion in which he gives a detailed answer to the arguments laid out by Hungary.<sup>120</sup> While the AG's opinion does not bind the ECJ, it still gives us possible insight on the future actions of the Court regarding the filed lawsuits. In its application, Poland expressed that the main objective of the 2018 PWD was to restrict the freedom to provide services by increasing the burden on service providers, which would result in a reduction in its competitiveness.<sup>121</sup> They also considered that the provisions of the Directive were discriminatory and contrary to the principle of proportionality due to insufficient justification.<sup>122</sup>

On the other hand, Hungary raises five pleas in law, of which we will, for relevance to our work, examine the first three.<sup>123</sup> Firstly, Hungary considers that the 2018 PWD is based on the wrong legal basis and should have been adopted on the basis of Article 153 TFEU, which deals with certain aspects of the EU's social

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<sup>116</sup> 'Posting of workers: Council adopts the directive' (*European Council*, 21 June 2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/>> accessed 11 May 2020

<sup>117</sup> 'Upućivanje radnika u okviru pružanja usluga' [2016] Hrvatski Sabor, Odbor za europske poslove (document on file with the authors) p2

<sup>118</sup> Case C-620/18, Action brought on 2 October 2018 – *Hungary v European Parliament and Council of the European Union*

<sup>119</sup> Case C-626/18, Action brought on 3 October 2018 – *Republic of Poland v European Parliament and Council of the European Union*

<sup>120</sup> Case C-620/18, Action brought on 2 October 2018 – *Hungary v European Parliament and Council of the European Union*, Opinion of AG Sánchez-Bordona (Opinion of AG Sánchez-Bordona)

<sup>121</sup> *Republic of Poland v European Parliament and Council of the European Union* (n 119) para 3

<sup>122</sup> *ibid.*

<sup>123</sup> For the other two pleas see: Case C-620/18, Action brought on 2 October 2018 – *Hungary v European Parliament and Council of the European Union*

policy.<sup>124</sup> The AG disagreed, pointing out that an act amending another earlier act, generally, has the same legal basis as the latter.<sup>125</sup> Secondly, Hungary considers that the Union has no legislative power to regulate the issue of remuneration in the field of labour relations.<sup>126</sup> AG Sanchez-Bordona refuted this argument, stating that the EU only harmonises the application of the rules of operation of the host country and country of origin.<sup>127</sup>

Additionally, stating that the 2018 PWD does not, in any case, specify the amount of salary to be paid.<sup>128</sup> In the end, he considers the argument of violation of the principle of proportionality, which both Hungary and Poland called upon, unfounded. Because it was necessary for the new Directive to protect workers' rights and thus restore the disturbed balance.<sup>129</sup> Given all the above, the AG recommends that the ECJ dismiss in its entirety these still pending actions.<sup>130</sup>

## 4.2. National parliaments' third yellow card

The challenge by Hungary and Poland is only the last line of defence against the 2018 PWD. While its adoption was still pending in 2016, the countries dissatisfied with the proposal felt that the Commission should either reject or amend the given proposal. To this regard, the yellow card process,<sup>131</sup> the system established with the Lisbon Treaty, was used as the primary resistance mechanism.<sup>132</sup>

In order to explain the yellow card system, we must first highlight one of the key principles of the EU – the principle of subsidiarity, defined in TEU<sup>133</sup> as well as in the

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<sup>124</sup> *Hungary v European Parliament and Council of the European Union* (n 118) para 1

<sup>125</sup> 'Advocate General Sánchez-Bordona proposes that the Court of Justice should dismiss the actions for annulment brought by Hungary and Poland against the Directive strengthening posted workers' rights' [2020] Court of Justice of the European Union Press Release No 63/20 <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200063en.pdf>> accessed 30 May 2020 p1 (ECJ Press Release: AG Sánchez-Bordona Opinion)

<sup>126</sup> *Hungary v European Parliament and Council of the European Union* (n 118) para 2

<sup>127</sup> ECJ Press Release: AG Sánchez-Bordona Opinion (n 125) p2

<sup>128</sup> *ibid.*

<sup>129</sup> Opinion of AG Sánchez-Bordona (n 120) para 108

<sup>130</sup> ECJ Press Release: AG Sánchez-Bordona Opinion (n 125) p2

<sup>131</sup> See Tatjana Briški and Jelena Špiljak, 'Indirect inclusion of National Parliaments in the European Lawmaking process: Croatian Parliament priorities in European affairs' [2014] vol 7 (1), 7-28 *Suvremene teme* <<https://hrcak.srce.hr/132136>> accessed 11 May 2020

<sup>132</sup> 'Mehanizam kontrole poštovanja načela supsidijarnosti' (*Europska Komisija*) <[https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism\\_hr](https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_hr)> accessed 11 May 2020

<sup>133</sup> Consolidated version of the Treaty on European Union [2012] OJ 326/13

Protocol on the application of the principle of subsidiarity and proportionality.<sup>134</sup> It stipulates that the Member States have competence in non-explicit areas of the Union, but at the same time opens the possibility for the EU to take over the regulation of a specific problem if the Member States cannot achieve the objectives of the action entirely or if it can be achieved with better results at the Union's level.<sup>135</sup> From this definition, we can identify the potential issues of dispute that can arise between national Parliaments and the European Union, in relation to the competence to resolve a particular issue, as was the case with the adoption of this Directive.

For the sake of protection, of Member States, from potential violations of the subsidiarity principle, in 2009, the Treaty Protocol introduced the possibility of submitting "yellow cards", defining them as a procedure under which national parliaments of EU Member States can object to a draft legislative act on the grounds of the previously mentioned, principle of subsidiarity.<sup>136</sup> They are part of an 'early warning' procedure, in which any national Parliament or any chamber of a national Parliament can in eight weeks, from the date when a draft legislative act was forwarded to it, send to the Presidents of the EU Parliament, the Council or the EU Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.<sup>137</sup> After this, the institution that produced the objected draft may decide to maintain, amend or withdraw it, while giving reasons for that decision.<sup>138</sup> Since their introduction, the yellow cards have only been used on three occasions,<sup>139</sup> one of them being against the proposal for a revision of the Directive on the posting of workers. The reason for its rare use is the fact that to set the process going the objection has to be raised by at least one-third of all votes of national Parliaments, which is indeed very difficult.<sup>140</sup>

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<sup>134</sup> Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Protocol (2) on the application of the principles of subsidiarity and proportionality [2008] OJ C 115/01

<sup>135</sup> TEU art. 5(3)

<sup>136</sup> 'Yellow card procedure' (*Eurofound*, 27 November 2017) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/yellow-card-procedure>> accessed 11 May 2020

<sup>137</sup> 'Načelo supsidijarnosti' [2020] European Parliament facts sheets <[https://www.europarl.europa.eu/ftu/pdf/hr/FTU\\_1.2.2.pdf](https://www.europarl.europa.eu/ftu/pdf/hr/FTU_1.2.2.pdf)> accessed 11 May 2020, p1

<sup>138</sup> 'Yellow card procedure' (n 136)

<sup>139</sup> two of which concern matters regarding employment and industrial relations

<sup>140</sup> 'Mehanizam kontrole poštovanja načela supsidijarnosti' (n 132)

#### 4.2.1. National Parliaments' reasoned opinions and the responses of the European Commission

In 2016, Croatia was one of 11 countries whose Parliament sent forward a reasoned opinion,<sup>141</sup> also known as a yellow card.<sup>142</sup> In its reasoned opinion, Croatian Parliament - Sabor highlighted four critical objections to the proposal for the revision of 1996 PWD. The Committee on European Affairs of the Croatian Parliament had highlighted a breach of Article 56 of the TFEU, arguing that "the proposal for a directive violates the freedom to provide services with the Union", emphasising that "labour costs are a legitimate element of competitiveness in the internal market".<sup>143</sup> The Republic of Croatia also firmly believed that proposing the revision of the 1996 PWD, while the process of implementing of the 2014 ED was still going on creates overregulation and contributes to legal uncertainty for workers and employers.<sup>144</sup> Lastly, the Committee concluded that this is "an unnecessary entry into the area of employer and trade union autonomy and that the issue of posted workers should be addressed through collective bargaining".<sup>145</sup> Given all the above, Croatia's Parliament had taken the view that the proposal to amend the 1996 Directive is contrary to the Article 5 of Protocol no.2 on the application of the principles of subsidiarity and proportionality.<sup>146</sup>

Once initiated, the yellow card process obliges the EU Commission to reconsider the proposal.<sup>147</sup> While reviewing the proposal for the amendments to the PWD, the Commission considered all reasoned opinions received by national Parliaments, classified them into four sets of conclusions and responded to each of them.

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<sup>141</sup> The other countries, beside Croatia, were Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia

<sup>142</sup> 'Obrazloženo mišljenje o prijedlogu direktive Europskog parlamenta i Vijeća o izmjeni Direktive 96/71/EZ Europskog parlamenta i Vijeća od 16. prosinca 1996. o upućivanju radnika u okviru pružanja usluga COM (2016) 128' [2016] Hrvatski Sabor, Odbor za europske poslove <<https://www.sabor.hr/sites/default/files/uploads/inline-files/OM%20Hrvatski%20sabor%20COM%20%282016%29%20128%20%2810%29.pdf>> accessed 11 May 2020

<sup>143</sup> ibid, p3.

