Enforcement of EU labour law in a transnational context
Houwerzijl, Mijke

Published in:
Effective enforcement of EU labour law

DOI:
10.5040/9781509944446.ch-008

Publication date:
2022

Document Version
Publisher's PDF, also known as Version of record

Link to publication in Tilburg University Research Portal

Citation for published version (APA):

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 19. Oct. 2023
1. Introduction

The focus of this chapter is on issues of EU labour law enforcement concerning transnational employment situations across the EU internal market. In the years leading up to the global pandemic, several legislative initiatives were taken to establish ‘clear, fair and enforceable rules’ to fight abuse and to foster fair cross-border movement for work. In the Covid-19 era, repeated outbreaks among mobile workers in low-wage sectors, such as the meat industry, have underlined the urgent need to combat the drivers of their precarious circumstances. As part of the European Pillar of Social Rights (EPSR) Action Plan launched in Spring 2021, the European Commission stated: ‘The EU’s social rulebook is only as good as its implementation … Protecting and improving the rights and working conditions …’

---

1 For the purpose of this chapter, the term ‘transnational employment situations’ covers mobile (posted) workers and some situations concerning the mobility of companies (in the context of the freedom of establishment). Employee involvement at transnational level, as laid down in the European Works Councils Directive, is beyond the scope of this chapter. See in this respect ch 16 by Dorssemont.

2 This chapter focuses on intra-EU employment situations and thus does not concern third-country nationals (TCN) in the EU. The bulk of EU law also applies in substance to Iceland, Liechtenstein and Norway, however, through the Agreement on the European Economic Area (EEA Agreement).

3 These words were used when launching the agreement on the European Labour Authority: see: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9301&furtherNews=yes.
The expression ‘mobile workers’ used by the European Commission – for example, in the EPSR Action Plan – is an umbrella term covering transnational workers in all forms of contractual situations and includes both workers who move in the context of free movement of workers (FMOW) and posted workers in the context of free provision of services (FMOS). While the right to FMOW is only for EU citizens (and their family members), posted workers within the framework of FMOS can also be third-country nationals (TCN), legally residing and working in an EU member state. The specific legal status of mobile workers is often decisive for the context in which they have rights: EU nationals using the FMOW rights to move for employment reasons within the EU can base their claims on a different set of norms from posted workers or migrants from outside the EU.

Despite the differences with regard to their legal status, what all (newly arrived) mobile workers have in common is that they are alien to the laws of the Member State in which they (temporarily) work. Therefore, mobile workers (in particular, the low-waged) may be cheated (even) more easily out of their rights than their local co-workers. Effective protection against violation of mobile workers’ rights should include information regarding the applicable law and the judicial system, made clear in accessible language. Because labour standards are not harmonised within the EU, it can make a major difference which law applies to their employment relationship and which court has jurisdiction and will apply its own national procedural rules. These rules belong to the area of private international law and are addressed in section 2.

As is well known, the status of posted workers is particularly challenging in this regard, as their employment (and social security and tax) situation is always linked to more than one legal system. This provides an (additional) obstacle to compliance and enforcement, because it is more difficult for employers, intermediaries, workers, trade unions and other worker representatives, as well as for inspectorates to identify, apply and/or monitor and control posted workers’ rights. As shown in recent research, court practice varies greatly as well, even within EU

---

4 See EPSR Action plan May 2021, ch 3.
5 Such as full-time or part-time workers and frontier workers on standard contracts, seasonal workers, temporary agency workers, (bogus) self-employed, students/trainees with a side job, multiple job holders and so on.
6 While Art 47 of the Charter imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law within the meaning of Art 51(1) of the Charter (CFREU), the principle of procedural autonomy still gives a crucial role to Member States’ own monitoring and enforcement instruments. See eg M Kullmann, Enforcement of Labour Law in Cross-Border Situations – A Legal Study of the EU’s Influence on the Dutch, German, and Swedish Enforcement Systems (Kluwer, 2015). See also Chapter 1 of this volume.
7 Since the entry into force of the Treaty of Amsterdam, the European legislator has been provided with near to full competences in the field of private international law (Art 81(1) and (2)(c) TFEU). This has led to the ‘Europeanisation of private international law’.
Member States. Therefore, in section 3, attention shifts to information, monitoring and enforcement tools regarding the rights of this specific category of posted workers.

In view of the persistent gap between (enforcement) rules on paper and rules in action, section 4 takes a 'contextual' perspective by sketching the emergence of cross-national subcontracting chains and letterbox companies. After these phenomena are explained and situated, (scarce) enforcement tools are identified whose purpose is to foster compliance with labour law within subcontracting processes. Section 5 ends the chapter with some concluding remarks and recommendations.

2. Guaranteeing the Rights of EU Mobile Workers in Private International Law

Where a court action is to be brought in an international dispute, three key issues arise in the context of private international law. The first question concerns which country’s court shall have jurisdiction. It is only after the competence of the court has been determined that this court will decide the second question, namely, which law is applicable to the dispute. Another important third question pops up after the judgment and concerns its recognition and enforceability. This question has in principle been answered satisfactorily by the Brussels I bis Regulation 10 (hereinafter 'Brussels I bis') to the extent that it concerns recognition and execution on the territory of EU Member States. Article 39 of Brussels I bis provides that judgments given in a Member State do not need any declaration of enforceability to be enforced in any other Member State. In other words, a judgment given in Member State A can be executed without the need for special procedures by Member State B where the execution is being requested. This is beneficial for employees if they are the claiming party. Moreover, in all cases where the employee is the defendant, they are protected against recognition and enforcement of a decision concerning the employment contract, if this would conflict with the rules on jurisdiction pursuant to Article 45 of Brussels I bis. 11

When determining which law applies (question 2) to contractual obligations in an employment relationship with a cross-border element, the Rome I Regulation

---

8 See for a recent examination of posting-related case law in 11 European countries: Z Rasnača and M Bernaciak, Posting of workers before national courts (Brussels, ETUI, 2020).
9 For more details concerning mobile workers in the context of FMOW and TCN migrant workers, see Chapter 12 of this volume.
11 Moreover, the Regulation puts in place a system of practical safeguards, such as communicating the decision prior to any enforcement being undertaken (Art 43(1) Brussels I bis); the possibility to request a translation of the documents when these are communicated in a language that the persons against whom enforcement is sought does not understand (Art 43(2) Brussels I bis).
(hereinafter ‘Rome I’)

12 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations. To improve consistency between the competent court and the applicable law there is a close link between Rome I and the related instrument in matters of conflicts of jurisdiction, Brussels I bis, which is also confirmed and further developed in Court of Justice of the European Union (CJEU or ‘the Court’) case law. Both question 1 and 2 will, in chronological order, be further elaborated below for situations of transnational employment within the EU.

2.1. Question 1: Which Court is Competent?

The formal scope of Brussels I bis requires that the dispute be connected to more than one country. Brussels I bis is applicable in international employment disputes if: (i) the defendant is domiciled in a Member State; or (ii) if the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle disputes that have arisen or which may arise in connection with a particular legal relationship (hereafter referred to as ‘choice of forum clause’). Importantly, Brussels I bis explicitly states that in relation to employment contracts, the weaker party (such as employees or consumers) should be protected by rules of jurisdiction more favourable to their interests than the general rules.

