Posted workers
La condizione dei lavoratori in distacco transnazionale in Europa
a cura di Rossana Cillo e Fabio Perocco

How Externalisation of Labour Recruitment Crosses Borders
Origins, Evolution, and Features of Posted Work

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Abstract The author reflects in this contribution on the regulatory frame of social policy and workers' rights in the area of labour mobility and transnational free provision of services with posted workers as applied in the European Union's internal market. The rights-based free movement of EU-workers is grounded on the *lex loci laboris* principles, or the notion that workers fall under the regulatory frame and labour standards of the ('new') state of residence and employment. Posted workers that provide services on behalf of their employer are not supposed to seek access to the other Member State's labour market and fall under a specific legal frame.

Keywords Free movement of workers. Labour mobility. Labour migration. Posting of workers. Free provision of services. Cross-border labour recruitment.

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1 Introduction

In debates about the phenomenon of labour migration and mobility, as well as in related industrial disputes, there is often no clear distinction between the general free movement of individual labour migrants (and their recruitment) and the posting of workers in the frame of the free provision of services by foreign companies. However, analysed from a rights-based angle these mobility tracks fit in quite different regulatory frames.

Mobile EU-27 citizens mainly move for employment-related reasons. And their free movement rights are enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). This principle of free movement of EU citizens and workers goes back to the earliest principles established in the European Economic Community in 1957. The citizens' rights of free movement and work in another Member State are grounded on the *lex loci laboris* principles, or the notion that workers fall under the regulatory frame of rules and labour standards of the ('new') state of residence and employment.[1] In other words 'When in Rome, do as the Romans do'.

However, over the years, one exception to the application of the *lex loci laboris* has been developed: firms can post their workers to another country to provide temporary services. The first type of rights-based labour mobility is more and more supplemented with this second type of temporarily posted workers based on the free provision of cross-border services. Posted workers are not supposed to seek access to that country's labour market and the rules and labour standards of the host country apply in a limited way (Cremers 2016). The core principles in the Single Market that govern cross-border activities by service providing firms across the EU are the freedom to establish a corporate entity in another country (Art. 49 TFEU) and the freedom to provide or receive services in a country other than the one where a company or consumer is established (Art. 56 TFEU).[2]

1 The 1957 Rome Treaty establishing the European Economic Community contained several provisions (Treaty of Rome, 1957, Arts 48-51) to ensure free movement of workers. This free movement meant in particular that nationals of a Member State had the right to go to another Member State to seek employment and work there. The 2012 Consolidated Version of the Treaty on the Functioning of the European Union formulates it in Article 45: "1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment".

2 According to data from the European Commission, 17.6 million EU citizens used the rights to reside in another Member State in 2018, whilst another 3 million people were posted. In addition, 1.5 million workers crossed the border as frontier workers (European Commission 2020). There are no reliable figures on cross-border seasonal work. In the rest of this essay, the author abstracts from the last two categories (frontier and seasonal workers).

This contribution will not go into the details of the legal and political debates around posting. These can be found in an extensive series of booklets, papers and articles. The aim is to provide a reflection on the phenomenon against the background of the mobility of workers in the EU in the last decennia. In legal terms, posted workers are protected by regulations of a contractual character of the sending country and by a hard core of minimum provisions in the host country. In practice, however, this means often in case of disputes or breaches that they will neither be an actor in the system of industrial relations in the country where they carry out their work, nor that they will have guaranteed protection from the legislator or social partners at home.

This ambiguous position has been defined and even strengthened by the European Court of Justice (ECJ) in a series of cases. According to the ECJ, posted workers are not seeking access to the host country labour market and, therefore, the legislator of the host country has not the task to watch over their employment relationship. Posted workers are supposed to return home after the provision of services, and thus, besides the hard core of the Posting Directive, cannot appeal to the rights that can be derived from the ordinary rights-based free movement of workers and citizens (as enshrined in Art. 45 TFEU).

In this essay, these presumptions will be questioned. After the second paragraph, which sketches out the notion of posting, a third paragraph is dedicated to the evolution of the cross-border recruitment (including posting of workers) in a globalising Europe. In addition, some reflections are formulated on the genesis of the Posting of Workers Directive (and the question is raised whether the rules are still fit for purpose). In the fourth paragraph, the focus is on a feature that, according to the legal frame and theory, has nothing to do with posting of workers and that I called in earlier writing 'fake posting'. Given the difficulties to control the genuine character of posting immediately at the workplace, labelling workers as being posted has become an easy smoke screen to cover up dishonest and exploitative practices. The consequences for the working conditions of the workers involved are treated in the fifth paragraph. The final paragraph evaluates the posting system and provides the reader with some reflections on the outlook.

2 The Origins of Posting

In recent decades, the notion of transnational free provision of services with posted workers has been introduced in two areas of social policy.