<sup>144</sup> ibid.

<sup>145</sup> ibid.

<sup>146</sup> 'Bilješka s međuparlamentarnog sastanka "Ciljana revizija pravila za upućivanje radnika"' [2016] Hrvatski Sabor, Odbor za europske poslove (document on file with the authors) p1 (Bilješke s međuparlamentarnog sastanka)

<sup>147</sup> 'Načelo supsidijarnosti' [2020] European Parliament facts sheets <[https://www.europarl.europa.eu/ftu/pdf/hr/FTU\\_1.2.2.pdf](https://www.europarl.europa.eu/ftu/pdf/hr/FTU_1.2.2.pdf)> accessed 11 May 2020, p3

As a first objection to the proposal, one part of the national parliaments stated that the existing regulations were sufficient and appropriate.<sup>148</sup> The background to this view is the fear of a possible reduction in competitiveness, which the Croatian Parliament also pointed out in its reasoned opinion, although this particular objection could not be a good enough reason to call upon a breach in the subsidiarity principle. The Commission did not take this view into account, pointing out that "the aim of this proposal is to reduce social dumping and ensure as similar conditions as possible for both domestic and cross-border service providers".<sup>149</sup> States abused the possibility of whether to apply or not collective agreements in non-construction sectors and have thus consciously contributed to the creation of conditions in which posted workers were paid less than domestic workers. In order to truly reduce social dumping, it was necessary to impose an obligation on States to extend the application of collective agreements to sectors other than construction.<sup>150</sup>

All national Parliaments that initiated the yellow card process argued that the question at hand should be dealt at the national level, adding that the Commission had not sufficiently demonstrated that the issue should be dealt with on the Union's level.<sup>151</sup> The Commission denied the latter. This issue was further deepened when countries such as Spain, Portugal, France, UK and Italy submitted their response, stating that the proposal did not violate the subsidiarity principle, thus supported the Commission's stances.<sup>152</sup> The Commission considered that "individual measures could not achieve legal harmonisation in the internal market and clarity of the legal framework of posted workers equally effectively".<sup>153</sup>

The Danish Parliament also expressed concerns about a violation of the principle of subsidiarity. Denmark was the only high wage country that joined the yellow card process. This country was worried that, unlike the 1996 PWD, the proposal for a new Directive does not explicitly state the competence of States to determine wages and conditions of employment.<sup>154</sup> The Commission tried to appease their position, arguing

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<sup>148</sup> 'Komunikacija Komisije Europskom Parlamentu, Vijeću i Nacionalnim Parlamentima o prijedlogu Direktive o izmjeni Direktive o upućivanja radnika, u pogledu načela supsidijarnosti, u skladu s Protokolom br.2' [2017] Europska Komisija <[https://www.sabor.hr/sites/default/files/uploads/inline-files/1\\_HR\\_ACT\\_part1\\_v2%20-%202019-06-04T103938.513.pdf](https://www.sabor.hr/sites/default/files/uploads/inline-files/1_HR_ACT_part1_v2%20-%202019-06-04T103938.513.pdf)> p5 (Komunikacija Komisije)

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*, p6.

<sup>152</sup> Bilješke s međuparlamentarnog sastanka (n 146) p1

<sup>153</sup> Komunikacija Komisije p7 (n 148)

<sup>154</sup> *ibid.*, p7.

that it was not about regulating remuneration and working conditions, but merely preventing discrimination between domestic and posted workers.<sup>155</sup>

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

The Commission, while reacting to all arguments in the reasoned opinions, remained in favour of the proposal, considering it was not in breach of the principle of subsidiarity or proportionality. The amended Directive was in the end, adopted. Majority of countries that started the yellow card process did not vote against the new Directive.<sup>156</sup> Why have many countries, including Croatia, changed their positions concerning what they have expressed in yellow card procedure is not as obvious.

One argument might be that the position in the Council is influenced by what countries expect to happen in Parliament. The most prominent parliamentary groups, EPP and S&D,<sup>157</sup> supported the proposal. The vote in the Parliament predominantly supported the amended Directive.<sup>158</sup> It would have been difficult for those opposed to the proposal to "mobilise enough MEPs to block it".<sup>159</sup> By not

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<sup>155</sup> *ibid*, p7.

<sup>156</sup> Countries that voted against the amending Directive were Hungary and Poland, countries that abstained were Croatia, Latvia, Lithuania and the UK, while the other 22 countries voted in favour of the new Directive; see 'Voting results', (*Council of the European Union*) <<https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/?meeting=3625>> accessed 6 June 2020

<sup>157</sup> European People's Party and Socialists & Democrats

<sup>158</sup> The revised rules were approved by 456 votes to 147, with 46 abstentions; 'Posting of workers: final vote on equal pay and working conditions' (*News European Parliament*, 29 May 2018) <<https://www.europarl.europa.eu/news/en/press-room/20180524IPR04230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>> accessed 11 May 2020

<sup>159</sup> Diane Fromage and Valentin Kreilinger, 'National Parliaments' third yellow card and the struggle over the Revisions of the Posted Workers Directive' [2017] vol 10(1), 125-160 *European Journal of Legal Studies* <[https://www.researchgate.net/publication/320077841\\_National\\_parliaments'\\_third\\_yellow\\_card\\_and\\_the\\_struggle\\_over\\_the\\_revision\\_of\\_the\\_Posted\\_Workers\\_Directive/citation/download](https://www.researchgate.net/publication/320077841_National_parliaments'_third_yellow_card_and_the_struggle_over_the_revision_of_the_Posted_Workers_Directive/citation/download)> accessed 11 May 2020 p158

having a majority in the Parliament, the opponents of the 2018 PWD would have lost in that institution, and possibly also in the Council. This might be one of the reasons why they also changed their positions within the Council. Such political constraints might be part of the explanation. However, it is also possible that during the negotiations process, the countries also realised that other arguments, and not only the competitiveness arguments, should be taken into consideration. In Croatia's case, whereas all the arguments in the yellow card procedure reflected the interests of the businesses that provided services across the border, the change in its position in the voting for Directive might be motivated by also endorsing arguments put forward by the trade unions.<sup>160</sup> Therefore, divided interests at home might have made governments more cautious in just plainly rejecting the amended proposal. The following title discusses this divergence of interests and arguments within a country, taking Croatia as a case study.

### **4.3. The new posted workers Directive**

After protracted negotiations, which had been elaborated in the previous title of this Chapter, the Revised Posted Workers Directive 2018<sup>161</sup> was finally adopted.

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

In its opening statements, the 2018 PWD states that, "in a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof".<sup>162</sup> In other words, enterprises should strive and compete in the EU market on bases that do not include the wages of the workers. In the upcoming text, we will be assessing two points from the 2018 PWD: remuneration and the duration of the posting.

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<sup>160</sup> The European Trade Union Confederation had written a letter to Commissioner Thyssen demanding that the 'yellow card' process be rejected, additionally the General Secretary of the ETUC stated that "All trade unions in Europe, including countries where parliaments have supported the yellow card procedure, strongly support the revision of the Posting of Workers Directive"; see 'No to the yellow card on posted workers' (*ETUC*, 13 May 2016) <<https://www.etuc.org/en/pressrelease/no-yellow-card-posted-workers>> accessed 6 June 2020

<sup>161</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16

<sup>162</sup> Directive (EU) 2018/957 (n 161) preamble 16

### 4.3.1. Remuneration

When it comes to remuneration, the 2018 PWD would oblige employers to treat posted workers according to the same rules as local workers as set out by law or, if applicable by a universally binding collective labour agreement of the host country<sup>163</sup>.

Additionally, having to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, overtime rates.<sup>164</sup> Unfortunately, the 2018 Directive leaves uncertainty about sick pay, maternity pay, unfair dismissal compensation and redundancy pay, which we believe might cause future disputes.<sup>165</sup> Besides, the phrase "equal pay" is still very vague and does not imply that a posted worker is entitled to an identical salary and benefits package that his local colleagues might be entitled to, such as lunch allowances and company car.<sup>166</sup> Regardless of the remuneration, employers are obliged to separately reimburse travel, board and lodging expenditure when workers are required to travel for professional reasons.<sup>167</sup>

### 4.3.2. Duration of the posting

Under the new provisions, a limit of 12 months of posting is introduced, which can be extended to 18 months if the service provider provided an acceptable justification. After these 18 months, the employment conditions of the host Member State will apply to the posted worker, if they are more favourable than the home Member State's employment laws.<sup>168</sup> This calculation of the stay period is based on the cumulative stay of an individual worker. This added provision was a way of aligning with the rules on coordination of social security system<sup>169</sup> and to, at the same time, fill the gaps left by the previous 1996 PWD when there was no clear interpretation of the words "limited period" concerning the duration of posting.<sup>170</sup>

Besides, it is essential to note that the 2018 PWD is entirely complementary to the 2014 ED as it mostly only addresses areas and problems that were not touched

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<sup>163</sup> Voss (n 107) p46

<sup>164</sup> *ibid.*

<sup>165</sup> Prof. dr. Paul Minderhoud, 'Revised Posted Workers Directive: in the service of fair labour mobility?' (MoveS Seminar Croatia, Zagreb, 25 October 2019) p58

<sup>166</sup> *ibid.*, p59

<sup>167</sup> *ibid.*, p60

<sup>168</sup> Sara Fekete, 'Revision of EU's Posting of Workers Directive: Blessing or Curse to Business?' (*Fragomen*) < <https://www.fragomen.com/insights/blog/revision-eus-posting-workers-directive-blessing-or-curse-business>> accessed 11 May 2020

<sup>169</sup> which limits the duration of stay under home social security to the max. duration of 24 months, that can be extended under the consent of home and host state

<sup>170</sup> Fekete, 'Revision of EU's Posting of Workers Directive: Blessing or Curse to Business?' (n 168)



upon in 2014.<sup>171</sup> With the revision of the PWD, we can further argue that while it made improvements that relate to the clarification of certain areas of its original version (e.g. the definition of "remuneration"), it introduces stricter requirements to all services providers active in transnational business, which may make it more difficult for undertakings to take place across home State borders.

