

**Bridging a Divide: The Relationship between the Evolving
Posted Workers Directive and Posted Workers' Experience
of Precarity**

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Philosophy**

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Declaration

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Marta Lasek-Markey

Summary

This is a sociolegal study which focuses on the evolution of the EU legal framework on the posting of workers, which since 2012 has been in a state of legal flux shaped by a combination of different forces: political, sociological and economic.

The overarching research question of this thesis seeks, firstly, to identify those elements of the EU framework that may have the effect of predisposing posted workers to precarious working conditions, and secondly, to propose solutions, both in the law and in the practice of its enforcement, that could potentially reduce the experience of precarity for posted workers.

The central research question is answered throughout this thesis in five steps. In the first step a working definition of precarious work in the context of this project is established. While posted work has previously been described as precarious by scholars and some EU institutions, the concept of precarity (or precariousness) has not been defined in EU law. This research adopts a modified version of a multi-layered definition of precarious work formulated by Rodgers and Rodgers in 1989 and requiring an analysis of four objective factors: degree of certainty of continuing work (1), the worker's bargaining power (2), the level of labour law and social security protection (3), and income level (4). This is supplemented by a fifth subjective element, that of the worker's perception of their own situation (5), added to the definition under the influence of Kalleberg's works.

The second step involves doctrinal research of the Posted Workers Directive (PWD) and its two revisions carried out by the 2014 Enforcement Directive and by Directive 2018/957. It is argued that the twisted design of the PWD with its many inconsistencies which essentially framed posted workers as a service resulted in it being ill-equipped to grant them a sufficient level of labour law protection. The 2014-2018 reforms have addressed some of the issues, firstly, by giving the EU framework 'teeth' it had previously lacked and, secondly, by providing an important shift in the framing of the PWD as a worker protection measure, yet it appears that the EU rules may continue to predispose posted workers to precarity.

In the third step, existing empirical studies on low-wage posted workers carried out by researchers such as Berntsen, Lillie, Matyska and Wagner are explored with a view to identifying those areas of the posting experience in which precarity tends to occur

in practice. While these authors' background is primarily in sociology and ethnography, and their publications are less concerned with legal issues, such as the assessment of the amended PWD, they offer a valuable insight into the posted workers' subjective perception of their situation, often described as precarious.

In the fourth step, research findings stemming from interviews conducted in this project are used to link the experience of precarity with specific elements of the EU legal framework and / or its enforcement. The qualitative data was obtained from 29 in-depth interviews conducted in 2019-2020 with the Faculty of Arts, Humanities and Social Sciences Research Ethics Committee's approval. The empirical study was designed as a narrative inquiry that collected stories from 'blue-collar' and 'white-collar' posted workers, as well as experts such as legal practitioners or representatives of the enforcement authorities. Data is analysed thematically to illustrate different aspects of the EU legal framework with the interview findings which are subsequently triangulated with the empirical literature.

The empirical evidence suggests that posted workers, both due to their unusual working arrangement, and to the fact that they are migrant workers, will continue to be a vulnerable category prone to precarity, and no legal reform can fully eliminate this risk of precarity. Yet, the risk of precarity stemming from posted work can be reduced by adequate legislation and strong enforcement mechanisms.

Accordingly, in the fifth step, this research reflects on solutions that may potentially reduce the precarity of posted workers. In line with the 'virtuous circle' of reducing precarious work, a model created by Doellgast, Lillie and Pulignano, this research stresses the vital role of the Member States, trade unions and employers in ensuring correct enforcement of the PWD and preventing fraud.

Finally, this research suggests a further reform of the EU framework that would entail introducing principle of equal treatment for posted workers to replace the existing 'nucleus' of mandatory rules of the 'host' state which is arbitrarily construed, limited and unfair.

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To Alan

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Academy of Management Journal	Acad Manage J
Acta Sociologica	Acta Sociol
American Economic Review	Am Econ Rev
American Journal of Sociology	Am J Sociol
Annual Review of Sociology	Annu Rev Sociol
British Journal of Industrial Relations	Br J Ind Relat
British Journal of Sociology	Br J Sociol
Cambridge Yearbook of European Legal Studies	CYELS
Canadian Journal of Philosophy	Can J Philos
Columbia Journal of European Law	Colum J Eur L
Common Market Law Review	CML Rev
Communist and Post-Communist Studies	Communist Post-Communist Stud
Comparative Labour Law and Policy Journal	Comp Lab L & Pol'y J
Cornell Law Review	Cornell L Rev
Current Legal Problems	Curr Leg Probl
Education and Training	Educ Train
<i>Ethnologia Europea</i>	Ethnol Eur
European Constitutional Law Review	Eur Const Law Rev
European Journal of Industrial Relations	Eur J Ind Relat
European Journal of Legal Studies	Eur J Legal Stud
European Journal of Migration and Law	EJML
European Journal of Politics and Gender	EJPG
European Journal of Social Security	EJSS
European Journal of Work and Organizational Psychology	Eur J Work Organ Psychol
European Law Journal	ELJ
European Law Review	ELRev
European Labour Law Journal	Eur Labour Law J

European Public Law	Eur Pub L
Evidence-Based Nursing	Evid-Based Nurs
Gender, Work & Organization	Gend Work Organ
German Law Journal	Ger Law J
Harvard Business Review	Harv Bus Rev
Human Resource Development International	Hum Resource Dev Int
Human Resources Management Journal	Hum Resour Manag J
Human Rights Law Review	HRLR
Industrial Law Journal	ILJ
Industrial Relations Journal	Ind Relat
Industrial and Labor Relations Review	Indus & Lab Rel Rev
International Enforcement Law Reporter	Int Enforc Law Report
International Journal of Comparative Labour Law and Industrial Relations	IJCCLIR
International Journal of Human Resource Management	Int J Hum Resour Manag
International Journal of Labour Research	IJLR
International Journal of Management	Int. J. Manag.
International Journal of Management Reviews	Int J Manag Rev
International Journal of Qualitative Methods	IJQM
International Labour Review	Int Labour Rev
Journal of Affective Disorders	J Affect Disord
Journal of Business and Psychology	J Bus Psycho
Journal of Common Market Studies	J Com Mar St
Journal of Ethnic and Migration Studies	J Ethn Migr
Journal of European Integration	J Eur Integr
Journal of European Public Policy	J Eur Public Policy
Journal of European Social Policy	J Eur Soc Policy
Journal of International and Comparative Law	J Int'l & Comp L

Journal of Management	J Manage
Journal of Managerial Psychology	J Manag Psychol
Journal of Nursing and Care	J Nurs Care
Journal of Pediatric Health Care	J Pediatr Health Care
Labor History	Labor Hist
London Review of Books	LRB
New Directions for Evaluation	New Dir Eval
New Technology Work and Employment	New Technol Work Employ
Philosophy & Public Affairs	Philos Public Aff
Polish Yearbook of International Law	PYIL
Population, Space and Place	Popul Space Place
Preventative Medicine	Prev Med
Relations Industrielles / Industrial Relations	Relat Ind - Ind Relat
Social Philosophy & Policy	Soc Philos Policy
Social Science & Medicine	Soc Sci Med
The English Historical Review	Engl Hist Rev
Theoretical Inquiries in Law	Theoretical Inq L
West European Politics	West Eur Polit
Western Journal of Nursing Research	West J Nurs Res
Work, Employment and Society	Work Employ Soc
Yale Journal of Law and Feminism	Yale J Law Fem

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Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459

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Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659

Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607

Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609

Case C-503/03 *Commission v Kingdom of Spain* [2006] ECR I-1097

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Council and Parliament Regulation 987/2009/EC laying down the procedure for implementing Regulation (EC) No 883/2004 [2009] OJ L 284/1, replacing Council Regulation (EEC) 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1972] OJ L 74/1

Council Regulation 1225/2009/EC on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51

Council and Parliament Regulation (EU) 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not

already covered by these Regulations solely on the ground of their nationality [2010] OJ L 344/1

Council and Parliament Regulation 492/2011 (EU) on freedom of movement for workers within the Union [2011] OJ L 141/1

Council and Parliament Regulation 2019/1149 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 [2019] OJ L 186/21

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Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19 (repealed)

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Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32 (repealed)

Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1

Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1997] OJ L 14/9

Council Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22

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Council and Parliament Directive 2001/95 on general product safety [2002] OJ L11/4

Council and Parliament Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158

Council and Parliament Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 and Regulation 2006/2004 [2005] OJ L149/22

Council and Parliament Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23

Council and Parliament Directive 2006/123/EC on services in the internal market [2006] OJ L 376/36

Council and Parliament Directive 2008/104/EC on temporary agency work [2008] OJ L 327/9

Council and Parliament Directive 2011/83 on consumer rights, amending Council Directive 93/13 and Directive 1999/44 and repealing Council Directive 85/577 and Directive 97/7 [2011] OJ L304/64

Council and Parliament Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57

Council and Parliament Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375

Council and Parliament Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8

Council and Parliament Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1

Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11

Council and Parliament Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16

Council and Parliament Directive 2019/1152/EU on transparent and predictable working conditions in the European Union [2019] OJ L 186/105

Council and Parliament Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79

Council and Parliament Directive 2020/1057/EU laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 [2020] OJ L 249/49

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Republic of Ireland

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European Union (Posting of Workers) Regulations 2016, S.I. No. 412/2016

Republic of Poland

Ustawa Kodeks cywilny [1964] Dz.U. 1964 Nr 16 poz. 93 ze zm.

Ustawa Kodeks pracy [1974] Dz.U. 1974 nr 24 poz. 141 ze zm.

Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych [1998] Dz. U. 1998 Nr 162 poz. 1118 ze zm.

Ustawa o promocji zatrudnienia i instytucjach rynku pracy [2004] Dz. U. 2004 Nr 99 poz. 1001 ze zm.

Rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie należności przysługujących pracownikowi zatrudnionemu w państwowej lub samorządowej jednostce sfery budżetowej z tytułu podróży służbowej [2013] Dz.U. 2013 poz. 167

Rozporządzenie Ministra Rodziny, Pracy i Polityki Społecznej w sprawie państw, do których obywateli stosuje się niektóre przepisy dotyczące zezwolenia na pracę sezonową oraz przepisy dotyczące oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi [2017] Dz.U. 2017 poz. 2349

Introduction

I. Posted Work in the EU Legal Order

The focus of this thesis is the evolution of the EU legal framework on the posting of workers which since 2012 has been in a state of legal flux shaped by a combination of different forces: political, sociological and economic.¹

The 1996 Posted Workers Directive (hereafter: ‘PWD’²) gave birth to a peculiar category of extraterritorial workers who are temporarily hired out to another Member State, but who remain legally bound to their country of origin. As will be argued in this thesis, posting of workers thrives whenever developmental gaps between EU Member States deepen. From the point of view of labour law, the architecture of the PWD has been from the outset underpinned by the notion of subtle exploitation, often referred to as ‘social dumping’, disguised as removing barriers to the free movement of services.³

To address this rights deficit, the legal framework has been revised twice: first, by the so-called Enforcement Directive in 2014,⁴ and subsequently by Directive

¹ In 2012, the European Commission put forward the proposal for the first reform of the Posted Workers Directive. See Commission, ‘Proposal for a Council Directive on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ COM(2012) 131 final.

² Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

³ See Chapter 2, s II A. See further Jens Alber and Guy Standing, ‘Social Dumping, Catch-up, or Convergence? Europe in a Comparative Global Context’ (2000) 10(2) J Eur Soc Policy 99; Daniel Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar Publishing 2003); Jon Kvist, ‘Does EU Enlargement Start a Race to the Bottom? Strategic Interaction Among EU Member States in Social Policy’ (2004) 14(3) J Eur Soc Policy 301; Magdalena Bernaciak (ed), *Market Expansion and Social Dumping in Europe* (Routledge 2015); Joanna Ryszka, ‘“Social Dumping” and “Letterbox Companies” – Interdependent or Mutually Exclusive Concepts in European Union Law?’ (2016) 36 PYIL 209.

⁴ Council Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L 159/11.

2018/957.⁵ It was during the latter reform, which has modified the core of the PWD, that the posting of workers took centre stage in the conflict over the future of the EU and exposed diverging interests between different stakeholders and some Member States. While the 2018 amendment preceded the launch of the European Pillar of Social Rights,⁶ it is closely linked to this initiative that frames the EU as a community of values rather than merely common economic interests.⁷

Compared to the current discourse around the protection of social rights in the EU, for example on the planned Directive on adequate minimum wages,⁸ the PWD may seem a modest measure and a relic from another time. Yet, it could be argued that the discussion over the PWD has paved the way for further social reforms in the EU that had previously been unthinkable. For instance, the regulation of pay had traditionally been excluded from the competence of the EU in accordance with Article 153(5) TFEU,⁹ yet the changes to the PWD framework have proved that it is possible to *influence* pay without setting a specific amount of wages paid to workers.¹⁰ Having tested the waters in the niche of posted workers, the EU institutions have the necessary experience to proceed with more comprehensive solutions that may potentially affect all workers across all the Member States.

Therefore, while the posting of workers may be viewed, fragmentarily, as a highly specialised area of EU labour law concerning barely a few million workers,¹¹ on

⁵ Council Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

⁶ The European Pillar of Social Rights was officially launched in 2017. See Commission, ‘Establishing a European Pillar of Social Rights’ COM(2017) 250 final.

⁷ See Chapter 3, s II A.

⁸ Commission, ‘Proposal for a Council Directive on adequate minimum wages in the European Union’ COM(2020) 682 final.

⁹ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

¹⁰ See Chapter 3, s II D 3.

¹¹ The numbers of posted workers in the EU are estimated on the basis of the A1 Portable Documents issued by the social security institution of the sending state in accordance with Council Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1 and Regulation 987/2009/EC laying down the procedure for implementing Regulation (EC) No 883/2004 [2009] OJ L 284/1. This method is not without its limitations, as the A1 documents are issued to all workers temporarily carrying out their work in other Member States, and not just to posted workers. Furthermore, it is believed that many postings remain undocumented. In 2018, approximately three million A1 documents were issued

a broader note it serves as a magnifying glass for the long-standing tension between the economic and the social dimensions of European integration.

II. Central Research Question and Methodology

A. The Question

The overarching research question of the present thesis is twofold. Firstly, it seeks to identify those elements of the EU framework, both in the law and in the practice of its enforcement, that may have the effect of predisposing posted workers to precarious working conditions. Secondly, this research aims to suggest solutions that could potentially reduce the experience of precarity for posted workers – similarly, not only through the law, but also in daily practice and with the involvement of stakeholders such as enforcement authorities, trade unions and employers.

B. Methodology

The overarching research question will be answered throughout this thesis in five steps. The first step is to establish a working definition of precarious work that, while drawing from existing scholarship, would be both suited to this particular project and up to date with the evolving world of work in postmodern societies of the EU.

The second step involves doctrinal research assessing the ongoing evolution of the EU rules on the posting of workers into measures which, in their own words, aim to provide ‘greater’ protection for posted workers.¹²

In the third step, existing empirical literature in the field of posted work will be examined to identify those areas of the posting experience in which precarity tends to occur in practice.

in the EU. See Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, ‘Posting of Workers. Collection of Data from the Prior Notification Tools. Reference Year 2019’ (European Commission 2021). See further Chapter 4, s II.

¹² Directive 2018/957/EU, Recital (10).

In the fourth step, qualitative data obtained from interviews conducted in this project will be used to link the experience of precarity with specific elements of the EU legal framework and / or its enforcement. Findings will also be triangulated with the existing empirical literature.

Finally, in the fifth step, this thesis will reflect on solutions that may potentially reduce the precarity of posted workers. In line with the ‘virtuous circle’ of reducing precarious work, a model created by Doellgast, Lillie and Pulignano,¹³ this research stresses the vital role of the Member States, trade unions and employers in ensuring correct enforcement of the PWD and preventing fraud.

While the methodology of the empirical phase, including research design and data analysis, will be explained in detail throughout Chapter 4, at this point it is worth signalling that the qualitative data relied upon in this project stems from 29 in-depth interviews conducted in person and remotely between July 2019 and July 2020. Therefore, while some interviewees did address the short-term impact of the COVID-19 travel restrictions on the posting of workers, the resulting data is by no means representative to assess the consequences of the pandemic.

The research sample consisted of EU nationals who either have carried out at least a single posting lasting a minimum of three months, or a number of short-term postings spread across a reference period of a minimum of 12 months, supplemented by practitioners in the field of posting (lawyers, employers and representatives of national enforcement bodies). Like the majority of qualitative studies in labour law, this research is not statistically representative and, therefore, its findings are by no means generalisable to the entire population of posted workers across the EU.¹⁴

The central research question is underpinned by two initial assumptions. One of them is that while not all postings display the characteristics of precarious work, the posting arrangement in itself predisposes workers to precarity. This hypothesis relies upon the existing empirical literature in the field of sociology which has identified posted work as a precarious working arrangement.¹⁵ Furthermore, the posting of workers has

¹³ Virginia Doellgast, Nathan Lillie and Valeria Pulignano (eds), *Reconstructing Solidarity. Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* (OUP 2018) 12-16.

¹⁴ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 926, 934.

¹⁵ E.g. Ines Wagner and Lillie, ‘European Integration and the Disembedding of Labour Markets: Transnational Labour Relations at the European Central Bank Construction Site’ (2014) 52(2) J Com Mar

been described as a precarious experience by the European Parliament¹⁶ and the European Union Agency for Fundamental Rights.¹⁷

Another preliminary assumption is that the effectiveness of the EU legal framework may only be fully assessed through the lens of a sociolegal inquiry. While qualitative research methods are usually associated with social sciences and humanities more generally than the discipline of law, labour and employment law are intrinsically linked with sociolegal studies and have a long tradition of empirical research.¹⁸ Some argue that legislation in this area can be understood only in the wider context of social control and ideologies.¹⁹

Blackham and Ludlow understand empirical labour law research as a sociolegal inquiry borrowing perspectives, techniques and tools from social sciences in order to examine the social context of the law and its impact on everyday life.²⁰ It appears that in the context of posted work, empirical evaluation is essential as the EU framework consists entirely of Directives which leave broad discretion to the Member States regarding the choice of form and methods employed in order to achieve their aim.²¹ As a result, the EU rules on the posting of workers infiltrate the national legal system through an additional layer of implementing legislation which further alters their effect on the rights of posted workers.

St 403; Lisa Berntsen, 'Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries' (2015) 31(4) IJCLIR 371; Erka Caro, Berntsen, Lillie and Wagner, 'Posted Migration and Segregation in the European Construction Sector' (2015) 41(10) J Ethn Migr 1600; Wagner, *Workers without Borders. Posted Work and Precarity in the EU* (Cornell University Press 2018). See further Chapter 4, s I.

¹⁶ European Parliament, 'Resolution on working conditions and precarious employment' [2018] OJ C 334/88.

¹⁷ *Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives* (European Union Agency for Fundamental Rights 2019).

¹⁸ See Simon Deakin, 'Labor and Employment Laws' in Cane and Kritzer (n 13) 308.

¹⁹ Bob Hepple, 'Foreword: Evidence and Ideology' in Alysia Blackham and Amy Ludlow (eds), *New Frontiers in Empirical Labour Law Research* (Hart Publishing 2015) 15.

²⁰ Blackham and Ludlow, 'Introduction' in *New Frontiers in Empirical Labour Law Research* (n 18).

²¹ Art 288 TFEU. See further Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials* (7th edn, OUP 2020) 136-154.

III. Originality of the Research and its Relationship with Scholarly Literature

Whereas the topic of the posting of workers has been explored to a certain extent in scholarly literature, there appears to be a disconnection between the existing publications in the fields of law and sociology.

Interest in posted work among legal scholars was sparked by the seminal ‘*Laval* quartet’²² decided by the CJEU in 2007-2008 which resulted in a vast body of literature touching on every aspect of the famous judgments.²³ The topic of the posting of workers has since resurfaced on the occasion of the 2014-2018 PWD revisions.²⁴ Yet it seems

²² The ‘*Laval* quartet’ comprises cases C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbunde and others* [2007] ECR I-11767; C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR I-10779; C-346/06, *Dirk Ruffert v Land Niedersachsen* [2008] ECR I-01989; and C-319/06 *Commission v Grand Duchy of Luxemburg* [2008] ECR I-04323.

²³ Catherine Barnard, ‘*Viking* and *Laval*: An Introduction’ (2007) 10 CYELS 463; Deakin, ‘Regulatory Competition after *Laval*’ (2007) 10 CYELS 581; Tonia Novitz, ‘A Human Rights Analysis of the *Viking* and *Laval* Judgments’ (2007) 10 CYELS 541; Mia Ronnmar, ‘Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective’ (2007) 10 CYELS 493; Silvana Sciarra, ‘*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU’ (2007) 10 CYELS 563; Anne C. L. Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 ILJ 126; Norbert Reich, ‘Free Movement v. Social Rights in an Enlarged Union - the *Laval* and *Viking* Cases before the ECJ’ (2008) 9(2) Ger Law J 128; Phil Syrpis and Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) 33(3) ELJ 411; Herwig Verschueren, ‘Cross-Border Workers in the European Internal Market: Trojan Horses for Member States’ Labour and Social Security Law’ (2008) 24 IJCLIR 167; Mark R. Freedland and Jeremias Adams-Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2016).

²⁴ Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Intersentia 2015); Jens Arnholtz and Lillie, *Posted Work in the European Union. The Political Economy of Free Movement* (Routledge 2019); Francesco Costamagna, ‘Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive’, in Silvia Borelli and Andrea Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene Editore 2019); Mijke Houwerzijl and Verschueren, ‘Free Movement of (Posted) Workers and Applicable Labour and Social Security Law’ in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019); Novitz and Rutvica Andrijasevic, ‘Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations’ (2020) 58(5) J Com Mar St

that the recent publications focus more narrowly on the specific changes to the EU rules on the posting of workers, rather than the general shifts in the framing of the law that the reform represents in a socio-economic and political context.

As far as the aforementioned empirical studies are concerned, they tend to be geographically fragmented and have been carried out mainly by academics specialising in such fields as sociology, economics, anthropology and ethnography, in which qualitative research methods are more commonly used than in law. Naturally, these studies are less concerned with legal issues, such as the assessment of the amended PWD. Rather, their focus shifts towards themes such as social conflict, interaction etc. Furthermore, the empirical literature focuses exclusively on posted workers carrying out work in low-pay labour-intensive settings who will be referred to throughout this thesis as ‘blue-collar’ posted workers. Conversely, it appears that the posting experience of highly qualified, high-wage workers (hereafter: ‘white-collar’ posted workers²⁵) has not been previously explored in empirical research.²⁶

This study will contribute to the ongoing discussion on posted workers by seeking to fill the above identified gaps in the existing literature. Firstly, it will situate the posting arrangement within a theoretical paradigm of precarity. Secondly, it will place the evolution of the EU framework in a broader socio-economic and political context. Thirdly, it will shed some light on the previously unexplored subcategory of ‘white-collar’ posted workers who usually move between different Member States via intra-corporate transfers.

Yet, adding these additional layers to the academic literature is only incidental to the predominant ambition of this research which aims to bridge the divide between doctrinal legal research and empirical sociological research on the topic of posted work. This project has been conceived to reflect the researcher’s dual background comprising

1325; Matteo Bottero, *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021).

²⁵ Current statistics regarding breaking down the numbers of posted workers into different sectors of employment can be found in De Wispelaere, De Smedt and Pacolet (n 11).

²⁶ There are sociological empirical studies concerning migrant ‘white-collar’ workers or business travel, but not the posting of workers as such, see James Wickham and Ian Bruff, ‘Skills Shortages Are Not Always What They Seem: Migration and the Irish Software Industry’ (2008) 23(1-2) *New Technol Work Employ* 31; Wickham and Alessandra Vecchi, ‘The Importance of Business Travel for Industrial Clusters - making sense of nomadic workers’ (2009) 91(3) *Geografiska Annaler Series B: Human Geography* 245.

a legal education followed by several years of professional experience in journalism. In this vein, this research attempts to depart from the traditional approach of ‘law on the books’ towards an interdisciplinary inquiry on ‘law in action’. While deeply rooted in the law, it will step outside the legal context of the PWD to grasp the interaction between the evolving EU rules and their impact on the workers’ posting experience.

IV. Structure of the Thesis

Chapter 1 of this thesis sets the scene for the subsequent evaluation of the posting experience by placing it in a broader paradigm of precarity with its sociological, historical and philosophical implications. The term ‘precarity’ (or ‘precariousness’) has gradually worked its way into everyday discourse, popularised by famous authors such as Bauman²⁷, Bourdieu²⁸, Butler²⁹ and Standing.³⁰ Traditionally denoting something physically unstable, e.g. a building, precariousness has grown to describe employment in the context of the current departure from the SER (Standard Employment Relationship).³¹

Chapter 1 engages in the scholarly conversation on the meaning of the term ‘precarity’ and its relationships with the concept of vulnerability to formulate a working definition of precarious work which will be up to date with the evolving world of work. The resulting definition of precarious work will be formulated on the basis of the approach proposed by Rodgers and Rodgers,³² further developed by Kalleberg.³³ It will comprise five elements: the degree of certainty of continuing work; control over the

²⁷ Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000); *Liquid Life* (Polity Press 2005).

²⁸ Pierre Bourdieu, *Firing Back: Against the Tyranny of the Market 2* (The New Press 2003).

²⁹ Judith Butler, *Precarious Life : the Powers of Mourning and Violence* (Verso 2004).

³⁰ Guy Standing, *The Precariat: the New Dangerous Class* (2nd edn, Bloomsbury 2020).

³¹ Leah F. Vosko, ‘The Partial Eclipse of the SER And the Dynamics of SER-Centrism in International Labour Regulations’ in Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2010).

³² Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989). See further Nicola Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y* J 21.

³³ Arne L. Kalleberg, *Precarious Lives: Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018).

working and living conditions; labour law and social security protections; income level; and the subjective perception of the worker's status.

With the central research question in mind, Chapter 2 lays out the core of the EU legal framework on the posting of workers prior to the 2014-2018 reforms. It will be argued that the original PWD, often considered a market integration tool, did not grant an adequate level of labour law protection to posted workers. This Chapter will elaborate on the aforementioned notion of 'social dumping' in the context of EU enlargements which has underpinned the posting arrangement ever since the CJEU's judgment in *Rush Portuguesa* preceding the birth of the PWD.³⁴ Furthermore, Chapter 2 will re-evaluate those provisions of the PWD that have remained unchanged since the Directive's adoption in 1996 through the lens of some more recent developments. On this note, the definition of a posted worker and its scope will be fleshed out with a focus on subcategories of posted workers which either tend to be overlooked, such as 'white-collar' workers, or whose inclusion in the PWD framework has been disputed, such as transport workers. In addition, Chapter 2 will provide some insights into the PWD's place in the EU legal order and its relationship with other provisions, such as Article 56 TFEU or the Rome I Regulation applicable to contractual obligations.³⁵

Chapter 3 will assess the 2014-2018 reforms against the background of a broad political and socioeconomic context. By 2012, the EU legislator realised that the PWD had been ill-equipped to safeguard the enforcement of even the most basic rights it had granted to posted workers, hence it proceeded with the first – seemingly modest – reform carried out in the form of the Enforcement Directive.³⁶ The second revision, conducted in 2018, interfered with the core principles of the posting arrangement and, thus, has proven politically controversial. The dispute accompanying the adoption of Directive 2018/957 brought back the underlying tension around 'social dumping' in the EU and was not entirely settled until the 2020 CJEU's judgments dismissing Poland and

³⁴ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-01417.

³⁵ Council Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

³⁶ See Commission, Impact Assessment, 'Revision of the legislative framework on the posting of workers in the context of provision of services' SWD(2012) 63 final accompanying the 'Proposal for a Council Directive...' (n 1).

Hungary's actions for annulment of the contested reform.³⁷ It will be argued that the 2018 revision of the PWD represents a certain shift in the framing of the law that chimes with the ongoing revival of the EU's social dimension. By separating the political dimension from the actual content of Directive 2018/957, this Chapter will argue that the 2018 reform of the PWD was not as far-reaching as it might have initially seemed, and has not addressed all of the issues that posted workers face.

As has been explained above, this project aims to bridge the existing divide between the doctrinal and the empirical literature on the topic of posting of workers. This is reflected in the structure of the present thesis which is divided into two distinct parts. The first part, encompassing Chapters 1-3, focuses on establishing a theoretical framework and conducting traditional research 'on the books'.

Chapter 4 marks the transition between the former part and the second, empirical part. It begins by a narrative literature review of the existing qualitative literature in the field of posted work. The literature review will regroup some recurring problems faced by posted workers, such as the weak enforcement of the PWD, accommodation issues or isolation in the 'host' Member State which will subsequently be triangulated with the qualitative data gathered in this project. Furthermore, this Chapter will describe in detail the research methodology of the empirical stage of this project and justify the choice of methods.

On this note, the thesis is supplemented with a number of appendices: the FAHSS's Research Ethics Committee's approval, the consent form and participant information sheet in the English language, as well as the interview guide. The application submitted to the FAHSS's Research Ethics Committee, including the consent form and participant information sheet in the Polish language, is available upon request. Signed consent forms returned by the research participants have not been attached to the thesis due to confidentiality concerns.

Chapters 5 and 6 will discuss findings from the interviews conducted in this project using anonymised excerpts which will subsequently be triangulated with existing literature. Chapter 5 will look at the data obtained from interviews concerning 'blue-collar' postings. It will evaluate the impact of the 2014 Enforcement Directive on the interviewee's experience of posting and, to a lesser extent, explore the potential impact

³⁷ Cases C-620/18 *Hungary v Parliament and Council* EU:C:2020:1001; C-626/18 *Republic of Poland v Parliament and Council* EU:C:2020:1000.

of Directive 2018/957 through the eyes of practitioners from the field of posted work. It will also identify legal issues faced by ‘blue-collar’ posted workers that are likely to persist despite the 2014-2018 reforms, such as the subcontracting liability regime, undocumented postings and semi-legal postings of third-country nationals, as well as social security implications. Finally, this Chapter will discuss some non-legal problems encountered by ‘blue-collar’ posted workers, such as discrimination in the ‘host’ country and the adverse effect of posting on the workers’ private lives.

Chapter 6 will shift the focus onto the previously unexplored subcategory of ‘white-collar’ posted workers. It will address some formal issues concerning different types of mobility in this sector and the lack of clarity surrounding the status of a ‘business trip’ in the EU which was a particularly common type of work-related travel prior to the COVID-19 crisis. It will be argued that compliance with the original PWD did not generally pose any issues for ‘white-collar’ postings, often referred to as secondments, where the workers’ salaries tend to be well above the minimum wage of the receiving country. Consequently, the interviewees’ experiences did not meet the definition of precarious work formulated in Chapter 1. Yet, the data obtained from the interviews has shown a certain degree of inequality of treatment, as well as a pay gap between posted and local workers in the ‘white-collar’ sector too, and the level of compliance with Directive 2018/957 among corporate employees seems uncertain.

The final Chapter 7 will, firstly, evaluate the findings presented in Chapters 5 and 6 against the initial theoretical assumptions and the working definition of precarious work formulated in Chapter 1. It will verify the potential risk factors predisposing workers to precarity that have been identified both in the doctrinal assessment of the revised PWD and in the existing empirical literature against the interview findings. Secondly, this Chapter will reassess the impact of the 2014-2018 reforms on improving the posting experience in light of the qualitative data obtained from the interviews. Furthermore, it will propose some amendments to the PWD that may further reduce the risk of precarity among posted workers provided that effective application is ensured by stakeholders such as competent authorities, trade unions and employers.

1. Precarious Work: History, Theory and the Law

Introduction

This thesis looks at the posting of workers through the lens of precarious work, a contested concept that in recent decades has been gaining in popularity among sociologists, economists and legal scholars. One difficulty of employing the notion of precarious work with regard to the posting of workers is the lack of an established legal definition, including in EU law, as the law tends to favour other concepts which appear more *measurable*. As will be argued in this Chapter, one such concept is discrimination which, albeit linked to precarious work, is far from synonymous. At the same time, posted work has previously been described as precarious by certain EU bodies, such as the European Parliament and the European Union Agency for Fundamental Rights.¹ In scholarly literature, notably Berntsen has employed the concept of precariousness to analyse the labour market experiences and the lives of Polish posted workers in the Netherlands.²

The purpose of this Chapter is to formulate a working definition of precarious work which will subsequently be employed at the empirical stage of this research project. As has been explained in the Introduction, one of the initial assumptions underpinning the central research question is that whilst not all postings display the characteristics of precarious work, the posting arrangement in itself predisposes workers to precarious working and living conditions.

Section I will explore the evolution of the popular understanding of the word ‘precarious’. While not new, in recent decades it has been popularised in the context of work. Particularly in sociological discourse, the terms ‘precariousness’ or ‘precarity’, often used interchangeably, yet not synonymous, have been employed by authors such

¹ European Parliament, ‘Resolution on working conditions and precarious employment’ [2018] OJ C 334/88. See further *Protecting Migrant Workers from Exploitation in the EU: Workers’ Perspectives* (European Union Agency for Fundamental Rights 2019).

² Lisa Berntsen, ‘Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries’ (2015) 31(4) *IJCLIR* 371. See Chapter 4, s I.

as Bauman,³ Bourdieu⁴ and Butler⁵ to describe the consequences of living in postmodern societies.

In the legal scholarship, the term ‘precarious work’ can be understood in two different ways. Section II will focus on the formal approach to defining precarious work, based on the worker’s contractual relationship with the employer. It follows a dualistic assumption that any working arrangement that is outside the Standard Employment Relationship (hereafter: SER) should automatically be classified as precarious. The section will also show the limitations of applying this rather theoretical definition to the changing realities of the working world.

Section III will examine a more flexible, multi-layered approach to defining precariousness (or precarity), initially offered by Rodgers and Rodgers,⁶ and further developed by Countouris,⁷ McKay⁸ and Kalleberg.⁹ This section will conclude with the formulation of a working definition of precarious work based on this approach, which will be employed throughout this research project. The resulting definition will consist of an analysis of a worker’s situation based on the assessment of four objective factors combined with the worker’s subjective perception of their situation.

Section IV will point to certain limitations of the concepts of precariousness and precarity by engaging with the contested notion of the ‘precariat’ as a social class or a *class-in-the-making*. It will also explore the overlap of the above notions with the ‘vulnerable subject’ theory developed by Albertson Fineman.¹⁰

³ Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000); *Liquid Life* (Polity Press 2005).

⁴ Pierre Bourdieu, *Firing Back: Against the Tyranny of the Market 2* (The New Press 2003).

⁵ Judith Butler, *Frames of War* (3rd edn, Verso 2016).

⁶ Gerry Rodgers and Janine Rodgers (eds), *Precairous Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989).

⁷ Nicola Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y J* 21.

⁸ Sonia McKay, ‘Disturbing Equilibrium and Transferring Risk: Confronting Precarious Work’ in Countouris and Mark Freedland, *Resocialising Europe in a Times of Crisis* (CUP 2013).

⁹ Arne L. Kalleberg, *Precairous Lives: Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018).

¹⁰ Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013). See also Albertson Fineman and Jonathan W. Fineman, *Vulnerability and the Legal Organization of Work* (Routledge 2017).

Finally, Section V will contemplate labour migration as yet another dimension of precarious work and place the current trends in a historical context. It will also trace the origins of empirical studies on migration back to the landmark qualitative research carried out by Thomas and Znaniecki at the turn of the 19th and 20th centuries, which has inspired the choice of methods employed in this study.¹¹

I. Precarious Work, Precariousness and Precarity

A. Etymology

In 2005, Zygmunt Bauman, the celebrated Polish-Jewish philosopher and sociologist exiled in the United Kingdom, wrote:

‘Liquid modern’ is a society in which the conditions under which its members act change faster than it takes the ways of acting to consolidate into habits and routines. Liquidity of life and that of society feed and reinvigorate each other. Liquid life, just like liquid modern society, cannot keep its shape or stay on course for long. (...) In short: liquid life is a precarious life, lived under conditions of constant uncertainty.¹²

Bauman employs the word ‘precarious’ which, although not new, in the last few decades seems to have acquired a different meaning and to have infiltrated the discourse of the mainstream media. The Latin term *precarius* signifies ‘given as a favour’, or ‘depending on the favour of another person’,¹³ and is derived from *prex*, the Latin word for ‘prayer’.¹⁴ Historically, the adjective ‘precarious’ meant that something was so uncertain that it was completely out of one’s hands and was, therefore, left to God’s mercy.

¹¹ William I. Thomas and Florian Znaniecki, *The Polish Peasant in Europe and America. A Classic Work in Immigration History* (University of Illinois Press 1996).

¹² Bauman, *Liquid Life* (n 3) 1-2.

¹³ Peter Gilliver, ‘precarious’ (Oxford English Dictionary Blog, 16 August 2012) <https://public.oed.com/blog/word-stories-precarious/> accessed 4 August 2021.

¹⁴ ‘precarious’ (Merriam Webster Dictionary) <https://www.merriam-webster.com/dictionary/precarious> accessed 4 August 2021.

Fast forward to the 21st century and newspaper headlines speak of ‘precarious work’ or ‘precarious pay’, and the word itself has a rather negative connotation because it brings to mind something insecure, perilous and unstable. Linguists revere the word’s unexpected career pointing out that it is ‘relatively unusual to come across a word whose core meaning — what most people would understand by it — has shifted significantly since it was first included in the OED [Oxford English Dictionary]’.¹⁵ Yet, Judith Butler, the influential American philosopher and gender theorist, would disagree that the meaning of the word ‘precarious’ has changed overtime, as for to her it continues to imply ‘that one’s life is always in some sense in the hands of the other’.¹⁶

B. Precariousness and Precarity

‘Precarious’ is an adjective associated with two nouns: ‘precariousness’ and ‘precarity’. The two words, often used interchangeably, evoke somewhat different connotations in everyday language, yet the difference in meaning might initially seem difficult to grasp. This difference has been accessibly explained by Butler who argues that ‘lives are by definition precarious: they can be expunged at will or by accident; their persistence is in no sense guaranteed.’¹⁷ Conversely, ‘precarity’ is described by Butler as a ‘politically induced condition in which certain populations suffer from failing social and economic networks of support’.¹⁸

In this vein, it would appear that the ongoing debate around precarious work revolves around the concept of state-induced precarity of certain categories of workers who due to different factors suffer from an inadequate level of protection, rather than the universal condition of precariousness. Mindful of the subtle semantic differences, this thesis will hereafter consistently use the word ‘precarity’ instead of ‘precariousness’ in the context of posted workers, even though the literature referred to in the remainder of this Chapter does not uniformly follow Butler’s distinction.

¹⁵ Gilliver (n 13).

¹⁶ Butler (n 5) 14.

¹⁷ *ibid*, 25.

¹⁸ *ibid*.

C. Bauman, Castel, Bourdieu

In order for work to be described as unstable, one has to assume that it is done so in contrast to a *previously* stable situation. On this note, Bauman reiterates that the Western civilisation has built some of the most secure societies that ever existed.¹⁹ And yet, he concludes, ‘it is precisely the cosseted and pampered *we* of all people who feel more threatened (...) and more passionate about everything related to security and safety than people of most societies on record’.²⁰

Indeed, to the likes of Bauman who had lived through WWII and became a Communist, only to have the Communist party turn against him and force him into exile in 1968, the growing concerns about the current state of affairs in Europe might have seemed premature. It is important to realise that the SER, which is the common framework of reference for labour law, was only the norm for a relatively short period of time in Europe’s history, particularly in the first three decades after the war.²¹

On this note, the French sociologist Robert Castel meticulously recounts the history of labour and the social welfare in Europe from the Middle Ages onwards to the modern post-war and post-industrial society which, to him, constitutes the ultimate social question.²² He describes the establishment of free access to labour resulting from the decline of the feudal system and serfdom as ‘a juridical revolution [which] (...) breaks the secular forms of organising the trades and turns forced labour into a barbaric atavism’.²³ Castel sees it as the counterpart of the industrial revolution yet argues that since the very moment of freeing the ‘working condition’ in the 18th century, it has been constantly under attack and, thus, is vulnerable *per se*.²⁴ Castel worked closely with the famous French intellectual Pierre Bourdieu who can be regarded as one of the popularisers of the paradigm of precarious work. The latter deplures the recent departure from the ‘security state’ (within the meaning of the SER) which, according to Bourdieu,

¹⁹ Bauman, *Liquid Modernity* (n 3) 55.

²⁰ *ibid*, 55.

²¹ See Leah F. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2010); Kalleberg (n 9) 75.

²² Robert Castel, *From Manual Workers to Wage Labourers: Transformation of the Social Question* (Transaction Publishers 2002).

²³ *ibid*, 5-6.

²⁴ *ibid*.

resulted in the creation of a new mode of production characterised by ‘domination through precariousness’ which forced workers into submission.²⁵

D. Exploitation

The use of expressions such as ‘mode of production’, ‘domination’ and ‘submission’ in the works of Bourdieu or Castel inevitably evokes the works of Karl Marx. In fact, references to Marx may be regarded as one common point linking Bauman, Castel, Bourdieu and Butler. This is perhaps due to the fact that if precarity implies a certain failing on the part of the employer and, ultimately, on the part of the state, then this brings it closer to the notion of exploitation,²⁶ a concept which, according to Wolff, can be understood in at least two different ways.²⁷ One way of exploiting someone is to get them ‘to work for you on unfair terms in the form of low wages that create illegitimate profit for the exploiter’, says Wolff.²⁸

But there is another way of exploiting someone, in Marx’s view, reiterated by Wolff, and it is by ‘undermining the conditions for their flourishing as human beings’.²⁹ ‘To extend this idea’, argues Wolff, ‘a wage may be perfectly adequate, but there may be something demeaning or damaging about the work performed, or the working relationship’.³⁰ And while modern-day examples of such exploitation usually revolve around sex workers or domestic workers, a parallel might also be drawn to posted workers. To anticipate what is going to be explored in detail in the following Chapters, it could be argued that the posting of workers is an atypical work arrangement which can have an adverse effect on the workers at issue insofar as it entails isolation, both physical and legal, of posted workers in their ‘host’ state.

²⁵ Bourdieu (n 4) 28-29.

²⁶ See also Nancy Holmstrom, ‘Exploitation’ (1977) 7(2) Can J Philos 353; John E. Roemer, ‘Should Marxists Be Interested in Exploitation?’ (1985) 14(1) Philos Public Aff 30; John L. Hill, ‘Exploitation’ (1994) 79(3) Cornell L Rev 631; Allen W. Wood, ‘Exploitation’ (1995) 12(2) Soc Philos Policy 136.

²⁷ Jonathan Wolff, ‘Structures of Exploitation’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

²⁸ *ibid*, 176.

²⁹ *ibid*, 177.

³⁰ *ibid*.

Furthermore, posting may also have negative consequences on the receiving country's native workforce who might be pressured to compete with posted workers by lowering their financial expectations. This drives the so-called race to the bottom and 'social dumping', a concept which will be explored in more detail in Chapters 2-3.³¹ Market liberalisation, as argued by Coyle, inevitably fuels vulnerability and dispossession as 'those who are less skilful, who have less to offer, face the prospect of unemployment. (...) Markets create not only wealth but also poverty: new obstacles to social mobility'.³² What is unclear, however, is the question of who, in Marxist terms, would be the *exploiter* in the posted work setup: would it be the posting companies in the sending states, or those who hire them in the receiving state, or, more generally, the European Union for having created the inequalities built into the European single market?

II. Precarious Work in Legal Scholarship

A. Formal Approach

Notwithstanding their recent rise in popularity in everyday discourse, the terms 'precariousness' and 'precarity' have been present in academic debate since the 1960s. Countouris traces the definition of 'precarious work' in relation to agriculture back to the Italian economist Paolo Sylos Labini.³³ His work exemplifies what Countouris identifies as the earliest approach to defining precarious work which focused on specific sectors that had been in many ways neglected in the early 20th century industrial relations, agriculture being one of them.³⁴

³¹ Christopher L. Erickson and Sarosh Kuruvilla, 'Labor Costs and the Social Dumping Debate in the European Union' (1994) 48(1) *Indus & Lab Rel Rev* 28; Jens Alber and Guy Standing, 'Social Dumping, Catch-up, or Convergence? Europe in a Comparative Global Context' (2000) 10(2) *J Eur Soc Policy* 99; Daniel C. Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar 2003); Magdalena Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?', (ETUI Working Paper 2012.06).

³² Sean Coyle, 'Vulnerability and the Liberal Order' in Albertson Fineman and Grear (n 10) 62.

³³ Paolo Sylos Labini, 'Precarious Employment in Sicily' (1964) 89 *Int Labour Rev* 268, 270-71, as cited in Countouris (n 7) 22.

³⁴ Countouris (n 7) 23.

‘By the 1970s-1980s’, continues Countouris, ‘the precarious work discourse started mirroring the growth and development of what came to be known as “atypical” or “nonstandard” work’.³⁵ Thus emerged the second and, according to Countouris, to this day the most widespread approach to defining precarious work, which examines the employment relationship in terms of adherence to the SER.³⁶ In short, the SER can be described as salaried work performed on a pre-set timetable at the employer’s site, and under their supervision.³⁷ Precarious employment would, therefore, be interchangeable with non-SER, encompassing different categories of workers from part-time, fixed-term and the self-employed, through agency workers, to the recently growing group of platform workers in the so-called ‘gig economy’.³⁸

One common characteristic of these atypical working arrangements was that they were traditionally deprived of the same level of social security protection as the SER.³⁹ Nowadays, the extent of social security protection varies both between the different types of atypical work, and from country to country. While in most Member States atypical workers are in theory entitled to the same benefits as those in a SER, in practice they might be at a disadvantage when qualifying for certain social security payments. For

³⁵ *ibid.* See also Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women, and the New Economy. The Challenge to Legal Norms* (Hart Publishing 2006).

³⁶ Countouris (n 7) 23. See also Kalleberg (n 9) 29.

³⁷ Vosko, *Managing the Margins* (n 21); Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar 2016).

³⁸ See further *Uber BV and others v Aslam and others* [2021] UKSC 5 On appeal from: [2018] EWCA Civ 274; Valerio De Stefano, ‘The Rise of the Just-in-time Workforce: On-demand Work, Crowdfund, and Labor Protection in the Gig-economy’ (2016) 37(3) *Comp Lab L & Pol’y J* 471; Paul Schoukens and Albertio Barrio, ‘The Changing Concept of Work: When Does Typical Work Become Atypical?’ (2017) 8(4) *Eur Labour Law J* 306; Jeremias Prassl, *Humans as a Service. The Promise and Perils of Work in the Gig Economy* (OUP 2018); Jeff Kenner, ‘Uber Drivers are “Workers”’: The Expanding Scope of the “Worker” Concept in the UK’s Gig Economy’ in Kenner, Izabela Florczak and Marta Otto (eds), *Precarious Work. The Challenge for Labour Law in Europe* (Edward Elgar 2019); David Mangan, ‘Ford, Taylor and the Gig: Workplaces in Transition’ in Valeria Pulignano and Frank Hendrickx, *Employment Relations in the 21st Century: Challenges for Interdisciplinary Research in a Changing World of Work* (Wolters Kluwer 2020).

³⁹ See further Anne C. L. Davies, ‘Regulating Atypical Work’ in Countouris and Freedland (n 8); Mangan, ‘Regulating for Decent Work: Reflections on Classification of Employees’ (2020) 11(2) *Eur Labour Law J* 111.

example, eligibility for unemployment benefits in some countries depends on the employee's contributions record and, in many cases, the level of their earnings.⁴⁰

Leighton and others refer to the above categories of atypical workers as 'non-employees' who 'may well consider themselves to be *marginal* or *secondary*, and some will consider themselves to be *victims*'.⁴¹ This is linked to the concept of the 'psychological contract' which consists of beliefs about the reciprocal obligations between a worker and their organisation.⁴² In relation to non-employees and their employers, it has proven to be particularly ambiguous and to generate problems over mutual expectations in those atypical relationships in which 'very little can be taken for granted'.⁴³

B. Nonstandard Work

Historically, the earliest forms of nonstandard work to have been recognised and protected by ILO Conventions in the 1990s, were: part-time work, home work, and agency work⁴⁴ which are believed to have influenced subsequent EU legislation regulating the above issues.⁴⁵ Indeed, the first forms of atypical work to have been embraced by EU labour law and regulated by Directives in the 1990s, were part-time and

⁴⁰ Commission, 'Non-standard Employment and Access to Social Security Benefits' – Research note 8/2015 (2016) 13. See further Frans Pennings, *European Social Security Law* (6th edn, Intersentia 2015).

⁴¹ Patricia Leighton, Michel Syrett, Robert Hecker and Peter Holland, *Out of the Shadows: Managing Self-employed, Agency and Outsourced Workers* (Butterworth-Heinemann 2007) 46-47.

⁴² Elizabeth Wolfe Morrison and Sandra L. Robinson, 'When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops' (1997) 22(1) *Acad Manage J* 226.

⁴³ Leighton and others (n 41). See also David Guest, 'Flexible Employment Contracts, the Psychological Contract and Employee Outcomes: An Analysis and Review of the Evidence' (2004) 5(1) *Int J Manag Rev* 1.

⁴⁴ Respectively, a) ILO Convention 175, 'Convention Concerning Part-time Work' (International Labour Office 1994); b) ILO Convention 177, 'Convention Concerning Home Work' (International Labour Office 1996), and c) ILO Convention 181, 'Convention Concerning Private Employment Agencies' (International Labour Office 1997). See also Vosko, 'Gender, Precarious Work, and the International Labour Code: The Ghost in the ILO Closet' in Fudge and Owens (n 35); L. Rodgers (n 37) 97-100.

⁴⁵ Vosko, 'Regulating Temporary Employment: Equal Treatment, Qualified' in *Managing the Margins* (n 21); Giuseppe Casale, 'International Labour Standards and EU Labour Law' in Countouris and Freedland (n 8).

fixed-term work,⁴⁶ in later years complemented by the Temporary Agency Work Directive.⁴⁷

As Bell points out, those Atypical Work Directives chime with the pursuit of flexicurity, a concept combining different aspects of flexibility and security in a package deal.⁴⁸ On EU level, flexicurity has been defined as a ‘deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective labour market policies, and modern, adequate and sustainable social protection systems’.⁴⁹ Deliberate because, at the time the ‘Common Principles of Flexicurity’ were formulated, it had become apparent that the level of employment stability maintained in the 1960-1970s was no longer a realistic goal.

Yet, more recently, and particularly since the 2008 global economic crisis, the concept of flexicurity seems to have attracted more criticism than praise. On one hand, concerns have been voiced over the suitability of flexicurity to post-recession times due to the requirement of an extensive social security net for workers which is sometimes considered to be expensive.⁵⁰ On the other hand, flexicurity has been accused of being counterproductive and further increasing the segmentation of rights between employees and non-employees.⁵¹

⁴⁶ Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1997] OJ L 14/9 (Part-time Work Directive) and Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43 (Fixed-term Work Directive). See further Diamond Ashiagbor, ‘Promoting Precariousness? The Response of EU Employment Policies to Precarious Work’ in Fudge and Owens (n 35).

⁴⁷ Council Directive 2008/104/EC on temporary agency work [2008] OJ L 327/9 (Temporary Agency Work Directive). See further Consuelo Chacartegui, ‘Resocialising Temporary Agency Work Through a Theory of Reinforced” Employers’ Liability’ in Countouris and Freedland (n 8).

⁴⁸ Mark Bell, ‘Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work’ (2012) 37(1) ELRev 31. See also Kenner, ‘New Frontiers in EU Labour Law: From Flexicurity to Flex-Security’ in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties. Looking Back and Thinking Forward* (Hart Publishing 2009).

⁴⁹ Bell (n 48). See also Council, ‘Towards Common Principles of Flexicurity – Council Conclusions’ 16201/07 (2007) 5.

⁵⁰ Astrid Sanders, ‘The Changing face of “Flexicurity” in Times of Austerity’, in Countouris and Freedland (n 8).

⁵¹ *ibid.* See further Calogero Massimo Cammalleri, ‘Precarious Work and Social Protection: Between Flexicurity and Social Pollution’ in Kenner, Floreznak and Otto (n 38).

Posted work, albeit traditionally not included in studies focusing on nonstandard work, may be considered another example of such a working arrangement. One argument would be that posted workers are entitled only to limited labour law protections of the ‘host’ state whilst remaining associated to the social security system of the ‘home’ state.⁵² Other traits of posted work that would place it outside the SER universe are its temporary nature and, sometimes, the presence of an intermediary between the worker and the end their workplace (not unlike in agency work but with a transnational aspect).

Notwithstanding the social security dimension of nonstandard work, another problematic issue is the exercise of the freedom of association by non-employees and their participation in industrial relations. In this respect, Leighton et al have identified a number of issues, such as using outsourced workers to ‘break strikes’ or the formal organisation of the non-employees’ participation in collective bargaining (e.g. dispute resolution procedures).⁵³ The issue of adapting industrial relations to the changing reality of the working life has become even more pressing in recent years with the rise of nonstandard forms of employment, such as platform work and self-employment.⁵⁴

Posted work adds a transnational aspect to the already complex relationship between nonstandard work and industrial relations, as has been illustrated in the landmark case *Laval* decided by the Court of Justice of the EU in 2007 and discussed in

⁵² Council and Parliament Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1 and Council and Parliament Regulation 987/2009/EC laying down the procedure for implementing Regulation (EC) No 883/2004 [2009] OJ L 284/1.

⁵³ Leighton and others (n 41) 224.

⁵⁴ Michael Doherty and Valentina Franca, ‘Solving the “Gig-saw”? Collective Rights and Platform Work’ (2020) 49(3) ILJ 352. See further Rebecca Gumbrell-McCormick, ‘European Trade Unions and “Atypical” Workers’ (2011) 42(3) Ind Relat 293; Maarten Keune, ‘Trade Union Responses to Precarious Work in Seven European countries’ (2013) 5(1) IJLR 59; Virginia Doellgast, Nathan Lillie and Pulignano (eds), *Reconstructing Solidarity. Labour Unions, Precarious Work and the Politics of Institutional Change in Europe* (OUP 2018); Countouris and De Stefano, ‘New Trade Union Strategies for New Forms of Employment’ (ETUC 2019); Antonio Aloisi and Elena Gramano, ‘Workers Without Workplaces and Unions Without Unity: Non-standard Forms of Employment, Platform Work and Collective Bargaining’ in Pulignano and Hendrickx (n 38); Davide Però, ‘Indie Unions, Organizing and Labour Renewal: Learning From Precarious Migrant Workers’ (2020) 34(5) Work Employ Soc 900. See also *Irish Congress of Trade Unions (ICTU) v Ireland* Complaint No 123/2016 (2018) European Committee of Social Rights decision; *Náisiúnta Leictreach Contraitheoir Eireann v The Labour Court and others* [2021] IESC 36 On appeal from: [2020] IEHC 303.

Chapter 2.⁵⁵ There have been instances of successful collective action carried out in the receiving state on behalf of posted workers. For example, in case *Sähköalojen*,⁵⁶ discussed in Chapter 3, a Finnish trade union successfully represented Polish posted workers in a lawsuit before a Finnish court.⁵⁷ Nevertheless, as described by Lillie, Berntsen, Wagner and Danaj, union responses to posted workers across Europe have been generally mixed.⁵⁸

C. Limitations of the Formal Approach

1. Decline of the SER

The traditional understanding of precarious work is not without its limits insofar as the SER has been in gradual decline in the recent decades, and the rise in the new ways of working has been putting pressure on the standard employer-employee relationship.⁵⁹ One problem linked to measuring the scale of these new forms of work is the lack of accurate statistics, particularly with regard to platform work.⁶⁰ Yet, in 2017 it was estimated that standard employment across the EU accounted for less than 60% of the workforce.⁶¹

Another problematic aspect of using the terms ‘precarious work’ and non-SER interchangeably is that it automatically excludes full-time employees on permanent contracts from the scope of precarious work. This appears to be an oversimplification,

⁵⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11845. See Chapter 2, s V.

⁵⁶ Case C-396/13 *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna* EU:C:2015:86.

⁵⁷ See also Chapter 4, s I.

⁵⁸ Lillie, Berntsen, Ines Wagner and Sonila Danaj, ‘A Comparative Analysis of Union Responses to Posted Work in Four European Countries’ in Jens Arnholtz and Lillie (eds), *Posted Work in the European Union. The Political Economy of the Free Movement* (Routledge 2020).

⁵⁹ Vosko, ‘The Partial Eclipse of the SER and the Dynamics of SER-Centrism in International Labour Regulations’ in *Managing the Margins* (n 21).

⁶⁰ ‘Labour Market Change. New Forms of Employment: 2020 Update’ (Eurofound 2020) https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20027en.pdf accessed 9 August 2021, 14-15.

⁶¹ European Parliament, ‘Resolution...’ (n 1).

since the SER is no longer considered, as Countouris puts it, ‘a safe-haven of security’.⁶² In this vein, the phenomenon of ‘employment precariousness’ has been described by a French sociologist Jean-Claude Barbier.⁶³ While a low level of labour law protection may be one facet of precarious work, McKay has identified other factors which might drive full-time permanent workers to precarity, such as low pay or unequal power relationships leading to a situation where employee rights are not enforceable.⁶⁴

2. The Self-employed

Another limitation of the formal definition of precariousness is the assumption that all workers outside the SER should be considered precarious. Such a dualistic view of the workforce ignores the fact that certain individuals might voluntarily opt out of the Standard Employment Relationship favouring flexibility (or, perhaps, flexicurity). For instance, part-time work, albeit generally not having the same level of labour law protection as full-time contracts, can sometimes be a lifestyle choice, e.g. for parents or people with caring responsibilities who do not view it as precarious employment. Another example is the growing category of self-employed workers who are often willing to sacrifice the security of a permanent job in exchange for the freedom to be their own boss.⁶⁵ Bauman would say that such people ‘master and practise the art of *liquid life*: acceptance of disorientation, immunity to vertigo and adaptation to a state of dizziness, tolerance for an absence of itinerary and direction, and for an indefinite duration of

⁶² Countouris (n 7) 25. See further Florczak and Otto, ‘Precarious Work and Labour Regulation in the EU: Current Reality and Perspectives’ in Kenner, Florczak and Otto (n 38).

⁶³ Jean-Claude Barbier, “‘Employment Precariousness’ in a European Cross-national Perspective. A Sociological Review of Thirty Years of Eesearch’ (‘De-standardisation of Employment’ Seminar, Cologne, May 2011) <https://halshs.archives-ouvertes.fr/file/index/docid/654370/filename/11078.pdf> accessed 12 August 2021, as cited in Sonia McKay (n 8) 199.

⁶⁴ McKay (n 8) 200.

⁶⁵ Wieteke Conen and Joop Schippers (eds), *Self-employment as Precarious Work. A European Perspective* (Edward Elgar 2019). See also Vosko, ‘Self-employment and the Regulation of the Employment Relationship: From Equal Treatment to Effective Protection’ in *Managing the Margins* (n 21); Alessandro Nato, ‘The Self-employed and the EU Court of Justice: Towards New Social Protection of Vulnerable EU Citizens?’ (2021) 12(1) Eur Labour Law J 17.

travel.’⁶⁶ British economist Guy Standing, who has popularised the term ‘precariousness’ among the English-language readership, refers to the same group as ‘proficians’, i.e. ‘those with bundles of skills that they can market, earning high incomes on contract, as consultants or independent own-account workers’.⁶⁷

To some extent, a parallel may be drawn between the ‘proficians’ and modern-day self-employed freelancers, often in the creative industries or in IT, who provide services as independent contractors. Schippers argues that the recent ‘emergence of this new type of (often solo) self-employed individual is quite the opposite of what has happened to a lot of individuals in traditional self-employment’.⁶⁸ While technological developments and globalisation seem to encourage these new forms of self-employment, they have jeopardised the traditional craftsmen and independent shopkeepers. At the same time, evidence stemming from the new forms of self-employment seems to suggest that genuine financial freedom is reserved for a relatively small group of successful ‘proficians’,⁶⁹ hence the emergence of categories such as involuntary or ‘bogus’ self-employment.⁷⁰

III. The Multi-layered Approach

A. Rodgers and Rodgers: Four Criteria of Precarious Work

The limitations of the formal definition have led to the formulation of a different approach to defining precarious work – one based on a multi-layered approach taking into account a number of factors that result in a situation of precarity. Perhaps the earliest

⁶⁶ Bauman, *Liquid Life*, 1.

⁶⁷ Standing, *The Precariat. The New Dangerous Class* (2nd edn, Bloomsbury 2020) 9.

⁶⁸ Schippers, ‘Labour Market Flexibility, Self-employment and Precariousness’ in Conen and Schippers (n 65) 26.

⁶⁹ See case *Uber BV v Aslam*; Sandra Fredman and Darcy Du Toit, ‘One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal’ (2019) 48(2) ILJ 260; Kenner, ‘Uber Drivers Are “Workers”’ (n 38).

⁷⁰ See ‘Fraudulent Contracting of Work: Bogus Self-employment in Czech Republic, Spain and UK’ (Eurofound 2017) <https://www.eurofound.europa.eu/publications/information-sheet/2017/fraudulent-contracting-of-work-bogus-self-employment-czech-republic-spain-and-uk> accessed 6 August 2021; Commission, Key messages from the Peer Review on ‘The Rise of Precarious Work (Including Bogus Self-employment) – Causes, Challenges and Policy Options’ (2018).

definition based on this approach was formulated in 1989 by Rodgers and Rodgers. These authors have identified four criteria that should be taken into account in order to assess whether work can be described as precarious. These criteria are, firstly, the degree of certainty of continuing work; secondly, control over the working conditions (in the context of bargaining power); thirdly, labour law and social security protections; and finally, and disputably, the income level.⁷¹ The final criterion has been deemed ambiguous by Rodgers and Rodgers insofar as low-income jobs are generally considered precarious only if they are associated with poverty.⁷² Obviously, the lower a particular situation scores in the above criteria, the stronger the indication of precarity is. On this note, McKay adds that ‘in practice, precariousness is more often equated with an absence of certain characteristics of the employment relationship, such as certainty, security, statutory rights, together with the mechanisms of enforcement’.⁷³ This would partially explain the negative connotation of the word ‘precarious’ which is often instinctively associated with situations of deprivation and social exclusion.

B. Countouris: Legal Determinants of Precarious Work

The above multi-layered approach to describing precarious work has further been developed by authors such as Countouris and Kalleberg. Countouris offers an alternative list to that formulated by Rodgers and Rodgers, featuring five key determinants of precariousness: immigration status, employment status, temporal nature of one’s work relation, income, and worker’s control over the performance of work.⁷⁴ This perspective differs from Rodgers and Rodgers’ definition insofar as Countouris speaks of ‘determinants’ which might be understood as the driving factors as opposed to the defining features of precarious work identified by Rodgers and Rodgers. In this vein, it appears that following Rodgers and Rodgers’ definition would imply that all four criteria must be present in a given situation in order to classify it as precarious. Conversely, Countouris’ approach suggests that the five ‘determinants’ do not necessarily have to

⁷¹ G. Rodgers, ‘Precarious Work in Western Europe: The State of the Debate’ in Rodgers and Rodgers (n 7) 3.

⁷² *ibid.*

⁷³ McKay (n 8) 196.

⁷⁴ Countouris (n 7) 27.

occur concurrently to cause a precarious situation. For example, not all migrants are precarious workers, although all posted workers are migrant workers.

Despite these differences, four of the determinants identified by Countouris are essentially synonymous with the four criteria formulated by Rodgers and Rodgers: temporary nature of work, lack of labour law protection, low bargaining power and low income. It would, therefore, appear that these four elements may both cause and constitute a feature of precarity. In contrast, the determinant of immigration status appears to constitute an individual attribute which, albeit not present among all precarious workers, may cause or exacerbate the experience of precarity. On this point, the overlap between precarious work and migration will further be explored in Section V of this Chapter.

With respect to other individual attributes which may potentially predispose workers to precarity, McKay has also identified gender and age and the list appears to be open-ended.⁷⁵ The concept of determinants is of vital importance in this research which aims to identify particular elements of the EU framework and its enforcement that predispose posted workers to precarity which could also be described as ‘determinants’.

In EU law, there is no uniform definition of precarious work. In this context, in 2017 the European Parliament adopted the aforementioned resolution calling on the Commission and the Member States to tackle precarious work.⁷⁶ The resolution contains a suggested definition of ‘precarious employment’ meaning ‘employment which does not comply with EU, international and national standards and laws and/or does not provide sufficient resources for a decent life or adequate social protection’.⁷⁷ Furthermore, the European Parliament argues that ‘the type of contract cannot, on its own, presage the risk of precarious employment but, on the contrary, this risk depends on a wide range of factors’.⁷⁸ This appears to be yet another embodiment of the multi-layered approach echoing the works of Rodgers and Rodgers, Countouris and McKay.

⁷⁵ McKay (n 8), 196. See further Fudge and Owens (n 35); European Parliament, study requested by the FEMM Committee, ‘Precarious work from a gender and intersectionality perspective, and ways to combat it’ (2020) [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/662491/IPOL_STU\(2020\)662491_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/662491/IPOL_STU(2020)662491_EN.pdf) accessed 12 August 2021.

⁷⁶ European Parliament, ‘Resolution...’ (n 1).

⁷⁷ *ibid*, 3.

⁷⁸ *ibid*, M.

C. Kalleberg: the Subjective Element

The multi-layered definitions proposed by the above authors involve an assessment, based on a number of objective factors, which has to be carried out to establish whether the situation at issue meets the criteria of precarious work. However, the outcome of such objective assessment is subject to the same limitation which has already been discussed in relation to the formal approach to defining precarious work, insofar as it does not account for the workers' lifestyle choices. Consequently, some individuals would not consider themselves precarious workers even though they may formally meet the objective criteria.

The criteria formulated by Rodgers and Rodgers might be refined through a filter proposed by Kalleberg who has investigated the link between the consequences of precarious work and the workers' well-being.⁷⁹ Kalleberg's contribution relies on the suggestion that precariousness (or precarity) should be measured both objectively, and subjectively based on the workers' perceptions of their status.⁸⁰ The importance of subjective perception cannot be overstated especially in light of the scientifically recognised correlation between precarious work and high levels of stress and mental health concerns.⁸¹

Kalleberg has also discussed the impact of precarious work on the worker's transition to adulthood and family formation.⁸² Similarly, empirical studies carried out in Ireland have shown the impact of precarious employment on such areas of life as health, housing and family formation.⁸³ Part-time work with variable hours, temporary work and self-employment were three main types of employment identified as precarious

⁷⁹ Kalleberg (n 9) 31.

⁸⁰ *ibid*, 30.

⁸¹ See Kyoung-Bok Min, Shin-Goo Park, Sang Hee Hwang, and Jin-Young Min, 'Precarious Employment and the Risk of Suicidal Ideation and Suicide Attempts' (2015) 71 *Prev Med* 72; Francesco Moscone, Elisa Tosetti and Giorgio Vittadini, 'The Impact of Precarious Employment on Mental Health: The Case of Italy' (2016) 158 *Soc Sci Med* 86; Kyu-Man Han and others, 'Precarious Employment Associated with Depressive Symptoms and Suicidal Ideation in Adult Wage Workers' (2017) 218 *J Affect Disord* 201.

⁸² Kalleberg (n 9) 31.

⁸³ Alicja Bobek, Sinéad Pembroke and James Wickham, 'Living with Uncertainty. The Social Implications of Precarious Work' (FEPS, TASC 2018).

by researchers from TASC – Think-Tank for Action for Social Change.⁸⁴ In terms of health, it has been reported that while precarious working conditions had a negative effect on physical and mental health, workers could not avail of paid sick leave and often could not even afford to pay for GP visits etc.⁸⁵ As far as the housing situation in Ireland is concerned, the TASC research has found that precarious workers find themselves unable to buy property and are therefore only left with the options of renting or living in the family home.⁸⁶ Furthermore, the lack of employment stability affects the workers’ decision to start a family and factors such as eligibility for maternity leave and the cost of formal childcare have been identified as contributing to the postponement in having children.⁸⁷

D. Definition of Precarious Work

Having considered the above alternative approaches, this research will hereafter employ a multi-layered definition of precarity consisting of the four objective criteria formulated by Rodgers and Rodgers, and a fifth subjective criterion inspired by the works of Kalleberg. The five criteria are: certainty of continuing work, control over working conditions, labour law and social security protection, income, and perception of one’s own situation. The workers’ individual attributes, particularly age and gender, as discussed by Countouris and McKay, will be taken into consideration in this research as additional factors that may further predispose workers to precarity or exacerbate the experience of precarity.

The migration status identified as a determinant by Countouris will not be considered an element of the working definition of precarious work. Migration status may be considered as one of the factors that potentially exacerbate the experience of precarity yet in the context of this research, unlike age and gender, it is not an individual trait but one shared by all posted workers. All posted workers are migrant workers and

⁸⁴ *ibid*, 9.

⁸⁵ *ibid*, ‘Precarious Work, Health and Access to Healthcare Services’.

⁸⁶ *ibid*, ‘Precarious Work and Precarious Housing’.

⁸⁷ *ibid*, ‘Precarious Employment and Family Formation’. See also Stefano Ba’, ‘The Struggle to Reconcile Precarious Work and Parenthood: The Case of Italian “Precarious Parents”’(2019) 33(5) *Work Employ Soc* 812.

some of the practical struggles they face in the ‘host’ countries,⁸⁸ such as isolation or the language barrier, overlap significantly with those of other migrant workers, which will be acknowledged in Section V. Throughout this thesis it will, however, be argued that the posting contract as an expression of the free movement of services differs significantly from the status of other migrant workers, especially from that of other intra-EU migrants. In this vein, it appears that the posted workers’ precarity stems particularly from the status of a posted worker, as regulated by the EU. Different provisions of the Posted Workers Directive (hereafter: PWD) framework⁸⁹ and its enforcement will, thus, fall into the scope of the four elements identified by Rodgers and Rodgers.

IV. Limitations and Related Concepts

A. The ‘Precariat’ and Return of the Social Class

Despite the lack of a universal legal definition, over the first two decades of the 21st century the notion of precarious work has been popularised both in the everyday language and in the academic discourse becoming an umbrella term encompassing different forms of atypical work. Against this background, the British economist Guy Standing, in his landmark book *The Precariat: the New Dangerous Class*, went a step further by linking precarious work to the emergence of a new social class-in-the-making. The ‘precariat’ is thus defined more in Marxist terms as a distinctive socio-economic group alongside the above mentioned ‘proficians’ and five other classes: the elite, the salariat, the old working class, the unemployed and the misfits.⁹⁰

The new millennium heralded an era of a seemingly classless, post-industrial society which went hand in hand with significant setbacks for trade unions, as well as for

⁸⁸ See Chapter 4, s I.

⁸⁹ The framework comprises Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1, as well as its two revisions: Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L 159/11, and Council and Parliament Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

⁹⁰ Standing (n 67) 8-9.

social-democratic and labour parties across the Western world. As Arthurs points out, a large body of literature associates those setbacks with ‘the disappearance of labour as social class and of class as prime determinant of political and social affairs’.⁹¹ The optics, however, have changed with the arrival of the 2008 global economic crisis and the ensuing years of austerity, and before long the concept of ‘class’ returned with a vengeance.

One example is the international bestseller *Returning to Reims*, first published in 2009, in which the French sociologist Didier Eribon confesses that it had been easier for him to come out as homosexual than to admit to his working class background.⁹² The author is convinced that the social stratification continues to be as stiff and hard to penetrate as ever explaining that to this day nearly all the members of his extended family work low-level, mostly manual jobs:

‘He works in the X factory or the Y factory.’ ‘He works in the champagne cellars.’ ‘He’s a builder.’ ‘He’s in the National Guard.’ ‘He’s out of work.’ (...). The intense poverty I knew in my childhood is no longer present (...). But the position occupied in the social field is still the same: an entire family group whose situation, whose relative position in the class structure, hasn’t budged an inch.⁹³

Against the backdrop of the re-emerging concept of social stratification, Standing describes the precariat as a new class-in-the-making whose members seem to be issued from a mixture of different social backgrounds. The precariat, argues Standing, ‘consists of people who have minimal trust relationships with capital or the state, making it quite unlike the salariat’, while by the same token lacking the social contract characteristics of the old working class.⁹⁴

Standing’s reconceptualisation has since been heavily criticised by other authors. Notably, Wright presented a Marxist critique contesting the notion of the ‘precariat’ as a

⁹¹ Harry Arthurs, ‘Labour Law after Labour’ in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (OUP 2013) 19. See also John Scott, ‘Social Class and Stratification in Late Modernity’ (2002) 45(1) *Acta Sociol* 23; Michael Hechter, ‘From Class to Culture’(2004) 110(2) *Am J Sociol* 400.