2.1.1. Choice of Forum Clause

In line with the concept of weaker party protection, Brussels I bis leaves only limited room for party autonomy in departing from these protective rules so as to choose the court in employment disputes. Parties can conclude a choice of forum only in two situations: (i) after the dispute has arisen, or (ii) if the agreement allows the employee to bring proceedings in courts other than the one that would otherwise be available for the employee under the rules of the Regulation. The clause

---

13 Besides Rome I, the Rome II Regulation (864/2007) determines the law applicable to non-contractual obligations. Art 9 contains a conflict of law rule regarding collective actions, such as strikes. See F Dorssemont and A Van Hoek, ‘Collective action in labour conflicts under the Rome II regulation’ in E Ales and T Novitz (eds), Collective Action and Fundamental Freedoms in Europe (Intersentia, 2011). It is beyond the scope of this chapter, but see Chapter 15 of this volume.
14 If an employee enters into a contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. See Art 20(2) Brussels I bis.
16 Usually, a choice of forum is made explicitly in a clause in the international employment agreement. Nevertheless, a tacit choice of forum is also possible.
must therefore widen the choice available to the employee of choosing between several courts with jurisdiction,\textsuperscript{17} while the employer is prevented from imposing restrictions on the employee's rights under the Regulation (Article 23). In general, a court of a Member State before which a defendant enters an appearance, shall have jurisdiction ex Article 26(1) Brussels I bis, even though that court may not be competent according to the general rules of Brussels I bis. If the defendant is an employee, however, Article 26(2) Brussels I bis obligates the court to ensure, before assuming jurisdiction, that the defendant is informed of their right to contest the jurisdiction of that court and of the consequences of entering or not entering an appearance.

2.1.2. Claim Brought by the Employee against the Employer

The weaker party protection concept also impacts claims brought by employees against their employer. In such a situation, the employee has a choice to sue the employer at the latter's domicile\textsuperscript{18} or at the place where the employee habitually carries out their work (or, if there is no such place, at the place where the business which engaged the employee is or was situated). Furthermore, according to Article 6(1) in connection with Article 21 (2), Brussels I bis applies when an employer is not domiciled in a Member State, and is sued by the employee: (i) in the courts of the place where or from where the employee habitually carries out their work, or in the courts of the last place where they did so; or (ii) if the employee does not or did not habitually carry out their work in any one country, in the courts of the place where the business which engaged the employee is or was situated.

2.1.3. Claim Brought by the Employer against the Employee

In case of a dispute, an employee domiciled in an EU Member State\textsuperscript{19} can be sued by the employer only in the Member State where they are domiciled (pursuant to Article 22(1) Brussels I bis). Furthermore, the employer has the right to bring a counter-claim in the court in which, in accordance with Brussels I bis, the original claim is pending.

\textsuperscript{17}The Court confirmed this in its judgment of 19 July 2012, C-154/11, \textit{Mahamdia}, ECLI:EU:C:2012:491.

\textsuperscript{18}Art 63 Brussels I bis provides that the employer (in case it is a company or other legal person) is domiciled at the place where it has its statutory seat, or central administration, or principal place of business. The company is thus domiciled in the EU even when only one of those criteria is fulfilled. Where an employer is not domiciled in a Member State but has a 'branch, agency or other establishment' in a Member State, the employer shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled there (Art 20(2) and (8)). See, for example, the CJEU judgment in the \textit{Mahamdia} case.

\textsuperscript{19}In order to determine where the employee is domiciled, the court shall apply its internal law (Art 62(1) Brussels I bis).
2.1.4. The ‘Habitual Place of Work’

The main connecting factor in Brussels I bis is the place where the employee habitually carries out their work. The habitual place of work is also the main connecting factor for Rome I, the regime for the applicable law. This means that the employee has access to court in the Member State where they habitually carry out their work and that that Member State’s law will generally apply. As the concept is common to both the Rome I and the Brussels I Regulations, it has been interpreted and applied in parallel in the case law.

According to settled case law regarding an employee working in different countries, the national court should try to determine in which place the employee has established the effective centre of their working activities. When the employee carries out a large part of their work in the country in which they have established their office, that country is deemed to be the country in or from which the work is habitually performed. However, if a worker is sent to different locations to perform one and the same activity (cooking on oil rigs on the Continental Shelf, for example), no such effective centre of working activities can be determined, nor can any qualitative criterion be used to determine the ‘essential’ part of the performance. In that case, the relevant criterion for establishing an employee’s habitual place of work is the place where they spend most of their working time engaged on their employer’s business.

The CJEU has given guidance most recently in a judgment concerning mobile workers in the air transport sector. Former Ryanair cabin crew employees took the view that Belgian law applied to their employment agreements and summoned their former employer Ryanair before a Belgian court to pay various compensations with respect to Belgian law. The question was which country was the habitual place of work: Ireland or Belgium? The facts of the case can be summarised as follows. Ryanair is an airline with its head office in Ireland. According to the employment contract, drafted in English, the Irish courts have jurisdiction over possible disputes, and Irish law governs the work relationship between the employees and Ryanair. The contract furthermore stipulated that the work was regarded as being carried out in Ireland, given that the duties were carried out on
board aircraft registered in that country. However, that same contract nominated Charleroi Airport (Belgium) as ‘home base’. The contract required the employees to live within an hour’s journey of the home base that they were assigned to. The employees started their working days at Charleroi Airport and ended them there. Similarly, they sometimes had to stay there on standby in order to replace a potentially absent member of staff. The employees were subject to Irish law in the field of tax and social security.

As regards determining the concept of ‘place where the employee habitually carries out their work’ the Court referred to its settled case law, in which it repeatedly held that the concept must be interpreted broadly. When an employment contract is performed in the territory of several countries, and where there is no effective centre of professional activities, the ‘place where the employee habitually carries out their work’ covers the place where, or from which, the employee in fact performs the essential part of their duties vis-à-vis their employer. In the present case, that meant that the court must identify ‘the place from which’ the aircrew principally discharged their obligations towards their employer. To determine that place specifically, the national court must refer to a set of indicia. In the transport sector, it is necessary in particular to establish in which Member State is located: (i) the place from which the employee carries out their transport-related tasks, (ii) the place where they return after completing their tasks, receive instructions concerning their tasks and organise their work, and (iii) the place where their work tools are to be found (C-29/10 Koelzsch, and C-384/10 Voogsgeerd). In this case, the place where the aircraft on which the work is habitually performed is stationed must also be taken into account.

2.1.5. The Place of Business

In situations in which there is no habitual place of work, employees can sue their employer at the place where the business which engaged them is or was situated. This also applies if there are two places that are equally important. For these exceptional (or so far even theoretical) situations, the Court’s interpretation in the Voogsgeerd case is important. In this case, the CJEU interpreted Rome I, but this case is also relevant for Brussels I bis.