## 5. CASE STUDY – CROATIA

Since the 2018 PWD is to be implemented by July 2020,<sup>172</sup> it is not possible as yet to predict the specific consequences that it will have on the competitiveness of the countries that launched the yellow card process. With the help of a case study method, we aim to prove our two hypotheses – the primary one being that the posted workers problem does not, or does not only, arise from the low versus high wage countries, but also from the discrepancy of beliefs about the appropriate level of intervention of state (or the EU) in the market in the individual Member States. Moreover, the second one is that the amendments to the 1996 PWD will lead to a decrease in the number of posted workers, this being contrary to the goals of an internal market without internal frontiers. In order to better answer our hypotheses, the authors of this paper have decided to present and analyse, in the form of a case study, the anticipated impact of the directives as per the views of the Croatian Trade Unions and the Croatian Employers' Association. During the interviews with the representatives of the institutions mentioned above, a semi-structured interview method was used where the respondents were asked to provide answers to the pre-set open-ended questions. The interviews were conducted with Agata Dajčić (a member of BusinessEurope and the Croatian Employers' Association) and Ana Miličević Pezelj and Sunčica Brnardić (representatives of the Croatian Trade Unions).

The aforementioned institutions were selected because of their familiarity with the subject matter of the Directive and their role in the process of the yellow cards, where their views were of great importance in forming a reasoned opinion of the Croatian Parliament.<sup>173</sup> They also reflect opposing interests – on the one hand, there is a need to improve the socio-economic status of posted workers (represented by the

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<sup>171</sup> Voss (n 107) p46

<sup>172</sup> Directive (EU) 2018/957 art 3

<sup>173</sup> We have also tried to reach the Croatian representatives in the EU Economic and Social Committee, but were not able to get their response to our correspondence.

Unions), and on the other hand the possibility of reducing competitiveness which results in a decrease in work (where the Association is fighting against this possibility). Additionally, the differences in their views of the 2018 PWD indicate that the problem of division goes much deeper than the first glance rift between the yellow card initiators and the countries that initiated the Directive. In other words, a division is formed inside states as well.

## **5.2. Croatian Employers' Association – "The issue of the posted workers should be regulated by the market"**

The Association was founded in 1993 in order to protect and promote the rights and interest of its members.<sup>174</sup> Since its start, it has become a member of BusinessEurope<sup>175</sup> as well as worked with other prominent international organisations such as ILO<sup>176</sup> and IOE<sup>177</sup>. Moreover, the Employers' Association has participated in the work of the EU's consultative body, EESC, that is composed of employers, employees and representatives of various interest.<sup>178</sup>

The Croatian Employers' Association was selected as the first subject of the analysis as there was congruence in between their point of view with the opinion of the Croatian Parliament. The Croatian Employers' Association and the Croatian Parliament both emphasised that the issue of decreased competitiveness is the central issue of the Directive and that its implementation will further hamper the position of the Croatian companies at the European market.<sup>179</sup>

The Croatian Employers' Association<sup>180</sup> expects that an additional cost, as a result of the equalisation of the gross wages of domestic workers and posted workers at the

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<sup>174</sup> 'O nama' (HUP) < <https://www.hup.hr/o-nama.aspx>> accessed 11 May 2020

<sup>175</sup> 'Business Europe' (HUP, unknown date) < <https://www.hup.hr/businessseurope.aspx>> accessed 11 May 2020

<sup>176</sup> 'Međunarodna organizacija rada (ILO)' (HUP) < <https://www.hup.hr/medjunarodna-organizacija-rada-ilo-i-medjunarodna-konferencija-rada-ilc.aspx>> accessed 11 May 2020

<sup>177</sup> 'Međunarodna organizacija poslodavaca (IOE)' (HUP) < <https://www.hup.hr/medjunarodna-organizacija-poslodavaca-ioe.aspx>> accessed 11 May 2020

<sup>178</sup> 'Europski gospodarski i socijalni odbor (EGSO)' (HUP, unknown date) < <https://www.hup.hr/europski-gospodarski-i-socijalni-odbor-egso.aspx>> accessed 11 May 2020

<sup>179</sup> See: 'Obrazloženo mišljenje o prijedlogu direktive Europskog parlamenta i Vijeća o izmjeni Direktive 96/71/EZ Europskog parlamenta i Vijeća od 16. prosinca 1996. o upućivanju radnika u okviru pružanja usluga COM (2016) 128' [2016] Hrvatski Sabor, Odbor za europske poslove <<https://www.sabor.hr/sites/default/files/uploads/inline-files/OM%20Hrvatski%20sabor%20COM%20%282016%29%20128%20%2810%29.pdf>> accessed 11 May 2020

<sup>180</sup> Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020)

same posts, will be the leading cause of a decline in competitiveness of Croatian service providers.<sup>181</sup> The need for future contributions to be calculated from the gross wage earned abroad would significantly increase the cost of the posted worker and reduce the employer's profit to such an extent that it will be unprofitable for the employer to continue to post workers or to apply for tenders. The arguments are backed up by an example of calculations of the accounting and counselling company from Germany prepared for Tehnomont shipyard Pula on the 22<sup>nd</sup> of April 2016.<sup>182</sup> Based on this calculation, it is demonstrated that the average cost per worker will increase from EUR 1000 to EUR 1500 per worker per month. Given that Tehnomont Shipyard sends 250 workers to Germany, it would be an increase in costs of approximately three to four million EUR a year which would cause the closure of its operations in Germany. The only solution to the increased costs would be to increase the prices of services offered by the Croatian employers in foreign countries. As a result, Croatian competitiveness would be diminished as the companies would lose the advantage of obtaining jobs coming from cheaper labour and would be faced with a practice where the jobs are more often given to domestic workers.<sup>183</sup>

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

Another question that arose during our interviews was the situation with the companies in the countries that were the initiators of the 2018 PWD, those that receive the largest number of posted workers and who wanted to reduce the problem of social dumping with this Directive? Our interviewee points out that the Directive will have a negative impact on large foreign companies that have been interested in posting due to lack of workforce.<sup>184</sup> They may be forced to relocate their production

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<sup>181</sup> Directive (EU) 2018/957 preamble para18

<sup>182</sup> 'Anketa za tvrtke – procjena učinaka u slučaju provedbe ciljane revizije Direktive o izaslanim radnicima 96/71/EZ EP (gubitka vrijednosti posla i broja radnih mjesta)' [2016] Tehnomont brodogradilište Pula d.o.o (document on file with the authors)

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

<sup>184</sup> *ibid.*

to areas where they will be able to find cheaper labour if the posting becomes unprofitable.<sup>185</sup> The sole beneficiaries of the whole situation will be the small and medium-sized enterprises in the recipient countries. Posting was not very important to them because of the small number of workers they need and negligible differences in the costs of labour, since these were less profitable jobs. It is precisely these companies that could attract workers from poorer countries and recruit them permanently if the predicted reductions in workers' posting prove to be correct in the future.<sup>186</sup> This means, according to our interviewee, that small and medium businesses might employ foreign workers if the reduction in posting numbers results in them not being able to get jobs as posted workers.

Finally, the Croatian Employers' Association considers that the Directive was adopted to favour wealthier countries rather than to address social dumping. Reducing the ability of employers to continue posting workers will lead to higher departures of "our"<sup>187</sup> workers to countries with higher social status and their permanent employment in foreign companies. Therefore, the solution to the regulation of posted workers should, according to Employers' Association, be left to the market and in line with the 1996 PWD, which, in their opinion, regulated this matter thoroughly. Due to the mobility of workers inside the European Union,<sup>188</sup> Croatian employers would still be forced to raise wages to their workers without this Directive to retain them. This would increase the standard of living of workers without compromising competitiveness.<sup>189</sup>

### **5.3. The Independent Trade Unions of Croatia – "The question of posted workers should be viewed from the point of view of society, not of the individual. "**

The Union of Independent Trade Unions of Croatia is an independent and voluntary interest organisation, founded in 1990.<sup>190</sup> It consists of 20 unions and a total of 99,682 members,<sup>191</sup> making it one of the most prestigious associations in the

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<sup>185</sup> The Association's representative was referring to non-European countries

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

<sup>187</sup> The Association's representative was referring to Croatian workers

<sup>188</sup> Which has become quite simpler for Croatians since joining the EU in 2013

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

<sup>190</sup> 'O nama' (SSSH, unknown date) < <http://www.sssh.hr/hr/static/sssh-1> > accessed 11 May 2020

<sup>191</sup> *ibid.*

country. Much like the Employers' Association, the Trade Unions have worked alongside prominent groups such as the EESC.<sup>192</sup> One of its projects, most crucial to the issue of posting, is a specialised advisory office for the rights of posted workers, where these workers can come and get informed about rights given to them by the Posted Workers Directives.<sup>193</sup>

Unlike the Croatian Employers' Association, the representatives of the Croatian Trade Unions did not agree with the reasoned opinion sent by the Croatian Parliament in the yellow card procedure.<sup>194</sup> The Trade Unions are of the opinion that the Parliament does not fully understand the wage discrimination issue and social dumping and that by initiating the yellow card process, the Parliament diminishes the significance of the problem.