⁹² Didier Eribon, *Returning to Reims* (Penguin Books 2019) 20.

⁹³ *ibid*, 99-100.

⁹⁴ Standing (n 67) 9-10.

class, or even a class-in-the-making based on two principal grounds.⁹⁵ Firstly, he argued that the interests of the members of the ‘precariat’ were not sufficiently opposed to those of the working class to constitute a distinct class. Secondly, Wright submitted that ‘across the various segments of the precariat the optimal strategies for securing a livelihood are not sufficiently unified for the precariat as a whole to constitute a class’.⁹⁶ The same point of view has been reiterated by Mrozowicki and others, an international team of sociologists who since 2016 have been carrying out comparative empirical research on precarious work among young workers in Poland and Germany.⁹⁷ These authors have concluded that the ‘precariat’ may be considered merely as a ‘discursive framework’ and not a social class, nor even a class-in-the-making, although the possibility of the creation of such a class in the future under certain circumstances could not be excluded.⁹⁸

B. The ‘Vulnerable Subject’ Theory

Another notion that seems interlinked with the concept of precariousness (or precarity) is vulnerability. Albertson Fineman explains that vulnerability might occur as a result of either physical harm or economic and institutional harms which affect not only individuals but also their families or entire social groups, and can be transferred from one generation to another.⁹⁹ Vulnerability, thus, appears to be a broad term, and it is

⁹⁵ Erik O. Wright, ‘Is the Precariat a Class?’ 7(2) *Global Labour Journal* 123.

⁹⁶ *ibid.*

⁹⁷ The PREWORK (‘Young precarious workers in Poland and Germany: a comparative sociological study on working and living conditions, social consciousness and civic engagement’) research project seeks to propose new theoretical insights into the extent to which precarious working and living conditions influence the emergent forms of social, class and political consciousness, individual life strategies and collective civic engagement of young workers in Poland and Germany. See further <https://www.prework.uni.wroc.pl/prework.eu/en.html> accessed 3 August 2021.

⁹⁸ Adam Mrozowicki and others, ‘Prekaryzacja Pracy a Świadomość Społeczna i Strategie Życiowe Ludzi Młodych: Ramy Teoretyczne’ in Mrozowicki and Jan Czarzasty (eds), *Oswajanie Niepewności. Studia Społeczno-ekonomiczne nad Młodymi Pracownikami Sprekaryzowanymi* (Wydawnictwo Naukowe Scholar 2020) 47.

⁹⁹ Albertson Fineman, ‘Equality, Autonomy and the Vulnerable Subject in Law and Politics’ in Albertson Fineman and Grear (n 10) 20. See also Albertson Fineman, ‘The Vulnerable Subject : Anchoring Equality in the Human Condition’ (2008–9) 20 *Yale J Law Fem* 1; ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

perhaps this broadness that might be one of the characteristics which makes the concept of vulnerability so powerful and appealing to legal scholars.

In introducing the theory of the ‘vulnerable subject’, Albertson Fineman describes it as ‘the embodiment of the realisation that vulnerability is a universal and constant aspect of the human condition’ ‘detached from specific subgroups or populations’.¹⁰⁰ This would bring vulnerability close to Butler’s take on precariousness (as opposed to precarity) understood as one of the defining characteristics of life. L. Rodgers points out that the word ‘vulnerability’ has been rarely used in the classical labour theory, while more recent literature favours the concept of ‘precariousness’, albeit often construed to denote the state-induced precarity rather than the universal human condition of uncertainty.¹⁰¹

It might partly be due to the broadness of the ‘vulnerable subject’ theory or, as critics could say, its vagueness, that labour law has been struggling to embrace it. In Albertson Fineman’s terms, to be vulnerable would mean to be human, as vulnerability is not deviant, but natural and inevitable.¹⁰² Thus, even without being part of a recognised minority, anyone might be vulnerable due to an innumerable number of factors such as physical appearance, personality (extraverted or introverted), temporary health problems etc. Furthermore, *everyone* is vulnerable at some stage in their lives because of age – both young and old.

According to L. Rodgers, however, this failure to incorporate vulnerability into labour law discourse results in lowering its effectiveness.¹⁰³ Instead of vulnerability, labour law on EU level tends to favour the concept of discrimination which, to a certain extent, is connected to vulnerability that often transpires as a trait exposing a person or a minority to be treated less favourably than the majority.¹⁰⁴ In this way, the grounds of discrimination recognised in the European Union (nationality within the EU, gender, sexual orientation, age, disability, racial or ethnic origin, religion or belief¹⁰⁵) could to

¹⁰⁰ Albertson Fineman, ‘Equality, Autonomy and the Vulnerable Subject’ (n 99) 20.

¹⁰¹ L. Rodgers (n 37) 13-14.

¹⁰² Albertson Fineman, ‘Equality, Autonomy and the Vulnerable Subject’ (n 99) 20-21.

¹⁰³ L. Rodgers (n 37) 14.

¹⁰⁴ See Bell, *Anti-Discrimination Law and the European Union* (OUP 2002).

¹⁰⁵ The above grounds of discrimination are recognised in art. 45 TFEU, art. 19 TFEU and art. 21 TFEU and, respectively, Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

some extent be considered as vulnerabilities protected on the Union level. And, as has been argued in the previous section, there is a correlation, confirmed by statistics, between certain protected grounds of discrimination, particularly gender and age, and precarious working arrangements.¹⁰⁶ The difference, nevertheless, lies in the clearly defined limits of discrimination and the enumerative grounds, which, as discussed above, is something that the broad concept of vulnerability does not have.

The notion of vulnerability has in recent years been embraced by the European Court of Human Rights, even if its understanding of vulnerability differs from that proposed by Albertson Fineman insofar as it is reserved solely for marginalised groups.¹⁰⁷ On EU level, the concept of vulnerability appears to be less commonly employed, even though it features in a number of legislative instruments, particularly in criminal and consumer protection law.¹⁰⁸ While the EU criminal law places particular emphasis on the rights of victims of crime, as well as those of suspects and accused persons,¹⁰⁹ the EU consumer law has introduced the notion of ‘particularly vulnerable consumers’ who unlike ‘average consumers’ might not be able to make reasonable choices due to ‘mental or physical infirmity, age or credulity’ (the list of characteristics is open-ended).¹¹⁰ Furthermore, the EU Charter of Fundamental Rights, while not using

[2006] OJ L 204/23 (Gender Equality Directive – recast); Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180 (Racial Equality Directive) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 (Employment Equality Directive).

¹⁰⁶ Bell, ‘EU Equality Law and Precarious Work’ in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing 2019).

¹⁰⁷ Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Albertson Fineman and Grear (n 10).

¹⁰⁸ Lisa Waddington, ‘Exploring Vulnerability in EU Law: An Analysis of “Vulnerability” in EU Criminal Law and Consumer Protection Law’ (2020) 45(6) *ELRev* 779.

¹⁰⁹ *ibid*, 786-789. See Council and Parliament Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

¹¹⁰ Waddington (n 108) 791-793. See Council and Parliament Directive 2011/83 on consumer rights, amending Council Directive 93/13 and Directive 1999/44 and repealing Council Directive 85/577 and Directive 97/7 [2011] OJ L304/64; Council and Parliament Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 and Regulation 2006/2004 (Unfair Commercial Practices Directive) [2005] OJ L149/22; Council and Parliament Directive 2001/95 on general product safety [2002] OJ L11/4.

the language of vulnerability, in Articles 24-26 acknowledges that certain people such as children, elderly persons and persons with disabilities may potentially need more protection than others.¹¹¹ Yet Waddington, drawing on Albertson Fineman's 'vulnerable subject' theory, argues against a model of vulnerability distinguishing minority groups, and in favour of embracing the universal model of vulnerability intrinsically linked to the human condition.¹¹²

While vulnerability in Albertson Fineman's terms may be likened to precariousness understood as the universal human condition, it differs from the notion of state-induced precarity which is more limited, albeit possibly broader than discrimination. One striking difference between vulnerability and precarity is that while vulnerability can be considered as universal to the human condition, precarity tends to be used in an ideological context. It is hardly a coincidence that term 'precarity' in sociology appears in the works of authors such as Bourdieu, Bauman and Standing (all of whom have been influenced by the Marxist theory of labour exploitation. Whereas 'vulnerability' sounds rather neutral, 'precarity', in Butler's terms, is a pejorative term denote the result of the failure to address innate human vulnerability – by employers, by the state, by the law etc. Although the two terms are definitely not synonymous, they may be used in close conjunction as two sides of the same coin with vulnerability as cause leading to precarity as effect.

V. Precarious Work and Migration

As has been mentioned in Section III, migration status is one of the key determinants of precariousness (or precarity) identified by Countouris, and all posted workers in the EU are migrants, even though, as will be explained in Chapter 2, EU law has denied them the status of migrant workers within the meaning of Article 45 TFEU.¹¹³ Consequently,

¹¹¹ Charter of Fundamental Rights of the European Union [2016] OJ C 202/389. See Filippo Ippolito, '(De)Constructing Children's Vulnerability under European Law' in Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Hart Publishing 2015) 39, as cited in Waddington (n 108) 785.

¹¹² Waddington (n 108) 799-800.

¹¹³ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1. See Chapter 2, ss II-III.

some of the themes stemming from the empirical studies conducted to date,¹¹⁴ as well as from the data collected in this project, such as isolation in the ‘host’ country or a language barrier, link the experiences of posted workers to other migrant workers. This link will be acknowledged and explored in the present Section which will also draw some parallels between posted workers and other examples of labour migrants, including historically and outside the EU.

A. Strangers, Denizens, Vagabonds

Being an immigrant, a stranger, has traditionally been viewed in culture as a delicate position. On the one hand, an individual’s bargaining power on the labour market is affected by their immigration status in that they might be prone to discrimination on the grounds of nationality or race / ethnic origin and, sometimes, religion. On the other hand, from the point of view of economics, the labour market’s condition is one of the factors determining the flux of workforce in a country. High labour demand tends to attract foreign workers while the rise of unemployment often encourages native workers to emigrate.¹¹⁵

Standing draws a parallel between the modern day ‘precariat’ and the non-citizens of the ancient Roman empire. He further compares the former to ‘denizens’ – foreigners who had been granted residency rights to ply their trade (essentially the equivalent of today’s work permits), but not the full citizenship.¹¹⁶ Denization was a form of a royal grant for foreigners in England which developed at the end of the fourteenth century. Beneficiaries of denization had both the right to own property in England and access to English courts.¹¹⁷ Lambert and Ormrod explain that in return, they had to perform a ceremony ‘in which they implicitly renounced their allegiance to the foreign powers under which they had been born’.¹¹⁸

¹¹⁴ Chapter 4, s I.

¹¹⁵ Anthony M. Messina, *The Logics and Politics of Post-WWII Migration to Western Europe* (CUP 2007); Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge 2013).

¹¹⁶ Standing (n 67) 109-112.

¹¹⁷ Bart Lambert and W. Mark Ormrod, ‘Friendly Foreigners: International Warfare, Resident Aliens and the Early History of Denization in England, c. 1250–c. 1400’ (2015) 130(542) *Engl Hist Rev* 1.

¹¹⁸ *ibid*.

Castel in his monumental work on the history of labour in Europe mentions vagabonds who were vulnerable ‘by the virtue of (...) being deterritorialised’ in the preindustrial society organised primarily around closed communities.¹¹⁹ To exemplify this, Castel recounts the story of a certain Frenchman who had been incarcerated as a vagabond in the Paris area. Unable to find enough work to provide for his family in his native Auvergne, he had the habit of venturing every year into foreign provinces of France for a few months at a time. The similarity of his situation to that of modern-day posted workers is so striking that he could in fact be considered an archetype of a posted worker. ‘This poor soul was lucky enough (...) in that two distinguished citizens were willing to take the trouble to write Meaux [prison] in order to appoint themselves as guarantors’, adds Castel to illustrate the precarious situation of medieval vagabonds.¹²⁰

B. The Polish Peasant in Europe and America

In sociological literature, the precarious status of migrants has been described since the 19th century when American scholars sought to paint a picture of their society, rapidly changing with the waves of economic migration.¹²¹ One of the earliest published works that depicted the culture and organisation of a group of immigrants was *The Polish Peasant in Europe and America*, considered as one of the classics in empirical research. Its authors, Thomas and Znaniecki, carried out a qualitative study of approximately two million Poles who arrived in the USA between 1880 and 1910. They were primarily single young male manual workers, prepared to move around and to endure difficult working and living conditions such as those depicted in the below excerpt of correspondence between two brothers (dating from December 1908):

Dear Brother, (...) I can well imagine your painful situation, and I should be glad to help you, dear brother (...). But now it is simply impossible. In the factory where I am working very few men have good work – only the engineers and we three carpenters. As to the ordinary workers in the mill, may God pity them, so bad is their work... I would not wish

¹¹⁹ Castel (n 22) 63.

¹²⁰ *ibid*, 71-72.

¹²¹ Eli Zartetsky, ‘Introduction’ in Thomas and Znaniecki (n 11).

it, not only not to my brother, but not even to the Russian [tsar] Nicholas to get it by my protection [assistance].¹²²

Experiences of Polish economic immigrants in the United States chime with the Irish emigration saga of the nineteenth century, after the Great Famine.¹²³ Those European emigrants could hardly be considered as precursors of modern-day posted workers as their migration was generally permanent. The modalities and the cost of transatlantic travel at the time practically excluded the possibility of migrants ever returning to their 'home' countries, as confirmed by Thomas and Znaniecki.¹²⁴ A better historical example of temporary labour migration was perhaps the seasonal migration of Poles to carry out work in German agriculture, primarily in East Prussia and Saxony, recorded since the mid-19th century.¹²⁵ Yet, some of the themes featuring in Thomas and Znaniecki's study, such as poor working conditions (which were, needless to say, much worse than those experienced by present-day posted workers) and difficulties at adapting in the new country, bear certain resemblances to the more recent qualitative studies on posted workers.

A wave of mass migration affected Europe in the aftermath of WWII when the old World order had collapsed, borders had been shifted and large populations displaced, which was followed by fast economic growth and industrialisation in Western Europe.¹²⁶ The former colonial powers such as the United Kingdom or France imported workers, who often had citizenship rights, primarily from their former colonies. Again, those migrants often came to Europe in order to settle permanently. In contrast, another category of temporary – at least in theory – migrants became prominent in West

¹²² Thomas and Znaniecki (n 11) 49.

¹²³ David Fitzpatrick, *Irish Emigration 1801-1921* (The Economic and Social History Society of Ireland 1984). See also Stephen Byrne, *Irish Emigration to the United States: What it Has Been, and What it is; Facts and Reflections Especially Addressed to Irish People Intending to Emigrate from their Native Land; and to those Living in the Large Cities of Great Britain and of the United States* (Catholic Publication Society 1873). Edward E. Hale, *Letters on Irish Emigration First Published in the Boston Daily Advertiser* (Phillips Sampso 1852).

¹²⁴ Thomas and Znaniecki (n 11).

¹²⁵ Kamila Fiałkowska and Maria Piechowska, 'New Way, Old Pattern. Seasonal Migration from Poland to Germany' (2016) 192(777) *ARBOR Ciencia, Pensamiento y Cultura* a285. See also Edward Marek, *Praca Polaków w Niemczech: Półtora Wieku Emigracji Zarobkowej* (IPiSS 2008).

¹²⁶ Messina (n 115).

Germany, but also Austria and Switzerland, after these countries had established the so-called ‘guest worker’ systems.¹²⁷ Such a system, explains Messina, ‘can be defined as a coercive policy by the state to rotate individual workers into and out of the domestic economy according to a regular, predefined schedule’.¹²⁸ The premise was to ensure that the foreign workers would not integrate in their receiving country, which bears striking similarities to the idea behind posted workers in modern-day EU.¹²⁹ However, by the 1960s, the system had broken down, allowing large groups of undocumented migrants.¹³⁰ The idea of ‘guest workers’ was summarised into what has become a famous quote attributed to the Swiss writer Max Frisch: ‘We asked for workers. We got people instead’.¹³¹ This statement concerning ‘guest workers’ who, again, bear certain similarities to posted workers, shows how those workers had been instrumentalised, which chimes with the argument made in Chapter 2 that the PWD has framed posted workers as a service.

The Polish emigration saga described by Thomas and Znaniecki has to some extent replayed itself a century later when following the 2004 EU enlargement up to half a million Poles¹³² emigrated temporarily to the United Kingdom and Ireland every year.¹³³ One example of a precarious situation of migrant EU workers in the UK is the case *Kalwak and Others v Consistent Group Ltd and Welsh Country Foods*, as described

¹²⁷ *ibid.* See also Stephen Castles, ‘Guestworkers in Europe: A Resurrection?’ (2006) 40(4) IMR 741.

¹²⁸ Messina (n 115) 23.

¹²⁹ See further Chapter 2.

¹³⁰ Castles (n 127) 742.

¹³¹ See further Beth Lyon (ed), *We Asked for Workers. We Got People Instead* (Open Society Institute 2016).

¹³² Detailed numbers are available from the Central Statistical Office of Poland. See ‘Informacja o Rozmiarach i Kierunkach Czasowej Emigracji z Polski w Latach 2004-2018’ (GUS 2019) <https://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-czasowej-emigracji-z-polski-w-latach-2004-2018,2,12.html> accessed 4 August 2021.

¹³³ See further Samantha Currie, ‘De-skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement’ (2007) 23(1) IJCLIR 83; Torben Krings and others, ‘Polish Migration to Ireland: “Free Movers” in the New European Mobility Space’ (2013) 39(1) J Ethn Migr 87; Paulina Trevena, Derek McGhee and Sue Heath, ‘Location, Location? A Critical Examination of Patterns and Determinants of Internal Mobility Among Post-accession Polish Migrants in the UK’ (2013) 19(6) Popul Space Place 671; Krings and others, *New Mobilities in Europe: Polish Migration to Ireland Post-2004* (Manchester University Press 2016).

by Barmes.¹³⁴ The claimants in *Kalwak* were recently arrived Polish migrants with very limited English, accommodated at travel lodges and hired to work as meatpackers. They had initially consented to sign a ‘zero-hour contract’, however they were unable to realise how it was different from the SER. In fact, notwithstanding the contract, they were required to remain at their employer’s disposal the whole time, which is a characteristic of a SER. Again, parallels to posted workers in this twenty-first century exodus from Poland to the British Isles are quite striking.

C. Temporary Labour Migration Outside Europe

Temporary labour migration similar to the posting of workers cannot be considered a phenomenon uniquely present in Europe. One example of a similar arrangement which has become infamous due its negative effects on workers’ rights is the ‘kafala’ system in Gulf countries.¹³⁵ Another example is the long-standing labour migration between Indonesia and Malaysia which originated from the demand for agricultural, construction and domestic workers.¹³⁶ It is worth noting that those programs opened doors also to highly skilled workers but without the same quotas and restrictions that applied to the low-skilled workforce.¹³⁷ Similarly, in Japan, South Korea and Taiwan, since the 1990s there have been attempts to turn illegal migrants into ‘guest workers’ based on the German system according to the following template:

(...) low-skilled foreigners were to be recruited to work in construction, manufacturing, and care giving, so long as they remained supplements to the native workforce, did not

¹³⁴ Lizzie Barmes, ‘Learning from Case Law Accounts of Marginalised Working’ in Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing 2012). See also Clíodhna Murphy, David M. Doyle and Muiréad Murphy, “‘Still Waiting’ for Justice: Migrant Workers’ Perspectives on Labour Exploitation in Ireland’ (2020) 49(3) ILJ 318.

¹³⁵ Mantouvalou, ‘Temporary Labour Migration and Modern Slavery’ in Joanna Howe and Owens (eds), *Temporary Labour Migration in the Global Era. The Regulatory Challenges* (Hart Publishing 2016).

¹³⁶ Ernst Spaan and Felicitas Hillmann, ‘Migration Trajectories and Migration Industry. Theoretical Reflections and Empirical Examples from Asia’ in Gammeltoft-Hansen and Nyberg Sørensen (n 115) 71.

¹³⁷ Spaan and Hillmann (n 136).

delay economic up-grading, stayed only temporarily with no access to citizenship, and brought only minimal social costs.¹³⁸

Again, such workers are allowed stay in the ‘host’ country only temporarily with no prospect of acquiring citizenship and provided that they ‘supplement’ the native workforce.¹³⁹

Conclusion

The purpose of this Chapter was to formulate a working definition of precarious work for the purpose of this project. The terms ‘precariousness’ and ‘precarity’ may be perceived as somewhat ambiguous, which also required to be acknowledge and clarified. The Chapter began by tracing the renaissance of the once obsolete word ‘precarious’ to Bauman, Castel, Bourdieu and Butler, all of whom had to some extent been influenced by the works of Karl Marx.

Legal scholars, in defining precariousness or precarity, had for a long time focused on the formal link between the worker and the employer. After the SER had become the norm in the 20th century Fordist societies, everything that fell outside it would have been classified as nonstandard and, thus precarious work. The present Chapter attempted to show the limitations of such approach which failed to accommodate the complexity of modern-day labour markets. In opposition to this formal approach to defining precarious work, stands a more flexible, multi-layered approach, first developed by Rodgers and Rodgers as early as in 1989. It involves an analysis of a number of objective factors in order to determine whether a given situation may be classified as precarious work. This ‘classic’ multi-layered approach has been expanded by other scholars such as Kalleberg and Countouris. These more recent takes on precarious work differ from each other, which might partially be explained by the different backgrounds and purposes of research of the authors. While Countouris constructed a definition for legal research which perhaps needed greater certainty as to the categories to be included

¹³⁸ Kristin Surak, ‘The Migration Industry and Developmental States in East Asia’ in Gammeltoft-Hansen and Nyberg Sørensen (n 115) 89.

¹³⁹ *ibid.* See further Wagner and Karen Shire, ‘Labour Subcontracting in Cross-Border Labour Markets: A Comparison of Rule Evasion in Germany and Japan’ in Arnholtz and Lillie (n 58).

and excluded, Kalleberg as a sociologist exploring precarious work focused more on the worker's subjective feelings arguing that they should equally be taken into consideration in carrying out this assessment.

In line with the multi-layered approach, which appears more suited to the evolving world of work, this research will adopt a modified version of the Rodgers and Rodgers' definition as a working definition of precarious work. It appears that a combined approach to defining precarious work which links an objective, legal assessment with a subjective, sociological assessment might be particularly suited to this study which is sociolegal in nature. Thus, the resulting definition consists of five elements, including all four elements identified by Rodgers and Rodgers: firstly, the degree of certainty of continuing work, secondly, the worker's bargaining power, thirdly, the level of labour law and social security protection and fourthly, income level. The fifth element is the worker's subjective perception of their situation and has been added under the influence of Kalleberg for two reasons. Firstly, the subjective criterion will help filter situations which might formally meet the objective criteria and yet, the workers at issue do not consider themselves precarious. Secondly, taking into account the worker's perception of their individual situation might shed some light on the impact of the posting arrangement onto the workers' mental health or family life.

This Chapter has also demonstrated an overlap between the concepts of precarity (or precariousness) and vulnerability which underlines the immanent fragility of the human condition in contrast to the state-induced situation of precarity. The notion of vulnerability chimes with Countouris' classification of the legal determinants of precariousness, whereby each of the determinants could be considered as a vulnerability exacerbating the precarious experience.

The overlap between precarity and vulnerability will, thus, be reflected throughout this thesis. This research seeks to identify the elements of the legal framework on the posting of workers and its enforcement which may predispose posted workers to precarious working conditions. The overarching research question implies a certain inadequacy of the existing rules to ensure effective protection of posted workers. This may be regarded as a failure, both on the part of the EU which created this framework and the Member States which are responsible for enforcing it, to fulfil their positive obligation to ensure an adequate level of worker protection. This is why the term 'precarity' as construed by Butler seems particularly suitable to the posting arrangement. At the same time, certain additional workers' traits, notably gender and age, will be

incorporated into the design of the empirical study as additional factors – or, in other words, vulnerabilities or determinants potentially exacerbating the experience of precarity. In this way, the concept of vulnerability will also find an expression in this research.

2. Workers as a Service. Unveiling the Twisted Logic of the 1996 Posted Workers Directive

Introduction

The purpose of this Chapter is to lay out the core of the EU legal framework on the posting of workers enshrined in the 1996 Posted Workers Directive (hereafter: PWD).¹ Amendments enacted by two reforms carried out in 2014² and 2018³ will not be discussed, as they will be the focus of Chapter 3. Despite the two revisions, the core components of the PWD, such as its legal basis, the relationship with Article 56 TFEU⁴ or the definition of a posted worker, have remained unchanged since 1996. By no means does this Chapter provide an exhaustive explanation of the contents of the PWD. Rather, with the central research question in mind, it aims to offer an interpretation of the EU rules which focuses on those elements of the legal framework that may predispose posted workers to precarity. It attempts to shed light on some of the inconsistencies in the PWD's twisted logic which resulted in it being ill-fitted to grant an adequate level of labour law protection to posted workers.

Section I will focus on the historical background of the PWD to trace the possible sources of the EU's approach to regulating the legal status of a posted worker. Notably, the CJEU's ruling in case *Rush Portuguesa*, which permanently linked posted workers to the principle of the free movement of services and, thus deprived them of the protection of the free movement of workers, will be re-evaluated.⁵

¹ Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

² Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11.

³ Council and Parliament Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

⁴ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

⁵ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-01417.

Section II will elaborate on the twofold objective of the PWD, as enshrined in its preamble, which aimed to reconcile the provision of services in a ‘climate of fair competition’ with the respect for the rights of posted workers.⁶ It will be argued that there exist two alternative understandings of the PWD’s aim. The dominant view, upheld by the CJEU in the ‘*Laval quartet*’,⁷ is one implying an inherent tension between the free movement of services and the free movement of workers. The alternative view is that the two aims of the PWD are mutually reinforcing. This interpretation, however, would require recognising that the contested notion of ‘social dumping’ has from the outset been the driving force underpinning the birth of the PWD.

Section III will evaluate and challenge the legal basis of the PWD which is linked to the principle of the free movement of services laid down in Article 56 TFEU. In addition, it will provide insights into the PWD’s place within the regime of the free movement of services, including its relationship with the Rome I Regulation⁸ and the Services Directive.⁹

Section IV will focus on Articles 1 and 2 PWD in an attempt to unpack the definition of a posted worker and the scope of application of the PWD. It will emphasise the lack of clarity regarding such aspects as the minimum and maximum duration of a posting, the ‘sufficient connection’ test established by the CJEU, the link to the provision of services or the posting of third-country nationals.

Section V will briefly evaluate the ‘nucleus’ of mandatory rules of the ‘host’ state laid down in Article 3(1) which is considered to be the PWD’s central provision, and its narrow interpretation imposed by the ‘*Laval quartet*’. This aspect of the EU framework provoked a scholarly discussion in which Article 3(1) was analysed and critiqued to the extent that it leaves very little to be added to this vast body of literature. Therefore, this

⁶ Directive 96/71/EC, Recital 5.

⁷ The ‘*Laval quartet*’ comprises cases C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbunde and others* [2007] ECR I-11767; C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR I-10779; C-319/06 *Commission v Grand Duchy of Luxembourg* [2008] ECR I-04323, and C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989.

⁸ Council and Parliament Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6 (Rome I Regulation).

⁹ Council and Parliament Directive on services in the internal market [2006] OJ L 376/36.

Chapter will only touch upon the nature of the ‘nucleus’ insofar as it is relevant for setting the scene for the 2018 revision of the PWD discussed in Chapter 3.

I. Historical Background of the EU Rules on the Posting of Workers

Posted workers were officially recognised as a distinct category of workforce in the EU by the PWD. Yet, evidence from the CJEU suggests that the phenomenon of hiring out workers from one Member State to another is not only older than the single market, but it may nearly be as old as the European Communities.¹⁰ The *Van der Vecht*¹¹ judgment, delivered by the Court of Justice in 1967, as well as the *Manpower*¹² judgment from 1970 concerning French temporary agency workers on construction sites in Germany, offered early precursors to the current definition of a posted worker laid down in Article 2 PWD.¹³ Both cases dealt with the social security aspect of this transnational working arrangement which to this day, as will be argued throughout this thesis, is no less problematic. On this note, it is worth pointing out that the *Manpower* judgment granted more favourable protection to the workers at issue than the current regulation of social security in the EU.¹⁴

¹⁰ Emmanuel Comte, ‘Promising More to Give Less: International Disputes Between Core and Periphery Around European Posted Labor, 1955–2018’ (2019) 60(6) *Labor Hist* 749. See further Aukje A. H. Van Hoek and Mijke Houwerzijl. “‘Posting’ and ‘Posted Workers’: The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive” (2012) 14 *CYELS* 2011-2012.

¹¹ Case 19/67 *Bestuur der Sociale Verzekeringsbank v J. H. Van Der Vecht* [1967] ECR 345, as cited in Houwerzijl and Herwig Verschueren, ‘Free Movement of (Posted) Workers and Applicable Labour and Social Security Law’ in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019) 77.

¹² Case 35/70 *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* [1970] ECR 1251, as cited in Houwerzijl and Verschueren (n 11) 77.

¹³ See *Van Der Vecht*, p. 352; *Manpower*, para 8.

¹⁴ In *Manpower*, the CJEU ruled that that the early precursors of posted workers at issue could only remain subject to the social security system of the country of establishment of the employer (‘home’ state) where the anticipated duration of their posting did not exceed 12 months. *N.B.* according to Article 12 of Council and Parliament Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1, posted workers continue to be subject to the social security system of the ‘home’ state for the first 24 months of their posting. See further Pennings, ‘Posting’ in *European Social Security Law* (6th edn,

A. *Rush Portuguesa*

The CJEU was equally generous to the emerging category of labour migrants in the *Rush Portuguesa* judgment concerning Portuguese workers building a railway in France.¹⁵ Considered ‘a turning point in Community law on the free movement of workers within the EU’,¹⁶ *Rush Portuguesa* effectively allowed Member States to subject posted workers to their national legislation and collective agreements by stating that:

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (...).¹⁷

The above paragraph was described by Barnard as ‘unreasoned’,¹⁸ while P. Davies argued that the Court of Justice had committed ‘a basic error of the craft of judicial decision-making, [and] answered a question which was not necessary for its decision’.¹⁹ It was in the aftermath of the *Rush Portuguesa* judgment, delivered in 1990, that the European Commission proceeded the following year to propose a new Directive

Intersentia 2015); Houwerzijl and Lisa Berntsen, ‘Posting of Workers: From a Blurred Notion Associated with “Cheap Labour” to a Tool for “Fair Labour Mobility”?’ in Jens Arnholtz and Nathan Lillie (eds), *Posted Work in the European Union. The Political Economy of the Free Movement* (Routledge 2020); Matteo Bottero, ‘Coordination of Social Security’ in *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021).

¹⁵ See Eeva Kolehmainen, ‘The Directive Concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems’ (1998) 20(1) *Comp Lab L & Pol’y J* 71, 76-77; Lydia Hayes and Tonia Novitz, ‘Workers Without Footprints: the Legal Fiction of Migrant Workers as Posted Workers’ *Labour Migration in Hard Times: Reforming Labour Market Regulation*. Liverpool: Institute for Employment Rights (2013) 2-4.

¹⁶ Verschuere, ‘Cross-Border Workers in the European Internal Market: Trojan Horses for Member States’ *Labour and Social Security Law* (2008) 24 *IJCLIR* 167, 175.

¹⁷ *Rush Portuguesa*, para 18. See further Norbert Reich, ‘Free Movement v. Social Rights in an Enlarged Union - the *Laval* and *Viking* Cases before the ECJ’ (2008) 9(2) *Ger Law J* 128, 139.

¹⁸ Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 214.

¹⁹ Paul Davies, ‘The Posted Workers Directive and the EC Treaty’ (2002) 31(3) *ILJ* 298, 300.

concerning the posting of workers in the framework of the free movement of services.²⁰ While the CJEU reiterated its generous stance a few years later in *Vander Elst*,²¹ the general clause developed in *Rush Portuguesa* that in theory allowed Member States to extend all labour legislation of the ‘host’ country onto posted workers did not last. The adoption of the PWD in 1996 significantly curbed the Court of Justice’s enthusiasm to grant any rights to posted workers.²²

Yet, for labour lawyers *Rush Portuguesa* may be regarded as a poisoned chalice, for this is where the CJEU separated posted workers from the principle of the free movement of workers and linked them – so far, irreversibly – to the free movement of services. The French Labour Code at the time required all foreign nationals to obtain a work permit, a condition which was struck down by the Court of Justice in *Rush Portuguesa* as an unjustifiable restriction on the free movement of services.²³ The CJEU reiterated its earlier stance expressed in *Webb* where the ‘provision of manpower’ had been interpreted to fall within the definition of a ‘service’ laid down in former Article 60 EEC (currently Article 57 TFEU).²⁴

Thus, in *Rush Portuguesa*, the CJEU drew a line between migrant workers seeking permanent access to the ‘host’ country’s labour market for themselves and their families,²⁵ and posted workers who ‘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’.²⁶ This contested distinction has since had far-reaching ramifications, both on the

²⁰ Commission, ‘Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ COM (1991) 230 final. See further Kolehmainen (n 15) 75.

²¹ Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3818. See also case C-91/13 *Essent Energie Productie BV* EU:C:2014:2206. See further Verscheuren, ‘Cross-Border Workers...’ (n 16) 172-173; Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Intersentia 2015) 156-159.

²² See joined cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and another and Bernard Leloup and others* [1999] ECR I-8498; C-165/98 *Criminal proceedings against André Mazzoleni and another* [2001] ECR I-2213. The latter two cases were decided after the adoption of the PWD, but they concerned situations which had occurred prior to the PWD. See also Rocca (n 21) 160-168.

²³ *Rush Portuguesa*, paras 11-12.

²⁴ Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305.

²⁵ *Rush Portuguesa*, para 14.

²⁶ *ibid*, para 15. See further Verschuereen, ‘Cross-Border Workers...’ (n 16) 175-176.

design of the PWD, and the factual situation of posted workers in the EU, which will be explored throughout this thesis. This reasoning was further developed in *Finalarte*, decided after the adoption of the PWD but concerning situations which had occurred prior to the Directive.²⁷ In this judgment, the Court of Justice expressly excluded posted workers from the scope of the principle of the free movement of workers laid down in former Article 39 EC²⁸ (currently Article 45 TFEU).

B. Long Road to the PWD

As recounted by Evju,²⁹ the Commission had already attempted – without success – to regulate the status of posted workers in the 1970s, when it put forward two drafts of a proposal for a Regulation concerning the conflict of laws in employment relations.³⁰ The initiative was pursued independently from the already ongoing legislative process which ultimately led to the adoption of the Rome Convention, the 1980 predecessor of the Rome I Regulation on the law applicable to contractual obligations.³¹ The proposal envisaged that workers posted to carry out temporary activities in another Member State would remain subject to the laws of their country of origin with the exception of a number of mandatory rules of the ‘host’ state.³² Evju rightly points out that these rules, as proposed in the 1976 draft, were almost identical as the 1996 wording of Article 3(1) PWD and, therefore, the PWD in its current wording also has this ‘conflict of laws’ dimension owed

²⁷ Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Lda and others* [2001] ECR I – 7884, paras 22-23. See further Verschueren, ‘Cross-Border Workers in the European Internal Market’ (n 16) 173-174; Rocca, *Posting of Workers and Collective Labour Law* (n 21) 169-172.

²⁸ Consolidated version of the Treaty establishing the European Community [2002] OJ C 325/33 (EC).

²⁹ Stein Evju, ‘Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Conflict’ (2010) 12 CYELS 151.

³⁰ Commission, ‘Proposition de règlement relatif aux dispositions concernant les conflits de lois en matière de relations de travail’ [1972] OJ C 107/8. The second draft (COM(75) 653 final) was not included in the OJ, as cited by Evju (n 29) 156.

³¹ Rome Convention on the law applicable to contractual obligations [1980] OJ C 27/34. See Evju (n 29) 158.

³² Evju (n 29) 157-158. See further Kolehmainen (n 15) 80-83.

to its unsuccessful predecessor.³³ Interestingly, the legal basis of the proposed Regulation had been the principle of the free movement of workers (formerly laid down in Article 48 EEC), and not the free movement of services, which is currently the case in the PWD.

On a different note, the birth of the PWD has also been linked to the unsuccessful efforts made by European trade unions in the construction sector in the 1980s to guarantee compliance with working conditions and collective agreements of the ‘host’ state in public procurement contracts.³⁴

The Commission’s proposal for a Directive concerning the posting of workers was tabled in 1991, but it was not until 16 December 1996, two drafts later, that the PWD was finally adopted.³⁵ According to Evju, the final compromise, adopted as a Common Position of the EU Council in June 1996 despite opposition from the United Kingdom and with Portugal abstaining from the vote, had been facilitated by the Italian presidency.³⁶ Other proponents of the PWD had been France and Germany amid concerns that the posting of workers, which was expected to grow in popularity with the completion of the single market,³⁷ was driving ‘social dumping’, a notion which will be explored in the next section.

³³ Evju (n 29) 157. See also Commission, ‘Proposal...’ (n 20) 15. See further Reich (n 17) 141; Rocca, *Posting of Workers and Collective Labour Law* (n 21) 115-119.

³⁴ See Jan Cremers, Jon E. Dølvik and Gerhard Bosch, ‘Posting of Workers in the Single Market: Attempts To Prevent Social Dumping and Regime Competition in the EU’ (2007) 38(6) *Ind Relat* 524, 526. See further Evju (n 29) 159. Many years later, the link between the posting of workers and public procurement transpired in case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* EU:C:2015:760. See further Albert Sánchez Graells, *Smart Public Procurement and Labour Standards. Pushing the Discussion after RegioPost* (Hart Publishing 2018).

³⁶ Council, Common Position No 32/96 with a view to adopting Directive 96/.../EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1996] OJ C 220/1. See Marco Biagi, Guest Editorial – ‘Fortune Smiles on the Italian EU Presidency: Talking Half-seriously about the Posted Workers and Parental Leave Directives’ (1996) 12(2) *IJCLIR*; Evju (n 29) 167-168; Rocca, *Posting of Workers and Collective Labour Law* (n 21) 119-128.

³⁷ Commission, ‘Proposal’ (n 20) 2.

II. Aim of the PWD

The PWD's preamble stated that its aim was twofold: firstly, to ensure 'a climate of fair competition' and secondly, to guarantee the 'respect for the rights of workers'.³⁸ While the latter element of this twofold aim is linked to Article 3(1) PWD which will be discussed in Section V, the former element is somewhat enigmatic and, thus, can be interpreted in two, diametrically different ways.

On one hand, 'fair competition' might mean removing obstacles to the single market, such as burdensome administrative barriers, as was the case in *Rush Portuguesa*. This would imply an inherent tension in the PWD's design, for an absolute freedom to provide services excludes the protection of posted workers and *vice versa*.³⁹ In this vein, the application of the PWD would require a constant balancing act to reconcile two irreconcilable goals. This interpretation was generally favoured by the CJEU in *Laval* where it was held that the PWD aimed, primarily, to ensure 'a climate of fair competition', and, only secondly, to provide 'minimum protection' for posted workers.⁴⁰ The 'climate of fair competition' was, thus, understood as removing barriers to the free movement of services, which allowed the Court of Justice to employ a strict interpretation of the PWD in *Laval*.

A. 'Social Dumping'

On the other hand, an alternative meaning of the twofold aim of the PWD is one underpinned by the controversial notion of 'social dumping'. The word 'dumping' is linked to economics and international trade, where it has been used to 'define any practice which consists in selling abroad (as exports) products or services below their price on the domestic market'.⁴¹ Regulation 1225/2009 on the protection against dumped products from third countries considers a product dumped 'if its export price to the Community is

³⁸ Directive 96/71/EC, Recital 5.

³⁹ P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 CML Rev 571, 591-592.

⁴⁰ *Laval*, paras 74-76.

⁴¹ Daniel C. Vaughan-Whitehead, *EU Enlargement versus Social Europe ? The Uncertain Future of the European Social Model* (Edward Elgar 2003) 324.

less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country'.⁴² Even within the EU the removal of barriers to the single market did not go smoothly, as in certain countries agricultural produce coming from other Member States had been considered unfairly cheap, hence the famous case of French farmers destroying Spanish strawberries and Belgian tomatoes.⁴³

Analogically, 'social dumping' could be described as denoting cost competition via unfairly low prices owed to cheap labour. Bernaciak observes that the notion of 'social dumping' seems to have grown in popularity in the period leading to the conclusion of the North American Free Trade Agreements (NAFTA) when Canadian and US trade unions expressed concerns over Mexico's lower wages and social protection standards.⁴⁴ Similar discussions on 'social dumping' intensified following the creation of the World Trade Organisation (WTO) in 1994.⁴⁵

Yet, it appears that fears over unfair cost competition based on lowering wages and labour standards were present in the European Communities even earlier in relation to the principle of the free movement of workers. Goodhart claims that the notion of 'social dumping' was 'as old as the free market itself',⁴⁶ and Barnard argues that in the context of European integration concerns over 'social dumping' were present already in the 1956 Spaak report which was instrumental to the adoption of the Treaty of Rome.⁴⁷

Indeed, concerns over unfair competition driven by low wages appear to be intrinsically linked to international organisations where economic integration does not go hand in hand with harmonisation of social policy and labour standards. This was reflected in a 1974 judgment in a dispute between the Commission and France, where the CJEU ruled that the Treaties protected from 'unfavourable consequences which could

⁴² Council Regulation 1225/2009/EC on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51.

⁴³ Case C-265/95 *Commission v French Republic* [1997] ECR I-06959.

⁴⁴ Magdalena Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?' (ETUI Working Paper 2012.06) 7-8. See further Christopher L. Erickson and Sarosh Kuruvilla, 'Labor Costs and the Social Dumping Debate in the European Union' (1994) 48(1) *Indus & Lab Rel Rev* 28.

⁴⁵ Bernaciak (n 44) 8-9.

⁴⁶ David Goodhart, 'Social Dumping Within the EU' in David Hine and Hussein Kassim, *Beyond the Market. The EU and National Social Policy* (Routledge 1998) 80, as cited in Bernaciak (n 44) 7.

⁴⁷ Barnard, 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties. Looking Back and Thinking Forward* (Hart Publishing 2009) 312-317.

result from the offer or acceptance by nationals from other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law.’⁴⁸ Vaughan-Whitehead defines ‘social dumping’ as:

(...) any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also playing a determinant role in this process.⁴⁹

The above seems to be a comprehensive and convincing definition emphasising the fact that ‘social dumping’ is more than merely the result of differences in wages occurring between different countries due to a combination of macroeconomic and geopolitical factors.⁵⁰ Rather, ‘social dumping’ implies an element of ‘bad faith’ on the part of undertaking taking advantage of gaps in the existing legislation.

The notion of ‘social dumping’, which has never been defined in EU law, sometimes appears in official EU documents.⁵¹ With regard to the posting of workers, it featured in the trade union discourse from the outset of the legislative process preceding the adoption of the PWD.⁵² Back then, the primary concern were migrant workers from the Southern Member States following Spain and Portugal’s accession to the EC, which was echoed in the above discussed cases such *Rush Portuguesa* or *Finalarte*, all concerning Portuguese workers. In France, the proposal for the PWD was framed by the media as an antidote to ‘social dumping’ by Portuguese companies.⁵³

⁴⁸ Case 167/73 *Commission v French Republic* [1974] ECR 359, para 45, as cited in Evju (n 29) 153.

⁴⁹ Vaughan-Whitehead (n 41) 325.

⁵⁰ See other definitions of ‘social dumping’ in Gerlinde Sinn and Hans-Werner Sinn, *Jumpstart: The Economic Unification of Germany* (MIT Press 1994), as cited in Bernaciak (n 44) 20; Hugh Mosley, ‘The “Social Dumping” Threat of European Integration: A Critique’ in Brigitte Unger and Franz van Waarden (eds), *Convergence or Diversity. Internationalization and Economic Policy Response* (Avebury 1995), as cited in Bernaciak (n 44) 20; Jens Alber and Guy Standing, ‘Social Dumping, Catch-up, or Convergence? Europe in a Comparative Global Context’ (2000) 10(2) *J Eur Soc Policy* 99.

⁵¹ See European Parliament, ‘Report on Social Dumping in the European Union’ (2016) 2015/2255(INI).

⁵² Cremers, Dølvik and Bosch (n 34); Bernaciak (n 44).

⁵³ ‘Pour Éviter le Dumping Social La CEE Prépare une Directive pour Protéger les Travailleurs Temporaires Européens’ (*Le Monde*, 21 June 1991).

In this vein, it would seem that the term ‘ensuring a climate of fair competition’ constituting one of the elements of the twofold aim of the PWD, as prescribed in its preamble, could also imply protection from unfair competition. This appeared to be the European Economic and Social Committee (EESC)’s reading of the proposed Directive. The EESC struggled with the twofold aim of the PWD pointing out that the ‘Directive does not have a coherent aim, in that it is based on freedom to provide services and elimination of unfair competition and also contains many provisions relative to worker protection.’⁵⁴

B. *Laval* and ‘Social Dumping’

The lack of clarity regarding the aim of the PWD in the context of ‘social dumping’, as noted by the EESC, later resurfaced in the famous *Laval* judgment. The dispute between a Latvian service provider and the Swedish trade unions occurred months after the biggest enlargement in the EU’s history. Accession of 10 new countries, the majority of which had recently reemerged from behind the ‘Iron Curtain’, was greeted both with excitement and apprehension by the ‘old’ EU-15.⁵⁵ The Union gained 75 million citizens, a lot of whom were, potentially, both consumers and workers. The wages in Eastern Europe at the time were very low which had far-reaching consequences for the single market.⁵⁶ To mitigate a potential influx of cheap workforce originating from low-wage economies of the ‘new’ countries, the majority of the ‘old’ EU-15 suspended the free movement of workers for a number of years.⁵⁷

⁵⁴ EESC, ‘Opinion on the Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ [1992] OJ C 49/41, para 2.1.2.

⁵⁵ Bernaciak (n 44) 12-16. See further Uladzislau Belavusau, ‘The Case of *Laval* in the Context of the Post-Enlargement EC Law Development’ (2009) 9(12) Ger Law J 2279, 2287-2290; Bottero, *Posting of Workers in EU Law* (n 14) 231-233.

⁵⁶ Vaughan-Whitehead (n 41) 46-47. See also Dougan, ‘A Spectre is Haunting Europe Free Movement of Persons and the Eastern Enlargement’ in Christophe Hillion (ed), *Enlargement of the European Union: A Legal Approach* (Hart Publishing 2004).

⁵⁷ Belavusau (n 55) 2293-2295; Jimmy Donaghey and Paul Teague, ‘The Free Movement of Workers and Social Europe: Maintaining the European Ideal’ (2006) 37(6) Ind. Relat 652, 653-655; Torben Krings, ‘A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour’ (2009) 15(1) Eur J Ind Relat 49.

Since there were no temporary restrictions on the free movement of services, the PWD offered undertakings from the ‘new’ Member States access to the single market for workers who otherwise could not have taken up employment in the ‘old’ EU during the transitional period.⁵⁸ Yet, Sweden, where the dispute in *Laval* took place, was among the three Member States which had not introduced temporary restrictions on the free movement of workers (alongside the United Kingdom and Ireland).⁵⁹ Therefore, it seems that recourse to the PWD in *Laval* was owing to economic considerations of the Latvian employer who subsequently did not have to comply with the Swedish collective agreements.

Advocate General Mengozzi in his opinion preceding the *Laval* judgment offered an interpretation of the twofold aim of the PWD in which he argued that the two elements specified in the Directive’s preamble were mutually reinforcing and not contradictory. The AG understood the ‘climate of fair competition’ requirement to denote not striking down the barriers to the single market, but ensuring equal treatment between foreign and domestic undertakings in the fight against ‘social dumping’.⁶⁰ Such an understanding of the preamble enabled AG Mengozzi to conclude that both aims of the PWD had to be ‘pursued concurrently’.⁶¹ Indeed, forcing foreign undertakings to comply with the ‘host’ country’s legislation to protect posted workers automatically weakens the competitive advantage that these undertakings would have gained from lower labour standards.

C. *Dobersberger* and ‘Social Dumping’

Many years after *Laval*, when the CJEU was dealing with the applicability of the PWD to Hungarian workers onboard Austrian trains in *Dobersberger*, the Advocate General Szpunar offered yet another take on the aim of the PWD.⁶² The AG saw its objective as

⁵⁸ See Houwerzijl and Verschuere (n 11) 78.

⁵⁹ Barnard, ‘*Viking* and *Laval*: An Introduction’ (2007) 10 CYELS 463, 463-464. See also Belavusau (n 55) 2280.

⁶⁰ *Laval*, Opinion of AG Mengozzi, para 251. See Reich (n 17) 150.

⁶¹ *Laval*, Opinion of AG Mengozzi, para 171.

⁶² Case C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* EU:C:2019:1110. See further Rocca, ‘One Train! (But Different Working Conditions)’ (2020) 50(3) *Arbeidsrechtelijke Annotaties* 71; Andrea Iossa, ‘Posting Highly Mobile Workers: Between Labour Law Territoriality and Supply Chains of Logistics Work — A Critical Reading of *Dobersberger*’ (2021) *ILJ* (published online on 17 May 2021);

threefold: firstly, to promote transnational provision of services; secondly, to ensure a climate of fair competition; thirdly, to guarantee the respect for the rights of workers.⁶³ Like P. Davies years earlier, the AG Szpunar argued that the above aims were ‘diametrically opposed’ and, consequently the PWD should be considered ‘a measure which seeks to reconcile the opposing objectives of the freedom to provide services and the protection of the rights of workers’.⁶⁴ On this note, the AG Szpunar put forward a controversial thesis suggesting that by guaranteeing respect for the workers’ rights in the PWD’s preamble, the EU legislator meant not only posted workers, but also the workers of the ‘host’ country.⁶⁵

While this interpretation may not be convincing, on a broader note it is worth pointing out that the analysis of the PWD led both Advocates General, Mengozzi in *Laval*, and Szpunar in *Dobersberger*, to believe that the fight against ‘social dumping’ had been inherent to the PWD’s design. Further insights into the aim of the amended PWD discussed by the CJEU in Hungary and Poland’s actions challenging the legality of the 2018 reform will be evaluated in Chapter 3.⁶⁶

III. Legal Basis of the PWD and the Link to the Free Movement of Services

The PWD’s legal basis were Articles 57(2) and 66 EEC (currently Articles 53(1) and 62 TFEU respectively). While the former Article enables the EU to issue Directives to facilitate the taking up and pursuit of activities as self-employed persons, Article 62 TFEU extends the application of the former provision to the free movement of services.⁶⁷ This appears a rather surprising choice given that the PWD does not apply to self-employed persons. Indeed, the EESC in its opinion preceding the adoption of the PWD

Marta Lasek-Markey, ‘Sufficient Connection Test and the Definition of a Posted Worker: Unexpected Lessons Learnt from *Dobersberger*’ (2021) 46(3) ELRev 395.

⁶³ *Dobersberger*, Opinion of AG Szpunar, para 23.

⁶⁴ *ibid*, paras 23-24.

⁶⁵ *ibid*, para 32.

⁶⁶ Cases C-620/18 *Hungary v Parliament and Council* EU:C:2020:1001, paras 121-123; C-626/18 *Republic of Poland v Parliament and Council* EU:C:2020:1000, paras 56-58. See Chapter 3, s II.

⁶⁷ P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems’ (n 39) 572.

questioned the choice of Article 57(2) for the legal basis of the proposed Directive and considered it ‘inappropriate’.⁶⁸ P. Davies considered the choice of the legal basis as a tactical move as, contrary to measures adopted on the basis of the Treaty provisions on social policy, legislation in the area of the free movement of services required merely a qualified majority in the Council to bind all the Member States.⁶⁹

25 years after the adoption of the PWD, Articles 53(1) and 62 TFEU still stand as its legal basis. What is more, the EU relied on the same two Articles when adopting the 2018 reform of the PWD.⁷⁰ The discussion around the suitability of Articles 53(1) and 62 TFEU as the legal basis for measures concerning posted workers returned when Hungary and Poland challenged the legality of the 2018 revision before the Court of Justice.⁷¹ The CJEU’s response to this question will be discussed in Chapter 3.

A. Relationship with Article 56 TFEU

While the specific choice of the above Treaty provisions remains somewhat confusing, on a broader note it is clear that, in line with *Rush Portuguesa*, the PWD’s legal basis is linked to the principle of the free movement of services. While Article 56 TFEU generally prohibits restrictions on the freedom to provide services, the Court of Justice allows for certain exceptions where a restriction on the free movement of service may be justified.⁷² In *Mazzoleni*, the CJEU clarified that the only justifiable restrictions were ‘overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided’.⁷³ Among such overriding reasons, according to the Court of Justice, are the protection of workers and ensuring access to social security for workers.⁷⁴

⁶⁸ EESC, ‘Opinion...’ (n 54).

⁶⁹ P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems’ (n 39) 572.

⁷⁰ Chapter 3, s II D 1.

⁷¹ *Hungary v Parliament and Council* [2020], paras 40-41; *Poland v Parliament and Council* [2020], paras 45-46. See also *Hungary v Parliament and Council*, Opinion of AG Campos Sánchez-Bordona, para 75. See further Chapter 3, s II.

⁷² See *Webb*, para 17; *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-04221, para 15; *Vander Elst*, para 16.

⁷³ *Criminal proceedings against André Mazzoleni and others* [2001] ECR I-2213, para 25.

⁷⁴ *Mazzoleni*, para 27; *Finalarte*, para 33.

In this vein, having laid down a number of basic labour law standards of the ‘host’ state to be applied mandatorily to posted workers, the PWD appears to be another justifiable restriction on Article 56 TFEU. The extent of justifiability and proportionality of this restriction was further investigated by the CJEU in the ‘*Laval quartet*’, and later resurfaced on the occasion of the 2018 revision of the PWD.⁷⁵

In *Laval*, the CJEU did not explicitly confirm that the PWD in itself was a derogation from Article 56 TFEU, but rather that the aims pursued by the PWD could constitute overriding reasons justifying a restriction on Article 56 TFEU. Notably, the Court of Justice agreed with the AG Mengozzi that the exercise of collective rights ‘for the protection of the workers of the host State against possible social dumping’ might be an overriding reason of public interest.⁷⁶ On this note, the AG Szpunar in *Dobersberger* contended that *Laval* brought a ‘paradigm-shift’ by adding the notion of ‘social dumping’ – without defining it – to the overriding reasons of public interest that could potentially justify a restriction on Article 56 TFEU.⁷⁷ Admittedly, this was a limited shift, for in *Laval* the CJEU held the collective action at issue to have been an unjustified restriction to the free movement of services, and ‘social dumping’ as a possible overriding reason has not since resurfaced in the case law.

What one can learn from the ‘*Laval quartet*’ is that the PWD is not an unlimited derogation from Article 56 TFEU.⁷⁸ Rather, like other overriding reasons of public interest, the measures introduced by the PWD are also subject to the proportionality test.⁷⁹ Consequently, the EU legislator has to be mindful of the potential hurdle that it may face before the CJEU should it attempt to further increase the protection of workers without changing the legal basis of the PWD. This issue resurfaced when the CJEU was asked to carry out a proportionality test of the 2018 revision of the PWD when dealing with Hungary and Poland’s actions for judicial review.⁸⁰ The outcome of this test will be discussed in Chapter 3.

⁷⁵ See *Hungary v Parliament and Council* [2020] and *Poland v Parliament and Council* [2020].

⁷⁶ *Laval*, para 103. See Belavusau (n 55) 2290.

⁷⁷ *Dobersberger*, Opinion of AG Szpunar, para 29.

⁷⁸ On the relationship with Article 56, see also *Commission v Luxemburg* and *Rüffert*.

⁷⁹ *Laval*, para 94. See also *Viking*, para 46; Barnard, ‘*Viking and Laval: An Introduction*’ (n 59) 467-468; Novitz, ‘A Human Rights Analysis of the *Viking and Laval* Judgments’ (2007) 10 CYELS 541, 550-551.

⁸⁰ See *Hungary v Parliament and Council* [2020] and *Poland v Parliament and Council* [2020]. See further Chapter 3, s II.

B. Challenging the Link to the Free Movement of Services

Looking at the PWD through the lens of Article 56 TFEU would to some extent justify the limited protection of the ‘host’ state available to posted workers. Restrictions on the free movement of services are only justifiable in exceptional circumstances and, in the absence of the PWD, the posting of workers would be governed by the Rome I Regulation. As will be argued in the next subsection, this would subject most posted workers entirely to the ‘home’ state legislation.

Nevertheless, it is not sufficiently clear why the CJEU linked posted workers to the free movement of services instead of the free movement of workers in the first place. Posted workers are, after all, migrant workers and the free movement of workers constitutes one of the four freedoms on which the single market has been built. Article 45 TFEU prohibits discrimination on the grounds of nationality towards workers who exercise their freedom to move and take up employment within the EU. Furthermore, Regulation 492/11/EU grants EU citizens who exercise this freedom the right to equal treatment in the ‘host’ state not only with regard to working conditions, but also to social security, collective rights etc.⁸¹

Posted workers have been explicitly excluded from the scope of Article 45 TFEU by the Court of Justice in *Finalarte* and, consequently, unlike other types of migrant workers, they cannot avail of the right to equal treatment. Their employment contract remains subject to the ‘home’ country’s legislation and their social security contributions for the first 24 months of posting are paid in the ‘home’ country too. This is why Verschueren contends that by making a choice between the two fundamental freedoms, the CJEU in *Rush Portuguesa* and subsequent case law ‘distanced itself from traditional principles of labour law, belonging to what is referred to as the European social model.’⁸² On this note, it could be argued that by linking posted workers to Article 56 TFEU the Court of Justice deprived them of a much broader scope of labour law protection guaranteed under Article 45 TFEU, and the EU legislator followed suit by preserving this distinction in the PWD.

⁸¹ Parliament and Council Regulation 492/2011 (EU) on freedom of movement for workers within the Union [2011] OJ 2011 L 141/1, arts 7-9. See further Verschueren, ‘Cross-Border Workers...’ (n 16) 177.

⁸² Verschueren, ‘Cross-Border Workers...’ (n 16) 177.

The CJEU's reasoning behind linking posted workers to the free movement of services in *Rush Portuguesa* appears somewhat unclear. As discussed above, one trait distinguishing posted workers from other labour migrants, according to the Court of Justice, was the fact that the former did not seek permanent access to the 'host' country's labour market. Yet, Verschueren reminds us that this was 'diametrically opposed' to the CJEU's established case law which considered the motives prompting workers to seek employment in another Member State to be irrelevant.⁸³ The decision to link the posting of workers to Article 56 TFEU appears all the more surprising in light of the fact that the outcome of *Rush Portuguesa*, allowing the 'host' Member States to extend national legislation onto posted workers, was generally 'worker-friendly'.

In hindsight, it seems that the link between posted workers and the free movement of services might have emerged from the way in which the referring Court had framed the issue by asking about compliance with the Treaty provisions on the free movement of services.⁸⁴ This would be justifiable provided that in practice posted workers had a strong connection to the employer established in the 'home' country. As will be shown throughout this thesis, however, this connection between the workers and the posting company often transpires to be tenuous in practice.

C. Relationship with the Rome I Regulation

As argued above, the original 1996 PWD had a 'conflict of laws' dimension insofar as it provided guidelines on which country's laws should be applicable to the posted workers' employment contract.⁸⁵ Yet, this matter had already been regulated by the 1980 Rome Convention, as replaced by the Rome I Regulation. Article 4(1) of Rome I Regulation provides that, in the absence of choice, a contract for the provision of services shall be

⁸³ Cases C-53/81 *D. M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para 21; C-237/94 *John O'Flynn v Adjudication Office* [1996] ECR I-02617, para 21; C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, para 55, as cited in Verschueren, 'Cross-Border Workers...' (n 16) 176.

⁸⁴ *Rush Portuguesa*, para 5.

⁸⁵ Evju (n 29) 155-158. See also Houwerzijl and Verscheuren (n 11) 105-110; Van Hoek and Houwerzijl, 'Where do EU Mobile Workers Belong, According to Rome I and the (E)PWD?' in Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong* (Intersentia 2016).

governed by the law of the country where the service provider has his habitual residence. Article 4(2) constitutes an exception from the above rule where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with the other country. And if the law cannot be determined using the above rules, the contract shall be governed by the law of the country with which it is most closely connected. In short, if it was not for the PWD, the Rome I Regulation would, as a general rule, subject posted workers to the employer's 'home' country legislation.⁸⁶

In this vein, it appears that the EU legislator had always considered the PWD as a permissible derogation from private international law. Notably, the proposal for the Rome I Regulation had identified Article 3(1) PWD as one of special conflict-of-law rules that would permit a derogation from the future Regulation.⁸⁷ Nevertheless, the exact relationship between the two legal instruments was for a long time unclear,⁸⁸ as Rome I Regulation allows for two types of exceptions laid down in Articles 9(2) and 23. According to Article 9(2), the Regulation shall not 'restrict the application of the overriding mandatory provisions of the law of the forum'. Such overriding mandatory provisions allow Member States to safeguard their 'public interests, such as its political, social or economic organisation'.⁸⁹ The other exception is laid down in Article 23 by clarifying that the Rome I Regulation shall not prejudice the application of other EU law provisions which lay down conflict-of-laws rules.

The CJEU was confronted with this issue 25 years after the adoption of the PWD, in Hungary and Poland's actions for judicial review of Directive 2018/957.⁹⁰ In these judgments, the Court of Justice clarified that the PWD constituted a *lex specialis* within the meaning of Article 23 of the Rome I Regulation, a special conflict-of-laws rule which took precedence over the Regulation.⁹¹ The CJEU's decision appears to reinforce the

⁸⁶ Simon Deakin, 'Regulatory Competition after *Laval*' (2007) 10 CYELS 581, 593-594.

⁸⁷ Commission, 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)' COM(2005) 650 final. See also *Hungary v Parliament and Council* [2020], Opinion of the AG Campos Sánchez-Bordona, para 196.

⁸⁸ Houwerzijl and Verschueren (n 11) 105-114.

⁸⁹ Rome I Regulation, art 9(1).

⁹⁰ See further Verschueren, 'The CJEU Endorses the Revision of the Posting of Workers Directive' (2021) ERA Forum.

⁹¹ *Hungary v Parliament and Council* [2020], para 180; *Poland v Parliament and Council* [2020], para 134.

conflict-of-laws dimension of the PWD even after the 2014-2018 reforms which, as will be argued in Chapter 3, have significantly strengthened the worker protection element of the PWD's twofold aim.

D. Relationship with the Services Directive

In 2004, the Commission put forward a proposal for a Directive regulating services in the internal market which was going to impact the PWD.⁹² The first draft, often referred to as the 'Bolkestein draft' contained a controversial 'country of origin principle' according to which all service providers within the EU would remain subject to the laws of their country of establishment.⁹³ While this rule was not going to affect posted workers for whom the Bolkestein draft had envisaged a derogation,⁹⁴ the proposed Directive would have compromised the PWD's provisions related to the cooperation between the Member States and information obligations laid down in Article 4 PWD.⁹⁵ The proposal coincided with the 2004 enlargement and sparked criticism, including from the European Trade Union Confederation (ETUC) which raised concerns that the proposed measure would further drive 'social dumping'.⁹⁶

Consequently, the 2006 Services Directive contains neither the controversial 'country of origin' principle, nor the originally proposed Articles 25-26 related to the posting of workers.⁹⁷ The PWD is still mentioned in the Services Directive, firstly, in Article 3(1) which generally gives priority to the provisions of the PWD and, secondly, as a specific derogation in Article 17(2). Barnard attributes this 'cross posting' to 'poor

⁹² Commission, 'Proposal for a Council and Parliament Directive on services in the internal market' COM(2004)2 final/3.

⁹³ *ibid*, art. 16. See Barnard, 'Unravelling the Services Directive' (2008) 45(2) CML Rev 323, 328; Phil Syrpis and Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to Their Reconciliation' (2008) 33(3) ELJ 411, 417.

⁹⁴ Commission, 'Proposal for a Regulation...' (n 87) art 17.

⁹⁵ *ibid*, art 34. See Barnard, 'Unravelling the Services Directive' (n 93) 329.

⁹⁶ Barnard, 'Unravelling the Services Directive' (n 93) 329. See also Bernaciak, 'Polish Trade Unions and Social Dumping Debates: Between a Rock and a Hard Place' (2016) 22(4) Transfer 505.

⁹⁷ See further Gareth Davies, 'The Services Directive: Extending the Country of Origin Principle, and Reforming Public Administration' (2007) 32(2) ELRev 232.

drafting'⁹⁸ and to an 'awkward mismatch' between the first draft which contained the 'country of origin' principle and derogations from it, and to the final version from which the 'country of origin' principle had been removed but the derogations remained.⁹⁹ In fact, according to Barnard, the EU legislation mentioned in Article 3(1) of the Services Directive as general derogations, such as the PWD, 'may actually work in conjunction with the Services Directive rather than in conflict with it'.¹⁰⁰ Indeed, many years after the adoption of the Services Directive, the potential conflict with the PWD has not materialised in litigation and, thus, appears rather theoretical.

IV. Scope of Application of the PWD

The definition of a posted worker was laid down in Article 2 PWD, and despite the two revisions, has remained essentially unchanged since 1996. It provides that a posted worker is a 'worker', as defined in the domestic law of the 'host' state,¹⁰¹ who, for a limited period, 'carries out his [or her] work in the territory of a Member State other than the State in which he [or she] normally works.'¹⁰² While concise, this definition contains a number of important elements of the posting arrangement, which will be unpacked below.

The first problematic issue is a discrepancy between Article 2 PWD and Article 12 of Regulation 883/2004. While the PWD applies only to workers and the self-employed are, thus, excluded from its scope,¹⁰³ Article 12(2) of Regulation 883/2004 does provide the option for self-employed persons to post themselves to another Member State.¹⁰⁴ On this note, in *Banks*,¹⁰⁵ a British opera singer performing a short-time contract in the Belgian Royal Theatre alongside a number of other artists contested the fact that

⁹⁸ Barnard, 'Unravelling the Services Directive' (n 93) 324.

⁹⁹ *ibid*, 360.

¹⁰⁰ *ibid*, 347.

¹⁰¹ Directive 96/71/EC, art 2(2).

¹⁰² *ibid*, art 2(1).

¹⁰³ Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, 'Posting of workers. Report on A1 Portable Documents issued in 2018' (European Commission 2019) 14.

¹⁰⁴ Pennings (n 14) 119. See also Bottero (n 14) 47-48.

¹⁰⁵ Case C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* [2000] ECR I-2005, as cited in Pennings (n 14) 119.

Belgian social security contributions had been deducted from their wages as though they had been regular employees in Belgium.¹⁰⁶ The artists produced E 101 documents (the A1's predecessor¹⁰⁷) certifying that they were self-employed and, during their contract in Belgium, remained subject to the British social security system¹⁰⁸ and, thus, the CJEU held that the certificates issued by the sending country were binding also in Belgium.¹⁰⁹

A. Duration of Posting

The first element of the above definition is the temporal dimension of posting. As discussed above, the Court of Justice in *Rush Portuguesa* drew the distinction between posted workers and migrant workers who fall within the scope of Article 45 TFEU based, *inter alia*, on the temporary nature of the posting arrangement. This temporariness, according to the CJEU, did not stem from a specific timeframe, but rather from the workers' intention to return to the 'home' country once the assignment abroad was completed. This is reflected in Article 2(1) PWD stating that the posting period should be *limited*, yet does not specifically set a lower or upper limit, which has a number of consequences.

Firstly, the lack of a maximum duration of a posting has given rise to postings lasting a number of years, whereby workers have *de facto* integrated into the 'host' country's labour market and the only feature distinguishing them from Article 45 TFEU migrants was their job contract.¹¹⁰ As will be discussed in Chapter 3, this issue has been largely addressed by the 2018 reform.¹¹¹ While Directive 2018/957 has not modified the definition of a posted worker as such, it has established a maximum duration of applying Article 3(1) PWD, after which posted workers will be granted the right to equal treatment with regard to labour law protection (but not social security).¹¹²

¹⁰⁶ *Banks*, para 2.

¹⁰⁷ On the A1 documents, see Chapter 3, s I B 4.

¹⁰⁸ *Banks*, para 5.

¹⁰⁹ *ibid*, para 48. See further Pennings (n 14) 119-121.

¹¹⁰ See Commission, Impact Assessment Accompanying the document 'Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' [2016] SWD(2016) 52 final, 17.

¹¹¹ See Chapter 3, s II D 4.

¹¹² Directive 2018/957/EU, art 1(2)(b) read in conjunction with Recitals 9-11.

Conversely, the lack of a lower limit to posting has not been addressed, which over time has led to a growing controversy, especially with respect to highly mobile workers whose place of work is often *immaterial*. The only mandatory exception from the PWD linked to the duration of postings is for the initial assembly and/or first installation of goods where the posting does not exceed eight days.¹¹³ Furthermore, Member States in the national transposition measures have – under certain circumstances – the option to exempt postings not exceeding one month, or where the amount of work is not significant, from the mandatory rules concerning pay and / or annual leave.¹¹⁴ Otherwise, there is nothing in the text of the PWD that would exclude short trips to the ‘host’ state from its scope, and the Commission supports the view that the rules on the posting of workers should apply also to activities of short duration.¹¹⁵

B. Sufficient Connection to the ‘Host’ Member State’s Territory

This issue was reflected in the CJEU’s judgment in *Dobersberger*, where the Austrian authorities had fined an employer for failing to comply with declaration requirements stemming from the Enforcement Directive with regard to Hungarian workers onboard Austrian trains.¹¹⁶ Those workers began and ended their cleaning or catering shifts in Hungary, but the work was carried out onboard trains which were crossing the Austrian territory. The employer argued that the workers in question were not posted workers, and the Court of Justice agreed. Relying on the above mentioned exception for the initial installation and / or assembly of goods, the CJEU concluded that the workers at issue lacked ‘a sufficient connection with the territory of the ‘host’ Member State to be classified as posted workers.’¹¹⁷

While the concept of the ‘sufficient connection’ had not been explained in *Dobersberger*, the CJEU took the opportunity to further expand on it in *FNV v Van den*

¹¹³ Directive 96/71/EC, art 3(2), and Recital 15. See further P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law’ (n 39) 583.

¹¹⁴ Directive 96/71/EC, art 3(3), art 3(4), art 3(5), and Recital 16.

¹¹⁵ Commission, ‘Practical Guide on Posting’ (2019) 9. See further Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, ‘Posting of Workers. Collection of Data from the Prior Notification Tools. Reference Year 2019’ (European Commission 2021) 25-29.

¹¹⁶ *Dobersberger*, paras 12-13.

¹¹⁷ *Dobersberger*, para 31. See further Iossa (n 62) 11-12; Lasek-Markey (n 62) 401-402.

Bosch.¹¹⁸ The Court of Justice clarified that to establish the degree of connection ‘an overall assessment of all the factors that characterise the activity of the worker concerned’ was required.¹¹⁹ These factors include the nature of the activity, the degree of connection between the activity and the territory of the ‘host’ Member State, and the proportion of this activity in the entire service.¹²⁰

In this context, one has to be reminded that many years earlier, in *Rush Portuguesa* and *Finalarte*, the CJEU excluded posted workers from the scope of Article 45 TFEU based on their lack of intention to integrate the labour market of the ‘host’ state. It would, therefore, appear that the Court of Justice perceived the posted workers’ connection to the ‘host’ country as loose by definition. Consequently, requiring these workers to demonstrate a degree of sufficient connection appears to be a rather surprising development coming from the CJEU given that the design of the PWD essentially precludes posted workers from developing such a connection in contrast to those migrant workers covered by Article 45 TFEU who have more opportunities to integrate in the ‘host’ country. The notion of ‘close connection’ is related to private international law and appears in the Rome I Regulation,¹²¹ but even there it is only relied upon as a last resort, where all other methods of determining the applicable law in the absence of choice fail.¹²² Conversely, requiring all posted workers to prove a sufficient connection to the ‘host’ state seems to be an unreasonably strict test.

¹¹⁸ Case C-815/18 *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others* EU:C:2020:976.

¹¹⁹ *ibid*, para 51.