The principles of coordination of social security systems (in the European Economic Community, now the European Union), which were first established by the EU rules in 1957 in Regulation No. 3,

and subsequently superseded by Regulation (EEC) No. 1408/71, introduced an exemption in the *lex loci laboris*. The exemption ruled that the social security law of the workplace does not apply in the event that a worker is sent by his employer for a short period to another Member State to work there on the employer's behalf. The reasoning was that it would be a severe burden on workers, employers and social security institutions if the worker is required to be insured under the social security system of every Member State to which he or she is posted in the course of his/her employment, if such posting is of short duration. This exemption still holds. The currently applicable Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and its implementing Regulation (EC) No. 987/2009 aim to facilitate the freedom of workers to move to other Member States as well as the freedom to provide services for the benefit of employers (Cornelissen, De Wispelaere 2020). The provisions provide firms with the opportunity to post workers during periods of a temporary nature to another Member State than the State in which the undertaking has its registered office or a place of business or the State in which the self-employed person normally pursues his activity. In such a situation, it is possible to derogate from the general *lex loci laboris* principle that a person who is pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State. Workers posted by an employer to another Member State to perform work on that employer's behalf continue to be subject to the legislation of the first Member State.

The same reasoning was followed during the preparation of the Posting of Workers Directive (96/71/EC) that aims to provide a regulatory frame regarding the applicable working conditions of workers, who are temporarily posted by their employer to provide services in another country. Directive 96/71/EC introduces 'posting', that is the situation whereby an employer sends an employee to work in another country for a limited period of time, within the juridical sphere of labour law. The assumption was (and is) that the posting undertaking/service provider is a genuine company, registered and normally carrying out substantial activities with its workers in the country of registration. The temporary services in the host country are provided by the foreign entity based on a public or private commercial contract between the user undertaking and the service provider.

Directive 96/71/EC did not have an easy birth. Its origins go partly back to the debate about public procurement principles. As the European Single Market was prepared in the late 1980s, the trade union movement pleaded, in line with ILO Convention 94 and the Davis Beacon Act in the USA, for a social clause in procurement rules for public works that guaranteed compliance with the labour standards in the country where the work had to be carried out (Cremers, Donders

2004). The European Parliament backed this demand with an overwhelming majority. The Council of Ministers, however, dropped the idea of an obligatory clause and watered it down to a voluntary act. Thereupon the European Commission decided to put forward a proposal for a Posting of Workers Directive in the 1989 action program related to the implementation of the Community Charter of Fundamental Social Rights of Workers.[3] Almost in parallel, the temporary provision of services with posted workers entered the courtroom. Above all, the ECJ used as a basic premise that the posting provisions serve to promote freedom to provide services for the benefit of undertakings that avail themselves of it by sending workers to Member States other than that in which they are established. On the one hand, the ECJ ruled (for instance in the Rush Portuguesa case ECJ C-113/89, 1990) 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". On the other hand, the court stressed continuously that exemptions to the *lex loci laboris* were justified because the posted workers would return to their country of origin after the completion of their work without at any time gaining (or seeking) access to the labour market of the host Member State.

After the first proposals in the early 1990s, it took five years of political debate to reach an agreement on the Directive. Member States were divided on the necessity for a posting Directive. The slow and difficult decision-making process forced some Member States, i.e., France, Germany and Austria (not an EU member at the time) to develop their own initiatives to guarantee national provisions and labour conditions to workers from abroad. In 1996, the Council and the European Parliament finally adopted a Directive concerning the posting of workers. With the introduction of Directive 96/71/EC, a second dimension of posting was introduced into Community law, next to the aforementioned Regulations concerning the coordination of social security within the EU.

The Posting Directive was about finding a balance between improving the possibilities for undertakings to provide services in other Member States and the social protection of workers. In fact, the

3 The Action Program, which was prepared even before the fall of the Berlin wall in 1989, in the European Community with 12 Member States back then, contained 47 proposals for binding and non-binding initiatives of various kinds. One was the *Proposal for a Community instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a subcontracting undertaking* (Commission of the European Communities 1991).

Directive can be seen as a compromise that seeks to avoid that workers are completely derived from rights-based free movement. It defines a set of terms and conditions of employment in the host state that must be guaranteed to workers posted in its territory, irrespective of the law that governs the contract of employment of the worker. As such the Directive touches two of the four pillars of the internal market: the free movement of workers and the free provision of services. The free movement of workers would be hampered if workers were to lose fundamental rights when they moved within the Community, whilst the temporary posting could disturb fair competition in cases where a foreign service provider was exempted from the rules governing local labour standards and working conditions. In case workers were not covered by the *lex loci laboris*, the protective rules in the host country, this exemption could easily result in distortion of competition between firms.

In brief, labour mobility inside the EU can take place via the rights-based legal access of free movement for EU citizens or via the temporary provision of services to other Member States with posted workers. Over the years, temporary mobility of posted workers developed into a substantial employer-driven form of labour mobility (Eurofound 2020). What was meant to be the legal instrument for the genuine provision of services became debatable because of the risks linked to social and wage dumping, deteriorating of working conditions, fraudulent practices such as letterbox companies, abuses with working time and pay, and abusive deductions for transport and lodging. For some scholars posting became part of a "matrix of complex, semi-legal and outright unlawful employment arrangements involving cross-border contracts" (Clark 2012, 3).