Their argumentation is based on the complaints received (mostly from workers in the construction sector), as well as seeing the practice of posted workers so far, as a ground for exploiting and circumventing the rules. According to the Trade Unions representatives, in the current situation, only the chain companies and the so-called letterbox companies, set up to circumvent social security, collective agreements and taxes, are profiting.<sup>195</sup> This allows employers to seek less for the same job and thus become more competitive in the foreign market. It is because of this practice that the countries of "Eastern Europe", including the Republic of Croatia, contribute to social dumping within the European Union. Although countries like Croatia contribute to social dumping, they state that this problem arose long before Croatian accession to the EU and that the low-income countries membership only further intensified the pay gap among the workers who do the same job.

Furthermore, they consider that the Republic of Croatia has neglected the fact that the Directive also protects their workers from lower labour costs caused by the arrival of workers from EU countries with a lower standard of living than Croatia's.<sup>196</sup> They

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<sup>192</sup> 'EGSO Info' (*SSSH*) <<http://www.sssh.hr/hr/vise/0-0/egso-info-787>> accessed 11 May 2020

<sup>193</sup> 'Pravno savjetovište za upućene radnike' (*SSSH*, unknown date) <<http://www.sssh.hr/hr/static/podrucja-rada/radno-pravo/pravno-savjetovaliste-za-upucene-radnike-100>> accessed 11 May 2020

<sup>194</sup> Interview with Ana Miličević Pezelj and Sunčica Brnardić, Croatian Trade Unions representatives (Zagreb, Croatia, 6 March 2020)

<sup>195</sup> See: 'Europski parlament za pravedne uvjete upućivanja radnika' (*SSSH*) <<http://www.sssh.hr/hr/vise/aktivnosti-75/europski-parlament-za-pravedne-uvjete-upucivanja-radnika-3462>> accessed 11 May 2020

<sup>196</sup> Poslovni.hr, 'Rastu duplo brže od nas: Hrvatsku bi po visini plaća uskoro mogle preći Rumunjska i Bugarska' (*Poslovni.hr*, 29 April 2020) <<https://www.poslovni.hr/hrvatska/hrvatsku-bi-po-visini-placa-uskoro-mogle-prestici-sve-srednjoeuropske-zemlje-352598>> accessed 11 May 2020

notice positive sides of the protection of Croatian workers against unfair competition but point out that a new problem is opening up and that is the increasing employment of third-country nationals where quota numbers are put up. This Directive does not regulate the employment of these workers.

One of the positive consequences of the 2018 PWD, when it is implemented, might perhaps be the increase in workers' efficiency, due to better working conditions and higher wages.<sup>197</sup> This statement is based on their research conducted in 2018 on the primary motivators for employees' satisfaction, where workers' wages and certainty of income are cited as one of the critical points for greater motivation and therefore better results.<sup>198</sup> However, the worker is not the only one responsible for the efficiency and organisation of the work, as management roles are a vital component contributing to the overall work environment and efficiency.<sup>199</sup> Countries like Norway, where the society's value system is different and where employers are proud of social equity in payment within the community as well as the ability of all to live off their work, is cited as a positive model.<sup>200</sup>

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

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<sup>197</sup> Interview with Ana Miličević Pezelj and Sunčica Brnardić, Croatian Trade Unions representatives (Zagreb, Croatia, 6 March 2020)

<sup>198</sup> Savez Samostalnih Sindikata Hrvatske, '*Rad po mjeri čovjeka*' [2018] <[http://www.sssh.hr/upload\\_data/site\\_files/rad-po-mjeri\\_brosura.pdf](http://www.sssh.hr/upload_data/site_files/rad-po-mjeri_brosura.pdf)> accessed 11 May 2020

<sup>199</sup> Interview with Ana Miličević Pezelj and Sunčica Brnardić, Croatian Trade Unions representatives (Zagreb, Croatia, 6 March 2020)

<sup>200</sup> *ibid.*

achieve more efficient public administration and better digitalisation of the whole workers posting system.<sup>201</sup>

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

### 5.3. Case study analysis

Following the interviews with the representatives of the Croatian Employers' and Trade Unions Association, the authors conclude that the proposed Directive on posted workers has caused large divisions within the Republic of Croatia. The views of both sides are products of their thorough analysis and indicate the complexity of the issue of regulating posted workers. As a fundamental argument, the Croatian Employers' Association points out that countries such as Croatia will face a decline in competitiveness in the EU market due to the adoption of this Directive. However, decreasing the competitiveness of 'poorer' countries could also become a problem for the European Union itself. The work of two authors, F. De Wispelaere and J. Pacolet, who have analysed the economic importance of posted workers in the EU based on statistical data collected from the Member States, will serve to explain this claim.<sup>202</sup> As per De Wispelaere and Pacolet, one of the benefits of posting is its impact on the free movement of labour within the EU. They state that in 2014 there were 1.45 million A1 permits issued for posted workers and that the number is increasing each year.<sup>203</sup> Luxemburg<sup>204</sup> is given as one of the examples where the number of posted workers is as high as 20.7% or Belgium,<sup>205</sup> where 30% of all employees in the construction sector are posted workers.

Furthermore, they emphasise the importance of posting in stimulating intra-EU competitiveness as well as the increase of household income of the posted workers.

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<sup>201</sup> *ibid.*

<sup>202</sup> De Wispelaere and Pacolet, '*An ad hoc statistical analysis on short term mobility – Economic value of posting of workers: The impact of intra-EU cross-border services, with special attention to the construction sector*' (n 106)

<sup>203</sup> *ibid.*, p10

<sup>204</sup> *ibid.*, p11

<sup>205</sup> *ibid.*, p20

The increase in income is due to a vast difference in minimal wage among the EU countries. Even the obligation, for the employers, to pay minimum wages in the countries where the workers are posted,<sup>206</sup> often results in the fact that the workers earn more than an average wage<sup>207</sup> in their sending country.<sup>208</sup> This means that even when receiving minimum wage, there is still an increase in living standards for posted workers since their home country's average wage is most likely much lower.

All of the stated benefits for the receiving countries as well as sending countries could be jeopardised due to an increase in costs for employers from the sending countries. Therefore, according to De Wispelaere and Pacoleta, it is crucial to determine whether the 2018 PWD will cause a decline in competitiveness. The most crucial aspects that impact the ability of the employers from the poorer countries to offer their services at a lower cost and as such to be competitive in the market are the amount of taxes they pay in their home country, the amount of social security contributions paid by employers, and gross wages.<sup>209</sup> In general, social security contributions and pay taxes<sup>210</sup> are lower in most sending countries than in recipient countries.<sup>211</sup> Therefore, although the obligation to Croatian employers to pay the minimum gross wage of the recipient country would cause a substantial increase in the cost of labour, they could still offer their services cheaper.

Nevertheless, our opinion aligns with Croatia's Trade Union's, in which commercial gain should not be obtained by lowering workers' rights. Given the research conducted by Cremer J. on good practices done by countries to maintain a fraudless environment, we believe that cooperation between the Member States might help in conducting the rules set out by the recent 2018 PWD and with that diminish fraudulent behaviour as well as guarantee the necessary working rights. Some of these good practices are the usage of E-Government as well as the usage of different databases by data sharing, matching or mining, strengthening of the Labour Inspectorate and requirements of identity cards for all workers at construction sites.<sup>212</sup>

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<sup>206</sup> i.e. Denmark where the average salary is 39% above the EU average

<sup>207</sup> i.e. Bulgaria with an average wage 52% below the EU average

<sup>208</sup> De Wispelaere and Pacoleta, 'An ad hoc statistical analysis on short term mobility – Economic value of posting of workers: The impact of intra-EU cross-border services, with special attention to the construction sector' (n 106) p15.

<sup>209</sup> *ibid*, p12.

<sup>210</sup> *OECD EC tax benefits indicator*

<sup>211</sup> *ibid*, p12.

<sup>212</sup> Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (n 110) p43



Furthermore, a universal, EU-wide monitoring system could lower the burden put on firms and also reduce the problems of differential treatment in the Member States.<sup>213</sup>

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

## 6. CONCLUSION

During the revision of the 1996 PWD, the Commission highlighted the fact that the old legislation "no longer replies to new realities within the Single Market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition".<sup>214</sup> This statement is connected to the fact that in the year the original PWD was adopted there were only 15 Member States.<sup>215</sup> As of February 2020, there are 27 Member States that make the European Union.<sup>216</sup> Even if we only address the changing number of Member States, we can agree that the single market in the mid-'90s is quite different to the situation existing in today's market, which means that a revision of the 1996 PWD was necessary to adapt the previous regulations to the changing single market.