¹²⁰ Lasek-Markey, ‘*FNV v Van den Bosch*, Or the Thin Line Between the Free Movement of Services and “Social Dumping” in the Never-ending Story of Posted Workers’ (European Law Blog, 8 December 2020) <https://europeanlawblog.eu/2020/12/08/fnv-v-van-den-bosch-or-the-thin-line-between-the-free-movement-of-services-and-social-dumping-in-the-never-ending-story-of-posted-workers/> accessed 1 August 2021. See also Fieke Van Overbeeke, ‘The Gordian Knot is Cut – CJEU Rules that the Posting of Workers Directive is Applicable to Road Transport’ (Conflict of Laws.net, 20 December 2020) <https://conflictoflaws.net/2020/the-gordian-knot-is-cut-cjeu-rules-that-the-posting-of-workers-directive-is-applicable-to-road-transport/> accessed 26 July 2021.

¹²¹ Regulation 593/2008, art 4(4). See further Van Hoek and Houwerzijl, ‘Where do EU Mobile Workers Belong...’ (n 85) 231-235.

¹²² On the concept of sufficient connection in the CJEU’s case law, see further case C-20/12 *Elodie Giersch and others v Great Duchy of Luxembourg* EU:C:2013:411, para 63. See also Lasek-Markey, ‘Sufficient Connection Test...’ (n 62) 401-402.

On another note, Article 2(1) PWD specifies that posted workers should carry out work ‘in the territory’ of the ‘host’ Member State and the Court of Justice appears to agree that workers have to physically move to the receiving country in order to qualify as posted. While the CJEU has not explicitly confirmed this, in *Bundesdruckerei* it ruled that contractors carrying out digital services remotely and based entirely in their ‘home’ state could not be considered as posted to the ‘host’ country.¹²³

C. Transport Workers

The applicability of the PWD to transport workers was, for a long time, another contentious issue considered to be in the ‘grey area’ due to Article 1(2) PWD which excludes the seagoing personnel of merchant navy undertakings from its scope. In addition, transport services are regulated by sector-specific Articles 90-100 TFEU, while the PWD is based on Articles 53(1) and 62 TFEU. In this vein, some argued that all transport services should fall outside the scope of the PWD.¹²⁴ The issue was resolved when the EU adopted Directive 2020/1057 which has explicitly extended the scope of application of the rules on posting onto the road transport sector.¹²⁵ Consequently, the CJEU in *FNV v Van den Bosch* clarified that the definition of a posted worker did not mention any restrictions as to the worker’s sector of activity except the seagoing personnel.¹²⁶

¹²³ Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* EU:C:2014:2235.

¹²⁴ *Hungary v Parliament and Council* [2020], paras 161-162; *Poland v Parliament and Council* [2020], paras 146-147. See also *Dobersberger*, Opinion of AG Szpunar, paras 38-42.

¹²⁵ Directive (EU) 2020/1057 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 [2020] OJ L 249/49, Recital 7. See further Van Overbeeke, ‘Do We Need a New Conflict-of-Laws Rule for Labour in the European Road Transport Sector? Yes We Do’ in Jan Buelens and Marc Rigaux (eds), *From Social Competition to Social Dumping* (Intersentia 2016).

¹²⁶ *FNV v Van den Bosch*, paras 32-33.

D. Three Posting Scenarios

To supplement the definition laid down in Article 2(1) PWD, Article 1(3) PWD sets out three different posting scenarios.¹²⁷ The first scenario is where an undertaking based in one Member State provides a service in another Member State and, for this purpose, moves its own workers to carry out the work.¹²⁸

The second posting scenario occurs where workers employed by the same group of undertakings travel between different branches of the company in different Member States.¹²⁹ This posting scenario may sometimes overlap with Directive 2014/66 concerning third-country nationals in the framework of an intra-corporate transfer (hereafter: ICT Directive).¹³⁰ The difference is that while the former instrument sets out the conditions of entry and residence of third-country nationals coming from outside the EU, the PWD applies to EU nationals and third-country nationals already lawfully working and residing in the EU.¹³¹ According to the ICT Directive, intra-corporate transferees admitted to the EU shall enjoy ‘at least equal treatment’ with workers covered by the PWD.¹³²

Costello and Freedland describe intra-corporate transferees as ‘the capital’s handmaidens’¹³³ and the legal status of this category of third-country nationals bears remarkable resemblance to that of posted workers.¹³⁴ According to Costello and Freedland, this is due to the fact that the ICT Directive mirrors the ‘posted workers anomaly’.¹³⁵ In fact, prior to the 2018 reform of the PWD the situation of intra-corporate

¹²⁷ See P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law (n 39) 576; Kolehmainen (n 15) 84; Van Hoek and Houwerzijl, ‘Where do EU Mobile Workers Belong...’ (n 85) 240-241; Bottero (n 14) 39-42. See further De Wispelaere, De Smedt and Pacolet (n 115) 22-24.

¹²⁸ Directive 96/71/EC, art 1(3) (a).

¹²⁹ *ibid*, art 1(3) (b).

¹³⁰ Council and Parliament Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1.

¹³¹ *ibid*, art 2(2) (c) and Recital 37.

¹³² *ibid*, art 18(1) and Recital 15.

¹³³ Cathryn Costello and Freedland, ‘Seasonal Workers and Intra-corporate Transferees in EU Law. Capital’s Handmaidens?’ in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era* (Hart Publishing 2016).

¹³⁴ See also Hayes and Novitz (n 15) 16.

¹³⁵ Costello and Freedland (n 133).

transferees was more favourable than that of posted workers since the former have always enjoyed the right to equal treatment with EU-nationals occupying comparable positions with regard the remuneration. This is particularly striking given the fact that posted workers are primarily EU nationals who, in theory, should enjoy the protection of Article 18 TFEU which prohibits discrimination on the grounds of nationality among EU citizens.

The third posting scenario is where an employer in the receiving country hires workers via a temporary work agency established in another Member State.¹³⁶ This last scenario gave rise to concerns over the relationship between the PWD and the Temporary Agency Work Directive.¹³⁷ While the former instrument initially limited the labour law protection of workers posted abroad via a temporary agency to a set of mandatory rules of the ‘host’ state laid down in Article 3(1) PWD, the latter contains the principle of equal treatment between agency workers and those recruited directly by the user undertaking.¹³⁸ This discrepancy has since been addressed by the 2018 reform of the PWD.¹³⁹

E. Link to Service Provision

Another element of the posted worker definition which sometimes tends to be overlooked – perhaps because it is not explicitly included in Article 1(2) PWD – is the necessary link to the provision of services. While commonly referred to as the Posted Workers Directive, the PWD’s full name is Directive ‘concerning the posting of workers *in the framework of the provision of services*’. Consequently, it would appear that workers who are temporarily sent to work in another Member State, but do not provide services there, are not posted workers. This view is supported by the Commission which excluded from the scope of the PWD ‘workers on business trips (when no service is provided), attending

¹³⁶ Directive 96/71/EC, art 1(3) (c).

¹³⁷ Council Directive 2008/104/EC on temporary agency work [2008] OJ L 327/9. See further Nicola Countouris and Rachel Horton, ‘The Temporary Agency Work Directive: Another Broken Promise?’ (2009) 38(3) ILJ 329; Consuelo Chacartegui, ‘Resocialising Temporary Agency Work Through a Theory of ‘Reinforced’ Employer’s Liability’ in Countouris and Mark R. Freedland, *Resocialising Europe in a Time of Crisis* (CUP 2013).

¹³⁸ Directive 2008/104, art 5.

¹³⁹ Chapter 3, s II D 5.

conferences, meetings, fairs, following training etc.’¹⁴⁰ This divide, however, is not always sufficiently pronounced in practice. Following the Commission’s logic, workers attending training workshops in another Member State are not posted workers, while those *giving* the training abroad should be considered posted workers insofar as they provide training services – even if all travel together and work in the same company group.

F. Posting of Third-country Nationals. Seasonal Workers Directive

While the PWD regulates intra-EU temporary labour mobility, it also applies to third-country nationals with a minor difference concerning social security.¹⁴¹ Already the early CJEU case law in the area of posted work, for example *Seco*, dealt with situations concerning non-EU nationals.¹⁴² In *Vander Elst*, the Court of Justice established a rule whereby third-country nationals lawfully and habitually employed in one Member State did not have to obtain a work permit for the purpose of being posted to another Member State.¹⁴³ The Commission sought to regulate the matter of posting of third-country nationals by a Directive that would reflect the *Vander Elst* rule,¹⁴⁴ but the initiative was abandoned. Nevertheless, *Vander Elst* applies to this day and can be viewed as a logical consequence of the principle of posting understood as an expression of the free movement of services. Indeed, as long as third-country nationals have a genuine link to

¹⁴⁰ Commission, ‘Practical Guide...’ (n 115) 10.

¹⁴¹ Social security of third-country nationals is regulated by Regulation (EU) 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [2010] OJ L 344/1.

¹⁴² See also joined cases 62/81 and 63/81 *Société anonyme de droit français Seco and another v Etablissement d’assurance contre la vieillesse et l’invalidité* [1982] ECR 223. See further Kolehmainen (n 15) 77-78. See also case C- 244/04 *Commission v Germany* [2006] ECR I-00885.

¹⁴³ *Vander Elst*, para 26. See further Verschueren, ‘Employment and Social Security Rights of Third-country Nationals under the EU Labour Migration Directives’ (2018) 20(2) EJSS 100; Ninke Mussche and Dries Lens, ‘The ECJ’s Construction of an EU Mobility Regime – Judicialization and the Posting of Third-country Nationals’ (2019) 57(6) J Com Mar St 1247.

¹⁴⁴ Commission, ‘Proposal for a Council and Parliament Directive on the posting of workers who are third-country nationals for the provision of cross-border services’ COM/99/0003 final. The first draft of the Services Directive also contained a specific provision related to the posting of third-country nationals which is not included in the Directive’s final version. See, Commission, ‘Proposal...’ (n 92) art 25.

the sending Member State, their situation is no different from that of EU nationals under the PWD.

Yet, what transpired from the interviews carried out in this research, is that the PWD might be used to grant third-country nationals access to the EU labour markets ‘through the back door’.¹⁴⁵ Poland, for example, has a simplified procedure of authorising temporary work for nationals from six non-EU countries by way of a simple declaration.¹⁴⁶ These third-country nationals may subsequently be posted to other Member States without meeting the immigration law requirements of those countries, even though – not being *habitually* employed in the sending state – they do not meet the *Vander Elst* criterion. Such postings are, therefore, unlawful and might result in far-reaching negative consequences for both the workers and the employers which will be discussed in Chapter 5.

A similar measure aimed specifically at third-country nationals who enter the ‘host’ country for the purpose of temporarily carrying out work is the Seasonal Workers Directive (hereafter: SWD).¹⁴⁷ The personal scope of the former, however, differs considerably from that of the PWD. Firstly, the SWD regulates the conditions of entry and stay of third-country nationals who arrive in the ‘host’ state directly from their ‘home’ country which is outside the EU. These workers do not otherwise have the right to live and work in the EU, just like third-country nationals moving within the same corporate group under the ICT Directive.

¹⁴⁵ Chapter 5, s V. See also Novitz and Rutvica Andrijasevic, ‘Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations’ (2020) 58(5) J Com Mar St 1325; De Wispelaere, De Smedt and Pacolet (n 115) 20-21.

¹⁴⁶ Ustawa o promocji zatrudnienia i instytucjach rynku pracy [2004] Dz. U. 2020 poz. 278, 1065, 1068, art. 88z, in conjunction with Rozporządzenie Ministra Rodziny, Pracy i Polityki Społecznej w sprawie państw, do których obywateli stosuje się niektóre przepisy dotyczące zezwolenia na pracę sezonową oraz przepisy dotyczące oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi [2017] Dz.U. 2017 poz. 2349. See also Anna Sokołowska and Małgorzata Skibińska, *Delegowanie Pracowników za Granicę* (Wolters Kluwer 2016) 156-165.

¹⁴⁷ Council and Parliament Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375. See further Judy Fudge and Petra Herzfeld Olsson, ‘The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights’ (2014) 16(4) EJML 439.

Secondly, third-country nationals who wish to avail from the SWD need to sign a contract directly with their employer established in the receiving state.¹⁴⁸ Thus, the key element of posting which lies in a link to the sending country, whether a temporary work agency or an employer established in the sending country, is not present in the SWD.¹⁴⁹

Thirdly, the SWD only applies to seasonal work which, by definition, is ‘dependent on the passing of the season’ such as agriculture, tourism etc., while the PWD, as explained above, covers all services with the exception of those provided by the seagoing personnel of merchant navy undertakings.¹⁵⁰ Consequently, despite some overlap, the scope of application of the PWD is broader. Third-country nationals who do not have the right to reside and work in the EU cannot rely on the PWD.

Conversely, those third-country nationals who are legally resident in one Member State cannot rely on the SWD when they are posted to another Member State.¹⁵¹ During the legislative process preceding the adoption of the SWD, Hayes and Novitz argued that the new instrument was going to replicate the PWD regime.¹⁵² The logic behind the SWD is indeed similar insofar as it relies on the principle that seasonal workers, just like posted workers, do not need to integrate into the ‘host’ country’s labour market. As has been demonstrated in Chapter 1, seasonal work is often classified as precarious.¹⁵³ In fact, some of the early definitions of precarious work focused specifically on seasonal work.¹⁵⁴ In terms of its material content, however, the SWD has a more extensive catalogue of rights than the PWD, even after the two reforms of the latter Directive.¹⁵⁵ Again, it is striking that a measure aimed at third-country nationals has a more extensive catalogue of rights than the PWD which is aimed primarily at EU citizens who should benefit from

¹⁴⁸ Directive 2014/36/EU, art 5(1)(a) and 6(1)(a).

¹⁴⁹ Note that according to Recital 12 of Directive 2014/36, where a Member State’s national law allows admission of third-country nationals as seasonal workers through employment or temporary work agencies established on its territory and which have a direct contract with the seasonal worker, such agencies should not be excluded from the scope of this Directive.

¹⁵⁰ Directive 2014/36/EU, art 3(b). See further De Wispelaere, De Smedt and Pacolet (n 115) 8.

¹⁵¹ *ibid*, art 2(3)(a). See also Recital 11.

¹⁵² Hayes and Novitz (n 15) 15-16.

¹⁵³ Chapter 1, s II A.

¹⁵⁴ Paolo Sylos Labini, ‘Precarious Employment in Sicily’ (1964) 89 *Int Labour Rev* 268, 270-71, as cited in Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y J* 21, 22. See Chapter 1, s II A.

¹⁵⁵ Directive 2014/36/EU, art 23. See also Costello and Freedland (n 133) 17-18.

the protection of Article 18 TFEU (prohibition of discrimination on the grounds of nationality).

V. Article 3(1) PWD: ‘Nucleus’ of Mandatory Rules of the ‘Host’ Member State

The central provision of the PWD is Article 3(1) which draws up a list of ‘hard core’ labour laws of the ‘host’ Member State to be mandatorily observed by all service providers who post workers.¹⁵⁶ In its original wording, prior to the 2018 revision, the Article 3(1) list contained the following: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay, including overtime rates but excluding supplementary occupational retirement pension schemes; conditions of hiring-out of workers, in particular by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to pregnant women or women who have recently given birth, children and young people; and equality of treatment between men and women, as well as other provisions on non-discrimination.¹⁵⁷

As explained above, Article 3(1) is a *lex specialis* to the Rome I Regulation which takes precedence over the general principle according to which contracts for the provision of services shall be governed by the laws of service provider’s country of establishment.¹⁵⁸ While this provision, by laying down an exception from private international law that is more favourable for workers, has a worker protection dimension, it also chimes with the ‘conflict of laws’ aspect of the PWD. Notably, as pointed out by Evju and discussed above, the ‘nucleus’ of mandatory rules from Article 3(1) PWD mirrors that from the unsuccessful proposal for a Regulation concerning the conflict of laws in employment relations put forward by the Commission in the 1970s.

Importantly, the ‘host’ country’s rules enshrined in the ‘nucleus’ had to be laid down either by law, regulation or administrative provision or, in the construction sector, by collective agreements or arbitration awards which have been declared universally

¹⁵⁶ Commission, ‘Proposal...’ (n 20) 15.

¹⁵⁷ See P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law’ (n 39) 579-580; Kolehmainen (n 15) 84-85; Deakin (n 86) 596; Evju (n 29) 170-171; Bottero (n 14) 75-80.

¹⁵⁸ Rome I Regulation, art 4(1).

applicable.¹⁵⁹ In the absence of a system for declaring the latter agreements and awards universally applicable, prior to the 2018 revision Member States had the option to base themselves on those agreements and awards which were applicable to all similar undertakings in a geographical area in a given industry.¹⁶⁰ Alternatively, Member States were allowed to rely on collective agreements concluded by the most representative organisations at national level.¹⁶¹ Furthermore, Article 3(7) PWD allowed to apply to posted workers terms and conditions of employment that are more favourable than the mere minimum regarding matters covered by the ‘nucleus’.

The ‘nucleus’ was further complicated by Article 3(10) PWD, compared by Kolehmainen to a ‘magician’s trick’, seemingly turning the exhaustive list from Article 3(1) into an inexhaustive one.¹⁶² The provision allowed Member States to extend onto posted workers, on the ‘basis of equality of treatment’, firstly, labour law legislation going beyond the ‘nucleus’ in the case of public policy provisions and, secondly, collective agreements and arbitration awards outside the construction sector.¹⁶³ Controversies regarding the interpretation of the above aspects of the PWD became the subject of the dispute in *Laval* and subsequent cases of the ‘quartet’, notably *Rüffert* and *Commission v Luxembourg*.¹⁶⁴

¹⁵⁹ Directive 96/71/EC, art 3(1) read in conjunction with art 3(8) and Annex.

¹⁶⁰ *ibid*, art 3(8).

¹⁶¹ *ibid*.

¹⁶² Kolehmainen (n 15) 86.

¹⁶³ Directive 96/71/EC, art 3(10). See P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law’ (n 39) 582-583.

¹⁶⁴ As for *Viking*, it did not touch upon the interpretation of the PWD or Article 56 TFEU, for it concerned the principle of the freedom of establishment (Article 49 TFEU) where a vessel had been re-flagged from Finland to Estonia. The case is relevant to this research insofar as it deals with issues such as ‘social dumping’ and the balance between economic freedoms and collective rights. In fact, it bears a number of similarities to *Laval*, as argued by Reich (n 17) 154-156. On *Viking*, see further Novitz (n 79); Silvana Sciarra, ‘*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU’ (2007) 10 CYELS 563; Anne C. L. Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37(2) ILJ 126, 129; Syrpis and Novitz (n 93).

A. The ‘*Laval* Quartet’ and the Interpretation of the ‘Nucleus’

1. *Laval*

Laval was a Latvian company which in 2004, days after Latvia had joined the EU, brought its own workers to a building site in Sweden where it intended to refurbish a school near Stockholm. It was approached by the local construction workers’ union about extending the Swedish collective agreement, which entailed higher wages, onto the posted workers. Having refused to cooperate with the unions, *Laval* faced a blockade of the building site coupled with a sympathy action by the electricians’ union, which ultimately led to the bankruptcy of its Swedish branch. After the company had sued the unions, the Swedish Labour Court enquired whether the blockade was compatible with EU law on the free movement of services and the PWD, given that the national transposition at the time did not address the issue of terms and conditions laid down in collective agreements.¹⁶⁵

While the PWD originally did not refer to collective rights, the CJEU, in line with *Schmidberger*¹⁶⁶ and *Omega Spielhallen*,¹⁶⁷ ruled that the exercise of fundamental rights did not lie outside the sphere of EU law, but had to be reconciled with it in accordance with the principle of proportionality.¹⁶⁸ This came as a disappointment to the unions and certain Member States which had argued that national social policies should be free from

¹⁶⁵ The PWD was transposed in Sweden by the Law on the posting of workers (lag om utstationering av arbetstagare (1999:678) which did not provide, at the time, for minimum rates of pay within the meaning of art 3(1) PWD. Minimum wages were laid down in collective agreements but Sweden did not have a system for declaring collective agreements universally applicable. See Mia Rönmmar, ‘Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective’ (2007) 10 CYELS 493; ‘Sweden’ in Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart Publishing 2014).

¹⁶⁶ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659. See further Novitz (n 84) 553-555.

¹⁶⁷ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Steve Weatherill, ‘*Viking* and *Laval*: The EU Internal Market Perspective’ in Freedland and Prassl (n 165) 32.

¹⁶⁸ *Laval*, para 94. See also *Viking*, para 46; A. Davies (n 164) 129. Barnard, ‘*Viking* and *Laval*: An Introduction’ (n 59) 467-468; Novitz (n 84) 550-551; Alicia Hinarejos, ‘*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms’ (2008) 8(4) HRLR 714, 720-721.

any interference of EU law.¹⁶⁹ The CJEU held that collective action ‘for the protection of the workers of the host State against possible social dumping’ might, in theory, constitute an overriding reason of public interest justifying a restriction on the free movement of services.¹⁷⁰

However, the collective action at issue, in particular blockading Laval’s building site in order to impose negotiations in pay, was found by the Court of Justice to be unjustified.¹⁷¹ Having analysed the wording of Article 3(1) PWD, the CJEU acknowledged that the collective agreement in question did not meet the requirement of being universally applicable, notwithstanding the fact that Sweden had not provided a way of laying down the minimum wage otherwise.¹⁷² This aspect of the PWD, related to the exercise of collective rights and the types of collective agreements and arbitration awards on which the Member States may base themselves, has been addressed by the 2018 revision of the PWD.¹⁷³

The CJEU also took the opportunity to interpret the nature of Article 3(7) PWD which, read in conjunction with Article 3(1), was thought to have laid down a ‘floor of protection’ for workers which could be extended by the Member States.¹⁷⁴ Yet, the CJEU took the stance that the provision of services by foreign undertakings could not be made conditional on the observance of more favourable rules introduced by the Member States.¹⁷⁵ In this vein, the Court of Justice thought that more favourable terms and conditions could only be applied to posted workers where the employer voluntarily agreed to observe them. Thus, the CJEU utilised the ambiguity in the wording of Article 3(7) PWD to impose a narrow interpretation of the PWD. That is why it has been argued

¹⁶⁹ *Syrpis and Novitz* (n 93) 291; *Laval*, Opinion of AG Mengozzi, paras 47-58. See case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I- 05751.

¹⁷⁰ *Laval*, para 103. See A. Davies (n 164) 132.

¹⁷¹ *Laval*, paras 108 and 110. See *Novitz* (n 84) 556.

¹⁷² *Laval*, para 78.

¹⁷³ Chapter 3, s. II D 2.

¹⁷⁴ See A. Davies (n 164) 129.

¹⁷⁵ *Laval*, para 80.

that *Laval* transformed the ‘floor of protection’ of posted workers laid down in the PWD into a ‘ceiling’.¹⁷⁶

The CJEU took a similarly restrictive approach to interpreting Article 3(10) PWD in *Laval*. The content of the collective agreement at issue concerned also various obligations regarding insurance schemes for workers, which went beyond the ‘nucleus’ of mandatory rules. While Article 3(10) allowed for an extension of the ‘nucleus’ in the case of public policy provisions, the Court of Justice reminded that this was reserved for the Member States, not trade unions, and Sweden had not opted for an extension regarding insurance schemes.¹⁷⁷

2. *Rüffert*

Another issue regarding the interpretation of Article 3(1) PWD arose in *Rüffert* which challenged the *Landesvergabegesetz*, a law on the award of public contracts in Lower Saxony requiring successful tenderers to ensure that all workers, including subcontractors, receive a wage laid down in a collective agreement which was not universally binding. The Court of Justice held that those requirements did not apply to posted workers because, firstly, the *Landesvergabegesetz* could not be considered a law setting the minimum wage within the meaning of Article 3(1) PWD.¹⁷⁸ This was a strikingly restrictive interpretation of the PWD since Germany did not have a statutory minimum wage at the time.¹⁷⁹ Consequently, ‘a law which did not fall precisely within the terms of Article 3 PWD, even though it had the aim of protecting both domestic and

¹⁷⁶ Barnard, ‘*Viking and Laval: An Introduction*’ (n 59) 475; Deakin (n 86) 596-598; Syrpis and Novitz, (n 93) 413; Diamond Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ (2013) 19(3) ELJ 303, 314.

¹⁷⁷ *Laval*, paras 82-84. See Barnard, ‘*Viking and Laval: An Introduction*’ (n 59) 474-475; Deakin (n 86) 600; A. Davies (n 164) 130; Reich (n 17) 146-147.

¹⁷⁸ *Rüffert*, para 24. See also P. Davies, ‘Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’ (2008) 37(3) ILJ 293; Rocca, *Posting of Workers and Collective Labour Law* (n 21) 194-200.

¹⁷⁹ See Deborah Mabbett, ‘The Minimum Wage in Germany: What Brought the State in?’ (2016) 23(8) J Eur Public Policy 1240.

posted workers and ensuring fair competition between undertakings, could not be regarded as an implementing measure.’¹⁸⁰

Secondly, the collective agreement at issue was deemed by the CJEU to be non-universally applicable given the fact Germany had a system for declaring collective agreements universally applicable in place.¹⁸¹ Again, the interpretation was restrictive for the collective agreement ‘was merely supplementary to the "TV Mindestlohn" collective agreement that had been declared to be universally binding across the Federal Republic of Germany.’¹⁸²

3. *Commission v Luxembourg*

When transposing the PWD, Luxembourg added four provisions that went beyond the ‘nucleus’ of Article 3(1). Three of them extended onto posted workers other EU Directives: concerning formal requirements of the employment relationship,¹⁸³ part-time¹⁸⁴ and fixed-term workers.¹⁸⁵ Yet, according to the CJEU, it was the sending Member State, also bound by those Directives, that was responsible for ensuring worker protection stemming from this legislation.¹⁸⁶

The fourth contested provision extended onto posted workers a domestic law providing for an automatic pay adjustment to reflect changes in the cost of living, and the Luxembourg authorities justified it on the grounds of the above discussed public

¹⁸⁰ Deakin (n 86) 600. See also Aravind R. Ganesh, ‘Appointing Foxes to Guard Henhouses: The European Posted Workers’ Directive’ (2008) 15(1) Colum J Eur L 123, 127.

¹⁸¹ Ruffert, paras 25-30. See also Barnard, ‘*Viking* and *Laval*: An Introduction’ (n 59) 476.

¹⁸² Ganesh (n 179) 127. See also Deakin (n 86) 601.

¹⁸³ Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32, repealed by Council and Parliament Directive 2019/1152/EU on transparent and predictable working conditions in the European Union [2019] OJ L 186/105.

¹⁸⁴ Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1999] OJ L 14/9.

¹⁸⁵ Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

¹⁸⁶ *Commission v Luxembourg*, para 40. See Deakin (n 86) 601; Ganesh (n 180) 128-129; Rocca, *Posting of Workers and Collective Labour Law* (n 21) 201-204.

policy derogation laid down in Article 3(10) PWD.¹⁸⁷ The Court of Justice was, however, unconvinced and held that Luxembourg had failed to prove that the provision at issue constituted a public policy exception, a term which ‘must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States’.¹⁸⁸ As argued by Deakin, *Commission v Luxembourg* shows, again, ‘how little scope for manoeuvre Member States have under Article 10 [Article 3(10)] even when they attempt, explicitly, to invoke it.’¹⁸⁹

¹⁸⁷ *Commission v Luxembourg*, para 22.

¹⁸⁸ *ibid*, para 30. See also case C-503/03 *Commission v Kingdom of Spain* [2006] ECR I-1097, para 45. See further Deakin (n 86) 601-602; Ganesh (n 180) 128-129.

¹⁸⁹ Deakin (n 86) 601.

Conclusion

This Chapter has looked at the twisted design of the 1996 PWD with its many inconsistencies which resulted in it being ill-equipped to grant an sufficient level of labour law protection to posted workers. It appears that the fundamental issues affecting the efficacy of the EU framework have been, firstly, the fact that the PWD has been adopted as an expression of the free movement of services and, secondly, its ambiguous twofold aim that allowed ample room for interpretation at the discretion of the Court of Justice of the EU.

The link to the free movement of services has determined a narrow scope of labour law protection for posted workers, as prescribed in the ‘nucleus’ of Article 3(1) PWD with standards which, as has been argued in this Chapter, were lower than those laid down in some EU measures addressed at third-country nationals, such as the ICT Directive or the SWD. At the same time, the original PWD left a back door open in the form Articles 3(7) and 3(10) PWD that allowed the Member States to intervene and extend better working conditions onto posted workers.

Yet, that back door appeared to have been shut by the CJEU in the ‘*Laval* quartet’ where all the ambiguities in the wording of the PWD were seized to frame this measure as a market integration instrument that left very little wiggle room for the Member States and, indeed, for industrial relations in the sphere of posted work and the fights against ‘social dumping’. The next Chapter will show how the EU has responded to the consequences of the ‘*Laval* quartet’ with the 2014-2018 revisions of the PWD.

The purpose of this Chapter was to shed light on those elements of the PWD which, prior to the reforms, may have predisposed posted workers to precarity. Looking back at Rodgers and Rodger’s definition of precarious work discussed in Chapter 1,¹⁹⁰ it appears that all four objective elements were deliberately built into the PWD’s design: uncertainty of continuing work, low bargaining power, low labour law and social security standards, as well as low income.

As for the first element, the posting arrangement was and has remained, by default, temporary. Secondly, it appears that posted workers exercised a low level of

¹⁹⁰ Chapter 1, s III A. See Gerry Rodgers, ‘Precarious Work in Western Europe: The State of the Debate’ in Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989).

control over their working arrangement¹⁹¹ and their bargaining power was limited by the lack of references to the exercise of collective rights in the original wording of the PWD. This placed posted workers in a ‘no man’s land’ – outside the ‘home’ country’s trade unions’ reach and with the ‘host’ country’s unions often viewing them as a threat, as was the case in *Laval*. In addition, the CJEU’s interpretation of Article 3(1) PWD further narrowed down posted workers’ bargaining power by limiting the scope of possible labour law protection of the ‘host’ country solely to the rules listed in the ‘nucleus’.

Thirdly, the labour law protection of posted workers was also low for the above reason, as Article 3(1) PWD did not ensure the same level of labour law protection that local workers enjoyed. Notably, the ‘nucleus’ lacked (and still lacks) the right to protection from unfair dismissal and to severance pay. Similarly, the social security coverage was also low (and continues to be low); by placing posted workers outside the receiving state’s social security system, the PWD deprived them of the right to sick pay should they become unfit for work while still on the territory of the ‘host’ state.

As for the fourth element of the Rodgers and Rodgers’ definition, Article 3(1) PWD originally only obliged service providers employing posted workers to comply with the minimum wage requirements of the ‘host’ state. This did not necessarily mean that posted workers were living in poverty. As explained above, posting thrives on labour cost differences between Member States in the EU and, therefore, posted workers often move from lower-wage sending countries to higher-wage receiving countries.¹⁹² Therefore, even a low-income job in the ‘host’ state might have ensured an adequate standard of living in the ‘home’ state.¹⁹³

Objectively, however, posted workers’ wages were, by default, lower than those of the domestic workers in comparable positions. In other words, posted workers prior to the 2018 revision used to receive lower remuneration than local workers for carrying out equal work. The above assessment of the PWD framework considered only the four objective elements of precarious work identified by Rodgers and Rodgers without taking into account the fifth subjective element added to the definition in Chapter 1 under the

¹⁹¹ See also Lillie, ‘The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework’ (2016) 17 *Theoretical Inq L* 39, 52.

¹⁹² Chapter 4, s II.

¹⁹³ *ibid*, s I B.

influence of Kalleberg's works.¹⁹⁴ This is due to the fact that it appears that doctrinal research 'on the books' cannot provide insights into the workers' subjective perception of their posting experience. Conversely, the fifth element of the definition of precarious work will be explored, firstly, in Chapter 4 in relation to the existing empirical literature in the field and, secondly, supplemented by this project's findings discussed in Chapters 5-6.

¹⁹⁴ Chapter 1, s III C. See Arne L. Kalleberg, *Precarious Lives. Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018).

3. Small Steps Towards Less Precarity. The 2014-2018 Reforms of the Posted Workers Directive

Introduction

The purpose of this Chapter is to evaluate the 2014-2018 reforms of the Posted Workers Directive (hereafter: PWD¹) with a view to assessing the extent to which the issues that had arisen over the years from the PWD's twisted design have been addressed by the two revisions. This Chapter does not aim to provide a detailed and exhaustive description of the contents of the Enforcement Directive² and Directive 2018/957.³ Rather, it seeks to grasp the essence of the evolution of the legal framework in the context of different political and socioeconomic forces that have enabled it. Both revisions may be viewed as a continuum of complementary reforms, one of which fixed a lot of practical problems stemming from the PWD's application, while the other provided an ideological shift in the framing of the EU rules on the posting of workers. It will be argued that the two revisions have carried out an important yet limited amendment to the PWD, which does not remedy the risk of precarity to a satisfactory extent.

Section I will examine the Enforcement Directive, adopted in 2014 without much controversy, which appears to be somewhat underexplored in the existing academic literature. Indeed, the Directive's contents may seem overly technical, yet they were carefully conceived in order to provide practical solutions to long-standing problems. As the benefits of the Enforcement Directive feature prominently in the interview findings discussed in Chapter 5, this Section aims to give this revision due consideration, with a

¹ Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

² Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11.

³ Council and Parliament Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

particular focus on solutions that might have contributed to reducing the risk of precarity for posted workers, which will be revisited in Chapter 5.

Section II will shift the focus onto Directive 2018/957 which, contrary to its 2014 predecessor, received ample attention from the Member States and appears to have catalysed the tensions stemming from diverging interests and conflicting views of the PWD's place in the EU legal order that had built over the years. It will look at the Commission's proposal, tabled in 2016 as the elaboration of the European Pillar of Social Rights was underway, which endured a challenge from the national parliaments and two actions for annulment before the CJEU.⁴ This Section will then evaluate the most important amendments introduced by Directive 2018/957, such as the strengthened role of collective rights, the time limit to applying Article 3(1) PWD and equal pay, in a broader context of the revised Directive's objective and relationship to the principle of the free movement of services.

I. The Enforcement Directive

A. Background of the Reform

The adoption of the PWD was followed by a number of implementation reports, monitoring exercises and other measures undertaken by the Commission and the Parliament. The very first evaluation, carried out in 2003,⁵ identified 'several deficiencies and problems of incorrect implementation' of the PWD across the Member States.⁶ The matter became only more pressing after the 2004 enlargement which proved both an opportunity to expand the single market and a challenge to integrate the new economies that for many years had been financially deprived. Wary of potential large influxes of cheap workforce from Eastern Europe, 12 out of the then-EU-15 (except the UK, Ireland

⁴ Commission, 'Proposal for a Council Directive amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' COM(2016) 128 final.

⁵ Commission, 'Report on the Implementation of the Parliament and Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM (2003) 458.

⁶ Commission, 'Proposal for a Council Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM (2012) 131 final, 4.

and Sweden) temporarily suspended the free movement of workers' prerogatives stemming from Article 45 TFEU⁷ – some of them, such as Germany, for up to seven years.⁸ Against this background, the PWD provided access to the EU labour market for those new countries 'through the back door'. Houwerzijl and Verschueren argue that workers based in the 'new' EU countries 'acquired a right to movement derived from their EU-based employer, albeit a "passive one"'.⁹ Krings adds that those transitional restrictions 'may have contributed to an increase in the posting of workers, "bogus" self-employment and the informal economy'.¹⁰

In 2006, the Commission issued guidance on the posting of workers¹¹ for the national competent authorities to provide more clarity during the legislative process leading to the adoption of the Services Directive referred to in Chapter 2.¹² The guidance was accompanied by a report¹³ summarising a monitoring exercise which showed that many Member States tended to bypass the PWD and relied entirely on domestic legislation to control transnational service provision.¹⁴ A 2007 Communication issued by the Commission further pointed to a 'virtual absence of administrative cooperation, the still unsatisfactory access to information as well as cross-border enforcement problems'.¹⁵ At that stage, the Commission considered that urgent measures in the field of posted work were required,¹⁶ which materialised in the form of a 2008 Commission

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

⁸ Torben Krings, 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) 15(1) *Eur J Ind Relat* 49. See also Uladzislau Belavusau, 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development' (2009) 9(12) *Ger Law J* 2279.

⁹ Mijke Houwerzijl and Herwig Verschueren, 'Free Movement of (Posted) Workers and Applicable Labour and Social Security Law', in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019) 78.

¹⁰ Krings (n 8) 57.

¹¹ Commission, Communication, 'Guidance on the Posting of Workers in the Framework of the Provision of Services' COM (2006) 159 final.

¹² Council and Parliament Directive on services in the internal market [2006] OJ L 376/36. See Chapter 2, s III D.

¹³ Commission, 'Report on the Implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' SEC (2006) 439.

¹⁴ Commission, Communication (n 11).

¹⁵ Commission, 'Posting of Workers in the Framework of the Provision of Services: Maximising its Benefits and Potential While Guaranteeing the Protection of Workers' COM (2007) 304 final.

¹⁶ *ibid.*

Recommendation urging the Member States to improve administrative cooperation.¹⁷ The following year, the then-President of the European Commission José Manuel Barroso in his State of the Union Address admitted that ‘the interpretation and the implementation of the Posted Workers Directive falls short in both respects’.¹⁸

The efforts culminated in 2012, when the Commission tabled a proposal for a Directive on the enforcement of the PWD.¹⁹ The proposal identified four main problematic areas around the posting of workers: 1) implementation, monitoring and enforcement; 2) abuse of the posted workers’ status in order to evade or circumvent legislation; 3) controversial or unclear interpretation of Article 3 PWD; and 4) tensions between the freedom to provide services and national industrial relations systems.²⁰ As will be argued in the next subsection, the resulting Directive focused primarily on the first area and, perhaps more indirectly, on the second issue, as better enforcement may improve detection of situations where the PWD is relied upon to circumvent other legislation.

A primary example of such arrangements are the fictitious postings of third-country nationals carried out in order to circumvent the immigration laws of the Member States, as discussed in Chapter 2.²¹ With regard to the two remaining areas, the controversies surrounding the interpretation of Article 3(1) PWD and the role of industrial relations transpired on the occasion of the ‘*Laval* quartet’, also discussed briefly in Chapter 2.²² As neither of the issues was adequately addressed by the 2014

¹⁷ Commission Recommendation on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services [2008] OJ C 85/1.

¹⁸ José Manuel Durão Barroso, Speech 09/391, ‘Passion and Responsibility: Strengthening Europe in a Time of Change’ (Strasbourg, 15 September 2009) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_391 accessed 2 June 2021, as cited in Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Intersentia 2015) 328.

¹⁹ Commission, ‘Proposal...’ (n 6).

²⁰ Commission, Impact Assessment, ‘Revision of the Legislative Framework on the Posting of Workers in the Context of Provision of Services’ SWD (2012) 63 final, 27.

²¹ Chapter 2, s IV F. See further Tonia Novitz and Rutvica Andrijasevic, ‘Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations’ (2020) 58(5) J Com Mar St 1325.

²² The quartet consists of cases C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767; C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s*

Directive, both resurfaced during the discussion preceding the adoption of Directive 2018/957 and will further be discussed throughout this Chapter.

The first reform of the PWD was eventually carried out in May 2014, in the form of Directive 2014/67/EU. It is worth noting that in the same year the EU launched a number of other legislative measures in the sphere of migrant workers' rights, beginning with the Seasonal Workers Directive in February (hereafter: SWD).²³ This was followed in April by Directive 2014/54/EU on the measures facilitating the exercise of migrant workers' rights,²⁴ and the Intra-corporate Transfer Directive (hereafter: ICT Directive), adopted on the very same day as the PWD revision.²⁵ After a prolonged period of austerity following the 2008 global financial crisis, this was perhaps one of the first signs that Social Europe was 'alive and kicking', yet not quite ready for the European Pillar of Social Rights.²⁶

B. Contents of the Enforcement Directive

Like its 1996 predecessor, the Enforcement Directive was adopted on the basis of Articles 53(1) and 62 TFEU,²⁷ and its objective is to ensure a 'more uniform implementation, application and enforcement in practice', as well as 'prevent and sanction any abuse and circumvention' of the EU framework.²⁸

Union v Viking Line [2007] ECR I-10779; C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989; and C-319/06 *Commission v Grand Duchy of Luxembourg* [2008] ECR I-04323. See Chapter 2, s V A.

²³ Council and Parliament Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375. See further Chapter 2, s IV F.

²⁴ Council and Parliament Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8.

²⁵ Council and Parliament Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1. See further Chapter 2, s IV D.

²⁶ Rocca, *Posting of Workers and Collective Labour Law* (n 18) 327-328.

²⁷ On the legal basis of the PWD, see more Chapter 2, s III.

²⁸ Directive 2014/67, art 1(1).

1. 'Monti Clause'

Article 1(2) states that the Enforcement Directive shall not affect the exercise of fundamental rights, 'including the right or freedom to strike or to take other action'. This clause, reiterated also in the Directive's preamble,²⁹ echoes an earlier yet unsuccessful initiative called the 'Monti II Regulation'. In 2010, Mario Monti, Italian economist and politician, had submitted to the Commission a report entitled 'A New Strategy for the Single Market'.³⁰ In it, Monti called for a clarification of the PWD implementation, as well as argued against the CJEU's discretion with regard to the interpretation of the EU framework on posted work which transpired in the '*Laval* quartet' where the Court of Justice insisted on a restrictive reading of the PWD.³¹

The report was followed by a proposal for a Regulation on the right to take collective action in the context of the free movement of services and the freedom of establishment ('Monti II').³² The proposal might be regarded as the Commission's response to the '*Laval* quartet' which had made apparent the tensions between economic integration and social rights. Apart from the above mentioned clause, 'Monti II' contained the so-called general principles which stated that the exercise of economic rights in the EU should respect the fundamental right to strike and take collective action, and *vice versa*.³³ The proposal essentially granted equal status to the economic freedoms and social rights,³⁴ yet *Laval* had made it clear that situations requiring to reconcile the two objectives would arise. In such cases, according to the Commission's proposal, the

²⁹ *ibid*, Recital 48.

³⁰ Mario Monti, Report to the European Commission, 'A New Strategy for the Single Market. At the Service of Europe's Economy and Society' (2010) <https://www.irpa.eu/en/a-new-strategy-for-the-single-market/> accessed 2 June 2021.

³¹ *ibid*. See further, Commission, 'Proposal...' (n 6) 5.

³² Commission, 'Proposal for a Council and Parliament Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' COM (2012) 130 final.

³³ *ibid*, art 2. See Niklas Bruun, Andreas Bückler and Filip Dorssemont, 'Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?' (2012) 28(3) *IJCLIR* 279, 288; Rocca, *Posting of Workers and Collective Labour Law* (n 18) 272-273.

³⁴ Bruun, Bückler and Dorssemont (n 33).

principle of proportionality should be the solution,³⁵ an idea that was widely criticised.³⁶ Other contested measures proposed in Monti II were a dispute resolution mechanism,³⁷ as well as an alert mechanism for the Member States in case of a ‘grave disruption’ of the internal market or ‘serious damage’ to the industrial relations.³⁸

The legislative process was, however, discontinued when the Member States launched a ‘yellow card’ procedure in accordance with Protocol 2 to the Treaties.³⁹ The term ‘yellow card’, coined as a reference to football terminology, implies a warning issued by the national parliaments for the Commission to reconsider its strategy. The procedure can be triggered where at least one third of all the votes allocated to the national Parliaments express reservations about a draft legislative measure’s compliance with the principle of subsidiarity.⁴⁰

Instead, ‘Monti clauses’ resembling the one laid down in Article 1(2) of the unsuccessful Regulation may now be found in Article 1(2) of the Enforcement Directive, and in Article 1(2) of Directive 2018/957. Otherwise, the remainder of the ‘Monti II’ Regulation seems to have been abandoned by the Commission.

2. Competent Authorities

Article 3 of the Enforcement Directive imposes on the Member States an obligation to establish one or more competent authorities responsible for the enforcement of the posted workers’ framework. In Ireland, for example, the Workplace Relations Commission (WRC) has been designated as both the national competent authority and as the central

³⁵ Commission, ‘Proposal for a Regulation...’ (n 32) Recitals 11 and 13.

³⁶ Bruun, Bücken and Dorssemont (n 33) 289-290; The Adoptive Parents, ‘The Life of a Death Foretold: The Proposal for a Monti II Regulation’ in Mark Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart Publishing 2014) 103-107.

³⁷ Commission, ‘Proposal for a Regulation...’ (n 32) art 3. See Bruun, Bücken and Dorssemont (n 33) 290, 297.

³⁸ Commission, ‘Proposal for a Regulation...’ (n 32), art 4. See Bruun, Bücken and Dorssemont (n 33) 297-299.

³⁹ 2. Protocol on the application of the principles of subsidiarity and proportionality [2004] OJ 2004 C 310/207. See further Katrin Auel and Thomas Christiansen, ‘After Lisbon: National Parliaments in the European Union’ (2015) 38(2) *West Eur Polit* 261; Rocca, *Posting of Workers and Collective Labour Law* (n 18) 273-280.

⁴⁰ 2 Protocol, art 7. See further s II C.

liaison office.⁴¹ While the concept of competent authorities, alongside liaison offices, had already been introduced by the original PWD, the Enforcement Directive has reinforced their role by granting them additional powers, as will be demonstrated throughout this subsection.⁴²

3. Identification of Genuine Postings – ‘Letterbox Companies’

With regard to the issue of the PWD being relied upon to circumvent other legislation, Article 4 of the Enforcement Directive contains a list of elements to be considered by the competent authorities in order to establish whether a given posting is genuine. Such evaluation is to take place during the routine checks and controls, and where the national authorities suspect that a worker may not qualify as a posted worker within the meaning of the PWD.⁴³ The list of criteria is indicative and non-exhaustive, and it has been broken down into two separate categories. The former category concerns *the place* where the posting undertaking has its registered office and administration, uses office space, pays taxes and social security contributions, performs its substantial business activity etc.⁴⁴ Overall, this provision seeks to identify the so-called ‘letterbox companies’ where there is no genuine link between the posting company and its country of establishment chosen for the purposes of tax evasion or, in the context of posted work, due to lower labour law and social security standards.⁴⁵

The latter set of criteria listed in Article 4 aims to help the competent authorities establish whether the worker at issue meets the definition of a posted worker laid down

⁴¹ European Union (Posting of Workers) Regulations 2016, S.I. No. 412/2016, art 3. See further Directive 2014/67, art 14.

⁴² Directive 96/71/EC, art 4.

⁴³ Directive 2014/67, art 4(1).

⁴⁴ *ibid*, art 4(2).

⁴⁵ Commission, Impact Assessment (n 20), 30. See Joanna Ryszka, “‘Social Dumping’ and ‘Letterbox Companies’ – Interdependent or Mutually Exclusive Concepts in European Union Law?” (2016) 36 *PYIL* 209; Thomas Hastings and Jan Cremers, ‘Developing an Approach for Tackling Letterbox Companies’ (Seminar of the European Platform Tackling Undeclared Work: ‘How to Identify and Tackle Fraudulent Letterbox Companies’, Brussels, November 2017); Patrícia Šimurková and Miloš Poliak, ‘Identification of Letterbox Companies in the Road Transport Sector’ (2019) 40 *Transportation Research Procedia* 1184.

in Article 2(1) PWD.⁴⁶ In this vein, it has to be verified whether the work is genuinely temporary and performed in a Member State other than the country in which the worker habitually works, and that the worker is expected to return to the sending country.⁴⁷

4. Information and Administrative Cooperation

Article 5 of the Enforcement Directive establishes obligations for the Member States concerning access to information and the creation of single official national websites. The websites' role is to inform posting companies about the domestic legislation and collective agreements applicable to posted workers. Chapter III (encompassing Articles 6-8 of the Enforcement Directive), as well as Articles 15-16, focus on administrative cooperation and mutual assistance between the competent authorities in the receiving and sending Member States. While the burden of ensuring correct enforcement of the PWD is primarily on the competent authorities of the 'host' country where the work is carried out and, therefore, checks and controls may easily be conducted, the competent authorities in the 'home' state should provide assistance and cooperate. Notably, the national authorities in the sending country issue the A1 portable documents in accordance with the EU Social Security Regulations, thus proving that the workers in question are insured in their country of origin.⁴⁸

The importance of the A1 certificates, and indeed of cooperation between the Member States, has been reiterated by the CJEU in well-established case law.⁴⁹

⁴⁶ For more on the definition of a posted worker, see Chapter 2, s IV.

⁴⁷ Directive 2014/67/EU, art 4(3).

⁴⁸ Council and Parliament Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1 and Council and Parliament Regulation 987/2009/EC laying down the procedure for implementing Regulation (EC) No 883/2004 [2009] OJ L 284/1. See Pennings, *European Social Security Law* (6th edn, Intersentia 2015); Aukje A. H. Van Hoek and Houwerzijl, 'Where Do EU Mobile Workers Belong, According to Rome I and the (E)PWD?' in Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong* (Intersentia 2016); Matteo Bottero, 'Coordination of Social Security' in *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021).

⁴⁹ Cases C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* [2000] ECR I-02005; C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-00883; C-2/05 *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV* [2006] ECR I-01079, as cited in Marc Morsa, 'Judgment *Altun*: Priority to Fight Against Cross-border Social Security Fraud and Social

Furthermore, the role of the A1 certificates in the fight against fraud transpired in two judgments issued in 2018, after the adoption of the Enforcement Directive yet concerning situations that had occurred prior to the 2014 revision. In *Altun*, the Belgian authorities investigated a construction company that hired Bulgarian workers on A1 or E101 (A1's predecessors⁵⁰) certificates, and it was found that the employer had no significant links to Bulgaria and was, thus, a 'letterbox company'.⁵¹ Belgium sent to the sending authority in Bulgaria a request for review or withdrawal of the E101 or A1 documents which was, however, declined. The Bulgarian authorities claimed that the relevant administrative conditions had been met at the time the certificates had been issued without taking into account the Belgian investigation's findings. As long as the certificates were still technically valid, the Belgian courts were unsure how to approach the matter given the principle of mutual trust, until the Supreme Court (*Cour de Cassation*) filed a reference for a preliminary ruling to the CJEU. The judgment of the Grand Chamber confirmed that the social security certificates had been 'fraudulently obtained and relied on', in which circumstances the national Court was given green light to disregard them.⁵² The importance of the A1 portable documents was further reiterated in *Alpenrind* where the CJEU has clarified that they bind not only the institutions, but also the courts of the 'host' Member States, even if they are issued by the sending authority with retroactive effect.⁵³

Dumping or a Just a Trick Mirror?' (UNIO EU Law Journal, the Official Blog, 25 June 2018) https://officialblogofunio.com/2018/06/25/judgment-altun-priority-to-fight-against-cross-border-social-security-fraud-and-social-dumping-or-a-just-a-trick-mirror/#_edn1 accessed 5 August 2021.

⁵⁰ The E101 certificates were issued in accordance with Article 11(1) of Council Regulation (EEC) 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1972] OJ L 74/1, repealed by Regulation 987/2009/EC.

⁵¹ Case C-359/16 *Criminal proceedings against Ömer Altun and Others* EU:C:2018:63.

⁵² *Altun*, para 61.

⁵³ Case C-527/16 *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others* EU:C:2018:669. See further Anne Pieter van der Mei, 'Overview of Recent Cases Before the Court of Justice of the European Union (July – October 2018)' (2018) 20(4) EJSS 364. See also cases C-365/15 *Commission v Kingdom of Belgium* EU:C:2018:555; joined cases C-370/17 and C-37/18 *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* EU:C:2020:260.

Chapter IV of the Enforcement Directive (Articles 9-10) shifts the focus back onto the competent authorities of the receiving state. Article 9 draws up a list of possible actions that the ‘host’ country may take to ensure effective monitoring and compliance. Member States may choose to require undertakings that post workers to ‘make a simple declaration’, no later than on the day the service provision begins, containing information such as the number and identity of posted workers, the anticipated duration of posting and the address of the company’s premises.⁵⁴ Member States may further impose an obligation on the posting companies to keep and make available, at the competent authority’s request, copies of all the employment contracts, time-sheets and pay-slips related to the posted workers,⁵⁵ including translations into the official language of the ‘host’ country.⁵⁶ On this note, it is worth reminding that in case *Dobersberger*, discussed in Chapter 2, the applicant had allegedly failed to comply precisely with the obligations stemming from Article 9 of the Enforcement Directive.⁵⁷

5. Inspections

Article 10 of the Enforcement Directive ensures that ‘appropriate and effective checks and monitoring mechanisms’ are put in place by the Member States in accordance with the domestic legislation and practice.⁵⁸ While inspections may be carried out randomly, the Enforcement Directive stipulates that they shall be based ‘primarily on a risk assessment’ taking into account relevant sectors of employment, long subcontracting chains or past record of non-compliance.⁵⁹ When carrying out the factual checks and controls, Member States are to take into account the above discussed criteria contained

⁵⁴ Directive 2014/67, art 9(1) (a).

⁵⁵ *ibid*, art 9(1) (b).

⁵⁶ *ibid*, art 9(1) (d).

⁵⁷ Case C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* EU:C:2019:1110, para 12. See further Chapter 2, s IV B.

⁵⁸ Directive 2014/67, art 10(1). However, according to art 10(5), Member States which do not have established mechanisms for controlling compliance with the PWD are encouraged to establish such procedures.

⁵⁹ Directive 2014/67, art 10(1).

in Article 4 of the Enforcement Directive.⁶⁰ This provision appears to be of crucial importance as, alongside Article 20 that has introduced penalties for infringement of the EU framework, it has given the PWD the ‘teeth’ that the original Directive had lacked.

6. Right to Redress

Chapter V of the 2014 Directive entitled ‘Enforcement’ includes two important measures. Firstly, Article 11 obliges the Member States to create effective mechanisms enabling posted workers to lodge a complaint directly against the employer or initiate either judicial, or administrative proceedings. Disputes against the employer may concern matters such as outstanding remuneration, unduly withheld taxes or social security contributions etc.⁶¹ In addition, Member States shall also ensure that trade unions or NGOs with a legitimate interest may take part in those proceedings, either on behalf of or in support of posted workers.⁶²

On this note, while it is argued throughout this thesis that the ‘host’ country’s trade unions are sometimes reluctant to assist posted workers,⁶³ there is evidence showing that when they do, their engagement may prove successful in securing remedy for posted workers.⁶⁴ Evju’s case study concerning Polish workers in Denmark exemplifies the practical difficulty for posted workers to initiate proceedings in cross-border situations prior to the Enforcement Directive.⁶⁵ Also in Ireland, the pre-revision PWD had been criticised for failing to provide posted workers with appropriate redress,

⁶⁰ *ibid*, art 10(3). See further Francesco E. Iannuzzi and Devi Sacchetto, ‘Italian Labour Inspectors Facing Posted Workers Phenomena’ in Jens Arnholtz and Nathan Lillie, *Posted Work in the European Union. The Political Economy of the Free Movement* (Routledge 2020).

⁶¹ Directive 2014/67, art 11(6).

⁶² *ibid*, art 11(3).

⁶³ See further Aravind R. Ganesh, ‘Appointing Foxes to Guard Henhouses: The European Posted Workers’ Directive’ (2008) 15(1) *Colum J Eur L* 123; Virginia Doellgast, Lillie and Valeria Pulignano (eds), *Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* (OUP 2018); Lillie, Lisa Berntsen, Ines Wagner and Sonila Danaj, ‘A Comparative Analysis of Union Responses to Posted Work in Four European Countries’ in Arnholtz and Lillie (n 60).

⁶⁴ See case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* EU:C:2015:86; Stein Evju, ‘Cross-Border Services, Postings of Workers and Jurisdictional Alternation’ (2010) 1 *ELLJ* 89. See also Chapter 4, s I B.

⁶⁵ Evju (n 64).

as ‘in many cases, the posted worker will have returned to their home country by the time the matter comes on for hearing, making it restrictively expensive to pursue’.⁶⁶

7. Liability in Subcontracting Chains

The second important provision in the context of the enforcement of the PWD is Article 12 of the Enforcement Directive on liability in subcontracting chains. It imposes on the Member States an obligation to ensure that posted workers in the construction sector can hold the contractor of which their employer is a direct subcontractor liable for recovering outstanding wages in addition to or in place of the employer.⁶⁷ This basic subcontracting liability may be extended in three different ways specified in the Enforcement Directive.⁶⁸

The scope and range of application of Article 12 may be extended, firstly, outside the construction sector. Secondly, the subcontracting liability may be expanded onto other contractors in the subcontracting chain, and not solely the main contractor. Thirdly, Member States may allow for posted workers to be able to recover more outstanding wages than merely the minimum wage of the ‘host’ country. Yet, the Enforcement Directive also provides that contractors may be acquitted from liability if they prove to have fulfilled due diligence obligations.⁶⁹

⁶⁶ Bryan Dunne, ‘International Employment’ in Ailbhe Murphy and Maeve Regan, *Employment Law* (2nd edn, Bloomsbury 2017) 1023. See further case C-428/19 *OL, PM, RO v Rapidsped Fuvarozási és Szállítmányozási Zrt.* (pending) Opinion of AG Bobek EU:C:2021:371.

⁶⁷ Directive 2014/67, art 12(2).

⁶⁸ *ibid*, art 12(4). See also Commission, ‘Report on the Application and Implementation of Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’) COM/2019/426 final.

⁶⁹ Directive 2014/67/EU, art 12(5). See further Vladimir Bogoeski, ‘Chain Liability as a Mechanism for Strengthening the Rights of Posted Workers’ (Conference: Protecting Mobility through Improving Labour Rights Enforcement in Europe, May 2017).

8. Penalties

Another welcome development brought about by the Enforcement Directive is the above-mentioned Article 20 which imposes on the Member States a duty to lay down effective, proportionate and dissuasive penalties for infringements of the EU framework. A report on the application and implementation of the Enforcement Directive published in 2019 showed that the range of those penalties varied across the EU. In countries that have introduced a system of fines irrespective of the number of workers concerned, the maximum amounts of penalties ranged from 300 euro in Lithuania to 500.000 euro in Germany.⁷⁰

In this vein, the CJEU's case law in this area has pointed to proportionality issues regarding fines for non-compliance with the declaration and information requirements laid down in the Enforcement Directive. In *Čepelnik*, a Slovenian company carrying out modest construction work in a private house in the neighbouring Austria had been ordered to pay a 9.000-euro fine for failure to notify the Austrian authorities of the posting of four workers and to present pay slips in the German language.⁷¹ This was considered by the Court of Justice a disproportionate sanction, 'going beyond what is necessary for attaining the objectives of the protection of workers and combating fraud, in particular social security fraud, and preventing abuse'.⁷²

C. Reception of the Enforcement Directive

The Commission's Proposal for the Enforcement Directive encountered some criticism from the EU Committees, as well as from the trade unions, for failure to intervene with the substance and the twisted logic of the PWD. The Committee of the Regions (CoR) seemed the most disappointed with the EU legislator's response to the issues stemming from the application of the PWD that had been identified over the years.⁷³ The European Economic and Social Committee (EESC) welcomed the Commission's initiative yet did

⁷⁰ Commission, 'Report on the Application...' (n 68) 20.

⁷¹ Case C-33/17 *Čepelnik d.o.o. v Michael Vavti* EU:C:2018:896.

⁷² *ibid*, para 49. See also case C-140/19 *EX and Others v Bezirkshauptmannschaft Hartberg-Fürstenfeld* EU:C:2019:1103.

⁷³ CoR, Opinion, 'The Posting of Workers in the Framework of the Provision of Services' [2013] OJ C 17/67.

suggest further amendments to the PWD that would further extend the ‘nucleus’ of the mandatory rules of the ‘host’ state enshrined in Article 3(1) PWD.⁷⁴ Furthermore, the European Trade Union Confederation (ETUC) was not satisfied with the enforcement mechanisms proposed by the Commission, notably with regard to joint and several liability in subcontracting chains.⁷⁵ ETUC regretted that the basic subcontracting liability required by the Enforcement Directive was only limited to the construction sector and extended only onto direct subcontractors, which was further undermined by the due diligence exception.⁷⁶ Indeed, the issue of liability in subcontracting chains was going to resurface on the occasion of the 2018 revision of the PWD.

When looking at the Enforcement Directive, it is difficult to avoid comparison with Directive 2014/54/EU facilitating the exercise of the rights of EU migrant workers and their family members which, as explained above, was adopted only a few months before Directive 2014/67/EU. The latter measure also contains a provision concerning the defence of rights, not unlike Article 11 of the Enforcement Directive.⁷⁷ This right to redress is significantly broader as it covers several areas listed in Article 2(1) of Directive 2014/54 including all conditions of employment, access to social and tax advantages, housing, and education. In addition, the right to remedy extends onto the family members of the migrant workers.⁷⁸

Furthermore, the remit of the bodies for the promotion, analysis, monitoring and support of equal treatment of the workers and their family members established in accordance with Directive 2014/54/EU also differs from that of the competent authorities within the meaning of the Enforcement Directive.⁷⁹ While the former bodies appear to play a supportive role providing information and offering assistance (including legal assistance) to the workers, the latter enforcement authorities act more as watchdog for

⁷⁴ EESC, ‘Opinion on the Proposal for a Council and Parliament Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ [2012] OJ C 351/61.

⁷⁵ ‘Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive’ (ETUC 2012) <https://www.etuc.org/en/document/etuc-declaration-commission-proposals-monti-ii-regulation-and-enforcement-directive> accessed 4 June 2021.

⁷⁶ *ibid.*

⁷⁷ Directive 2014/54/EU, art 3.

⁷⁸ *ibid.*, art 3(1).

⁷⁹ *ibid.*, art 4.

monitoring compliance with the PWD by the employers, equipped with prerogative to carry out inspections and impose penalties.

This difference manifested on the level of enforcement is, however, a logical consequence of other differences regarding the substance of rights granted to posted workers in comparison to migrant workers falling within the scope of Article 45 TFEU. As discussed in Chapter 2, the latter category of migrants and their family members have the right to equal treatment with regards to the working conditions (remuneration, protection from unfair dismissal etc.), tax, social security, union membership, housing etc.⁸⁰ This is not the case with posted workers, intrinsically linked to the principle of the free movement of services (Article 56 TFEU) whose rights are, thus, limited to the ‘nucleus’ laid down in Article 3(1) PWD.⁸¹

Revisiting the four main problem areas identified in the 2012 proposal for a Directive amending the PWD, it appears that the Commission did not even attempt to address the issue of the controversies surrounding the interpretation of Article 3(1) PWD. In the Impact Assessment accompanying the 2012 proposal, the Commission admitted that the notion of minimum rates of pay gave rise to growing uncertainty across the Member States, as Article 3(1) did not specify which components of the wage were to be included. Among problematic components were special payments related to the posting and the distinction between pay and reimbursement of costs.⁸² Since the Enforcement Directive did not provide any clarity in this matter, some answers came from the Court of Justice in 2015 in the *Sähköalojen* judgment which will be discussed below.

Despite its many shortcomings, the Enforcement Directive was approved by the EU Council at first reading. As Barnard explains, while ‘there was little appetite in the Commission to reopen the substance of the PWD’, the general consensus was that the implementation mechanisms urgently needed to improve.⁸³ Even BUSINESSSEUROPE (Confederation of European Business), usually critical of any initiatives that may interfere with the free movement of services, agreed that closer administrative

⁸⁰ Council and Parliament Regulation (EU) 492/2011 on freedom of movement for workers within the Union [2011] OJ 2011 L 141/1, arts 7-9. Chapter 2, s III.

⁸¹ See Chapter 2, s V.

⁸² Commission, Impact Assessment (n 20) 39-40.

⁸³ Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 237. See further Rocca, *Posting of Workers and Collective Labour Law* (n 18).

cooperation between the Member States and better information were necessary steps to improve the enforcement of the PWD.⁸⁴

The Enforcement Directive, framed as a purely technical measure, was soon to be overshadowed by the heavily politicised discussion surrounding the 2018 revision which reawakened the long-lasting tensions between the free movement of workers and services. Yet in its defence, it is worth noting that the qualitative data gathered in this research project paints a different picture of the 2014 reform suggesting that the Enforcement Directive has had a profound effect on posted workers' working life. Research findings related to the impact of the Enforcement Directive will be evaluated in Chapter 5 of this thesis.

II. Directive 2018/957

A. European Pillar of Social Rights

The European Union has always had a social dimension,⁸⁵ dating back at least to the principle of equal pay for men and women enshrined in the Rome Treaty, followed by the first gender equality Directives in the 1970s.⁸⁶ Unfortunately, the adoption of the Lisbon Treaty which granted binding force to the EU Charter of Fundamental Rights and could have given more momentum to the European Social Model⁸⁷ coincided with the

⁸⁴ 'Enforcement of the Posting of Workers Directive' (BUSINESSEUROPE Position Paper 2012 <https://www.businesseurope.eu/publications/enforcement-posting-workers-directive-businesseurope-position-paper> accessed 21 June 2021).

⁸⁵ See Rebecca Zahn, 'What Future for the European Social Model? The Relevance of Early Intellectual Concepts of Social Integration' (2020) 7(2) J Int'l & Comp L 351.

⁸⁶ See further case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR I -00455; Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19; Council Directive 76/207/ on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40. See Mark Bell, *Anti-Discrimination Law and the European Union* (OUP 2002).

⁸⁷ Csilla Kollonay-Lehoczky, Klaus Lörcher and Isabelle Schömann, 'The Lisbon Treaty and the Charter of Fundamental Rights of the European Union' in Bruun, Lörcher and Schömann, *The Lisbon Treaty and Social Europe* (Hart Publishing 2012).

2008 global financial crisis and the sovereign debt crisis in Europe.⁸⁸ In response to the crash many Member States introduced radical austerity measures that profoundly affected their labour markets and the protection of workers' rights.⁸⁹ Since the EU had encouraged the reforms, the European Social Model might have been perceived as having plunged into crisis too.⁹⁰

Subsequently, the EU committed to revive it in the form of the European Pillar of Social Rights, first announced by the then-Commission's President Jean-Claude Juncker in 2015,⁹¹ and officially launched in 2017 to create a 'truly pan-European labour market.'⁹² The Pillar has been developed into 20 principles to be implemented through a number of legislative measures or other initiatives. In 2021, the principles were turned into concrete actions as part of the European Pillar of Social Rights Action Plan.⁹³ Principle 5 of the European Pillar of Social Rights, which refers to secure and adaptable employment, has been worded as follows:

⁸⁸ Barry Eichengreen, *The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era* (OUP 2018); Liz Fekete, *Europe's Fault Lines: Racism and the Rise of the Right* (Verso 2018) 96. See also Jean Pisani-Ferry, *The Euro Crisis and its Aftermath* (2nd edn, OUP 2014).

⁸⁹ Simon Deakin, 'The Lisbon Treaty, the *Viking* and *Laval* Judgments and the Financial Crisis: In Search of New Foundations for Europe's Social Market Economy' in Bruun, Lörcher and Schömann (n 87); Deakin and Aristeia Koukiadaki, 'The Sovereign Debt Crisis and the Evolution of Labour Law in Europe' in Nicola Countouris and Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013).

⁹⁰ Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Curr Leg Probl* 199.

⁹¹ Jean-Claude Juncker, 'State of the Union 2015: Time for Honesty, Unity and Solidarity' (Speech, Strasbourg, 9 September 2015) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614 accessed 5 June 2021.

⁹² Commission, 'Establishing a European Pillar of Social Rights' (Communication) COM (2017) 250 final, 2. See further Lörcher and Schömann, 'The European Pillar of Social Rights: Critical Legal Analysis and Proposals' (ETUI Research Paper Report 2016) 139; Zane Rasnača, 'Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-level Policymaking' (ETUI Working Paper 2017); Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14(1) *Eur Const Law Rev* 210; 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) 21 *CYELS* 101.

⁹³ Available at <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/> accessed 20 June 2021.

Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration.⁹⁴

The latter issue has been addressed in the Directive on transparent and predictable working conditions which in relation to posted workers lays down further information obligations in addition to those applicable to all workers.⁹⁵ According to this legislation which was adopted after the 2018 reform of the PWD and takes account thereof, posted workers shall also be notified of the remuneration to which they are entitled to, the link to the single national website of the ‘host’ state and, where applicable, of any allowances or reimbursement arrangements.⁹⁶

Principle 5 is crucial to posted work and to other atypical arrangements such as part-time work, self-employment, fixed-term contracts, temporary agency work, zero hours / on-call work and internships’.⁹⁷ Another pivotal initiative linked to the European Pillar of Social Rights and the posting of workers has been the creation of the European Labour Authority (ELA) which is expected to play a major role in complementing the EU framework on posted workers.⁹⁸ Putting forward the proposal for the ELA, the Commission admitted that it was developed in synergy with the 2018 PWD reform.⁹⁹ The Commission underlined that it had in mind concerns over ‘mobile workers being

⁹⁴ Commission, ‘The European Pillar of Social Rights in 20 Principles’ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en accessed 6 September 2021.

⁹⁵ Council Directive 2019/1152/EU on transparent and predictable working conditions in the European Union [2019] OJ 2019 L 186/105. See further Bartłomiej Bednarowicz, ‘Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union’ (2019) 48(8) ILJ 604.

⁹⁶ Directive 2019/1152, art 7(2). See also Recital 26.

⁹⁷ European Parliament, ‘Precarious Employment in Europe: Patterns, Trends and Policy Strategies’ (2016). See further Chapter 1.

⁹⁸ Council Regulation 2019/1149 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 [2019] OJ L 186/21.

⁹⁹ Commission, ‘Proposal for a Council Regulation establishing a European Labour Authority’ COM (2018) 131 final, Explanatory Memorandum.

vulnerable to abuse or being denied their rights, as well as businesses operating in an uncertain or unclear business environment and unequal playing field.’¹⁰⁰

The ELA’s objectives are to facilitate access to information regarding labour mobility, to enable and improve cooperation between the Member States in matters regarding the enforcement of relevant EU law, to provide mediation in cross-border disputes between the Member States, as well as to support the national authorities in tackling undeclared work.¹⁰¹ Furthermore, the ELA has the competence to coordinate and support concerted or joint inspections, carried out either at a Member State(s)’ request or of the ELA’s own motion, for example if a matter has been brought to its attention by the social partners.¹⁰² Specifically in relation to posted workers, it is expected that the ELA, once it reaches full operational capacity by 2024, shall support the Member States in facilitating access and disseminating information as required by Article 5 of the Enforcement Directive.¹⁰³

Among other initiatives conducted under the auspices of the European Pillar of Social Rights are also the adoption of the Work-Life Balance Directive¹⁰⁴ and, recently, the proposed Directive on adequate minimum wages in the EU.¹⁰⁵ While the 2016 proposal for a second revision of the PWD¹⁰⁶ was developed in synergy with the Pillar and is broadly linked to it, it is uncertain whether it is to be considered an integral part of the Pillar.¹⁰⁷ According to Garben, one of the factors separating the PWD revision from the European Pillar of Social Rights is the fact that ‘the Pillar has neither been

¹⁰⁰ *ibid.* See further Cremers, ‘The European Labour Authority and Enhanced Enforcement’, *sociológica: enquadramento e análise* (Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament 2018) 148; ‘The European Labour Authority and Rights-based Labour Mobility’ (2020) 21 ERA Forum.

¹⁰¹ Regulation 2019/1149, art 2.

¹⁰² *ibid.*, arts 8-9.

¹⁰³ *ibid.*, art 5(c).

¹⁰⁴ Council Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79. See further Elisa Chiericato, ‘A Work–Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158’ (2020) 36(1) IJCLIR.

¹⁰⁵ Commission, ‘Proposal for a Council Directive on adequate minimum wages in the European Union’ COM (2020) 682 final. See further Tornsten Müller and Thorsten Schulten, ‘The European Minimum Wage on the Doorstep’ (ETUI Research Paper - Policy Brief 1 2020).

¹⁰⁶ Commission, ‘Proposal...’ (n 6).

¹⁰⁷ Garben, ‘The European Pillar of Social Rights: An Assessment...’ (n 92) 109.

conceived, nor designed, to resolve the clashes between social and market values that have arisen in the area of the internal market (or economic governance).¹⁰⁸ This view, again, reflects the paradox of the PWD's design, sometimes perceived as an internal market measure linked to the free movement of services, while in practice interfering with the labour law regulation of the Member States.¹⁰⁹

B. The 2016 Proposal for a PWD Revision

The Commission set forth a proposal for a second revision of the PWD in March 2016, as some Member States had not yet implemented the Enforcement Directive ahead of the June 2016 deadline for national transposition.¹¹⁰ The initiative came at a crucial time for the EU, just a few months ahead of the 'Brexit' referendum, as attitudes towards migration in the UK, both from outside and inside the EU were becoming increasingly negative.¹¹¹ Similarly, anti-immigrant populist views were gaining more ground in other countries of the 'old' then-EU-15, notably in France, Italy, Austria and the Netherlands.¹¹²

As discussed above, the Impact Assessment conducted prior to the 2014 reform had identified problematic areas in which the 1996 PWD had proved deficient, yet the Enforcement Directive addressed them only partially, without interfering with the core principles of posting. Therefore, the 2016 proposal may be considered a continuation of a process that had begun back in 2012 with the proposal for the Enforcement Directive. Indeed, according to the Commission, both reforms were going to be 'complementary to each other and mutually reinforcing', and the 2016 draft did not touch on the areas

¹⁰⁸ *ibid*, 109-110.