3 The Evolution of (Cross-Border) Recruitment Over the Past Fifteen Years

In the first period after the adoption of the 1996 Directive, the regulation of the posting of workers was, in general, seen of limited relevance for the mobility on the labour market, outside the construction sector that continuously had to deal with the issue. Cross-border mobility was relatively low in the EU and if it happened, the recruitment was often limited to blue collar workers in the building trades (next to high-skilled specialists that were treated as 'expats'). Employers in the building sector were sensitive to distortion of competition between construction companies based on circumvention of local standards and the European building trade unions, for their part, had a particular interest in defending the principle of equal labour conditions for building workers. Other industries did not really discuss the issue. It was thus not astonishing that a first assessment of

the national transposition of the Posting Directive in 2003 showed a lack of urgency and political priority at a national level during the implementation process. Whilst the issue appeared to be topical at European level in the early 1990s, it attracted less attention in most Member States once the Directive was concluded. Member States questioned the need for and the scope, form and content of posting regulations and considered it a minor sectoral issue with no impact on their labour market (Cremers, Donders 2004). Moreover, the European Commission's acknowledgement that the expectations of the mid-1980s concerning EU mobility had not been realised, or only to a very modest degree, contributed to this negligence. The 2003 assessment made clear that the implementation in several Member States was extremely poor.

For instance, the notion of "the maintenance of an employment relation", a key condition according to the ECJ ("workers are not supposed to seek access to the market"), was at the time of the assessment not implemented in 5 of the then 15 Member States. And Article 2.2, which allocates the competence to decide whether a worker is an employee or a self-employed to the host country, was neither prominently transposed in national legislation. Most Member States applied the posting periods used in the European coordination rules (at the time Regulation (EEC) No. 1408/71) without further considerations about the temporary nature of the service contract that defined the posted work.

Even more important, there were hardly any instruments developed to monitor compliance and enforce the rules; the national reports, which were produced for the 2003 assessment, revealed that liaison offices had insufficient staff to enforce the Directive properly. These offices were not well informed or even unaware of the provisions of the Directive. Member States applied little or no control of foreign undertakings that came with posted workers to provide services whilst the practical part of the assessment showed enough evidence to conclude that the application of the posting rules was sensitive to fraud. The conclusion was that measures taken by the Member States to assure compliance with the Directive were underdeveloped (Cremers, Donders 2004). One could say that until around 2004, the posting of workers remained largely unregistered, unnoticed and unmonitored.

A later assessment pointed at several developments and circumstances, which could not be taken into consideration as the Directive was drafted, and that can be seen as reasons why the issue, in those days, was seen of less importance (Cremers 2019b). The flanking social policy, developed in the European Community with 12 and later on 15 Member States, did not keep pace with several important developments in the following decades. As the main parts of the social dimension were concluded in the early 1990s, it was for instance incon-

ceivable that the European Union would enlarge with countries from the still existing Comecon bloc. The main reference for the European legislator in the modelling of the flanking social dimension was the labour market and industrial relation system that 12 Member States had in common and this policy making was not interrupted by the earlier enlargement to 15 Member States (as Sweden, Austria and Finland affiliated in 1995). The first public drafts of the Posting Directive stated that Community law "does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State" (European Commission 1991). However, within a period of 15 years after the publication of the forecasted future of a more unified European Community (the Cecchini reports, published in 1988[4]) an unprecedented enlargement took place that led to a European Union with 28 Member States, characterised by a broad and divergent spectrum of industrial relations and socioeconomic traditions. After 2004, it proved very complicated to accommodate in EU-law disparities in wages and working conditions among the Member States, exacerbated by the accession of new Member States that led to a huge reservoir of labour, with workers coming from countries with a tradition of relatively poor labour standards and low pay.

But there was more going on. During the successive economic crises (early 1990, followed by the IT bubble and a crash in 2000), it became very clear that the globalisation and liberalisation of the European market had a serious impact, not only on the 'global' players and corporations but also on all other labour market actors. The paradigm for corporate strategy in these turbulent years of boom and bust changed from the 'economy of scale' into market activities characterised by operating 'slim and lean'. Moreover, the primacy of the principles of economic freedom and the easing of the mobility of business transformed the organisation of production and services and intensified the pressure on wage costs, with a substantial impact on the recruitment practices used. The traditional model of running a firm with skilled and unskilled direct labour under the supervision and disciplinary control of one employer is no longer the basic standard. Cost reduction strategies leading to extensive outsourcing, downsizing, subcontracting, the use of agencies for the supply of labour, and the widespread practice of bogus self-employment, created a new, Europe-wide playground for types of contracts that do not fit in the traditional model. In the construction sector, for instance, this was the period in which the dominant contractors shifted to a policy of

4 See Cecchini et al. 1988.

'management contracting'. In the search for cheap labour, large segments of the operational work and the execution were outsourced, and important parts of the labour recruitment were externalised. In some sectors with a cyclical production process, the 'day labourer' returned. The direct labour relationship with the main (user) undertaking is nowadays broken. The substitute, formed by temporary work agencies, labour brokers and middlemen, subcontractors only specialised in supplying labour, operate with flexible, temporary, short time contracts. This fits in the ideology of the 'new' employee, an 'individual worker' operating flexible and mobile on the labour market.