That being said, after a thorough analysis of the issue of posted workers, we, the authors of this paper, believe that the question whether the 2018 PWD will improve the posting of workers or not, is not, simply put, black or white. It is, on the other hand, a very complex issue that goes much deeper than the surface division between the 'old' and the 'new' Member States or the 'richer' and the 'poorer' Member States. Using a case study method, we showcased that the division is mostly based on the difference of interests that exist within each country. These interests are in the

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<sup>213</sup> Roberto Pedersini and Massimo Pallini, '*Posted workers in the European Union*' [2010] European Foundation for the Improvement of Living and Working Conditions <<https://www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union>> accessed 11 May 2020 p33

<sup>214</sup> Voss (n 107) p45

<sup>215</sup> 'The 27 member countries of the EU', (*Europa*) <[https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en)> accessed 11 May 2020

<sup>216</sup> *ibid.*

legislative process often articulated as ideological beliefs of higher or lesser public intervention in the market. This forms a conflict inside each country between those who believe the state (or the EU) should limit the amount of intervention it could have on the market and those who believe the opposite. Therefore, proving our primary hypothesis, the posted workers dispute is much more complicated than the opposition between the 'richer' and the 'poorer' European countries.

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

It is still early to predict the real influence of the new legislation on the internal market, given that its implementation period only expires in July 2020. However, based on the presented predictions, we can expect a rise in costs for companies engaged in the posting of workers, making it unprofitable to some firms who have based their earnings on being able to post low-income workers to other 'richer' Member States to remain on this market. That may result in a decrease in posted workers overall. One of the objectives of the internal market is to increase the cross border movements. Therefore, the new legislation might show to have consequences that are contrary to the internal market goals. There are, consequently, indications already now, that our secondary hypothesis might prove right. This can, in turn, raise concerns about the legitimacy of the new legislation from the point of view of the EU internal market policy. In principle, the EU has competence only to pursue those measures that enhance the functioning of the internal market.<sup>217</sup> As the new Directive might go in a different direction, this might lead to a conclusion that the EU is not, any longer, only a market-building project, but instead a social project as well. This might be the "new realities of the single market" of which the Commission spoke about in the statement, which we have reproduced at the beginning of this concluding Chapter. Therefore, the balance between market enhancing measures and the protection of social interests might be different in the current EU than in the time of the *Laval* judgment. If so, even if new legislation will lead to the decrease of the

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<sup>217</sup> Case C-376/98 *Germany v the European Parliament and the Council* (Tobacco Advertising), ECLI:EU:C:2000:544

movement of posted workers, it might still be seen as legitimate, as it is balancing between the two goals of the EU integration process – building an internal market, but also caring for a social Europe.

Besides, we can assume that countries that have been most opposed to the new Directive will also have the biggest problems in implementing it. As several studies show,<sup>218</sup> areas such as food regulation, transport regulation and social policy regulation – have "a lot of conflicting interests and, therefore, potential resistance in implementation".<sup>219</sup> Resistance in implementation from the opposing forces usually leads to a delay in the implementation of the Directive.<sup>220</sup> This time delay, we believe, can be anticipated in Croatia as well as other countries that have participated in the yellow card process. Consequently, the analysis of the posted workers issue shows us the timeless conflict between workers' rights and business competitiveness, which we can best sum up with the phrase "one person's social dumping is another's competitive advantage".<sup>221</sup>

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<sup>218</sup> See: Brigitte Unger, *'The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy'* (Edward Elgar Publishing, Incorporated, 2014) p50

<sup>219</sup> *ibid.*, p50

<sup>220</sup> *ibid.*

<sup>221</sup> Carter (n 50) p49

## 7. ACKNOWLEDGEMENTS

This paper and the research behind it would not have been possible without the support of our mentor, Prof. Tamara Čapeta. Her patient guidance and useful critiques were of great importance to us from our first encounter to the final draft of this paper. We would also like to thank Assoc. Prof. Ivana Vukorepa and Prof. Iris Goldner Lang, for their advice and assistance during our research, as well as Ms Tatjana Briški and Assoc. Prof. Ksenija Grubišić for providing early insight and expertise that greatly assisted the research.

We would like to express our deepest gratitude to the Croatian Trade Unions and the Croatian Employers' Association, and their representatives who set their time aside for us and patiently participated in our interviews. Finally, we are immensely grateful to Assoc. Prof. Iskra Alexandra Nola from University of Zagreb's School of Medicine and our family members for spending this last year constantly rereading our work.

All errors remain ours.

## 8. REFERENCES

### Research papers and books

1. Andrea Grgić, 'Posting of Workers within the Framework of Free Movement of Services in the European Union Law' (Doctoral thesis, University of Zagreb 2016)
2. Brigitte Unger, *'The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy'* (Edward Elgar Publishing, Incorporated, 2014)
3. Daniel Carter, *'Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive'* [2018] vol 14 (1), 31-68 *Croatian Yearbook of European Law & Policy* <<https://doi.org/10.3935/cyelp.14.2018.312>>
4. Diane Fromage and Valentin Kreilinger, 'National Parliaments' third yellow card and the struggle over the Revisions of the Posted Workers Directive' [2017] vol 10(1), 125-160 *European Journal of Legal Studies* <[https://www.researchgate.net/publication/320077841\\_National\\_parliaments'\\_third\\_yellow\\_card\\_and\\_the\\_struggle\\_over\\_the\\_revision\\_of\\_the\\_Posted\\_Workers\\_Directive/citation/download](https://www.researchgate.net/publication/320077841_National_parliaments'_third_yellow_card_and_the_struggle_over_the_revision_of_the_Posted_Workers_Directive/citation/download)>
5. Eckhard Voss (in cooperation with Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicione), *'Posting of Workers Directive: current situation and challenges'* [2016] Policy Department A: Economic and Scientific Policy <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2016\)579001](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)579001)>
6. Frederic De Wispelaere and Jozef Pacolet, 'An ad hoc statistical analysis on short term mobility – Economic value of posting of workers: The impact of intra-EU cross-border services, with special attention to the construction sector' [2016] European Commission – DG EMPL Brussels
7. Frederic De Wispelaere and Jozef Pacolet, *'Posting of workers: Report on AI Portable Documents issued in 2017'* [2018] European Commission – DG EMPL Brussels <<https://www.etk.fi/wp-content/uploads/Komissio-tilastoraportti-Posting-of-workers-2017.pdf>>

8. Jan Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (CLR Studies, 2011)
9. Melita Carević, Paula Kiš and Filip Kuhta, 'Minimum Wages as an Obstacle to the Free Provision of Services' [2008] vol 4 (1), 75-100 *Croatian Yearbook of European Law & Policy* <<https://hrcak.srce.hr/28576>>
10. Mijke Houwezijl, 'European Union law and Dutch labour law: The employment protection of posted temporary services workers' [2006] (forthcoming)
11. Mijke Houwezijl and Herwig Verschueren, 'Free Movement of (Posted) Workers' in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia Ltd 2019)
12. Monika Kiss 'Understanding social dumping in the European Union' [2017] European Parliamentary Research Service <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599353](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599353)>
13. Ninke Mussche, Vincent Corluy and Ive Marx, 'How posting shapes a hybrid Single European Labour Market' [2017] vol 24(2), 113-127 *European Journal of Industrial Relations* <<https://doi.org/10.1177/0959680117708374>>
14. Rebecca Zahn, 'Revision of Posted Workers Directive: A Europeanisation Perspective' [2017] vol 19, 187-210 *Cambridge Yearbook of European Legal Studies* <<https://doi.org/10.1017/cel.2017.5>>
15. Roberto Pedersini and Massimo Pallini, 'Posted workers in the European Union' [2010] European Foundation for the Improvement of Living and Working Conditions <<https://www.eurofound.europa.eu/publications/report/2010/posted-workers-in-the-european-union>>
16. Savez Samostalnih Sindikata Hrvatske, 'Rad po mjeri čovjeka' [2018] <[http://www.sssh.hr/upload\\_data/site\\_files/rad-po-mjeri\\_brosura.pdf](http://www.sssh.hr/upload_data/site_files/rad-po-mjeri_brosura.pdf)>
17. Tatjana Briški and Jelena Špiljak, 'Indirect inclusion of National Parliaments in the European Lawmaking process: Croatian Parliament priorities in European affairs' [2014] vol 7 (1), 7-28 *Suvremene teme* <<https://hrcak.srce.hr/132136>>