2.1.6. A Specific Jurisdiction Clause for Posted Workers

Article 6 of the Posted Workers Directive (PWD) stipulates that in order to enforce their rights to the terms and conditions of employment guaranteed in

---

26 Vice versa, answers to questions regarding jurisdiction are (most often) also relevant to determining the applicable law, as a result of the desired consistency between jurisdiction and applicable law.
27 Directive 96/71/EC on the posting of workers in the framework of the provision of services.
this Directive,\textsuperscript{28} posted workers must, alongside the possibilities of suing pursuant to Article 21 of Brussels I bis (such as in the Member State where they habitually perform their contracted employment), have the possibility to institute judicial proceedings in the host Member State.\textsuperscript{29} Hence, all Member States have had to ensure that workers posted to their country and covered by the Directive can bring judicial proceedings for enforcement in the territory to which they have been posted. Because the jurisdiction rules under the PWD and Brussels I bis are concurrent, the rules on connected and related actions under Brussels I bis remain applicable. This provides the possibility to sue more than one employer before a court in the domicile of only one of them in situations of multiple postings in multiple countries.\textsuperscript{30}

2.1.7. Access to Justice, both on Paper and in Reality?

All in all, from a ‘law on paper’ perspective, mobile (posted) workers’ access to justice\textsuperscript{31} as established in Brussels I bis and Art 6 of the PWD, seems to be adequate. Workers’ ability in fact to start legal proceedings depends on their knowing (how to determine) their rights and on support (for instance, legal aid systems) in exercising them. Precisely this gap between having a possibility on paper to bring a claim to court and exercising this right in practice is inherent in labour law, because of fears of retaliation or dismissal if one insists on one’s rights, but also, say, a lack of awareness of rights. Not surprisingly, (low-waged) mobile workers encounter several extra difficulties when they consider pursuing a legal claim in another Member State.\textsuperscript{32} In this regard, the practical relevance of the Legal Aid Directive (2003/8/EC) for cross-border workers needs examination (and, if need be, improvement). Extension of the scope of the Small Claims Regulation, which currently excludes outstanding wages claims, might also be helpful.\textsuperscript{33}

\textsuperscript{28}Issues governed by the law of the habitual country of work (such as conclusion and termination of the contract), however, do not fall within the jurisdiction of the host state.

\textsuperscript{29}The lex specialis principle under Art 67 Brussels I bis facilitates this.

\textsuperscript{30}See I Queirolo, CE Tuo et al, ‘Article 67 Brussels I bis: overall critical analysis’ in CE Tuo, L Carpaneto and S Dominelli (eds), Brussels I bis Regulation and special rules: opportunities to enhance judicial cooperation (Arane editrice, 2021) 84.

\textsuperscript{31}In general on this topic, see Chapter 3 of this volume. On the empirical aspect of whether posted workers bring claims and which kind, see Z Rasnača and M Bernaciak, Posting of workers before national courts (Brussels, ETUI, 2020).

\textsuperscript{32}As was made clear, for instance, by Advocate General Alber in a passing observation in his Conclusion on the (non-posted worker) case Commission v Italy, see C-279/00 Commission v Italy, points 34–36.

\textsuperscript{33}Regulation (EU) 2015/2421 of 16 December 2015 amending Regulation (EC) No 861/2007 and Regulation (EC) No 1896/2006 creating a European order for payment procedure. Since its enactment (14 July 2017) the Regulation has applied to both contested and uncontested cross-border civil and commercial claims of a value not exceeding €5,000. In line with Brussels I bis, it also ensures that the judgments given within this procedure are enforceable without any intermediate procedure, in particular without the need for a declaration of enforceability in the Member State of enforcement (abolition of exequatur).
2.2. Question 2: Which Law Is Applicable?

Concerning applicable law, the uniform rules of Rome I apply to contractual obligations in any situation involving the laws of different countries (Article 1), that is, in situations in which not all the contractual elements are connected to the legal order of one and the same state. Consequently, Rome I does not apply to purely domestic situations with connecting factors with a single country. Furthermore, Article 2 states clearly that Rome I asks for universal application, meaning that Rome I is applicable not only among Member States of the European Union.\footnote{Being an EU Regulation, Rome I in principle would be in force in the Member States of the European Union. However, since it has not opted in, Rome I is not in force in Denmark.} It also applies in case the law of a non-Member State is made applicable (for instance by choice of the parties) and the dispute is brought before a court in an EU Member State.

Article 3 of Rome I embodies the principle of party autonomy and therefore vests parties with a wide freedom of choice of contract law. But Article 8(1) Rome I limits the effect of a choice of law in employment contracts because such a choice by the parties cannot deprive employees of the protection afforded them by mandatory provisions of the law applicable in absence of this choice (the 'objectively applicable law'). Hence, employees will be protected by the law that offers better protection; if the employer and employee agree on better employment conditions than those put into the law applicable in the absence of choice, Article 8(1) Rome I prioritises the chosen law. By contrast, if the parties agree on worse employment conditions than those laid down in the objectively applicable law, the latter law prevails. This 'favourability principle' is meant to prevent employers from abusing their superior bargaining position.

2.2.1. Habitual Place of Work

Because the objectively applicable law acts as a 'floor', or a minimum standard of protection, it is always relevant to ascertain the latter law, which can be done following the rules in Article 8(2)--8(4) Rome I. Rome I provides two connecting factors in Article 8(2) and (3): the 'habitual place of work' and the 'place of business'. In the Koelzsch and Voogsgeerd cases already mentioned, the CJEU decided to go for a broad interpretation of the state of employment principle (\textit{lex locis laboris}). The CJEU made clear that even in the case of a truck driver working in international transport (\textit{Koelzsch}) or a sailor working on a seagoing vessel (\textit{Voogsgeerd}), the national court should try to establish whether, based on the circumstances as a whole, a country can be identified where or from which the work is actually performed.\footnote{See CJEU 15 March 2011, Case C-29/10 Koelzsch, ECLI:EU:C:2011:151, paras 47–49.} The main argument for this broad interpretation is that it complies
with the objective of Article 8 Rome I (which is to guarantee protection to the weaker party).

2.2.2. The ‘Place of Business’

Article 8(3) Rome I contains an alternative reference rule in case a country where the work is habitually carried out cannot be identified. In that case the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. The connecting factor serves to provide legal certainty in a case in which the primary connecting factor is not able to provide a clear link to any particular jurisdiction. However, taking into account the very broad interpretation of the ‘habitual place of work’ in Article 8(2) Rome I, there seem to be hardly any situations that will be covered by Article 8(3) Rome I, which refers to ‘the place of business through which the employee was engaged’. For (so far theoretical) situations in which Article 8(3) would apply, the term ‘place of business’ encompasses not only the subsidiaries and branches but also other units, such as the offices of an undertaking, even though they do not have legal personality. However, the undertaking is required to have a degree of permanence.

