# Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

## To the European Commission
## Contract VC/2011/0096


**Aukje van Hoek / Mijke Houwerzijl**

With the cooperation of
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Tomas Davulis
Michael Doherty
Kristīne Dupate
Joaquin Garcia Murcia / Angeles Ceinos
József Hajdú / Dora Sári
Petr Hůrka
Rajko Knez / Verena Rošic
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Ulla Liukkunen
Andrea Olsovska
Costas Papadimitriou
Eva Soumeli
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UNIVERSITY OF AMSTERDAM

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**Executive Summary November 2011**


## University of Amsterdam

## 1. Background and aim of the study

The position of workers who are posted to another Member State in the framework of the provision of services has been a European concern for a considerable period of time. The Posting of Workers Directive (hereafter referred to as PWD, adopted on 16 December 1996) is one of the tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (former Article 49 TEC) with the need to ensure a climate of fair competition and respect for the rights of workers (preamble paragraph 5). The European Commission has regularly monitored the implementation and enforcement of the PWD to assess whether the aims of the PWD were being met. A comprehensive monitoring exercise launched in 2006 by the European Commission led to the assessment that the Directive's main shortcomings, if not all of them, could be traced to a range of issues relating to its implementation, application and enforcement in practice.

In July 2009 the European Commission launched a pilot project 'working and living conditions of posted workers'. One of the research projects commissioned in this context (VT/2009/63), led to the study "The legal aspects of the posting of workers in the framework of the provision of services in the European Union", by Ms Aukje van Hoek and Ms Mijke Houwerzijl, March 2011. It is based on twelve national studies and examines the questions and difficulties that arise in the practical application of the posting of workers legislation, as well as its enforcement in practice. The current study is meant to supplement this first study with information on the implementation, application and enforcement of the PWD in the other fifteen Member States. In this executive summary we highlight the main findings of the current study in comparison to the results of the previous study.

## 2.1 Legal context: the interaction of Rome I and PWD

The PWD deals with the law applying to the labour relationship of posted workers. To a great extent this topic is also covered by the rules of private international law (PIL), but, as was shown in the previous study and confirmed in the current study, the exact relationship between both legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention/Rome I Regulation, also because the ECJ did for a long time not judge PIL issues. Accordingly, the Member States have developed or maintained different interpretations both of the interaction between Article 8 and Article 9 of the Rome I Regulation and of the interaction between the Rome I Regulation and the PWD.

The law applying to the individual contract of employment is determined in particular by Article 8 of the Rome I Regulation. This provision primarily refers to the law of the country where or from which the work is habitually performed. The PWD basically contains this requirement in its definition of posted worker in Article 2(1): " 'posted worker` means a worker who, for a limited period, carries out his work in the territory of a Member State other than *the State in which he normally works*" [emphasis added AH/MH]. However, in the previous study we found that this provision currently lacks adequate practical enforcement and implementation in the

Member States. This finding was confirmed in the current study. Therefore we advise to make Article 2(1) PWD operational while drawing inspiration from Article 12(1) Regulation 883/04 and, most notably, Article 14 Regulation 987/2009. We think this is important to ensure that the concept of posting is effectively applied and enforced and based on a genuine connection between the 'sending state' and the employment contract of the posted worker. The requirement of a real link between sending state and contract of employment is an important factor in achieving that. But also the fact that the employer pays the costs of expatriation can be relevant.

In the previous report we distinguished different national traditions with regard to the interaction between labour law and private international law. The current study does confirm the distinctions made. In particular the national traditions differ with regard to the role ascribed to the law applying to the labour contract under Article 8 of the Rome I Regulation and the functions of the 'territorial application' of labour law. Labour protection is often organized through statutes having an independent scope of application in international cases. This is especially true for common law jurisdiction such as the UK in the previous study and IE in the current study. But also in other states specific protection can be limited in scope to work performed within the territory. An important conclusion to be drawn from this is that the implementation of the PWD in the law of the Member States may have harmonized the application of overriding mandatory provisions of the host state, but has not done the same as regards the application of the mandatory protection of the law of the sending state. In particular, under the current interpretation of the interaction between the PWD and the Rome I Regulation, there is no guarantee that a worker will always be protected by at least one system of law – be it that of the host state, the country of habitual place of work or the country of establishment of the employer. This problem is not caused by the PWD but may be exacerbated by it, because the PWD limits the possibility of the host state to offer additional protection to workers posted to their territory under foreign law. The danger of lacunae is in practice most urgent when the worker does not have a relevant connection with the country of establishment of the service provider. This again underlines the importance of ensuring a real link to the sending state in all cases of posting under the PWD.