¹⁰⁹ See further Chapter 2.

¹¹⁰ Directive 2014/67, art 23(1). See further Zahn, 'Revision of the Posted Workers' Directive: A Europeanisation Perspective' (2017) 19 C.Y.E.L.S 187; Francesco Costamagna, 'Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive' in Silvia Borelli and Aandrea Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene Editore 2019).

¹¹¹ James Kirchick, *The End of Europe* (Yale University Press 2017) 169; Eichengreen (n 88) 136.

¹¹² See Jean-Yves Camus and Nicolas Lebourg, *Far-Right Politics in Europe* (The Belknap Press of Harvard University Press 2017); Jan-Werner Müller, *What is Populism?* (2nd edn, University of Pennsylvania Press 2017).

amended by the 2014 Directive.¹¹³ The original proposal is worth a brief reflection in order to understand its reception in Europe, and to appreciate the extent to which the final version of Directive 2018/957 differs from the first draft. Conversely, the core of the changes introduced by the 2018 revision will be evaluated in more detail in Subsection D.

In relation to the guaranteed minimum wage of the ‘host’ state, the Court of Justice had already disrupted the *status quo* with its 2015 judgement in case *Sähköalojen* which, like *Laval*, concerned a dispute between a Scandinavian trade union and an Eastern-European service provider.¹¹⁴ In *Sähköalojen*, the CJEU raised the controversial issue of posted workers’ wages and defined the notion of ‘minimum rates of pay’. The Court of Justice clarified that compensation for travel time exceeding one hour each way and a flat-rate daily allowance constituted substantive elements of the minimum wage for posted workers carrying out work on a power plant construction site in Finland.¹¹⁵ This was a generous interpretation of the notion of the minimum wage which clearly went beyond the direct salary.

Consequently, the 2016 proposal addressed the contentious issue of pay by replacing the term ‘minimum rates of pay’ with ‘remuneration’.¹¹⁶ The Commission went one step further than *Sähköalojen* and proposed the principle of equal pay for the same work at the same place instead of merely the minimum wage.¹¹⁷ While following the ‘*Laval* quartet’ all the Member States have introduced a minimum wage, set either by the law or by collective agreements,¹¹⁸ some countries, notably in Scandinavia, continued to

¹¹³ Commission, Impact Assessment accompanying the document ‘Proposal for a Council Directive amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ SWD (2016) 52 final, 9.

¹¹⁴ See Rocca, ‘Stepping Stones Over Troubled Waters. Recent Legal Evolutions and the Reform of the Posting of Workers Directive’ in Arnholtz and Lillie (n 60) 175; Zahn, ‘Revision of the Posted Workers’ Directive...’ (n 110). See also case C-522/12, *Tevfik Isbir v DB Services GmbH* EU:C:2013:711.

¹¹⁵ *Sähköalojen*, paras 46-57. See further Chapter 4, s I B.

¹¹⁶ Commission, ‘Proposal...’ (n 6) art 1(2) (a).

¹¹⁷ President Jean-Claude Juncker’s State of the Union Address 2017: ‘Wind in our Sails’ (13 September 2017) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 accessed 13 August 2021.

¹¹⁸ Commission, ‘Proposal...’ (n 6). See further Alfonso Arpaia and others, ‘Statutory Minimum Wages in the EU: Institutional Settings and Macroeconomic Implications’ (IZA Policy Paper no. 124, 2017).

rely heavily on collective agreements that were not universally applicable.¹¹⁹ Therefore, the Commission argued that the PWD in its original wording had created ‘an in-built structural wage gap between posted and local workers’.¹²⁰ That gap has grown since the adoption of the PWD, especially after the enlargements to the East. 20 years into the PWD’s enforcement, the ratio between the lowest and highest minimum wage in the EU increased from 1:3 to 1:10, with the biggest differences between the Scandinavian countries and the ‘new’ Eastern European Member States.¹²¹

Another problem identified by the Commission was the lack of a clear definition of the temporary nature of posting. Without a statutory upper limit of a single posting, certain companies continued to extend the PWD’s application to workers who had lived in the ‘host’ country for a considerable length of time.¹²² Therefore, rules intended for temporary situations were applied to workers who should have enjoyed the status of a permanent migrant worker. In response to that problem another proposed amendment was a maximum duration of applying the PWD set at 24 months.¹²³ According to the 2016 proposal, in case a posting exceeded the above time limit, it would automatically be assumed that the ‘host’ country was the worker’s habitual place of work.¹²⁴

The same amendment attempted to tackle the issue of ‘cumulative postings’ whereby the same task at the same place was carried out by a number of workers who would replace each other after a certain time. According to the proposal, the cumulative duration of postings would be taken into account for counting the 24-month period. However, the above rule would only apply to workers posted for at least six months.¹²⁵

¹¹⁹ Impact Assessment (n 113) 11-12. See further Mia Rönnmar, ‘Sweden’ in Freedland and Prassl (n 36); Bjarke Refslund, ‘Adjusting the Danish Industrial Relations System after *Laval*: Recalibration Rather Than Erosion’ (2015) 21(2) Transfer 247.

¹²⁰ Impact Assessment (n 113) 11.

¹²¹ *ibid.*, 13. In 2020, hourly labour costs borne by the employers (including social security contributions) across the EU-27 varied from 45.80 euro in Denmark to 6.50 euro in Bulgaria. See Eurostat, ‘Estimated Hourly Labour Costs, 2020’ (2021) https://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs accessed 13 August 2021.

¹²² Commission, Impact Assessment (n 113) 16.

¹²³ Commission, ‘Proposal...’ (n 6) art 1(1).

¹²⁴ *ibid.*

¹²⁵ *ibid.*

The proposed revision also accentuated discrepancies between the PWD and the Temporary Agency Work Directive.¹²⁶ While most Member States at the time the 2016 proposal was put forward had solved the problem by extending the principle of equal treatment laid down in the Temporary Agency Work Directive onto posted workers,¹²⁷ the Commission observed that 13 countries had not addressed the issue.¹²⁸ Accordingly, the 2016 proposal amended Article 3(1) PWD by adding a new paragraph ensuring that the equal treatment clause from the Temporary Agency Work Directive would apply also to posted workers.¹²⁹

Another problematic area identified in the 2016 proposal was subcontracting chains. While the Enforcement Directive has addressed the issue of joint and several liability,¹³⁰ it has not clarified whether workers supplied by a subcontractor are also entitled to the protection of Article 3(1) PWD.¹³¹ That issue also emerged in case *RegioPost*, where the CJEU established that Member States were allowed to require that subcontractors in public tenders comply with the PWD as regards the minimum rates of pay.¹³² In line with *RegioPost*, the 2016 proposal granted Member States the option to oblige undertakings to subcontract only to those posting companies that guaranteed posted workers certain conditions of remuneration.¹³³ However, this could only be enforced, ‘on a non-discriminatory and proportionate basis’, if the same clause applied nationwide to all subcontractors in the given Member State.¹³⁴

¹²⁶ Council and Parliament Directive 2008/104/EC on temporary agency work [2008] OJ L327/9). See Chapter 2, s. IV D. See further Countouris and Rachel Horton, ‘The Temporary Agency Work Directive: Another Broken Promise?’ (2009) 38(3) ILJ 329; Consuelo Chacartegui, ‘Resocialising Temporary Agency Work Through a Theory of ‘Reinforced’ Employer’s Liability’ in Countouris and Freedland (n 89); Lisa Rodgers, ‘Temporary Agency Work’ in *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar 2016).

¹²⁷ Directive 2008/104, art 5.

¹²⁸ Commission, Impact Assessment (n 113)16.

¹²⁹ Commission, ‘Proposal...’ (n 5), art 1(2) (b).

¹³⁰ Directive 2014/67, art 12.

¹³¹ Commission, Impact Assessment (n 113) 14-15.

¹³² Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* EU:C:2015:760.

¹³³ Commission, ‘Proposal...’ (n 6), art 1(2) (b). See further Rocca, ‘Stepping Stones Over Troubled Waters’ (n 114) 176-177; Bottero, *Posting of Workers in EU Law* (n 48) 113-114.

¹³⁴ Commission, ‘Proposal...’ (n 6), art 1(2) (b).

C. Rocky Road to Directive 2018/957

1. Social Partners and EU Committees' Reaction to the 2016 Proposal

Unlike its 2014 predecessor, widely supported by the Member States, the 2016 proposal for a PWD revision generated a wave of fierce criticism from virtually all of the relevant stakeholders. A great deal of hostility arose on the part of the social partners who felt offended¹³⁵ for not having been consulted in spite of the requirement to do so laid down in Protocol 2 to the European Treaties.¹³⁶ According to the Protocol, the Commission may only forgo the consultations due to 'exceptional urgency' in which case it shall be explained in the proposal for the new legislation, yet the 2016 proposal did not provide any justification in this matter.¹³⁷ It is for this reason that BUSINESSEUROPE and ETUC issued a joint letter to the Commission, even though otherwise their reaction to the 2016 proposal, albeit in both instances critical, was diametrically different.

BUSINESSEUROPE opposed any kind of intervention with the posting framework, arguing that the reform was going to hinder the development of the single market. It warned that the share of cross-border services in the EU GDP, which was only 5%, might further decrease.¹³⁸ Contrastingly, ETUC welcomed the initiative but criticised the proposed reform for failing 'to include a number of elements to stop the exploitation of workers, including full respect for the fundamental right to collective bargaining and collective action in the host Member State'.¹³⁹ Some more specific arguments put forward by the EU social partners will further be considered throughout

¹³⁵ ETUC, BUSINESSEUROPE, UEAMPE and CEEP, 'Revision of the Posting of Workers Directive: Joint Letter to President Juncker' (2016) <https://www.etuc.org/en/document/revision-posting-workers-directive-joint-letter-president-juncker> accessed 15 August 2021.

¹³⁶ See further Bruno Veneziani, 'The Role of Social Partners in the Lisbon Treaty' in Bruun, Lörcher and Schömann (n 87).

¹³⁷ 2. Protocol, art 2.

¹³⁸ 'Revision of the Posting of Workers Directive – BUSINESSEUROPE Position' (BUSINESSEUROPE 2016) <https://www.buinessseurope.eu/publications/revision-posting-workers-directive-buinessseurope-position> accessed 15 August 2021.

¹³⁹ 'Revision of the Posting of Workers Directive: ETUC Assessment for Further Consultation' (ETUC Orientation paper, 2016) https://www.etuc.org/sites/default/files/event/public-files/etuc_revision_of_the_posting_of_workers_directive_1.pdf accessed 15 August 2021.

this Section. The 2016 proposal for a PWD revision also met with a mixed reception from the EU Committees. While EESC was generally supportive of the reform,¹⁴⁰ the CoR suggested a number of further amendments, some of which were indeed incorporated into the final draft of Directive 2018/957 and will be considered below.¹⁴¹

2. ‘Yellow Card’

The 2016 proposal was also heavily criticised by some of the Member States, 11 of which, including Denmark and all of the Eastern-European Member States except Slovenia, initiated a ‘yellow card’ procedure in an attempt to block the reform.¹⁴² Similarly to the social partners, national parliaments criticised the proposal both in terms of its content and the legislative procedure. Some of the arguments put forward by the Member States were subsequently reiterated by Hungary and Poland in their actions for judicial review of Directive 2018/957, and will be considered in Subsection D.¹⁴³ Yet the gist of the reasoned opinions issued by the parliaments of the Eastern Member States was primarily political and reflected concerns over service providers established in these countries being deprived of their competitive advantage.

In this vein, the Estonian parliament submitted that many undertakings ‘will probably not be able to ensure the posted workers the pay requirements applicable in the target country’.¹⁴⁴ Indeed, over a decade after the 2004 Eastern enlargement, the posting

¹⁴⁰ Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services’ [2017] OJ C 75/81.

¹⁴¹ Opinion of the European Committee of the Regions — ‘The Revision of the Posting of Workers Directive’ [2017] OJ C 185/75.

¹⁴² Commission, ‘Communication on the Proposal for a Directive Amending the Posting of Workers Directive, with Regard to the Principle of Subsidiarity, in accordance with Protocol No 2’ COM (2016) 505 final. See further Diane Fromage and Valentin Kreiling, ‘National Parliaments’ Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive’ (2017) 10(1) Eur J Legal Stud 125.

¹⁴³ Cases C-620/18 *Hungary v Parliament and Council* EU:C:2020:1001; C-626/18 *Republic of Poland v Parliament and Council* EU:C:2020:1000.

¹⁴⁴ Resolution of the Riigikogu, ‘Reasoned Opinion to the Presidents of the European Parliament, the European Commission and the Council of the European Union on Non-conformity to the Principle of Subsidiarity of the Proposal for a Directive of the European Parliament and of the Council amending Council

of workers was still financially advantageous for many service providers in those countries. With regard to the wage gap between the ‘old’ and the ‘new’ EU, certain national parliaments, as well as BUSINESSEUROPE, were of the opinion that the proposed Directive ran the risk of further increasing this gap.¹⁴⁵

In 1992, Francis Fukuyama famously announced that the end of the Cold War brought the ‘End of History’.¹⁴⁶ Indeed, in the 1990s the general perception was that communism had been the last threat to a united Europe. But the political conflict surrounding the PWD reform exposed a curtain, no longer an iron one, but more implicit, still separating the East of Europe from the West. The Romanian parliament openly attacked the Commission for drawing a dividing line across the continent.¹⁴⁷ It claimed that that by putting forward the proposal, the ‘old’ then-EU-15 disregarded the 45 years of the Soviet occupation of the Member States from behind the ‘Iron Curtain’.¹⁴⁸ It also added that the EU enlargements to the East were ‘a historical redress for those countries and a promise made at the highest political level (...) that the process of convergence would be substantial and continuous’.¹⁴⁹ While the above words might seem greatly exaggerated with regard to a revision of a small and highly specialised area of employment law, they shed some light on the ‘new’ Member States’ approach to the EU and the political conflict that escalated well beyond posted work. This statement exemplifies the logic of the Eastern European countries which viewed the competitive advantage owed to low wages as some sort of historical justice that enabled their ‘catching-up’ process after the fall of the Berlin Wall.

and Parliament Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ (2016).

¹⁴⁵ BUSINESSEUROPE (n 138).

¹⁴⁶ Francis Fukuyama, *The End of History and the Last Man* (20th anniversary edn, Penguin 2012).

¹⁴⁷ Parliament of Romania, Decision No. 38 approving the Reasoned Opinion on the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM(2016) 128 (2016).

¹⁴⁸ Parliament of Romania, ‘Decision on the adoption of an opinion on the Communication from the Commission to the European Parliament, the Council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 COM(2016)505’ (2016).

¹⁴⁹ *ibid.*

3. Adoption of Directive 2018/957. Hungary and Poland's Opposition

Prior to the 2016 proposal, the 'yellow card' had been relied upon twice, and in the case of the above mentioned proposal for the 'Monti II' Regulation opposition from the national parliaments pushed the Commission to abandon the proposed measure altogether.¹⁵⁰ Yet this time, the launch of a 'yellow card' procedure did not knock down the reform of the PWD. Instead, in response to widespread criticism, the European Commission issued a Communication refuting the national parliaments' allegations in which it announced that the legislative process was going to be continued.¹⁵¹

In early 2017, Malta took over the EU Council presidency from Slovakia and tabled a compromise which appeared to move the discussion on the PWD reform forward.¹⁵² The revision gained more impetus after Emmanuel Macron's rise into power in France in May 2017. The issue of posted workers in the context of 'social dumping' had transpired already during the presidential campaign in which Macron was running against the far-right *Front National*'s leader Marine Le Pen.¹⁵³ Subsequently, the newly elected French president called the original PWD 'a betrayal of the European spirit in its essence',¹⁵⁴ and at the height of his popularity toured Eastern Europe trying to win support for the revision.¹⁵⁵

¹⁵⁰ In 2013, the procedure was also triggered in response to the Commission's 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM(2013) 534 final.

¹⁵¹ Commission, 'Communication...' (n 142). See further See Tomasz Jaroszyński, 'National Parliaments' Scrutiny of the Principle of Subsidiarity: Reasoned Opinions 2014-2019' (2020) 16(1) Eur Const Law Rev 91.

¹⁵² Council, Interinstitutional File: 2016/0070 (COD) [2017] 9882/17.

¹⁵³ 'Débat Le Pen-Macron, 2h30 d'invectives' (Le Figaro, 4 May 2017) <https://www.lefigaro.fr/elections/presidentielles/2017/05/03/35003-20170503LIVWWW00339-en-direct-debat-presidentielle-macron-le-pen.php> accessed 17 May 2021 accessed 17 August 2021.

¹⁵⁴ Oscar Schneider, 'Macron: Posted Workers Directive is "a Betrayal" of the European Spirit' (The Brussels Times, 24 August 2017) <https://www.brusselstimes.com/news/eu-affairs/43798/macron-posted-workers-directive-is-a-betrayal-of-the-european-spirit/> accessed 17 August 2021.

¹⁵⁵ François Murphy, 'France's Macron Gains Eastern Foothold on EU "Posted Workers"' (reuters.com, 23 August 2017) <https://www.reuters.com/article/us-france-centraleurope/frances-macron-gains-eastern-foothold-on-eu-posted-workers-idUSKCN1B31PK> accessed 21 June 2021.

Macron's mission in Eastern Europe proved successful for by October 2017, the EU Council reached a compromise,¹⁵⁶ further revised by the European Parliament in 2018,¹⁵⁷ and Directive 2018/957 amending the PWD was adopted on June 28 2018. Interestingly, its final wording differs substantially from the original draft. Not only did the EU legislator implement some of the amendments suggested by the social partners and the EU Committees, but it also introduced bolder changes to the original Directive, which at the outset of the legislative process might have appeared too far-reaching. The revision was backed by 22 countries, including six that had earlier been involved in the 'yellow card' procedure.¹⁵⁸ Four Member States abstained from vote: Croatia, Latvia and Lithuania, as well as the UK in view of its imminent withdrawal from the EU.¹⁵⁹

The only two Member States that continued to oppose Directive 2018/957 and voted against its adoption were Hungary and Poland, both forming an unofficial anti-EU alliance led by the Viktor Orbán's Fidesz party in Hungary and the Prawo i Sprawiedliwość (PiS) in Poland. On this note, the 2018 PWD reform was not the only bone of contention between the two Eastern European members and the rest of the EU. The conflict with Hungary, among other issues, has been revolving around the country's asylum law and policy,¹⁶⁰ discrimination of foreign NGO's,¹⁶¹ and a media tax designed to target primarily independent media outlets.¹⁶² Poland has been affected by profound

¹⁵⁶ Council, Interinstitutional File: 2016/0070 (COD) [2017] 13612/17.

¹⁵⁷ Council, Interinstitutional File: 2016/0070 (COD) [2018] 9467/18.

¹⁵⁸ The six countries were Denmark, the Czech Republic, Slovakia, Estonia, Romania and Bulgaria. See Council of the European Union, 'Voting Result' (2018) 10422/18.

¹⁵⁹ Council, 'Voting Result' (n 158).

¹⁶⁰ Case C-808/18 *Commission v Hungary* EU:C:2020:1029. See Boldizsár Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation' (2016) 17(6) *Ger Law J* 1033.

¹⁶¹ Case C-78/18 *Commission v Hungary* EU:C:2020:1. See further Fekete, 'Hungary: Power, Punishment and the "Christian-national Idea"' (2016) 57(4) *Race and Class* 39.

¹⁶² Case C-596/19 P *Commission v Hungary* EU:C:2021:202; Krisztina Nagy, 'Hungary: The New Tax on the Media and Advertising Sector' (2014) 8 *IRIS: Legal Observations of the European Audiovisual Observatory* 27. Note that similar measures have also been proposed in Poland, see James Shotter, 'Poland to Amend Media Tax Plan After Outcry' (Financial Times, 16 February 2021) <https://www.ft.com/content/2966a238-acaf-4e3a-8402-39ca61e0c681> accessed 9 June 2021; Thomas Seal and Wojciech Moskwa, 'Discovery Legal Challenge Escalates Poland-U.S. Media Row' (Time Magazine, 13 August 2021) <https://time.com/6089941/poland-discovery-media-law/> accessed 17 August 2021.

changes to the judiciary with growing concerns over the independence of judges.¹⁶³ Both governments have a prominent ideological agenda featuring ‘anti-LGBT’ campaigns, which in Poland resulted in the creation of ‘LGBT-free zones’ in a number of local municipalities.¹⁶⁴ Poland has also undertaken to further restrict one of the strictest abortion laws in the World by a judgment of the government-controlled Constitutional Court.¹⁶⁵ In this vein, an infringement procedure in accordance with Article 7 TEU¹⁶⁶ is currently ongoing against the two Member States,¹⁶⁷ albeit without much success.¹⁶⁸ It was, thus, no surprise that having lost the ‘yellow card’ procedure and the Council vote, Hungary and Poland would proceed with bringing an action for judicial review of Directive 2018/957 against the EU before the CJEU.

In December 2020, the Court of Justice delivered two separate, yet similar, decisions dismissing Poland and Hungary’s applications.¹⁶⁹ At that stage the 2018 revision had already been implemented by most Member States (including the two

¹⁶³ Cases C-192/18 *Commission v Republic of Poland* EU:C:2019:529; C-619/18 *Commission v Republic of Poland* EU:C:2018:910; C-791/19 R *Commission v Republic of Poland* EU:C:2020:277. For more on the rule of law in Hungary and Poland, see Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within : Rule of Law Backsliding in the EU’ (2017) 19 *CYELS* 3; Kriszta Kovács and Scheppele, ‘The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – And the European Union’ (2018) 51(3) *Communist Post-Communist Stud* 189; Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019).

¹⁶⁴ See Elżbieta Korolczuk, ‘The Fight Against “Gender” and “LGBT ideology”’: New Developments in Poland’ (2020) 3(1) *EJPG* 165.

¹⁶⁵ See Małgorzata Fuszara, *Abortion and the Formation of the Public Sphere in Poland* (Routledge 2018). For recent developments, see Shaun Walker, ‘Poland to Implement Near-total Ban on Abortion Imminently’ (The Guardian, 27 January 2021) <https://www.theguardian.com/world/2021/jan/27/poland-to-implement-near-total-ban-on-abortion-imminently> accessed 9 June 2021.

¹⁶⁶ Consolidated version of the Treaty on European Union [2016] OJ C 202/1.

¹⁶⁷ Commission, ‘Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law’ COM (2017) 835 final; Parliament, ‘Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded’ P8_TA (2018)0340.

¹⁶⁸ A more recent measure is the so-called ‘conditionality mechanism’. See further Michael Blauburger and Vera van Hüllen, ‘Conditionality of EU Funds: An Instrument to Enforce EU Fundamental Values?’ (2021) 43(1) *J Eur Integr* 1.

¹⁶⁹ See further Verschueren, ‘The CJEU Endorses the Revision of the Posting of Workers Directive’ (2021) *ERA Forum*.

applicants).¹⁷⁰ The CJEU's judgments are of vital importance for they have offered a new interpretation of many provisions of the PWD which either had not been addressed by the Court of Justice since the '*Laval* quartet', or else had never been interpreted before. The CJEU's answers to some of the issues, such as the PWD's relationship with the Rome I Regulation¹⁷¹ or the PWD's applicability to the road transport sector¹⁷² have been discussed in Chapter 2. Other issues, such as the new insights into the PWD's objective and its relationship with Article 56 TFEU, as well as Hungary and Poland's reservations against the contents of Directive 2018//957 and the CJEU's interpretation thereof will be addressed in the next Subsection.

D. Evaluation of Directive 2018/957

1. Legal Basis of Directive 2018/957 and Its Objective

With regard to the PWD's twofold aim discussed in Chapter 2,¹⁷³ the 2018 Directive has considerably rephrased the objective by amending Article 1 PWD (now entitled 'Subject-matter and scope') and inserting the following paragraph, not included in the 2016 draft:

This Directive shall ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of workers' health and safety that must be respected.¹⁷⁴

This could be considered a major change compared to the 1996 Directive which due to its ambiguous twofold aim, sometimes perceived as paradoxical, was often framed as a

¹⁷⁰ According to art 3(1) of Directive 2018/957, the measure had to be transposed into the national legal systems of the Member States by 30 July 2020.

¹⁷¹ Council and Parliament Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6. See *Poland v Parliament and Council* [2020], paras 130-134; *Hungary v Parliament and Council* [2020], paras 177-180. This issue has been addressed in Chapter 2, s III C.

¹⁷² *Poland v Parliament and Council* [2020], paras 146-147; *Hungary v Parliament and Council* [2020], paras 161-162. See Chapter 2, s IV C.

¹⁷³ Chapter 2, s II.

¹⁷⁴ Directive 2018/957, art 1(1)(b).

market integration measure and a ‘conflict of laws’ instrument.¹⁷⁵ Interestingly, this amendment had been proposed shortly before the revision’s adoption by the European Parliament which had only delivered its opinion on the proposed legislation in May 2018.¹⁷⁶ What may, however, be problematic about this revamped objective of the EU framework from a strictly legal point of view is the fact that Directive 2018/957 is based, just like the original PWD,¹⁷⁷ on Articles 53(1) and 62 TFEU and, thus, remains linked to the principle of the free movement of services.¹⁷⁸ In this vein, Poland and Hungary in their applications to the CJEU did not hesitate to challenge the 2018 revision’s legal basis by arguing that the reform’s primary aim was to strengthen worker protection and, thus, it should have been based on Article 153 TFEU, and not on the free movement of services.¹⁷⁹

To have suggested Article 153 TFEU as the legal basis was a trap set up by Hungary and Poland, for its provisions do not apply to pay, whereas the PWD, both before and after the 2018 reform, does regulate the posted workers’ pay. However, the CJEU aided by the Advocate General Campos Sánchez-Bordona¹⁸⁰ has successfully proved that neither the PWD, nor its reforms fall within the scope of Article 153 TFEU.¹⁸¹ Furthermore, the AG argued that the 2018 revision constituted an important, yet limited, amendment to the PWD and it was, thus, not unusual for the reform to have been adopted on the same basis as the 1996 Directive.¹⁸² From a formal point of view this may be a valid argument, yet it does not explain how the freedom to provide services fits in with a reform aimed primarily at improving the protection of posted workers.

In this vein, the CJEU argues that legislation adopted on the basis of Articles 53(1) and 62 TFEU ‘must not only have the objective of making it easier to exercise the

¹⁷⁵ See further Chapter 2.

¹⁷⁶ Council, ‘Interinstitutional File...’ (n 157).

¹⁷⁷ Chapter 2, s III.

¹⁷⁸ See also Costamagna (n 110) 92-94.

¹⁷⁹ *Hungary v Parliament and Council* [2020], para 29. See also *Poland v Parliament and Council* [2020] para 40. See further Verschueren (n 169).

¹⁸⁰ *Hungary v Parliament and Council* [2020], Opinion of AG Campos Sánchez-Bordona, paras 81-82.

¹⁸¹ *Hungary v Parliament and Council* [2020], paras 67-69. See further Verschueren (n 169).

¹⁸² *Hungary v Parliament and Council* [2020], Opinion of AG Campos Sánchez-Bordona, para 75. See also *Poland v Parliament and Council* [2020], paras 45-46; *Hungary v Parliament and Council* [2020], paras 40-41.

freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom'.¹⁸³ With regard to the twofold objective of the PWD, the Court of Justice recalls that the free movement of services should not be pursued at all costs, but on a 'fair basis'.¹⁸⁴ Referring to the term 'fair competition' in the PWD's objective that has caused so much controversy over the years,¹⁸⁵ the CJEU clarifies that 'fair competition' in the area of posted work 'does not depend on excessive differences in the terms and conditions of employment to which the undertakings of various Member States are subject within one and the same Member State'.¹⁸⁶ Instead, EU undertakings are able to compete on other bases, such as the workers' productivity and efficiency.¹⁸⁷

In this interpretation the CJEU seems to side with the AG Mengozzi's Opinion in *Laval* which perceived the limb of the two-fold aim of the PWD requiring to ensure a climate of free competition not as competition that is free from any barriers, but more as *fair* competition.¹⁸⁸ Back in 2007 this interpretation had been rejected by the Court of Justice which in the '*Laval* quartet' positioned social rights as secondary to furthering market integration,¹⁸⁹ yet 2020 the CJEU's stance appeared to have evolved. While the term 'social dumping'¹⁹⁰ is carefully avoided in both judgments dismissing Hungary and Poland's applications, it appears that as the EU is pursuing the European Pillar of Social Rights, the CJEU has undertaken to restore the balance between the economic freedoms and the social rights that had been disturbed by *Laval*. According to Verschueren, 'the Court is therefore of the opinion that the contested directive creates a new balance

¹⁸³ *Hungary v Parliament and Council* [2020], para 48; *Poland v Parliament and Council* [2020], paras 51-52. See also case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* EU:C:2016:325, para 60.

¹⁸⁴ *Hungary v Parliament and Council* [2020], paras 50-51; *Poland v Parliament and Council* [2020], para 104.

¹⁸⁵ See Chapter 2, s II.

¹⁸⁶ *Hungary v Parliament and Council* [2020], para 127; *Poland v Parliament and Council* [2020], para 105. See further Verschueren (n 169).

¹⁸⁷ *Hungary v Parliament and Council* [2020], para 128; *Poland v Parliament and Council* [2020], para 106.

¹⁸⁸ *Laval*, Opinion of AG Mengozzi, para 171.

¹⁸⁹ *Viking*, para 79. See further Barnard, '*Viking* and *Laval*: An Introduction' (2007) 10 CYELS 463, 481-482. See further Chapter 2, s V.

¹⁹⁰ Chapter 2, s II.

between the factors on the basis of which undertakings established in various Member States can compete with one.’¹⁹¹

2. Collective Rights

Directive 2018/957 has strengthened collective rights in the context of posted work in two ways. Firstly, Article 1 PWD has been amended to include an explicit reference to the respect of fundamental rights, including the right to strike and to take collective action.¹⁹² This is another ‘Monti clause’ (which was missing from the 2016 proposal), which while uncontested in the Enforcement Directive, this time was challenged before the CJEU by Hungary. The applicant argued that the newly inserted clause had insulated collective rights against any EU intervention, thus calling into question the CJEU’s decision in *Laval*.¹⁹³

The Court of Justice was, therefore, prompted to revisit the issue of the place that fundamental collective rights held with regard to the posting of workers which lay at the heart of the dispute in *Laval*. At the time, the CJEU’s stance that collective rights did not lie outside the sphere of EU law but had to be reconciled with it in accordance with the principle of proportionality¹⁹⁴ ‘destroyed any cosy assumptions’ as to the place of labour law within the EU system.¹⁹⁵ On this note, it seems that the CJEU’s view in the matter has not changed since the ‘*Laval* quartet’, for in its 2020 judgments it reiterates in line with the previous case law that ‘the exercise by workers of their rights of collective action, in the context of a posting of workers (...) must be assessed in the light of EU law.’¹⁹⁶ It would, therefore, appear that the ‘Monti clause’ in the revised PWD has more of a symbolic meaning insofar as it encourages posted workers to avail of collective rights, and perhaps also invites the trade unions to reach out to posted workers.

¹⁹¹ Verschueren (n 169).

¹⁹² Directive 2018/957, art 1(1)(b).

¹⁹³ *Hungary v Parliament and Council* [2020], paras 164-165.

¹⁹⁴ *Laval*, para 94. See also *Viking*, para 46; Barnard, ‘*Viking* and *Laval* (n 188); Novitz, ‘A Human Rights Analysis of the *Viking* and *Laval* Judgments’ (2007) 10 CYELS 541, 550-551. See also Chapter 2, s V.

¹⁹⁵ Phil Syrpis and Novitz, ‘The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy. In *The Autonomy of Labour Law*’ in Alan Bogg, Cathryn Costello, Anne C. L. Davies and Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).

¹⁹⁶ *Hungary v Parliament and Council* [2020], para 168.

The second amendment with respect to the role of trade unions brought about by Directive 2018/957 is far more tangible and concerns Article 3(1) PWD. The nucleus of mandatory rules of the ‘host’ state may now be set by collective agreements and arbitration awards not only in the construction sector, as was the case in the original PWD, but in all sectors of economic activity.¹⁹⁷ Furthermore, even if Member States have a system for declaring collective agreements universally applicable, the revised PWD allows to rely on collective agreements that are generally applicable in an industry or profession and geographical area, or on collective agreements concluded at national-level by the most representative organisations.¹⁹⁸

On a purely practical level it appears that this amendment, while overall positive for workers’ rights, may prove somewhat difficult to implement in practice since the burden is on the posting companies to check all the relevant collective agreements in the receiving country, concluded in the local language of that country.

3. Remuneration, Board and Lodging

The replacement of the term ‘minimum rates of pay’ with a broader term ‘remuneration’ has by far proved the most controversial amendment to the PWD.¹⁹⁹ In accordance with Directive 2018/957, the concept of remuneration ‘shall be determined by the national law and/or practice’ of the ‘host’ Member State.²⁰⁰ With regard to this matter, Hungary in its application to the CJEU submitted that the concept of remuneration was unclear, which allegedly went against the principles of legislative clarity and legal certainty.²⁰¹ On a similar note, BUSINESSSEUROPE argued prior to the adoption of Directive 2018/957 that while the concept of a minimum wage had already been clarified in *Sähköalojen*, the term ‘remuneration’ was only going to cause further confusion.²⁰² In response, the Court

¹⁹⁷ Directive 2018/957, art 1(2)(a). See further Marta Głowacka, ‘Posting of Workers Directive Reloaded’ (2019) 29 *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 29.

¹⁹⁸ Directive 2018/957, art 1(2)(a). See further Rocca, ‘Stepping Stones Over Troubled Waters’ (n 114) 172-174.

¹⁹⁹ See further Bottero (n 48) 259-263; Costamagna (n 110) 94-96; Rocca, ‘Stepping Stones Over Troubled Waters’ (n 114) 170-172.

²⁰⁰ Directive 2018/957, art 1(2)(a).

²⁰¹ *Hungary v Parliament and Council* [2020], para 174.

²⁰² BUSINESSSEUROPE (n 138).

of Justice held that there were no doubts regarding the concept of remuneration which should be determined in accordance with the law or practice of each Member State.²⁰³

While this amendment clearly strengthens the rights of posted workers and appears to be another step towards reducing the risk of precarity, it seems that it might be a difficult change to implement on a practical level. Ensuring equal pay for posted workers requires a comparator in order to assess whether posted workers receive the same remuneration as local workers. This might prove a complex task in practice, for there may be reasons for differentiating the workers' pay based on factors such as experience, loyalty to the employer or some extra skills which, although not essential for the job, might be quite desirable. This might be particularly problematic for postings in the corporate world, often referred to as 'secondments',²⁰⁴ where the salary is often individually negotiated and remunerations cannot be disclosed to co-workers. In this vein, the CJEU reminds that Member States are required to publish information on the terms and conditions of employment on their single official national websites,²⁰⁵ which further accentuates the crucial role of the national competent authorities in effective enforcement of the PWD framework.

With regard to remuneration, Poland in its application for judicial review of Directive 2018/957 argued that the requirement to offer posted workers the same remuneration as local workers effectively amounted to a principle of equal treatment.²⁰⁶ This, according to the applicant, should not be the case, as neither foreign service providers are in a comparable situation to domestic service providers, nor posted workers should be compared to local workers.²⁰⁷ Yet in the CJEU's view, the 2018 revision does not have the effect of rendering the situation of either posted workers or foreign undertakings identical to that of domestic workers and undertakings insofar as it only applies to pay.²⁰⁸

Analysing the Court of Justice's response to Poland's plea one might, however, get the impression that the CJEU appears to agree with the applicant that introducing the principle of equal treatment in the PWD which is a measure based on the principle of the

²⁰³ *Hungary v Parliament and Council* [2020], paras 183-184.

²⁰⁴ See further Chapter 6.

²⁰⁵ *Poland v Parliament and Council* [2020], para 129.

²⁰⁶ *ibid*, para 75

²⁰⁷ *ibid*, para 76.

²⁰⁸ *ibid*, para 111.

free movement of services would be too far-reaching. In this vein, the Court of Justice does not dismiss Poland's argument by stating, for example, that ensuring equal treatment for posted workers is a necessary step towards guaranteeing fair competition and greater protection of posted workers in accordance with Directive 2018/957's aim. On the contrary, the CJEU goes to great lengths to demonstrate that the 2018 revision did not have the effect of granting posted workers the right to equal treatment, underlining that the PWD is merely 'an instrument for the coordination of the law of the Member States on terms and conditions of employment'.²⁰⁹

This is an interesting point with regard to possible further revisions of the PWD, which suggests that the EU legislator may run into difficulty in trying to justify more equal treatment for posted workers in light of the proportionality test required by Article 56 TFEU. Again, this issue exemplifies the restrictions that the PWD is subject to due to its legal basis, for rights that would be obvious under the regime of the free movement of workers (Article 45) continue to be unattainable for posted workers.²¹⁰

Another amendment that had not been included in the 2016 proposal but was suggested the following year during the Maltese presidency,²¹¹ is the inclusion in the nucleus of reimbursement of or advances for the expenditure to cover travel, board and lodging for posted workers, as well as the requirement to ensure a certain standard of accommodation when provided by the employer.²¹² This is yet another clarification of the term 'remuneration' for it stipulates that such expenses are not component elements of remuneration and, therefore, cannot be deducted from it. Disappointingly, the requirement to cover the above expenses has to be fulfilled 'in accordance with the national law and/or practice applicable to the employment relationship'²¹³. In this vein, a report carried out by the European Trade Union Institute (ETUI) has shown that national laws and practice in this field are far from uniform.²¹⁴ Therefore, it seems

²⁰⁹ *ibid*, paras 102, 103, 116, 126-127.

²¹⁰ See Chapter 2, s III.

²¹¹ Council, 'Interinstitutional File' (n 152).

²¹² Directive 2018/957, art 1(2)(a).

²¹³ *ibid*, art 1(2)(c).

²¹⁴ Rasnača, 'Reimbursement Rules for Posted Workers: Mapping National Law in the EU28' (ETUI 2019).

unclear whether Member States which do not have statutory reimbursement rules, such as for instance Ireland, are obliged to introduce them with regard to posted workers.²¹⁵

4. Long-term Postings

The regulation of the maximum duration of applying Article 3(1) PWD in Directive 2018/957 differs from the 2016 draft, which appears to be owed to the remarks made by the EU Committees, as well as by ETUC. The amended PWD in its entirety now applies to workers posted to another Member State for a maximum duration of not 24, but 12 months (or 18, provided that the employer submits a ‘motivated notification’).²¹⁶ The shortening of the maximum duration of applying Article 3(1) PWD from 24 to 12 months had previously been suggested by the CoR,²¹⁷ and appeared in the 2017 compromise reached by the Council following Emmanuel Macron’s trip to Eastern Europe.²¹⁸ Conversely, postings exceeding the maximum period, sometimes referred to as a ‘long-term postings’,²¹⁹ are covered by all of the applicable terms and conditions of employment in the ‘host’ state.²²⁰ It has to be noted that this does not extend to the social security affiliation of posted workers for according to the current wording of Article 12 of Regulation 2004/883 posted workers’ contributions are paid in the sending country for the first 24 months of posting.²²¹

The 2018 revision has also implemented remarks made by ETUC that the exclusion of postings shorter than six months from the overall cumulative period would provide an easy way to circumvent the law with a succession of short postings.²²² Consequently, the six months clause has been deleted from the Directive. Thanks to that change, all postings – regardless of their duration – will be taken into account for the

²¹⁵ *ibid*, 36.

²¹⁶ Directive 2018/957, art 1(2)(b).

²¹⁷ Opinion of the European Committee of the Regions (n 141) 76.

²¹⁸ Council, ‘Interinstitutional File...’ (n 156)

²¹⁹ See Głowacka (n 195) 36-40; Bottero (n 48) 265-267.

²²⁰ With the exception of procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses, as well as supplementary occupational retirement pension schemes, see Directive 2018/957/EU, art 1(2)(b).

²²¹ See also Costamagna (110) 96-98.

²²² ETUC, ‘Revision...’ (n 139).

purpose of counting cumulative posting. The Directive's preamble explicitly states that the rules on cumulative postings have been introduced in order to 'ensure that such replacements are not used to circumvent the otherwise applicable rules'.²²³

5. Other Issues – Temporary Work Agencies and Subcontracting

The revised EU framework also contains the amendment proposed in the 2016 draft that addresses the conflict between the PWD and the Temporary Work Agency Directive. Accordingly, Article 1(2)(b) of Directive 2018/957 stipulates that the Member States shall ensure the same terms and conditions of employment that are guaranteed by Article 5 of the Temporary Work Agency Directive.²²⁴ In addition, the third posting scenario laid down in point (c) of Article 1(3) PWD that refers to posting via temporary work agencies²²⁵ has been modified to remedy situations known as 'double postings' which occur when posted workers are recruited by an agency and posted to one Member State, only to be sent again to another Member State.²²⁶ According to the revised PWD, the temporary agency which initially hires workers continues to be the employer throughout the posting and, therefore has to comply with the PWD and the Enforcement Directive.²²⁷

Conversely, the proposed amendment concerning subcontracting chains which would give Member States the option to oblige undertakings to subcontract only to those companies that guaranteed a certain amount of remuneration to workers is missing from the final version of Directive 2018/957.²²⁸ This development came as a disappointment to some of the relevant stakeholders, such as the trade unions and the CoR which had argued that the regulation of subcontracting liability laid down in Article 12 of the Enforcement Directive was insufficient, and was, thus, lobbying for further reform.

To be precise, the issue of subcontracting has not been fully abandoned, but rather postponed. According to Directive 2018/957, by the end of July 2023 the Commission shall submit a report on this matter and propose any necessary amendments in the field

²²³ Directive 2018/957/EU, Recital 11.

²²⁴ See also Directive 2018/957, Recital 6.

²²⁵ See further Chapter 2, s IV D.

²²⁶ Bottero (n 48) 264.

²²⁷ Directive 2018/957, art 1(1)(c). See also Głowacka (n 195) 40-41.

²²⁸ See also Bottero (n 49) 263.

of subcontracting.²²⁹ Meanwhile, Member States should ensure effective implementation of the Enforcement Directive ‘with a view to tackling abuses in subcontracting situations and in order to protect the rights of posted workers’.²³⁰ This situation is far from ideal, for it perpetuates the state of legal uncertainty concerning the entitlements of workers in subcontracting chains. The CJEU had been encouraged to clarify the issue in *Dobersberger*, but refused to address it.²³¹

Conclusion

This Chapter examined the evolution of the EU framework on the posting of workers that has been in a state of flux since 2012. Back then, the Commission published an Impact Assessment that identified many gaps in the 1996 Directive and its enforcement which had rendered the PWD manifestly insufficient to guarantee even the most basic rights for posted workers. While some of those problems were addressed by the Enforcement Directive, other issues which required further intervention with the substance of the PWD were left untouched due to the lack of political consensus among the Member States, only to return in the 2016 proposal for a second revision. While both reforms form part of the same process, it appears that what had not been feasible in 2014, was rendered possible in 2018 thanks to changes that had occurred on a political level. On this note, this Chapter also looked at a broader context of the PWD reforms, including the shift of focus in the EU onto tighter social integration which took the shape of the European Pillar of Social Rights.

The Enforcement Directive is a technical tool that equipped the PWD with the teeth that the 1996 Directive had lacked. On the same note, Directive 2018/957 has put a time limit on the nucleus of mandatory rules and addressed the issue of cumulative postings, which, again, are enforcement-related solutions, for the PWD had clearly been envisaged from the outset to cover temporary situations, and its prolonged use was always considered a malpractice. With regard to new rights for posted workers, the 2018

²²⁹ Directive 2018/957, art 2.

²³⁰ *ibid*, Recital 25.

²³¹ *Dobersberger*, para 34. See also Opinion of AG Szpunar, paras 70-83. See further Marta Lasek-Markey, ‘Sufficient Connection Test and the Definition of a Posted Worker. Unexpected Lessons Learnt from *Dobersberger*’ (2021) 46(3) ELRev 395.

revision has extended the scope of the nucleus to include all the elements of remuneration and reimbursement of expenses, as well as relaxing the criteria for collective agreements that may apply to posted workers. Furthermore, on an ideological level Directive 2018/957 represents certain shifts in the framing of the PWD which is now considered a worker protection measure, rather than merely a ‘conflict of laws’ instrument for strengthening market integration.

Against this background, the 2018 PWD revision provoked heavy criticism from the Eastern European Member States whose service providers have been the main beneficiaries of the posting arrangement since the 2004-2013 enlargements. The reasons behind this opposition were, thus, to some extent pragmatic but perhaps also ideological, and stemmed from a conservative reading of the PWD that did not take into account the changing social reality in the EU. In this vein, Hungary and Poland’s challenges to Directive 2018/957 exposed the limits of the PWD as a worker protection measure based on the free movement of services, which requires a proportionality test for every change that strengthens the rights of posted workers.

Referring back to the overarching research question and the five elements of precarity established for the purpose of this project,²³² it appears that the 2014-2018 reforms have the potential to reduce the experience of precarity. Firstly, while the posting arrangement remains temporary by default, by introducing a time limit to applying Article 3(1) PWD and solving the issue of cumulative postings, Directive 2018/957 has put an end to situations where the PWD had been applied to long-term contracts.

Secondly, extending the scope of collective agreements that may apply to posted workers might contribute to strengthening the bargaining power, albeit it seems that the level of control exercised by posted workers over their employment relationship in the ‘host’ country will remain low.

Thirdly, the amended nucleus has granted more labour law protection to posted workers, such as the right to statutory reimbursement of expenses incurred on account of posting. Furthermore, the Enforcement Directive by strengthening the role of national authorities, introducing declaration procedures, inspections and penalties, has

²³² The five criteria are: uncertainty, lack of control over the working conditions, low level of labour law and social security protection, low income and subjective perception of precarity. See further Chapter 1, s III D.

safeguarded the rights already granted by the 1996 Directive which had not been adequately enforced prior to the 2014 reform.

Fourthly, Directive 2018/957 has improved the situation of posted workers with regard to income by requiring employers to ensure the same remuneration as that received by domestic workers carrying out comparable jobs.

Finally, with respect to the fifth subjective criterion, the workers' perception of the changes introduced by the 2014-2018 reforms will be investigated in Chapters 5-6 through the use of research findings from the interviews conducted for the purpose of this project.

The revisions have, therefore, brought about changes in the right direction with regard to reducing the risk of precarity for posted workers. Yet, as has been argued throughout this Chapter, the amendments are limited by the principle of the free movement of services on which the EU framework continues to be based. The far-reaching implications of the PWD's legal basis were described at length in Chapter 2.²³³ While posted workers are now entitled to equal pay, the labour law protection of those whose contracts do not exceed 12 months remains limited, and does not extend to the right to severance pay or protection from unfair dismissal. Furthermore, posted workers do not enjoy the right to equal treatment with local workers with regard to social security and tax, which would also cover the workers' family members, as is the case under the regime of the free movement of workers. As a result, the worker protection aspect of the revised PWD remains deficient and continues to predispose posted workers to precarity.

²³³ Chapter 2, s III.

4. Empirical Research: Literature Review and Research

Methodology

Introduction

The present Chapter marks the passage between the theoretical and the practical part of this research. Its primary aim is to set the scene for the evaluation of the interview findings carried out in Chapters 5 and 6. As explained in the Introduction, the answer to the central research question requires five steps.¹ In the first step, a working definition of precarious work for the purpose of this project was established in Chapter 1. It is essentially the Rodgers and Rodgers definition comprising four elements: the degree of uncertainty of continuing work (1), the worker's bargaining power (2), level of labour law and social security protection (3) and income level (4),² supplemented with the workers' subjective perception of their situation.³

In the second step, the Posted Workers Directive (hereafter: PWD)⁴ and its reforms⁵ were assessed with a view to identifying those aspects of the posting arrangement where worker protection remains deficient despite the changes. While this assessment of the EU framework proved that the posting of workers displayed the four elements of precarious work identified by Rodgers and Rodgers, evidence regarding the

¹ Introduction, s II B.

² Gerry Rodgers, 'Precarious Work in Western Europe: The State of the Debate' in Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989). See Chapter 1, s III A.

³ Arne L. Kalleberg, *Precarious Lives. Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018). See Chapter 1, s III C.

⁴ Council and Parliament Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

⁵ Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11; Council and Parliament Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

fifth, subjective element of precarity, may be found in the existing empirical literature in the field. On this note, this Chapter will begin with a brief literature review carried out in Section I. The existing empirical studies in the field of posted work conducted by researchers with a background in sociology and anthropology will be evaluated to identify those areas of the posting experience that have often proved precarious in practice. This literature will subsequently be referred to in Chapters 5 and 6 in order to triangulate the research findings.

Section II will discuss the available statistical data regarding the posting of workers in the EU, collected for the European Commission by De Wispelaere and others on a regular basis, with the latest edition concerning postings reported in 2019.⁶ These statistics are useful insofar as they shed light on both the scale and some major trends in posted work. Data regarding the popularity of the posting arrangement in particular Member States, as well as the information on the different sectors of employment where postings are typically carried out, influenced the recruitment methods and the sampling procedure in the empirical phase of this research.

Section III will shift the focus to the research methods used in the empirical phase of this project. It will provide justification of the chosen methodology which employed the narrative inquiry approach to carry out qualitative interviews. The eligibility criteria, recruitment methods, sampling and saturation will be discussed in Section IV. Ethical considerations regarding consent and confidentiality will only be briefly mentioned, as detailed explanation was provided in the researcher's application to the Trinity College Dublin Faculty of Arts, Humanities and Social Sciences (FAHSS) Research Ethics Committee which granted approval in April 2019. Section V will describe the conduct of the interviews, including the interview guide and the different modes of carrying out the interviews (in person and remotely). Finally, Section VI will explain how the collected data was analysed with the use of the thematic analysis framework to link the recurring themes stemming from the interviews with specific aspects of the PWD.

Sections III-VI are supplemented with a number of appendices attached to this thesis: the FAHSS's Research Ethics Committee's approval, the consent form and participant information sheet in both English and Polish, as well as the interview guide. The application submitted to the FAHSS's Research Ethics Committee is available upon

⁶ Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, 'Posting of Workers. Collection of Data from the Prior Notification Tools. Reference Year 2019' (European Commission 2021).

request. Signed consent forms returned by the research participants have not been attached to the thesis due to confidentiality concerns.

I. Existing Empirical Literature on Posted Work

As far as existing empirical studies on the posting of workers available in the English language are concerned, they tend to be geographically fragmented and have been carried out mainly by academics specialising in such fields as sociology, economics, anthropology and ethnography, in which qualitative research methods are more commonly used than in the law. Notably, Wagner in her monograph offers a comprehensive account of a qualitative research project exploring the issue of precarious posted workers in the German meat-processing industry prior to the 2018 reform of the PWD.⁷

Fieldwork featuring in-depth interviews concerning various aspects of posted work has been carried out also by Lillie and Sippola who conducted interviews at the construction site of a nuclear power plant in Finland⁸ which later became the set of the *Sähköalojen* case discussed in Chapter 3.⁹ Wagner and Lillie also carried out a case study at the European Central Bank construction site in Frankfurt, Germany.¹⁰ Furthermore, Berntsen, as well as Thörnqvist and Bernhardsson, interviewed Polish posted workers: respectively in the Netherlands,¹¹ and in Sweden.¹² Caro and others conducted a comprehensive study on the isolation of posted workers in the construction sector in

⁷ Ines Wagner, *Workers without Borders. Posted Work and Precarity in the EU* (Cornell University Press 2018).

⁸ Nathan Lillie and Markku Sippola, 'National Unions and Transnational Workers: the Case of Olkiluoto 3, Finland' (2011) 25(2) *Work Employ Soc* 292.

⁹ Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* EU:C:2015:86. See Chapter 3, s II B.

¹⁰ Wagner and Lillie, 'European Integration and the Disembedding of Labour Markets: Transnational Labour Relations at the European Central Bank Construction Site' (2014) 52(2) *J Com Mar St* 403.

¹¹ Lisa Berntsen, 'Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries' (2015) 31(4) *IJCLIR* 371.

¹² Christer Thörnqvist and Sebastian Bernhardsson, 'Their Own Stories — How Polish Construction Workers Posted to Sweden Experience Their Job Situation, or Resistance Versus Life Projects' (2014) 21(1) *Transfer* 23.

Finland, Germany, the Netherlands and the UK.¹³ Alsos and Ødegård's study focuses on business strategies of Norwegian companies in the shipbuilding industry which since the 2004-2007 EU enlargements have been hiring large number of Eastern European workers, albeit not only as posted workers.¹⁴ Elsewhere in Scandinavia, Nielsen and Sandberg carried out ethnographic observations and in-depth interviews with Polish temporary migrants working on building sites in the Copenhagen region between 2011 and 2013 which focused on the impact of the workers' family lives.¹⁵ More recently, Iannuzzi and Sacchetto carried out interviews with labour inspectors in Italy to evaluate the implementation of the Enforcement Directive,¹⁶ and Matyska conducted an anthropological study of Polish posted workers.¹⁷

A. Limits of the Existing Empirical Literature

The above qualitative studies focus exclusively on low-wage and low-skilled 'blue-collar' posted workers.¹⁸ Most importantly, given the authors' background, their focus naturally shifts towards themes such as social conflict and interaction, which adds an invaluable insight to the complex picture of posted work. An interesting conclusion

¹³ Erka Caro, Berntsen, Lillie and Wagner, 'Posted Migration and Segregation in the European Construction Sector' (2015) 41(10) *J Ethn Migr* 1600.

¹⁴ Kristin Alsos and Anne Mette Ødegård, 'Shifting Employer Strategies in Light of Institutional Change', in Jens Arnholz and Lillie, *Posted Work in the European Union. The Political Economy of the Free Movement* (Routledge 2020).

¹⁵ Niels Jul Nielsen and Marie Sandberg, 'Between Social Dumping and Social Protection' (2014) 44(1) *Ethnol Eur* 23.

¹⁶ Francesco E. Iannuzzi and Devi Sacchetto, 'Italian Labour Inspectors Facing Posted Workers Phenomena' in Arnholtz and Lillie (n 14).

¹⁷ Anna Matyska, 'Ambiguous Mobility: Polish Transnational Workers Navigating and Changing the Institutional Landscape of Posting', in Arnholtz and Lillie (n 14). See also Matyska, 'Transnational Contract Work and the Remaking of Class Among Polish Workers in Construction and Shipyards: Between Collective Subjugation' (2018) 4 *Kultura i Społeczeństwo* 133.

¹⁸ There are sociological empirical studies concerning migrant 'white-collar' workers or business travel, but not the posting of workers as such, see James Wickham and Ian Bruff, 'Skills Shortages Are Not Always What They Seem: Migration and the Irish Software Industry' (2008) 23(1-2) *New Technol Work Employ* 31; Wickham and Alessandra Vecchi, 'The Importance of Business Travel for Industrial Clusters - Making Sense of Nomadic Workers' (2009) 91(3) *Geogr Ann Ser B GEOGR ANN B* 245.

reached by the researchers is the social segregation of posted workers from the native workforce in the ‘host’ state driven by the temporary nature of their stay.¹⁹ In the context of the German meat-processing industry, Wagner speaks of a ‘de-territorialisation’ of posted workers and stresses the need for their ‘re-territorialisation’ and ‘re-embedding them into an inclusionary framework with collective interest representation.’²⁰ Focusing mainly on the above mentioned themes of social cohesion and interaction, the existing qualitative studies tend to be less concerned with legal issues, particularly on the EU level, such as the enforcement of the PWD or its revisions. While some of the fieldwork was carried out when the 2014-2018 revision process was already underway, those studies generally do not focus on the impact of the reforms (with the exception of Iannuzzi and Sacchetto).

B. State of the Art

One important research finding relevant to the legal assessment of the posted workers’ situation was made by Berntsen following nearly 50 interviews with Polish workers employed on various non-SER (Standard Employment Relationship) contracts in the Netherlands. Berntsen notes that ‘many posted migrants show a limited understanding of the local regulatory context, due to the way they are brought to work in another country, as well as their temporary presence in that country.’²¹ This led to a practical difficulty for the research to differentiate between the various contractual arrangements under which the research participants had been employed in the ‘host’ country. Distinguishing between different, often vague, contractual arrangements to distil posted workers from other atypical workers is a significant methodological challenge for qualitative studies which also emerged in this project.

On a general note, in line with what is argued throughout this thesis, Lillie points to a variety of factors, legal and other, contributing to the unusual status of posted workers in the EU:

¹⁹ Berntsen (n 11) 381; Caro and others (n 13) 1612-1614; Wagner (n 7) 78-81.

²⁰ Wagner (n 7) 82. On de-territorialisation, see further Andrea Iossa, ‘Posting Highly Mobile Workers: Between Labour Law Territoriality and Supply Chains of Logistics Work — A Critical Reading of *Dobersberger*’ (2021) ILJ (published online on 17 May 2021).

²¹ Berntsen (n 11) 382.

Formal legal structures are only part of the biopolitical technology of posting: in order for regulatory sovereignty to be held at bay, posted workers must continue to regard their employment and social world as extraterritorial, and to tolerate the segregation which cuts them off from host-country society.²²

Research findings reported in the existing literature generally confirm that all five elements of precarious work identified in the definition formulated in Chapter 1 are present among posted workers in the EU, or at least were present prior to the 2014-2018 reforms of the PWD. Matyska, who between 2014-2017 carried out ethnographic research among Polish temporary workers in Finland is certain that their situation might be considered as ‘economic and affective precariousness’.²³

With regard to the first criterion regarding the lack of certainty of continuing work, Lillie argues that the posting arrangement ‘involves a high degree of uncertainty; workers expect that they can be dismissed at any time, and realize they may have to move to another job, perhaps in another country’.²⁴ On this note, Berntsen stresses the negative impact of short posting contracts on the working conditions by comparing two different industries employing posted workers in the Netherlands: construction and meat-processing. The author argues that differences between these two groups of interviewees resulted partly from the duration of their stay in the ‘host’ country, as meat factory posted workers tended to have more stable jobs ‘with more opportunities than construction workers to acquire knowledge about their rights and entitlements.’²⁵

Regarding the second element of precarious work, the lack of control over the posted workers’ contractual terms of employment, Lillie argues that ‘it is absurd to believe that individual workers are navigating the intricacies of international labor law themselves, or that there is some kind of negotiation or agreement occurring around it.’²⁶ Recounting the experiences of Polish posted workers, Matyska states: ‘Many workers I met did not seem to question openly much of their circumstances or inquire into the

²² Lillie, ‘The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework’ (2016) 17 *Theoretical Inq L* 39, 51.

²³ Matyska, ‘Transnational Contract...’ (n 17) 143.

²⁴ Lillie (n 22) 57

²⁵ Berntsen (n 11) 388.

²⁶ Lillie (n 22) 52.

entitlements of their posting status abroad, thus tacitly giving the employers the power to define their situation.’²⁷

Why did the posted workers tolerate the many malpractices on the part of the employers? In answering this question, Lillie refers to a certain mentality of a short-term migrant ‘who cannot afford to invest too much effort and risk into improving conditions in any particular location, because soon they will be moving on.’²⁸ On a different note, Wagner employs the notion of a ‘dual frame of reference’ developed originally by Waldinger and Lichter, according to which migrant workers tend to be tolerant towards substandard working conditions in the receiving country.²⁹ This is because posted workers compare job opportunities at home and abroad, and the latter country still usually offers better remuneration.³⁰ In this vein, Thörnqvist and Bernhardsson argue that the financial incentive was the main reason behind the posted workers’ decision to seek work in Sweden to finance what they called ‘a life project’: ‘build a house, start up a company, start a family and raise children, or to save for retirement’.³¹ The same is confirmed by Lillie who describes posted workers in the EU as ‘target earners’: workers who work abroad to achieve a certain monetary “target,” and once this is earned, return home.’³²

Yet, even if posted workers, preoccupied with their ‘life projects’, do not complain about the employers’ malpractices, the question arises why the matter is not addressed by the trade unions in the ‘host’ Member State either. The issue of the workers’ bargaining power is also linked to the second element of precarious work. The answer probably lies partly in the much broader theme of the unions’ response to both migrant and atypical workers such as those discussed in Chapter 1.³³ Furthermore, in relation to the posting of workers, the issue of representation by trade unions seems even more complex. Posted workers are, on one hand, outside the reach of their ‘home’ country

²⁷ Matyska, ‘Ambiguous Mobility...’ (n 17) 74.

²⁸ Lillie (n 22) 59.

²⁹ Roger Waldinger and Michael I. Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (University of California Press 2003), as cited by Wagner (n 7) 65.

³⁰ Thörnqvist and Bernhardsson (n 12) 33. See also Matyska, ‘Ambiguous Mobility...’ (n 17) 74-76.

³¹ Thörnqvist and Bernhardsson (n 12) 33-35.

³² Lillie (n 22) 57-58.

³³ See Chapter 1, s II B.

unions, while the ‘host’ country unions often perceive them as a threat, as was the case in *Laval*.³⁴

Different union policies and responses to posted work have been explored by Doellgast, Lillie and Pulignano.³⁵ In the case of the German meat-processing industry, Wagner confirms that the unions did try to approach posted workers but faced considerable hurdles such as ‘language barriers, the frequent site mobility of workers, and workers’ fear of and lack of trust in unions’.³⁶ Similarly, Lillie and Sippola, following a *Laval*-like case study of a nuclear power plant construction site, which at the time was the biggest construction site in Europe, speak about the Finnish union’s ineffectiveness, inability to win the foreign workers’ trust and the workers refusal to cooperate with the unions of the ‘sending’ states:

The posted workers (at least, initially) did not usually come to the union of their own initiative and the shop stewards [union representatives at a company level in Finland] found they did not have the capacity and skills to check employment conditions in a meaningful way. Finnish unionists were exasperated by the reluctance of many Polish workers to complain when working conditions did not match the Finnish CBA [collective bargaining agreement].³⁷

At the same time, Lillie and Sippola explain that when Polish workers employed by Atlanco Rimec, a transnational agency registered in Ireland,³⁸ filed an official complaint in 2007, the local union was reluctant to offer assistance.³⁹ Concerning Atlanco Rimec, Lillie extensively explains how the company was ‘a leader in innovative labor

³⁴ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbunde and others* [2007] ECR I-11767. See further Chapter 2, s V. See also Aravind R. Ganesh, ‘Appointing Foxes to Guard Henhouses: The European Posted Workers’ Directive’ (2008) 15(1) Colum J Eur L 123.

³⁵ Virginia Doellgast, Lillie and Valeria Pulignano (eds), *Reconstructing Solidarity. Labour Unions, Precarious Work and the Politics of Institutional Change in Europe* (OUP 2018). See also Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Intersentia 2015) 39-51.

³⁶ Wagner (n 7) 67.

³⁷ Lillie and Sippola (n 11) 301.

³⁸ See further Frank Shouldice and Liam O’Brien, ‘EU Court Entertained Bogus Case on Welfare Rights’ (EU Observer, 21 December 2015) <https://euobserver.com/investigations/131569> accessed 3 August 2021.

³⁹ Lillie and Sippola (n 11)

intimidation strategies' with regard to those posted workers employed by the undertaking across the EU who did dare file a complaint.⁴⁰

That the Finnish unions' attitude has evolved since, was proved in *Sähköalojen* in which workers posted by a Polish subcontractor ESA to the same construction site in Finland were successfully represented by the local union. Yet interestingly, involvement in the CJEU case only proved partially beneficial for the Polish workers, as has been uncovered by Matyska who interviewed some of the individuals involved in the conflict with ESA. All of them were either dismissed shortly after the dispute arose or their contracts were not renewed, and eight years after seeking redress they still had not received the outstanding remuneration due to an ongoing court battle following ESA's appeal of the Finnish court's judgment.⁴¹

Moving on to the third element of precarious work, that of the low labour law protection and social security standards, Wagner offers an interesting insight into some of the management malpractices in the German meat industry prior to the 2014 Enforcement Directive, based on interviews conducted with trade union representatives:

Several unionists expressed that, nowadays, 'on paper, all the employment standards are correct', but there is 'a difference between the rights on one hand and the reality on the other. Workers operate in what can be described as a lawless space'.⁴²

It is worth pointing out that many of the issues identified by Wagner did not stem from the pre-revision PWD regime itself, but rather from the circumvention of the rules and from an incorrect enforcement of the PWD. Therefore, the question arises to what extent the situation has improved following the implementation of the 2014 Enforcement Directive,⁴³ which has introduced factual checks and controls at workplaces, penalties, as well as information and documentation obligations on the part of the employers. On this note, Italian labour inspectors interviewed by Iannuzzi and Sacchetto stress the

⁴⁰ Lillie (n 22) 53-55.

⁴¹ Matyska, 'Ambiguous Mobility...' (n 17) 79-80.

⁴² Wagner (n 7) 60.

⁴³ The deadline for the implementation of the Enforcement Directive elapsed in June 2016. See Directive 2014/67, art 23(1).

benefits of the 2014 revision, praising particularly the prior notification system which allows them to track the presence of posted workers and facilitate control.⁴⁴

Wagner also reports a set of issues faced by posted workers before the adoption of Directive 2018/957 stemming from aspects of the PWD that have subsequently been amended by the 2018 reform. Consequently, it seems reasonable to expect that some of these problems identified by Wagner will have been solved since. One such problem was the deduction of a range of work-related costs from the posted workers' wages, e.g. travel expenses, overpriced rent or tools and protective workwear.⁴⁵ In the revised PWD, reimbursement of expenses incurred on account of posting (such as travel, board and lodging), where provided for in national legislation, is now part of the 'nucleus' of Article 3(1) PWD.⁴⁶

With regard to the social security coverage, one problem reported by Wagner was related to accidents which occurred at the workplace. The issues raised by workers concerned, *inter alia*, dismissal following an accident in order to avoid covering the cost of long-term treatment or the lack of paid sick leave for the period following the accident during which the person was unable to work.⁴⁷ Furthermore, posted workers experienced issues with the payment of their social security contributions which, while deducted from the wages by the employer, were often not paid to the social security institutions of the 'sending' states.⁴⁸ In this vein, Berntsen has also observed various problems concerning access to healthcare for posted workers.⁴⁹

Concerning the fourth element of the precarious work definition regarding the income of posted workers, Lillie argues that while many individuals decided to pursue posted work abroad hoping for higher wages than in the sending country, this was not always the case in practice: 'they sometimes were paid similar or lower wages than at home, but accepted the position to avoid unemployment.'⁵⁰ According to Wagner,

⁴⁴ Iannuzzi and Sacchetto (n 16) 120-124.

⁴⁵ Wagner (n 7) 62-64. See also Iannuzzi and Sacchetto (n 16) 113.

⁴⁶ Directive 2018/957, art 1(2) (a). See further Chapter 3, s II D.

⁴⁷ Wagner (n 7) 62-64. The right to sick pay, linked to social security affiliation, is outside the 'nucleus' of Article 3(1) PWD. See further Frans Pennings, *European Social Security Law* (6th edn, Intersentia 2015) 180-182.

⁴⁸ Wagner (n 7) 62.

⁴⁹ Berntsen (n 11) 382-383.

⁵⁰ Lillie (n 22) 57.

employers frequently did not comply with the maximum work and minimum rest periods guaranteed in Article 3(1) PWD, making posted workers work longer hours than permitted and, at the same time, not accounting for overtime.⁵¹ Similar findings were also reported in relation to posted workers in Sweden interviewed by Thörnqvist and Bernhardsson.⁵² Furthermore, Wagner's interviewees signalled the issue of employers withholding the annual leave pay received in Germany. Even though the accumulated annual leave sum was regularly transferred from the local collective social fund, the employers did not pass it on to the workers.⁵³

In terms of the fifth, subjective element of the precarious work definition, this has been reflected, for example, in the posted workers' perception of their accommodation in the 'host' state, compared by Wagner to the 'dormitory labour regime', a term coined in the context of the Chinese production methods.⁵⁴ On a similar note, posted workers interviewed by Caro and others compared the accommodation arrangements to those in 'a prison' or even 'a concentration camp'.⁵⁵ Iannuzzi and Sacchetto also deplore the living conditions of posted workers in the transport sector in Italy who sometimes had to remain in one place for a number of days (close to a port), sleeping inside the driver's cab with few drinking fountains available and no sanitary facilities.⁵⁶ In this vein, it is argued that the accommodation conditions contributed to the posted workers' segregation from the native workforce in the 'host' country.⁵⁷ Furthermore, Berntsen notes that those posted workers who tried to avoid group accommodation and rent privately instead encountered 'discriminatory or xenophobic attitudes from potential landlords' in the Netherlands.⁵⁸ Again, this aspect of the posting arrangement was

⁵¹ Wagner (n 7) 60-61. See Chapter 2, s V.

⁵² Thörnqvist and Bernhardsson (n 12).

⁵³ Wagner (n 7) 61.

⁵⁴ Ngai Pun and Chris Smith, 'Putting Transnational Labour Process in Its Place: The Dormitory Labour Regime in Post-Socialist China' (2007) 21(1) *Work Employ Soc* 27, as cited by Wagner (n 7) 63.

⁵⁵ Caro and others (n 13) 1610. See also Thörnqvist and Bernhardsson (n 12) 30.

⁵⁶ Iannuzzi and Sacchetto (n 16) 112-113. See also Jan Buelens and Lies Michielsen, 'Social Dumping: A Symptom of the European Construction. An Explanatory Study of Social Dumping in Road Transport' in Buelens and Marc Rigaux, *From Social Completion to Social Dumping* (Intersentia 2016).

⁵⁷ Berntsen (n 11) 381-386. See also Caro and others (n 13) 1610-1612.

⁵⁸ Berntsen (n 11) 386.

amended by Directive 2018/957 which obliges employers to ensure that the accommodation provided for posted workers meets a certain standard.⁵⁹

Furthermore, Matyska's works add valuable insights into other factors affecting the workers' overall subjective perception of their posting such as the negative impact on family life and a feeling of being regarded as second-class EU citizens: 'exploited and subjugated in the global ethnicized hierarchies of labour in which Poles are synonymous with a skilled and cheap workforce.'⁶⁰

II. Statistics on the Posting of Workers in the EU

The choice of methods and research design of the empirical part of this project was a result of an evaluation of four separate sources of information. The first source was the theoretical framework of precarious work explored in Chapter 1 and the preliminary assumption that the degree of precarity among posted workers will vary depending on a number of factors. The second source was the evaluation of the PWD and its two revisions addressed in Chapters 2 and 3, which allowed the identification of certain elements of the legal framework and its enforcement that may have the effect of predisposing posted workers to precarity. The third and fourth sources of information that have influenced the choice of methodology were, respectively, the empirical literature in the field (reviewed above) and the statistical data concerning the posting of workers in the EU.

A. Methodological Challenges to Data Collection

In relation to the scale of the phenomenon of posting workers in the EU, since the 2004 enlargement the numbers of workers falling within the scope of the PWD have been growing. While in 2005 the population of posted workers in the EU was estimated to be

⁵⁹ Directive 2018/957, Recital 7.

⁶⁰ Matyska, 'Transnational Contract...' (n 17) 147. See also Samantha Currie, 'De-skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement' (2007) 23(1) *IJCLIR* 83.

‘just under one million’,⁶¹ by 2018 the number of postings reported by the Member States had tripled.⁶² It is important to bear in mind that these statistics are not accurate since they are based primarily on the number of A1 social security certificates issued by the sending countries for social security purposes. Those are issued in accordance with the EU Social Security Regulations⁶³ and there are certain discrepancies between the definition of a posted worker in the PWD⁶⁴ and that used for social security purposes.⁶⁵ Notably, A1 certificates are also issued to self-employed persons who fall outside the scope of the PWD.⁶⁶

Furthermore, Regulation 883/2004 has created two separate legal categories, regulated by Articles 12 and 13 respectively, based on whether the worker (or the self-employed person) is posted to another Member State (Article 12) or if they normally work in two or more Member States (Article 13). The latter category, while not considered as posted workers by Regulation 883/2004, might fall within the definition of a posted worker within the PWD.⁶⁷ In addition, A1 documents take into account ‘postings’ as opposed to posted workers and, as it has been explained in Chapter 3, a single posting might be carried out by a number of workers who replace each other.⁶⁸

Following the implementation of the Enforcement Directive, statistical data regarding posted workers may also be obtained through the prior notification systems

⁶¹ Commission, Communication ‘Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers’ (2007) COM/2007/0304 final.