2.2.3. Escape Clause

Under Article 8(4) Rome I, both pre-established connecting factors – habitual place of work and engaging place of business – may be set aside where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of that other country shall apply. This clause has been interpreted by the Court in a case with rather unusual factual circumstances, in particular that after 11 years of working in one Member State, the frontier worker in question was still affiliated to the social security system of her former habitual country of work. The Court ruled that even where an employee carries out the work in performance of the contract habitually, for a

36 See CJEU 15 December 2011, Case C-384/10 Voogsgeerd/Navimer, ECLI:EU:C:2011:842, para 47.
37 Nevertheless, the provision may remain of or regain relevance for the emerging group of ‘hyper-mobile’ workers.
38 The CJEU clarified this concept in the Voogsgeerd judgment. As the elements related to the performance of the contract are already taken into account in determining the habitual place of work, the assessment of the place of engagement has a more formal character and focuses on the place where the recruitment activities were situated. Accordingly, this connecting factor does not establish a relevant link to the performance of the employment contract but is fixed at the very beginning thereof.
40 See CJEU 12 September 2013, Case C-64/12 Schlecker/Boedeker, ECLI:EU:C:2013:551.
41 Under the current (policy) rules of the Regulations for the coordination of social security systems this is possible only for a maximum of five years.
Th e employer and employee were domiciled in Germany, remuneration was paid in German marks (prior to the introduction of the euro), the pension arrangements were made with a German pension provider, the employee had continued to reside in Germany, the employment contract referred to mandatory provisions of German law, and the employer reimbursed the employee’s travel costs from Germany to the Netherlands.

43 Because Art 8(2) Rome I stipulates that the country in which the work is habitually carried out shall not be deemed to have changed if a worker is temporarily employed (posted) in another country.

2.2.4. Overriding Mandatory Provisions

If we apply the Rome I rules to mobile workers covered by the FMOW, Article 8 Rome I will almost always point to the *lex loci laboris*, being the law of the country to which they moved in order to carry out their work in performance of the contract. In terms of outcome, this means that all mandatory laws and collective agreements in the Member State of habitual employment are applicable to their contracts. This implies that (only) in a system with relatively few mandatory and/or collectively agreed labour law standards, the equal treatment principle enshrined in Article 45 TFEU may suffer from the private international law rules. However, Article 9(2) Rome I allows courts to apply domestic ‘overriding mandatory’ provisions (law of the forum), regardless of the (objectively) applicable law. Many labour law rules have an overriding mandatory character, though the Member States traditionally draw the line differently between law or laws chosen by a forum court from among the relevant legal systems and overriding mandatory provisions.

Regarding the posting of workers within the framework of FMOS, it is important to note that, in essence, the PWD uses the same technique as Article 9 Rome I to achieve its aims. From the perspective of the host state, the PWD fills the ‘gap’ that Article 8 Rome I would create for the territorial application of labour law. However, the interaction of private international law and the internal market-related PWD has created a highly complex legal system for posted-workers situations, exacerbating the ‘usual’ difficulties involved in guaranteeing the rights of mobile workers. This has (eventually) been acknowledged by the European legislator. Below, we take a closer look at the legal instruments concerning (the monitoring and fostering enforcement of) their position.
3. Strengthening the Protection of Posted Workers

3.1. Rights of Posted Workers

Currently, three Posted Workers Directives are in place: the original PWD, amended by the revised PWD,44 and a Posted Workers Enforcement Directive (PWED; see section 3.2 below). The revised (2018) PWD amends the original PWD and complements the PWED, rather than replacing these Directives. As stated in its recital 5, the (1996) PWD is intended to reconcile the exercise of companies’ fundamental freedom to provide cross-border services under Article 56 TFEU with the need to ensure a climate of fair competition and respect for workers’ rights. The revised (2018) PWD resets the balance between said goals in favour of the latter (see eg recitals 4 and 10), in order ‘to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties’. According to its recital 16: ‘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’.45

Article 1(3) PWD defines three categories of posting: (1a) posted workers by service providers (subcontractors); (1b) intra-concern posted workers; and (1c) posted workers via intermediaries such as temporary work agencies (TWAs). In order to achieve its aims, the PWD coordinates Member States’ legislation in a way that it provides a core of mandatory rules with which employers who post workers to the Member State in which the service is to be provided,46 must comply in the host country. According to Article 3(1) PWD, Member States are to ensure

45 Moreover, the principle of equal treatment, equal pay and the prohibition of any discrimination on grounds of nationality in Union law is emphasised (recital 6) and recital 3 refers expressly to Article 3 TEU, establishing that the Union is to promote social justice and protection and Article 9 TFEU, stating that, in defining and implementing its policies and activities, the Union takes into account requirements linked to, for instance, the guarantee of adequate social protection.
46 As explained in a practical guide on posting issued by the European Commission, workers who are sent temporarily to work in another Member State, but do not provide services there are not posted workers. European Commission, Practical Guide on Posting (Luxembourg, Publications Office of the European Union, 2019), 10 (answer to question 2.4). For example, this concerns workers on business trips (when no service is provided), attending conferences, meetings, fairs, following training and so on, but also workers sent (seconded) abroad for a longer period of time, such as foreign correspondents for a newspaper, performing tasks directly belonging to the core services of their employer in the home country). The implication of the distinction between workers posted and ‘sent’ abroad, seems to be that the latter are covered by the FMOV. If they are only (short-term) business travellers in the other Member State, private international law rules will still designate the law of the habitual country of work as applicable law. In the example of the journalist, the habitual country might however (partly) switch (depending on the specific circumstances of the case), because of private international law rules and in light of the equal treatment principle enshrined in Art 45 TFEU and operationalised in Art 7 of Regulation 492/2011.
that undertakings falling within the scope of the Directive guarantee to workers posted to their territory certain terms and conditions of employment laid down by mandatory law, including collective agreements that have been declared universally applicable. Hence, Article 3(1) PWD determines the nature of the labour standards that must be applied in the host state, but not the substance of these standards.

The revised PWD focuses on three main areas: the remuneration of posted workers, where it introduces the principle of equal pay for equal work, rules applying to long-term posting\(^{47}\) and rules on temporary work agencies.\(^ {48}\) The minimum wage guarantee is replaced by a guarantee of equal remuneration, including all elements of remuneration that are mandatory in the host state (both in statutory law and in mandatory or generally binding collective agreements) and apply to both local and posted workers.\(^ {49}\) Moreover, Article 3(8) PWD is amended in a way that allows application of generally applicable agreements or agreements concluded by the most representative organisations not only in the absence of, but also in ‘in addition to’ universally applicable ones.\(^ {50}\) Hence, there is still a ceiling of protection for posted workers, but at a higher level.

3.1.1. Social Security Issues in Posted Workers Situations

Undisputedly, the revised PWD has solved – at least on paper – many issues, such as wage differentiation between local and posted workers, which prevented the establishment of a level playing field for companies, and a lack of clarity regarding the temporary nature of postings as well as vis-à-vis rotational postings. However, the inconsistencies between the PWD and legal instruments concerning

\(^{47}\) Once the duration of the posting exceeds 12 months (or 18 months) following a motivated notification from the employer, all of the mandatorily applicable terms and conditions of employment in the host state should be guaranteed to the posted worker, with the exception of procedures and conditions of conclusion and termination of the employment contract and the rules on supplementary occupational pension schemes, which will remain covered by the law of the habitual country of work, in accordance with Art 8(2) Rome I.

\(^{48}\) The revised directive links the protection of posted agency workers to the ‘equal treatment provision’ of the Temporary Agency Work Directive 2008/104 (Art 5 TAWD), stipulating equal treatment of temporary agency workers in the user company. In addition to the provisions of Art 5 TAWD, Member States are entitled to require that posted temporary agency workers benefit from other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out (see Art 1(2)(e) revised PWD, amending Art 3(9)). Moreover, Art 1(1)(c) of the revised Directive adds to the protection of temporary agency workers in specific situations.