By doing so, the social risks are transferred to entities lower down the chain that had no other specialisation than labour recruitment. As a result of this outsourcing and externalisation of recruitment, the pricing and allocation of labour are no longer governed by the regulatory frame set by the main firms in the industry and the trade unions. It has led to fragmented production chains headed by large transnational firms that engage a great number of smaller firms, suppliers and subcontractors as well as individuals to perform particular tasks within a dependency chain involving a myriad of complex multitiered contracting and subcontracting relationships (Miller 2009).

Already at an earlier stage, with the shift from manufacture to services as the largest economic sector (services constitute nowadays 70% of the European economy) and the emergence of temporary agencies, it became clear that the workers' voice through the trade union movement had serious difficulties in keeping pace with these developments. In some countries, trade unions started to defend the rights of workers in non-standard employment relationships and succeeded in a certain regulation of the more flexible segments of the labour market, resulting in collective agreements and labour legislation for the temporary agency sector and initiatives to protect the labour and social rights of self-employed (Countouris, De Stefano 2019). But membership in these segments stayed very low, and as a consequence, the implementation of a more stable workers' voice at plant or firm level did not come off the ground. The lowest echelon of agency workers, to a large extent labour migrants, does not figure in official workers' statistics or is simply ignored because of the temporary character of the work. These workers are invisible and unrepresented.

These developments served as a breeding ground for the recruitment of cheap labour at a size that was hard to imagine as the Single market was created. Even during the economic crisis, with growing unemployment, the cross-border recruitment increased and, at the beginning of the recovery, certainly at the expense of local jobseekers. There is no systematic research available in this regard, but for instance, a report dedicated to the construction sector in Belgium reveals that intra-EU posting to Belgium has mainly become mani-

fest in the construction sector. In 2015, intra-EU posting accounted for one third of employment in the Belgian construction sector. While the number of employed local workers decreased by 7% between 2011 and 2015, the percentage share of intra-EU posting of total employment in the construction sector increased by 19 percentage points between 2011 and 2015 (De Wispelaere, Pacolet 2017).

4 Features of Fake or False Posting

An assessment of the functioning of posting after the early 1990s identified a broad range of posting practices. Next to regular posting of specialists, posting at the minimum level and posting with breaches of the posting rules, a fourth type that was named 'fake posting' was signalled. It was a mechanism used in irregular cases as soon as compliance control and enforcement came into play (Cremers, Donders 2004).

In some segments of the labour market the labelling posting became a smokescreen to cover up recruitment practices that had nothing to do with the free provision of services. Labour inspectors and other competent authorities were confronted with arguments that the (foreign) workers were posted. Investigations whether this was genuine or not depended on cooperation with and information of the countries of origin, therefore, the control of all paper formalities had to be postponed. Or competent authorities were provided with false documents whose verification was time-consuming. Moreover, the fact that an A1-form could be handed out ex-ante was not of great help. This hindered an effective control of the regularity and as a consequence obstructed the grip on notorious cases of recruitment completely different in nature from posting. The features of 'fake' posting that were found in later research varied:

> from the copying and distribution over a whole gang of E101/A1 forms, to recruitment of posted workers who were already present in the host country or of workers turned into bogus self-employed, to posting via letterbox companies and unverifiable invoices for the provision of services. (Cremers 2011, 41)

In Decisions No. 162/1996 and No. 181/2000, and in Decision No. A2 of 2009, the Administrative Commission for the coordination of social security systems in the EU tried to define situations where posting does not apply:[5]

5 For instance, implemented in Italy in Circolare INPS No. 83/2010 (`https://www.inps.it/CircolariZIP/Circolare%20numero%2083%20del%2001-07-2010.pdf`).

1. the undertaking to which the worker has been posted makes him available to another undertaking in the Member State in which it is situated;
2. the worker posted to a Member State is made available to an undertaking situated in another Member State;
3. the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State;
4. the worker is recruited in one Member State by an undertaking located in a second Member State to work in the first Member State;
5. the worker is sent to replace a worker who has reached the end of his posting. (Istituto Guglielmo Tagliacarne 2010, 18)

Cases were reported in several studies, for instance in an Italian country report, in which it was described that workers (mainly Romanians, but even Italians) who lived already since years in Italy were recruited and registered on the payroll of a Romanian letterbox company that signed 'posting' contracts with the workers (Cremers 2011).[6]

Eurofound (2016) signalled the phenomenon in a study and labelled it "false posting". One of the listed practices was a case where the posting company could be identified as a sham set-up because it had no real business autonomy, establishing itself only to post workers abroad. Workers were not registered, had no contracts, received payments in cash etc. In other cases, the contractual framework for the posting of workers is used to hire resident foreign workers instead of recruiting the workers based on rights-based labour mobility as enshrined in the free movement of workers principle. Brought before court, in most cases, this does not lead to the requalification of the contractual relationship, such as the transformation of the inconsistent posting relationship into direct employment in the host country. And in addition, the subcontractors or hiring firms in several analysed cases 'vanish' completely or go bankrupt, a procedure that immediately slows down or even entirely blocks the process of recovering the entitled workers' rights. As a result, attempts to enforce these rights are usually unsuccessful.