⁶² De Wispelaere, De Smedt and Pacolet, ‘Posting of Workers Report on A1 Portable Documents Issued in 2018’ (European Commission 2019) 8.

⁶³ Council and Parliament Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1 and Council and Parliament Regulation 987/2009/EC laying down the procedure for implementing Regulation (EC) No 883/2004 [2009] OJ L 284/1. See further Pennings, ‘Posting’ in *European Social Security Law* (n 47).

⁶⁴ Chapter 2, s IV.

⁶⁵ Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicone, ‘Posting of Workers Directive – Current Situation and Challenges’ (European Parliament 2016) 15.

⁶⁶ Regulation 883/2004, art 12(2).

⁶⁷ De Wispelaere, De Smedt and Pacolet (n 6) 14.

⁶⁸ Chapter 3, s II B.

established by the Member States in accordance with Article 9 of the 2014 Directive.⁶⁹ These systems do take account of the distinction between postings and posted workers.⁷⁰

B. Key Figures and Trends

Setting aside the statistical challenges, below are some key figures that sketch a picture of some general trends related to posted work across the EU. In 2017, there was a sharp increase in the number of A1 certificates which coincided with the implementation of the 2014 Enforcement Directive (the deadline for transposition into national law was in mid-2016, but the implementation was delayed in several countries).⁷¹ This suggests that it may not necessarily have been the number of postings that increased, but rather that the reporting improved thanks to the enactment of the Enforcement Directive. Since 2017, the number of postings has been growing at a steadier pace, and as the information on the number of postings carried out following the outbreak of the coronavirus pandemic is not yet available, it is difficult to assess the impact of COVID-19 on the posting of workers.⁷²

In 2018, the two main sending Member States were Poland and Germany (with postings from these two countries amounting to 36% of the total number of A1 documents issued),⁷³ followed by Italy, Spain and France.⁷⁴ Interestingly, comparing the share of the ‘old’ (then-EU-15) and the ‘new’ (EU-13) Member States in the number of postings, the ratio was nearly 50:50 with a slight lead of the former.⁷⁵ This proves that the posting of workers is far from being dominated by workers from the Eastern European Member States and shows a more nuanced picture of this phenomenon.

As far as the receiving countries are concerned in terms of postings based on Article 12 of Regulation 883/2004, workers are indeed posted primarily to Western European Member States: Germany, Belgium, Austria and France.⁷⁶ Ireland, since 2012,

⁶⁹ De Wispelaere, De Smedt and Pacolet (n 6).

⁷⁰ *ibid*, 34-37.

⁷¹ De Wispelaere, De Smedt and Pacolet (n 62) 9.

⁷² See further Chapter 5, s VI, Chapter 6, s VI.

⁷³ De Wispelaere De Smedt and Pacolet (n 62) 15.

⁷⁴ *ibid*, 10.

⁷⁵ *ibid*, 15

⁷⁶ De Wispelaere De Smedt and Pacolet (n 6) 23.

has been issuing on average 7,000 A1 documents annually for workers posted to other EU Member States.⁷⁷ The number of received A1 documents has been growing steadily and in 2018 for the first time the incoming postings based on Article 12 of Regulation 883/2004 outnumbered the outgoing postings,⁷⁸ thus making Ireland a net receiving country. While Poland remains a net sending country, it has been receiving a growing number of postings in recent years. Since 2010, the number of incoming postings in Poland has more than doubled, reaching over 26,000 A1 certificates issued in accordance with Article 12 of Regulation 883/2004 in 2018.⁷⁹

In terms of sectors of employment, in 2018 approximately two thirds of the total number of A1 documents were issued in industry, of which the construction sector constituted 40%.⁸⁰ One third of A1 documents were issued in the services sector, including: education, health and arts (12%), as well as financial, real estate, scientific etc. (12%).⁸¹ This breakdown to some extent chimes with the divide between the ‘blue-collar’ and ‘white-collar’ posted workers, as one can assume that the majority of postings in the services sector were ‘white-collar’ postings. Yet, it would be an oversimplification to assume that all postings in the industry sector concern ‘blue-collar’ workers, for many highly qualified specialists and managers carry out postings also in the industry sector, including some of the participants in this project. Conversely, the services sector comprises postings in healthcare concerning care workers who work in low-income jobs and whose situation is often described as precarious.⁸² Therefore, instead of focusing on the sectors of employment, it appears that the divide between ‘blue-collar’ and ‘white-collar’ postings could better be explained in terms of income and the workers’ highly sought expertise and specialised skills.

⁷⁷ De Wispelaere, De Smedt and Pacolet (n 62) 21.

⁷⁸ *ibid.*, 28.

⁷⁹ *ibid.*

⁸⁰ *ibid.*, 30.

⁸¹ *ibid.*

⁸² See further Lydia Hayes, *Stories of Care: A Labour of Love. Gender and Class at Work* (Palgrave Macmillan 2017). See also Stéphanie Bernstein, ‘The Regulation of Paid Care Work in the Home in Quebec: From the Hearth to the Global Marketplace’ in Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy. The Challenge to Legal Norms* (Hart Publishing 2006); Pat Armstrong and Kate Laxer, ‘Precarious Work, Privatization, and the Health Care Industry: The Case of Ancillary Workers’ in Leah F. Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (MQUP 2006) 115.

III. Research Methodology

A. Why Qualitative Research?

When it comes to choosing a methodology, Webley notes that ‘some argue that epistemological and ontological differences are at the heart of the divide between qualitative and quantitative research’.⁸³ Epistemology, the theory of knowledge, deals with the question of what should be considered as acceptable knowledge in a field and how the social world should be studied.⁸⁴ The two alternative epistemological approaches in social sciences research are positivism and interpretivism. The former advocates the use of the exact same methods that are used in natural sciences,⁸⁵ including rigorous quantitative methods. Those rely on the use of statistical tools and measurements to provide a ‘yes’ or ‘no’ answer to the research question and either prove or disprove the initial hypothesis.⁸⁶

In opposition to this stands interpretivism based on the view that social research which focuses on people and their institutions is radically different from that of the natural sciences and, therefore, requires different strategies that respect those differences.⁸⁷ For this reason, qualitative research employs methods such as direct observation, interviews and analysis of documents⁸⁸ to evaluate social facts or phenomena in more depth.⁸⁹ Traditionally linked to such disciplines as sociology, anthropology or ethnography,⁹⁰ qualitative research can be described as ‘watching people in their own territory and interacting with them in their own language, on their own

⁸³ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 929.

⁸⁴ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 27.

⁸⁵ *ibid*, 27-28.

⁸⁶ *ibid*, 24.

⁸⁷ *ibid*, 28-30.

⁸⁸ Webley (n 83) 927-928.

⁸⁹ Jerome Kirk and Marc L. Miller, *Reliability and Validity in Qualitative Research* (SAGE Publications 1986) 26.

⁹⁰ Amy Ludlow, ‘Using Ethnographic Methods to Explore Labour Law Questions’ in Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart Publishing 2015) 93.

terms'.⁹¹ These methods, notably in-depth interviews or ethnographic observation, can be time-consuming, as they require the researchers to build a rapport with the participants and to create a safe environment in order to encourage the participants to 'open up'. Consequently, the sample size in qualitative research tends to be smaller than in quantitative research and the findings are, thus, not generalisable or statistically representative.⁹² Rather, a popular choice is to 'interview individuals who have knowledge about the area of focus and can provide a perspective on it.'⁹³

The interpretivist epistemology appears to chime with the objectives of this empirical inquiry which does not aim to answer a 'yes' or 'no' question. This research, based on evidence stemming from the existing literature, both legal and sociological, that has been discussed throughout this thesis, assumes from the outset that the posting arrangement is linked to the experience of precarity. In this vein, this project aims to delve deeper into the interaction between the ongoing evolution of the EU legal framework and the experiences of posted workers and other practitioners from this field to identify those elements that may predispose workers to precarity.

Turning to ontology, a branch of philosophy that deals with the nature of being, in the context of research methods it is concerned with the extent to which the studied phenomena and, consequently, the research findings, can be considered as truth or objective reality. On this note, two alternative ontological approaches in social sciences research are objectivism and constructivism. Objectivism, linked to natural sciences and quantitative research methods, assumes that social facts and phenomena 'have an existence that is independent of social actors.'⁹⁴ In the context of posted work, employing the objectivist ontology would imply the assertion that the PWD has created a uniform reality for this category of temporary migrant workers which, evidently, is untrue. Firstly, the EU framework on the posting of workers has been laid down exclusively in Directives – legal instruments which are binding as to the result to be achieved, but leave the choice

⁹¹ Kirk and Miller (n 89) 9.

⁹² Webley (n 83) 934. See also Giampietro Gobo, 'Sampling, Representativeness and Generalizability' in Clive Seale, Gobo, Jaber F. Gubrium and David Silverman (eds), *Qualitative Research Practice* (SAGE Publications 2004).

⁹³ Ben K. Beitin, 'Interview and Sampling. How Many and Whom' in Gubrium, James A. Holstein, Amir B. Marvasti and Karyn D. McKinney (eds) *Handbook of Interview Research* (2nd edn, SAGE Publications 2012) 244.

⁹⁴ Bryman (n 84) 33.

of form and methods to the domestic authorities of each of the 27 Member States.⁹⁵ Each posting contract is the outcome of the employment legislation and social security rules of the sending state blended with the domestic implementation of the PWD in the receiving country. Thus, even in purely legal terms, there is no single posting reality, but thousands of such realities depending on the combination of the ‘home’ and the ‘host’ Member State, as well as on other factors, such as the sector of employment. Furthermore, as was demonstrated in Chapter 3, prior to the 2014 revision the enforcement of the PWD was particularly weak and, therefore the legal regulation of posted work was not reflected in the practice of posting. In fact, if the PWD had genuinely created a uniform reality for posted workers, the adoption of the Enforcement Directive would not have been necessary.

The rejection of objectivism has, thus, prompted this research to embrace the constructivist ontology typically associated with qualitative studies, which assumes that social phenomena are, firstly, realised differently by different actors, and secondly, in a constant state of flux.⁹⁶ On this note, it appears that not only is each posted worker’s ‘reality’ shaped by the legislation, but also by a number of different actors, such as the enforcement authorities, employers and the ‘host’ Member State’s trade unions. The level of compliance with the PWD and, in the case of the unions, willingness to interact with posted workers (or lack thereof), determine the degree of precarity experienced by posted workers.⁹⁷ Analysing the law through the use of qualitative methods that take into account a broader social context and the dynamics between different actors in the society is particularly relevant in labour law that has a long tradition of empirical research.⁹⁸ In fact, some argue that legislation in the field of employment and labour can only be understood in the wider context of social control and ideologies.⁹⁹

According to constructivism, ‘the researcher always presents a specific version of social reality, rather than one that can be regarded as definitive’.¹⁰⁰ Again, this chimes with the purpose of this research which traces the legal evolution of the EU rules on the

⁹⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1, art 288.

⁹⁶ Bryman (n 84) 33.

⁹⁷ See Doellgast, Lillie and Pulignano (n 35). See further Chapter 7.

⁹⁸ Simon Deakin, ‘Labor and Employment Laws’ in Cane and Kritzer (n 83) 308.

⁹⁹ Bob Hepple, ‘Foreword: Evidence and Ideology’ in Ludlow and Blackham (n 90).

¹⁰⁰ Bryman (n 84) 33.

posting of workers as experienced by posted workers and practitioners from the field. The findings of this study can only be interpreted in the context of the timing of the data collection which occurred following the 2014-2018 revisions of the PWD (albeit prior to the implementation of the 2018 Directive¹⁰¹). This is also one of the reasons why it is to be expected that the findings of this study will differ to some extent from those demonstrated in earlier studies discussed in Section I (Wagner, Berntsen), where data had been collected prior to the revisions of the PWD.

B. Why Narrative Inquiry?

The next step following the decision to carry out a qualitative study with the use of in-depth interviews was the choice of an approach that would be suitable to answering the overarching research question. With the central research question in mind, the project turned to Creswell's typology that distinguishes five different approaches to qualitative inquiry: narrative research, phenomenology, grounded theory, ethnography, and case studies.¹⁰² From the outset, it was clear that this sociolegal research was not going to use ethnographic methods which are typically employed to study an entire culture-sharing group in their natural habitat and focus on patterns such as rituals or customs.¹⁰³ Not only did this project have a different purpose, but also the ethnographic research requires distinct methods that the researcher would not be familiar with. Similarly, the case study method was eliminated due to the fact that this project's ambition was to show the diversity of the posting experience in different sectors of employment, different receiving countries etc., as opposed to studying it in a system bounded by the time and place,¹⁰⁴ as was the case with Lillie and Sippola's study carried out at the construction site of a nuclear power plant in Finland.

As for grounded theory, it appears that fundamental differences between this methodology and narrative inquiry lie in the data analysis methods which will be addressed in Section VI. Furthermore, in the grounded theory approach theory is derived

¹⁰¹ Directive 2018/957, art 3(1).

¹⁰² John W. Creswell and Cheryl N. Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (4th edn, SAGE Publications 2018).

¹⁰³ *ibid*, 90-92.

¹⁰⁴ *ibid*, 96.

from data in an inductive way and, therefore, there are no theoretical assumptions formulated *a priori*.¹⁰⁵ This was not the case in this research. Notably, the objective of the doctrinal assessment carried out in Chapters 2-3 was to identify those elements of the posting arrangement that could potentially predispose posted workers to precarity. This theory was then confronted with the interviews to find real-life examples of the legal issues and link them to the specific provisions of the PWD or aspects of its enforcement.

Phenomenology, for its part, seems to display considerable overlaps with narrative inquiry and, therefore, the choice of an appropriate qualitative approach in this research was ultimately between these two. Phenomenological research derives from the phenomenological philosophy fathered by Husserl and further developed by Heidegger.¹⁰⁶ In social sciences, phenomenology as a research method aims to describe a concept or a phenomenon through lived experiences of individuals.¹⁰⁷ This approach was initially tempting for this project which revolves around the posting of workers which might be perceived as a phenomenon.

Yet, the aim of phenomenological research is to grasp the essence, the very nature of a phenomenon such as insomnia, anger, grief etc.¹⁰⁸ Conversely, the empirical phase of this study does not aim to provide a definition or a detailed description of the posting phenomenon which has already been sufficiently researched by legal scholars. Rather, its ambition is to explore a number of different facets of posting, as told by the research participants and, therefore, it was decided that the objectives of this research would be most efficiently achieved through the narrative inquiry approach.

¹⁰⁵ Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aladine Transaction 2008) 12-15.

¹⁰⁶ Thomas Groenewald, 'A Phenomenological Research Design Illustrated' (2004) 3(1) IJQM 42; Lois Phillips-Pula, Julie Strunk and Rita H. Pickler, 'Understanding Phenomenological Approaches to Data Analysis' (2011) 25(1) J Pediatr Health Care 67; Gina M. Reiners, 'Understanding the Differences Between Husserl's (Descriptive) and Heidegger's (Interpretive) Phenomenological Research' (2012) 1(5) J Nurs Care 1.

¹⁰⁷ Cresswell and Poth (n 102) 75. See further Phyllis Knaack, 'Phenomenological Research' (1984) 6(1) West J Nurs Res 107.

¹⁰⁸ Max van Manen, *Researching Lived Experience. Human Science for an Action Sensitive Pedagogy* (State University of New York Press 1990), 177, as cited in Cresswell and Poth (n 102) 75.

The narrative inquiry method has flourished following various projects carried out in the late 1980s and early 1990s.¹⁰⁹ While primarily associated with humanities,¹¹⁰ narrative studies are nowadays present across diverse disciplines, including the law, psychology, medicine or nursing.¹¹¹ Narrative inquiry is based on the idea that ‘people by nature lead storied lives and tell stories of those lives, whereas narrative researchers describe such lives, collect and tell stories of them, and write narratives of experience.’¹¹²

One characteristic of the narrative inquiry approach is the emphasis on the importance of research interviews as ‘*speech events*’.¹¹³ An interview can be viewed as a social interaction between strangers where one party voluntarily agrees to share information required by the other party. The success of this endeavour will rely not only on the interviewer’s skill and receptivity, or on whether the interviewee is in possession of the desired knowledge, but to a large extent it will also depend on the interviewee’s ability and willingness to tell a *story*.

Narrative inquiry is commonly found in qualitative studies on professions, such as teachers,¹¹⁴ health professionals¹¹⁵ or social workers, counsellors and psychotherapists.¹¹⁶ Morgan-Fleming argues that thanks to narrative studies, readers ‘are

¹⁰⁹ Michael Connelly and D. Jean Clandinin, ‘Stories of Experience and Narrative Inquiry’ (1990) 19(5) *Educational Researcher* 2; Stefinee Pinnegar and J. Gary Daynes, ‘Locating Narrative Inquiry Historically. Thematics in the Turn to Narrative’ in Clandinin (ed), *Handbook of Narrative Inquiry. Mapping a Methodology* (SAGE Publications 2007).

¹¹⁰ E.g. Elliot G. Mishler, *Research Interviewing: Context and Narrative* (Harvard University Press 1986); Donald Polkinghorne, *Narrative Knowing in the Human Sciences* (State University of New York Press 1988).

¹¹¹ Catherine Kohler Riessman, ‘Analysis of Personal Narratives’ in Gubrium and others (n 93) 367-368.

¹¹² Connelly and Clandinin (n 109) 2. See also Riessman, *Narrative Methods for the Human Sciences* (SAGE Publications 2007) 3-6.

¹¹³ Mishler (n 110). See also Sandra Hollingsworth and Mary Dybdahl, ‘Talking to Learn: The Critical Role of Conversation in Narrative Inquiry’ in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109). See also Gubrium and Holstein, ‘Narrative Practice and the Transformation of Interview Subjectivity’ in Gubrium and others (n 93).

¹¹⁴ Freema Elbaz-Luwisch, ‘Studying Teachers’ Lives and Experience’ in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109).

¹¹⁵ Cheryl F. Mattingly, ‘Acted Narratives. From Storytelling to Emergent Dramas’ in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109).

¹¹⁶ Riessman and Jane Speedy, ‘Narrative Inquiry in the Psychotherapy Professions. A Critical Review’ in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109).

invited to see each profession not as disembodied activity but as a part of the world of those who participate in it.’¹¹⁷ This is yet another reason why narrative research methods seem particularly suited to study posted workers who can also be viewed as a professional group, albeit scattered across different industries and countries.

C. Limitations and Research Validity

Like any other research method, narrative inquiry also has certain limitations and challenges.¹¹⁸ Bell notes that while researchers are generally expected to share their narrative-construction process, since stories are inherently ambiguous¹¹⁹ ‘participants can never be quite free of the researcher’s interpretation of their lives’.¹²⁰ This becomes evident when reflecting on the question of the criteria that should be used for assessing the validity of narrative research.

While in quantitative research methods criteria such as reliability and validity are considered to be key concepts in terms of evaluating the quality of a research project, there is an ongoing scholarly debate regarding the relevance of these criteria in qualitative research.¹²¹ While some argue that reliability and validity could still be employed, only with less emphasis on measuring their extent,¹²² others suggest alternative criteria for evaluating qualitative research such as trustworthiness and authenticity.¹²³ Narrative inquiry appears to favour the latter stance and, according to Connelly and Clandinin, narrative research ‘relies on criteria other than validity, reliability, and generalisability’ which are still under development.¹²⁴

¹¹⁷ Barbara Morgan-Fleming, ‘Narrative Inquiry in the Professions’ in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109) 355.

¹¹⁸ Cresswell and Poth (n 102) 73-74; Jill S. Bell, ‘Narrative Inquiry: More Than Just Telling Stories’ (2002) 36(2) TESOL Quarterly 207.

¹¹⁹ Alan Peshkin, ‘In Search of Subjectivity-one’s Own’ (1988) 17(7) *Educational Researcher* 17, as cited in Bell (n 118) 210.

¹²⁰ Bell (n 118) 210. See also Ruthellen Josselson (ed), *Ethics and Process in the Narrative Study of Lives* (SAGE Publishing 1996).

¹²¹ Bryman (n 84) 389.

¹²² Jennifer Mason, *Qualitative Researching* (SAGE Publications 1996) 21. See also Bryman (n 84) 389.

¹²³ Yvonna S. Lincoln and Egon G. Guba, ‘But Is It Rigorous? Trustworthiness and Authenticity in Naturalistic Evaluation’ (1986) 30 *New Dir Eval* 73.

¹²⁴ Connelly and Clandinin (n 109) 7.

Midway between the two opposing approaches lies Hammersley's stance which does not reject the use of traditional quantitative criterion of validity for evaluating qualitative research, but reformulates its definition to adjust it to the peculiarity of qualitative research methods.¹²⁵ Thus, Hammersley understands validity as 'plausible and credible' findings.¹²⁶ What is meant by this is that findings must represent 'accurately those features of the phenomena that it is intended to describe, explain or theorise', even though one can never establish with certainty that something is 'true'.¹²⁷

With regard to this criterion in the context of this project, what adds to the plausibility and credibility of the conducted interviews is the theoretical part of this project, particularly the doctrinal evaluation of the EU rules on the posting of workers. Chapters 2 and 3 of this thesis explored the twisted logic of the PWD which has framed posted workers as a constituent element of transnational services, and the limits of the 2014-2018 reforms. Consequently, some potential elements of the legal framework that may predispose posted workers to precarity were identified prior to commencing the empirical phase of the project. Even if the interviewees presented their *own* version of reality and some of the stories might have been exaggerated, the issues raised by the participants, such as the lack of appropriate redress or non-declaration of postings, genuinely exist because they are grounded in the legal reality. In addition, triangulation of the interview findings with the above reviewed empirical literature further adds credibility to the data collected in this research project.¹²⁸

Another important criterion of qualitative research validity, according to Hammersley, is 'relevance'.¹²⁹ In this vein, the timeliness of the issue of posted workers has been emphasised throughout this thesis and particularly in Chapter 3 which recounted the political turmoil behind the adoption of the 2018 revision of the PWD, as well as the broader context of the European Pillar of Social Rights.¹³⁰ As has been argued in the Introduction, the discussion over the PWD has paved the way for further social reforms

¹²⁵ Martyn Hammersley, *What's Wrong with Ethnography? Methodological Explorations* (Routledge 1992).

¹²⁶ *ibid.*, 69.

¹²⁷ *ibid.*

¹²⁸ See Helen Noble and Roberta Heale, 'Triangulation in Research, with Examples' (2019) 22 *Evid-Based Nurs* 67.

¹²⁹ Hammersley (n 125) 72-73.

¹³⁰ See Chapter 3.

in the EU related to pay that had previously been unthinkable, such as the proposed Directive on adequate minimum wages across the EU.¹³¹ On this note, the timing of this research project coincided with the 2018 reform of the PWD and the interviews were conducted shortly afterwards, at a crucial time when the EU rules on the posting of workers were in a ‘transitional period’ following the two revisions.

IV. Research Participants

There is no general consensus regarding the minimum number of interviews in a qualitative study,¹³² and different researchers suggest that an appropriate sample size could be between 2-10 participants,¹³³ 6-12 participants,¹³⁴ 5-25 participants¹³⁵ or 20-30 participants.¹³⁶ Instead of using an exact number of interviewees as the standard in qualitative studies, scholars have turned to the theoretical saturation approach where the interview phase concludes once the researcher is satisfied that the topic has been exhausted after hearing a number of narratives.¹³⁷

The initial ambition of this project was to carry out interviews with posted workers, employers and other relevant actors from the field of posting who can be described as experts: national competent authorities, trade unions employers’ organisations or lawyers practising in the field of posted work. The interviews were intended to take place in Poland and in Ireland to reflect the above discussed characteristics of the Member States which primarily send posted workers and those which primarily receive posted workers. Accordingly, it was expected that while posted workers would be of Polish nationality, employers would be interviewed in Ireland.

¹³¹ Commission, ‘Proposal for a Council and Parliament Directive on adequate minimum wages in the European Union’ COM(2020) 682 final.

¹³² Beitin (n 93) 243.

¹³³ Carolyn O. Boyd, ‘Philosophical Foundations of Qualitative Research’ in Patricia L. Munhall (ed), *Nursing Research: A Qualitative Perspective* (Jones and Bartlett 2001), as cited in Beitin (n 93) 244.

¹³⁴ Sandra P. Thomas and Howard R. Pollio, *Listening to Patients: A Phenomenological Approach to Nursing Research and Practice* (Springer 2002), as cited in Beitin (n 93) 243.

¹³⁵ Creswell and Poth (n 100), as cited in Beitin (n 93) 244.

¹³⁶ Carol A. B. Warren, ‘Qualitative Interviewing’ in Gubrium and others (n 93) 99.

¹³⁷ Beitin (n 93) 243-244.

With the above considerations in mind, the project proceeded to begin recruiting participants in the summer of 2019. To gain access to posted workers, the research relied on the concept of ‘gatekeepers’, such as journalists, trade unions, national authorities and employers’ organisations or other practitioners, some of whom were met at dedicated events. Given the fact that the project also aimed to interview experts, some of the ‘gatekeepers’ became interview participants as well. Unfortunately, the research encountered considerable difficulties in gaining access to employers who post or hire posted workers. As has been explained throughout this thesis, the posting arrangement is controversial and tends to have a bad reputation due to both concerns over weak enforcement of the PWD, and ‘social dumping’ arguments. Thus, the employers were generally reluctant to take part in the project. Overall, approximately 100 individuals and organisations had been contacted and the vast majority either did not respond at all, or refused to participate in the project. Notably, no trade union representatives responded to the invitation to participate in the project despite follow-up efforts to recruit such participants.

A. Eligibility Criteria and Sampling

Following the first batch of interviews with the contacts provided by the ‘gatekeepers’, the research continued to recruit participants with the use of the so-called ‘snowball’ sampling technique whereby previous interviewees provided contact details of subsequent participants.¹³⁸ The eligibility criteria took into account the varying duration of postings which, as has been described in Chapter 2, can last a few short days or a number of years. Therefore, any workers who between 2010-2020 had carried out posting contracts of varying duration depending on the type of posting – either a single posting lasting a minimum of three months, or a number of short-term postings spread across a reference period of a minimum of 12 months – were considered eligible for this study.

Furthermore, the research relied on purposive sampling, a technique employed ‘to ensure that there is a good deal of variety in the resulting sample, so that sample members differ from each other in terms of key characteristics relevant to the research question’.¹³⁹ Mindful of the diversity of the factual situations in which the PWD may

¹³⁸ Webley (n 83) 934.

¹³⁹ Bryman (n 84) 418.

apply, this project aimed for the interview sample to reflect this diversity. Notably, purposive sampling was employed to recruit both ‘blue-collar’ and ‘white-collar’ posted workers, as well as to ensure an appropriate gender balance of the interview sample, as well as age diversity. These two characteristics have been identified in Chapter 1 as potential vulnerabilities further exacerbating the precarity of posted workers¹⁴⁰ and, indeed, the existing literature demonstrates evidence of links between precarious work on one hand, and gender¹⁴¹ and age¹⁴² on the other.

Finally, purposive sampling was used with a view to answering the overarching research question. The analysis of the PWD and its revisions carried out in Chapters 2-3, supplemented with the evaluation of the empirical literature from the field, resulted in identifying a number of problematic elements of the EU legal framework and its enforcement. Thus, the research sought to illustrate these legal issues, such the limits of Article 3(1) PWD, circumvention of the rules on posting or the lack of redress, with ‘first-hand’ experience of posted workers in order to appreciate the impact of the 2014-2018 reforms. Accordingly, the research aimed to recruit workers who had gained posting experience both prior to the 2014-2018 revisions of the PWD, and as the reforms were already in place. While this aim has been achieved with regard to the 2014 Enforcement Directive which had been transposed by the Member States by 2016, the empirical phase of the project was concluded in July 2020, shortly before the deadline for implementation

¹⁴⁰ Sonia McKay, ‘Disturbing Equilibrium and Transferring Risk: Confronting Precarious Work’ in Nicola Countouris and Mark R. Freedland, *Resocialising Europe in a Times of Crisis* (CUP 2013) 196. See also Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y J* 21, 22. See further Chapter 1, s III B.

¹⁴¹ Fudge and Owens (n 82); Marisa C. Young, ‘Gender Differences in Precarious Work Settings’ (2010) 65(1) *Relat Ind - Ind Relat* 74; Kate Bahn, Jennifer Cohen and Yana van der Meulen Rodgers, ‘A Feminist Perspective on COVID-19 and the Value of Care Work Globally’ (2020) 27(5) *Gend Work Organ* 695.

¹⁴² Dirk Witteveen, ‘Precarious Early Careers: Instability and Timing Within Labor Market Entry’ in Kalleberg and Steven P. Vallas (eds), *Precarious Work* (Bingley Emerald Publishing 2018); Adam Mrozowicki and Jan Czarzasty (eds), *Oswajanie Niepewności. Studia Społeczno-ekonomiczne nad Młodymi Pracownikami Sprecaryzowanymi* (Scholar 2020); Mrozowicki and Vera Trappmann, ‘Precarity as a Biographical Problem? Young Workers Living with Precarity in Germany and Poland’ (2021) 35(2) *Work Employ Soc* 221.

of Directive 957/2018 elapsed.¹⁴³ It was, therefore, not possible to thoroughly evaluate the latter revision's impact on the reality of working as a posted worker in the EU.

It is important to emphasise that the above eligibility criteria were only employed in relation to posted workers, and not with regard to the interviewed experts (employers, enforcement authorities, lawyers practising in the field of posting). The latter category of interviewees, unlike workers, did not share their personal posting experience, but rather their *knowledge* of the posting arrangement stemming from professional experience. Therefore, personal characteristics, such as age or gender were considered irrelevant in this category of research participants.

B. The Final Sample

The resulting sample consisted of 29 qualitative interviews conducted with the two following categories of research participants:

Posted workers (n=18)

Experts (n=11)

The actual number of interviews conducted was 32 but after the interviews moved online following the onset of the COVID-19 pandemic in March 2020, as the consent procedure was becoming increasingly difficult, three participants did not return signed consent forms. Data obtained from these interviews was, therefore, not used and the three participants are not included in the final sample.

The first category of interviewees comprised Polish posted workers who met the above described eligibility criteria in terms of the length of posting. These interviewees had worked in a range of Member States including Austria, Belgium, Czech Republic, France, Germany, Hungary, the Netherlands, Romania, Slovakia, Slovenia and the UK.¹⁴⁴ Some workers were not able to recall all the countries to which they had been sent, particularly in the case of short-term postings, therefore the list is incomplete. While

¹⁴³ The deadline for national implementation was set for the 30th of July 2020, see Directive 957/2018, art 3(1).

¹⁴⁴ The interview was conducted immediately after the United Kingdom's withdrawal from the European Union in January 2020, when the EU rules on the free movement of persons were still in force in the UK.

11 of the interviewed posted workers were female, seven were male. In terms of age, the majority of interviewed workers were aged 30-40 at the time of the interview, although many referred to experiences that had occurred earlier in their life. The age breakdown of the interviewed posted workers was as follows:

20-30 years (n=2)

30-40 years (n=10)

40-50 years (n=4)

50-60 years (n=1)

60-70 years (n=1)

In terms of the divide between ‘blue-collar’ and ‘white-collar’ workers, eight were ‘blue-collar’ workers, while 10 were ‘white-collar’ workers. Among ‘blue-collar’ workers, the gender ratio was 50:50, while among ‘white-collar’ workers, seven were female and three were male.

As for the second category of interviewees, the sample comprised representatives of the national enforcement authorities in Ireland (n=3); representatives of employers’ organisations in Ireland (n=1) and in Poland (n=1); employers in Poland (n=2) and in Ireland (n=1); and lawyers practising in the field of posting in Poland (n=2) and in Germany (n=1). These participants provided insights mainly into the posting of ‘blue-collar’ workers which generally tends to be affected by poor enforcement to a greater extent than intra-corporate postings of ‘white-collar’ workers.

C. Saturation

Regarding the above remarks on saturation, a satisfactory level of saturation was reached with respect to the interviewees from the ‘white-collar’ subcategory. By the final, tenth interview with a participant from this subcategory, it appeared that the topic had been exhausted as the collected narratives were largely similar in terms of the issues faced by ‘white-collar’ posted workers.

Conversely, the same level of saturation was not reached with regard to ‘blue-collar’ posted workers. Only eight of the interviewed posted workers belonged to this subcategory and every single interview added stories of unique experiences, as it seems

that ‘blue-collar’ workers are generally far more exposed to precarity than ‘white-collar’ posted workers. Finding access to ‘blue-collar’ workers was, however, becoming increasingly difficult following the onset of the COVID-19 pandemic and the resulting travel restrictions. The same was not true for ‘white-collar’ workers, most of whom worked remotely during the pandemic and, therefore, had the means to participate in online interviews. Yet, the small number of ‘blue-collar’ interviewees was partially mitigated thanks to the 11 interviews conducted with ‘experts’ who focused mostly on ‘blue-collar’ postings in their narratives. Therefore, the researcher was satisfied to have found in the interviews the majority of issues that frequently appear in relation to ‘blue-collar’ postings, such as weak enforcement of the PWD, poor accommodation conditions or problems with social security. In this respect, the interviews related to ‘blue-collar’ postings also reached thematic saturation.

D. Ethical Considerations

All participants were asked to sign an informed consent form having familiarised themselves with an information sheet provided.¹⁴⁵ These two documents, supplied to the participants prior to the interview in either English or Polish, contained key information regarding the purpose and the methods of the study. The interviewees were made aware that no financial incentives would be offered in exchange for participating in the project. Participants were also reassured of the confidentiality of the information except in the case of disclosure of serious harm to the participant or another person, which never occurred. While provided to the participants ahead of the interview, the consent forms were typically signed after the conclusion of the interview. Participants were informed of the possibility to refuse answering a certain question, as well as of the option to withdraw from the research at any stage until the completion of the project (no interviewee availed of this latter option).

The audio recordings of the interviews and handwritten notes were subsequently transcribed. The recordings were stored in a password-protected folder in the cloud. Handwritten notes were transcribed into a written summary of the interview with some direct quotes. The transcripts were then anonymised by removing not only the participants’ name and surname, but also any characteristics or information which may

¹⁴⁵ Attached to this thesis. See Appendices 2 and 3.

have made them identifiable, such as the employer's name or the geographic location of posting. The names and contact information of all the participants were stored in a single, password-protected file. A copy of the transcript was provided to the participants for review and a small number of interviewees decided to alter or amend the transcripts. The participants were made aware that some direct quotes from the interviews, and in certain cases also longer interview excerpts might be included in the thesis and subsequently published.

V. The Interviews

A. Interview Guide

Prior to commencing the interview phase, a number of issues stemming both from the twisted logic of the PWD and from poor enforcement of the PWD, notably prior to the enactment of the Enforcement Directive, were identified throughout this thesis. These include the limits of Article 3(1) PWD, the vagueness of the definition of a posted worker which lends itself to bending the rules, the lack of opportunities to exercise collective rights, problems with social security or poor accommodation conditions. Enforcement-related issues, that were expected to have improved following the 2014 reform, included non-declaration of postings, lack of oversight or penalties for infringement of the PWD and lack of appropriate redress, particularly in subcontracting chains. Other, non-legal issues, identified by the existing empirical literature discussed earlier in this Chapter, were linked to isolation in the 'host' country.

In light of this prior knowledge and with regard to the overarching research question requiring precise answers to link the findings to the specific provisions of the PWD, it was decided that the most appropriate manner to carry out the empirical phase was through semi-structured interviews.¹⁴⁶ Thus, an interview guide was created containing a number of questions aimed at exploring the contents of the PWD and tracing its evolution through the posting experience.¹⁴⁷

¹⁴⁶ Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (SAGE Publications 1996) 124.

¹⁴⁷ Attached to this thesis. See Appendix 4.

B. The Medium

15 interviews were conducted in person, mostly during a research trip to Poland in November 2019. While most of these took place in informal settings, such as coffee shops, some interviews with participants belonging to the ‘expert’ category were carried out on their professional premises. 14 interviews were conducted remotely, which was mainly due to the COVID-19 restrictions regarding travel and face-to-face meetings. Following the onset of the pandemic in March 2020, the interviews moved online and, overall, 10 interviews were carried out via video calls using applications such as Microsoft Teams or WhatsApp. In this vein, internet interviewing is thought to be ‘just as effective in terms of spontaneous interactions’ in person as long as it is synchronous.¹⁴⁸ Indeed, no differences between in-person and video interviews in terms of the quality of interactions were noticed. Conversely, four interviews with ‘experts’ (one employer and three representatives of the enforcement authorities) were conducted over the phone, which did affect the quality of the interviews. The phone interviews were generally a more *strained* exchange, often associated with the traditional approach to interviewing where the interviewee is a ‘vessel of answers’ and a ‘repository of facts’.¹⁴⁹

Conversely, the online mode of conducting interviews appears to have affected the structure of the interview sample due to digital exclusion of some potential participants. After the pandemic had begun, it was significantly easier to recruit interviewees belonging to the ‘white-collar’ category who generally continued to work on their employer’s premises due to the nature of their work in construction, production etc. While ‘blue-collar’ workers were usually able to use applications such as WhatsApp video etc., they were often unable to avail of a printer to print out and sign the informed consent form, and return a soft copy to the researcher. Instead, the interviewees were offered the option to receive a hard copy of the consent form by post and return it to the researcher also by post but, as explained above, this was not always successful.

The same issues regarding digital exclusion affected potential older interviewees (aged 60-70). Consequently, only one participant from this age group was included in the final sample and the online interview, as well as the consent procedure, had been facilitated by another interviewee. Another interview conducted remotely with a person

¹⁴⁸ Nalita James and Hugh Busher, ‘Internet Interviewing’ in Gubrium and others (n 93) 179.

¹⁴⁹ Gubrium and Holstein (n 109) 32.

from the 60-70 age group was not included in the sample because the participant had not returned the consent form.

Except for the phone interviews (n=4) and situations where the interviewee had objected to the interview being recorded (n=9), the interviews were audio-recorded. Participants were free to stop the recording at any time and have the recording destroyed, even after the interview. Where recording was not possible, the interviewer took handwritten notes throughout the conversation.

C. The Meeting

While the narrative approach to qualitative interviewing favours unstructured interviews in order for the stories to *flow*,¹⁵⁰ it was possible to carry out semi-structured interviews while remaining faithful the narrative inquiry approach. The interviewees from the posted workers category were initially invited to give their own, uninterrupted and unstructured, account of the posting experience, followed by additional questions from the interviewer that corresponded with the interview guide. The participants were thus asked to either provide more detail of some of the aspects of their posting that they had referred to in their narrative, or answer questions related to issues that had not previously been mentioned. Through ‘active listening’ the interviewer was at times able to steer the participant’s narrative, often meandering and digressing (which is desirable in the narrative inquiry approach¹⁵¹), into the intended direction.¹⁵²

One exception from the general rule of ‘letting the stories flow’ were some of the interviews with participants from the ‘expert’ category who participated in the project in a professional capacity. While most of these interviewees initially asked for clear questions, only some of them limited their participation throughout the interview to providing strict answers to previously asked questions. Most of these participants gradually became more comfortable as the interview progressed and ended up telling more unstructured stories based on their professional experience. These unexpected stories stemming from strict questions chimed with Riessman’s thesis that ‘storytelling

¹⁵⁰ Hollingsworth and Dybdahl (n 113) 150 and Table 6.1.

¹⁵¹ Riessman, ‘Analysis of Personal Narratives...’ (n 111).

¹⁵² Annika Lillrank, ‘Managing the Interviewer Self’ in Gubrium and others (n 93) 283.

in interviews can occur at the most unexpected times, even in answer to fixed-response question'.¹⁵³

Another exception from the narrative approach occurred where the participant's communication style was very concise and, consequently, when asked to share the story of their posting experience, they did so in merely a few short sentences. In such instances, recourse to the interview guide was particularly helpful, as it allowed to gather more data through the use of some detailed questions. This proves that interviews are social interactions whose varying degree of success depends on a number of factors. Despite the fact that all the interviews were carried out by the same interviewer and with the use of the same methodological tools, some turned out *better* than others. Some participants 'opened up' and told powerful stories, whereas others did not. Accordingly, while some interviews ended in less than 30 minutes, others lasted up to 90 minutes.

The participants' trust is linked to yet another ethical consideration, separate from the informed consent procedure addressed in Section IV. Josselson argues that the requirement to build an 'individual, personal, intimate relationship' with the stranger that agrees to 'open up' and tell their story is an important, albeit implicit, part of the 'contract' between the interviewee and the interviewer.¹⁵⁴ In this vein, during the interviews it was important to respect certain ethical boundaries, for example refraining from asking a question if the participant appeared uncomfortable or not including certain information in the research findings.

VI. Data Analysis and Write-up

As explained above, interview recordings and handwritten notes were subsequently transcribed and, where necessary, translated from Polish into English. The analytical framework adopted in this research project was thematic analysis as described by Riessman, which is one the most commonly employed analytical frameworks in narrative inquiry.¹⁵⁵ Clandinin explains that in this type of narrative analysis, 'data (stories) are collected from research participants or subjects and the narrative data is analysed for

¹⁵³ Riessman, *Narrative Methods for the Human Sciences* (n 112) 24.

¹⁵⁴ Josselson, 'The Ethical Attitude in Narrative Research: Principles and Practicalities' in Clandinin (ed), *Handbook of Narrative Inquiry* (n 109) 539.

¹⁵⁵ Riessman, 'Thematic Analysis' in *Narrative Methods for the Human Sciences* (n 112).

common themes, metaphors, plotlines, and so on to identify general themes of concepts'.¹⁵⁶ Thematic analysis is often confused with grounded theory, but differs from the latter analytical framework in a number of aspects.¹⁵⁷

One of such differences is the relationship between the theory and data collected during the research project, which has been briefly mentioned in Section III B. While in the grounded theory approach theory is derived from data in an inductive way and, therefore, there are no theoretical assumptions formulated *a priori*, in thematic analysis, prior theory guides the inquiry,¹⁵⁸ as was the case in this research project.

Furthermore, thematic analysis differs from grounded theory in the way data is treated. While grounded theory relies on the concept of breaking the data down into components famously known as 'coding',¹⁵⁹ thematic analysis preserves the sequences that form stories.¹⁶⁰ Accordingly, the interview transcripts in this project were analysed by dividing them thematically into shorter excerpts. Recurring themes were then linked to the specific aspects of the PWD framework and its enforcement and guided the write-up of the interview findings in Chapters 5 and 6.

Except for the 'expert' category, the interviewees were generally not familiar with the EU legal framework, although occasionally they mentioned 'changes in the law' that affected their situation. Due to the complexity of the EU rules and their national enforcement, on several occasions the participants were unsure if their work had officially been recognised as posted work, even though it displayed all the characteristics of posted work. Other interviewees, notably those who had been working abroad long-term, had experienced several different atypical temporary arrangements and posting was often only one of them. The researcher's task was, thus, to match the participants' experiences with the evolving contents of the PWD.

The common themes identified in this project and illustrated by the interview findings corresponded with the following aspects of the EU framework on the posting of workers:

¹⁵⁶ Clandinin, 'Preface' in *Handbook of Narrative Inquiry* (n 109) XV.

¹⁵⁷ Riessman, 'Thematic Analysis' (n 155) 76.

¹⁵⁹ Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd edn, SAGE Publications 1998) 101, as cited in Bryman (n 84) 570.

¹⁶⁰ Riessman, 'Thematic Analysis' (n 155) 76.

- 1) Impact of the 2014 revision on the enforcement of the PWD (declaration, inspections, redress, penalties, tackling ‘letterbox companies’¹⁶¹),
- 2) Unresolved enforcement-related matters (diffusion of responsibility in subcontracting chains¹⁶²),
- 3) Impact of the 2018 revision on expanding the rights of posted workers (degree of compliance with the amended PWD, regulation of reimbursement of work-related expenses, decreasing popularity of the posting arrangement across the EU),
- 4) Limits of the definition of a posted worker (e.g., the regulation of business trips, ‘fictitious’ postings of third-country nationals in order to circumvent immigration laws of the Member States),
- 5) Impact of COVID-19 (preliminary findings regarding the short period between March and July 2020),
- 6) Impact on the social security and personal income tax situation of posted workers.

Other recurring themes, which were not linked to specific aspects of the EU framework, but seem important in the context of the subjective element of precarity, and had previously been identified in the empirical literature were:

- 1) Reception in the ‘host’ Member State,
- 2) Impact of posting on work-life balance

As explained above, one of the purposes of this research was to identify the differences in the experiences between ‘blue-collar’ and ‘white-collar’ posted workers and to verify if precarity was confined exclusively to ‘blue-collar’ workers. Consequently, research findings from the interviews conducted with these two subcategories were addressed in separate Chapters: Chapter 5 and 6 respectively. Both Chapters are structured around the above discussed recurring themes which feature to a varying degree in each of the Chapters. Every identified theme is illustrated with examples from the interviews, typically in the form of a short excerpt signed with a fictional name.

¹⁶¹ See Chapter 3, s I B.

¹⁶² *ibid.*

In addition, each of the two Chapters begins with a longer narrative of *circa* 2000-3000 words which serves as an individual voice exemplifying the collective experiences of, respectively, ‘blue-collar’ (‘Sławek’) and ‘white-collar’ (‘Paulina’) posted workers. Inspired by Hayes’ approach to recounting the experience of paid care workers,¹⁶³ the opening narratives invite the reader to immerse themselves in the story and they may be viewed as an homage to the narrative inquiry approach.

Contrary to other methods of narrative analysis, intrinsically linked with literary studies or linguistics where the focus naturally shifts onto the form of the narrative, in thematic analysis the focus on *how* the narrative is told or written is minimal.¹⁶⁴ Indeed, this study was far more concerned with the content of the narratives than the form, especially given the fact that many of the transcripts had been translated from Polish into English by the researcher and, thus, some of the nuances were inevitably lost in translation. Interview excerpts were edited by removing the interviewer’s questions and amending the structure of the narratives in order to add more coherence. This is not to say that the stylistic dimension of the presented interview excerpts was entirely overlooked. On the contrary, this project aimed to preserve the individual communication style of each participant, and the language of the interview excerpts is generally colloquial which is a characteristic of oral narratives, although the degree of colloquiality depends on factors such as the interviewee’s level of education and familiarity with the legal vocabulary.

Conclusion

The present Chapter may be considered as an introduction to Chapters 5-6 which will evaluate the findings of the interviews conducted in this research project. It began with a brief review of the existing empirical literature in the field of posted work which served a specific aim. Notably, the aforementioned publications gave voice to posted workers, which was important in the context of the fifth element of the definition of precarious work formulated in Chapter 1. As argued in Chapter 1, the importance of subjective

¹⁶³ Hayes (n 82).

¹⁶⁴ Riessman, ‘Thematic Analysis’ (n 155) 54.

perception cannot be overstated in light of the link between the consequences of precarious work and workers' well-being investigated by Kalleberg.¹⁶⁵

Consequently, the interviews with posted workers conducted by researchers such as Wagner and Berntsen provide important – yet worrying – insights into the first-hand experience of posted workers prior to the 2014–2018 revisions of the PWD. The available research paints a disturbingly bleak picture of an isolated population of Eastern European workers living in Western Europe in conditions resembling forced labour camps. While these empirical studies do not delve into the legal causes of the precarious status of posted workers, analysis of the available material leads one to believe that it was primarily due to incorrect enforcement of the PWD and the limits of the 'nucleus' laid down in Article 3(1) PWD.

Yet given the evolution of the EU legal framework there are reasons to hope that the situation of some posted workers in Europe might have improved following the implementation of the two reforms of the PWD. While far from providing comprehensive protection of posted workers, the revised rules place more emphasis on workers' rights. In addition, the 2014 Directive appears to have tightened the enforcement of the EU framework as implemented by the Member States.

On another note, it has to be borne in mind that the empirical literature to date focused exclusively on low-skilled posted workers carrying out manual labour. Nevertheless, the definition of a posted worker and the three posting scenarios, as analysed in Chapter 2, suggests that the PWD is not used solely in situations requiring cheap labour and driven by cost competition. In this vein, the statistical data discussed in Section II may be useful in challenging some of the popular assumptions pertaining to posted work in the EU.

One such assumption is that postings flow from low-wage economies to high-wage economies. Against this background, the available statistics prove that the second biggest 'exporter' of posted workers in the EU is Germany which is a high-wage economy. Furthermore, the statistical data shows that high numbers of German workers carry out postings in countries such as Austria, France or the Netherlands, where wages might differ but are essentially comparable to those in Germany.¹⁶⁶ Consequently, while the empirical evidence proves that exploitation of posted workers and poor

¹⁶⁵ Kalleberg (n 3). See further Chapter 1, s III C.

¹⁶⁶ De Wispelaere, De Smedt and Pacolet (n 62) 23.

accommodation conditions are present in Europe, the statistical data (naturally, based solely on declared postings) paints a more nuanced picture with many shades of grey.

The remainder of this Chapter was dedicated to a diligent explanation of the methods employed in the empirical phase of this project. It provided a justification of the chosen methodology which relied on the narrative inquiry approach for conducting in-depth qualitative interviews. Furthermore, issues such as research validity, eligibility criteria, sampling, consent and confidentiality, as well as data safety and the thematic analytical framework were addressed throughout Sections III-VI. This was done with the intention to provide an appropriate context for the forthcoming evaluation of the interview findings, and to set the scene for the narratives of posted work constructed in Chapters 5-6.

5. Experiences of ‘Blue-collar’ Posted Workers in the EU

I'm 38 years old, I live in a city in the South of Poland and I have been working abroad since 2012, mainly in Austria.

The thing with me was that I did prison time, so when I came out I had a family to support and several problems including an outstanding fine. I had almost finished college before and was planning to go back when a friend of mine said: ‘Listen, I make 10.000 zloty a month [approx. 2.000 euro] as an electrician over in Austria’. Wow. That was a real opportunity for me. Even though I wasn't an electrician, I did a quick course which cost only 300 zloty [approx. 70 euro], and three months later I had a basic permit.

Back in 2012, the times were difficult because all the posting companies were trying to avoid the law. I was looking for work through Polish agencies which recruited people and posted them abroad. But you know, the Poles are greedy, so the work was semi-legal. They posted me from Poland to Austria, but on a Slovakian contract, because they had worked out that employee costs were lower in Slovakia. I wasn't sure if my social security contributions were being paid, and when I later checked in the ZUS [Zakład Ubezpieczeń Społecznych, social security institution in Poland], it turned out that during six years my contributions had only been paid for three. I used to get some sort of a payslip, but it was dodgy. Also, they were telling us that it was a full-time contract, but I later found out that they only declared us as working quarter-time. And my wages were being paid from the Canary Islands, because it was some kind of a tax haven. I can't do anything about it now, the company doesn't exist anymore. With hindsight, I shouldn't have clung to that one job, but I didn't know that there was a hundred similar companies around and not all of them were scams. People told me to change jobs, but I didn't have the guts to do it, I didn't speak any German at the time. I knew I would get 1600 euro by the end of the month and I really needed that money.

I actually don't like this work, I don't like having to be on the road the whole time, but I have no choice. I have an amazing wife and an amazing child, plus I'm trying to keep my own business in Poland. But things are hard here, you know, the government is horrendous. They are doing everything to kill small business with taxes and that's why employers can't afford to pay decent wages, while the big foreign companies are not paying any tax. This work abroad is easy money for me. I only work 38.5 hours per week Monday to Thursday, and I know that this money is coming in, it's guaranteed. But the

work is hard, I mean the conditions are hard, although I have got used to it. I'll show you here [shows photographs on the phone]... I'm working on this crane right now. It's in the Alps and you're working outdoors whether it's pouring rain or snowing.

Around 2016 new laws came in, according to which you could only work in Austria on Austrian terms and conditions. This has been brought in to put an end to the 'hokey-pokey' contracts. Everything changed back then, because it was no longer allowed to be employed on a contract that was theoretically Slovakian. Since then, I have been working for Austrian companies, they call them in German 'Leasing-Firmas'. So I'm no longer posted by an intermediary, but hired out to work for a period of time on Austrian terms. How it works is that I have this Polish friend, Dawid, who sends me all the paperwork from a leasing firm in Austria, and this firm then hires me out to work on building sites. Each building project lasts a number of weeks or months and if they are happy with me, they hire me back in for other jobs. So Dawid is not my employer, but he applies for work on my behalf and gets paid for it, obviously. And I get paid directly by the Austrian company. Even my social security is paid in Austria now.

Since the law changed in Austria, it's not only the wages that have improved, but everything. Companies comply with the law more, because workers have become more aware of their rights, and as soon as something is against the law, they quit. Also the working time is better observed, except overtime which is still a scam, because I'm getting a reduced hourly rate for the extra hours. I have been with the current leasing firm for five weeks and so far I'm very happy with it. The hourly rate is 13.20 euro plus a daily allowance of 35 euro. And on top of that you get two extra salaries per year, one for Christmas and another one in lieu of annual leave. The employer also pays for my accommodation instead of subtracting it from my wages. So I get to stay in a hotel with breakfast, although sometimes I have to share the room with another guy. They also pay for bus hire, so the only expenses that go out of my pocket are petrol and the hire of PPE and tools. But at least from day one on a job I get a toolbox worth thousands of euro and I can work away, which I see as an investment in the worker. Before, I had to buy all the tools myself and that cost money too.

Overall, I make 2.400 euro a month, which is astronomical money in Poland. The hours are good because I'm back home on Thursday, so I have long weekends. Only I have to get up at 02.50 a.m. on Monday, brush my teeth and – on an empty stomach – get on a bus which picks me up from home. Thankfully I can sleep on the way, because as soon as I get there, I begin a 12-hour shift.

Before, when I worked for posting companies, the wages were lower. I'm an electrician, so I should get a special industry rate, an extra 80 cent per hour in accordance with the collective agreement. But since I didn't speak any German then, and didn't know about that, I used to get only the basic rate, and the posting company kept the balance. Similarly, I didn't know about these two extra payments per year so I never saw them either, even though it had been paid by the investor.

At the same time, it's not only the Polish posting companies that are doing that, the Austrian leasing firms are liable to do the same thing. For example, at first glance everything looks legit but then they don't pay you the electrician industry rate which amounts to an additional 3.000 euro per year. That's why you have to be diligent and make sure you don't get scammed, but that comes with experience. I can speak some German now, I'm not fluent, but I get by. Besides, some more experienced colleagues have helped me a lot. Now I know that if 300 euro is missing from my monthly wages and I say it to my boss, they won't pay unless I threaten to report them to the Arbeiterkammer. This is the Austrian labour inspection, and it's extremely feared, it's an institution like no other, back in Poland even the tax office doesn't work as fast. When the inspectors arrive, they check everything and they will always find something. I think that it's great, without these inspections there would be total chaos. All these regulations, directives and so on, are great for workers too. The only slight disadvantage is that you need to think twice before you report your company. A friend of mine did that and yes, he did get some 1.600 euro back after the inspection, but when the control was ongoing, he was off work for four months, so he lost 8.000 euro in wages, plus no one will hire him again.

Once I briefly worked on a full-time contract in Austria without any intermediaries. I was employed directly by a big construction company, so I had the comparison. I had all the perks of being an employee, they invited me to work parties, to join the unions and so on. As a contractor, you can be fired anytime without any consequences, whereas in Austria it's very difficult to get sacked when you're an employee, they really need to have something on you, and even then they have to pay you three months' wages. That's why Austrian companies are so eager to hire external contractors. But it didn't turn out so well for me to have a full-time contract in Austria when still living in Poland. I felt like I was imprisoned, I was tied down by the contract, while as a freelancer I'm much more flexible. For example, when my daughter has a dance show during the week, I ring the leasing firm and say that I won't be in until the following week.

Another reason why I quit that full-time job was the fact that I didn't get on with my boss. I have often experienced a certain lack of respect because I'm an 'Auslander' [Ger. 'foreigner'], but as a temporary worker I don't care about that, I can always quit if something doesn't suit me. I couldn't do that when I had a permanent contract.

With regard to the discrimination thing, it happens a lot when you're a foreigner, regardless of the type of contract. The Austrians generally treat us Poles like slaves at work, while themselves are really slow, they always take their time. One time I was doing light installations with an Austrian guy, that was before I could speak any German. All of a sudden, I was called to the boss – I brought a friend of mine as an interpreter – and I was told that I wasn't doing enough work. I couldn't believe what I was hearing, but it turned out that the Austrian guy had told the master that he was doing all the work himself. The next day, the boss came in to me at the end of the day asking to show him what I had done. So I did show him, and he then asked what the other guy had done. I said I didn't know because I wasn't going to denounce him. The next day, the boss came back to check on me and he fired the Austrian guy instead, which was unheard of. The lads were talking about it for weeks.

But this can be a double-edged sword too, because the locals think that we are taking their jobs. I have recently worked with two German guys in Berlin who didn't even bother to reply when I said 'hello' to them. They were typical racists, in the canteen I used to say to them in German 'enjoy your meal', and they would look away and pretend like I wasn't there. So I insisted on chatting them up for the next three weeks, and at the end I even wished them a merry Christmas. But this happens everywhere, in Poland people are doing the same to the Ukrainians. Everywhere you go, the Ukrainians are there: in the taxi, in the café, in the flower shop... I understand them perfectly, because I'm the same, I work abroad. But people here don't like them.

The Ukrainians actually have it tough in Austria too. They are really being taken advantage of and working for no money. But they accept it and they are happy to take the work, because otherwise they would have made 500 zloty a month [approx. 100 euro] back home. For example, between 2012-2014 I worked as a posted worker on a building site of a skyscraper. The work was hard, I was laying down the floor. I was there with some other 150 posted workers from Poland and our hourly rate was 11 euro. But there were workers from Ukraine too earning 5 euro an hour, imagine? Plus they had to pay for transport and accommodation. They were working illegally, and the Arbeiterkammer every so often sent police to the building site. One time so many police cars arrived that

they were blocking the motorway. But when the inspectors looked at the scaffoldings, it was like the drills were still drilling, but everyone had left. They just hid. My dodgy Slovakian contract passed the inspection. It used to be the norm that out of 400 people on a building site some 50-100 were illegal. But now, since the laws changed, it is more difficult to hire people illegally.

On every building site we have a health and safety training, but the rules are not really observed, in this respect Austria is even worse than Poland. But a lot has improved in terms of accidents too since the laws changed. At the beginning, when we were working as posted workers on Slovakian contracts, we didn't even have proper insurance. If you got hurt, you couldn't report it, because they would have fired you straight away. So even though you had nearly lost an arm, you would have said: 'No, I'm alright, it's nothing', to which the boss would have praised you for being a good worker. One of my colleagues fell off a ladder and a helicopter had to take him to hospital, which cost an enormous amount of money. The employer rang me and said they were going to give me that money, it was 6.000 euro, so that I pay the hospital as a private party. But I refused to do that, having had enough trouble with the law in my life I didn't want to end up in court again.

Now I can go to any doctor in Austria, because I'm working on an Austrian contract. I have paid sick leave too. The only problem is that not too many people use it because of the language barrier. How would you explain to the doctor what's wrong with you? You would need to bring a German speaking friend with you, and they wouldn't take half a day off and lose a couple hundred euro just to take you to the doctor. But it's fine, really, because I have this Austrian health card now, so I can go to any doctor in Poland for free.

Another problematic thing when you work abroad is accommodation, because there are a lot of thugs around. When I'm in Austria, I try to make the most of staying in places like Vienna or the Alps. I finish work at 5 and I have four hours to spend on sightseeing, hiking and so on. But most of the lads are just drinking all the time. They are really young, like 22-24, and they don't even bother to leave the hotel room after work. They have been working in Vienna for 18 months, a beautiful city left intact by the war, but they only know the way to work, and to Lidl where they buy booze. Sometimes the wife rings them and they say: 'Really sorry, honey, but I need to stay over for the weekend, I've loads of work'. But it's not true, the work is always over on Thursday and they stay over to get drunk all weekend.

That's also why I don't like this work, but I have no choice. I have recently checked my pension situation with the ZUS and found out that so far I only have 25.000 zloty [approx. 5.500 euro] on my account. What sort of pension is that? So I have to keep working in Austria, and in another 10 years or so I will qualify for a basic pension there. Here I'm not going to have a decent pension even if I work non-stop for the next 25 years. My wife says: 'You won't have a penny in your old age', but she has been working in the civil service all her life and now, at nearly 40 years of age, she only has 80.000 zloty [approx. 18.000 euro] on her pension account. This country is a scam, I'm telling you. I have a job offer in Norway for 25.000 zloty a month, so in one summer I can earn my wife's entire pension. Not to mention the wages in places like Dubai, but I couldn't go there and not see my wife and daughter for months.

(Sławek, interview conducted in November 2019)

Introduction

Sławek's story represents the voice of the 'blue-collar' posted workers in the EU, the most common embodiment of the Posted Workers Directive¹ (hereafter: PWD) in practice. Whilst Houwerzyl and Verschueren suggest that the posting of workers began with high-level management,² 'blue-collar' construction workers rapidly took front stage as the European legislator undertook to regulate this controversial aspect of the free movement of services.³ Consequently, the wording of the PWD, notably its Annex which lists a number of activities related to construction, as well as the ongoing controversies related to 'social dumping' suggest that the Directive's primary concern are workers from labour-intensive sectors of employment.⁴

In 2018, two thirds of all A1 portable documents issued according to Article 12 of the Social Security Regulation 883/2004⁵ concerned postings in industry, and within that category construction constituted some 40%.⁶ While some of these might be issued for high-wage workers in construction too, such as managers, the majority of postings in the building sector are more likely to concern low-wage workers. All of the empirical

¹ Council and Parliament Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

² Mijke Houwerzyl and Herwig Verschueren, 'Free Movement of (Posted) Workers and Applicable Labour and Social Security Law' in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019) 77.

³ Jan Cremers, Jon Erik Dølvik and Gerhard Bosch, 'Posting of Workers in the Single Market: Attempts to Prevent Social Dumping and Regime Competition in the EU' (2007) 38(6) *Ind Relat* 524. See further 'Pour Éviter le Dumping Social La CEE Prépare une Directive pour Protéger les Travailleurs Temporaires Européens' (*Le Monde*, 21 June 1991).

⁴ Christopher L. Erickson and Sarosh Kuruvilla, 'Labor Costs and the Social Dumping Debate in the European Union' (1994) 48(1) *Indus & Lab Rel Rev*; Daniel C. Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar 2003) 324; Magdalena Bernaciak, 'Social Dumping: Political Catchphrase or Threat to Labour Standards?' (ETUI Working Paper 2012). See further Chapter 2, s II A.

⁵ Council and Parliament Regulation (EC) No 883/2004 on the coordination of social security systems [2004] OJ L 166/1, art 12. See also Council and Parliament Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284.

⁶ Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, 'Posting of workers. Report on A1 Portable Documents issued in 2018' (European Commission 2019) 30. See further Chapter 4, s II.

studies published to date in the field of posted work and discussed in Chapter 4 were carried out among low-income workers in construction, shipbuilding, food-processing etc.⁷ This focus on ‘blue-collar’ posted workers in scholarly literature might be explained partially by the statistical prominence of this type of postings, but also by the discernible susceptibility of workers belonging to this group to vulnerable working and living conditions.

This Chapter engages in the ongoing debate on ‘blue-collar’ postings by looking at the interviewees’ experiences through the lens of the evolving legal landscape. Research findings are based on 19 in-depth interviews. As explained in Chapter 4, eight of them were conducted with participants exclusively from the ‘blue-collar’ subcategory.⁸ These were supplemented with 11 interviews with ‘experts’: representatives of the national enforcement authorities, employers’ organisations, employers and lawyers practising in the field of posting. As explained above, representatives of trade unions in Ireland and Poland had also been invited to participate in the research, but there was no response. While some of the interviewees from the latter category also shared insights on ‘white-collar’ postings, they tended to focus primarily on ‘blue-collar’ postings due to a significantly higher number of issues affecting workers in the ‘blue-collar’ subcategory.

The PWD framework has in recent years undergone two major revisions carried out, firstly, by the 2014 Enforcement Directive⁹, and secondly, by Directive 2018/957.¹⁰ As will be argued hereafter, the reforms have had a substantial impact on posted workers’ daily lives and work. The first part of this Chapter is dedicated to the legal evolution of the PWD, as experienced in practice by research participants. It begins in Section I with an evaluation of these provisions of the 2014 Enforcement Directive which appear to be the most successful at safeguarding the rights of posted workers.

⁷ See Chapter 4, s I.

⁸ *ibid*, s IV B.

⁹ Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L 159/11.

¹⁰ Council and Parliament Directive 957/2018/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173.

Section II will raise the question of the liability regime for subcontractors with regard to the posting of workers which, albeit addressed by the Enforcement Directive, due to the optional nature of the possible extensions of the basic regime, still appears to be insufficient.

Section III will shift the focus from the Enforcement Directive to Directive 2018/957 which, upon the conclusion of the empirical phase of this research project was still at a preliminary stage of domestic transposition, thus an in-depth analysis of its long-term implications was not feasible. Instead, this section will identify and discuss some of the possible practical problems with the Directive's implementation and enforcement, particularly revolving around remuneration, expenses and the conditions of workers' accommodation.

Section IV will look at some more recent developments and alternatives to the posting of workers, such as different types of temporary work arrangements in which the foreign 'user undertaking' becomes the direct employer.

Sections V-VII will address some legal issues, as experienced by research participants, which persist in spite of the ongoing evolution of the PWD framework. While Section V will focus on undocumented postings and semi-legal postings of third-country nationals, Section VI will engage in the discussion on the impact of the COVID-19 public health emergency on the posting of workers which has exposed some of the persisting issues in the EU framework.

Section VII will evaluate the long term implications of carrying out posted work with regard to the workers' social security records and pension schemes.

Having evaluated the data against the background of the evolving PWD framework, the remainder of this Chapter will look at some areas that are located at the intersection of posting and other types of labour mobility. Section VIII will reflect on posted workers' struggles with discrimination in the 'host' state, principally experienced on the grounds of nationality but also, as will be argued, on the grounds of their employment status of posted workers.

Section IX will discuss the research findings in relation to work-life balance and the consequences of prolonged absence from the 'home' state for the workers' personal and family situation.

Finally, Section X will evaluate the interviewees' motivations behind the decision to pursue temporary work abroad which seem a crucial factor distinguishing 'blue-collar' from 'white collar' posted workers.

I. Positive Impact of the 2014 Enforcement Directive on ‘Blue-collar’ Posted Workers

Sławek’s experience of working on building sites which opens the current Chapter encompasses the years 2012-2019 and, as a result, offers valuable insight into the evolving reality of transnational ‘blue-collar’ workers in the EU. While the interviewee was not aware of the PWD’s reforms, he recalled that his working conditions in Austria improved substantially in 2016, which coincided with the national transposition of the 2014 Enforcement Directive by that Member State.¹¹ In Sławek’s narrative, the year 2016 becomes a demarcation line between working conditions which, in his own words, were ‘semi-legal’, and the regularisation of the employment status for many temporary workers in Austria.

A. ‘Letterbox Companies’

Prior to the 2016 reform in Austria, Sławek had worked as a posted worker in a typical ‘letterbox company’, where there was no genuine link between the employer and the country in which they were supposedly based.¹² Such companies have been notorious for circumventing laws in a number of contexts outside the realm of posted work, such as tax evasion or, as was sadly the case of the Essex lorry deaths, human trafficking.¹³ With regard to the posting of workers, a common tactic employed by some posting companies was to hire workers on contracts governed by the laws of a Member State which allowed for the lowest possible employee costs. As a result, Sławek had been posted to work in Austria by a company operating in Poland but established as a ‘letterbox company’ in Slovakia, which had serious implications for the worker. Sławek’s sending country for a

¹¹ BGBl, Number: I Nr. 44/2016 (2016).

¹² Karsten E. Sorensen, ‘The Fight against Letterbox Companies in the Internal Market’ (2015) 52 CML Rev 85; Joanna Ryszka, “‘Social Dumping’ and ‘Letterbox Companies’ – Interdependent or Mutually Exclusive Concepts in European Union Law?” (2016) 36 PYIL Law 209; Thomas Hastings and Cremers, ‘Developing an Approach for Tackling Letterbox Companies’ (Seminar of the European Platform Tackling Undeclared Work: How to Identify and Tackle Fraudulent Letterbox Companies, Brussels, November 2017). See further Commission, Impact Assessment, ‘Revision of the Legislative Framework on the Posting of Workers in the Context of Provision of Services’ SWD (2012) 63 final, 30.

¹³ See Kay Stephens, ‘Essex 39: The Root Causes’ (2020) 61(3) Race & Class 87.

number of years had technically been Slovakia and, therefore, his social security contributions should have been paid there too.¹⁴ While this might explain why some social security contributions were missing from Sławek’s pension account in Poland, it is difficult to assess whether they had been paid in Slovakia, as the employer was a ‘letterbox company’ operating *de facto* outside the reach of Slovakian authorities.

The above problem has been addressed by the Enforcement Directive which, in Article 4, contains a non-exhaustive list of criteria to be taken into account by the national competent authorities while assessing whether a company is genuine.¹⁵ A preliminary evaluation is typically carried out by the sending state’s authority when considering an undertaking’s application for issuing A1 portable documents to posted workers.¹⁶ The procedure is illustrated in the below excerpt of an interview with a representative of the International Postings Section of the Department of Employment Affairs and Social Protection, which issues A1 certificates for outgoing posted workers in Ireland:

We have different application forms for people travelling under the different articles of Regulation 2004/883. If a company is applying for the first time, they need to give more information than in subsequent applications. From first-time applicants we require a company registration form to be able to check whether the applicant is genuine. We also regularly receive updates from the Revenue, everything is coordinated, so we can see it all on the one system. We also keep the company’s contact details in case we need to get in touch with them again. Sometimes we receive requests from competent authorities in other Member States to verify that the postings are genuine, mostly from Belgium, France and Germany.

(International Postings Section Ireland, interview conducted in May 2020)

¹⁴ See Pennings, ‘Posting’ in *European Social Security Law* (6th edn, Intersentia 2015).

¹⁵ Chapter 3, s I B 3.

¹⁶ The binding force of the A1 social security certificates has been emphasised by the CJEU in case C-527/16 *Salzburger Gebietskrankenkasse v Alpenrind* EU:C:2018:669. See also case C-359/16 *Criminal proceedings against Ömer Altun and Others* EU:C:2018:63; Anne Pieter van der Mei, ‘Overview of Recent Cases before the Court of Justice of the European Union (July – October 2018)’ (2018) 20(4) E.J.S.S. 364. See also case C-365/15 *Commission v Kingdom of Belgium* EU:C:2018:555; joined cases C-370/17 and C-371/18 *Caisse de retraite du personnel navigant professionnel de l’aéronautique civile (CRPNPAC) v Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* EU:C:2020:260. See also Chapter 3, s I B 4.

B. Inspections, Penalties, and the Right to Remedy

As has been argued in Chapter 3, by tightening the enforcement of the existing rules and strengthening the role of national competent authorities, the 2014 revision has given the PWD the ‘claws’ it previously lacked. Two mechanisms that, according to the interviews conducted with ‘blue-collar’ posted workers, have been particularly effective, are the factual checks performed at the employer’s premises,¹⁷ and the penalties for infringement of the rules on posting.¹⁸ Diligence in conducting inspections in Austria, vividly described and praised by Sławek, was also confirmed by other posted workers from the construction sector who have worked in Austria.¹⁹ The following excerpt of an interview conducted with a representative of the Workplace Relations Commission, the Irish authority responsible for the enforcement of the PWD with regard to incoming workers,²⁰ appertains to the issue of inspections:

We send out inspectors with prior notification and try to keep the complainant’s identity confidential. If we send an inspector to a specific building site, we look at all the companies operating onsite. We check the terms and conditions of employment, documentation, payslips. The paperwork is sometimes lacking in detail, while other times it is lacking altogether. Sometimes we find issues related to the working time. For example, if towards the end of the contract workers had been working extra hours, the extra hours over 40 hours per week might not have been remunerated. Pay tends to be the main issue, particularly with regard to workers from the lower pay economies. Workers are often aware of the problems but they put up with it, especially if they are from these low-wage countries. But now, since the Enforcement Directive we can also go to the principal contractor if pay-related issues arise.

(Representative of the Workplace Relations Commission Ireland, interview conducted in March 2020)

¹⁷ Directive 2014/67, art 7(6). See also Chapter 3, s I B 5.

¹⁸ Directive 2014/67, art 13(2), see also Chapter 3, s I B 8.

¹⁹ The Austrian competent authority has been criticised by the CJEU for going too far in its application of the law with regard to posted workers in cases C-33/17 *Čepelnik d.o.o. v Michael Vavti* EU:C:2018:896 and C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* EU:C:2019:1110.