\(^{49}\) Arts 1(2)(a) of the revised Directive, amending Art 3(1) PWD. The explicit exclusion of supplementary occupational retirement pension schemes remains.

\(^{50}\) Art 1(2)(d) of the revised Directive. This solves certain problems, such as in Germany after the \textit{Rüffert} judgment (C-346/06). However, certain problems encountered in Sweden and Denmark after the \textit{Laval} judgment (C-341/05) seem not to be solved, although it remains to be seen whether Art 1(b)(1a) of the revised Directive will make a difference in this respect. This clause stipulates that the Directive does not affect inter alia the right to take collective action, as well as the right to negotiate, to conclude and enforce collective agreements. Regarding the (possible) impact on the right to strike of this ‘safeguard clause’ see Chapter 16 of this volume.
the coordination of social security systems, Regulations (EC) Nos 883/2004 and 987/2008 on the Coordination of Social Security Systems, have not yet been resolved.

Posted workers remain insured under the social security schemes of the sending Member State, pursuant to Article 12 of Regulation 883/2004. In principle, during the first 24 months of posting, the worker remains affiliated to the social security system of the state where their employer is normally supposed to carry out its economic activities and where the worker and/or their employer continue to pay social contributions. This ‘posting provision’ is a derogation from the main rule in the Regulation, which is the state-of-employment principle (\textit{lex loci laboris}). The application of the social security system of a state other than that where the actual activities are carried out, may provide the sending company with a competitive advantage over companies established in the host state, in particular when the former has to pay a lower level of social security contributions. Therefore, the CJEU explicitly regards the posting provision as an exception to the state-of-employment principle and holds that it can be applied only if a number of conditions are met.

Notably in practice, as reported in various studies, the sending state’s social security legislation and/or policy rules or practice sometimes facilitate abuse of the posting rule, such as the requirement of having substantial activities in the state of establishment of the employer. The so-called ‘A1 posting certificate’ plays a key role in these strategies. The A1 certificate is a document issued by the competent body of the sending state, attesting that its legislation applies to the posted worker. As confirmed by the CJEU, as long as the A1 certificate is not withdrawn or declared invalid, the competent body of the host state must take into account that the legislation of another state should be applied to the workers concerned, meaning that it may not subject them to its own social security legislation. In recent years, the CJEU has nuanced ‘home state control’ of the A1 certificates, however the host state court is allowed to disregard certificates only in situations of intentional fraud and under strict conditions.\footnote{CJEU, C-359/16 Altun and CJEU, joined Cases C-370/17 and C-37/18, Vueling.} Other loopholes allowing for sham posting arrangements have also been addressed in recent judgments, such as in \textit{Alpenrind}, regarding the so-called non-replacement condition for posting in the context of social security coordination. This judgment makes more difficult the recurrent use of posted workers to fill the same role, or undertake the same activity at the premises of the (same) host country entity.\footnote{CJEU 6 September 2018, Case C-527/16 Alpenrind, ECLI:EU:C:2018:669.} Moreover, in \textit{AFMB}, the Court pierced the corporate veil in order to make clear that purely artificial arrangements are not acceptable and that national courts should have regard to ‘all relevant circumstances’ in determining the ‘true’ employer within the meaning of Regulation 883/2004.\footnote{CJEU Case C-610/18 AFMB, ECLI: EU: C:2020:565. See for an extensive discussion of this judgment in relation to a possible development towards a uniform EU employer concept M van Schadewijk,}
The notion of “employer”: Towards a uniform European concept? (2021) 12(3) European Labour Law
Journal 363–86.

54 CJEU 3 June 2021, C-784/19 Team Power Europe.


57 For an extensive legal analysis of labour, social security, company and tax law aspects of this phenomenon and how to combat it, see M Houwerzijl, E Traversa and F Henneaux, A hunters game: How policy can change to spot and sink letterbox-type practices (Brussels, ETUC, 2016).
of services. To achieve its aims, the PWED sets a common framework of measures and control mechanism. Its most important measures include:

- a non-exhaustive list of indicative factual elements to help competent authorities such as labour inspectorates to determine whether there is a genuine establishment of the posting company in the sending state (Article 4(2) of the Directive) and to assess whether a posted worker is only temporarily carrying out their work in a Member State other than the one in which they normally work (Article 4(3) of the Directive);\(^{58}\)

- a stricter framework for improving access to information in host Member States, relevant for the posting of workers (Article 5) to enhance legal certainty for service providers;

- a framework for enhancing administrative cooperation between authorities and other stakeholders across countries (Articles 6 and 7);

- a (non-limitative) list of justified and proportionate administrative requirements and control measures that might be applied by the Member States (Article 9);

- an obligation upon Member States to ensure effective mechanisms for posted workers to lodge complaints and institute juridical/administrative proceedings (also through trade unions) against their employers also in the Member State where they are posted (Article 11);

- a subcontracting liability arrangement for wages (Article 12).\(^ {59}\) Member States can escape the liability arrangement through implementation of ‘equivalent measures’ in a direct subcontracting relationship. On the other hand, Member States are allowed to take more stringent liability measures, such as chain liability affecting all subcontractors in the chain.\(^ {60}\)

Clearly, the PWED facilitates and stimulates enforcement in some respects, but requires a real effort with budgetary implications and strong political will at the level of the host Member State. Ensuring that posted workers’ rights are adequately protected requires comprehensive cooperation – such as joint visits to work sites of posted workers, enhanced information exchange – on the part of different national actors (depending on the national system, these may be inspectorates, other state bodies, social partners). Moreover, although posting of workers falls under both sending and receiving country regulations, enforcers of the rights of posted workers (for example, trade unions, labour inspectorates) do not have the competence to act beyond their own national jurisdictions. In order more effectively

---

\(^{58}\) In line with Art 8(2) Rome I.

\(^{59}\) In section 4 this measure is examined in the context of transnational subcontracting chains.

\(^{60}\) The best-known and most far-reaching example of chain liability was established in Germany in 1995 for the construction sector and since then has been extended to several other sectors. See V Bogoesski, ‘Chain liability as a mechanism for strengthening the rights of posted workers. The German chain liability model’ (PROMO, 2016).
to monitor and enforce posted workers’ rights, cross-border cooperation seems crucial. Although cross-border cooperation has increased during the past decade, especially in relation to posting, procedures are long and time-consuming and no proper sanctions are available. Some enhancement may be expected from the PWED where it links the inspectorates’ information exchange to the so-called Internal Market Information (IMI) System. Moreover, in 2019 the Regulation to establish a European Labour Authority (ELA) was adopted. The ELA is meant to provide more comprehensive and easily accessible information and services, to stimulate cooperation because authorities, including joint inspections, across the legal areas of, for example, social security and labour law. ‘It will serve the double mission of helping national authorities fight fraud and abuse and making labour mobility easier for EU citizens.’

Stricter registration rules (such as notification systems, dissuasive penalties for not following the rules, making service recipients co-responsible for registration) for service providers posting their workers are allowed (but not obligatory) under the PWED and have been introduced in several Member States in order to enhance the quality of data collection on postings and to facilitate monitoring and enforcing the rights of posted workers. The Belgian LIMOSA scheme was one of the first and certainly the best-known and advanced notification system. At the same time, it is a contested notification system, from the perspective that it would limit the free provision of services too much. It has been the subject of several proceedings before the CJEU, with mixed outcomes. More recently, the advantages of the advanced LIMOSA database have been highlighted by statistical research, making reliable estimates of the extent to which posting in the Belgian construction sector has resulted in displacement of local labour.