Very often it is thought that these practices are mainly used for serving labour markets in North-Western Europe. However, several projects provide evidence of a prevalence of 'fake posting' all over Europe.

In the so-called LABCIT-project, NGOs from Romania, Poland, the Czech Republic and Italy investigated cases of labour rights violations

6 The author of the original country report on the above-mentioned case is Maria Mora. Cf. Cremers 2011, 92.

and false posting.[7] The researchers organised meetings with migrant workers, public hearings with labour rights experts and interviews with local stakeholders. The authors describe examples of serious forms of labour exploitation. The basic pattern is the extensive use of outsourcing, cross-border recruitment via middlemen and/or letterbox companies and large chains of labour-only subcontracting. The Italian report, dedicated to notorious cases in logistics and hospitality, concludes that outsourcing allows the client or user undertaking to shift all risks to a (foreign) entity, making it more difficult to identify the employer in cases of breaches or workplace disputes. The foreign entity or a subcontractor further down the chain provides the recruitment, selection and transfer of the workers to the host country. The user undertaking easily can argue that the subcontractor or the middleman is responsible and liable (Sacchetto et al. 2016).

In the Romanian report (Guga 2016), this is illustrated in a case where Romanian workers were recruited by a Romanian branch of a German company to carry out work in the UK. The workers had to sign a blank resignation letter and were confronted with several broken promises (no payment of excessive overtime – up to 350 hours per month – neither decent lodging nor compensation for food). After a certain period in the UK, the workers insisted on receiving a signed and valid A1-form. Their contracts were immediately cancelled and they were told to return to Romania at their own expense. The user undertaking took no responsibility for these practices and stayed completely out of the liability in this case.

In a similar case in the Czech Republic (Čaněk et al. 2016), Romanian workers performed their work in Moravia through a Ukrainian intermediary. They had no contract until the user undertaking was informed of an investigation by the labour inspectorate. Workers were confronted with serious abuses and violations of their rights. After signalling their disagreement, they tried to address these problems to the subcontractor higher up in the chain, with no success. The intervention of an NGO that established contacts with the user undertaking led to a partial payment of outstanding wages and compensations. However, the user undertaking rejected any responsibility for the practices of its subcontractors.

Other examples of fake or false posting were found in STRONGLAB, a project dedicated to enforcement practices in Central and Eastern Europe.[8] The researchers used the common name of 'Polish visa workers' to characterise the socio-political state of semi-legality of

7 The project's site https://migrationonline.cz/en/about/project/testing-eu-citizenship-as-labour-citizenship-from-cases-of-labour-rights-violations-to-a-strengthened-labour-rights-regime.

8 The project's website: https://migrationonline.cz/en/about/project/stronglab.

the workers' appearance on the labour market. The use of 'Polish visas' is a method applied in CCE countries to circumvent legal restrictions to the recruitment of third-country workers, with workers mainly coming in from Belarus or Ukraine. For the handing out of Polish visa, a registered company in Poland and a job request/invitation suffice. Even the more problematic is that fake postings via Polish companies are usually not fined by labour inspectors: workers simply lose their jobs and are often deported by the Foreign Police. The inspectorate is not obliged to address the individual claims of the workers involved.

In the Czech STRONGLAB-report (Trčka et al. 2018), for instance, the authors conclude that strategies of posting workers are often used as the method to access the labour market. For workers, the semi-legal status of a 'Polish visa' worker's category has been internalised, conceivably creating differences in salary and types of work, feelings of exclusion, fears of being revealed and official institutions or non-governmental organisations being notified, and sometimes even changing behaviour or dress (trying to 'look like Czechs'). The posting mechanism is used as a semi-legal strategy, used to circumvent restrictions on the labour migration of non-EU workers, allowing savings in social security and other payments. It is a strategy companies and intermediaries employ (in addition to the use of European passports, e.g., from Romania or Bulgaria) to get Ukrainian workers to the Czech market (Čaněk 2017).

Thus, employers or intermediaries can easily exploit the precarious position of Ukrainian workers. In posting the workers through 'Polish visas' (Schengen or national types of visas issued in Poland), certain posting conditions are not met, such as duration of stay (i.e., 90 days of work):

> We observed a decrease in the labour rights standards defined in the Czech Republic, and the creation of unofficial, unregulated ones, only 'executed' on a personal level via job intermediaries. The main expression of injustice at work is the issue of unpaid wages and underpayment. Other violations include a lack of security instructions and training at the workplace, a lack of protective equipment and long shifts (e.g., 11-13 hours, 6 days a week). (Trčka et al. 2018, 3)

Other evidence of false posting includes the finding that third country workers often come directly to the Central and Eastern European countries; they are transferred from one firm to another or recruited by fictitious agencies (so-called 'letterbox companies'). Also, the fictitious registration as self-employed is widespread. In the Slovak and Polish reports, more types of fake posting are signalled as well: for instance, situations where the posting intermediary is simply the

employer from the host country. In general, migrant workers have very limited safety nets and very limited resources to fight against abusive practices. In the case of third-country workers that perform work in false posting, the uncertainty of their legal status contributes even more to their vulnerability and workers are more reluctant to report labour rights violations and/or exploitation to enforcement bodies. The main reason is the fear of expulsion. Virtually no measures exist to protect victims of labour exploitation; they are usually treated as illegal workers, at the risk of being deported.