Hence, we recommend a clarification of the relationship between the Rome I Regulation and the PWD and an interpretation of the concept of posting in the PWD in the light of the Rome I Regulation (*recommendation 1*). Moreover, attention is drawn to the responsibility of the sending state in offering adequate protection to posted workers (*recommendation 2*).

## *2.2 The PWD and the different systems of standard setting in labour law*

Since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection, might be seen as being in conflict with the Directive in combination with the Treaty provisions on free movement of services. This is caused partly by the wording of Article 3(8) and partly by the interpretation of the Directive and Treaty by the ECJ. The result is that the Directive seems to be more apt at accommodating the systems in which collective agreements are comparable to

delegated legislation, such as the FR/BE/LU/DE/NL systems of generally applicable CLAs than at accommodating autonomous systems such as the UK/SW/DK.

In contrast to the previous study, in the current study no major problems are reported in this respect. The situation in IE as regards the system of collective negotiations is problematic, but this seems to be linked to economic reasons and constitutional objections, rather than to problems caused by EU law. The high prevalence of procedures for extension of collective agreements in combination with the low relevance of CLAs at sector level in many of the countries studied, might explain the absence of reported problems in the current study. Other explanations include the predominance of the sending state perspective amongst the Member States covered and the relatively low awareness as to posting in some MS. Nevertheless, when the requirements of Article 3(8) in combination with the case law of the ECJ are compared to practice in the Member States covered in the current study, certain discrepancies are revealed. This regards particular aspects of the FI system and to a minor extent also those of CY and LV. Thus, we can uphold the conclusion drawn in the previous study that several countries experience difficulties in their attempts to reconcile the PWD and internal market case law with their system of establishing labour standards. The impact of the ECJ case law can to a certain extent be mitigated by measures at the national level (see *recommendation 3*).

However, national action can not eliminate all the reported problems and uncertainties. The case law of the ECJ in the Laval quartet has created legal uncertainty with regard to both the position of the unions/the right to take industrial action and the conformity with EU-law of social clauses in (public and private) procurement. In the previous report we concluded that this uncertainty should be remedied by action at EU level. In the current study we stick to that conclusion which will be further explained below.

## The EU and the position of the unions

Unions fulfill different roles in the protection of posted workers by host labour standards. Collective (solidarity) action by unions in the host state to impose adherence to national collective agreements may be used as a means to impose host state standards if not going beyond the protection offered by the PWD (Laval). This type of collective action is covered (and limited) by Article 3(8). However, unions also have a role in monitoring and enforcing labour rights – a role specifically referred to in Article 5 second sentence PWD. Finally, unions may assist posted workers in their negotiations with the employer over the conditions of work and employment. The ECJ has consistently held - in the context of the interpretation of Article 3(7) PWD - that employers may voluntarily agree to provide their workers with better protection than that offered by the PWD. Nevertheless, it is currently unclear what negotiating methods may be used by the posted workers themselves in order to persuade their employer to agree on better conditions during their posting - and which role the unions may play in this respect. Clarification as to the distinction between the three types of union activity would be welcome. Moreover, in several national reports, in particular in the previous report, concern was expressed as to the effect of claims for damages on the effective enjoyment of the fundamental right to collective action. As the sanctioning of breaches of EU law is not entirely at the discretion of the

Member States but takes place in an EU framework, we recommend rules at EU level on the liabilities of the unions (r*ecommendation 4).*

### Social clauses in (public and private) procurement

As regards social clauses in *public* procurement contracts, we repeat our recommendation to clarify the issue of compatibility between EU law and ILO Convention No. 94 (C94). In the current study, experts of IE, FI and MT specifically mention the relevance of fair competition in public procurement and the efforts made to include an effective check on employment and labour conditions in the procurement procedure. However, state authorities involved in public procurement do not act in their capacity as legislators, but rather as contractual counterparts. Social clauses are an integral part of 'corporate' social responsibility. Against this background, the Rüffert case does not only call into question the ability of state authorities to adhere to social standards in their contracting practice, but may also affect the possibility of private parties (including social partners) to do so. Such practices of corporate social responsibility occur in different varieties in the Member States. In the previous report we reported on the use of the rules on codetermination to induce respect for CLAs in case of subcontracting (SE). Also collective agreements are used to regulate the working conditions in the subcontracting chain. Likewise, collective agreements may regulate outsourcing and the hiring of temporary agency workers by the companies bound by the CLA. In the previous report this method was found to be of importance in the UK and IT. In the current study it is reported as being used in FI and CY. This aspect, in our opinion, also merits a rethinking (and a clarification) of the application of the PWD to social clauses (r*ecommendation 5*).