In the revised PWD, some other surveillance and control measures are further developed. To foster legal certainty and law enforcement, Member States are obliged to publish ‘without undue delay and in a transparent manner’ information on the constituent elements of remuneration on their single official national website, next to the other information referred to in Article 5 PWED, as well as information on additional terms and conditions of employment applicable to postings exceeding 12 or, where applicable, 18 months. Each Member State should ensure that the information on the single official national website is accurate and updated on a regular basis. Failure to comply with this obligation shall be taken into account when determining the fines applicable for infringement of the national provisions adopted pursuant to the (revised) Directive, ‘to the extent

---

61 See Press Release: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9301&furtherNews=yes. For more details on the ELA see Chapter 17 in this volume.

62 Belgium, for instance, had to reduce the amount of information they collected initially because, according to the Court of Justice, the scheme restricted, without good reason, the free movement of services. See ECJ 2010, Case C-515/08 dos Santos Palhota et al; ECJ 2012, C-577/10 Commission v Belgium; ECJ 2014, C-315/13 De Clercq and others.

63 F De Wispelaere and J Pacolet, De omvang en impact van intra-EU detacheren op de Belgische economie. Met een specifieke focus op de bouwsector (HIVA KU Leuven, 2017).
necesary to ensure the proportionality thereof. Moreover, the revised PWD complements the PWED by establishing an obligation for the host state to create a sanctions regime.

3.2.1. Posted Workers’ Awareness of Rights

Finally, regarding information and awareness-raising tools, the recent Directive on Transparent and Predictable Working Conditions (TPWC Directive) is worth mentioning. This instrument must be implemented in the national law of the Member States before August 2022, and aims to ensure a transparent basic level of universal protection across existing and future contractual forms. With such a general and broad personal scope, the TPWC Directive promises to become a more effective instrument than separate legislative initiatives targeted at specific forms of employment, which may easily be superseded by the rapid pace of changes on the labour market. The idea is that all (mobile) workers, including those in short-term and casual employment relationships, will benefit from clarity about their working conditions and new minimum standards. Article 6 of the TPWC Directive updates Article 4 on ‘Expatriate workers’ of the abolished Directive 91/533/EEC, to align with the relevant provisions of the PWD and the related PWED. Workers posted or sent abroad should receive additional information specific to their situation. In order to limit burdens on employers, the obligations set out in this Article apply only if the duration of the work period abroad is more than four consecutive weeks, unless Member States specifically provide otherwise. Information provided before the first departure may cover several grouped work assignments and may subsequently be modified in case of change. Where they qualify as posted workers under the PWD, workers should also be notified of the single national website developed by the host Member State where they will find the relevant information on the working conditions applying to their situation.

This, however, is easier said than done in transnational networks of companies, which put mobile ‘posted’ workers to work as cheap labour in high-wage Member States. As will be addressed in the next section, in the context of such cross-border subcontracting chains, mobile workers typically lack awareness of their genuine (and often volatile) legal status and employer. Moreover, they

---

64 Art 1(2)(a) of the revised Directive.
65 Finally, the revised PWD and Directive 2020/1057 have specific implications for the road transport sector, which are beyond the scope of this chapter. See F van Overbeeke, ‘The Gordian knot is cut – CJEU rules that the Posting of Workers Directive is applicable to road transport’, 10 December 2020, https://conflictoflaws.net/2020/the-gordian-knot-is-cut-cjeu-rules-that-the-posting-of-workers-directive-is-applicable-to-road-transport/.
67 COM 2017 797 final, 3.
68 COM 2017 797 final, 13.
69 Pursuant to Art 5(2) of the PWED.
4. Challenges to Guaranteeing Decent Work in Transnational (Chains of) Companies

Sectoral collective bargaining by strong, representative trade unions is generally acknowledged to be the most effective instrument on national labour markets to lift and enforce pay levels above the minimum, as well as to establish other good working conditions and more generally as a redistribution tool and a mechanism for ‘workplace democracy’. There is also historical proof for this broadly supported assumption. In the first four decades of post-war Europe, in all democratic countries the sectoral level became firmly rooted as the most important collective bargaining level. This system was supported by national legal or conventional regulative frameworks, and by recognition in (post-war) international treaties such as ILO Conventions Nos 87 and 98, Articles 5, 6 and 19 of the European Social Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a default, both skilled and unskilled workers on standard full-time contracts were employed under the supervision and authority of one (large) liable and responsible employer, bound by a (generally applicable) sectoral collective agreement. All in all, this socio-economic model brought an unprecedented increase in the living standards and purchasing power of ‘the working class’.

Since the 1980s however, many industries have gone through processes of outsourcing and externalisation of activities. These processes were stimulated by privatisation, deregulation and Europeanisation of product and services markets in the context of the ‘completion’ of the EU internal market (1985–92), and since
1994 by the Europeanisation of labour markets under the influence of association agreements and from 2004 onwards enlargements of the EU involving central and eastern European countries. Against this backdrop, first the rise of transnational subcontracting chains and letterbox companies is outlined (section 4.1) and then tools are identified that combat abuses and foster the (enforcement of) the rights of (mobile) workers in said context (section 4.2).

4.1. The Rise of Transnational Subcontracting Chains and Letterbox Companies

Demand for (cheap) labour in the ‘old’ Member States was matched with supply from ‘new’ Member States facilitated by legally permitted arrangements, partly based on EU law, such as fixed-term contracts and (posted) temporary agency work, posting of workers in (sub)contracting processes and self-employment. Hence, on top of the ongoing fragmentation of firms and labour within national labour markets, a layer of cross-border fragmentation of labour within the EU emerged. This led to well-known challenges to the territorial application of labour law and to posting of workers as a new business model based on ‘regime competition’.77

Through cost-driven transnationalisation of subcontracting and outsourcing practices, often but not only in the context of European-wide public procurement,78 production processes may take the form of a fragmented multiple network of economic activities (often) across several Member States.79 In many sectors, outsourcing activities made companies replace direct employees with all kinds of flexible employment relations, such as posting as a business model based on ‘regime competition’. Characterised as these processes are by unequal bargaining power, crucial social risks are transferred away from the main contractor to SMEs and/or individuals, such as (bogus) self-employed persons.80 Such a cost-driven chain can ultimately reach the informal economy, especially when large settled companies transfer labour recruitment to labour-only subcontractors that drive costs down even further by using temporary work agencies, gangmasters and other intermediaries. The lower parts of the chain then tend to feature an irregular supply of cheap labour, resulting in low pay, poor working conditions, inadequate

77 See eg S Evju (ed) Regulating Transnational Labour in Europe: The quandaries of multilevel governance, Skrifterie No 196 (Oslo, UiO, 2014).
78 See Chapter 19 in this volume.
79 Related to this subject but beyond the scope of this chapter is the upcoming proposal for an EU Directive on sustainable corporate governance, including a mandatory EU system of human rights due diligence for supply chains. See eg: www.etuc.org/en/time-act-human-rights-due-diligence-and-responsible-business-conduct.
80 For recent investigations of abusive labour practices in (partly transnational) subcontracting chains, see S Borelli and G Frosecchi et al, Securing workers’ rights in subcontracting chains. Case studies (Brussels, ETUC, 2021).
A crucial loophole, hampering enforceability of the regulatory framework, is linked to corporate mobility law. Some legal advisers specialise in setting up letterbox companies, which are legal entities with little or no activity in the country of registration. These companies have strategies for operating across legal areas, whereas inspectorates are often divided along the lines of legal areas (‘silos’). A major difficulty in combating such exploitative bogus arrangements is that EU law in principle does not prohibit these companies.