²⁰ See Michael Doherty, ‘Posting of Workers Before Irish Courts’ in Zane Rasnača and Bernaciak (eds), *Posting of Workers Before National Courts* (ETUI 2020).

The reference to posted workers from lower pay economies tolerating the employers' malpractices chimes with the notion of the 'dual frame of reference', as discussed in the previous Chapter.²¹ The above interview with the representative of the Workplace Relations Commission in Ireland reaffirms the workers' willingness to endure substandard working conditions in the 'host' state due to the lack of suitable job opportunities in the 'home' country.

Another amendment strengthening the workers' rights introduced by the Enforcement Directive that Sławek alluded to in his account, is the facilitation of complaints for posted workers regarding any outstanding remuneration.²² Research participants pointed to the simplicity of the procedure of lodging a complaint against the employer, including access to a Polish-speaking official in the Austrian *Arbeiterkammer*. The only practical difficulty, as identified by the interviewees, seems to be the lack of effective protection against retaliation by the employer, ensured in theory in the Enforcement Directive,²³ but problematic to execute in practice.

Overall, interviews with participants from the 'blue-collar' subcategory underline the Enforcement Directive's beneficial effect on posted workers' working conditions. Wagner, who carried out qualitative research on posted workers in the meat-processing industry in Germany prior to the national transposition of the Enforcement Directive, pointed out that employers from that sector seemed to comply with the PWD only 'on paper'.²⁴ In contrast, a number of interviews conducted during this project suggest that following the implementation of the 2014 Directive, the enforcement of rules has improved substantially, at least in countries such as Austria, Ireland and Poland. This might be considered a positive example of 'law in action' having effect on people's lives and working conditions, and of direct impact of EU legislation, as implemented by the Member States.

²¹ Chapter 4, s I B. See also Roger Waldinger and Michael I. Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (University of California Press 2003), as cited by Ines Wagner, *Workers without Borders. Posted Work and Precarity in the EU* (Cornell University Press 2018) 65.

²² Directive 2014/67, art 11.

²³ *ibid*, art 11(5).

²⁴ Wagner (n 21) 60.

II. Work in Progress: the Evolving Regulation of Subcontracting Liability in the PWD

The interviewee from the Irish Workplace Relations Commission also alluded to another modification introduced by the Enforcement Directive which has partially addressed the pressing issue of liability in subcontracting chains.²⁵ While the latter instrument has enabled Member States to extend the liability in a number of ways, Ireland has implemented the most basic regime, limiting the subcontracting liability for outstanding net remuneration to the direct subcontractor in the building sector.²⁶ The importance of this type of liability regime in the construction sector, where subcontracting chains are a common occurrence, is explored in the following quote from an interview with a manager supervising posted workers on building sites:

I often supervise manual labourers who carry out installation works for our company. I can't say that they are highly qualified workers, but we've used them a lot, and they are a reliable team who are very familiar with our technology. While I only travel to construction sites abroad for a couple of days at a time, these guys spend a number of weeks or even months in the country where the service is being provided. They are from a village in the North-East of Poland, and they are eager to take on this kind of work because there are no jobs at all in their region. They generally work on sites all around Poland, even for our company, these gigs abroad only happen occasionally and are

²⁵ Directive 2014/67, art 12. See further Nathan Lillie, 'Subcontracting, Posted Migrants and Labour Market Segmentation in Finland' (2012) 40(1) Br J Ind Relat 148; Lillie and Wagner, 'Subcontracting, Insecurity and Posted Work: Evidence from Construction, Meat Processing and Ship Building' in Jan Drahoukoupil (ed), *The Outsourcing Challenge: Organizing Workers Across Fragmented Production Networks* (ETUI 2015); Vladimir Bogoeski, 'Chain Liability as a Mechanism for Strengthening the Rights of Posted Workers' (Conference: Protecting Mobility through Improving Labour Rights Enforcement in Europe, May 2017). See also Chapter 3, ss I B 7 and II D 5.

²⁶ European Union (Posting of Workers) Regulations 2016, SI 412/2016, art 7(2) and Schedule 2. See Commission, 'Report on the Application and Implementation of Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')' COM (2019) 426 final.

better paid. But I don't know how much these guys earn, they are employed by our subcontractor, so the subcontractor is their boss. I'm not responsible for them and I settle the accounts with their boss only. Sometimes they come to me asking for bonuses or things like that, but I can't give any money directly to them, so I send them back to their boss. If, hypothetically, their boss didn't pay them, I would feel morally obliged to talk to him about it, but I wouldn't be under any legal obligation to do so. At times we have bigger projects for which we need workers for simple jobs that don't require any experience, in which case our subcontractor hires more guys, or else he hires another subcontractor. I have no idea where he gets these extra guys, I know that he pays them, but I'm not even sure if they are working legally.

(Stefan, interview conducted in November 2019)

The interviewee was not entirely correct in saying that his company was under no legal obligation to ensure the payment of the subcontracted workers' wages. With regard to domestic building sites, the subcontracting chain liability in the construction sector is governed by the Polish Civil Code (*Kodeks cywilny*) which envisages a stringent regime encompassing contractors and subcontractors regardless of their position in the chain.²⁷ With regard to foreign building sites, as explained above, in accordance with the Enforcement Directive Stefan's company would also be liable for the outstanding remuneration of workers hired by its direct subcontractor.²⁸

The above passage, exemplifying the vulnerable position of construction workers in subcontracting chains, may serve as an explanation as to why an extended subcontracting liability regime would be the most desirable mechanism for strengthening the protection of posted workers' rights. Rendering extended subcontracting liability optional in the Enforcement Directive has resulted in many Member States opting for the most basic subcontracting liability regime which does not ensure adequate protection of posted workers' rights.

²⁷ Ustawa Kodeks cywilny [1964] Dz.U. 1964 Nr 16 poz. 93 ze zm., art 647¹.

²⁸ Directive 2014/67, art 12(4). According to the European Commission, 10 Member States (Austria, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain and Sweden) have extended the subcontracting liability onto parties that are not in a direct contractual relationship with the posting employer, see Commission, 'Report on the Application and Implementation...' (n 26).

III. Directive 957/2018's Implications on Safeguarding the Rights of Posted Workers

The empirical phase of this project was concluded in July 2020, shortly before the deadline for implementation of Directive 957/2018 elapsed.²⁹ It was, therefore, impossible to thoroughly evaluate the revision's impact on the reality of working as a posted worker in the EU. The interviews conducted in 2019 and early 2020 with practitioners and representatives of the competent authorities in the Member States revealed a great deal of uncertainty regarding the 2018 revision's transposition. The most controversial aspect of the reform, as discussed in detail in Chapter 3, was the replacement of the term 'minimum wage' of the 'host' country with 'remuneration' as a minimum requirement for posted workers.³⁰ Even though the CJEU had previously shed some light onto the definition of minimum pay and all its component elements in *Sähköalojen*,³¹ following the adoption of Directive 2018/957 practitioners from the field of posting raised more questions, like in the example below:

Member States are legally obliged to provide information regarding the posting of workers on a single national website. The problem is that, from experience, this information is usually limited to the administrative requirements that have to be met by the posting companies. I have yet to come across a website containing all the relevant information, including the requirements stemming from collective agreements. At times, there are links to the collective agreements on the national websites, but some of these

²⁹ The deadline for national implementation was set for the 30th of July 2020, see Directive 2018/957, art 3(1).

³⁰ Directive 2018/957, art 1(2) (a). See further Francesco Costamagna, 'Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive' in Silvia Borelli and Andrea Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene Editore 2019) 94-96; Marco Rocca, 'Stepping Stones Over Troubled Waters. Recent Legal Evolutions and the Reform of the Posting of Workers Directive' in Jens Arnholtz and Lillie (eds), *Posted Work in the European Union. The Political Economy of Free Movement* (Routledge 2019)170-172; Matteo Bottero, '*Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021) 259-263. See also Chapter 3, s II D 3.

³¹ Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* EU:C:2015:86. See also Chapter 3, s II B.

websites are not being updated for years. So when the new Directive comes into force, it will be problematic for the posting companies to find out what remuneration should apply to the workers going to, say, Germany, where there is a myriad of sectoral collective agreements.

(Weronika, employment lawyer in Poland, interview conducted in October 2019)

With regard to the lack of accurate information for employers, Directive 2018/957 has reinforced the obligation conferred upon the Member States by the Enforcement Directive to provide such information on the single national websites.³² However, the same interviewee expressed concerns that due to the above practical difficulties, posting companies would purposely decide not to comply with the revised PWD.

Another amendment introduced by the 2018 revision has been the insertion into Article 3(1) PWD of allowances or reimbursement of the cost of travel, board and lodging of workers away from home for professional reasons.³³ Again, as discussed in Chapter 3, this provision only applies where Member States already have such statutory reimbursement rules in their national legislation.³⁴ The accounts of ‘blue-collar’ posted workers gathered in this project prove that prior to the transposition of Directive 2018/957 there was no uniform approach to the cost of travel, board and lodging. While some employers covered the above work-incurred expenses on top of the workers’ remuneration, others subtracted them from the wages.

Furthermore, employers now have to ensure a certain standard of accommodation for posted workers, which is supposed to address the issue of poor living conditions.³⁵ Writing prior to the 2018 reform, Wagner described this as a ‘dormitory labour regime’.³⁶

³² Directive 2018/957, art 1(2) (a). See further Directive 2014/67, art 5. See also case C-626/18 *Poland v Parliament and Council* EU:C:2020:1000, para 129.

³³ Directive 2018/957, art 1(2) (a).

³⁴ See Chapter 3, s II D 3. See also Rasnača, ‘Reimbursement Rules for Posted Workers: Mapping National Law in the EU28’ (ETUI 2019).

³⁵ Directive 2018/957, art 1(2) (a).

³⁶ Ngai Pun and Chris Smith, ‘Putting Transnational Labour Process in Its Place: The Dormitory Labour Regime in Post-Socialist China’ (2007) 21(1) *Work Employ Soc* 27, as cited by Wagner (n 21) 63. See further Erka Caro, Lisa Berntsen, Lillie and Wagner, ‘Posted Migration and Segregation in the European Construction Sector’ (2015) 41(10) *J Ethn Migr* 1600; Francesco E. Iannuzzi and Devi Sacchetto, ‘Italian Labour Inspectors Facing Posted Workers Phenomena’ in Arnholtz and Lillie (n 30). See also Chapter 4, s I B.

Interestingly, research participants in this project did not generally complain about substandard accommodation but, rather, pointed out to their living conditions being difficult due to the behaviour of fellow posted workers. This issue, first mentioned by Sławek, can further be explored through the following story:

I worked for five months in the Netherlands where I had been posted by a Polish temporary work agency. I spoke English, so I was assigned to an admin job in a Korean company, which was boring but fine. My boss wasn't even aware of the extent to which the temp agency was taking advantage of the workers. He paid them 40 euro an hour not knowing that I would only get eight euro out of it. The agency provided accommodation, but it wasn't free, it was subtracted from my salary. And so was transport, because I lived in Germany, some 30-40 minutes away from the office, and every morning a bus would pick me up from the estate where I was living. Everyone on that estate was working for the same agency, although for different employers. We lived in three-bedroom houses, two people in each bedroom. People were mostly from Poland, Hungary, and the Czech Republic, and they were working shifts in factories or in agriculture. The accommodation was a nightmare, and it actually pushed me to quit a month earlier than agreed, even though I didn't mind the work itself. The atmosphere on the estate was awful, and those conditions were simply too much for me. I don't mean the actual living standard, because the house was nice and clean, but alcohol was the main problem which kept me awake at nights. Let's just say that I quit because I valued my own comfort and safety more than the prospect of making a lot of money. Personally, I was lucky not to have experienced any violence or harassment but having heard other people's stories, I was constantly fearing for my life.

(Marzena, interview conducted in November 2019)

What transpires from the above example is that while the temporary work agency might have had its logistic reasons for accommodating all the workers on the one estate (notably, it facilitated their daily commute), it contributed to isolating them in the 'host' country. The fact the migrants were working in one Member State whilst living in another further reinforced their perception of being segregated and, in Wagner's words, 'disconnected from the "host" country's institutional system'.³⁷ The above excerpt also

³⁷ Wagner (n 21) 78. See further Erka Caro and others (n 36). See also Chapter 4, s I B.

chimes with Berntsen's findings on the posted workers' social vulnerability related to their housing arrangements.³⁸ While Directive 2018/957 has addressed the living conditions of posted workers, it seems more likely that this provision's implementation in practice will focus on ensuring a certain standard of living, as opposed to tackling the issue of the workers' isolation in the 'host' Member State.

Another aspect of laying down an obligation to ensure a certain standard of accommodation for posted workers in Directive 2018/957 were its ramifications during the COVID-19 pandemic. While it is highly unlikely that epidemiological concerns had been on the EU legislator's mind back in 2018, it appears that following the onset of the public health crisis, ensuring an appropriate sanitary regime should in theory fall within the scope of Article art 1(2)(a) of Directive 2018/957. The reality of working as a posted worker during the pandemic will be discussed in Section VI.

Furthermore, Directive 2018/957 addressed the problem of the conditions of the workers' accommodation, but not those of their transport, while some research participants raised the issue of poor and unsafe transport conditions. The interviewed construction workers regularly travelled from Poland to Austria or Germany and back on minibuses driven by fellow workers who were often made to drive following a busy day on the building site. In this vein, one interviewee admitted to having been involved in a road accident in which one person was killed.³⁹

IV. Long-term Consequences of the 2014-2018 Reforms of the PWD: Decreasing Popularity of the Posting of Workers?

Another issue addressed by the 2014-2018 revisions has been more emphasis on differentiating between genuine postings and 'fictitious' ones. Pursuant to Article 4(3)

³⁸ Berntsen, 'Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries' (2015) 31(4) IJCLIR 371, 381-382. See also Chapter 4, s I B.

³⁹ Similarly, in the summer of 2020 the public in Poland was shook by an accident involving a passenger car, a public transport bus and a minibus. All eight of the minibus's passengers who were traveling from Eastern Poland to carry out temporary work in the Netherlands, and its driver, were killed, while seven passengers of the public transport bus were injured. See Anna Malinowska, 'Dziewięć Osób Zginęło, Siedem Jest Rannych. Tragiczny Wypadek pod Gliwicami' (Gazeta Wyborcza Katowice, 23 August 2020) <https://katowice.wyborcza.pl/katowice/7,35063,26232316,dziewiec-osob-zginelo-siedem-jest-rannych-tragiczny-wypadek.html> accessed 7 July 2021.

of the Enforcement Directive, as discussed in more detail in Chapter 3, a genuine posting occurs when the worker is only temporarily carrying out work in the ‘host’ state and intends to return to the ‘home’ state.⁴⁰ Referring to Sławek’s experience, it was clear from his narrative that he did not normally work in Poland, but rather his habitual place of work was Austria where he earned a living, like many other construction workers, through consecutive short-term contracts. After Austria had transposed the Enforcement Directive, Sławek’s posting contracts were deemed fictitious postings, which resulted in Austrian companies from the construction sector switching to hiring subcontractors such as Sławek directly instead of using posting companies. From 2016 onwards Sławek has been employed via Austrian undertakings similar to temporary work agencies.

Directive 2018/957 has further strengthened the focus on targeting fictitious postings by amending the wording of the third posting scenario in which the workers are hired out through a temporary work or placement agency.⁴¹ The 2018 revision has clarified that agencies are bound by the PWD and by the Enforcement Directive to the same extent as any other undertaking that posts workers.⁴² In the following excerpt, a recruiter from a big temporary work agency in Poland discusses the potential impact of the 2018 reform on this type of posting arrangement:

Posting workers on AI certificates was for many years the norm for temp agencies until the AIs became public enemy number one in Europe, particularly in France. At the moment, there is an open war against the posting of workers as trade unions in the ‘host’ states are lobbying against hiring workers on AI certificates and in favour of frequent controls and more stringent administrative measures. In Germany, for example, the works councils in companies have a lot of say and sometimes they object to hiring posted workers. The latest reform of the EU Directive tries to limit the postings to the free movement of services, where businesses compete on quality as opposed to price which was being done by Polish companies. In other words, the reform aims to eliminate fraud, and the use of the AIs by temp agencies is, in my opinion, fraudulent. That’s why, in recent years, hiring foreign workers directly in the ‘host’ state has become more

⁴⁰ Chapter 3, s I B 3.

⁴¹ Directive 2018/957, art 1(1) (c). See Chapter 3, s II D 5.

⁴² See also Marta Głowacka, ‘Posting of Workers Directive Reloaded’ (2019) 29 *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 29, 40-41; Bottero (n 30) 264. See further Chapter 3, s II D 5.

preferable, unless a company is really doing the posting for the purpose of providing a transnational service. But otherwise it's becoming more common for Polish workers to get a German employment contract, and their social security is paid in Germany too. This is also more favourable for the workers in the long-term since social benefits and pensions are more attractive in Germany than in Poland.

(Szymon, Polish recruiter in a temporary work agency based in Germany, interview conducted in November 2019)

While the interviewee used strong language to condemn the use of the PWD for the purpose of temporary agency work, it could indeed be argued that this arrangement is entirely distinct from the two remaining posting scenarios envisaged by the PWD.⁴³ There are legitimate reasons for an undertaking established in one Member State to temporarily send its workers to another Member State for the purpose of service provision,⁴⁴ or for workers in a multinational company to be moving between offices situated in different countries.⁴⁵ Contrastingly, when it comes to hiring workers via a temporary work agency, it is difficult to imagine a different reason than cost reduction for using a foreign agency instead of opting for a local agency.

Perhaps in the early days following the 2004 enlargement, when most of the then-EU-15 countries had temporarily restricted access to their labour markets, temporary work agencies provided a shortcut for nationals from the 'new' Member States intending to work abroad.⁴⁶ In recent years, however, when the transitional periods are no longer in place, the posting of workers via temporary work agencies seems a somewhat obsolete construct. Furthermore, not only are the social partners hostile to the concept of hiring workers via foreign agencies, but the interviews with 'blue-collar' workers also confirm that those who habitually carry out their work abroad prefer to be entirely covered by the employment law and the social security system of the 'host' state.

⁴³ Directive 96/71/EC, art 1(3).

⁴⁴ *ibid*, art 1(3) (a).

⁴⁵ *ibid*, art 1(3) (b).

⁴⁶ See Torben Krings, 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) 15(1) *Eur J Ind Relat* 49; Jimmy Donaghey and Paul Teague, 'The Free Movement of Workers and Social Europe: Maintaining the European Ideal' (2006) 37(6) *Ind Relat* 652, 653-655. See further Chapter 2, s II B.

On a more general note, interviews in the ‘blue-collar’ subcategory suggest that the 2014-2018 reforms of the EU framework have rendered the posting of workers a less appealing option for employers. As the new rules and tighter enforcement of the existing ones have increased the cost of posting and created new documentation obligations, the advantages of posting workers – without a genuine reason such as the workers’ specialist skillset – are questionable.

In Ireland, for example, interviews with employers in the home care sector have revealed a certain degree of reluctance to avail of posted workers due to the legal complexity of this type of working arrangement. One interviewee shared the results of a survey conducted among 20 members of an organisation representing home care providers in the private sector in Ireland, which included questions on the posting of workers. Only one company reported using posted workers in the capacity of care and support workers. While posted workers’ flexibility and availability were appreciated, issues related to the language barrier and cultural differences were referred to among the negative aspects of employing posted workers. Another disadvantage mentioned in the survey in relation to posted workers on short-term contracts were issues with ensuring continuity of care for the patients.

V. Tackling Undeclared Postings and Semi-legal Posting of Third-country Nationals

Data gathered in this research project confirms that the 2014 reform, by tightening the enforcement of the PWD, has considerably improved the working conditions of posted workers in the EU. The 2018 revision also appears to have some potential to further safeguard the rights of posted workers, even if the timing of the empirical phase of this project did not allow for a thorough assessment of Directive 2018/957. In spite of the 2014-2018 reforms’ contribution to better enforcement of rules and to fairer working and living conditions, interviews indicate that a number of problems, both legal and practical, persist.

One issue that transpired from the interviews was that of undeclared postings, partially addressed by the creation of the European Platform to enhance cooperation in

tackling undeclared work in the EU.⁴⁷ Undeclared posted workers are those who do not have an A1 portable document, therefore competent authorities in the Member States, both sending and receiving, cannot keep track or exercise any control over the migrants' professional activity. Furthermore, undeclared postings are outside the official statistics on the numbers of posted workers which are entirely based on the A1 documents issued by the sending authorities, as well as the prior notification systems of the Member States.⁴⁸ The following quote from an interview with a representative of the Irish Workplace Relations Commission touches upon the ways in which undeclared postings might be tackled by the competent authorities in cooperation with social partners:

In the past, a lot of posted workers were coming to Ireland from countries such as Portugal and Spain but nowadays they are mostly from Northern Ireland. Of course, the numbers are according to what companies declare and we know that there are also undeclared posted workers. With regard to non-declaration, we are in contact with the social partners. For example, we have recently had a meeting with a major trade union in the construction sector during which we discussed resources for undeclared postings.
(Representative of the Workplace Relations Commission)

Another problem that appeared in the interviews were certain irregularities surrounding the posting of third-country nationals, particularly Ukrainian workers posted by Polish undertakings.⁴⁹ In Poland, migrants from Ukraine and five other non-EU countries are not obliged to apply for a typical work permit as long as they intend to carry out work in

⁴⁷ Council Decision (EU) 2016/344 establishing a European Platform to enhance cooperation in tackling undeclared work [2016] OJ L 65. See Colin Williams, 'Developing a Holistic Approach for Tackling Undeclared Work' (Seminar of the European Platform Tackling Undeclared Work, December 2016). See further Williams and others, 'An Evaluation of the Scale of Undeclared Work in the European Union and its Structural Determinants: Estimates Using the Labour Input Method (European Commission 2017); Ioana A. Horodnic and Williams, 'Tackling Undeclared Work in the European Union: Beyond the Rational Economic Actor Approach' (2019) 35(5) Policy Studies 916.

⁴⁸ De Wispelaere, De Smedt and Pacolet (n 6) 8. See also De Wispelaere, De Smedt and Pacolet, 'Posting of Workers. Collection of Data from the Prior Notification Tools. Reference Year 2019' (European Commission 2021).

⁴⁹ See Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime-Judicialization and the Posting of Third-country Nationals' (2019) 57(6) J Com Mar St 1247. See also Chapter 2, s IV F.

Poland for no longer than six months.⁵⁰ Instead, their Polish employer is required to make a simple declaration confirming the intention to hire the foreign national.

Interviews conducted in Poland in 2019 suggest that Polish companies have been availing of this simplified procedure on a large scale in order to facilitate the work of Ukrainian nationals in other EU countries via fictitious postings. In this context, it is important to bear in mind that once a third-country national is able to work legally in the sending Member State, they are no longer required to apply for a work permit in the receiving country.⁵¹ This, however, does not render circumventing national immigration laws via the use of the PWD lawful, and potential consequences of this legal construct are explored in the following excerpt:

This is being done on a massive scale in relation to thousands of Ukrainian workers who only spend one day in Poland, so they are not posted workers because they do not usually work in Poland. But it can be risky because the social security institutions are frequently questioning this procedure. To them, this is not a genuine posting as Poland is merely a transit country for these Ukrainian workers. It creates potential criminal liability for the posting companies if it turns out that the workers' registration has been made in bad faith by providing false information to a public servant that the work will be carried out in Poland. I have recently come across a case where the social security contributions were being paid in Poland, but as soon as the ZUS realised that the posting wasn't genuine, they applied for the person's registration to be cancelled. They were going to return all the collected contributions saying that the money should have been collected in the real sending country. Furthermore, this procedure is risky for workers too. If the border guards carry out a control at the employer's premises and uncover this fictitious posting, they will have it on their system. And they will catch the workers as soon as they

⁵⁰ Ustawa o promocji zatrudnienia i instytucjach rynku pracy [2004] Dz. U. 2004 Nr 99 poz. 1001 ze zm., art. 88z, read in conjunction with Rozporządzenie Ministra Rodziny, Pracy i Polityki Społecznej w sprawie państw, do których obywateli stosuje się niektóre przepisy dotyczące zezwolenia na pracę sezonową oraz przepisy dotyczące oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi [2017] Dz.U. 2017 poz. 2349. See Anna Sokołowska and Małgorzata Skibińska, *Delegowanie Pracowników za Granicę* (Wolters Kluwer 2016) 156-165.

⁵¹ Case C-91/13 *Essent Energie Productie BV* EU:C:2014:2206, as cited in Sokołowska and Skibińska (n 50) 102-103. See also case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3818.

try to cross the border back to Ukraine. What usually happens next, is that the workers are interrogated and fined. But if they fail to prove that they have been misled by the Polish employer, and the court establishes that they knew that they were working illegally, they can be banned from re-entering Poland for a year.

(Dominika, lawyer specialising in employment law in Poland, interview conducted in November 2019)

This interviewee's experiences chime with Novitz and Andrijasevic's research findings describing the practice of hiring third-country nationals from Serbia as posted workers in Slovakia, which may lead one to believe that it is not an isolated incident in the daily practice of posting.⁵²

VI. COVID-19 and 'Blue-collar' Posted Workers

While on the one hand, data gathered in this project suggests a gradual decrease in popularity of the posting of workers as a result of the 2014-2018 reforms, on the other hand another factor that might potentially affect postings in the 'blue-collar' subcategory is the COVID-19 pandemic. As has been explained above, interviews were conducted between July 2019 and July 2020, and the coronavirus emergency occurred unexpectedly towards the end of the empirical phase of this project. At the time of writing, it was difficult to predict the pandemic's impact on labour mobility in the EU, with the earliest available data accentuating the negative effects of COVID-19.⁵³

In March 2020, the European Commission issued guidelines on the exercise of the free movement of workers during the coronavirus pandemic accompanied with information aimed specifically at posted workers, seasonal workers and frontier

⁵² Tonia Novitz and Rutvica Andrijasevic, 'Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations' (2020) 58(5) J Com Mar St 1325. See also Andrijasevic and Sacchetto, 'From Labour Migration to Labour Mobility? The Return of the Multinational Worker in Europe' (2016) 22(2) Transfer 219.

⁵³ 'Living, Working and COVID-19' (Eurofound 2020) <https://www.eurofound.europa.eu/publications/report/2020/living-working-and-covid-19> accessed 7 July 2021; Giovanni Bonaccorsi and others, 'Economic and Social Consequences of Human Mobility Restrictions Under COVID-19' (2020) 117(27) Proceedings of the National Academy of Sciences 15530; Tesseltje de Lange, Sandra Mantu and Paul Minderhoud, 'Into the Unknown: COVID-19 and the Global Mobility of Migrant Workers' (Symposium on COVID-19 and Global Mobility of Migrant Workers 2020).

workers.⁵⁴ The Commission's advice briefly addressed two questions: firstly, the issue of restrictions to the workers' mobility depending on whether they have already travelled to the receiving country or not, and secondly, posted workers' eligibility for COVID-19 emergency payment. As for the latter, the Commission specified that workers who were unable to pursue their activity, which due to the pandemic was cancelled or postponed, would qualify for the emergency payment, albeit in the sending Member State, even if they were already residing in the receiving country.⁵⁵

The Commission's approach was criticised by the European Trade Union Confederation (ETUC) for lacking comprehensive measures to ensure the safety of posted workers during the coronavirus crisis.⁵⁶ ETUC pointed out that since posted workers were active in critical and essential sectors such as construction, transport and agriculture, many of them continued to work throughout the pandemic-related restrictions.⁵⁷ Furthermore, data gathered in this project indicates that postings which had been postponed or cancelled, resumed following the easing of the most stringent COVID-19 restrictions. At the same time, the degree of compliance with sanitary measures and other COVID-19 specific laws among employers of 'blue-collar' posted workers remains unknown. On a broader note, ETUC's concerns over the uncertain and vulnerable position of posted workers chime with findings confirming migrant workers' heightened

⁵⁴ Commission, Communication 'Guidelines Concerning the Exercise of the Free Movement of Workers During COVID-19 Outbreak' (2020) OJ C 102I/03; Commission, 'COVID-19 Information for Frontier Workers and Posted Workers' (2020) <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=9630> accessed 7 July 2021.

⁵⁵ *ibid.* See further Państwowa Inspekcja Pracy, 'Delegowanie Pracowników do Polski w Ramach Świadczenia Usług w Czasie Epidemii Wirusa SARS-CoV-2' (2020) <https://www.pip.gov.pl/pl/informacje-dla-obcokrajowcow/covid-19-informacje-dla-cudzoziemcow/110164.delegowanie-pracownikow-do-polski-w-ramach-swiadczenia-uslug-w-czasie-epidemii-wirusa-sars-cov-2.html> accessed 17 July 2021.

⁵⁶ ETUC, 'Note on Posted Workers and the COVID-19 Outbreak' (2020) <https://www.etuc.org/en/document/etuc-note-posted-workers-and-covid-19-outbreak> accessed 7 July 2021.

⁵⁷ *ibid.*

susceptibility to negative implications of the coronavirus emergency, both on their health and employment.⁵⁸

In this vein, Rasnača notes the challenges of COVID-19 on highly mobile workers in the EU who in the course of the pandemic proved ‘essential but unprotected’.⁵⁹ While only some individuals belonging to this category which comprises international transport workers, seasonal workers, frontier workers etc. are posted workers, some of the issues raised by Rasnača, such as ineligibility for social security benefits, may have affected posted workers too. With regard to the existing legislative framework, the pandemic has, yet again, exposed certain weaknesses of Article 3(1) of the PWD. While those workers who were unable to commence or continue their posting did qualify for the emergency COVID-19 payments in their ‘home’ states, the European Commission’s guidelines did not contain any information on those posted workers who contracted the coronavirus. Since the right to sick pay is intrinsically linked to social security contributions which according to Article 12 of Regulation 883/2004 are to be paid in the ‘home’ country, posted workers can only avail of it if the receiving country’s rules on sick pay have been explicitly extended onto posted workers.⁶⁰

VII. Long-term Consequences of Posted Work for the Workers’ Social Security Situation

The interviews conducted with ‘blue-collar’ posted workers also shed light on a novel method of recruiting foreign workers to be hired directly by the ‘host’ country’s employer, which has been already alluded to in Section IV. Similarly, in the narrative opening this Chapter, the interviewee referred to a ‘friend’ who acted as an intermediary by finding suitable job offers for him in Austria. By the same token, a new business model that seems to be gaining popularity in Poland are companies operating as career

⁵⁸ Francesco Fasani and Jacopo Mazza, ‘A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic’ (Publications Office of the European Union 2020); Andrian Liem and others, ‘The Neglected Health of International Migrant Workers in the COVID-19 Epidemic’ (2020) 7(4) *The Lancet Psychiatry* e20. See further Special Committee on Covid-19 Response Deb 13 August 2020.

⁵⁹ Rasnača, ‘Essential But Unprotected: Highly Mobile Workers in the EU During the Covid-19 Pandemic’ (ETUI Policy Brief N°9/2020).

⁶⁰ ETUC, ‘Note on Posted Workers...’ (n 56).

consultancies recruiting workers for long-term contracts abroad which, contrary to posting contracts, are entirely governed by the laws of the 'host' country. While career advice for job candidates is free of charge and there is no legal link between the recruiter and the worker, upon hiring a candidate the recruiter receives a commission from the foreign employer for every successful match. The difference between a posting and this type of recruitment is further elaborated upon below:

In our company, we do not post workers. Posting is an entirely different procedure generating a great deal of responsibility on the part of the posting company, which effectively becomes the worker's employer. On one hand, the posting of workers is still popular in Poland but as far as I know, posting companies are looking mainly for Ukrainian nationals, at least in the West of Poland. Polish workers, on the other hand, are more interested in German contracts which are more beneficial to them when it comes to social security contributions. Having worked for five years in Germany, Polish workers can qualify for a basic state pension there. Our focus are long-term contracts because this is what appeals both to Polish job candidates, and to German employers who value reliable, permanent workers. So if someone is 30 years old and they start working in Germany now, they will have an opportunity to build a good pension there.
(Oliwia, career consultant in Poland, interview conducted in November 2019)

This model has its advantages for migrant workers since candidates apply directly to the foreign employers, and those who are successful receive a permanent German employment contract with all of the social security benefits available to German workers. In the above interview, Oliwia stressed that her company targeted mostly young workers such as recently qualified tradesmen who were thinking about transferring their entire professional activity to another country. While this might be an attractive prospect for some, it is not without certain risks to the workers.

Sławek, disappointed with his experience with posting companies, many of which he found dishonest, started applying for work directly with Austrian companies which, albeit temporary, offered a range of social security benefits, including access to the Austrian healthcare system. Nonetheless, in order to qualify for a basic state pension

in Austria one has to complete at least 15 years of insurance.⁶¹ Therefore, at the time of the interview Sławek was still a long way away from becoming eligible for a pension in Austria. By the same token, having spent a number of years outside the Polish social security system, the interviewee was concerned that he would not qualify for a liveable pension in Poland.

A similar scenario occurred to Danuta who had worked abroad as a carer for over 20 years. Having initially worked illegally in Western Europe prior to Poland's accession to the EU, she subsequently carried out several postings before settling permanently in Italy for 15 years, where she worked in a nursing home on a variety of temporary contracts. Danuta, at the time of the interview in her late sixties, was experiencing material difficulties as a result of the fact that her social security contributions had been split between Poland and Italy, and had not been paid for a number of years at all:

After all the years, it turns out that my pension in Italy is so low that my work there nearly seems like a waste of time, even though I have become attached to the Italian lifestyle. My Italian pension is currently 200 euro per month, it's humiliating. The only thing is that at least I can go to the doctor for free for most things, and as well as that, I can get some medication for free. In Poland I have a pension too, but it's very low since I left the country 20 years ago. Because of my financial difficulties, six months ago I moved back to Poland. If I had a proper Italian pension, I could live quite comfortably here. But since I don't, I'm finding it hard to make ends meet in Poland. Honestly, I feel cheated, I thought that now that we [Poland] are in Europe, the pension systems would somehow be connected.

(Danuta, interview conducted in February 2020)

According to Article 50 of Regulation 883/2004, old-age and survivors' pensions are to be calculated with the use of the so-called partial pensions method.⁶² As explained by Pennings, 'the total pension a person receives consists of a number of pensions, each based on the period of insurance completed in the Member States where s/he has been

⁶¹ 'Austria - Old-age pensions and benefits' <https://ec.europa.eu/social/main.jsp?catId=1101&intPageId=4407&langId=en> accessed 26 June 2021.

⁶² Pennings (n 14) 216.

employed.’⁶³ While the request for award is submitted to the social security institution of the country where the worker was insured immediately prior to retiring, the entitlement to benefits is established in cooperation with any other social security institutions in countries where the person had also been insured.⁶⁴

Importantly, however, if a worker has been insured in more than one Member State, it might happen that they do not qualify for old-age pension in one of them, in which case the country in which the conditions are satisfied shall disregard the periods completed in the other Member State.⁶⁵ Furthermore, even if a person has not lost the entitlement to old-age pension in one of the countries, periods of prolonged absence when contributions were not paid may substantially affect the resulting amount of the statutory pension, as is the case in Poland.⁶⁶

Opting for temporary work in another Member State without the involvement of a posting company might, furthermore, produce some immediate consequences to the workers’ social security situation. In the narrative opening this Chapter, Sławek declared that carrying out work directly for Austrian employers granted him the right to access the Austrian healthcare system which he could also avail of in Poland. However, since Sławek and his Polish co-workers were working as subcontractors hired by Austrian undertakings on temporary contracts, they were only insured in Austria for the duration of their contract, as well as for one extra month following the conclusion of the contract. Should the period in between two contracts be longer than one month, those workers would lose social security coverage and would, therefore, be unable to avail of public healthcare system services either in Austria, or in Poland.

This appears to be yet another reason to believe that transferring to another Member State’s social security system is advantageous solely for those migrant workers who genuinely wish to settle permanently in that Member State early in their working life. Conversely, for those who only carry out work abroad temporarily, remaining in the ‘home’ country’s social security system seems essential in order to maintain an uninterrupted social insurance record.

⁶³ *ibid.*

⁶⁴ Regulation 883/2004, art 50(1). See Pennings (n 14) 216-217.

⁶⁵ Pennings (n 14) 216. See Regulation 884/2004, art 50(2).

⁶⁶ Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych [1998] Dz. U. 1998 Nr 162 poz. 1118 ze zm.

VIII. Attitudes toward ‘Blue-collar’ Workers in the Receiving Countries

While the preceding sections focused on issues which are unique to posted workers and stem from the legal regulation of posted work, the interviewers also reported other problems, such as discrimination in the ‘host’ state or negative impact on private and family life. These aspects appear to be located at the intersection between the posting of workers and other types of labour migration. The issue of discrimination of posted workers in the receiving country, first introduced by Sławek in the narrative opening this Chapter, was raised in the majority of interviews with workers from the ‘blue-collar’ subcategory. One example of overt discrimination was mentioned by Łukasz, a Polish posted worker in a transport company in France:

One day I arrived at work and I noticed another worker whom I had never met before, but I knew he worked for my company too because he was wearing the same uniform. I said hello to him and he went mad. He started shouting that he wanted nothing to do with me and threatened to file a complaint to the management should I ever dare talk to him again. That was the only example of overt racism that happened to me since I’ve been working abroad, but I have been made feel unwelcome in more indirect ways too. For example, when I was new in the garage I naturally had a lot of questions, but some guys just stared at me and didn’t want to help me at all, or else they pretended they didn’t know the answer.

(Łukasz, interview conducted in February 2020)

Łukasz’s story was not the only case of verbal or physical violence reported in the interviews. Another participant, who had worked as a posted worker on a building site in Austria, has experienced a physical assault by his manager who, according to the interviewee, ‘simply disliked the Poles’:

I can speak German, but that boss was from a region with a very strong accent that I wasn’t used to. I found it really hard to understand, even when he was saying the most basic words such as ‘water’. He used to shout at me, one time he even pushed me when he was passing by. Another time he called me stupid and I just ignored it, even though I

was really annoyed, especially because he was only a 20-year old kid. But one time I was having a bad day, and when I heard the boss scold another worker for working too slowly, and it was a man in his sixties who had health problems, I exploded. I started shouting at the boss and I kicked a skip that was standing nearby, because otherwise I would have kicked the boss. Of course, I was fired straight away.

(Jarek, interview conducted in December 2019)

While the above passages represent examples of discrimination on the grounds of nationality, it could also be argued that the status of a posted worker contributes to the hostility that research participants experienced in the receiving states. As has been argued throughout this thesis, the posting of workers was for many years associated with ‘social dumping’ and circumvention of national laws in the ‘host’ countries. Posted workers might, thus, be associated with the narrative suggesting that they deprive local workers of jobs.⁶⁷

The above assumption applies equally to other labour migrants, yet posted workers who pay social security contributions in the ‘home’ state, and whose tax liability in the ‘host’ state is limited too, appear to be particularly prone to negative reactions.⁶⁸ In this vein, the existing literature confirms that in the absence of formal hierarchies among many production workers, informal hierarchies based upon factors such as contractual status have been created instead.⁶⁹ Hopkins’ study has revealed that migrant agency workers in the UK, both from Eastern Europe and from outside the EU, were at the bottom of this informal hierarchy, and were exposed to visible hostility.⁷⁰ The narrative relying upon the assumption that posted workers ‘are taking jobs’ which would

⁶⁷ See Amelie F. Constant, ‘Do Migrants Take the Jobs of Native Workers?’ (IZA world of labor 2014); Aviva Chomsky, *They Take Our Jobs!: And 20 Other Myths About Immigration* (Beacon Press 2018). See also Samantha Currie, ‘De-skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement’ (2007) 23(1) IJCLIR 83; Anna Matyska, ‘Transnational Contract Work and the Remaking of Class Among Polish Workers in Construction and Shipyards: Between Collective Subjugation’ (2018) 4 *Kultura i Społeczeństwo* 133.

⁶⁸ On the issue of income taxation rules for posted workers, see Chapter 6, s III.

⁶⁹ Vicki Smith, ‘New Forms of Work Organization’ (1997) 23 *Annu Rev Sociol* 315, as cited in Benjamin Hopkins, ‘Informal Hierarchies Among Workers in Low-skill Food Manufacturing Jobs’ (2011) 42(5) *IRL* 486.

⁷⁰ Hopkins (n 69) 497-498.

have otherwise been available to local workers is further explored in the following excerpt:

The EU is such a melting pot that I don't think discrimination because of someone's different race or nationality is a problem. But I have personally experienced hostility and this kind of thinking that the Poles are going to take the locals' jobs, although it's never directly expressed. One time my company was asked to take over a site in Romania and the local managers were against it, they would have preferred a local company instead. As a result, at every step they were making life difficult for us. We had massive problems with building inspectors in Romania, even though everything was working perfectly, and even to this day we experience odd problems in that particular building. For example, we get a message that there is an error in the system, so we have to fly all the way to Romania, and then we find out that all the devices have simply been unplugged. There is no way this could just happen by itself, it hasn't happened anywhere else, so we are convinced that the locals are doing this to sabotage our work.

(Wojciech, interview conducted in November 2019)

The above passage shows an example of posting 'blue-collar' workers from a higher-wage economy (Poland) to a lower-wage economy (Romania), motivated not by price, but rather by the unique technology offered by the Polish service provider. This type of posting is perhaps less common in the 'blue-collar' subcategory, but it does exist – a different interviewer discussed another instance of posting workers with a unique skillset from a higher-wage to a lower-wage economy in Western Europe (from Germany to France).⁷¹

IX. Broken Relationships, Isolation, Depression. Posted Workers and Work-life Balance

⁷¹ On the flows of posted workers between the Member States, see De Wispelaere, De Smedt and Pacolet (n 48) Table A1.4). See also Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicone, 'Posting of Workers Directive – Current Situation and Challenges' (European Parliament 2016) 18.

Another social aspect of posting workers in the ‘blue-collar’ subcategory is the impact of this working arrangement on the workers’ private and family life. While under the Citizens’ Rights Directive family members of EU nationals are able to accompany or join those who move or reside in another Member State,⁷² in reality ‘blue-collar’ posted workers are not in a position to travel abroad with family. Firstly, the conditions of the workers’ accommodation, as discussed in Section III, are not suitable for family members. Construction and factory workers usually stay in cheap accommodation, such as budget hotels or rented houses in which they often share the room with co-workers, as described above by Sławek and Marzena. Not only would it be unsuitable for partners or children to stay there, but it also would not be allowed for by the employer.

In theory, workers could look for alternative accommodation at their own expense, but this solution seems both costly and impractical as it would require a lot of effort on the part of the workers who usually do not speak the language of the ‘host’ state fluently.⁷³ Secondly, according to the interviewees, a typical posting contract in the ‘blue-collar’ subcategory lasts several weeks or months. While an individual might in reality be working in the same Member State for a number of years, this often happens through a series of short-term contracts spread across different locations, especially in the construction sector.⁷⁴ Such a ‘nomadic’ working arrangement does not typically lend itself to a family-friendly lifestyle and would be quite disruptive, especially when the worker’s partner intends to maintain their career or if the workers’ children are of school age.

For the above reasons, none of the research participants had ever been accompanied by a partner or other family members during their time abroad. Some of the interviewees carried out their postings when they were single in their twenties and had no family commitments, yet they admitted to experiencing homesickness and isolation in the ‘host’ state. Marzena, who worked for five months as an agency worker in the Netherlands while staying in shared accommodation in Germany recalled spending her time off work in the following way:

⁷² Council and Parliament Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158.

⁷³ See Berntsen (n 38) 386. See also Chapter 4, s I B.

⁷⁴ Berntsen (n 38) 385-386.

I was off work every weekend, but I spent most of my free time in the shared house, especially at the beginning. I was lucky because my dad lives in the Netherlands permanently, so I was able to visit him or else he visited me. Even though he was far away, we managed to see each other every two or three weeks. I also like sightseeing, so on some weekends I went on day trips to nearby towns. But I tried not to spend too much as my main goal was to save as much money as possible, so I mostly stayed in my room, either on the phone, or reading books.

(Marzena)

Mateusz, another research participant from Poland, who at the time of the interview had been working in France for two years, expressed a particularly negative view of his lifestyle during the posting, which he found repetitive and uninspiring:

My life in France is very miserable. I get up, go to work, come back, make some food, and then I clean up and go to bed. I have no life here at all, and I'm living the life I have left back in Poland where my friends are. I hate this stagnation. My relationship broke down after I came here, it was too difficult to be together and yet separated by the distance. Especially because, as a foreigner, I had no chance of getting time off for Christmas, even though everyone knew that I didn't have anyone here and I was dying to go home.

(Mateusz, interview conducted in February 2020)

While Mateusz experienced a relationship breakdown during his posting, other posted workers seemed more successful at navigating long-distance relationships with family members, notably Sławek whose wife had a permanent job in the civil service in Poland. The interviewee seemed attached to his family and often referred to his daughter during the interview. Being able to spend longer weekends at home with family was one of the reasons why he had opted for temporary work in Austria instead of a permanent contract.

Another research participant also managed to maintain his family life in Poland despite having worked abroad for 15 years. He did not envisage returning to work in Poland ever again and confirmed that he had been offered a permanent position in the 'host' state which he turned down for personal reasons. The interviewee disclosed that his spouse pursued a successful career in Poland and did not wish to leave the home town where the couple had built a house.

At the same time, Sławek disclosed that his wife disapproved of his working arrangement abroad and viewed it as precarious, often trying to persuade her husband to find more stable, even if less paid, employment in Poland. Other research participants also admitted to having strained family relationships as a result of prolonged absence from the 'home' country, as was the case with Hanna who had left Poland as her son was approaching 18, and 15 years later confessed that her son, now in his thirties, was avoiding contact with her.

In line with Berntsen's and Wagner's findings, the interviewees' experiences suggest that not only are 'blue-collar' posted workers institutionally disconnected from the 'host' state, but their working arrangements and living conditions do not facilitate social interaction either. Workers living in shared accommodation have the opportunity to socialise only with co-workers or housemates, and although some interviewees reported having made friends during their posting(s), others admitted to experiencing difficulties at finding common ground with other posted workers. And while some construction and production workers found the constant company of housemates intrusive, those working as live-in carers experienced the opposite problem, as described by Hanna:

A live-in carer's work is different from that in production or the hospitality sector in the way that we don't have the same degree of social interaction. Our social lives are limited because we live in our patients' homes. According to my current contract, I should be working 10 hours per day six days a week, so 54 hours altogether. 11 hours off at night, three hours off during the day, one free afternoon per week, and one full day off, which usually is Sunday, unless someone is of a different denomination. But these rules are rarely observed. At the moment I'm on my own in the house with a 98-year-old lady who is in good form overall and doesn't require much help except general housekeeping, but at the same time I can't really leave her on her own. The truth is that I'm lost for company. I'm watching TV a lot and I'm quite bored in my free time.

(Hanna, interview conducted in February 2020)

The lack of support and sense of isolation in the 'host' country emanating from the interviewees' stories stand in contrast to the experiences of 'white-collar' workers. The latter subcategory of postings will be discussed in detail in the next Chapter, yet, it is worth indicating at this point that while 'white-collar' employees also experience

negative effects of posting on their private and family lives, they can avail of a range of benefits to facilitate a family-friendly transition to the 'host' state including a family relocation package.

X. The Trap of Posting. The Workers' Motivations Behind Pursuing Posted Work

To anticipate what is going to be argued in the following Chapter, it could be argued that one factor that distinguishes 'white-collar' from 'blue-collar' postings is the workers' motivations for pursuing temporary work abroad. In the 'blue-collar' subcategory, a difference has to be drawn between short-term postings carried out by undertakings providing transnational services, individuals on long-term postings (for example via an agency), and those who build their livelihoods on series of consecutive posting contracts. Workers from the first subcategory consider international postings as occasional business trips, generally better remunerated than their everyday work, but ancillary to their trade.

As far as the second group of postings is concerned, the workers' motivation for opting for a posting lasting at least a number of months seems to be entirely financial. This was confirmed in the above discussed interview with Marzena, and elaborated upon in the interview conducted with Mateusz who explained his reasons behind pursuing work abroad in the following manner:

I'm 29 years old now and I would like to build my own house back home in the area where I'm from, in the South-East of Poland. But if I were to work in Poland, this would be impossible, especially in a little town in that part of the country. So I came to the UK to work here for the first time a few years ago. But like I said, I got so depressed that I only survived a year. One day, I just walked out and I went back home. With hindsight, it wasn't such a great thing to do and I shouldn't have burnt all the bridges. I had put aside some money and I thought that it would be enough to start my own business in Poland. I was thinking of setting up a transport company. But when I got home I realised that even if I worked 24 hours a day, seven days a week, I would barely make the same money I did in the UK with no responsibility. So after six months in Poland, I decided to come back to the UK, at least for the moment.

(Mateusz)

As well as financial, Mateusz's incentive to carry out temporary work abroad could also be described in terms of pursuing his 'life project', a term introduced in relation to posted workers by Thörnqvist and Bernhardsson.⁷⁵ In this context, Mateusz's 'life project' was to build a house in Poland, and to enjoy a happy retirement was that of another interviewee, a qualified electrician. Having realised that his pension in Poland was going to be very low, he started working as a posted worker on construction sites in Austria just few years short of reaching retirement age in Poland.

Finally, another group of posted workers are those who, for a number of reasons, fell into the trap of temporary work relatively early on in their life. One example of such situation was Sławek who, having served prison time, in his early thirties was looking for a 'quick fix' in order to support his family. Having initially worked in Austria as a posted worker for companies which, prior to the Enforcement Directive, had been abusing the EU framework on posted workers, he realised that his social security contributions had not been paid in Poland for several years. As a result, Sławek's pension in Poland was so low that he had no choice but to continue working in Austria, legally yet on a temporary basis, hoping to eventually qualify for a basic Austrian pension.

While Sławek started working as a posted worker in 2012, some of his fellow construction workers had been working abroad on a temporary basis since 2004-2005. According to their stories, at the time there was no work available in Poland and, given the labour market restrictions introduced temporarily by the majority of the 'old' then-EU-15 countries after the 2004 enlargement, posting contracts were the only way to obtain work abroad. A similar example outside the construction sector was that of Hanna, a woman in her fifties, who at the time of the interview had been working abroad as a live-in carer for 15 years. Having built her livelihood on a series of different types of short-term contracts, including posting contracts, with intermittent periods spent back in Poland, she reminisced about her initial motivations in the following excerpt:

⁷⁵ Christer Thörnqvist and Sebastian Bernhardsson, 'Their Own Stories — How Polish Construction Workers Posted to Sweden Experience Their Job Situation, Or Resistance versus Life Projects' (2014) 21(1) *Transfer* 2333-35, as discussed in Chapter 4, s I B.

I started working abroad around the time the Pope died [Pope John Paul II, who passed away in 2005]. I was having, let's say, family problems, and on top of that I lost my job. So when the unemployment benefit ran out [in Poland, workers who have been made redundant are eligible for the unemployment benefit for a maximum duration of 12 months⁷⁶], an opportunity presented itself. My brother's mother-in-law was working in Italy at the time as a carer, and at a family get-together she suggested that I try too. My son was already raised then, he was turning 18, so I took the risk for financial reasons, but also out of curiosity. I was curious whether I would get by in a foreign country whose language I didn't speak. The first time I went to a little village in Tuscany where I worked completely illegally for three months. I literally went everywhere with a Polish-Italian dictionary at hand and, surprisingly, I managed. That was how I got into care work at 40 years of age, but when I look back now, I slightly regret that initial decision. I have a degree, I had worked for many years as a school counsellor in Poland, and since my current job revolves around caring for the elderly, I really miss working with young people. But education is an enclosed environment in Poland, with very few vacancies available, so once I was out of work for a year or so, there was no return to my previous career.

(Hanna)

The interviewees who have been working abroad on a temporary basis for a duration exceeding five years declared that following such a prolonged absence from the 'home' country's labour market and social security system they had no choice but to continue working abroad. Consequently, all of the research participants who have been working abroad for longer than five years gradually progressed from semi-legal posting contracts via temporary agencies or undeclared work, to temporary contracts in the receiving state. The workers were thus hopeful that they would qualify for a pension in the 'host' state after reaching a certain age and / or contribution level.

Conclusion

The interviews conducted with 'blue-collar' workers, employers, legal practitioners and representatives of national competent authorities shed light on the ongoing evolution of

⁷⁶ Ustawa o promocji zatrudnienia (n 50), art 71(1).

the PWD framework initiated in 2014. While a detailed assessment of the impact of Directive 2018/957 was not possible at a preliminary stage of its domestic transposition, the qualitative data demonstrates the paramount importance of the Enforcement Directive with regard to ensuring better protection of posted workers' rights. The Directive's provisions tackling the so-called 'letterbox companies', introducing factual checks and documentation obligations, as well as facilitating the workers' access to justice, have been reflected in real-life experiences of posted workers. This might be considered a positive example of 'law in action' on improving people's lives and working conditions.

Yet, research findings stemming from interviews with 'blue-collar' workers equally suggest that the existing EU framework remains insufficient to safeguard adequate labour law protection and social security coverage for posted workers. The persisting problems manifest the deficiencies of not solely the PWD, but also its national enforcement, as well as its relationship with the EU social security Regulations. Those unresolved issues include ensuring the continuity of the workers' social security insurance, undocumented or fictitious postings, and the need for an extensive subcontracting liability regime, compulsory in all Member States. Furthermore, the unexpected onset of the COVID-19 emergency seems to have far-reaching consequences for 'blue-collar' workers. The repercussions of the pandemic have exposed, yet again, the limits of the 'nucleus' of mandatory rules in Article 3(1) PWD.

Data from the interviews indicates that posted workers, even narrowed to solely those carrying out labour-intensive, manual work, cannot be perceived as a homogenous group. Consequently, the degree of precarity will vary depending on the particular working arrangement, as well as the workers' personal characteristics. The above discussed interviews appear to suggest that particularly older workers in the 'blue-collar' group found it more difficult to adapt to the posting relationship and were more prone to fall victim of fraud. Furthermore, another personal characteristic that appeared to predispose posted workers to precarity was their social background. In this vein, well-educated workers from urban backgrounds were less inclined to seek posted work, unless it was on short-time basis. In contrast, the workers' gender did not seem to affect the degree of precarity, although it played a part insofar as female workers were more commonly found in traditionally female professions such as care work, as opposed to male-dominated environments, such as construction. Those 'vulnerabilities' or

determinants of precarity that transpired from this research will be evaluated in more detail in Chapter 7.⁷⁷

Furthermore, it appears that postings driven by a specialist skillset, merely incidental to the workers' professional activity, which also occur in the 'blue-collar' subcategory should be excluded from the below assessment of the precarious status of posted workers. One example of such postings occurred in a company mentioned by one of the research participants' Stefan, in Section II. The company provided specialist IT services in a certain type of commercial real estate across Europe that included installation works carried out by technicians. According to the interviewee, the work was not complicated yet required specialist training and, therefore, the company preferred to bring its own technicians to the construction sites situated across Europe. In fact, it could be argued that this type of posted workers bears more resemblance to postings carried out in the 'white-collar' subcategory, likewise driven mostly by the employee's skillset, which will be the focus of the next Chapter.

Having evaluated the interviews with 'blue-collar' posted workers against the EU legal framework and bearing in mind the original research question, it is essential to assess the posted workers' experiences in terms of their affinity with the paradigm of precarity. In Chapter 1, a working definition of precarious work was established which comprises five component elements: uncertainty about continuing work, lack of control over the employment relationship, low level of labour law and social security protection, low income and the workers' subjective perception of their status.⁷⁸ All five elements seem to be present, at least partially, in the interviews carried out with 'blue-collar' posted workers.

Firstly, the degree of certainty of continuing work is generally low, for a posting contract is, by definition, a fixed-term contract, and the length of a single posting depends on the industry in which the workers are carrying out their posting among other factors. The construction sector generally operates on a project basis with each project lasting up to several weeks or months. With regard to production work, some industries also tend

⁷⁷ Chapter 7, s II.

⁷⁸ Chapter 1, s III D. See further Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (ILO 1989); Nicola Countouris, 'The Legal Determinants of Precariousness in Personal Work Relations' (2012) 34(1) *Comp Lab L & Pol'y* J 21; Arne L. Kalleberg, *Precarious Lives. Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018).

to be cyclical (for example the automotive sector but also, to some degree, meat-processing plants⁷⁹), with posted and agency workers subcontracted during the periods of high demand. However, posted work in non-cyclical industries or services such as care work is also linked with short-term contracts and high levels of uncertainty about continuing work. That being said, some individuals deliberately choose temporary contracts which suit their needs – this is true particularly for students who often opt for seasonal work or foreign postings via temporary agencies during the summer months.

With regard to the workers who have built their livelihood on temporary arrangements, one observation is that they generally tend to be confident that they will be able to find another job once their current contract expires. At the same time, those workers are usually unsure how long they will spend unemployed between contracts or even, particularly in the building sector, in which EU Member State their next assignment is going to take place. Overall, it may be argued that this last group of research participants who have been working abroad long-term display the highest level of uncertainty about continuing work.

With regard to the second criterion – that of the workers’ bargaining power – the interviewees’ testimonies point to a low amount of control over their working and living conditions. ‘Blue-collar’ posted workers are generally not in a position to negotiate the terms of their contract prior to posting. They are, nevertheless, sometimes able to opt for a posting company of their choice given a range of available options, particularly in a country like Poland with a developed posting infrastructure. By the same token, making an informed choice of the posting intermediary requires prior experience and, therefore, workers who are new to this working arrangement are often susceptible to fall victim of fraud or dishonesty on the part of the employer.

Furthermore, it could be argued that, once posted to the ‘host’ Member State, workers have little control over their working and living conditions. While there is some limited evidence of trade unions’ involvement with posted workers in the receiving countries,⁸⁰ none of the interviewees in this project mentioned any interaction with the

⁷⁹ See Wagner (n 21) 36-37.

⁸⁰ See case *Sähköalojen*; Lillie, Berntsen, Wagner and Sonila Danaj, ‘A Comparative Analysis of Union Responses to Posted Work in Four European Countries’ in Arnholtz and Lillie (n 30). See further Virginia Doellgast, Lillie and Valeria Pulignano (eds), *Reconstructing Solidarity. Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* (OUP 2018).

unions during their posting. In this vein, the potential field of action for trade unions with respect to posted workers will be identified in Chapter 7.⁸¹

Thirdly, evidence gathered from the interviews indicates that research participants from the ‘blue-collar’ subcategory did not enjoy adequate labour law and social security coverage during their posting(s). With respect to employment laws of the ‘host’ state, as has been explained in Chapter 2, the scope of protection for posted workers is limited to the ‘nucleus’ of mandatory rules from Article 3(1) PWD.⁸² Nonetheless, it transpires from the interviews that prior to national implementation of the Enforcement Directive even the narrow list of rights laid down in Article 3(1) was not always being observed by service providers employing posted workers. And while the situation seems to have improved for the workers following the transposition of the Enforcement Directive, issues with compliance with the existing rules persist. This has been the case particularly in relation to wages, on many occasions not compliant with industry standards unless workers personally intervene with the employer, which requires a certain level of experience and knowledge of the laws of the ‘host’ state and the collective agreements in place.

An important aspect of the enforcement of labour law and social security protections is the existence of an efficient mechanism for ensuring the defence of rights. The Enforcement Directive has to be praised in this respect too for imposing an obligation on the Member States to introduce procedures for redress⁸³ which, according to both the interviewed workers and national competent authorities, have improved access to justice. And while research participants from the ‘blue-collar’ subcategory have spoken highly of the enforcement authorities in countries such as Austria and Poland, it has to be underlined that posted workers continue to face substantial obstacles to adequate defence of rights. Factors such as the prospect of loss of earnings, as well as fear of retaliation, not only on the part of the current employer but also potential future employers, often prevent posted workers from seeking redress.

Apart from insufficient protection of the rights listed in the PWD, research participants have also faced issues related to those aspects of labour law which are outside the EU framework. Interviewees have experienced unfair dismissal for which

⁸¹ Chapter 7, s VI B.

⁸² Chapter 2, s V.

⁸³ Directive 2014/67, art 11.

there was neither severance pay nor the right to redress in the ‘host’ state. An issue which, based on the interviews, appears exceptionally alarming, is the posted workers’ social security coverage, particularly in light of the recent trend of workers deliberately choosing temporary contracts directly in the ‘host’ state over posting contracts. While this solution offers a range of advantages to workers, one serious repercussion is the permanent change of social security system which may at times be disadvantageous for old-age pensions.

While the situation of workers in the ‘blue-collar’ subcategory often seems deficient with respect to genuine postings, the status of undeclared posted workers and third-country nationals posted to EU Member States in order to circumvent national immigration laws seems even more disconcerting. As for undeclared postings, those are entirely outside of the enforcement system and, therefore, not only is the access to justice non-existent, but the workers have no social security coverage in either the ‘home’, or the ‘host’ state. Third-country nationals, as well as facing immigration law repercussions, are also at risk of losing their social security contributions in the event their posting is deemed fictitious by the competent authorities of the sending country.

The fourth criterion of precarious work – income level – is likely the most controversial one in relation to posted workers due to the above mentioned notion of a ‘dual frame of reference’ often employed by labour migrants. In the ‘blue-collar’ subcategory, wages in the receiving state habitually tend to be higher than in the ‘home’ state (although, as discussed in Section VIII, there are exceptions from this general trend). Consequently, income which would be considered low in the ‘host’ country, may as well be above the average industrial wage in the sending country.

With regard to the fifth criterion which involves an assessment of the posted workers’ subjective perception of their status, interviews contain numerous examples confirming that research participants in the ‘blue-collar’ subcategory view their situation as precarious. The interviewees were aware of the negative implications of their working arrangement on their social security contributions, with some of them regretting their decision to seek work abroad and fearing that they would not be eligible for a liveable pension once retired. Furthermore, some ‘blue-collar’ workers were apprehensive of losing their job at any time and being unable to continue to provide for their family.

Another aspect of the posting arrangement viewed by many as precarious were the conditions of the workers’ accommodation during the posting(s), often perceived as demeaning. Some interviewees pointed out that the fact that they were staying with large

groups of migrant workers in accommodation that was secluded, and located far away from the employer's premises, stigmatised them in the receiving countries as 'cheap labour'. This might be considered as one of factors contributing to the overall feeling of isolation from the 'host' state's community experienced by many 'blue-collar' posted workers.

Furthermore, the majority of research participants have been subject to discrimination in the 'host' state on the grounds of nationality and / or their status of posted workers, which in the informal hierarchy of migrant workers tends to be lower than that of permanent migrants. The specific examples of direct discrimination described in Section VIII were only some of the many instances in which the interviewees had been made to feel unwelcome in the receiving countries. In this vein, many participants viewed themselves as 'second-class EU citizens', working below their qualifications and often with strained relationships with family members in the 'home' state who often disapproved of the posting arrangement. The experience of discrimination in the 'host' state might be considered yet another factor that contributes to the posted workers' general perception of precarity.

6. Experiences of White-collar' Posted Workers in the EU

I live in a city in the West of Poland. For nearly 15 years, I have been working in logistics, in a German-owned multinational company. I applied for a job there because I spoke German and I was starting a postgraduate degree in logistics, so I thought the job would combine the two factors.

Shortly after I had begun work as an intern, there was a call for applications for a secondment to Germany. I was the first one to sign on to the list, but I was informed that I wasn't eligible because I was only new to the company. It was considered to be a reward. I was so disappointed that I promised myself that I would do this secondment in Germany someday. It was my long-term goal and I worked hard towards it. That's why when the time came, I said I wanted to go to the head office.

In the meantime, I had been to another company office in Germany on several occasions. I used to go there on short business trips, and eventually I stayed for six weeks. It is common for employees from Poland to be posted to that specific factory on a short-term basis, because it is a sister company, so the work is similar and sometimes they have an increased demand for support, whenever German employees retire or are on sick leave and so on. That six-week stay in Germany happened around 2011 and I have fond memories of it. I really enjoyed it and to this day I have kept in touch with the people whom I had met there, which encouraged me to apply for a longer secondment later.

I left for Germany in 2013 and I was initially going to stay there for two years. That entailed serious preparations which lasted several weeks. Even though I was looking forward to going, I knew it was primarily for work, not for fun. Prior to leaving I had to discuss and sign a number of documents, I had them all in a big file. I was told what my remuneration in Germany would be, which sounded promising. I signed a posting contract, which meant that the company in Poland guaranteed to rehire me upon my return. When I was gone, I was like a meteor hanging over their head because they knew they would have to keep a place for me. In Germany, I signed a separate contract. In my company, these secondments never last longer than five years, because having worked five years in Germany, one is already eligible for the German state pension. Otherwise, I worked there on Polish terms and conditions. For example, my working week was eight hours a day, Monday to Friday. And the Germans worked in a system in which every second Friday was off. Alongside my salary, I received a number of

additional benefits, the purpose of which only became clear to me once I was already in Germany.

One of those was compensation for the fact that, during my secondment, I technically worked at a lower position than in Poland. My duties were similar but it happened that in Germany they corresponded to a lower position. So technically it was a demotion. It didn't matter to me but it must have mattered to the Germans so that they offered me this extra pay. Another benefit was called the 'cinema supplement' to compensate for the fact that while abroad, I wasn't able to go the cinema or otherwise socialise with my friends and family. The Germans know how to draw a line between work and private life, and they actually have a good work-life balance.

Prior to leaving everyone has to fill out a questionnaire and specify whether they will be moving abroad on their own or with a partner or even children. In the latter option, the family are entitled to a number of benefits, such as private health insurance, free German classes for the partner or spouse, and school or childcare, as well as extracurricular activities for the kids. Also, upon my arrival in Germany, I got a welcome pack from the mayor with a variety of gift cards. The town is small and, therefore, that one factory is the main employer. Everything around lives off it and for it. The production plant is 2km long and 3km wide, it's a little self-sufficient town in itself. There is a restaurant inside, a medical centre, a flower shop.

My salary in Germany was such that it definitely made me slightly better off than back in Poland but I wasn't making millions either. I was able to set aside some money, the German lifestyle is not lavish yet they are used to getting something tangible out of their work. Pay within the company is very differentiated, everyone negotiates their salary individually but my salary was lower than that of the German employees. I earned half of my best friend's salary, I know it for a fact because she told me what her salary was. But I had all these extra supplements. Overall, I still earned more than in Poland where my salary only covers the bare minimum, I pay the bills, I buy food and that's it. In Germany, I had a higher standard of living. For example, I made sure to rent a big apartment, a three-bedroom one, even though its standard and interior design were not great, but I was looking forward to inviting my parents and siblings over and showing them around. I could afford all that. One time, I treated myself to a trip to Disneyland in Paris, which I had booked only a month in advance. And I could afford it too.

I knew that upon my return to Poland I would be badly affected by the pay cut, so I was trying to make the most of my German salary while I had it. For example, I

organised my Dad's birthday party in Italy because I knew he had always dreamt about visiting it. My Mum likes the sea, so for her fiftieth we went to a luxurious hotel on the Polish coast, where we paid close to 3000 zł [approximately 700 euro] for the one night with a spa treatment. With hindsight, it seems like an extravagance but at least she'll never forget her fiftieth. There is no way you could afford such luxury when you live and work normally in Poland. I mean, if I need a new laptop, I can set the money aside and get it eventually but I can't afford a trip to Disneyland next month, unless I starve myself or not pay the bills. And the Germans who work in the same company as me doing the same job, only in a different country, can live much more comfortably. That work gives them the status of middle class in Germany. So I was middle class for a few years there too.

I spent the first two weeks in a hotel looking for an apartment to rent, which was stressful, even though my employer provided professional assistance. There was a lady who found the offers for me and accompanied me to the viewings, like a real estate agent. But the problem was that there was not many properties for rent in that small town. And I had very little time to make up my mind, so the apartment I finally chose wasn't great. I even had the option to stay permanently in the hotel, but the room was very small. The company paid for my accommodation, I mean they subtracted the rent from my salary. You can choose a furnished or unfurnished apartment and if it's unfurnished, they will give you extra money to buy the furniture.

On a daily basis I worked with German co-workers but there was one Polish guy in the same room, which was a relief because if there was something I didn't know at the beginning, I could always ask him. He was also delighted to have me there because I was the only person he could speak Polish to, of course when nobody was around, otherwise we were obliged to speak German to each other. But in my first days there I was convinced that I couldn't speak German at all. The language I had learnt at school was completely different from the one at work, plus they spoke with a specific dialect in that region. Communication problems were also linked to the different culture, I think. It is a cliché, but most Germans really are not expressive, and showing emotions at work is frowned upon. They keep their feelings to themselves. That's why in the early days I often couldn't work out whether they were happy with my work or not.

Honestly, that secondment was really challenging at times. It took me well over a year to adapt to the new environment. When I arrived, I had to attend a number of talks and workshops where I learnt, for example, how to properly recycle waste or even how

to air my apartment. Seriously. But one of these talks was about the German culture and we were told that we shouldn't expect to make friends in Germany. Apart from the language barrier at the beginning, it felt like I was joining a team which had its own rhythm and the people in it didn't exactly know what my role would be. They imagined that I had come there for a promotion and that I was doing it to become a manager in Poland. They had their own 'cliques', like the coffee break group or the Thermomix cooking group. I was an outsider, even though I was there at a good time, when Donald Tusk was in charge of Poland and we had the reputation of this miraculously prosperous country. I don't know what it would be like to be going there now, even though most Germans are not interested in politics.

I was also lucky, because the people in my team were generally nice, and I was sitting next to a lovely girl who became my best friend. She was a bit of an outsider too, didn't really fit in with the 'cliques', but with me she was always very polite and helpful. For example, I am a practising catholic, so she offered to look up mass times for me. And when the others saw that she was chatting to me, they slowly started to warm up towards me too. But I felt that some people were still relieved to see me leave. I think that when you are abroad, you're only a guest, even though everyone is being nice. And a guest is only passing by. I have friends and family in England, and they feel the same, they are there only because of the financial factor. Back in Poland, when someone in the office gets on my nerves, I don't mind saying something stupid to them, whereas in Germany I had to control myself the whole time.

So I was a bit lonely there at the beginning, all the supplements I was getting were no good to make up for the lack of social life. The best thing was the company car I had which I could fill up for free. Thanks to it, I was able to travel back home every single weekend. If I had been paying for petrol myself, I could have only afforded to go back home every two weeks. That car was a blessing also because I lent it to my colleagues, despite not being supposed to, which ultimately tipped the scales in my favour. I couldn't imagine staying in Germany for a whole weekend, I wouldn't have known what to do there on my own. It's perhaps different when you go away as a family. In the early days, I had a boyfriend back in Poland, so I wanted to keep in touch regularly. With time, that relationship ended but other friendships survived. Later I started a part-time degree in the German language, so I had to go to college in Poland every second weekend. It used to take me four hours and a quarter to drive back home,

which wasn't too bad. I left the office at midday on Friday, which my boss didn't mind at all, and on Sunday at six pm I was back on the road making plans for the week ahead.

After a while, things were starting to improve in Germany, so I successfully applied for an extension of my contract for another year. The management agreed probably because it suited them that I was working on Polish terms, five days a week. I was delighted to be staying for another year but when that extension ended, I felt like it was time to go back to Poland, to my dog, and to my own apartment. Actually, towards the end of my secondment I was sent to another office in Germany for three months, they were looking for support from the head office. I went there because one person from my team had to go and nobody else volunteered. In Poland, when an offer to go anywhere comes up, 99% of people volunteer, just for the adventure. The Germans would only volunteer if it meant career progression, so they are only interested in going to the USA. Otherwise, they have their houses built and they are real home birds who value their private life the most. So while I was in that other office, I was offered a permanent job there but I refused because it was too far away from Poland. It was the other end of Germany and I couldn't imagine having to take annual leave to go visit my parents.

At the same time, things got complicated because I met my boyfriend in Germany. We met a year before the end of my secondment and I told him straight away that I was going home afterwards, I generally didn't have high hopes about this relationship. But we've been together five years now and I think it's working out because we are friends, as well as a couple. We are planning a future together but neither of us wants to impose anything on the other person.

When I was leaving my office in Poland, I had said to my manager that I wasn't interested in a promotion, and that I would be more than happy to return to the same job. And so I did, but I actually found it frustrating. I still am disappointed that I can't make any use of my improved language skills or my contacts in Germany. I thought that after my secondment I would be a perfect candidate for the role of a coordinator, but the boss told me that the whole constellation of the stars in the sky would have to change for that position to become available. Perhaps it's my own fault, and I should be looking more actively for new opportunities, for example in another team within the same company. But thanks to my stay in Germany I know that if I were to leave this company, I would be looking for a new job all around Europe, and not just in Poland... I can pack anytime and go, I'm no longer scared of the unknown.