## Legal sources

1. 'Bilješka s međuparlamentarnog sastanka "Ciljana revizija pravila za upućivanje radnika" [2016] Hrvatski Sabor, Odbor za europske poslove (document on file with the authors)
2. Consolidated version of the Treaty on European Union [2012] OJ 326/13
3. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01
4. Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Protocol (2) on the application of the principles of subsidiarity and proportionality [2008] OJ C 115/01
5. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1
6. Directive 2014/67/EU of the European Parliament and of the Council of the 15 May 2014 on the enforcement of the Directive 96/71/2012 concerning the posting of workers in the framework of the provision of services and amending Regulation [2014] OJ L159/11
7. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16
8. '*Komunikacija Komisije Europskom Parlamentu, Vijeću i Nacionalnim Parlamentima o prijedlogu Direktive o izmjeni Direktive o upućivanja radnika, u pogledu načela supsidijarnosti, u skladu s Protokolom br.2*' [2017] Europska Komisija <[https://www.sabor.hr/sites/default/files/uploads/inline-files/1\\_HR\\_ACT\\_part1\\_v2%20-%202019-06-04T103938.513.pdf](https://www.sabor.hr/sites/default/files/uploads/inline-files/1_HR_ACT_part1_v2%20-%202019-06-04T103938.513.pdf)>
9. '*Obrazloženo mišljenje o prijedlogu direktive Europskog parlamenta i Vijeća o izmjeni Direktive 96/71/EZ Europskog parlamenta i Vijeća od 16. prosinca 1996. o upućivanju radnika u okviru pružanja usluga COM (2016) 128*' [2016] Hrvatski Sabor, Odbor za europske poslove <<https://www.sabor.hr/sites/default/files/uploads/inline-files/OM%20Hrvatski%20sabor%20COM%20%282016%29%20128%20%2810%29.pdf>>
10. Opinion of the European Economic and Social Committee, '*Threats and obstacles to the Single Market*' (own-initiated opinion) rapporteur: Oliver

Ropke [2016] < <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/threats-and-obstacles-single-market-own-initiative-opinion>>

### **Case law**

1. Case 19/67 *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht* ECLI:EU:C:1967:49
2. Case 35/70 *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* ECLI:EU:C:1970:120
3. Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* ECLI:EU:C:1990:142
4. Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxemburg* ECLI:EU:C:1996:263
5. Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411
6. Case C-376/98 *Germany v the European Parliament and the Council (Tobacco Advertising)*, ECLI:EU:C:2000:544
7. Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* ECLI:EU:C:2004:488
8. Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* ECLI:EU:C:2007:809
9. Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809
10. Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, Opinion of AG Mengozzi
11. Case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189
12. Case C-620/18, Action brought on 2 October 2018 – *Hungary v European Parliament and Council of the European Union*
13. Case C-626/18, Action brought on 3 October 2018 – *Republic of Poland v European Parliament and Council of the European Union*



14. Case C-620/18, Action brought on 2 October 2018 – *Hungary v European Parliament and Council of the European Union*, Opinion of AG Sánchez-Bordona

### Newspaper articles

1. Aline Robert, 'French EU minister seeks solutions to fight social dumping' (*Euractiv*, 18 November 2013) <<https://www.euractiv.com/section/trade-society/news/french-eu-minister-seeks-solutions-to-fight-social-dumping/>>
2. Aline Robert, 'Paris pushes EU-wide minimum wage in crusade against social dumping' (*Euractiv*, 2 December 2013) <<https://www.euractiv.com/section/trade-society/news/paris-pushes-eu-wide-minimum-wage-in-crusade-against-social-dumping/>>
3. Béatrice Houchard, 'Comment le plombier polonaise a fait voter "non" au referendum de 2005' (*L'Opinion*, 28 october 2013) <<https://www.lopinion.fr/edition/politique/comment-plombier-polonais-a-fait-voter-non-referendum-2005-5531>>
4. Cécile Barbière, 'France looks for EU allies in fight against low-cost workers' (*Euractiv*, 7 November 2013) <<https://www.euractiv.com/section/social-europe-jobs/news/france-looks-for-eu-allies-in-fight-against-low-cost-workers/>>
5. Daniela Vincenti 'Posted workers revision gets off to shaky start' (*Euractiv*, 9 March 2016) <<https://www.euractiv.com/section/social-europe-jobs/news/posted-workers-revision-gets-off-to-shaky-start/>>
6. Dr. Katharina Gnath, 'EU Single Market boosts per capita incomes by almost 1,000 euros a year' (*Bertelsmann Stiftung*, 8 May 2019) <<https://www.bertelsmann-stiftung.de/en/topics/latest-news/2019/may/eu-single-market-boosts-per-capita-incomes-by-almost-1000-euros-a-year/>>
7. Eurasia Review, 'Tracking the Rise of Euroscepticism and Support for the Far-Right' (*Eurasia Review News & Analysis*, 3 March 2020) <<https://www.eurasiareview.com/03032020-tracking-the-rise-of-euroscepticism-and-support-for-the-far-right/>>
8. 'European social model challenged by Court rulings' (*Euractiv*, 27 February 2008) <<https://www.euractiv.com/section/social-europe-jobs/news/european-social-model-challenged-by-court-rulings/>>

9. 'Europski parlament za pravedne uvjete upućivanja radnika' (*SSSH*) <<http://www.sssh.hr/hr/vise/aktivnosti-75/europski-parlament-za-pravedne-uvjete-upucivanja-radnika-3462>>
10. Florence Dupont-Fargeaud and Camilla Spira, 'New directive on posted workers ignores member states' objections' (*Euractiv*, 16 April 2014) <<https://www.euractiv.com/section/social-europe-jobs/opinion/new-directive-on-posted-workers-ignores-member-states-objections/>>
11. Jean-Christophe Chanut, 'Le difficile combat contre la fraude au détachement des salariés étrangers' (*La Tribune*, 11 June 2015) <<https://www.latribune.fr/economie/france/le-difficile-combat-contre-la-fraude-au-detachement-des-salaries-etrangers-483398.html>>
12. Jon Henley, 'Support for Eurosceptic parties doubles in two decades across EU' (*The Guardian*, 2 March 2020) <<https://www.theguardian.com/world/2020/mar/02/support-for-eurosceptic-parties-doubles-two-decades-across-eu>>
13. 'Labour ministers hammer out agreement on posted workers' (*Euractiv*, 10 December 2013) <<https://www.euractiv.com/section/social-europe-jobs/news/labour-ministers-hammer-out-agreement-on-posted-workers/>>
14. 'La révision de la directive sur le détachement des travailleurs' (*Robert Schuman*, 10 October 2016) <<https://www.robert-schuman.eu/fr/questions-d-europe/0406-la-revision-de-la-directive-sur-le-detachement-des-travailleurs>>
15. Lauren Frayer, 'If Britain leaves the EU, what happens to the "Polish plumber"?' (*NPR*, 14 May 2016) <<https://www.npr.org/sections/parallels/2016/05/14/477685487/if-britain-leaves-the-eu-what-happens-to-the-polish-plumber?t=1581279346169>>
16. 'Lorry drivers take protests to Brussels on Monday' (VRT NWS, 23 September 2012) <[https://www.vrt.be/vrtnws/en/2012/09/23/lorry\\_drivers\\_takeproteststobrusse sonmonday-1-1437591/](https://www.vrt.be/vrtnws/en/2012/09/23/lorry_drivers_takeproteststobrusse sonmonday-1-1437591/)>
17. Michael Whittall, 'Unions fear ECJ ruling in Laval case could lead to social dumping' (*Eurofound*, 24 February 2008) <<https://www.eurofound.europa.eu/publications/article/2008/unions-fear-ecj-ruling-in-laval-case-could-lead-to-social-dumping>>

18. 'No to the yellow card on posted workers' (*ETUC*, 13 May 2016) <<https://www.etuc.org/en/pressrelease/no-yellow-card-posted-workers>>
19. Olaf Cramme, 'Social Europe's new Battleground' (*Euractiv*, 22 March 2011) < <https://www.euractiv.com/section/social-europe-jobs/opinion/social-europe-s-new-battleground/>>
20. Poslovni.hr, 'Rastu duplo brže od nas: Hrvatsku bi po visini plaća uskoro mogle preći Rumunjska i Bugarska' (*Poslovni.hr*, 29 April 2020) <<https://www.poslovni.hr/hrvatska/hrvatsku-bi-po-visini-placa-uskoro-mogle-prestici-sve-srednjoeuropske-zemlje-352598>>
21. 'Posting of workers: final vote on equal pay and working conditions' (*News European Parliament*, 29 May 2018) < <https://www.europarl.europa.eu/news/en/press-room/20180524IPR04230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>>
22. Sara Fekete, 'Revision of EU's Posting of Workers Directive: Blessing or Curse to Business?' (*Fragomen*) < <https://www.fragomen.com/insights/blog/revision-eus-posting-workers-directive-blessing-or-curse-business>>
23. Sébastien Richard, 'The implementing directive on posted workers: and what now?' (*Robert Schuman*, 29 February 2016) < <https://www.robert-schuman.eu/en/european-issues/0383-the-implementing-directive-on-posted-workers-and-what-now>>
24. 'Unions frustrated at Court ruling on posted workers' (*Euractiv*, 28 February 2012) <<https://www.euractiv.com/section/social-europe-jobs/news/unions-frustrated-at-court-ruling-on-posted-workers/>>