## *3.1 Implementation and application of the personal scope of the PWD*

### The concept of posting

The PWD contains criteria for distinguishing postings from other types of labour mobility. These relate to the establishment of the employer, the performance of a cross-border service, the context in which the posting takes place and the temporary character of the posting as such. These criteria cause problems of interpretation. In order to avoid such problems several Member States have chosen not to include the personal scope criteria used in the PWD in their implementing statutes, but to apply instead the relevant standards of labour law and labour protection to anyone working within the territory (or similar criteria). In the previous study we found this to be true in B, NL and the UK; in the current study, IE provides an example of this policy. A clear disadvantage of this latter method of implementation is that it may lead to over-application of the implementation measure. It might be applied in cases in which application of host state law is ineffective and/or disproportionate but also in cases in which full (rather than limited) application of host state law would be warranted. A proper implementation of the scope of application of the PWD into national law may prevent this – see *recommendation 6*.

From the material gathered in both reports – inter alia in the analysis of cases that have attracted media attention – we conclude that clear and enforceable definitions of posting and posted worker may also help to avoid 'creative use' of the freedoms in which the provision of services is used to avoid (full) application of the host state's law. Controversial cases include the setting up of letter box companies which then hire workers specifically to 'post' them to other Member States and incidences of consecutive 'postings' of a single worker to a single Member State by different 'employers' in different Member States. Two main points of concern are the genuine character of the establishment of the employer in the sending state and the proper implementation of the concept of posted worker in Article 2 PWD. Whereas only a few states have implemented requirements as to the establishment of the employer, none has fully implemented the concept of posted worker. To fight abuse of the free provision of services, we recommend further implementation of these two criteria. This implementation is best achieved at EU level. A set of recommendations are formulated to accomplish this: see *recommendation 7, 8 and 9.* In absence of and awaiting EU action, the national enforcement authorities should reach agreement as to the criteria used to determine the status of the posted worker under the Directive: see *recommendation 10.*

The current report also confirms the conclusions in the previous report that the definition of posting in the PWD may cause problems of interpretation as regards posting which is not linked to the provision of a service (notably trainees) and three party arrangements in which the employer is not the service provider. Hence we repeat our recommendation to clarify and if necessary amend the requirements of a service provision and a service contract between the employer and the recipient of the service in order to fit the purpose of the Directive. In the absence of a solution at EU level, a further clarification by the Member States would be welcomed (see *recommendations 11 and 12*).

The current study also confirms the special status of transport workers, both as regards the exact criterion for application of the protection offered by the PWD and as regards the practical application and enforcement thereof. HU, SK, CZ have or until recently had specific conflict of laws rules for transport workers. Cross-border mobility of transport workers may not qualify as posting under domestic law and/or the implementation measure in AT, HU, SI and PT. These findings underscore the relevance of a separate implementation of the PWD for transport workers, as was recommended in the first study. In absence of and awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application and enforcement of the PWD to this sector. See *recommendation 13*.

## The national regulation of posting from a sending state perspective

The PWD addresses the Member States in their role as host state. Several member states covered by the current study have, however, included provisions on posting *from* their territory in their implementing laws. This is the case in BG, ES, HU, LV, LT, PT, SK – and until recently in CZ. For example BG law grants protection under

host state law for postings from its territory only if they exceed 30 days. Laws of other states, e.g. SI contain substantive protection of posted worker posted from their territory/under their laws, but no rules based on the private international law effect of the PWD.

In principle, the implementation in the law of the sending state of a duty to respect the host state core protection standards in situations of posting may be welcomed as a way to further the effective enforcement of the rights conveyed by the directive. This could also be stipulated at EU-level. However, care should be taken as to the exact formulation of the implementing provision. The provision should not cause confusion as to the applicability of the law of the sending state as law applicable to the contract of employment ánd the provision should not contradict the relevant rules in the host state by making protection under host state law dependent on a minimum term of posting (see the example of BG above). The findings in the current study have led us to formulate a new recommendation to this end: *recommendation 14 new.*

## *3.2 Issues related to the substantive scope of the PWD*

The PWD guarantees posted workers a nucleus of protection in the host state (Article 3(1) PWD). In both studies we examined problems, either at the PWD level or at the level of its national implementation and application, regarding the terms and conditions of the posted worker's employment (substantive scope of the Directive).