5 The Thin Line Between Poor Working Conditions and Labour Exploitation

The experiences described in Chapter 4 disclose forms of recruitment that starkly contrast with rights-based free movement or genuine and regulated posting. The revealed practices are in stark contrast to the ECJ-slogan that posting companies want to provide cross-border services with posted workers that do not seek access to the labour market in the host state. In this section, we resume some findings of research dedicated to the working conditions at stake. The focus is here on proxy evidence of serious breaches of the posting rules or the application of the label 'posting' in situations that do not fit in the provision of services with posted workers, but instead are irregular forms of (cross-border) labour recruitment.

In general terms, the use of posting in labour-intensive segments of the labour market does not necessarily lead to a deterioration of working conditions. By the late 1980s, the first indications of the practice of bypassing rules through the use of foreign labour-only subcontractors had emerged, leading to questions about the possible relationship between cross-border labour recruitment and artificial company arrangements in the EU. The free provision of services by foreign entities resulted in their exemption from host country social security legislation, questionable practices in the field of income and corporate tax, and the watering down of national labour standards, mandatory pay and working conditions. The absence of genuine activities in the country of origin was combined with repeated cross-border work on an almost permanent basis. Letterbox companies were (and still are) opened with the purpose of recruiting workers for work abroad.

The problem arises as soon as cross-border labour-only subcontracting is presented as a provision of services. In such a situation, the freedom to provide services with posted workers creates an opening for forms of recruitment, not intended by the legislators. This is especially the case when companies externalise the recruitment of labour to small subcontractors, leading to the use of agencies, gang-

masters and other intermediaries that act as the go-between for the worker and the user undertaking or the specialised subcontractor. Distortion of the labour market is potentially substantial and posting can become one of the channels for the cross-border provision of cheap labour in the single market without the application of the equal treatment that can be derived from the EU legislation related to the free movement of workers.

Early research with country reports in 9 Member States summarised several examples of the non-respect of labour standards and applicable working conditions (Cremers 2011):

- Wages were not corresponding with the working hours or the skill level.
- Unlawful deductions and systematic refunding after the return home.
- The cheapest collective bargaining framework was chosen (for instance construction workers were registered as cleaners).
- Unpaid overtime.
- Long working hours. Workers signed for 40 hours and were paid accordingly, but actually worked 60 hours a week.
- Non-respect of daily and weekly rest periods.
- Higher risks as a result of fatigue, no training provided, no translation of health and safety rules, lack of the necessary protective equipment.
- Inferior work environment
- Living in barges for 4Star prices. Deductions for housing and food in breach of the provisions of the posting rules.
- Kept away from the local population and the colleagues.

The consequences and effects of the non-respect and circumvention of applicable working conditions can be manyfold, not in the least as it bears the risk of a hollowing out of the applicable legal and conventional framework (the *lex loci laboris*). In recent years this has been acknowledged by several scholars (Arnholtz, Lillie 2020; Rijken, de Lange 2018; Bernaciak 2015). Moreover, the effects have led to fierce political debate in several Member States. For instance, in France, the Conseil Économique Social et Environnemental commissioned a special study on posting in 2015 that included a critical chapter on the effects on the working conditions of the involved workers. Next to the lower level of social security payments that already is in favour of a posting company, the French rapporteur signalled abuses such as real working time that absolutely did not match with the paid wages or the reduction of lodging and travel costs. The search for cheap labour led to the provision of fraudulent pay slips or the payment on paper of the right wage, with the obligation to return a substantial part of the wages once returned home. There was also reference to administrative intermediary fees that can put the workers in a con-

stant situation of debt (Grosset 2015). Another French author found, based on fieldwork as a construction worker, both infractions of the labour code and non-respect of mandatory collective provisions, varying from the non-payment of bonuses for shift work, holiday leave, bad weather and work during weekends to fictitious fees. With a permanent threat of losing one's job and income, workers experienced pressure on wages, working time and occupational health and safety (Jounin 2006, 2007). In recent years, these infractions were reported by several anthropologists and ethnographers in their fieldwork among low-paid migrant workers (Monteiro 2014; Berntsen 2015). In a recent study, two authors summarise the overlapping strategies applied in Italy (Iannuzzi, Sacchetto 2020). First, in order to suggest respect for the regulation of wages and social contributions, firms can use an accounting practice that allows them to record the largest part of wages as benefits, such as transfer and daily allowances, creating a net global remuneration equal to non-posted workers. Secondly, the strategy of fake posting, workers that were made redundant were re-employed through agencies or letterbox companies. The consequences are clear: a loss of social protection and a growing situation of precarity.