(Paulina, interview conducted in May 2020)

Introduction

Paulina's narrative captures the experience of posted workers in high-wage sectors of employment, usually in multinational companies, who will be the focus of this Chapter. These 'white-collar' postings appear to be a somewhat unexplored field of application of the Posted Workers Directive (hereafter: PWD),¹ in contrast to 'blue-collar' postings discussed in the previous Chapter. This might be due in part to the fact that the debate surrounding the legislative process leading to the adoption of the PWD concentrated on labour-intensive sectors of employment, such as construction work.² This was reflected both in the CJEU's caselaw at the time which concerned mostly Portuguese service providers who were perceived as undercutting companies based in France and Germany.³ Consequently, the wording of the Annex to the PWD which refers to construction works suggests that the EU legislation was designed primarily to tackle issues arising in labour-intensive sectors of employment.⁴

Yet, Houwerzijl and Verschuere trace the origins of the posting arrangement to 'key personnel', such as 'managers, professionals and specialist technicians', a phenomenon documented in the Court of Justice's case law as early as in the 1960-70s.⁵ Nowadays, approximately one third of the total number of A1 portable documents are issued in the services sector, including professional services: education, health and arts

¹ Council and Parliament Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

² Jan Cremers, Jon Erik Dølvik and Gerhard Bosch, 'Posting of Workers in the Single Market: Attempts to Prevent Social Dumping and Regime Competition in the EU' (2007) 38(6) *Ind Relat* 524.

³ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-01417; joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Lda and others* [2001] ECR I-788. See also 'Pour Éviter le Dumping Social La CEE Prépare une Directive pour Protéger les Travailleurs Temporaires Européens' (*Le Monde*, 21 June 1991).

⁴ See Commission, 'Proposal for a Council and Parliament Directive concerning the posting of workers in the framework of the provision of services' (1991) COM(91)230 final.

⁵ Cases 19/67 *Bestuur der Sociale Verzekeringsbank v J. H. Van Der Vecht* [1967] ECR 345 and C-35/70 *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* [1970] ECR 1251, as cited in Mijke Houwerzijl and Herwig Verschuere, 'Free Movement of (Posted) Workers and Applicable Labour and Social Security Law' in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019) 77.

(12%), as well as financial, real estate, scientific etc. (12%).⁶ As explained throughout this thesis, the sector of employment alone does not reveal whether postings are ‘white-collar’ or ‘blue-collar’, yet one might assume that the workers travelling abroad in fields such as finance or science are predominantly high-wage. Thus, there is sufficient evidence that while ‘white-collar’ postings appear to be a minority, they are far from marginal.

Findings discussed in this Chapter are based on 13 in-depth interviews. 10 of them were conducted with participants from the ‘white-collar’ subcategory, yet as explained in Section I, in certain cases it was difficult to establish whether the workers’ contracts were posting contracts due to the overlap with the Polish statutory regulation of business trips. These were supplemented with three interviews with ‘experts’: one representative of the national enforcement authority and two practitioners from the field of posting. As discussed in Chapters 4-5, the majority of interviewees from the ‘expert’ category focused entirely on ‘blue-collar’ postings, yet the three included in this Chapter also shared insights on ‘white-collar’ postings.

Section I will address some methodological issues concerning different types of postings in the ‘white-collar’ subcategory, and the lack of clarity surrounding the status of ‘business trips’ in relation to the PWD. In this vein, the workers’ experiences reflect the legal regulation of business-related travel in Poland and its interrelationship with the new Article 3(1) PWD, as revised by Directive 957/2018.⁷

Section II will focus on the compliance with Article 3(1) PWD in multinational companies against the background of the controversial notion of ‘social dumping’.

Continuing to explore the financial dimension of ‘white-collar’ postings, Section III will examine the issue of personal income tax declaration of workers who have carried out postings. This matter rarely comes up in the academic literature, and yet a number of interviewees viewed their personal income tax situation as one of the most problematic implications of their time abroad.

⁶ Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, ‘Posting of Workers. Report on A1 Portable Documents Issued in 2018’ (European Commission 2019) 30. See further Chapter 4, s II.

⁷ Council and Parliament Directive 957/2018/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173, art 1(2) (a).

Turning to more sociological aspects of the research findings, Section IV will evaluate the interviewees' age profile and motivations driving them to opt for a long-term posting.

Section V will shift the focus onto the impact of the posting arrangement on the workers' private and family life, and the employers' engagement in supporting family relocation.

Section VI will address the potential adverse implications of the COVID-19 public health emergency on 'white-collar' postings. It has to be noted that this research project did not intend to measure the impact of COVID-19 on the posting of workers, and the pandemic occurred as the qualitative phase was nearing completion. However, the issue was raised by the workers in the course of the interviews, as it appears to have considerably affected labour mobility across the EU, especially for workers carrying out office jobs.

I. Typology of 'White-collar' Postings and Methodological Remarks

As explained in Chapter 2, Article 1(3) PWD lays out three distinct posting scenarios.⁸ The first scenario is where an undertaking based in one Member State provides services in another Member State and, to this end, moves its own workforce to carry out the work,⁹ like in the example below:

I work in a small Polish-English IT company which provides services across Europe, including outside the EU. Sometimes I'm involved in long-term projects in other countries. The most recent one was in Romania for a number of months. Every week I had to drive to Warsaw, which is over 300 km away from where I live, then fly to Bucharest for three days, and then back home again.

(Staszek, interview conducted in November 2019)

While such postings do occur in the 'white-collar' group, it appears that particularly the second scenario laid out in Article 1(3) PWD, concerning postings within a group of undertakings owned by the same 'parent' company, lends itself to 'white-

⁸ Chapter 2, s IV D.

⁹ Directive 96/71/EC, art 1(3) (a).

collar' postings.¹⁰ It denotes a situation where an employee, who is normally based in one EU Member State, carries out a fixed-term contract, often referred to as a 'secondment', in another state within the same 'parent' company. A parallel might be drawn here to secondments from outside the EU governed by Directive 2014/66 on the conditions of third-country nationals in an intra-corporate transfer.¹¹ Paulina's story which opened this Chapter was an example of an intra-corporate transfer within the EU, and so was Zuzanna's:

The company for which I was working in Poland posted me to Germany, initially for one year, but I ended up staying there for two years. The employer was from the FMCG [fast-moving consumer goods] sector. Prior to my secondment I had worked in the sales department for three years, but in Germany I worked in the marketing department, in an office situated close to a big city. I didn't have a German employment contract, only a posting contract between myself and my Polish employer. Once I had received this A1 certificate from the ZUS [Zakład Ubezpieczeń Społecznych, Polish social security institution], I had to present it when I was applying for the European Health Card to get medical insurance in Germany. But my pension was still being paid back in Poland during the secondment.

(Zuzanna, interview conducted in March 2020)

Conversely, the third scenario envisaged by the PWD of posting workers via a temporary work agency did not feature in the interviews carried out in this project among 'white-collar' workers, as it appears more commonly linked to 'blue-collar' postings.¹²

Yet apart from the three different types of postings recognised by the PWD, there seems to be a divide between long-term secondments and short business trips stemming from the interviews with the 'white-collar' workers. The issue of applicability of the PWD to the latter type of business trips is rather unclear. As discussed in Chapter 2, there

¹⁰ *ibid*, art 1(3) (b).

¹¹ Council and Parliament Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1 (ICT Directive). See Cathryn Costello and Mark Freedland, 'Seasonal Workers and Intra-corporate Transferees in EU Law. Capital's Handmaidens?' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era* (Hart Publishing 2016). See also Chapter 2, s IV D.

¹² Directive 96/71EC, art 1(3)(c), as amended by Directive 2018/957, art 1(1)(c).

is no minimum duration of a posting and, notwithstanding a number of statutory exceptions, the PWD applies in its entirety to all postings irrespective of their minimum duration.¹³ Thus, it seems that the determining factor in terms of the PWD's applicability is the purpose of the trip rather than its duration. Given the fact that the PWD is intrinsically linked to the free movement of services, only workers who provide a service abroad should be considered posted workers.¹⁴ Consequently, the European Commission is of the view that workers on business trips when no service is provided, as well as those 'attending conferences, meetings, fairs, following training etc.' are outside the scope of the PWD.¹⁵

One complication for outgoing posted workers in Poland is the statutory regulation of a 'business trip' in the Polish Labour Code (*Kodeks pracy*) which preceded the PWD and may at times overlap with it.¹⁶ According to Article 77⁵ of the Labour Code, 'an employee who, at the employer's request, performs an official task outside the area where the employer has its registered office, or outside the regular workplace, is entitled to the reimbursement of any expenses incurred in relation to the business trip.'¹⁷ While according to the Polish Supreme Court (*Sąd Najwyższy*), a business trip shall be incidental, temporary and short-term,¹⁸ experts are divided as to whether there exists a set maximum duration of activities to which Article 77⁵ applies.¹⁹ Consequently, it would appear that while domestic trips outside the regular place of work, as well as those trips

¹³ A mandatory exception from the PWD linked to the duration of postings is for the initial assembly and/or first installation of goods where the posting does not exceed eight days. See Directive 96/71/EC, art 3(2). See further Chapter 2, s IV A. See also Commission, 'Practical Guide on Posting' (2019) 6-7.

¹⁴ Cases *Rush Portuguesa* ; C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] EU:C:1994:310; *Finalarte*. See Paul Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 CML Rev 571. For more on the relationship of the PWD with Article 56 TFEU, see Chapter 2, s IV E.

¹⁵ Commission, 'Practical Guide...' (n 13) 7. See Chapter 2, s IV E.

¹⁶ Ustawa Kodeks pracy [1974] Dz. U. 1974 Nr 24 poz. 141 ze zm., art 77⁵ § 1. See Marta Otto, 'Posting of Workers Before Polish Courts' in Zane Rasnača and Magdalena Bernaciak (eds), *Posting of Workers Before National Courts* (ETUI 2020) 191-193; Anna Sokołowska and Małgorzata Skibińska, *Delegowanie Pracowników za Granicę* (Wolters Kluwer 2016) 167-177.

¹⁷ *The Labour Code. Kodeks pracy*, trans. Agnieszka Jamroży (6th edn, Wolters Kluwer 2019), art 77⁵ § 1

¹⁸ Uchwała SN II PZP 11/08, OSNP 2009, nr 13-14, poz. 166, as cited in Sokołowska and Skibińska (n 16) 23. See also Otto (n 16) 192.

¹⁹ Sokołowska and Skibińska (n 16) 23-24.

to other Member States that do not entail service provision (e.g. attending conferences or fairs), should be considered business trips, transnational service provision should be classified as postings in the ‘host’ country, as well as business trips from the point of view of the workers’ expenses.

Yet, the evidence gathered in the course of this project suggests that this is not always the case in practice. While employees on longer secondments interviewed in this project were always considered posted workers in Poland, shorter trips, even those involving service provision, were regarded solely as ‘business trips’ within the meaning of Article 77⁵ § 1 of the Polish Labour Code. The regulation of such trips is illustrated in the following example of a high-level manager in the metal industry:

Foreign business trips are better paid than domestic ones, so when I leave the country, I have to mark the exact time from which the better rate starts. I usually book the flights myself to adapt flight times to my schedule, but everything is reimbursed. My assistants book the hotels and there is no upper budget, they know I like to go for a run, for a swim or to the gym, and choose accordingly. On top of that, I get daily allowances which differ depending on the country. In Western Europe and Japan, these daily allowances are higher than in Eastern Europe. Everything in my company is done in accordance with the law but these statutory allowances are quite low, for example they usually wouldn’t cover a meal in the ‘host’ country.²⁰

(Rafał, interview conducted in November 2019)

This demonstrates that the 2018 amendment introducing allowances or reimbursement of the cost of travel, board and lodging for workers away from home for professional reasons has already been a norm in the high-wage sectors in Poland.²¹ Other interviewees have travelled for business under more modest conditions than Rafał (for example, one participant recalled having a 50 euro limit per night for accommodation in an Eastern European country), but the general standard of covering travel-related expenses by the employer was met in every case. In this vein, it is worth noting that while the provision

²⁰ The exact rates of daily allowances in each country are set in Poland in accordance with the following Regulation: Rozporządzenie Ministra Pracy i Polityki Społecznej w sprawie należności przysługujących pracownikowi zatrudnionemu w państwowej lub samorządowej jednostce sfery budżetowej z tytułu podróży służbowej [2013] Dz.U. 2013 poz. 167.

²¹ Directive 2018/957, art 1(2) (a). See Chapter 3, s II D 3.

of Directive 2018/957 introducing the obligation for the employer to cover the expenses incurred on account of posting has been transposed in Poland, the issue of its relationship to Article 77⁵ has not been addressed.²² Consequently, the final decision as to classifying a given type of labour mobility as a business trip or a posting in Poland is left to the relevant authorities, such as the labour inspectorate, the tax office and the social security institution.²³

While other EU countries also have statutory rules for the reimbursement of business travel or the posting of workers, those rules tend to differ substantially from country to country.²⁴ As it has been argued in Chapter 3, even after extending statutory reimbursement of travel-incurred expenses onto posted workers by the 2018, the situation across the EU-27 will be far from uniform.²⁵ Differences in regulation of business travel between the Member States were captured by Izabela, who had carried out business trips within the same multinational group of undertakings, both in accordance with the Polish and the German laws:

A German business trip differs from a Polish one, for in Poland I used to get 'pocket money' for each day ahead of the travel, while in Germany you have to pay for food and things like that out of your own pocket. Obviously, the employer covers the cost of accommodation, car hire, petrol, insurance and all the essential expenses. But everything beyond that has to be paid for with your own money.

(Izabela, interview conducted in January 2020)

Prior to the COVID-19 emergency, short business trips were inherent to the nature of working for undertakings that provided services transnationally or for multinational companies with offices spread across the globe. In this context, interviewees often mentioned being involved in projects that entailed cooperation with teams based in another EU Member State, attending training sessions and fairs or meeting clients abroad. Such trips are not usually linked with service provision and, consequently, are not

²² Ustawa o zmianie ustawy o delegowaniu pracowników w ramach świadczenia usług oraz niektórych innych ustaw [2020] Dz.U. 2020 poz. 1423, art 1(3)(b).

²³ Sokołowska and Skibińska (n 16) 25.

²⁴ Rasnača, 'Reimbursement Rules for Posted Workers: Mapping National Law in the EU28' (ETUI, 2019).

²⁵ Chapter 3, s II D 3.

classified by the European Commission as postings, albeit the difference may at times be blurred in practice, especially due to the discrepancies between the scope of the PWD and that of the social security Regulation 883/2004 according to which all workers travelling abroad require an A1 portable document regardless of the purpose of their trip.²⁶

II. Remuneration. Compliance with Article 3(1) PWD in Multinational Companies

In terms of the financial aspect of posting, even though the interviews were conducted prior to the national transposition of Directive 2018/957, it appears that some of the changes introduced by the 2018 reform have already been a standard in the ‘white-collar’ subcategory prior to Directive 2018/957.²⁷ Notably, all the interviewed workers who had carried out a secondment under the PWD framework, had their accommodation provided by the employer. Similar to Paulina’s story, however, rent was usually subtracted from the employee’s salary and considered a component element of the remuneration alongside other financial benefits such as the family relocation package and the aforementioned ‘cinema supplement’. This practice does not comply with the revised PWD, for according to Directive 2018/957, allowances or reimbursement of travel, board and lodging expenses for workers away from home for professional reasons are separate from remuneration.²⁸ Yet as the interview stage of this research project ended shortly

²⁶ Council and Parliament Regulation (EC) No 883/2004 on the coordination of social security systems [2004] OJ L 166/1, arts 12 and 13; Council and Parliament Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1. See further Chapter 2, s IV; Chapter 4, s II A.

²⁸ Directive 2018/957, art 1(2)(a). See Chapter 3, s II D 3. See also Francesco Costamagna, ‘Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive’, in Silvia Borelli and Andrea Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene Editore 2019) 94-96; Marco Rocca, ‘Stepping Stones Over Troubled Waters. Recent Legal Evolutions and the Reform of the Posting of Workers Directive’ in Nathan Lillie and Jens Arnholtz (eds), *Posted Work in the European Union. The Political Economy of Free Movement* (Routledge 2019) 170-172; Matteo Bottero, *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021) 259-263.

before the deadline for national transposition of Directive 2018/957,²⁹ those employers who had subtracted rent from the workers' salary were not in breach of the EU framework at the time. Furthermore, it has to be borne in mind that reimbursement of expenses incurred on account of posting has to be carried out in accordance with the national law or practice in the 'host' country.³⁰ Consequently, it appears that Member States that do not have a statutory right to the reimbursement of expenses are under no obligation to implement it for posted workers.³¹

On another note, the fact that the cost of accommodation, as well as other supplements, were deducted from the posted workers' salaries, coupled with the interviewed employees' reluctance to disclose their earnings, made the assessment of remuneration in intra-corporate postings fairly difficult. Paulina was the only interviewee to have admitted that her salary during the secondment was two times lower than that of a German colleague performing a comparable job. Again, it has to be emphasised that accommodation and other supplements that Paulina received were considered component elements of her pay and, therefore, her overall remuneration might have been similar to that of her German colleagues. Other participants posted from Poland to Germany said that their salaries during the secondment were 'slightly' higher than in Poland to compensate for the difference in the cost of living between the two countries. Another interviewee emphasised that he considered his posting contract 'a huge investment in the employee'.

With regard to the compliance with Article 3(1) PWD in intra-corporate postings, it has to be borne in mind that the interviewees carried out their postings prior to the national implementation of Directive 957/2018, when employers were merely obliged to ensure the minimum wage of the 'host' country for posted workers.³² And that requirement was relatively easy to meet in the high-wage sectors of employment. At the same time, it seems difficult to assess whether Directive 957/2018 will be observed in the 'white-collar' subcategory. Paulina's story illustrates the fact that salaries in multinational companies are often individually negotiated. Therefore, finding an adequate comparator to ensure the same pay for posted and local workers in accordance

²⁹ The deadline for national transposition was set on 30 July 2020, see Directive 957/2018, art 3(1).

³⁰ Directive 2018/957, art 1(2)(c). See Chapter 3, s II D 3.

³¹ See Rasnača and Bernaciak, *Reimbursement Rules for Posted Workers...* (n 24) 36.

³² Directive 96/71/EC, art 3(1) (c).

with the revised PWD might prove challenging.³³ The below excerpt of an interview with a lawyer advising companies in Poland implies that the difficulty to find a comparator might not only be an obstacle for employers, but also a pretext to circumvent Directive 957/2018:

In the absence of a collective agreement, remuneration is evaluated on a case by case basis. It is easy to justify why two employees performing similar jobs might not have the same salary. Perhaps one of them is more experienced, has a longer track record with the employer, a unique skillset or maybe they speak more foreign languages. My clients don't seem especially preoccupied with the Posted Workers Directive's revision in this respect, because they know that the remuneration criterion is ambiguous and a difference in pay can easily be explained.

(Dominika, lawyer specialising in employment law in Poland, interview conducted in November 2019)

This suggests that some employers in the 'white-collar' subcategory may choose not to comply with the revised rules on remuneration for posted workers, in the same way as some undertakings choose not to apply for the A1 portable documents when they post workers.³⁴ Interviewees representing multinational companies disclosed that employers were sometimes advised by their lawyers to purposely ignore the documentation and information requirements stemming from the Enforcement Directive and from the Social Security Regulations.³⁵ These are considered so costly and burdensome that some companies allegedly prefer to risk penalties than declare a short-term posting or apply for an A1 portable document. This is confirmed by the Workplace Relations

³³ Directive 957/2018, art 1(2) (a).

³⁴ The requirement to apply for an A1 portable document proving that a worker's social contributions are being paid in their 'home' country stems from arts 12-13 of Regulation 883/2004. See further Pennings, 'Posting' in *European Social Security Law* (6th edn, Intersentia 2015); Bottero, 'Coordination of Social Security' in Bottero (n 28).

³⁵ Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11. See Chapter 3, s I.

Commission,³⁶ the Irish competent authority responsible for the enforcement of rules on posted workers:

Some of the undeclared postings in Ireland are actually the professionals in the IT sector where declaration is also mandatory, but there are employers who do not comply with this requirement. But when it comes to these workers, there are generally no issues with employment rights and their salaries are way above the statutory requirements.

(Workplace Relations Commission representative, interview conducted in March 2020)

The fact that some types of postings are more prone to precarity than others is reflected in Article 10(1) of the Enforcement Directive, which specifies that inspections shall be conducted following a risk assessment which may identify certain sectors of activity. In the Irish transposition, this is stipulated in Article 10 of the European Union (Posting of Workers) Regulations.³⁷ The probability of an inspection in the ‘white-collar’ subcategory is, therefore, rather low, as national competent authorities are primarily concerned with the low-wage sectors of employment where the risk of precarious conditions tends to be higher.

As for other mandatory rules of the ‘host’ state laid down in Article 3(1) PWD, it is problematic to assess the extent to which employers in the ‘white-collar’ subcategory comply with the legal requirements. For example, Paulina recalled that her working time in Germany remained, contrary to the PWD, subject to the Polish Labour Code. However, it is also possible that the German regulation was similar to the Polish one and the shorter working week that Paulina’s colleagues were entitled to resulted from a collective agreement which did not cover Paulina at the time. In this vein, another Polish interviewee mentioned that she received four additional days of annual leave in order to comply with the German regulation of annual leave.

On a broader note, Paulina’s narrative is underpinned with a sense of inequality owing to the pay gap between the ‘old’ and the ‘new’ Member States. As has been argued in Chapter 3, in spite of the EU membership, wages in Eastern Europe have remained

³⁶ See Michael Doherty, ‘Posting of Workers Before Irish Courts’ in Rasnača and Bernaciak, *Posting of Workers Before National Courts* (n 16) 131-132.

³⁷ European Union (Posting of Workers) Regulations 2016, SI 412/2016.

relatively low.³⁸ In this vein, some of the Polish interviewees admitted to experiencing an improvement in their living standard during their stay in Germany despite performing the same work as previously, for the same ‘parent’ company. The workers’ experience chimes with empirical evidence of ‘social dumping’ present also in the high-wage sectors of employment, such as IT and the highly unionised steel industry.³⁹

In her work, Trappmann documents ‘a plethora of employer-driven strategies that ultimately lead to the lowering of wages and social entitlements, redundancies, relocations via so-called “best shoring” and site closures’.⁴⁰ By ‘best-shoring’ the author refers to the practice of offshoring business processes, for example by relocating production sites to countries where the cost of running a business is lower.⁴¹ Some scholars stress the positive effects of offshoring in accordance with the so-called ‘country of origin effect’ causing multinational companies to transfer their best practices and traditions of social dialogue from the ‘home’ country to the ‘host’ locations.⁴² More recent studies have, however, challenged this idea arguing that site relocations to Eastern Europe have been primarily cost-driven and seek to take full advantage of the wage gap and the weaker position of trade unions.⁴³

While offshoring to Eastern Europe appears to be relatively uncommon as multinational companies continue to prefer relocating sites to developing countries

³⁸ Chapter 3, s II B. Statistics on the hourly labour cost (wages combined with social security contributions) in the EU can be found in Eurostat, ‘Estimated hourly labour costs, 2020’ (2021) https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Hourly_labour_costs accessed 1 September 2021. See also Béla Galgóczi, ‘Why Central and Eastern Europe Needs a Pay Rise’ (ETUI Working Paper 2017).

³⁹ Vera Trappmann, ‘Social Dumping with no Divide: Evidence from Multinational Companies in Europe’ in Bernaciak (ed), *Market Expansion and Social Dumping in Europe* (Routledge 2015).

⁴⁰ *ibid*, 141.

⁴¹ See Ravi Aron and Jitendra V. Singh, ‘Getting Offshoring Right’ (2005) 83(12) *Harv Bus Rev* 135.

⁴² Anthony Ferner, ‘Country of Origin Effects and HRM in Multinational Companies’ (1997) 7 *Hum Resour Manag J* 19, as cited in Trappmann (n 39) 142.

⁴³ Galgóczi, Maarten Keune and Andrew Watt, ‘Relocation: Concepts, Facts and Policy Challenges’ (2006) 12(4) *Transfer* 499; Guglielmo Meardi, Sonja Strohmer and Franz Traxler, ‘Race to the East, Race to the Bottom? Multi-nationals and Industrial Relations in Two Sectors in the Czech Republic’ (2013) 27(1) *Work Employ Soc* 39, as cited in Trappman (n 39) 142.

where costs and labour standards are lower,⁴⁴ some relocations that did occur from Western to Eastern Europe following the enlargements to the East received widespread attention.⁴⁵ This issue is not directly linked to the posting of workers, yet it did resurface during the interviews. Paulina’s narrative describes the various ‘luxuries’ she could afford in Germany, followed by her return to Poland where her salary in the same company was substantially lower, even considering the difference in the cost of living. Her account could be considered as a *post-script* to the discussion on ‘social dumping’ in Eastern Europe featured throughout this thesis.⁴⁶ While it would appear that equal work should be remunerated equally within the same company, multinational companies choose differently, and they differentiate the pay of workers performing the same or a similar role depending on the country where the work is carried out.

III. Personal Income Tax Declaration for Posted Workers

One problem related to the financial aspect of posting that appeared in the interviews with ‘white-collar’ workers was the complexity of their personal income tax situation. There is no special taxation regime for posted workers and no harmonisation of personal income tax on EU level. Some countries, following the OECD Convention with respect to taxes on income and on capital, apply the so-called 183-day rule, according to which an employee becomes tax-resident of a country having spent longer than 183 days there in a given year.⁴⁷ It is, however, possible that an individual remains tax-resident in their country of origin, e.g. France, but having exceeded the 183-day period in another Member State, e.g. Poland, will have the income sourced in Poland taxed in Poland. In

⁴⁴ Guy Douetil, ‘Repatriation of Manufacturing to Europe Still the Exception for Many Multinationals Favouring “Best-shoring” in Emerging Economies’ (2014) 3(3) Corporate Real Estate Journal 199.

⁴⁵ Jon Henley, ‘How Macron calmed Whirlpool workers whipped up by Le Pen’ (The Guardian, 27 April 2017) <https://www.theguardian.com/world/2017/apr/27/how-macron-calmed-whirlpool-workers-whipped-up-by-le-pen> accessed 2 July 2021; James Meek, ‘Somerdale to Skarbimierz’ (2017) 39 LRB 8.

⁴⁶ See Chapter 2, s II; Chapter 3, s II C.

⁴⁷ Articles of the OECD Convention with respect to taxes on income and on capital (as they read on 21 November 2017), art 15(2) (a).

the above case, taxpayers can usually rely on bilateral treaties for the avoidance of double taxation.⁴⁸

While in some Member States posted workers can be assisted with their tax obligations in the ‘host’ state by the employer, other countries do not allow such a possibility, as explained in the below excerpt:

In Poland, posted employees have to personally calculate and pay to the Polish tax office the monthly tax advances, as Poland does not recognise the so-called shadow payroll concept. The ‘home’ country employer or the ‘host’ country entity do not have any tax withholding obligations in Poland. Therefore, posted workers in Poland need to personally declare their yearly income in the annual tax return form which is available only in the Polish language.

(Dorota, senior tax advisor in Poland, interview conducted in October 2019)

The issue of personal income tax declaration appeared in the majority of interviews conducted with the high-wage posted workers. It is perhaps best summarised by Zuzanna, a Polish employee posted to Germany for two years, who encountered considerable problems while trying to declare and pay her personal income tax:

⁴⁸ A list of such treaties concluded between the EU Member States can be found here: https://ec.europa.eu/taxation_customs/individuals/personal-taxation/treaties-avoidance-double-taxation-concluded-member-states_en accessed 23 June 2021.

Tax declaration was the worst part of my posting. I had my employer's full support and my posting contract contained a clause with a sum of money dedicated to the tax advisor's fee in Germany. Unfortunately, I struggled to find a tax advisor that would take my case due to the complexity of the posting arrangement. I encountered refusals or quotes asking for 2000 euro. One advisor initially agreed, but then she stopped returning my phone calls. My employer couldn't help either because, despite being posted to Germany, I remained subject to the Polish rules according to which I had to personally calculate and declare my tax. Once I finally got it done in Germany, I had to consult it with a tax advisor in Poland too. It has been four months since I submitted the declaration and I keep getting questions from the tax office about some discrepancies that are coming up.

(Zuzanna)

While similar personal income taxation issues might occur also in 'blue-collar' postings, the 'blue-collar' posted workers interviewed during this project did not report having experienced problems with tax, even though some of them did mention paying income tax in the 'host' country. It is, however, likely that the majority of the research participants from the 'blue-collar' subcategory either did not exceed the 183-day period in the 'host' state, or else they worked exclusively abroad and were, thus, no longer tax-resident in the 'home' country.

IV. 'Millennials' on the Move: Motivations of 'White-collar' Posted Workers

With regard to secondments in multinational companies which, contrary to the controversial business trips, were undeniably classified by the employer as postings, there was a discernible age profile among the interviewees. It appears that the opportunity to relocate temporarily to a foreign office appealed mostly to individuals in their late twenties and early thirties. Some of them, like Paulina whose story opened this Chapter, would have preferred to be seconded earlier in their career, however it seems that only employees with at least a few years of service in their company were eligible to apply for a temporary relocation. Such intra-corporate posting schemes required a considerable logistic effort from the employer and were, therefore, usually perceived as a reward for the employee, as in Paulina's case, as well as that of Jakub:

I approached my manager asking about a posting to Germany but he bounced the idea off. Later, a German colleague contacted me about an exchange because he wanted to come to Poland. So we tried our luck again with my manager who at first seemed open to the possibility but when I followed up on it three weeks later, he simply said that he didn't see any reason why I should go to Germany. Some nine months later my manager's boss changed, and it was the new guy who offered me a two-year contract in Germany. Lucky he did that because at that stage I was so fed up with the company, having worked in the same place for six years, that when I got the offer to relocate I was just about to hand in my notice, as I had already another job lined up.

(Jakub, interview conducted in July 2020)

Interestingly, all of the interviewees in this group were representatives of the so-called 'millennial' generation (Generation Y), born in the 1980s and early 1990s⁴⁹ who have often been described in academic literature as valuing personal satisfaction in the workplace more than stability or material gratification.⁵⁰ On one hand, sociologists are cautious about the concept of distinct generations given the individual differences within what is considered the same generation.⁵¹ Furthermore, the majority of studies concerning generational differences in the workplace are based on research conducted in the USA where those generations have been shaped in a given socioeconomic reality that differed from the circumstances of those born in Europe, and particularly in Eastern Europe. Yet with regard to the 'Millennials', raised in a globalised world, the

⁴⁹ The exact age profile of Generation Y varies across the academic literature. Stewart and others consider those born 1981-1995 as 'Millennials', see Jeanine S. Stewart, Elizabeth Goad Oliver, Karen S. Cravens and Shigehiro Oishi, 'Managing Millennials: Embracing Generational Differences' (2017) 60(1) *Business Horizons* 45, 46. Conversely, Twenge and others believe Generation Y to have been born 1982-1999, see Jean M. Twenge, Stacy M. Campbell, Brian J. Hoffman and Charles E. Lance, 'Generational Differences in Work, Values: Leisure and Extrinsic Values Increasing, Social and Intrinsic Values Decreasing' (2010) 36(5) *J Manage* 1117, 1220.

⁵⁰ See Andrea Hershatter and Molly Epstein, 'Millennials and the World of Work: An Organization and Management Perspective' (2010) 25 *J Bus Psycho* 211; Jenna Luscombe, Ioni Lewis and Herbert C Biggs, 'Essential Elements for Recruitment and Retention: Generation Y' (2013) 55 *Educ Train* 272; Glynne Williams, 'Management Millennialism: Designing the New Generation of Employee' (2020) 34(3) *Work Employ Soc* 371.

⁵¹ Williams (n 50).

characteristics of this generation, as described by American authors, tend to feature more universally also in Eastern Europe.⁵²

Consequently, workers representing Generation Y have been considered ‘markedly different, whether in their capabilities, expectations, or beliefs, from those who preceded them’.⁵³ According to Luscombe and others, an important aspect linked to Generation Y’s career goals was valuing the option of further training.⁵⁴ At the same time, the ‘Millennials’ have also been reported to value work-life balance more than the preceding generations, and half of those representatives of Generation Y who took a ‘gap year’ or a sabbatical did so in order to ‘explore passions or volunteer’.⁵⁵

The above characteristics of Generation Y have been present among the research participants in this project. As opposed to the motivations of ‘blue-collar’ posted workers discussed in Chapter 5 which appeared to primarily financial,⁵⁶ the motivation driving ‘white-collar’ employees to apply for a long-term posting seemed to be more of a combination of a number of factors rather than any particular reason. The prospect of improving language skills featured among all the interviewed participants, and so did a desire to gain experience in a new environment described by one person as ‘horizontal career growth, as opposed to a vertical progression’. As in Paulina’s case, all the other interviewees in the high-wage sector had been made aware prior to relocating that their posting would not automatically lead to a promotion upon their return. In fact, none of those participants who had already concluded their secondment at the time of the interview did receive a promotion, although some were subsequently able to change departments and considered their posting instrumental to career conversion.

At the same time, all ‘millennial’ interviewees did demonstrate a desire to maintain a healthy work-life balance and showed attachment to their family. Paulina recalled travelling back to Poland from Germany every weekend during her three-year

⁵² Alicja Smolbik-Jęczmień, ‘Podejście do Pracy i Kariery Zawodowej wśród Przedstawicieli Generacji X i Y–Podobieństwa i Różnice’ (2013) 14(1) *Nauki o Zarządzaniu* 89; Sylwia Stachowska, ‘Oczekiwania Przedstawicieli Pokolenia Y wobec Pracy i Pracodawcy’ (2015) 85(2) *Zarządzanie Zasobami Ludzkimi* 12.

⁵³ Williams (n 50).

⁵⁴ Luscombe and others (n 50) 282.

⁵⁵ Sylvia A, Hewlett, Laura Sherbin and Karen Sumberg, ‘How Gen Y and Boomers Will Reshape Your Agenda’ (2009) 87(7/8) *Harv Bus Rev* 71, as cited in Hershatter and Epstein (n 50) 219.

⁵⁶ Chapter 5, s X.

posting. Furthermore, all but one participant who at the time of the interview had already concluded their secondment did ultimately return to their country of origin. Their relocation was indeed only temporary, which chimes with the traditional understanding of the posting arrangement according to which posted workers do not seek permanent access to the labour market of the ‘host’ state.⁵⁷

V. ‘White-collar’ Postings and the Impact on Private and Family Life

One common theme underpinning the interviewees’ stories in the ‘white-collar’ subcategory was the impact of foreign travels on private and family life. This aspect affected interviewees in different ways depending on the type of mobility, thus highlighting the aforementioned divide between short business trips and longer secondments. Research participants whose trips were short (lasting two or three days at a time) but frequent (several times a month) complained mostly about travel-incurred fatigue. One interviewee mentioned being fed up with airplanes and cars after several years of constant work-related travel, while another one presented the following account:

I was 25 at the time and had never owned a car before, I wasn’t a very experienced driver. And all of a sudden, I was being asked to drive the company car on long routes, for example from Poland to Croatia. So by the end of a long day, upon my arrival in Croatia I was only looking forward to checking in to the hotel and going to bed. The best part of each trip was coming home.

(Kinga, interview conducted in November 2019)

However, Kinga who at the time of the interview had changed jobs and was no longer travelling for work, admitted to feeling nostalgic about that period of her life and missing the thrill of her frequent business trips.

With regard to employees on longer secondments, those interviewees who had moved to another country on their own also experienced fatigue related to travelling back and forth to visit family in the ‘home’ country. Apart from the tiredness, longer

⁵⁷ *Rush Portuguesa*, para 15. See further Verschueren, ‘Cross-Border Workers in the European Internal Market: Trojan Horses for Member States’ Labour and Social Security Law’ (2008) 24 IJCLIR 167, 176. See also Chapter 2, s III B.

secondments tended to have a more permanent effect on the employees' private and family life. Paulina's posting contributed to her romantic relationship breakdown, while other interviewees in this subcategory recalled feeling homesick and finding it difficult to socialise in the 'host' country, at least at the beginning. In this vein, postings seem to have an impact on private and family life regardless of the worker's income, as both 'blue-collar' and 'white-collar' workers have experienced, to some extent, the feeling of isolation in the 'host' country. According to Haslberger and Brewster, one type of resources that take a long time to develop and, therefore, tends to be lacking in the 'host' country, are community resources found in 'religious bodies, sports and social clubs and friendships'.⁵⁸

Yet, while both 'white-collar' and 'blue-collar' workers experience negative effects of posting on their private and family lives,⁵⁹ it could be argued that 'white-collar' workers are generally better equipped by their employer to deal with this issue. Firstly, they can avail of a number of financial benefits, such as the 'cinema supplement' mentioned by Paulina, which may partially compensate for the difficulty at adapting to the new country. Secondly, most of the interviewees who carried out an intra-corporate posting recalled attending workshops and talks organised by the employer in order to help them adjust to the change. Finally, another advantage of 'white-collar' postings was the possibility to relocate the entire family (spouse / partner and children) at the employer's expense, an option which is unavailable to posted workers in the 'blue-collar' subcategory. The extent of assistance is reflected in Adam's narrative recounting his employer's policy:

Prior to relocating to Germany you have to declare whether you will be moving with your family, as this determines the budget you get for accommodation. If you move together with a partner, you get a bigger budget than you would if you were moving on your own, and you usually rent a furnished apartment. But if you bring your kids, you get an unfurnished apartment which is then fully furnished according to the family's needs at the company's expense, including a fitted kitchen. As far as the children are concerned, they cannot be relocated on worse terms than they had back in Poland. So if

⁵⁸ Arno Haslberger and Chris Brewster, 'The Expatriate Family: An International Perspective' (2008) 23(3) J Manag Psychol 324, 332-333.

⁵⁹ See Chapter 5, s IX.

they had attended a public crèche that was free of charge in Poland, they don't get any funding for crèche in Germany. But if the children had been in a fee-paying crèche in Poland, they get the same in Germany, and the company pays for the crèche. I have moved together with my partner. We're not married, but thankfully that doesn't matter, and she also has a spending budget. She can attend a German language course for up to 2.500 euro and she can spend up to 15.000 euro on professional training and education. This means that she can buy computer software or pursue any course if she says that she would like to develop professionally in that area. But if she wanted to rent a kayak just for fun, then the company wouldn't cover that.

(Adam, interview conducted in July 2020)

While none of the interviewees from the 'white-collar' subcategory have carried out a posting with children, some participants mentioned colleagues of theirs who had decided not to move their families, and travelled back to Poland every weekend in order to visit them. This reflects the fact that relocating an entire family to another country, despite the employer's willingness to facilitate it, poses logistic challenges and a disruption to family life.⁶⁰ An unsuccessful intra-corporate assignment has sometimes been referred to in the scholarly literature as 'expatriate failure',⁶¹ and research has shown that when taking into account severe negative effects on the expatriates' family lives, the expatriate failure rate was as high as 28%.⁶² With regard to children, while their level of adjustment to expatriation is significantly underexplored in research,⁶³ Haslberger and Brewster argue that 'the demands [school-age] children face – because of possible differences in schooling from country to country – are potentially broader in range than those of either of the parents'.⁶⁴

⁶⁰ See Karen I. van der Zee, Anees J. Ali and Esther Salomé, 'Role Interference and Subjective Well-being Among Expatriate Families' (2005) 14(3) Eur J Work Organ Psychol 239; Haslberger and Brewster (n 58); Katherine Rosenbusch and Maria Cseh, 'The Cross-Cultural Adjustment Process of Expatriate Families in a Multinational Organization: A Family System Theory Perspective' (2012) 15(1) Hum Resource Dev Int 61.

⁶¹ Anne-Wil K. Harzing, 'The Persistent Myth of High Expatriate Failure Rates' (1995) 6(2) Int J Hum Resour Manag 457; Van der Zee and others (n 60); Lee Hung-Wen, 'Factors that Influence Expatriate Failure: An Interview Study' (2007) 24(3) Int J Manag 403.

⁶² Van der Zee and others (n 60) 239-240.

⁶³ Haslberger and Brewster (n 58) 335.

⁶⁴ *ibid*, 334-335.

For the worker's accompanying partner or spouse, sometimes referred to in literature as 'the trailing spouse', temporary relocation sometimes entails a career hiatus.⁶⁵ If this is the case, the expatriate partner may fall back 'into a more traditional role of caregiver and housekeeper'⁶⁶ and, consequently, experience a loss of professional status in addition to 'underload' resulting from too much spare time.⁶⁷ In this research, only two participants have carried out their posting with an accompanying person, and although the majority of the interviewees in the 'white-collar' subcategory were women,⁶⁸ in both cases relocation concerned male workers and female partners / spouses. This echoes the traditional, patriarchal relationship model in which the man is considered the main breadwinner for the family, while the woman is more willing to sacrifice her career, at least temporarily.⁶⁹ The following account describes the consequences of a posting for the 'trailing spouse':

Having worked for a number of years in a multinational company in Poland, two years ago I was posted to Germany. It wasn't exactly my own initiative to move abroad, I only said I would like to change departments and I was told that a position was available, but in Germany. I'm married, so from the start I knew that if I were to go anywhere, I would only go if my wife moved with me. We discussed it and we made the decision to give it a

⁶⁵ Michael Harvey, 'Dual-career Couples During International Relocation: The Trailing Spouse' (1998) *Int J Hum Resour Manag* 309. See further Robert J. Brown, 'Dominant Stressors on Expatriate Couples During International Assignments' (2008) 19(6) *Int J Hum Resour Manag* 101; Yvonne McNulty, "'Being Dumped in to Sink or Swim": An Empirical Study of Organizational Support for the Trailing Spouse' (2012) 15(4) *Hum Resource Dev Int* 417; Mandy E. G. van der Velde, Paul G. W. Jansen, P. Matthijs Bal and Kim J. P. M. Van Erp, "'Dual-earner Couples" Willingness to Relocate Abroad: the Reciprocal Influence of Both Partners' Career Role Saliency and Partner Role Saliency' (2017) 26(2) *Eur J Work Organ Psychol* 195.

⁶⁶ Van der Zee and others (n 60) 242.

⁶⁷ Haslberger and Brewster (n 58) 330.

⁶⁸ See Chapter 4, s IV B.

⁶⁹ Birgit Pfau-Effinger, 'Socio-historical Paths of the Male Breadwinner Model – An Explanation of Cross-national Differences' (2004) 55(3) *Br J Sociol* 377; Youngjoo Cha and Sarah Thébaud, 'Labor Markets, Breadwinning, and Beliefs: How Economic Context Shapes Men's Gender Ideology' (2009) 23(2) *Gender & Society* 215. See also Antje Röder, Mark Ward and Carmen-Adriana Frese, 'From Labour Migrant to Stay-at-Home Mother? Childcare and Return to Work among Migrant Mothers from the EU Accession Countries in Ireland' (2018) 32(5) *Work Employ Soc* 850.

go. My wife was offered a relocation package. She can't really work in Germany, we're here only temporarily and we're planning to go back to Poland after my contract expires. Before the pandemic, my wife volunteered part-time in an arts centre and attended German classes which were quite intense, five times a week. Now, during the lockdown, we're both stuck at home anyway. From time to time, my wife also does commissions remotely for clients based in Poland. So I would say that she has enough here, but it's not like these activities keep her busy for eight hours every day.

(Marcin, interview conducted in June 2020)

It has been found that those who strongly value their career are less likely to accompany a partner during an international assignment,⁷⁰ while the 'trailing spouses' tend to be committed primarily to the relationship's success.⁷¹ McNulty's empirical study published 2012 found that while 84% of the 'trailing spouses' had a third-level degree and a career prior to relocating, only 36% were able to continue their career in the 'host country'.⁷² These findings have been confirmed in this research in both cases in which interviewees had relocated with a partner or spouse. Marcin's wife was a graphic designer, while Adam's partner had a successful career as an architect back in Poland, yet both opted for a career hiatus during their partner's posting.

VI. The Impact of COVID-19 on 'White-collar' Postings

Marcin's story which ended the previous section touches upon the issue of the COVID-19 emergency and its potential impact on labour mobility in the EU, including on the posting of workers. As has been explained in Chapter 4, interviews in this project were conducted between July 2019 and July 2020. The coronavirus crisis was, thus, an unexpected development that occurred towards the end of the empirical phase. When the final interviews were conducted online at the beginning of the pandemic, it was difficult to predict the consequences of this public health emergency for the world of work generally, and for posted workers specifically. The earliest available data accentuates the

⁷⁰ Van der Velde and others (n 65) 203.

⁷¹ *ibid.* See also McNulty (n 65).

⁷² McNulty (n 65) 428.

detrimental effect of COVID-19's repercussions on people's lives and working conditions across the world⁷³ and in the EU,⁷⁴ as well as on labour mobility.⁷⁵

With regard to the impact of the pandemic on postings in the 'white-collar' subcategory, a dividing line has to be drawn between short-term 'business trips', and long-term posting contracts. The former type has been heavily affected due to travel restrictions,⁷⁶ cost-cutting and the growing popularity of remote work and meetings.⁷⁷ In terms of the latter group, the COVID-19 effect seems more nuanced. During the first 'lockdown' in the spring of 2020 borders were closed within the EU and all non-essential international travel ceased. But once the easing of restrictions began, one interviewee

⁷³ 'COVID-19 and the World of Work. Seventh Edition' (ILO Monitor, January 2021) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_767028.pdf accessed 6 July 2021. See further Amit Kramer and Karen Z. Kramer, 'The Potential Impact of the Covid-19 Pandemic on Occupational Status, Work from Home, and Occupational Mmobility' (2020) 119 J Vocat Behav.

⁷⁴ 'Living, Working and COVID-19' (Eurofound 2020) <https://www.eurofound.europa.eu/publications/report/2020/living-working-and-covid-19> accessed 6 July 2021.

⁷⁵ Giovanni Bonaccorsi and others, 'Economic and Social Consequences of Human Mobility Restrictions under COVID-19' (2020) 117(27) Proceedings of the National Academy of Sciences 15530; Tesseltje de Lange, Sandra Mantu and Paul Minderhoud, 'Into the Unknown: COVID-19 and the Global Mobility of Migrant Workers' (Symposium on COVID-19 and Global Mobility of Migrant Workers 2020).

⁷⁶ Sharmila Devi, 'Travel Restrictions Hampering COVID-19 Response' (2020) 395 The Lancet 1331; Alan A. Lew and others, 'Visions of Travel and Tourism after the Global COVID-19 Transformation of 2020' (2020) Tourism Geographies 455.

⁷⁷ Louis-Philippe Béland, Abel Brodeur and Taylor Wright, 'The Short-term Economic Consequences of Covid-19: Exposure to Disease, Remote Work and Government Response' (IZA Discussion Papers 2020); Erik Brynjolfsson and others, 'COVID-19 and Remote Work: an Early Look at US Data' (NBER Working Paper 27344, 2020). While studies on the impact of COVID-19 on business travel are not yet available, short-term business trips can be likened, in the context of the pandemic, to such sectors as tourism or road transport. See 'COVID-19 and civil aviation (ILO Sectoral Brief, April 2020) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_741466.pdf accessed 9 August 2021; ILO, 'COVID-19 and road transport' (Sectoral Brief, June 2020) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_746914.pdf accessed 9 August 2021; Stefan Gössling, Daniel Scott and C. Michael Hall, 'Pandemics, Tourism and Global Change: A Rapid Assessment of COVID-19' (2020) Journal of Sustainable Tourism 1.

from the ‘white-collar’ subcategory was able to commence a two-year posting contract from Poland to Germany within a multinational company:

I was due to start my posting from April 2020. At the beginning of March, my girlfriend and I went to Germany for a couple of days to pick an apartment and run some errands. The day after we came back home Poland closed its borders due to the coronavirus. So my secondment was postponed, at first until May, and finally until June. But even during the lockdown some limited travel was possible, because I have heard about a Chinese person in my company who managed to travel to Germany for a secondment when everything was closed. For me, June was the last call, I was told that if my posting was delayed for another month, it would most likely be cancelled altogether. The company is cutting costs due to the pandemic and all the secondments scheduled for the second half of 2020 are now on hold and will probably be cancelled. Upon arrival, we didn't have to quarantine with my girlfriend, it wasn't required in the Land that we're in. For the first two weeks I wasn't supposed to be allowed in at the company's site, I only got a one-time pass to pick up my laptop etc. But after the first week, Germany entered another phase of easing the restrictions and so they let me come in to work. We're currently divided into two teams which are not supposed to mix to minimise contact. Each team works on-site for two weeks and then they swap with the other team.

(Adam)

The above excerpt proves that travel for the purpose of long-term postings was feasible within the EU during the pandemic. The quarantine or self-isolation requirement, while in place in some Member States, was not a major obstacle for workers beginning a posting which was going to last for a period of several months or years. At the same time, it appears that some long-term ‘white-collar’ secondments may have been reduced due to financial factors.

Conclusion

The interviews conducted with participants from the ‘white-collar’ subcategory paint a complex picture of this atypical and unexplored facet of the posting of workers in the EU. The workers’ narratives emphasise the diverse spectrum of work-related travel

among high-wage workers. In this vein, it appears that short-term business trips within the same company generally tend to fall outside the scope of the PWD. At the same time, these workers are still required to obtain an A1 portable document for the purpose of their trip and, therefore, are counted in the overall number of postings within the EU.

The main focus of this Chapter were, thus, the narratives of workers on long-term postings within multinational companies, where there was no doubt regarding their legal status. Overall, the interviews tell a story of a logistically complex endeavour which entails personal costs and, as its advantages are described mainly in terms of ‘horizontal development’, offers little immediate gratification. Furthermore, while the reasons behind the willingness of employers in the corporate world to facilitate postings seem to vary, it appears that lower employee cost incurred by posted workers from lower-wage economies are also an incentive in multinational companies.

Nonetheless, compared to ‘blue-collar’ postings discussed in the previous Chapter, the interviews conducted with ‘white-collar’ participants reveal that these posted workers tend to be outside the paradigm of precarity. In Chapter 1, a working definition of precarious work was established which comprises five component elements: uncertainty about continuing work, lack of control over the employment relationship, low level of labour law and social security protection, low income and the workers’ subjective perception of their status.⁷⁸ On this note, it appears that none of the above elements were present among the interviewees in the high-wage sectors.

Firstly, the degree of certainty of continuing work upon the conclusion of the posting arrangement was high among this type of employees. While their contract in the receiving Member State was temporary, the ‘white-collar’ posted workers knew that their employment within the same multinational company would continue upon their return to their ‘home’ country.

Secondly, the workers’ testimonies prove that during their posting they exercised a fair amount of control over their working and living conditions. In particular, they were

⁷⁸ Chapter 1, s III D. See further Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989); Nicola Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y* J 21; Arne L. Kalleberg, *Precarious Lives. Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018).

able to negotiate their posting contract and given the freedom to choose accommodation provided by the employer.

Thirdly, participants enjoyed adequate labour law and social security protections during their posting. Although they remained within the system of their country of origin for the purpose of social security, this arrangement generally suited them as they were not planning to settle permanently in the ‘host’ state.

The fourth criterion of income level, as has been argued in Chapter 1, is perhaps the most problematic in terms of posted workers, since a low salary in the ‘host’ Member State may be considered high in the ‘home’ Member State (or *vice versa*).⁷⁹ In relation to ‘white-collar’ employees, however, neither aspect of their remuneration displayed any characteristics of a precarious financial situation. While it was difficult to assess the interviewees’ income in comparison to local workers in the receiving country due to the confidentiality of information on pay in multinational companies, it is clear that they enjoyed a decent quality of life along with a variety of financial benefits.

Finally, the subjective perception of the worker’s status during the posting in the ‘white-collar’ subcategory was not one of precarity. The interviewees’ working and living arrangements in the ‘host’ country were temporary and some of the workers did perceive their situation as somewhat unstable. However, this instability was protected by a safety net of a relocation package which resulted in the posting being experienced as more of an adventure than a precarious situation. The relocation package applied also to the workers’ family members who wished to accompany them abroad, which is another difference between ‘white-collar’ and ‘blue-collar’ postings. Workers from the latter group are not in a position to relocate their family at the employer’s expense and even if they wished to do so at their own expense, their working situation and living conditions are usually too precarious to do so.⁸⁰

Overall, it appears that ‘white-collar’ postings stand in contrast to the image of precarious posted workers dominant in the existing literature, which may raise questions over the PWD’s adequacy for this particular subcategory of posted workers. The suitability of the PWD to the different types of workers will further be explored in

⁷⁹ Chapter 1, s III A ; Chapter 4, s I B.

⁸⁰ Chapter 5, s IX. See also Lisa Berntsen, ‘Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries’ (2015) 31(4) IJCLIR 371, 386, as cited in Chapter 4, s I B.

Chapter 7 which will re-evaluate the current EU legal framework in light of the evidence gathered from the interviews. At the same time, evidence regarding the interviewees' remuneration presented in Section II appears to suggest that even intra-corporate transfers of highly skilled individuals, for example from Poland to Germany, may sometimes be driven by the employer's intention to save money thanks to lower labour costs applicable to posted workers.

Furthermore, Paulina's narrative which opened this Chapter, as well as those of some of the other interviewees, exposed a certain degree of pay inequality among workers employed in different countries within the same company. This might be one of the reasons why the interviewees from this group, even if at times during their posting they earned less than colleagues performing similar roles, still perceived themselves to be better off than when working back in the 'home' state.

7. Conclusion: Minimising the Risk of Precarity. Causes and Potential Legal Remedies

Introduction

An initial assumption underpinning this research was that posted work belonged to the paradigm of precarious work alongside forms of atypical work such as temporary agency, fixed-term, part-time and ‘zero hour’ contracts or ‘sham’ self-employment.¹ This is not a controversial statement in light of the existing literature in the field that has been referred to throughout this thesis, and the posting arrangement has in fact been classified as a precarious working arrangement by the European Parliament.² The central research question aimed, firstly, to identify those elements of the EU framework, both in the law and in the practice of its enforcement, that may have the effect of predisposing posted workers to a precarious existence, and, secondly, to suggest solutions that could potentially reduce the experience of precarity for posted workers.

The first step in order to answer this question, carried out in Chapter 1, was to establish a working definition of precarious work that would suit the reality of postmodern employment relationships in order to evaluate the posting arrangement.³

In the second step, the focus of this research shifted into the EU legislation on the posting of workers, which since 2014 has been in a state of flux caused by two important reforms.⁴ Chapter 2 sought to identify those elements of the original design of the PWD

¹ See Chapter 1.

² Parliament Resolution on working conditions and precarious employment [2018] OJ C 334/88. See further *Protecting Migrant Workers from Exploitation in the EU: Workers’ Perspectives* (European Union Agency for Fundamental Rights 2019).

³ Chapter 1, s III D.

⁴ Council and Parliament Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1 (hereafter PWD) was supplemented by Council and Parliament Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ 2014 L 159/11. Directive 96/71/EC was then revised by Council and Parliament Directive (EU) 2018/957

that might have predisposed posted workers to precarity. Chapter 3 attempted to capture the evolution of the EU rules on posted work toward a measure employing a more fundamental rights-based approach. While the doctrinal analysis of the PWD and its revisions offered some insights into potential factors predisposing posted workers to a situation of precarity, the resulting picture seemed manifestly incomplete for assessing the effectiveness of the EU framework which is, ultimately, an empirical question. This research from its outset relied also on the assumption that the posting of workers could only be fully understood and evaluated in terms of its precarity by means of gathering qualitative data.

Accordingly, in the third step, the doctrinal research was supplemented by a brief literature review of the existing empirical studies on posted workers which added a valuable contribution in terms of the fifth element of precarious work, as defined for the purpose of this research.⁵

To bridge the divide between legal and sociological analysis of posted work, in the fourth step, in-depth interviews with posted workers, employers and experts from the field of posting such as legal practitioners and representatives of national competent authorities were conducted. While the choice of methods and research design of this sociolegal study were elaborated upon in Chapter 4, Chapters 5 and 6 presented findings from interviews conducted, respectively, in relation to ‘blue-collar’ and ‘white-collar’ postings.

The purpose of this Chapter is to evaluate these empirical findings against the central research question, as well as to complete the fifth step and answer the second limb of the central research question which requires identifying potential pathways for further improvements of the legislative framework of posted work and its enforcement.

The first three sections of this Chapter address the impact of research findings on the theoretical framework. Section I will distinguish the category of ‘white-collar’ posted workers who, based on the qualitative data discussed in Chapter 6, fall outside the paradigm of precarity. They will, therefore, be excluded from further assessment of the PWD framework and proposed amendments.

amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173.

⁵ Chapter 4, s I.

Section II will focus on the interview findings in relation to potential risk factors which may predispose certain posted workers to precarity.

Section III, concluding the first part of this Chapter, will discuss the extent to which interview findings have informed the initial definition of precarious work formulated in Chapter 1.

Sections IV-VI will shift the focus back onto the legal regulation of posted work by analysing the impact of interview findings on the assessment of the EU legal framework and discussing potential further reforms. Section IV will identify both the improvements brought about by the 2014-2018 revisions of the PWD and the issues which, based on the qualitative evidence, the reforms have failed to adequately address.

Section V will propose amendments to the PWD that could potentially bring tangible improvements to the situation of posted workers in practice. It will be argued that a separate legal regime for those temporary workers is in their best interest, yet the PWD requires a reform which should repeal the ‘nucleus’ of mandatory rules and, instead, extend the existing principle of equal treatment for ‘long-term’ posted workers onto all postings.

Section VI will discuss the importance of effective application of the PWD in practice to reducing the risk of precarity among posted workers by considering the role of each of the actors crucial to the enforcement: competent authorities, trade unions and employers.

I. The Distinct Category of ‘White-collar’ Postings Within the PWD Framework

The interviews have revealed that posted workers are far from a homogenous category of labour migrants. This was, to some extent, expected from the outset, hence the choice of a purposive, non-probability sampling method for recruiting research participants in order to ensure a variety of experiences.⁶ The research design was informed by statistics which drew a distinction between postings of low-skilled manual labourers and postings

⁶ Chapter 4, s IV A. See further Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 418.

of highly-skilled specialists (hereafter referred to, respectively, as ‘blue-collar’ and ‘white-collar’ postings).⁷

The latter category of postings, often referred to as secondments, bears a resemblance to the type of labour mobility covered by Directive 2014/66 on the conditions of third-country nationals in an intra-corporate transfer.⁸ The ICT Directive differs in personal scope from the PWD and, therefore, also regulates immigration law aspects, such as the conditions of entry and residence for third-country nationals and their family members. But with regard to the substance of rights, the situation of intra-EU ‘white-collar’ postings and intra-corporate transfers of third-country nationals is, essentially, similar.⁹ Pre-existing studies suggested that while ‘blue-collar’ postings were driven by wage competition between the Member States, the latter category of ‘white-collar’ mobility was motivated by ‘skills shortages and the need of highly specialised personnel and services’.¹⁰ Another parallel might be drawn here between ‘white-collar’ postings and the ICT Directive, which covers intra-corporate transfer of ‘managers’, ‘specialists’ and ‘trainee employees, all of which can be associated with specialist skills and expertise or the acquisition thereof.’¹¹

Interestingly, the qualitative data from the interviews does not entirely confirm this dichotomy. On the one hand, interviewees were aware of postings in the ‘blue-collar’ sector that entailed moving workers from a higher-wage economy to a lower-wage economy for the purpose of providing a specialist service (e.g. from Germany to France or from Poland to Romania). On the other hand, interviews with Polish ‘white-collar’ workers appear to suggest that their intra-corporate postings to Germany were also partially driven by the difference in wages between those two Member States, at least prior to the 2018 reform of the PWD. In Germany, ‘white-collar’ posted workers were offered lower salaries than their German colleagues in a similar position, thus, it seems

⁷ Frederic De Wispelaere, Lynn De Smedt and Jozef Pacolet, ‘Posting of Workers. Report on A1 Portable Documents issued in 2018’ (European Commission 2019). See also Chapter 4, s II.

⁸ Council and Parliament Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1. See also Chapter 2, s IV D; Chapter 6, s I.

⁹ Directive 2014/66, Recital 15.

¹⁰ Eckhard Voss, Michele Faioli, Jean-Philippe Lhernould and Feliciano Iudicone, ‘Posting of Workers Directive – Current Situation and Challenges’ (European Parliament 2016).

¹¹ Directive 2014/66, art 3.

that the employer's incentive to facilitate such postings was to some extent financial too.¹²

Nevertheless, the principal factor distinguishing 'white-collar' postings from other postings is the fact that interviewees from this subcategory did not display any of the characteristics of precarious work, as defined in Chapter 1. As argued in Chapter 6, none of the five elements of precarity were present in the qualitative data.¹³ The existence of this separate category of posted workers suggests, *a contrario*, that precarity experienced by other posted workers does not result solely from the legal status of posted workers, but rather from a combination of different factors. Conversely, it might be argued that the suitability of the PWD to 'white-collar' workers is questionable. Referring back to the two-fold aim of the Directive consisting of the protection of posted workers and the tackling of unfair competition,¹⁴ posting of 'white-collar' workers does not seem to pose a threat to either the rights of seconded workers or fair competition. This does not necessarily mean that this subcategory of postings should be exempt from the scope of the PWD, for it would deprive high-income posted workers of some of the protections of the 'host' state currently enshrined in 'the nucleus' of Article 3(1).

On this note, evidence gathered in this project implies that the enforcement of rules on the posting of workers in the high-income sectors has been, and will most likely remain, rather weak due to the low risk of precarity among these workers. Representatives of the national enforcement bodies, albeit aware of undeclared 'white-collar' postings, admitted that the probability of an inspection in that sector was low due to the low risk of breach of the statutory minimum the 'host' state.¹⁵ In this vein, it seems highly probable that the weak enforcement of the PWD in the 'white-collar' sector will lead to an equally weak enforcement of the changes introduced by the 2018 Directive.

The already weak enforcement of the PWD in the 'white-collar' sector might be exacerbated by the confusion about the distinction between the types of business-related trips which fall within the scope of the PWD and those which do not. Prior to the COVID-19 pandemic, short trips to offices located in different countries were inherent to working

¹² Chapter 6, s II.

¹³ Chapter 6, Conclusion.

¹⁴ Directive 96/71/EC, Recital 5. See case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbunde and others* [2007] ECR I-11767, Opinion of AG Mengozzi, para 251. See further Chapter 2, s III.

¹⁵ Chapter 6, s II. See Directive 2014/67, art 10(1). See also Chapter 3, s I D 5.

in a multinational company. Research participants often travelled within the EU in order to attend training sessions and fairs, meet with clients or supervise the work of subordinate teams based in another Member State. Yet not all of those trips qualified as postings, as only those types of professional mobility that are related to service provision fall within the scope of the Directive.¹⁶ Conversely, ‘attending conferences, meetings, fairs, following training etc.’ does not qualify as a posting within the meaning of the PWD.¹⁷

This lack of clarity might have further weakened the enforcement of rules on the posting of workers in the ‘white-collar’ sector, as corporate employers were frequently unsure whether they should declare short business trips as postings or not. Following the outbreak of the COVID-19 pandemic in Europe in early 2020, short business trips have been massively reduced due to travel restrictions, environmental factors, cost-cutting and the growing popularity of virtual meetings.¹⁸ While it is difficult to predict the lasting impact of this public health emergency on business-related travel, the present trend is likely to continue in the medium term.

II. Risk Factors Which May Predispose Posted Workers to (Greater) Precarity

Apart from the above discussed ‘white-collar’ postings, evidence stemming from the interviews indicates that posted workers, even narrowed down solely to those carrying out labour-intensive, manual work, cannot be perceived as a homogenous group. Consequently, the degree of precarity will vary to a great extent among posted workers. The same may, however, be argued about other forms of atypical work, generally linked to precarity, for example part-time work, which is often voluntary and might be a

¹⁶ See Chapter 2, s IV E.

¹⁷ Commission, ‘Practical Guide on Posting of Workers’ (2019) 7. See also Chapter 2, s IV E.

¹⁸ Louis-Philippe Béland, Abel Brodeur and Taylor Wright, ‘The Short-term Economic Consequences of Covid-19: Exposure to Disease, Remote Work and Government Response’ (IZA Discussion Papers 2020); Erik Brynjolfsson and others, ‘COVID-19 and Remote Work: An Early Look at US Data’ (NBER Working Paper 27344 2020).

consequence of a lifestyle choice.¹⁹ The varying degree of precarity among ‘blue-collar’ posted workers does not refute the hypothesis that the posted workers are prone to precarity. Rather, data gathered in this project allows to assemble a more nuanced image of the posting arrangement in which the often precarious status of workers seems to be the result of different forces, both legal and sociological, shaping the final situation for each interviewee.

The range of disparities observed among research participants raises questions about certain additional factors potentially predisposing workers to precarity. In Chapter 1 it was argued that Countouris’ concept of legal determinants of precariousness which may be understood as the driving factors of precarity²⁰ chimed with the vulnerable subject theory.²¹ As explained in Chapter 4, the notion of vulnerabilities as additional factors exposing posted workers to precarity had been integrated into the design of this study.²² As the existing literature has demonstrated a correlation between gender and age and precarious working arrangements, these two individual characteristics were taken into consideration as potential additional vulnerabilities at every stage of the empirical phase, from the participant recruitment procedure, through the interview conduct, to the data analysis stage.²³ Yet, during the interviews the interviewer was also attentive to potential other vulnerabilities including, but not limited to, the seven grounds of

¹⁹ See Mark Bell, ‘EU Equality Law and Precarious Work’ in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing 2018).

²⁰ Nicola Countouris, ‘The Legal Determinants of Precariousness in Personal Work Relations’ (2012) 34(1) *Comp Lab L & Pol’y J* 21, 27. See Chapter 1, s III B.

²¹ Martha Albertson Fineman, ‘Equality, Autonomy and the Vulnerable Subject in Law and Politics’ in Albertson Fineman and Anna Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013). See further Chapter 1, s IV B.

²² Chapter 4, s IV A.

²³ Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy. The Challenge to Legal Norms* (Hart Publishing 2006); Marisa C. Young, ‘Gender Differences in Precarious Work Settings’ (2010) 65(1) *Relat Ind - Ind Relat* 74; Bell (n 19); Dirk Witteveen, ‘Precarious Early Careers: Instability and Timing within Labor Market Entry’ in Arne L. Kalleberg and Steven P. Vallas (eds), *Precarious Work* (Bingley Emerald Publishing 2018); Adam Mrozowicki and Jan Czarzasty (eds), *Oswajanie Niepewności. Studia Społeczno-Ekonomiczne nad Młodymi Pracownikami Sprekaryzowanymi* (Scholar 2020); Kate Bahn, Jennifer Cohen and Yana van der Meulen Rodgers, ‘A Feminist Perspective on COVID-19 and the Value of Care Work Globally (2020) 27(5) *Gend Work Organ* 695; Mrozowicki and Vera Trappmann, ‘Precarity as a Biographical Problem? Young Workers Living with Precarity in Germany and Poland (2021) 35(2) *Work Employ Soc* 221.

discrimination recognised in EU law.²⁴ The following subsections will evaluate the research findings against the two predefined potential risk factors, as well as identifying two other vulnerabilities that transpired from the interviews.

A. Gender

With regard to gender, labour law has often been accused of ‘demonstrating an unquestioned acceptance that its subjects are male workers’.²⁵ In contrast, women tend to be the subject of legal research in stereotypical contexts such as motherhood (e.g. concerning the right to maternity leave) or ‘highly feminised occupations such as caring and cleaning’.²⁶ Mindful of the above considerations, this research regarded gender as an organising principle of the labour market, and was, from the outset, attentive to the potential gender dimension of the posting arrangement.²⁷ While the research sample was fairly balanced in terms of the gender ratio, there was an overrepresentation of female interviewees among highly skilled professionals who were either ‘white-collar’ posted workers or experts in the field of posting.²⁸ The experiences of female ‘white-collar’ posted workers may be viewed as positive examples of empowerment conveyed in stories of independent and driven women pursuing career goals in corporate environments. Conversely, the narratives of ‘blue-collar’ posted workers appear to largely perpetuate the stereotype of highly masculinised and feminised professions. Most of the ‘blue-collar’ posted workers were males working in the construction industry, while the rare female interviewees tended to work mostly as carers (with the exception of one female participant employed in production).²⁹

With regard to the impact on private life, gender differences were not highly pronounced, as interviewees of both genders equally emphasised the detrimental effect

²⁴ See Chapter 1, s IV B.

²⁵ Lydia Hayes and Roseanne Russell, ‘Women in Labour Law: The Use and Implications of Empirical Methods’ in Amy Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart Publishing 2015) 51.

²⁶ *ibid.*, 53.

²⁷ See Chapter 4, s IV A.

²⁸ *ibid.*, s IV B.

²⁹ *ibid.*

of working away from home on their family situation and mental health.³⁰ One interesting gender-related finding of this study – albeit not linked to precarity – is the role of partners and spouses who choose to relocate to another country to accompany a posted worker in the ‘white-collar’ sector. Such a move tends to entail serious implications on the professional situation of the partner / spouse, and has been described in sociological literature as the ‘trailing spouse’ phenomenon.³¹ While the majority of interviewees in the ‘white-collar’ sector were female, the only participants who had relocated together with a partner / spouse to carry out their posting, were male workers accompanied by female partners / spouses.³² This chimes with the conservative, patriarchal family model of the male breadwinner and the subordinate female homemaker whose personal life or career goals are secondary to the primary goal of preserving and protecting the family.

B. Age

Age was one potential risk factor that did appear to have a greater effect on the posted workers’ precarity than gender. While workers of all ages were present among the interviewees in the ‘blue-collar’ subcategory³³ (contrary to ‘white-collar’ interviewees who were primarily representatives of the so-called ‘Generation Y’³⁴), older participants seemed particularly susceptible to precarity.

This might be explained with a combination of factors. Firstly, Polish research participants in their fifties and sixties had often been badly affected by the 1990s’ economic transformation into a market economy characterised by high rates of unemployment in certain industries and regions. Those individuals were, thus, often forced to work on a series of different types of short-term contracts abroad for a number of years and have, therefore, fallen into the ‘trap of posting’. By this is meant that these workers, having been outside the labour market of the ‘home’ state yet unable to access full-time employment in the ‘host’ state, are often left with no choice but to continue

³⁰ Chapter 5, s IX; Chapter 6, s V.

³¹ Michael Harvey, ‘Dual-career Couples During International Relocation: The Trailing Spouse’ (1998) *Int J Hum Resour Manag* 309. See further Chapter 6, s V.

³² Chapter 6, s V.

³³ Chapter 4, s IV B.

³⁴ Chapter 6, s IV.

temporary work abroad. This is usually coupled with a complicated social security situation with the worker's contributions scattered across two or more countries and, thus, insufficient to guarantee a liveable state pension.³⁵

Secondly, data obtained from the interviews appears to suggest that older posted workers found it more difficult to adapt to the new working environment in the 'host' countries than younger posted workers. As a result, due to the language barrier and the lack of other job opportunities, and with underlying concerns over the future pension, older posted workers were more inclined to tolerate substandard working conditions. Again, this finding echoes the existing evidence from the field of equality law which confirms that precarious work can heavily affect younger and older workers, and that these groups are over-represented in nonstandard forms of employment.³⁶

C. Nationality

Another ground of discrimination protected by EU law that proved relevant in this research project was nationality. It was expected from the outset that this ground might feature in the interviews, as posted workers belong to the broad category of intra-EU labour migrants who are often subject to discriminatory treatment in the receiving countries.³⁷ However, evidence stemming from the qualitative data seems to suggest that the primary source of unfavourable treatment that some of the participants had been exposed to, albeit linked to nationality, lay elsewhere.

Notably, it has to be emphasised that the 'host' countries' nationals who, according to the interviewees, had behaved in a discriminatory way towards posted workers, were rarely prejudiced against any specific nationality. In light of the interviews, it appears that it was rather the status of a posted worker – associated with many negative connotations in the public discourse of the receiving states – that tended to attract hostility.³⁸ In migration studies, authors often refer to the concept of 'civic

³⁵ Chapter 5, s VII.

³⁶ Bell (n 19) 86-87. See further Rachel Horton, 'Justifying Age Discrimination in the EU' in Belavusau and Henrard (n 19).

³⁷ See Maurizio Ferrera, 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights' (2016) 22(6) ELJ 791.