### Web-based sources

1. 'BusinessEurope' (*HUP*) <<https://www.hup.hr/business europe.aspx>>
2. 'Confederation of European Business' (*Wikipedia*, 15 April 2020) < [https://en.wikipedia.org/wiki/Confederation\\_of\\_European\\_Business](https://en.wikipedia.org/wiki/Confederation_of_European_Business)>
3. 'EGSO Info' (*SSSH*) < <http://www.sssh.hr/hr/vise/0-0/egso-info-787>>
4. 'Europski gospodarski i socijalni odbor (EGSO)' (*HUP*) < <https://www.hup.hr/europski-gospodarski-i-socijalni-odbor-egso.aspx>>

5. Kent O'Neil, 'Do I Have a "Posted Worker"?' (*Newland Chase*, 20 February 2019) < <https://newlandchase.com/do-i-have-a-posted-worker/>>
6. 'Međunarodna organizacija poslodavaca (IOE)' (*HUP*) < <https://www.hup.hr/medjunarodna-organizacija-poslodavaca-ioe.aspx>>
7. 'Međunarodna organizacija rada (ILO)' (*HUP*) < <https://www.hup.hr/medjunarodna-organizacija-rada-ilo-i-medjunarodna-konferencija-rada-ilc.aspx>> accessed 11 May 2020
8. 'O nama' (*HUP*) < <https://www.hup.hr/o-nama.aspx>>
9. 'O nama' (*SSSH*) < <http://www.sssh.hr/hr/static/sssh-1>>
10. 'Posted workers' (*European Commission*) < <https://ec.europa.eu/social/main.jsp?catId=471>>
11. 'Pravno savjetovalište za upućene radnike' (*SSSH*) < <http://www.sssh.hr/hr/static/podrucja-rada/radno-pravo/pravno-savjetovaliste-za-upucene-radnike-100>>
12. 'Race to the bottom' (*Cambridge Dictionary*) < <https://dictionary.cambridge.org/dictionary/english/race-to-the-bottom>>
13. 'Schengen Agreement' (*Schengen visa info*, 1 october 2019) < <https://www.schengenvisainfo.com/schengen-agreement/>>
14. 'The 27 member countries of the EU', (*Europa*) < [https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en)>
15. 'What is the euro area?' (*European Commission*) < [https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area\\_en#relatedlinks](https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en#relatedlinks)>

### Interview

1. Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative (Zagreb, Croatia, 27 February 2020)
2. Interview with Ana Miličević Pezelj and Sunčica Brnardić, Croatian Trade Unions representatives (Zagreb, Croatia, 6 March 2020)

### Tables

1. Table 1: Saving made by companies through posting

## Other sources

1. '*Advocate General Sánchez-Bordona proposes that the Court of Justice should dismiss the actions for annulment brought by Hungary and Poland against the Directive strengthening posted workers' rights*' [2020] Court of Justice of the European Union Press Release No 63/20 <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200063en.pdf>>
2. '*Anketa za tvrtke – procjena učinaka u slučaju provedbe ciljane revizije Direktive o izaslanim radnicima 96/71/EZ EP (gubitka vrijednosti posla i broja radnih mjesta)*' [2016] Tehnomont brodogradilište Pula d.o.o (document on file with the authors)
3. '*Commission to boost protection for posted workers*' [2012] European Commission Press Release IP/12/267 <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_267](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_267)>
4. '*Council reaches general approach on posting of workers Directive*' Presse 562 [2013] Council of the European Union <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lisa/139997.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/139997.pdf)>
5. '*Mehanizam kontrole poštovanja načela supsidijarnosti*' (*Europska Komisija*) <[https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism\\_hr](https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_hr)>
6. '*Načelo supsidijarnosti*' [2020] European Parliament facts sheets <[https://www.europarl.europa.eu/ftu/pdf/hr/FTU\\_1.2.2.pdf](https://www.europarl.europa.eu/ftu/pdf/hr/FTU_1.2.2.pdf)>
7. '*Posting of workers: Council adopts the directive*' (*European Council*, 21 June 2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/>>
8. '*Posting workers to Switzerland*' [2019] MCH Group Ltd, Basel <<https://www.mch-group.com/en-US/venues/basel/messe-basel/organisers-regulations.aspx>>
9. Prof. dr. Paul Minderhoud, '*Revised Posted Workers Directive: in the service of fair labour mobility?*' (MoveS Seminar Croatia, Zagreb, 25 October 2019)
10. '*Upućivanje radnika u okviru pružanja usluga*' [2016] Hrvatski Sabor, Odbor za europske poslove (document on file with the authors)

11. 'Voting results', (*Council of the European Union*)  
<<https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/?meeting=3625>>
12. 'Yellow card procedure' (*Eurofound*, 27 November 2017) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/yellow-card-procedure>>

## 9. APPENDIX

### I. Interview with Agata Dajčić, Croatian Employers' Association and BusinessEurope representative

#### 1. Koja je uloga HUP-a u pitanju upućenih radnika?

Objašnjeno nam je da je HUP osnovana 1993. godine s ciljem da štiti interese svojih članova te da je Hrvatska udruga poslodavaca član BusinessEurope. Također HUP surađuje s mnogim europskim organizacijama na poboljšanju položaja poslodavaca koji upućuju radnike.

#### 2. Što mislite o izjavi Mladena Novosela (SSSH) koji navodi da su iskustva iz Savjetovališta pokazala da poslodavci upućivanje radnika koriste kao poligon za iskorištavanje i zaobilaženje pravila te da se radnici žale na teške uvjete i plaće manje od propisanog minimalca?

Tijekom razgovora primijetili smo da se gospođa Dajčić ne slaže s navedenim mišljenjem. Komentira kako ne može svatko upućivati radnika jer poduzeće tog poslodavca mora obavljati minimalno 25% djelatnosti u RH. Na taj način RH sprječava osnivanje poduzeća samo s ciljem izbjegavanja propisa već traži stvarno obavljanje djelatnosti na svom teritoriju. Ta obveza koju poslodavci moraju zadovoljiti dokazuje da mogu platiti radnike i da njihovo postojanje nije utemeljeno u zaobilaženju propisa.

#### 3. Poznajete li termin socijalnog dumping i što Vi podrazumijevate pod njim?

Sugovornica je upoznata s tim terminom te smatra da je kod ovog prijedloga direktive problem u pokušaju istiskivanja upućivanja radnika kako bi se pridobili ti radnici da se trajno zaposle u stranim poduzećima. Naglašava da tu nije riječ o socijalnom dumpingu.

#### 4. Koje kriterije konkurentnosti od ponuđenih smatrate najugroženijima PWD direktivom?

Iz HUP-a ističu da će se zbog dodatnih troškova smanjiti zarada poduzeća. Kao posljedicu većih troškova i manjeg profita neki poslodavci bi mogli biti primorani snižavati dosadašnje satnice radnika na minimalne.

Osim same zarade navode i problem pada konkurentnosti u odnosu na strane poslodavce te otežanost izlaska na europsko tržište zbog povećane cijene rada koju bi mogla uzrokovati nova direktiva. HUP smatra da će se troškovi za hrvatske poduzetnike povećati u odnosu na troškove koje imaju poduzetnici koji obavljaju svoju djelatnost u zemlji u kojoj se radnici upućuju.

### **5. Postoji li mogućnost funkcioniranja s manjom zaradom?**

U razgovoru je nekoliko puta istaknuto da mogućnost funkcioniranja s manjom zaradom ne postoji te da će hrvatskim poslodavcima već samo prijavljivanje na natječaj biti neisplativo.

### **6. Ako strani poslodavac mora jednako platiti domaćeg i upućenog radnika, koji su sve razlozi zašto bi naši poslodavci bili manje konkurentni od stranih i da li kvaliteta rada igra ulogu?**

Saznali smo da u HUP-u smatraju da je jedino velikim stranim poduzećima upućivanje radnika u interesu. Kako bi se potkrijepila ta tvrdnja, spomenut je primjer Njemačke koja je svjesna nedostataka radne snage i važnosti upućivanja. Upravo ta velika poduzeća najviše će osjetiti smanjenje broja upućenih radnika zbog nove direktive te bi kao rješenje problema mogli preseliti svoju proizvodnju na „jeftinija mjesta“.

Naprotiv malim i srednjim stranim poduzećima upućivanje radnika nije u interesu jer poslovi koje obavljaju ne donose dovoljan profit da bi se razlika jeftinije radne snage osjetila. Njihov cilj je preuzeti strane radnike tako što će im ponuditi bolje uvjete rada. Smatra da su upravo zato poslodavci tih poduzeća bili glavni zagovornici direktive, svjesni da se poduzećima iz država pošiljateljica nameće prevelikim teret plaća.

Također ključna je i praksa država, prepuna primjera gdje domaći radnici imaju prednost pri zapošljavanju nad stranim.



**7. Poslovni.hr objavio je članak prema kojem RH ima prosječnu minimalnu plaću od 546 eura, što ju stavlja u bolji položaj nego Mađarsku (487 eura), Rumunjsku (466 eura), Latviju (430 eura) i Bugarsku (312 eura).**

**Da li onda direktiva štiti naše poslodavce i radnike?**

Sugovornica se slaže s tvrdnjom da direktiva štiti i naše poslodavce i radnike te navodi da su nam zbog manjka radne snage strani radnici potrebni.