Notably, the CJEU has facilitated the establishment of letterbox companies through its case law in a number of judgments, starting with Centros and more recently confirmed in Polbud. According to this case law, the ‘host state’ may not refuse to recognise the legal capacity of a company incorporated under the law of another Member State, even if that company does not pursue any economic activity in the latter state. Hence, such corporate forms may benefit in the same way as any ‘genuine’ company with real economic activities from the internal market principles that guarantee the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU). These registered corporate forms are free to move around and enjoy market access elsewhere in Europe. This is facilitated by many websites that promote incorporation of businesses in, for example, Estonia, Romania and Slovakia. Furthermore, the Supreme Court of Latvia has interpreted posted workers case law in a facilitative manner for letterbox practices. This again underlines the importance of ensuring that, in cases of posted workers, each service provider involved should perform a ‘genuine activity’ in the Member State where the posted worker habitually works (see Section 2 above on this) and therefore should be a genuine undertaking. Currently, Article 4(2) and Article 4(3) PWED (see section 3.2 above) are not formulated strongly enough to make companies comply with such preconditions for bona fide posting.

In sum, after some 15 years of measures and case law prioritising EU fundamental economic freedom, the need to combat ‘regime shopping’, fraudulent posting, the use of ‘letterbox companies’ and (too) complex cross-border subcontracting

---

81 The European Agency on Fundamental Rights (FRA) has called for ‘zero tolerance for severe forms of labour exploitation’ in its report on Severe Labour Exploitation: Workers Moving within or into the European Union, States’ Obligations and Victims’ Rights (Brussels, 2015).
82 K McGauran, The impact of letterbox-type practices on labour rights and public revenue (Brussels, ETUC, 2016).
86 Many fraudulent situations involve posted (temporary agency) workers who have never actually been employed on the territory of the Member State of establishment of the employer (although this state is allegedly their habitual place of work).
Interesting in this respect is a passage in the so-called ‘Nahles report’ of February 2021 on improving social dialogue, which advises the EC to close existing regulatory loopholes that could adversely affect workers’ involvement at company level and to ‘assess whether to propose a revision of the European framework directive 2002/14/EC on workers’ involvement and information and consultation rights so as to include common minimum standards for European and national companies, to prevent misuse in the form of letter box companies or chains of subcontractors’.

The Framework Directive for safety and health at the workplace (89/391/EEC) prescribes that an ‘employer shall take appropriate measures so that employers of workers from any outside undertakings and/or establishments engaged in work in his undertaking’ receive adequate occupational safety and health information (Article 10). This was implemented in sector-specific Directives. The Directive on temporary agencies (91/383/EEC) adds that ‘the user-undertaking is responsible, for the duration of the assignment, for the conditions governing performance of the work’ (Article 8). The Directive on the implementation of minimum safety and health requirements at temporary or mobile construction sites (92/57/EEC) introduces mandatory coordination between the various parties in a chain, including self-employed persons on site (from the project preparation stage to the completion of work). See further on effective enforcement of occupational safety and health, Chapter 14 of this volume.

The Employers Sanctions Directive 2009/52/EC provides – at least in theory – the most far-reaching subcontracting liability measures. The Directive is targeted solely against employers of illegally present third-country nationals. This Directive establishes full-chain liability, which implies in principle the strongest protection and highest preventive effect possible, because every link of the subcontracting chain is a possible debtor. However, the wording of Article 8(2) suggest that all links must have knowledge (‘the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals’).

The most recent update was in 2017 in a report commissioned by the European Parliament (hereafter: the PWD and the launch of the ELA (see section 3.2). These are not magic bullets, but only first steps in the right direction. To achieve ‘fair labour mobility’ and a ‘level playing field’ between domestic and cross-border companies in the internal market, the EU acquis still needs further strengthening. 87

4.2. Tools to Guarantee (Posted) Workers’ Rights in Subcontracting Chains Across the EU

Abuses of (EU) labour law in (transnational) subcontracting chains can be combatted by instruments that stipulate joint or shared employer responsibility. At European level, to date, this approach has been taken only in relation to health and safety instruments. If a worker employed by a subcontractor performs activities at a workplace of the main undertaking, responsibility for some aspects of occupational health and safety are shared. 88 In some other areas of EU law, co-responsibility between levels in the subcontracting chain has been created by provisions regarding transnational subcontracting liability. 89 A number of studies have provided an extensive overview of liability tools at both national and EU level, revealing loopholes as well as fraudulent practices. 90 The most recent update was in 2017 in a report commissioned by the European Parliament (hereafter: the LABCIT Project, 2016; Y Jorens, S Peters and M Houwerzijl, Study on the protection of workers’ rights in subcontracting processes in the European Union (Project DG EMPL/B2-VC/2011/0015, 2012); M Houwerzijl and S Peters, Liability in subcontracting processes in the European construction sector, Comparative Report (Dublin, Eurofound, 2008).
Enforcement of EU Labour Law in a Transnational Context

2017 European Parliament study).\textsuperscript{91} It provides an overview of liability provisions at EU level and a comprehensive picture of the legal systems in five EU Member States regarding liability in (transnational) subcontracting chains.\textsuperscript{92}

Because posted workers are often employed in transnational subcontracting chains, the PWED includes in Article 12 a provision on cross-border joint and several liability for the payment of wages in subcontracting chains. This provision stipulates direct joint and several liability, extending liability to one link up the chain only, in respect of any outstanding net remuneration (according to the minimum rates of pay of the host state) and/or contributions due to common funds or institutions of social partners regulated by law or collective agreement (insofar as these are covered by Article 3(1) PWD). While Member States are required to introduce such subcontracting liability in the construction sector and cover at least unpaid net remuneration corresponding to the minimum rates of pay (pursuant to Article 12(1)), they may provide for it in any sector, also for more tiers than only towards the direct contractor and with broader scope than minimum rates of pay (Articles 12(2) and 12(4) PWED). Instead of such a system of subcontracting liability, Member States may take other appropriate enforcement measures (Article 12(6)).\textsuperscript{93} All these measures have to be taken on a non-discriminatory and proportionate basis. A ‘flanking’ measure which might help in invoking the liability instrument in practice is laid down in Article 11 PWED. This provision enables trade unions and other third parties, such as associations, organisations and other legal entities having a legitimate interest in compliance with the PWD, to engage, on behalf or in support of the posted workers, and with their approval, in any judicial or administrative proceedings.