A basic characteristic in situations of externalised labour is the inequality between direct employees and subcontracted workers. The user undertaking exempts itself from the existing regulatory frame of working conditions (including the rules that are applicable for temporary agencies) and, in cases of cross-border recruitment with 'fake posting', even from the rights that can be derived from the posting rules. Workers are becoming dependent for their pay and work, their housing and their daily lives on the goodwill of an often invisible employer (in the legal sense), whilst the firm that uses their labour takes no direct responsibility.

The poor working and living conditions (and the cumbersome enforcement of rights) often go hand-in-hand with a general climate of fear in which the workers live. In the Polish/German LABCIT-report (Schöll-Mazurek et al. 2016), cases are cited in which the employer or the middleman is regarded as an untouchable authority that dictates unfair deductions for rent or lodging and orders penalties for "misbehaviour" or too low "inadequate performance at work". Housing in isolated places is an easy means of control and repression and workers were told to declare false address details, whilst sickness or an accident at work immediately results in dismissal. Workers reported bullying, being threatened physically, or witnessing other workers being threatened or even attacked. As a result, workers refrain from taking any legal steps. This and other LABCIT-reports even describe situations where workers are trapped in situations because they 'owe' money to the company as a result of 'negative wages' or deductions and penalties.

Some of the ethnographic work also illustrates how workers internalise this dependency and how they try to cope with it (Queirós 2019). The opacity of the personal consequences of migration was reinforced by migrants' internalisation and naturalisation of experiences of exploitation and domination. By contributing to the impression that it was an exceptional period or a period of respite, the transitoriness of their migration period helped deflect attention away from the conflicts attributable to the dependency they were subject to. The author found that workers reinterpreted the mental and physical costs of work using the logic of masculine stoicism and virtuosity ("many can't stand it") and justified by the financial compensation it brought ("as long as they pay me at the end of the month…") (Queirós 2019, 163). Workers had to deal with feelings of inferiority that they experienced as 'foreigners' and, when expressing their uneasiness in encounters with other persons (supervisors, inspectors and native), they seemed to provide the very proof of evidence that initially justified the prejudices heaped on them ('incompetent', 'rough', 'incomprehensible'). The loss of social value surrounding them, in reality due to the situation of social and economic deprivation in which they live, promotes their loss of public visibility and appreciation even more. This contributes to the attitude of seeking to accelerate economic earnings and accepting self-exploitation through overwork and arduous labour under harsh conditions (Monteiro 2014).

6 Outlook

The irregularities that are signalled beyond have been confirmed by the European Commission in documents that underpin the proposal to revise the Posting Directive. The Commission, for instance, refers in an assessment of the implementation of the Enforcement Directive to Article 4 of the Posting Directive that provides for two non-exhaustive lists of elements which Member States may in particular use when making the overall assessment to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment (Art. 4.2) and whether a posted worker carries out his work temporarily in a Member State other than the one in which he or she normally works (Art. 4.3). These elements should assist competent authorities when carrying out checks and controls and where they have a reason to believe that a worker may not qualify as a posted worker (European Commission 2019). However, one of the problems is that an overall assessment to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment is not part of the competencies of the controlling authorities in the Member State where the work is pursued. The competence to identify a genuine posting and prevent

abuse and circumvention is dispersed over different authorities in the host country and the country of origin (and in many cases the country of registration of the go-between). In addition, the administrative A1-issuing offices in most EU Member States have neither an enforcement tradition nor a legal status to act against providers of fake posting.[9] As a result, compliance offices have serious problems in controlling whether posting is just a workforce supply or in fact a provision of services based on a commercial contract.

The activities of mobile companies with workers that provide cross-border services are ruled by several Directives and Regulations, partly belonging to the social domain, partly arising from specific sectoral legal acts. But the core parts of the EU acquis that are relevant in the assessment of the 'genuine' character of corporate legal entities acting as cross-border service providers do not belong to the competence of national competent authorities (such as the labour inspectorate). That core part is enshrined in primary EU law, i.e., the freedom of establishment and the free provision of services. Based on the principles of these economic freedoms, the EU and its Member States have built a European market for national corporate legal entities with a relatively weak transnational safety net to ensure the genuine character of any cross-border activity. For instance, non-genuine service providers making use of artificial arrangements and 'empty' corporate legal entities are difficult to tackle or to withdraw from the market (Cremers 2019a).

The problem of dispersed competences and the resulting lack of effective enforcement in practice was to a certain extent acknowledged in the argumentation that led to the foundation of the European Labour Authority (ELA) (European Commission 2018). The European Commission announced in September 2017 plans for an authority that had to ensure in a fair, simple and effective way the enforcement of EU rules on labour mobility. The Commission's proposal, formulated in March 2018, dealt with the mismatch between the legal theory and the practice of compliance and enforcement of social rights. The proposal, which was published together with an impact assessment and a synopsis report summarising the outcomes of a stakeholder consultation, stated that the objective was to help strengthen fairness and trust in the Single Market. To that effect, the ELA should support the Member States and the Commission in strengthening access to information about rights and obligations in cross-border labour mobility situations and in facilitating the solution of cross-border labour market disputes or irregularities.