**8. Kako riješiti iskorištavanje radnika koji su bili uzrok donošenja nove direktive?**

Na temelju iznesenog zaključili smo da se HUP zalaže za prepuštanje pitanja upućenih radnika tržištu, a ne direktivama. Poslodavci će pod utjecajem tržišta morati dizati plaće ako žele zadržati radnike, kojima je nakon ulaska u EU odlazak iz Hrvatske olakšan. Također naglašeno je da je direktiva iz 1996. godine dobro uredila pitanje upućenih radnika.

## **II. Interview with Ana Miličević Pezelj and Sunčica Brnardić, Croatian Trade Unions representatives**

**1. Koja je uloga SSSH u pitanju upućenih radnika?**

Savez samostalnih sindikata Hrvatske ima više od 99 tisuća članova, među kojima se nalaze i upućeni radnici. Također suradnja s EGSO-om (Europskim gospodarskim socijalnim odborom) uvelike je pomogla SSSH u razumijevanju problematike upućenih radnika.

Posebno je istaknuta uloga Savjetovališta za upućene radnike putem kojih su do sindikata stizale pritužbe na propuste u postupanjima poslodavaca te na kojima su upućeni radnici mogli saznati svoja direktivom zajamčena prava.

**2. Hrvatska udruga poslodavaca zastupa stajalište kako će ova direktiva još više otežati položaj hrvatskih tvrtki na europskom tržištu i sniziti njihovu konkurentnost. HUP navodi da će se troškovi ovim prijedlogom direktive za hrvatske poduzetnike povećati u odnosu na troškove koje imaju poduzetnici iz zemalja u koje se radnici upućuju.**

### **Koje je Vaše mišljenje o smanjenju konkurentnosti na koje aludira Hrvatska udruga poslodavaca?**

U SSSH smatraju da trošak rada nije jedini segment konkurentnosti. Povećanje troškova koji ovom direktivom nastaje za poslodavce treba riješiti RH tako što će osigurati pristup jeftinijim financijskim sredstvima kroz razne poticaje.

Također ističu da se glede doprinosa koje u RH plaćaju poslodavci, RH nalazi u sredini naprem doprinosa u ostalim zemljama EU. Zbog navedenog argument da će hrvatski poslodavci biti više opterećeni nego poslodavci drugih zemalja smatraju nevažecim.

Kao temeljni uvjet konkurentnosti u SSSH vide nužne promjene kojima bi se trebala postići efikasnija javna uprava i bolju informatizaciju cijelog sustava upućivanja po uzoru na Slovenski model.

### **3. Smatrate li da su zemlje s nižim socijalnim statusom (poput Hrvatske) pridonijele socijalnom dumping na europskom tržištu?**

Gospođe Ana Miličević Pezelj i Sunčica Brnardić slažu se da zemlje “Istočne Europe” pa tako i RH, pridonose socijalnom dumping unutar EU-a jer su zbog nižih plaća koje dobivaju njihovi radnici u mogućnosti tražiti manje za isti posao u zemljama u kojima upućuju radnike.

Ističu da taj problem nije uzrokovala Hrvatska već da se on pojavio puno prije primanja RH u članstvo EU. Proširenjem Unije na siromašnije zemlje samo se povećala razlika u plaćama radnika koji rade isti posao te samim time i problem socijalnog dumping.

### **4. Jedan od stavova HUP-a je da će zbog nove direktive doći do znatnog smanjenja profita poslodavcima te da će im prijava na natječaj za posao biti neisplativa. Postoji li po Vama ta mogućnost?**

Predstavnice sindikata slažu se da ta mogućnost postoji. Navode da je to možda i dobra stvar jer se javlja velik problem nelojalne konkurencije unutar Hrvatskih poslodavaca, a čine ju upravo oni poslodavci koji su iskorištavali radnike, ne isplaćivali im plaće te tako profitirali.

Stoga smatraju da će regulacija koju donosi ova direktiva ići na ruku transparentnijem i boljem poslovanju poslodavcima koji mogu ispunjavati njene uvjete.

**5. Mislite li da će poduzeća moći funkcionirati i ako dođe do manje dobiti za poslodavca?**

Tijekom razgovora istaknuto je da je ključno pitanje koliko je profita poslodavcu potrebno? Mišljenja su da je ključno gledati s aspekta društva, a ne iz aspekta pojedinca te tko odlučiti koje sektore poticati, kako podići kvalitetu života radnika te koja je svrha rada poduzeća koja ne mogu osigurati standarde koje nameće direktiva?

Kao primjer navode Norvešku koja ima sustav vrijednosti drugačiji od našeg te činjenice da se norveški poslodavci hvale ujednačenim plaćama i mogućnostima da se radnici uzdržavaju od svog rada, što je vrlo rijetko u današnjem svijetu.

**6. Smatrate li da će zadovoljstvo radnika zbog boljih uvjeta rada rezultirati povećanjem njihove efikasnosti u izvođenju poslova?**

Kao jedan od ključnih elemenata konkurentnosti iz SSSH-a vide i efikasnost radnika. Pozivaju se na istraživanja koja idu u prilog povećanju produktivnosti u poduzećima gdje je došlo do smanjenja radne satnice te istraživanje provedeno 2018. godine o *Glavnim motivatorima zadovoljstva radnika* gdje se kao ključan problem ističu ugovori na određeno vrijeme. Stoga zaključuju da radnici zadovoljni uvjetima rada (za što se zalaže Direktiva) pridonose produktivnosti.

Naglašavaju i važnost menadžerskih uloga u organizaciji i efikasnosti rada.

**7. Vidite li mogućnost negativnog utjecaja direktive na naše radnike, ako ćemo zbog neisplativosti dobivati manje poslova?**

Temeljem svih informacija koje su nam prezentirane tijekom intervjua smatramo da je ključno da se za ovo pitanje pobrine država te preventivno djeluje pomoću javnih sredstava koja će omogućiti poslodavcima da isplate plaće te spriječiti otpuštanje radnika.

**8. Poslovni.hr objavio je članak prema kojem RH ima prosječnu minimalnu plaću od 546 eura, što ju stavlja u bolji položaj nego Mađarsku (487 eura), Rumunjsku (466 eura), Latviju (430 eura) i Bugarsku (312 eura).**

**Štiti li direktiva i naše radnike i poduzetnike?**

Zaključili smo da je prema SSSH direktivu nužno gledati dvostrano jer je i RH izložena dolascima upućenih radnika (iako malobrojnim) koji su spremni raditi za manje od hrvatske minimalne plaće te zato smatraju da direktiva štiti i nas.

Kao veći problem u SSSH navode zapošljavanja državljana iz *“Trećih zemalja”* u RH čiji je broj određen kvotama i koje ova direktiva ne uređuje.

**9. Koje je Vaše mišljenje o stavu koji je zauzeo Hrvatski sabor pokrenuvši postupak žutog kartona?**

Naše sugovornice smatraju da Sabor ne razumije cijelu priču o diskriminaciji vezanoj uz plaće te tom poglavlju posvećuje premali značaj pokrenuvši postupak žutog kartona.

**10. Poslodavci se zalažu za to da se regulaciju ovog pitanja treba prepustiti tržištu jer će nezadovoljni radnici lakše odlaziti u druge zemlje otkako smo u EU, što će primorati poslodavce da ih bolje plaćaju.**

**Slažete li se s ovom izjavom?**

Ukazano nam je na to da poslodavci zagovaraju tržišni model dok posluju dobro, a čim upadnu u krizu traže pomoć od države.

Oslanjanje na isključivo tržišni model u praksi dovodi do već navedenih problema s kojima se susreću radnici. Ističu da je ključan bipartitni model u kojem će sindikati i poslodavci zajedno kolektivnim ugovorima pomoći reguliranju ovog pitanja.

## 10. SUMMARY

Filip Bjelinski and Karla Žeravčić

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

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

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

## SAŽETAK

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### UPUĆENI RADNICI U EUROPSKOJ UNIJI – NA RAZMEĐI IZMEĐU SUKOBLJENIH INTERESA I CILJEVA JEDINSTVENOG TRŽIŠTA

Tijekom dvadeset godina, praksa privremenog slanja radnika iz jedne države članice u drugu u kojoj se navedeni radnici ne integriraju na tržište rada zemlje domaćina, postala je tema u Europskoj uniji koja stvara razdor između država članica. U radu se govori o problemu upućenih radnika unutar EU, pristupajući mu iz perspektive prava, kao i politike. Kroz kritičku analizu sudske prakse i pravnih dokumenata EU-a, autori identificiraju i predstavljaju problem koji nadilazi jaz između 'starih' i 'novih' država članica, s obzirom na to da unutar svake zemlje postoje različita uvjerenja aktera o odgovarajućem nivou državne intervencije (ili EU-a) na tržištu u vezi s upućivanjem radnika. Nadalje, kako bi dokazali tu hipotezu, autori koriste Hrvatsku kao studiju slučaja, gdje su vođeni razgovori s najistaknutijim hrvatskim sukobljenim stranama u vezi s tim pitanjem. Na kraju, autori daju konačnu ocjenu ovog problema i naglašavaju bezvremenski sukob između prava radnika i poslovne konkurentnosti.

Ključne riječi: *upućeni radnici, izaslani radnici, Europska unija, jedinstveno tržište EU-a, prava radnika, postupak žutog kartona.*