In their implementation, some Member States introduced new measures on joint and several liability, in particular in the context of public procurement and regarding temporary agency work. Nevertheless, considerable differences were observed in the European Parliament study of 2017 in terms of scope. While Germany, Italy\textsuperscript{94} and the Netherlands have very far-reaching and elaborate systems of chain liability, sometimes even covering all wage components, Poland, the United Kingdom and – in part – Hungary are pursuing a policy strictly according to the minimum requirements of the PWED.\textsuperscript{95}

In line with previous assessments, the authors of the European Parliament study in 2017 assessed the effectiveness of the PWED’s chain liability measure as limited, 


\textsuperscript{92} Germany, Italy, Hungary, the Netherlands, Poland.

\textsuperscript{93} Only Denmark and Finland made use of that, according to the EC evaluation report (COM (2019) 426 final).

\textsuperscript{94} Regarding Italy, the assessment showed very strict liability rules, but because foreign subcontractors and posting are less significant than in other Member States and Italy is ‘traditionally facing issues with the enforcement of rules’, there were doubts regarding the preventive impact in reality.

\textsuperscript{95} The report Transnational posting of workers within the EU: Guidelines for administrative cooperation and mutual assistance in the light of Directive 67/2014/EU, ENACTING project (VS /2015/0013) (2016), also contains an examination of the subcontracting liability rules in Belgium, Germany, Italy and Romania.
because it is relatively easy to circumvent by inserting a letterbox company.\textsuperscript{96} Moreover, the provision includes an escape clause (Article 12(5)), according to which a contractor who has undertaken due diligence obligations as defined by national law shall not be liable.\textsuperscript{97} Specific requirements are not defined and are left, according to recital 37, to the discretion of the Member States.\textsuperscript{98} This results in a wide margin of interpretation and therefore legal uncertainty.\textsuperscript{99} Furthermore, liability is still restricted to the construction sector despite clear evidence that the practice of subcontracting has spread to other sectors, such as transportation, meat processing, agriculture and other labour-intensive sectors (albeit that Member States are free to expand the scope to these sectors). According to the 2019 evaluation by the European Commission,\textsuperscript{100} the liability rules have not yet been frequently applied in practice as there are no relevant court cases. Nonetheless, 12 Member States\textsuperscript{101} indicated that the introduction of these rules has increased the effective protection of workers’ rights in subcontracting chains.\textsuperscript{102}

With regard to the need to combat letterbox-type practices (see section 4.1 above), a so-called EU company law package adopted in spring 2019 is noteworthy.\textsuperscript{103} In its proposal, the Commission introduced into company legislation a check by the competent authority of the Member State of departure against the risk of abuses in case of cross-border company mobility.\textsuperscript{104} Unfortunately, in the compromise text of the adopted Directive 2019/2121 the anti-abuse check is a generally formulated obligation to stop abusive cross-border restructuring processes. The procedure for the anti-abuse check is to be defined in national law. Therefore, it will depend on how ambitiously the Directive is implemented at national level with regard to safeguards against letterbox companies.

5. Concluding Remarks

This chapter identified and examined legal tools and instruments to strengthen and guarantee the rights of mobile (posted) workers, including shared liability tools to overcome the most salient enforcement challenges related to employment

\textsuperscript{96} However, because of the – at that time – recent implementation in mid-2016, there was no reliable data or practical experience with the flanking measures of Arts 4 and 11 of the PWED.
\textsuperscript{97} 16 Member States introduced the option of a due diligence defence.
\textsuperscript{98} Due diligence may include, among other things, measures taken by the contractor concerning documentation of compliance with administrative requirements and control measures in order to ensure effective monitoring of compliance with the applicable rules on the posting of workers.
\textsuperscript{99} In contrast, para (2) of the first draft of Art 12 provided a prestructured due diligence proposing how reasonable due diligence could be performed and transposed to national legislation.
\textsuperscript{100} COM (2019) 426 final.
\textsuperscript{101} Belgium, Bulgaria, Croatia, Denmark, Germany, Finland, Italy, Lithuania, Luxembourg, Malta, the Netherlands and France.
\textsuperscript{102} COM (2019) 426 final, 17–18.
\textsuperscript{103} Press release 13 March 2019: ’Commission welcomes agreement on the cross-border mobility of companies’.
\textsuperscript{104} COM (2018) 241.
in transnational (chains of) companies in the EU. Together, these tools contribute to a ‘comprehensive approach to enforcement’. This approach was explained – almost 10 years ago – in the proposal for the PWED as follows:

The comprehensive approach to enforcement includes awareness-raising (better information), state enforcement mechanisms (inspections and sanctions) and private law enforcement mechanisms (joint and several liability). All aspects are deemed important for a balanced approach. Weakening one of the aspects would imply strengthening other aspects of enforcement in order to achieve a similar result. 105

Although the view of enforcement taken in this chapter has focused on the position of low-wage mobile (posted) workers vis-à-vis other mobile workers in the EU, the political discourse in the past decade justifies such a selective approach. In order to safeguard and maintain ‘one of the most cherished freedoms of our EU’, 106 it is important to reinforce intra-EU labour mobility as the human face of the Union, allowing all mobile workers to improve their living and working conditions and to improve their social advancement, while preventing (unfair) competition on social standards with non-moving workers in the Member States.

The steps recently taken and subject to a follow-up within the framework of the EPSR are going in the right direction and will hopefully be supported by the ongoing but bumpy process (in CJEU case law) of the ‘constitutionalisation of the EU internal market’. 107 However, it is of key importance to insist that respect for and even promotion of effective enforcement of EU labour and social rights is safeguarded in other legal areas as well. 108 This calls for a consistent and genuine operationalisation of the so-called horizontal social clause in Article 9 TFEU, requiring that the EU legislator and policymakers take into account the objectives of social protection, social inclusion and high levels of (good quality) employment in all its policy initiatives, instead of limiting this to the scope of its social policy. 109

106 As the European Commission likes to emphasise: more than eight out of 10 Europeans support the free movement of citizens and the possibility to live, work, study and do business anywhere in the EU. See leaflet Social priorities under the Juncker Commission, 29 January 2019.
107 If the potential impact of the CFREU as a ‘counterweight to the neo-liberal orientation of the Treaties’ were truly realised. See C Barnard, European Employment Law (OUP, 2012) 33. See for further exploration and a proposed approach to a constitutionally conditioned internal market: D Schieck, EU Social and Labour Rights and EU Internal Market Law (European Parliament, Policy Department A: Economic and Scientific Policy, 2015) 80–93.
108 As became clear in the Laval quartet, freedom to exercise economic rights may considerably limit the granting or exercising of social rights. Moreover, until summer 2020, it was not compulsory for service providers to pay cross-border posted workers equally to national workers, on the grounds that this would infringe the freedom of services.
109 In essence, the twofold strategy boils down to a consistent and coherent exercising of labour and social rights in line with internal market law and vice versa. If there is a conflict between those rights, mutual optimisation will have to be achieved. See D Schieck, n 109 at 89. See also R Ferrara, ‘The horizontal social clause and the social and economic mainstreaming: a new approach for social integration?’ (2013) European Journal of Social Law 295; P Vielle, ‘How the Horizontal Social Clause can be made to Work: The Lessons of Gender Mainstreaming’ in N Bruun, K Lörcher and I Schömann (eds), The Lisbon Treaty and Social Europe (Hart, 2012) 105.