³⁸ Benjamin Hopkins, 'Informal Hierarchies Among Workers in Low-skill Food Manufacturing Jobs' (2011) 42(5) IRL 486. See Chapter 5, s VIII.

stratification³⁹ introduced by the famous sociologist David Lockwood in the context of how different states and the EU manage migration flows ‘to attract “wanted” immigrants and to discourage “unwanted ones’.⁴⁰ In this vein, posted workers, often considered to be ‘undercutting’ local workers and companies through unfair wage competition, would be viewed as ‘unwanted migrants’ on the basis of their status, sometimes ‘disguised’ as nationality.

D. Social Background

One trait that the majority of those interviewees who did find themselves in a precarious situation as a result of their posting shared was a disadvantaged social background in the ‘home’ country. Most of those research participants had either worked in low-income jobs in the ‘home’ state, or had been unable to find employment due to a lack of opportunities in a given geographic area, a criminal record etc. In contrast, the interviewed ‘white-collar’ posted workers, who generally could not be classified as precarious, tended to be highly skilled university graduates, fluent in a number of foreign languages, and hailed from developed urban environments. In light of this evidence, it could be argued that another vulnerability predisposing posted workers to precarity is their social class, construed within its contemporary, postmodern meaning proposed by authors such as Standing, as discussed in Chapter 1.⁴¹ It appears that those posted workers who, for various reasons, are not in a position to avail of adequate job opportunities in the ‘home’ country are more willing to accept poor working conditions abroad and, thus, their posting further perpetuates their precarity.

³⁹ David Lockwood, ‘Civic Integration and Class Formation’ (1996) 47(3) Br J Sociol 531.

⁴⁰ Godfried Engbersen, Arjen Leerkes, Peter Scholten and Erik Snel, ‘The Intra-EU Mobility Regime: Differentiation, Stratification and Contradictions’ (2017) 5(3) Migration Studies 337, 344-345. See further Lydia Morris, *Managing Migration: Civic Stratification and Migrants' Rights* (Psychology Press 2002).

⁴¹ Chapter 1, s IV A. See Guy Standing, *The Precariat: the New Dangerous Class* (2nd edn, Bloomsbury 2020). See also Anna Matyska, ‘Transnational Contract Work and the Remaking of Class Among Polish Workers in Construction and Shipyards: Between Collective Subjugation’ (2018) 4 Kultura i Społeczeństwo 133, as discussed in Chapter 4, s I B.

III. Evaluation of the Definition of Precarious Work Against the Interview Findings

To suit the reality of postmodern employment relationships, a flexible approach to defining precarity, originally proposed by Rodgers and Rodgers and further advanced by Countouris⁴² and Kalleberg,⁴³ was followed in this research. The resulting definition consisted of five elements, four of which were identified by Rodgers and Rodgers. Those four elements are: firstly, the degree of certainty of continuing work; secondly, control over the working conditions (in the context of bargaining power); thirdly, labour law and social security protections; and fourthly, income level.⁴⁴ The fifth component of precarious work, added to the Rodgers and Rodgers' definition based on Kalleberg's contribution, is the worker's subjective perception of their working arrangement. The resulting definition, combining insights from the above authors, was subsequently employed to test the initial hypothesis that the posting of workers was a working arrangement resulting in precarity.⁴⁵

With regard to the five elements of precarious work, the evidence gathered from the interviews has shown that the posting of 'blue-collar' workers may display all five elements constituting the working definition of precarity.⁴⁶ Firstly, as the posting arrangement is, by definition, a fixed-term contract, the degree of certainty of continuing work upon the contract's expiry is low.

Secondly, posted workers in the 'blue-collar' subcategory generally have a small amount of control over their working and living conditions. Not only are they not in a position to negotiate the terms of their contract prior to posting, but also, once posted to the 'host' Member State, they rarely interact with local trade unions or avail of their assistance.⁴⁷

⁴² Countouris (n 20) 22, as discussed in Chapter 1, s III B.

⁴³ Kalleberg, *Precarious Lives. Job Insecurity and Well-Being in Rich Democracies* (Polity Press 2018) 75, as discussed in Chapter 1, s III C.

⁴⁴ Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe* (ILO 1989), as discussed in Chapter 1, s III A.

⁴⁵ Chapter 1, s III D.

⁴⁶ See also Chapter 5, Conclusion.

⁴⁷ See Chapter 4, s I B.

Thirdly, it could be argued that posted workers do not enjoy appropriate employment law and social security protection. The worker protection aspect of the EU framework has improved over time and, as has been discussed in Chapters 2 and 3, the 2014-2018 reforms have gradually transformed the PWD into a more worker-oriented measure. However, data gathered from the interviews suggests that existing legislation is still deficient and unsatisfactory with respect to safeguarding posted workers' social rights. Further possible amendments of the EU legal framework will be considered below.

Fourthly, postings in the 'blue-collar' subcategory can also be characterised as low-income jobs, both objectively and relatively. Objectively, because wages in occupations relying primarily on physical labour tend to be rather low for all workers, regardless of whether they are posted workers or nationals of the receiving country. And relatively, given the wage inequality between posted and local workers that the PWD had allowed for until the 2018 reform which has introduced the principle of 'equal pay for equal work' at the same place.⁴⁸

The fifth criterion focusing on the worker's subjective perception of their has also been present in the interviews with 'blue-collar' research participants. On this note, the interviewees raised a number of issues through which they have experienced precarity during their posting(s), such as uncertainty about their future pension, poor conditions of accommodation and discrimination in the 'host' state(s).⁴⁹

When confronted with the empirical data gathered in this project, the above definition of precarious work generally proved suitably capacious. Accordingly, the majority of legal issues stemming from either the design of the PWD framework or its enforcement fell within the scope of the third element of the definition concerning labour law and social security protection. Furthermore, the fifth, subjective element provided additional flexibility to encompass a number of different factors affecting the interviewees' perception of their posting experience, such as the negative impact on personal relationships, the sense of isolation and feeling unwelcome in the 'host' state.

One type of research findings that is not directly linked to any of the five elements of the above definition, yet felt relevant in the context of this study and was, consequently

⁴⁸ Directive 2018/957, Recital 6 and art 1(2) (a). See Chapter 3, s II.

⁴⁹ See further Chapter 5.

discussed both in relation to ‘blue-collar’⁵⁰ and ‘white-collar’⁵¹ postings, were the participants’ motivations behind pursuing a posting contract. It appears that those workers who were exposed to precarity had decided to seek work abroad due to the lack of suitable alternatives in the sending country. Those were the participants who, for example, had lost a permanent job at a time when unemployment rates in the ‘host’ state were high or when they were approaching retirement age, who originated from a disadvantaged area or had a criminal record. While they opted for posted work voluntarily and had not by any means been coerced to do so, effectively they had no choice.

Conversely, among those interviewees who did not experience precarity, notably but not exclusively in the ‘white-collar’ subcategory, motivations behind pursuing posted work were entirely different, and often involved elements of curiosity, adventure and the desire to learn new skills described by one research participant as ‘horizontal development’ that did not always lead to career progression upon return to the ‘home’ country. While the workers’ motivation proved an important factor in this particular project, it does not mean that it should be considered an indispensable element of precarious work overall. Notably, a high degree of precarity seems to be common in the creative industries where careers are pursued for reasons such as personal satisfaction, and not the lack of alternatives.⁵²

⁵⁰ Chapter 5, s X.

⁵¹ Chapter 6, s IV.

⁵² See Ian Greer, Barbara Samaluk and Charles Umney, ‘Better Strategies for Herding Cats? Forms of Solidarity among Freelance Musicians in London, Paris and Ljubljana’ in Virginia Doellgast, Nathan Lillie and Valeria Pulignano (eds), *Reconstructing Solidarity. Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* (OUP 2018); Wike Been and Marten Keune, ‘That is Just Part of Being Able to Do My Cool Job: Understanding Low Earnings but High Job Satisfaction in the Creative Industries in the Netherlands’ in Pulignano and Frank Hendrickx, *Employment Relations in the 21st Century. Challenges for Theory and Research in a Changing World of Work* (Wolters Kluwer 2020); David Chafe and Lisa Kaida, ‘Harmonic Dissonance: Coping with Employment Precarity among Professional Musicians in St John’s, Canada’ (2020) 34(3) *Work Employ Soc* 407.

IV. Assessment of the Revised EU Legal Framework Through the Lens of the Qualitative Data

Between 2014-2018 the EU legal framework on the posting of workers has undergone two reforms. This research project, while borrowing perspectives and methods from social sciences, was mindful of the recent transformation of the EU legal framework and sought to examine the impact of the reforms on posted workers' working conditions and the experience of precarity. In particular, the fieldwork conducted between 2019-2020 was aimed at evaluating the impact of the 2014 Enforcement Directive which, at the time of the interviews, had been fully implemented on national level.⁵³ At the same time, it has to be borne in mind that like the majority of qualitative studies, this research is not statistically representative and its findings with regard to the impact of the Enforcement Directive are by no means generalisable to the entire population of posted workers across the EU.⁵⁴

A. Positive Impact of the Enforcement Directive on the Posted Workers' Working Conditions

The interviewees' experiences with the Enforcement Directive in countries such as Austria, Poland and Ireland have been largely positive. While not all of the research participants were aware of the legal changes on the EU level, for the interviewed workers carrying out their work in Austria, the year 2016 in which the Enforcement Directive was implemented marked a fresh start and a move away from 'semi-legal' employment.⁵⁵ In this vein, among the most beneficial – from the workers' point of view – changes have been the introduction of a mechanism tackling the 'letterbox companies' and a new system of inspections and penalties for infringement of the PWD.⁵⁶

⁵³ The deadline for implementation of the Enforcement Directive elapsed in June 2016. See Directive 2014/67, art 23(1).

⁵⁴ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 934. See Chapter 4, s III A.

⁵⁵ Chapter 5, s I.

⁵⁶ Chapter 3, s I B. See also Chapter 5, s I.

Some of the interviewed posted workers, prior to the 2014 reform had carried out work for ‘letterbox companies’, where there was no genuine link between the employer and the country in which they were officially registered.⁵⁷ Interviews have shown that such companies frequently offered posted workers contracts governed by the laws of those Member States which had the lowest possible employee costs, even when neither the employer, nor the worker had any links to those countries.⁵⁸ To address this issue, the Enforcement Directive has introduced a non-exhaustive list of elements to be taken into consideration by the national competent authorities in order to assess whether a given company is genuine.⁵⁹ The system of factual checks and controls introduced by the Enforcement Directive has improved detection of the various breaches of the PWD committed by the posting companies which often revolve around non-compliance with the ‘nucleus’ of mandatory rules of the ‘host’ state.⁶⁰ Following the 2014 revision, employers can be fined for infringement of the PWD,⁶¹ and while the amounts of penalties vary across the Member States, the system of fines has given the PWD the ‘teeth’ its original 1996 version lacked.⁶²

Overall, feedback from research participants indicates that the Enforcement Directive, a highly technical piece of legislation adopted with much less controversy than the subsequent 2018 reform, has improved the enforcement of posted workers’ rights.⁶³ This might be viewed as a remarkable example of ‘law in action’, and of direct impact of EU law, as transposed by the Member States, on people’s lives and working conditions in Europe. Furthermore, the 2014 Directive will be instrumental in enforcing the changes to the substance of rights guaranteed for posted workers that have been introduced by

⁵⁷ See Joanna Ryszka, “‘Social Dumping’ and ‘Letterbox Companies’ – Interdependent or Mutually Exclusive Concepts in European Union Law?” (2016) 36 *PYIL* 209; Thomas Hastings and Jan Cremers, ‘Developing an Approach for Tackling Letterbox Companies’ (Seminar of the European Platform Tackling Undeclared Work: ‘How to Identify and Tackle Fraudulent Letterbox Companies’, Brussels, November 2017); Patrícia Šimurková and Miloš Poliak, ‘Identification of Letterbox Companies in the Road Transport Sector’ (2019) 40 *Transportation Research Procedia* 1184, as cited in Chapter 3, s I B 3.

⁵⁸ See also Chapter 5, s I A.

⁵⁹ Directive 2014/57, art 4. See also Chapter 3, s I B 3.

⁶⁰ Directive 2014/57, art 7(6). See also Chapter 3, s I B 5.

⁶¹ Directive 2014/57, art 13(2). See also Chapter 3, s I B 8.

⁶² See Commission, ‘Report on the Application and Implementation of Directive 2014/67/EU’ (2019) COM(2019) 426 final, 19.

⁶³ See Chapter 5, s I.

Directive 2018/957. The latter reform has considerably shifted the framing of the PWD by emphasising its worker protection aspect, in line with other initiatives put forward as part of the European Pillar of Social Rights.⁶⁴

B. Shortcomings of the Enforcement Directive: Subcontracting Liability and the Right to Redress

While the 2014-2018 reforms have been a step towards improving the situation of posted workers, data gathered in the course of this project have confirmed that legal issues revolving around the posting of workers in the EU persist.⁶⁵ With regard to the Enforcement Directive, the two least satisfying aspects of the reform, as indicated in the interviews, appear to be the regulation of subcontracting liability⁶⁶ and the defence of rights for posted workers.⁶⁷ On one hand, the 2014 Directive has brought improvements in the above matters, as prior to the reform the PWD had not envisaged any specific mechanisms, neither for extending the liability for infringements, nor for redress. On the other hand, however, evidence stemming from the interviews shows that in many practical situations experienced by posted workers the existing regulation of the above issues proves insufficient.

Regarding the defence of rights, Article 11 of the Enforcement Directive has provided for facilitation of complaints lodged by posted workers. The 2014 revision has guaranteed protection against ‘any unfavourable treatment’ for those posted workers who initiate judicial or administrative proceedings against the employer,⁶⁸ yet research participants have identified a practical difficulty in the lack of effective protection against retaliation by the employer. Notably, interviewees admitted to being reluctant to file a complaint for fear of retaliation, not only on the part of their employer, but also any potential future employers.⁶⁹

⁶⁴ See Chapter 3, s II.

⁶⁵ See Chapter 5, s II.

⁶⁶ Directive 2014/67, art 12.

⁶⁷ *ibid*, art 11.

⁶⁸ *ibid*, art 11(5). See also Chapter 3, s I B 6.

⁶⁹ See Chapter 5, s I B.

Another issue which, according to the interviews, weakens the posted workers' right to redress is the regulation of subcontracting liability introduced in Article 12 of the Enforcement Directive. Again, this provision can be considered another step toward better enforcement of the PWD as the use of the latter chains are a popular practice in the construction industry where posted workers are commonly found.⁷⁰ The Enforcement Directive has imposed an obligation onto the Member States to ensure *at least* that posted workers in the construction sector can hold the contractor of which their employer is a direct subcontractor, liable for recovering outstanding wages, in addition to or in place of the employer.⁷¹ This basic construction introduced by the 2014 Directive can be extended in the national legislation in three different ways: firstly, outside the construction sector; secondly, onto contractors in the subcontracting chain other than the direct contractor; and thirdly, to allow to recover more outstanding wages than merely the minimum wage of the 'host' country.⁷²

However, not all of the Member States have availed of the option to broaden the scope and range of the chain liability regime outside the basic option provided for in the Enforcement Directive.⁷³ Furthermore, the subcontracting liability mechanism in the Enforcement Directive is further diluted by a due diligence exception thanks to which contractors may be acquitted from liability if they prove to have fulfilled due diligence obligations.⁷⁴ Consequently, interviews conducted in this project have shown that limiting liability in any of the above three ways significantly weakens the right to redress for posted workers.⁷⁵ The data suggests that only an extensive subcontracting liability regime can improve the enforcement of posted workers' rights in practice.

⁷⁰ Lillie, 'Subcontracting, Posted Migrants and Labour Market Segmentation in Finland' (2012) 40(1) *Br J Ind Relat* 148; Lillie and Ines Wagner, 'Subcontracting, Insecurity and Posted Work: Evidence from Construction, Meat Processing and Ship building' (ETUI 2015); Vladimir Bogoeski, 'Chain Liability as a Mechanism for Strengthening the Rights of Posted Workers: The German Chain Liability Model' (Conference: Protecting Mobility through Improving Labour Rights Enforcement in Europe, May 2017).

⁷¹ Directive 2014/67, art 12(2).

⁷² *ibid.* See also Chapter 3, s I B 7.

⁷³ See Commission, 'Report on the Application and Implementation...' (n 62) 15-17.

⁷⁴ Directive 2014/67/EU, art 12(5).

⁷⁵ Chapter 5, s II.

C. Potential Practical Problems Stemming from the Application of Directive 2018/957

With regard to the 2018 reform of the PWD, it has to be emphasised, again, that the empirical phase of this project ended prior to the deadline for domestic implementation of Directive 2018/957.⁷⁶ Therefore, any information on potential practical issues stemming from the new legislation given by research participants, such as legal practitioners and representatives of national competent authorities, was based on their prior experience with the PWD. In this vein, two aspects of the 2018 Directive related to the modification of the ‘nucleus’ of mandatory rules were identified in the interviews as potentially problematic when applied in practice.⁷⁷

Firstly, with regard to the requirement of ensuring that posted workers’ remuneration is equal to that received by other workers in the ‘host’ country,⁷⁸ the interviewees pointed out a practical difficulty in finding an adequate comparator.⁷⁹ This is particularly relevant in non-unionised working environments, such as the IT sector, where in the absence of a collective agreement contracts are individually negotiated and often contain confidentiality clauses preventing employees from sharing the salary amount. Furthermore, the equal remuneration criterion may be regarded as a relative one, for there is a number of valid reasons justifying a difference in pay between two workers performing a similar job. One of them is a longer track record with a given employer, while another one is a unique skill which, although not essential for the job, might be viewed as an asset. In view of this practical difficulty to find a comparator, one of the interviewed lawyers said that, as the deadline for implementation of Directive 2018/957 was approaching, one of the largest law firms in one of the Member States decided to advise all posting companies against complying with the equal remuneration requirement.⁸⁰

⁷⁶ The deadline for implementation of Directive 2018/957 elapsed in July 2020. See Directive 2018/957, art 3(1).

⁷⁷ See also Chapter 5, s II.

⁷⁸ Directive 2018/957, art 1(2)(a). See further Chapter 3, s II D 3.

⁷⁹ See further Chapter 6, s II.

⁸⁰ *ibid.*

The second practical problem related to the changes in the ‘nucleus’ of mandatory rules of the ‘host’ state is the national enforcement of the provision concerning reimbursement / allowances for work-related expenses such as travel, board and lodging for posted workers.⁸¹ As discussed in Chapter 3, it appears this applies solely to those Member States which already have statutory rules reimbursement of work-incurred expenses in their national legislation.⁸² Prior to the implementation of Directive 2018/957, the approach to such expenses varied to a great extent among the Member States,⁸³ which was confirmed also by the interviews conducted in the course of this project.⁸⁴ In Ireland, for example, reimbursement of work-related expenses is a contractual right as opposed to a statutory one and, therefore, it appears that posted workers in Ireland cannot rely on this provision of the revised PWD.

V. Suggested Further Amendments of the PWD to Ensure Better Protection of Posted workers

A. A Rights-based Argument Against Repealing the PWD

The empirical evidence stemming from this project suggests that the 2014-2018 reforms of the PWD have been a partial success, and that the EU legal framework continues to pose practical challenges to workers and the competent national authorities. When contemplating potential legal pathways for addressing the many issues faced by posted workers, it might be tempting for a labour lawyer to consider abolishing the PWD altogether. While the above mentioned practical issues around the enforcement leading to legal uncertainty for workers and employers could serve as one argument, another argument that could be formulated in favour of repealing the PWD is a theoretical one.

As has been discussed in Chapter 2, one criticism of the 1996 Directive was that by creating a separate regime for posted workers, the EU deprived them of the much

⁸¹ Directive 2018/957, art 1(2)(a). See also Chapter 3, s II D 3.

⁸² See Chapter 3, s II D 3.

⁸³ See further Zane Rasnača, ‘Reimbursement Rules for Posted Workers: Mapping National Law in the EU28’ (ETUI 2019).

⁸⁴ See Chapter 6, s I.

broader scope of protection that they would have enjoyed under the regime of the free movement of workers.⁸⁵ Under Article 45 TFEU, discrimination on the grounds of nationality is prohibited with respect to workers who move and take up employment within the Union. Regulation 492/2011/EU further specifies that EU citizens have the right to equal treatment with regard to all of their working conditions including remuneration, but also tax, social security, collective rights etc.⁸⁶ But the posting of workers is exempt from Article 45 TFEU and, instead, intrinsically linked to the regime of the free movement of services (Article 56 TFEU).⁸⁷ The EU's approach placing posted workers within the realm of the free movement of services follows the stance adopted by the CJEU in the 1990s, notably in case *Rush Portuguesa*.⁸⁸ From the point of view of labour law, it could be argued that the PWD has an inbuilt unfair dimension leading to inequality between posted workers and those types of EU migrants that can enjoy the protection of Article 45 TFEU.⁸⁹ In this light, repealing the PWD would, in theory, enable those workers, currently known as posted workers, to rely on the principle of the free movement of workers.

However, there is a risk that the prospect of repealing the PWD, at first sight promising, might in practice cause more damage than good to the workers who temporarily carry out work on the territory of another Member State. It is essential to remember that these workers are employed by a service provider established in the sending Member State. If the PWD was to be repealed, those workers' contracts would be governed by the Rome I Regulation, which stipulates that, in the absence of choice, a contract for the provision of services shall be governed by the law of the country where the service provider has their habitual residence.⁹⁰ Article 4(2) of Rome I constitutes an

⁸⁵ See Chapter 2, s III. See further Herwig Verschueren, 'Cross-Border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law' (2008) 24 IJCLIR 167.

⁸⁶ Council and Parliament Regulation 492/2011 (EU) on freedom of movement for workers within the Union [2011] OJ 2011 L 141/1, arts 7-9. See Chapter 2, s III B.

⁸⁷ See further Paul Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 CML Rev 571. See also Chapter 2, s III.

⁸⁸ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-01417. See further Chapter 2, s I A.

⁸⁹ See Verschueren (n 85) 177. See also Chapter 2, s III B.

⁹⁰ Council and Parliament Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, art 4(1). See further Chapter 2, s III C.

exception where it is clear from all the circumstances that the contract is manifestly more closely connected with the other country. If the law cannot be determined using these rules, the contract shall be governed by the law of the country with which it is most closely connected.⁹¹

On one hand, there is strong evidence that the posting arrangement has often been abused in order to circumvent the law, such as in the case of the ‘letterbox companies’, and the connection to the service provider’s ‘home’ state can be fictitious. Furthermore, interview findings have shown that the third scenario envisaged by Article 1(3) of the PWD as revised by Directive 2018/957,⁹² whereby workers are posted via a temporary work agency established in the sending country,⁹³ is often solely driven by wage competition.⁹⁴ While agencies are not ‘letterbox companies’ as such, they act merely as intermediaries, and the posted workers’ employers are, in fact, user undertakings established in the ‘host’ state.

On the other hand, the interviews have shown that, on many occasions, the workers have genuine links both to the employer established in the ‘home’ state, and to that state. In some cases, assignments carried out abroad are incidental to the workers’ professional activity based predominantly in the ‘home’ country. In this vein, it seems that if the PWD was repealed, the decision as to the choice of law would remain within the sphere of private international law, which could lead to a great deal of legal uncertainty for the workers at issue.

The above problem could possibly be addressed by amending the Rome I Regulation and, potentially, other secondary EU legislation, such as Regulation 492/2011, in order to extend the scope of Article 45 TFEU onto those workers currently

⁹¹ See Chapter 2, s III C. See further Mijke Houwerzijl and Verschuere, ‘Free Movement of (Posted) Workers and Applicable Labour and Social Security Law’ in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (Intersentia 2019); Aukje van Hoek and Houwerzijl, ‘Where do EU Mobile Workers Belong, According to Rome I and the (E) PWD?’ in Verschuere (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong Studies* (Hart Publishing 2016).

⁹² Directive 2018/957, art 1(1)(c). See also Chapter 3, s II D 5.

⁹³ Directive 96/71/EC, art 1(3) (c).

⁹⁴ See Chapter 5, s IV.

known as ‘posted’.⁹⁵ This would require further legislative reforms but, more importantly, it seems that this would come with a risk to ensuring the enforcement of rights of those workers who only temporarily carry out their work in another Member State. The 2014 Enforcement Directive, drawing from years of practice (and, often, malpractices) in applying the PWD, has introduced a number of mechanisms in order to safeguard the rights of posted workers in the EU. Even though these rights are presently limited, thus creating an inequality between posted workers and local workers in the ‘host’ country, the 2014 Directive has equipped the Member States with tools to better track and combat fraud. In particular, postings have to be declared to the competent authorities in the receiving state, which enables the latter to keep a close eye at certain workplaces, carry out inspections and, in the case of violations, issue fines to employers.⁹⁶

Of course, should the workers currently classified as ‘posted’ fall within the scope of Article 45 TFEU, Member States could still carry out factual checks at building sites. Yet, the existing enforcement mechanism with the declaration obligation allows the competent authorities to better locate particular premises and employers who hire workers who might be particularly prone to precarity. In other words, the existence of a separate regime for posted workers with additional information obligations conferred upon posting companies allows national authorities to identify vulnerable workers and, through close supervision, ensure better protection of their rights. In this vein, it appears that maintaining a similar level of protection of the category of labour migrants currently known as posted would require distinguishing them as a subcategory in Regulation 492/2011 and, subsequently, significantly amending Directive 2014/54/EU on the measures facilitating the exercise of migrant workers’ rights to include those mechanisms tailored for posted workers in the Enforcement Directive.⁹⁷

Consequently, the PWD, as a *lex specialis* to the Rome I Regulation, could be viewed as a tool differentiating posted workers from other labour migrants not to discriminate against them, but rather for the purpose of better safeguarding their rights.

⁹⁵ See also Marco Rocca, ‘Extending the Principle of Equal Treatment to Posting of Workers’ (GUE/NGL European Parliamentary Group 2020) 31-35.

⁹⁶ Directive 2014/67, art 9(1) (a); Recitals 24-25. See Chapter 3, s I B.

⁹⁷ Council and Parliament Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8. See also Chapter 3, s I C.

The latter aspect has already been spelled out in the amended Article 1 of the PWD which now includes references to the protection of workers during their posting and to the fundamental rights to strike and take collective action.⁹⁸ Yet, it seems that in order to give full effect to the revised Article 1, further amendments of the PWD would be necessary.

B. Principle of Equal Treatment for Posted Workers Instead of the ‘Nucleus’ of Mandatory Rules of the ‘Host’ State

As discussed above, data gathered from the interviews conducted in this project indicates that the current regulation of the posted worker’s status is insufficient. This chimes with the aforementioned scholarly literature emphasising the inequality between migrant workers whose status is regulated under the free movement of workers framework and posted workers, stemming from the narrow ‘nucleus’ of rights granted in Article 3(1) PWD. In this light, it could be argued that the simplest solution to address this inequality would be to abandon the ‘nucleus’.⁹⁹ A similar approach was pursued by Ireland in its implementation of the original 1996 Directive which states that a posted worker shall be treated in the same manner as ‘any other type of employee’.¹⁰⁰ Since Ireland did not narrow the protection to the ‘nucleus’, but extended all of its existing legislation in the field of employment onto posted workers, the discriminatory dimension of the PWD is not present in the Irish transposition.¹⁰¹

The 2018 revision has, in fact, already partially taken the PWD in this direction with respect to those so-called ‘long-term postings’ exceeding 12 (or 18) months. According to Directive 2018/957, workers whose posting has surpassed the above period shall be guaranteed, on the basis of equal treatment, all the applicable terms and conditions of employment of the ‘host’ state, laid down by the law or collective

⁹⁸ Directive 2018/957, art 1(1) (a) and (b). See also Chapter 3, s II D 2.

⁹⁹ See also Rocca (n 95) 27-30.

¹⁰⁰ Protection of Employees (Part-Time) Work Act 2001, s 20. See also Michael Doherty, ‘Posting of Workers Before Irish Courts’ in Rasnača and Magdalena Bernaciak (eds), *Posting of Workers Before National Courts* (ETUI 2020).

¹⁰¹ See Joint Committee on European Affairs, Seventh Report *The Lisbon Treaty & Workers’ Rights* (2009), as cited in Frances Meenan, *Employment Law* (Round Hall 2014) 169-170.

agreements.¹⁰² Compared to ‘short-term’ posted workers who can only rely on the rights enshrined in the ‘nucleus’, ‘long-term’ posted workers enjoy such additional labour laws of the ‘host’ state as protection from unfair dismissal or the right to redundancy or severance pay upon termination of employment.

It appears that the same regulation could successfully apply to all postings irrespective of their duration, as the 12-month time limit to applying the ‘nucleus’ (which upon the employer’s motivated notification can be extended to 18 months¹⁰³) is arbitrary and introduces an artificial divide. Extending the principle of equal treatment onto all postings, regardless of their duration, would substantially enhance the rights of posted workers while creating a level playing field for all workers in a given industry and country or area. In this vein, such amendment would conform with the two-fold aim of the PWD by ensuring both better labour law protection of posted workers and fairer competition between service providers established in different Member States. One possible criticism is that business associations could argue that the requirement to comply with the entire labour legislation of the ‘host’ state is too onerous in respect of genuinely short postings. However, in such cases service providers would be able to avail of the already existing exceptions from the PWD linked to the duration of postings,¹⁰⁴ such as the mandatory exemption of the initial assembly and/ or first installation of goods,¹⁰⁵ and from the option of the Member States to exempt postings not exceeding one month from certain aspects of the ‘host’ country’s legislation which could also be preserved.¹⁰⁶

Another possible criticism of this solution is more legalist and lies in the PWD’s legal basis linked to the free movement of services.¹⁰⁷ As discussed in Chapter 2, the ‘*Laval* quartet’ has proved that such positioning of the PWD within the EU legal order requires every worker-oriented measure to be balanced against the principle of the free

¹⁰² With the exception of procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses; supplementary occupational retirement pension schemes, as stipulated in Directive 2018/957, art 1(2) (b). See Chapter 3, s II D 4.

¹⁰³ Directive 2018/957, art 1(2)(b).

¹⁰⁴ See further Chapter 2, s IV A.

¹⁰⁵ Directive 96/71/EC, art 3(2), and Recital 15.

¹⁰⁶ *ibid*, art 3(3), art 3(4), art 3(5), and Recital 16.

¹⁰⁷ See further Chapter 2, s III.

movement of services and pass a strict proportionality test.¹⁰⁸ This difficulty has since resurfaced in Hungary and Poland's actions for judicial review of Directive 2018/957¹⁰⁹ in which the applicants contended that the 2018 revision was a disproportionate restriction on Article 56 TFEU, and the CJEU struggled to build a legally convincing argument in response to this challenge.¹¹⁰ On this note, Rocca argues that an amendment extending the principle of equal treatment onto posted workers would require changing the legal basis of the PWD from the free movement of services to the free movement of workers,¹¹¹ a move which would undoubtedly prove highly controversial in practice given the political context of the posting of workers.

It has to be emphasised that while such an amendment would reduce the inequalities between posted and local workers, it would not eliminate them, for it would solely concern terms of conditions of employment, and not matters such as tax residence and social security, both of which are governed by separate legal regimes. In terms of the former aspect, there is neither a special taxation regime for posted workers, nor harmonisation of personal income tax on EU level.¹¹² With regard to social security, in accordance with Regulation 883/2004 on the coordination of social security systems, posted workers whose contracts do not exceed 24 months usually remain subject to the social security system of the 'home' state.¹¹³ This rule reflects the temporary nature of the posting arrangement and the assumption that workers will return to their country of

¹⁰⁸ See further Chapter 2, s V See also cases C-165/98 *Criminal proceedings against André Mazzoleni and another* [2001] ECR I-2213, para 25; *Laval*, para 94. See also C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779, para 46.

¹⁰⁹ Cases C-620/18 *Hungary v Parliament and Council* EU:C:2020:1001; C-626/18 *Republic of Poland v Parliament and Council* EU:C:2020:1000. See further Chapter 3, s II C 3. See further Verschueren, 'The CJEU Endorses the Revision of the Posting of Workers Directive' (2021) ERA Forum.

¹¹⁰ *Hungary v Parliament and Council* [2020], para 48; *Poland v Parliament and Council* [2020], paras 51-52. See Chapter 3, s II D 1.

¹¹¹ See also Rocca (n 95) 26-27.

¹¹² See further Chapter 6, s III.

¹¹³ Council and Parliament Regulation (EC) No 883/2004 on the coordination of social security systems [2004] OJ L 166/1, arts 12-13. See also Council and Parliament Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284. See Pennings, 'Posting' in *European Social Security Law* (6th edn, Intersentia 2015). See further Matteo Bottero, 'Coordination of Social Security' in *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition* (Wolters Kluwer 2021).

origin upon the conclusion of the service provision. Indeed, the interviews conducted in this project have confirmed that when it comes to temporary work, it is usually in the worker's best interest to ensure continuous social security insurance in the 'home' country where the worker and their family primarily reside. Otherwise, workers who have spent a number of years outside the social security system of the country of primary residence, and particularly those unfortunate to have worked in a 'letterbox company', risk not qualifying for a decent state pension in that country.¹¹⁴

By the same token, the fact that workers carrying out postings not exceeding 24 months remain within the social security system of the country of origin is not without negative implications, both on ensuring fair competition between service providers and on the posted workers' social benefits. As regards the fair competition aspect, one observation that must be noted is that posted workers' social security contributions are paid in the sending state, therefore leaving the door open for service providers to compete on social security costs. The EU framework on the posting of workers allows undertakings to gain a competitive advantage by hiring posted workers from a country in which social security contributions are lower. Such practices may be considered as veering into the 'social dumping' territory.¹¹⁵

As for negative implications of the current social security arrangement on posted workers, one complication is access to sick leave for those workers who become physically unable to carry out work while residing in the 'host' state. The right to sick pay is not currently included in the 'nucleus' of mandatory rules laid down in Article 3(1) of the PWD.¹¹⁶ But even if all the applicable terms and conditions of employment were extended onto posted workers, as has been proposed above, ensuring the right to sick pay for posted workers physically residing in the 'host' state would be problematic. This is due to the fact that the right to sick pay is intrinsically linked with social security

¹¹⁴ See further Chapter 5, s VII.

¹¹⁵ The EU is currently considering a reform of the social security coordination Regulations. See Commission, 'Proposal for a Council and Parliament Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 COM(2016) 815 final. See further Bottero (n 113) 157-163. For alternative solutions, see Rocca (n 95) 36-42.

¹¹⁶ See further 'Note on Posted Workers and the COVID-19 Outbreak' (ETUC 2020) <https://www.etuc.org/en/document/etuc-note-posted-workers-and-covid-19-outbreak> accessed 7 July 2021.

and conditional on the payment of contributions by the employer, and the latter are paid in the ‘home’ country. This weakness of the posting arrangement related to social security has further been exposed by the COVID-19 pandemic when workers who became unable to work were not eligible for the pandemic emergency payments in the ‘host’ state.¹¹⁷ The European Commission’s guidelines issued in this matter did not contain any information on social security entitlements of those posted workers who contracted the coronavirus and were thus unable to carry out work in the receiving country¹¹⁸. It would, therefore, appear that ensuring adequate social security protection for posted workers, including access to sick pay, would require closer cooperation between the social security institutions in the Member States.

C. Mandatory Extensive Subcontracting Liability Regime and Guaranteeing Rights for Subcontracted Workers

Another possible amendment to the Enforcement Directive which could facilitate defence of rights for posted workers would be to render the extended subcontracting liability regime mandatory for all Member States. The current wording of Article 12 of the Enforcement Directive imposes merely a baseline chain liability mechanism allowing posted workers in the construction sector to hold their employer’s direct subcontractor liable for outstanding wages. Extending the subcontracting liability is optional and, as has been discussed above, only some Member States have availed of this option. Evidence from the qualitative data gathered in the course of this project indicates that only a compulsory chain liability encompassing all subcontractors, in all sectors of employment, and all the rights stemming from the contractual relationship would guarantee adequate protection of posted workers in subcontracting chains.¹¹⁹

Furthermore, workers in subcontracting chains would greatly benefit from a provision that would guarantee them the same terms and conditions of employment,

¹¹⁷ See also Rasnača, ‘Essential But Unprotected: Highly Mobile Workers in the EU During the Covid-19 Pandemic’ (ETUI Policy Brief N°9/2020).

¹¹⁸ Commission, ‘COVID-19 Information for Frontier Workers and Posted Workers’ (2020) <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=9630> accessed 5 August 2021.

¹¹⁹ See Chapter 5, s II.

including remuneration, as those required for those posted workers hired directly by the main contractor, not unlike the solution proposed in the 2016 draft of Directive 2018/957 which was ultimately abandoned.¹²⁰

To recapitulate, on the basis of the qualitative interviews, this research proposes two changes to the EU legal framework on the posting of workers. The first suggested amendment is to remove the ‘nucleus’ of mandatory rules of the ‘host’ state from the PWD and, instead, extend the current regulation of ‘long-term’ postings onto all postings with the exclusion of the existing statutory exemptions. This might reduce the inequalities between posted and local workers and, in line with the two-fold aim of the Directive, create a more level playing field for all service providers in the EU. The second proposed revision introduce changes aiming at further extending the liability regime in subcontracting chains. Yet, it has to be borne in mind that even the most perfect legal regulation, and the above proposed reforms are far from perfect solutions, would not entirely remedy the problem of precariousness among posted workers.

VI. Need for Adequate Enforcement of the PWD Framework in Reducing the Risk of Precarity

The interviews conducted in this project have shown that the enforcement of the PWD regime is a key factor in order to improve the protection of posted workers’ rights, hence the important role of the mechanisms introduced by the 2014 Enforcement Directive. Ensuring effective application of any legislation in the field of employment in an ideal scenario would require simultaneous engagement from the following three groups: the state, the trade unions and the employers. Doellgast, Lillie and Pulignano, who have created a model of a ‘virtuous circle’ of reducing precarious work, would add to the above three groups another one: active engagement of the workers themselves.¹²¹ This is a valid statement in ordinary workplace relationships, yet in the context of posted workers or, broadly speaking, vulnerable workers, worker engagement is substantially

¹²⁰ Commission, ‘Proposal for a Council Directive amending Directive 96/71/EC of The European Parliament and of the Council concerning the posting of workers in the framework of the provision of services’ COM (2016) 128 final’, art 1(2) (b). See Chapter 3, ss II B and II D 5. See also case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* EU:C:2015:760.

¹²¹ See further Doellgast, Lillie and Pulignano (n 52) 12-16.

hindered. Therefore, it could be argued that the remaining three groups of actors: authorities, unions and employers have an increased responsibility to safeguard the rights of these workers.

A. Role of the National Competent Authorities

With regard to the EU legal framework on the posting of workers, it could be argued that the Enforcement Directive has to a large extent shifted the burden onto the competent national authorities. In this context, some of the interviewees have spoken enthusiastically and praised the effectiveness of those authorities in Member States such as Austria and Poland. On this note, evidence confirming a high degree of diligence from the competent authorities in certain EU countries stems also from some of the Court of Justice's case law in the field of posted work and social security,¹²² as well from the data gathered by the Commission.¹²³ Nevertheless, it has to be reiterated that this study, like the majority of qualitative projects, is not statistically representative and its findings are not generalisable. Similarly, the most recent case law on the national enforcement of the rules on posted work offers insights mostly from Member States such as Austria and Belgium and, thus, forms only a fragmented picture in which most of the EU-27 states are lacking.

The interviews conducted in this project indicate that the involvement of the national enforcement authorities seems crucial in tackling undocumented postings and 'fictitious' postings of third-country nationals. Particularly the latter problem transpires from the data collected from research participants in Poland, which has allegedly become a 'transit' country for many Ukrainian workers seeking employment in Western Europe. Thanks to the simplified procedure available to nationals from Russia and a number of former Soviet republics in Poland for legalising employment and residence, Ukrainian workers, having spent merely a day in Poland, can be posted to another EU Member State

¹²² See cases C-359/16 *Altun and Others* EU:C:2018:63; C-33/17 *Čepelnik d.o.o. v Michael Vavti* EU:C:2018:896; C-16/18 *Dobersberger v Magistrat der Stadt Wien* EU:C:2019:1110; joined cases C-64/18, C-140/18, C-146/18 and C-148/18 *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei* EU:C:2019:723.

¹²³ Commission, 'Report on the Application and Implementation...' (n 62).

without having to meet that country's immigration law requirements.¹²⁴ It is worth noting that third-country nationals from Ukraine are not genuinely resident in Poland, as the registration of their work and stay has been carried out in bad faith in order to facilitate a 'fictitious' posting to another EU Member State. Negative ramifications of this practice, both for the posting company and the worker, have been discussed in Chapter 5. While the issue of fraudulent posting of third-country nationals has emerged from the interviews conducted in Poland, there is some evidence suggesting that similar practices might occur elsewhere in the EU.¹²⁵

It appears that the enforcement of the PWD framework, particularly in relation to undocumented postings and certain irregularities derived from differences in the national legislation of the Member States, would benefit from tighter cross-border cooperation of the enforcement authorities.¹²⁶ To this end, firstly, the European Platform to enhance cooperation in tackling undeclared work was created in 2016.¹²⁷ Secondly, the European Labour Authority, established in 2019 and expected to reach its full operational capacity by 2024, could play a significant role in improving international cooperation of the national competent authorities responsible for the enforcement of the PWD framework.¹²⁸

B. Role of Trade Unions

As argued above, another group of actors whose engagement is crucial to improve the enforcement of the PWD framework and reduce the precarity of many posted workers are the trade unions. However, as became apparent in *Laval*, the nature of the posting

¹²⁴ Chapter 5, s V.

¹²⁵ See further Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime – Judicialization and the Posting of Third-country Nationals' (2019) 57(6) J Com Mar St 1247; Tonia Novitz and Rutvica Andrijasevic, 'Reform of the Posting of Workers Regime – An Assessment of the Practical Impact on Unfree Labour Relations' (2020) 58(5) J Com Mar St 1325.

¹²⁶ See also case *Altun*.

¹²⁷ See Council and Parliament Decision (EU) on establishing a European Platform to enhance cooperation in tackling undeclared work [2016] OJ L 65/12.

¹²⁸ Council and Parliament Regulation (EU) 2019/1149 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 [2019] OJ L 186/21. See further Chapter 3, s II A.

arrangement underpinned by the two-fold aim of the 1996 Directive has placed the unions in the ‘host’ state in a rather ambiguous and delicate situation towards posted workers.¹²⁹ In the context of posting, the trade unions’ primary concern has traditionally been the protection of local workers from unfair competition. Consequently, the collective action undertaken in Sweden against Laval backfired equally against the Latvian posted workers who as a result of the strike lost their jobs and had to return to Latvia. Furthermore, while the CJEU did recognise the fight against ‘social dumping’ as an overriding reason justifying a restriction Article 56 TFEU,¹³⁰ the strict proportionality test applied by the Court of Justice in *Laval* considerably diminishes the chances of successfully relying upon ‘social dumping’ as an overriding reason in the future.¹³¹ This is yet another reason further complicating the trade unions’ stance towards posted workers.

It appears that this ambiguous position of trade unions in relation to posted workers often meets with distrust from the latter group. As discussed in Chapter 5, posted workers rarely take action in order to recover outstanding remuneration or claim other entitlements.¹³² Wagner suggests that this might be due to the aforementioned ‘dual frame of reference’ employed by posted workers who are aware of the lack of suitable job opportunities in the ‘home’ country and, therefore, concede to substandard working conditions.¹³³ Another reason behind the posted workers’ unwillingness to reach out to trade unions in the ‘host’ state might be the fact that they often originate from Eastern Europe, where the unions have been in deep crisis in the post-communist era, and whose role as the cradle of the Solidarity movement is being continuously undermined.¹³⁴ As union membership and trust in collective bargaining is drastically declining in their

¹²⁹ See further Chapter 2, s V A.

¹³⁰ *Laval*, para 103.

¹³¹ See further Chapter 2, s V A.

¹³² See Chapter 5, s I B. See also Chapter 4, s I B.

¹³³ Wagner, *Workers without Borders. Posted Work and Precarity in the EU* (Cornell University Press 2018) 65. See further Chapter 4, s I B.

¹³⁴ See further David Ost, *The Defeat of Solidarity: Anger and Politics in Postcommunist Europe* (Cornell University Press 2005); Juliusz Gardawski, Mrozowicki and Czarzasty, ‘Historia i Teraźniejszość Związków Zawodowych w Polsce (2012) 34(3) Dialog. Pismo Dialogu Społecznego 3; Vera Trappmann, *Związki Zawodowe w Polsce. Aktualna Sytuacja, Struktura Organizacyjna, Wyzwania* (Friedrich-Ebert-Stiftung 2012).

‘home’ countries, posted workers might not believe that they could get any help from the trade union in the ‘host’ state, and a certain level of mistrust towards them can be understandable.

Another possible conflict area between posted workers and the trade unions was the type of collective agreements recognised by the PWD. In order to apply to posted workers in the construction sector, collective agreements had to be universally applicable, and in the absence of such a system, ‘generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’ and / or ‘concluded by the most representative employers’ and labour organisations at national level and (...) are applied throughout national territory’.¹³⁵ At the same time, in post-crisis Europe there has been a tendency to move away from collective bargaining at these levels, thus, often rendering the access to collective agreements virtually impossible for posted workers.¹³⁶ The fact that collective agreements, for the above reasons, often did not apply to posted workers might have been considered, from the point of view of the unions, as another unfair competitive advantage. Yet, as discussed in Chapter 3, the 2018 reform of the PWD has slightly relaxed the criteria for collective agreements in order to become enforceable onto posted workers and added a reference to the respect for the fundamental rights to strike and take collective action.¹³⁷

Despite some diverging interests, the existing case law and empirical literature prove that there is potential for mutually beneficial cooperation between posted workers and trade unions in the ‘host’ Member States.¹³⁸ Case *Sähköalojen* is one example in which Finnish trade unions reached out to posted workers and, as a result, achieved not only more favourable conditions for the Polish workers at issue, but also a more generous interpretation of the term ‘minimum rates of pay’ at EU level.¹³⁹

¹³⁵ Directive 96/71/EC, art 3(1) read in conjunction with art 3(8) and Annex. See Chapter 2, s V.

¹³⁶ See further Hayes, Novitz and Petra Herzfeld Olsson, ‘Migrant Workers and Collective Bargaining: Institutional Isomorphism and Legitimacy in a Resocialised Europe’ in Countouris and Mark R. Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 464.

¹³⁷ Respectively, Directive 2018/957, art 1(2) (a) read in conjunction with art 1(2) (d), and art 1(1) (b). See further Chapter 3, s II D 2.

¹³⁸ See further Chapter 4, s I B.

¹³⁹ Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* EU:C:2015:86. See further Chapter 3, s III B.

With regard to the union responses to posted workers, Lillie and others have carried out a comparative analysis of approaches adopted by trade unions in Finland, the Netherlands, Germany and the UK.¹⁴⁰ The authors have categorised union responses based on their level of involvement with posted workers ranging from providing information to the workers about their entitlements, through political lobbying and enforcing collective agreements, to monitoring the enforcement of collective agreements on-site. These positive examples of union responses prove that fruitful collaboration between trade unions in the receiving countries and posted workers is indeed possible, albeit with the requirement of some readjustments on the part of the unions. Accommodating posted workers appears to be one of the many challenges for collective bargaining and chimes with the ongoing debate on the role of unions in the evolving world of work and the union response to the rise in nonstandard forms of employment.¹⁴¹

In this vein, given the growing popularity of platform work in the so-called ‘gig economy’, briefly mentioned in Chapter 1, which has in recent years infiltrated many sectors of economy employing casual workers such as passenger transport or deliveries, it is worth reflecting on any potential crossover between platform work and posted work.¹⁴²

With regard to traditional posting, it seems difficult to imagine facilitating postings of individual workers via an online platform that would be compliant with the PWD framework. The very nature of the posting arrangement is such that it requires an intermediary between the worker and the ‘host’ state establishment in the form of a company established in the ‘home’ state that posts workers abroad and (at least formally) remains their employer. Removing that element and replacing it with an online platform that would link individual workers with companies in the receiving countries would be

¹⁴⁰ Lillie, Berntsen, Wagner and Sonila Danaj, ‘A Comparative Analysis to Union Responses to Posted Work in Four European Countries’ in Jens Arnholtz and Lillie (eds), *Posted Work in the European Union. The Political Economy of Free Movement* (Routledge 2020).

¹⁴¹ Doellgast, Lillie and Pulignano (n 52). See further Chapter 1, s II B.

¹⁴² See Valerio De Stefano, ‘The Rise of the Just-in-time Workforce: On-demand Work, Crowdfork, and Labor Protection in the Gig-economy’ (2016) 37(3) *Comp Lab L & Pol’y J*; Michael Doherty and Valentina Franca, ‘Solving the “Gig-saw”? Collective Rights and Platform Work’ (2020) 49(3) *ILJ* 352; David Mangan, ‘Ford, Taylor and the Gig: Workplaces in Transition’ in Pulignano and Hendrickx (n 52); Annika Rosin, ‘Platform Work and Fixed-term Employment Regulation’ (2021) 12(2) *Eur Labour Law J* 156. See also Chapter 1, s II B.

possible, but it would not be posting within the meaning of the PWD. Rather, it would appear that such platforms would facilitate the free movement of workers under the regime of Article 45 TFEU.

As discussed in Chapter 5, an arrangement whereby the presence of an intermediary is no longer necessary, as individuals are able to apply for temporary work directly with foreign employers is gaining in popularity following the PWD reforms and, notwithstanding some social security issues, appears to be more beneficial for the workers than traditional posting.¹⁴³ In such instances, an online platform could potentially replace the existing formal and informal recruitment procedures. It is worth noting that platforms which facilitate finding freelance service providers already exist, for example Upwork, Fiverr, Outsourcely or Freelancer, although they currently specialise exclusively in remote services that do not involve physically moving the contractors.

Conversely, online platforms for freelance handymen or companies also exist, yet they currently appear to be limited to single countries, for example in Ireland: Taskmaster, Bark or Online Tradesmen. One could potentially imagine similar transnational platforms facilitating work for either freelancers or companies established in other countries that could subsequently move their workforce to the ‘host’ state with the use of posting contracts. Such a solution would, however, be targeted at either self-employed persons or employers, and not at posted workers as such.

C. Role of Employers

Finally, another group of actors whose level of observance of the rules on the posting of workers is crucial to diminishing the risk of precarity among workers are the employers, meaning both posting companies and undertakings that hire them to provide services in the ‘host’ states. On this note, the interviews carried out in this research show that employers often tend to seek loopholes in the PWD framework or create alternative working arrangements to make their business more profitable.¹⁴⁴ As the EU legal framework is evolving towards a more comprehensive worker protection, and the enforcement authorities are intensifying their efforts to address fraud and irregularities,

¹⁴³ See further Chapter 5, s VII.

¹⁴⁴ *ibid*, s IV.

it appears that every legal improvement meets with an immediate reaction from some of the employers who invent new ways of circumventing the law.¹⁴⁵

Berntsen and Lillie argue that this approach of the posting companies echoes the concept of ‘creative destruction’, a term coined in the early 1940s by the economist Joseph Schumpeter.¹⁴⁶ Having witnessed real-life instances of creative destruction at Henry Ford’s assembly line, Schumpeter described it as a ‘process of industrial mutation (...) that incessantly revolutionises the economic structure from within, incessantly destroying the old one, incessantly creating a new one’.¹⁴⁷ Similarly, Berntsen and Lillie refer to examples from the field of posted work where posting companies purposely take advantage of lower-cost economies and less stringent regulatory environments. This is a worrying trend and the effort of the national enforcement authorities confronted with a myriad of creative solutions for circumventing the PWD regime may indeed appear at times to be laborious if not futile.

Yet, from the point of view of macroeconomics, ‘creative destruction’ can bring progress and innovation, and is well within the limits of competition in free market economies. Furthermore, ‘creative destruction’ does not necessarily have to affect workers in a negative way and, indeed, Schumpeter thought that the process would ultimately lead to the fall of capitalism and bring improvements to the society as a whole. One positive example of ‘creative destruction’ that transpired from the data collected in this research project is a novel method of recruiting foreign workers in Poland to be hired directly by companies in ‘host’ countries. Such companies operate as ‘career consultancies’ that have no legal links to the workers and merely match candidates with prospective employers which allows them to avoid any employer liability.¹⁴⁸ Compared to the posting arrangement, this model seems generally more beneficial for workers who receive permanent job contracts and full social security coverage in the ‘host’ countries. This example leaves one hopeful that confronting the PWD framework with ‘creative’ corporate practices can sometimes produce positive results for workers too.

¹⁴⁵ *ibid*, s VII.

¹⁴⁶ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (3rd edn, Harper Perennial 1975), as cited in Berntsen and Lillie, ‘Breaking the Law? Varieties of Social Dumping in a Pan-European Labour Market’ in Bernaciak (ed), *Market Expansion and Social Dumping in Europe* (Routledge 2015) 43.

¹⁴⁷ Schumpeter (n 146) 83.

¹⁴⁸ See Chapter 5, s VII.

Conclusion

The purpose of this Chapter was to, firstly, evaluate the initial theoretical framework formulated in Chapter 1 against the qualitative data and, secondly, to offer some insights into how posted workers' susceptibility to precarity could be addressed by EU law. Research findings stemming from the interviews have enabled the creation of a nuanced picture in which posted workers are a diverse category encompassing individuals from a variety of backgrounds, with different material statuses, education levels and skillsets, carrying out temporary work abroad for different reasons. Not all of these workers are precarious, and specifically the interviewed 'white-collar' workers whose links to the PWD seem rather weak did not fit into the definition of precarious workers. By the same token, their narratives recounted in Chapter 6 suggested that their foreign assignments were not free from non-legal issues such as isolation in the 'host' state or negative effect on their private and family lives.¹⁴⁹ The lack of precarity reported by 'white-collar' workers suggests that the precarious reality faced by other interviewees might be the result of a combination of different factors rather than solely the legal regulation of posting. In particular, age and social background have been identified as additional risk factors exposing posted workers to precarity.

Furthermore, evidence gathered from the interviews suggests that the very status of a posted worker may constitute yet another risk factor, as some interviewees fell victim of discrimination which seemed to be caused by the negative perception of the posting arrangement in the receiving countries and a certain social stigma surrounding the status of a posted worker.

In light of this empirical evidence, it appears that the above issues faced by many posted workers are likely to persist. It seems that posted workers, both due to their unusual working arrangement, and to the fact that they are migrant workers, will continue to be a vulnerable category prone to precarity, and no legal reform can fully eliminate this risk of precarity. Yet, the risk of precarity stemming from posted work can be reduced by adequate legislation. Data gathered in this project has shown that the Enforcement Directive, when correctly implemented by Member States, can have a positive impact on posted workers' daily lives and work experiences. Some of the interviewees have depicted the changes resulting from the Enforcement Directive in a

¹⁴⁹ See further Chapter 6, ss II and V.

way that can be considered an outstanding example of ‘law in action’. Research findings have shed some light on the myriad ‘creative’ tricks employed by posting companies in order to circumvent the PWD and this is precisely the reason why an effective enforcement mechanism is indispensable to ensure better protection of posted workers’ rights.

The 2018 reform has been yet another step towards a more worker-oriented approach to the PWD. As discussed in Chapter 3, while Directive 2018/957 has offered an important shift in the framing of the EU regulation of posted work, tangible improvements in the sphere of posted workers’ rights seem scarce. Of course, as has been reiterated throughout the empirical part of this thesis, the interview stage of this research project concluded prior to the deadline for domestic implementation of Directive 2018/957. Therefore, the impact of the latter revision on the reality of working as a posted worker in the EU could not be fully appreciated or evaluated. Nevertheless, it appears that the current regulation of the posting of workers is insufficient to safeguard the rights of posted workers, as it has maintained the inequality between posted workers and local workers of the ‘host’ state.

In this vein, it has been argued in this Chapter that a better approach to regulating posted work would be to extend all the labour law legislation of the ‘host’ state onto posted workers. Extending the labour law legislation of the ‘host’ state would entail introducing the principle of equal treatment for posted workers to replace the existing ‘nucleus’ of mandatory rules of the ‘host’ state which is arbitrarily construed, limited and unfair. Posted workers belong to the realm of the free movement of services, yet the PWD, particularly following the 2018 revision, should be viewed as an exemption, or *lex specialis* to Article 56 TFEU and the Rome I Regulation, that allows for fair working conditions for posted workers. Such understanding of the PWD had in fact been adopted in Ireland already at the stage of domestic implementation of the 1996 Directive. A similar logic was pursued by the EU in the 2018 revision when the principle of equal treatment was introduced in relation to ‘long-term postings’.

Yet, there is no valid reason why the extent of labour law protection for posted workers should depend on the length of posting, and the same regulation could successfully apply to all posted workers. One possible side effect that extending the principle of equal treatment onto posted workers might cause is rendering the posting arrangement less attractive for employers, which would in turn constrict the opportunities for workers to be posted to other Member States. Similar arguments had also been used

on the occasion of the 2018 revision of the PWD.¹⁵⁰ Indeed, it appears that the recent reforms might contribute to the decrease in the numbers of postings driven exclusively by cost competition as opposed to the quality of the services provided. At the same, interview findings discussed in Chapter 5 suggest that alternatives to posted workers for those individuals that seek temporary work in other Member States on more preferential conditions than those currently offered by the PWD are emerging.¹⁵¹

¹⁵⁰ See further Chapter 3, s II C.

¹⁵¹ See further Chapter 5, s VII.

Appendix 1. Faculty of Arts, Humanities and Social Sciences

Research Ethics Committee Approval



Trinity College Dublin
 Coláiste na Tríonóide, Baile Átha Cliath
 The University of Dublin

Faculty of Arts, Humanities and Social Sciences Research Ethics Committee Decision	
Project Title:	"Posted Workers and Precariousness in Practice"
Name of Lead Researcher:	Marta Lasek
Name of Supervisor:	Prof Mark Bell
Estimated start date of survey/research:	1 July 2019
Date of Committee meeting:	23 April 2019
Committee:	<p>Directors of Research: Prof Jacob Erickson (Chair) Prof Diarmuid Phelan (comments via e-mail) Prof Eoin O'Sullivan (comments via e-mail) Prof Ruth Barton (comments via e-mail) Prof Daniel Geary (comments via e-mail)</p> <p>Secretary: Jade Barreto</p>
Decision:	
The Committee granted ethical approval for this research proposal.	

Appendix 2. Informed Consent Form (English)

**TRINITY COLLEGE DUBLIN
SCHOOL OF LAW
INFORMED CONSENT FORM**

LEAD RESEARCHERS: Marta Lasek-Markey

BACKGROUND OF RESEARCH:

The purpose of the research is to investigate the vulnerable working conditions of posted workers, which is a timely issue on the EU agenda. They are workers who are sent to another EU country for a short time on an assignment.

There are two categories of posted workers. The first category are blue-collar workers in industries such as construction who travel to countries with higher wages, e.g. Polish workers in Germany. The second category are highly qualified professionals, often working for multinational companies, who are temporarily sent to another country.

However different these two categories are from each other, they both fall within the scope of the same EU law called the Posted Workers Directive. This directive was revised in 2018 and as of now, it guarantees the same pay for the same work at the same time.

The purpose of this study is to assess how effective the new law will be and what other legal changes could be made to improve the situation of posted workers in the European Union. In-depth interviews will be conducted with workers, employers and representatives of other relevant institutions such as migrant centres, trade unions, EU or government officials etc.

PROCEDURES OF THIS STUDY:

If you agree to participate, this will involve you taking part in an interview with the researcher. The interview will be held at a previously agreed public place (e.g. your

office, the researcher's office, coffee shop) and it is expected to last approximately one hour. With your prior consent, an audio recording of the interview will be made by the researcher.

PUBLICATION:

The research will be published by Trinity College Dublin in the form of a PhD thesis. It might also be published in a revised version as a monograph (book available for purchase in bookshops). Parts of the research might be published as papers in academic journals. Research findings will be orally and visually presented in a shortened version at academic conferences. Individual results may be aggregated anonymously and research reported on aggregate results.

DECLARATION:

- I am 18 years or older and am competent to provide consent.
- I have read, or had read to me, a document providing information about this research and this consent form. I have had the opportunity to ask questions and all my questions have been answered to my satisfaction and understand the description of the research that is being provided to me.
- I agree that my data is used for scientific purposes and I have no objection that my data is published in scientific publications in a way that does not reveal my identity.
- I understand that if I make illicit activities known, these will be reported to appropriate authorities.
- I understand that I may stop electronic recordings at any time, and that I may at any time, even subsequent to my participation have such recordings destroyed (except in situations such as above).
- I understand that, subject to the constraints above, no recordings will be replayed in any public forum or made available to any audience other than the current researcher.
- I freely and voluntarily agree to be part of this research study, though without prejudice to my legal and ethical rights.
- I understand that I may refuse to answer any question and that I may withdraw at any time without penalty.
- I understand that my participation is fully anonymous and that no personal details about me will be recorded.

- I have received a copy of this agreement.

PARTICIPANT'S NAME:

PARTICIPANT'S SIGNATURE:

Date:

Statement of investigator's responsibility: I have explained the nature and purpose of this research study, the procedures to be undertaken and any risks that may be involved. I have offered to answer any questions and fully answered such questions. I believe that the participant understands my explanation and has freely given informed consent.

RESEARCHER'S CONTACT DETAILS:

Marta Lasek-Markey

E-mail : mlasek@tcd.ie

Phone : 00353852801669 (Ireland), 0048602478717 (Poland)

INVESTIGATOR'S SIGNATURE:

Date:

Appendix 3. Participant Information Sheet (English)

TRINITY COLLEGE DUBLIN

SCHOOL OF LAW

Participant Information Leaflet

Project Title: “Posted Workers and Precariousness in Practice”

Principal Investigator: Marta Lasek-Markey (LL.M.)

Academic Supervisor: Professor Mark Bell

Discipline: EU Employment Law

You are invited to participate in this research project which is being carried out by Marta Lasek-Markey (LL.M.), PhD Candidate at Trinity College Dublin Law School. Your participation is voluntary. Even if you agree to participate now, you can withdraw at any time without any consequences of any kind.

The study is designed to investigate the vulnerable working conditions of posted workers in the European Union. They are workers who are sent to another EU country for a short time on an assignment.

There are two categories of posted workers. The first category are blue-collar workers in industries such as construction who travel to countries with higher wages, e.g. Polish workers in Germany. The second category are highly qualified professionals, often working for multinational companies, who are temporarily sent to another country.

However different these two categories are from each other, they both fall within the scope of the same EU law called the Posted Workers Directive. This directive was revised in 2018 and as of now, it guarantees the same pay for the same work at the same time.

The purpose of this study is to assess how effective the new law will be and what other legal changes could be made to improve the situation of posted workers in the European Union. In-depth interviews will be conducted with workers, employers and representatives of other relevant institutions such as migrant centres, trade unions, EU or government officials etc.

If you agree to participate, this will involve you taking part in an interview with the researcher. The interview will be held at a previously agreed public place (e.g. your office, the researcher's office, coffee shop). It is expected to last approximately one hour. With your prior consent, an audio recording of the interview will be made by the researcher.

Should any of the questions asked during the interview cause emotional discomfort, please feel free to inform the researcher about it and refuse to answer.

You will not benefit directly from participating in this research. However, the research may benefit the working conditions of posted workers in the future.

Any information or data that we obtain from you during this research and with which you could be identified will be treated confidentially and in accordance with the GDPR. Excerpts of interviews or characteristics which may make you identifiable, will not be disclosed.

We will render the data anonymous by coding and the key to the code will be stored securely in a password-protected file. The data will be kept on a password-protected computer, as well as a password-protected cloud drive compliant with the GDPR. Any print documents will be stored in a locker. Access to the collected data will be granted only to the investigator, her supervisor and any examiners of Trinity College Dublin.

Upon the conclusion of this research project, a copy of the data gathered will be stored on an external hard drive held in a secure location in the School of Law, Trinity College Dublin, for five years.

Anonymised data from this research project may be published in future. The original recording and all copies will be available only to the present investigator, her supervisor and any examiners of Trinity College Dublin.

If you have any questions about this research you can ask me. You are also free, however, to contact my supervisor to seek further clarification and information:

- Professor Mark Bell, mark.bell@tcd.ie

Appendix 4. Interview Guide

Part 1. Introduction

- Thank you for taking the time to meet with me today. Before we start, I will quickly talk to you about my research and about your contribution to this project.
- The aim of the research is to investigate the working conditions of posted workers, which is a term of EU law. Posted workers are sent to another EU country for a short time on an assignment. They fall within the scope of a law called the Posted Workers Directive. This directive has recently been revised and the purpose of this study is to assess how effective the new law will be and what other legal changes could be made to improve the situation of posted workers in the European Union.
- I have asked you to take part in this interview because I am interested in talking to people who have had direct experiences with posting so that I can understand this issue better. The interview should not be longer than 90 minutes.
- During the interview, if you do not understand a question, please let me know and I will rephrase it. If you do not know how to answer a question, that's fine too. It is ok for you to say that you don't know. We will move on to the next question.
- If you come across a question that makes you feel uncomfortable, please feel free not to answer it. You are also welcome to take a break, and to stop the interview at any time you wish to do so. You are also free to leave the interview at any time. Also, if during or after the interview you decide that you don't want to take part in this project, it is ok too. In such case I will not use the information you have given to me.

- The information you give me is confidential. I don't work for the government, the EU or for any company. The information you give me will not be passed on except if you tell me something that makes me believe you or someone else is in danger.
- If you see me write things down it is just to remind myself of other questions I need to ask you.
- As we have agreed, our conversation will be recorded. The recording will later be transcribed, which means that the entire interview will be written down. I will share the written interview with you so that you can make sure that the document is accurate.
- Thank you once again for your time and for agreeing to take part in this interview. I will press the "Record" button now if you don't mind?

Part 2. Questions

2.1. Questions to posted workers from low-wage employment sectors:

- What is your nationality?
- How old are you?
- What is your gender? M F Unidentified
- What is your formal education and your trade / profession?
- Where do you currently live? Do you work? If so, where?
- How long have you been working as a posted worker? How long at a time at one job?
- How often do you change jobs? Have you ever had a permanent job?
- What countries / industries have you already worked in?
- Had you ever been outside your home country before you started working abroad?
- Is working short-term abroad your main job or is it seasonal while you are looking for permanent job?
- Why did you decide to take up this type of work?

- Do you think there are enough jobs in your trade / profession in your home country / region?
- Is going abroad for work common among your family or friends?
- What did you think of the host country / countries before you first went there?
- Have you noticed differences in working or living conditions in different EU countries?
- Where did you live while working abroad? Did your employer provide accommodation? Were you happy with it?
- What would your average day at work look like?
- Have you ever been employed by a temporary work agency while abroad? If so, was it any different than working without a temporary work agency?
- How much money were you making per hour? Have there ever been any disputes with your employer about how much you should be getting?
- Has your financial situation changed since you started working abroad?
- Have you or your colleagues ever had an accident at work abroad? If so, have you or they been able to claim back insurance?
- Was your social security paid when you were working abroad? If yes, who paid it?
- Have you ever met representatives of trade unions in the countries in which you worked? If yes, have they ever offered to help you?
- Did you speak the language(s) of the country / countries you worked in? If not, how were you able to communicate with local people?
- What was the attitude of local people towards you and your colleagues? Have you ever felt discriminated against?
- According to you, what are the advantages and disadvantages of this working arrangement? Are you happy with it? What would you change?
- What impact did it have on your family life?
- Do you have a support network in the host country?
- If you had a problem when abroad, who would you go to talk to?
- If there were better working conditions / pay in your home country, would you still have decided to go abroad?
- Are you planning to look for work in your home country in the future?
- Have you heard of the new law on pay for posted workers? What do you think of it? Is it easy do circumvent?

- Do you think you should be earning the same wages for doing the same job as local workers?
- How do you feel about your country's membership in the EU? What advantages or disadvantages does the EU have for you personally?

2.2. Questions to posted workers from high-wage employment sectors:

- What is your nationality?
- How old are you?
- What is your gender? M F Unidentified
- What is your formal education and your profession? Is it common among your friends?
- Where do you currently live? Where do you work?
- How long have you been working as a posted worker? How does a single posting usually last in your company / sector of employment?
- Is posting a common practice in your company / sector of employment?
- What countries have you already worked in?
- Was posting your choice or the company's? If it was your choice, what were the reasons behind it?
- What cultural differences have you noticed in other EU countries? Have you noticed any differences in work ethics?
- Are there any solutions or work practices that you would import into your home country?
- Did your working conditions, e.g. pay, change when you were posted abroad?
- Where did you live while working abroad? Did your employer provide accommodation? Were you happy with it?
- During your posting, were you aware which country's labour regulations applied to you? Did it matter to you?
- During your posting, were you aware of the healthcare plan or other social benefits that were available to you?
- Do you feel you were treated on equal terms with local colleagues in your office? Have you ever felt discriminated against?
- What was the attitude of the new colleagues towards you? Did you make friends with any of them?

- Did you speak the language(s) of the country / countries you worked in? If not, did it affect your work or social life?
- Did you have a support network in the host country?
- If you had a problem when abroad, who would you go to talk to?
- What impact did posting have on your family life?
- According to you, what are the advantages and disadvantages of this working arrangement? Are you happy with it? What would you change?
- Do you see yourself working abroad or in your home country long-term?
- Have you heard of the new law on pay for posted workers? What do you think of it? Is it relevant in your sector of employment?
- How do you feel about your country's membership in the EU? What advantages or disadvantages does the EU have for you personally?

2.3. Questions to employers in low-wage employment sectors:

- Why is posting of workers a common practice in your company / sector of employment?
- How many workers would your company typically post abroad at a time? To what countries?
- How long does an average posting last?
- What jobs do workers do while they are working in their host country?
- What are the differences in working or living conditions in different EU countries?
- Where are the workers living while abroad? Does your company provide accommodation? Is it free?
- How much money would posted workers earn per month in your company / sector of employment in each of the host countries? How much would they earn doing the same job in their home countries?
- What kind of contracts do you offer to posted workers? Are you paying their social security?
- How does the recruitment procedure for posting look? Is it easy to find candidates for posting in your company / sector of employment?
- Are there any unnecessary burdens on posting companies of administrative or other nature? If yes, what are they?

- What are the advantages and disadvantages of posting for the workers?
- What is the effect of posting on the sending country's economy?
- Which country's labour regulations applies to workers when they are abroad?
- Are the laws on posting clear to you? Has your company ever had legal problems related to posting?
- Have your workers had any problems related to posting?
- What would your company do if a worker had an accident while at work abroad? Has it ever happened?
- What do you think of trade unions in the receiving countries? Are they allowed to represent your workers?
- What is your opinion on the new EU law on the posting of workers? Is it effective? Is it easy to circumvent?
- Should posted workers earn the same wages for doing the same job as local workers?
- What is the attitude of local people to your company and workers?
- How much more would the same service cost were it to be provided by a local company in the host country?

2.4. Questions to employers in high-wage employment sectors:

- Why is posting of workers a common practice in your company / sector of employment?
- How often would your company post employees abroad? To what countries?
- How long does an average posting last?
- Do employees' working conditions change when they are posted abroad? Do their contracts change?
- Where are the employees living while abroad? Does your company provide accommodation? Is it free?
- Are employees able to relocate with their family if their posting is only temporary? Do they get a special supplement for that?
- What salary do employees get when they are posted abroad? If they go to a country where the cost of living is here, do they get a supplement to their salary? Would they get the same salary their colleagues in the host country get?
- Do employees volunteer to be posted abroad? If yes, what are their reasons?

- What are the advantages and disadvantages of posting for the workers?
- Have you noticed any cultural differences between employees in different EU countries? Have you noticed any differences in work ethics?
- Are there any unnecessary burdens on posting companies of administrative or other nature? If yes, what are they?
- Which country's labour regulations applies to employees when they are abroad?
- Are the laws on posting clear to you? Has your company ever had legal problems related to posting?
- Have the employees had any problems of administrative or other nature related to posting?
- Are posted workers covered by a healthcare plan or other benefits (e.g. meal vouchers, gym membership) that local employees would have?
- Do employees have a support network when they are posted abroad? Is there someone they can talk to if they have a problem?
- Does the company organise any social events to help posted workers adapt in the new office environment?
- Have you heard of the new EU law on the posting of workers? What is your opinion on it? Does it apply to your company's employees?

Part 3. Advise the Study

Over the next few months, I will be conducting interviews with other workers, employers etc.

Do you think there are any other questions I should ask or anything I should do differently?

Do you know of anybody else who you think might be interested in taking part?

Is there anything else you would like to tell me that you feel is relevant?

Do you have any questions for me?

Thank you for your time and for participating in this interview.

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