9 Moreover, the ECJ has ruled that decisions of the EU Administrative Commission for the coordination of social security systems in the EU in case of conflicting interpretations are not legally binding in relation to the legality of issued A1-forms.

The Commission recognises the fact that in several industries, (first of all, labour-intensive industries, such as construction, manufacturing, shipbuilding, transport and logistics compliance) control is hampered as soon as a transnational dimension is introduced on local labour markets. The Commission's assessment of the enforcement practices confirms most of the signalled shortcomings in the relevant research. National compliance arrangements that protect workers' interests are neither equipped nor adapted to the enforcement challenges in the Single Market. The assessment pinpointed insufficient capacity of national authorities to organise cooperation across borders, although this is essential for effective and efficient handling of cross-border issues. Moreover, the assessment signalled weak or absent mechanisms for joint cross-border enforcement or mediation activities. In essence and indirectly, the assessment illustrated that the (operational implementation of the) EU and national acquis did not keep pace with the Single Market development.

It is too early for a review of the functioning of the ELA; a compromise between the European Council and the European Parliament was concluded in the spring of 2019 and ELA started in October 2019. But some question marks, partly based on the text of the compromise, can already be formulated. In order to strengthen the legal capacity of the national enforcement bodies in joint and EU-wide investigations in cases of infringements or irregularities related to cross-border labour mobility, it is necessary to broaden up their competence with other parts of the EU acquis, such as control of the 'genuine' character of the service provider. Special attention should be given to dubious subcontracting practices and fake posting.

Social partners report in several studies the appearance of artificial legal corporate entities created for the sole purpose of subcontracting work to one or more countries. The workers most often work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. Therefore, the planned combined tasks relating to cross-border labour mobility and the coordination of social security should be complemented with legislative areas not yet covered, such as the tackling of artificial arrangements (i.e., letterbox companies) and the transnational cooperation and fight against fraudulent service providers. It is a missed opportunity that the ELA Regulation does not lay down the main rules for an EU-wide fining policy and for procedures for properly sanctioning in case of violation of the law. Effective measures are needed to promote genuine operations and prevent abuses. Fake entities should be refused the entrance to the market (such as withdrawal of licenses and certificates or the exclusion from public procurement). An ultimate sanction should be the suspension or cessation of fraudulent activities, with an EU-wide effect in order to avoid non-genuine actors starting all over again in other constituencies.

Competences to decide on and to control compliance with the regulatory framework of pay and working conditions, as enshrined in collective agreements and labour legislation, should lie more with the country of employment. This asks for a reestablishment of the *lex loci laboris* principle. Free movement of workers will survive alone if it takes place grounded on the principle of equal treatment in the territory where work is carried out. The competence to check the reliability of documents that underpin the cross-border activity and, if necessary, to withdraw these documents, should become a competence that can be performed EU-wide by compliance and enforcement authorities in both the sending and the receiving country.

7 Postscript

At the time of writing this essay, the world became paralysed by the COVID-19 pandemic. I do not intend to discuss the consequences of this disaster for the world of work. However, it is clear that it will structurally change the modelling of work and the future labour mobility in Europe.

One key feature is that the sudden surfacing of the virus has (once more) revealed the precarity of labour migrants. National governments dictated (more or less) restrictions and forms of social distancing, but only few information was given in the language of the migrants present on their markets. In a random check of websites of important agencies that recruit migrant labour, I could hardly find any relevant information in the necessary languages about the consequences of the virus for the work environment. What is missing completely is basic education of migrant workers in social distancing, illness and mental wellness. This is even more worrying as the housing of labour migrants is often overcrowded, with shared living quarters that make it hard to maintain the social distance required to contain the spread of COVID-19.

Secondly, the pandemic has highlighted the essential nature of the work these migrants do in industries such as agriculture, food services, hospitality and caregiving, in jobs that are often characterised by low wages and difficult working conditions; and, although the crisis created a rapid growth of unemployment, the demand for migrant labour did not disappear completely. On the contrary, recruitment for essential services and basic activities in logistics, distribution and seasonal harvesting stayed topical. These workers produce, harvest, slaughter and process the food we eat, they stock, transport and distribute the services and products we command online and, in many countries, fulfil crucial care duties.

Thirdly, the recruitment of mobile workers has become more difficult. Companies looking to fill seasonal positions are already facing a tougher time. Employers in agriculture and other vital sectors

have expressed their worries about border closures and travel restrictions that impact the migrant workforce in their industry. Some employers have taken the initiative to fly fruit and order pickers in.

And lastly, the virus has reversed the flow of mobility. Many workers have returned to the country of origin, with the exception of Poles and workers from the Baltic region that are largely settled. Especially in Central and Eastern European countries, where the suffering seems to be lower than in the rest of Europe, this return is substantial. And despite a growing record of unemployment, the predicted size of unemployment in most Central and Eastern European countries will not reach the levels in, for instance, Italy or Spain. This might be the right time to return and to stay home. Some governments in Central and Eastern European countries have expressed it a priority to retain these workers.

All of this, of course, can have a huge impact on future mobility and the challenge in the EU will be to attract the next generation of mobile workers through decent rights-based recruitment.

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