### Wages and working time

The rules on minimum rates of pay are identified in the national reports to both studies as being of paramount importance, besides safety and health and, to a lesser degree, working time and paid holidays. They can be regarded as the 'hard nucleus within the hard nucleus' of protection. Most countries included in the current study have a system of statutory minimum wages (BG, CY, CZ, HU, IE, LV, LT, MT, PT, SK, SI, and ES). In Cyprus, however, the statutory protection only covers 9 specific professions. Collective agreements are the sole basis for setting wage levels in AT, FI, EL and CY (outside the 9 professions covered by the statutory system). They form an additional or complementary (IE) source of wage provisions - besides the statutory minimum - in the other countries.

As was noted in the previous study, the interpretation of the concepts 'rates of pay' and 'minimum wage' is uncertain. The Directive delegates the definition of the concept minimum rates of pay to the Member States. Moreover, the Directive specifically allows the Member States to use universally applicable collective agreements as a means to establish minimum protection in the areas covered by the PWD. However, the PWD does not provide a clear answer to the question of whether the host state can only impose a single minimum wage (flat rate) or rather a set of rules determining the minimum rate of pay in the individual case (wage structure / job ladder). As – again - demonstrated by the overview given in the current study, these two pay levels may differ considerably (e.g. in IE, HU). Hence, if the PWD is to create a level playing field, the application of the entire national minimum wage

structure is of paramount importance. It should be absolutely clear that such is allowed under the PWD: see *recommendation 15*.

A separate problem with regard to rates of pay concerns the relation between the wages paid and the number of hours worked. This problem is partly caused by the rules on minimum wages in the Member States themselves. If minimum rates are fixed by the hour, the number of hours worked directly impacts on the wages paid at the end of the day, week or month. On the other hand, monthly wage rates may result in varying effective hourly wage costs, depending on the number of hours worked. Problems of comparability may arise when hourly wages are measured against monthly standards and vice versa.

In the countries covered by the current study, the minimum wage is calculated on a variety of bases – we found minimum wage levels determined on an hourly (IE), daily (ES), weekly (MT) and monthly (HU, SI) basis. Hourly and monthly rates were by far the most common. In several countries, the law contains both a monthly and an hourly minimum (as well as the calculating method to get from the one to the other): see e.g. BG, CZ, LV, LT, SK. ES has both a monthly and a daily minimum. AT uses a different calculus for employees (by the month) and workers (by the hour/day/week).

Member States are encouraged to introduce an hourly minimum wage when this is not already in their legislation (*recommendation 16*). However, with regard to effective hourly wage costs, the larger problem seems to be the (national) supervision and enforcement of working time provisions. This also holds with regard to the right to paid holidays. Although officially part of the hard nucleus, this right is barely relevant in practice. Only when the right to paid holidays is effectuated through a special holiday fund (for the current study this concerns the BUAK in AT) do the right itself and its enforcement take on practical relevance.

In the context of the comparison of wages, a problem which clearly surfaced in the current study concerns the payment of expenses and per diems under the law of the sending state and the calculation thereof against the minimum wage level of the host states. This particular problem is directly related to the fact that several Member States have statutory rules on the payment of expenses and per diems in case of (both domestic and cross-border) posting (BG, CY, LV, LT, HU). The high level of per diem remuneration in LV even seems to lead to evasion of the rules on posting, to the benefit of either direct employment in the host state or irregular posting.

Which labour conditions should or should not be taken into consideration when determining the minimum rates of pay? The finding in the previous study that the concept of ‘minimum rates of pay’ is far from clear, was convincingly underpinned in the countries covered by the current study. Where some countries stipulate that the per diems are part of the minimum rates of pay (FI, EL), such does not seem to be the case in BG. The holiday and Christmas bonuses, which are usually considered to be part of the rates of pay, are not part of the calculation of the minimum rates of pay in SI. For some countries in the current study, the experts indicate that the domestic concept differs from the one used in the context of posting. For example in LT per diem allowances for business trips are not considered to be part of the minimum wage for domestic purposes whereas in the context of posting they are. Similarly in ES

travel expenses going beyond the actual costs are excluded for domestic purposes, but included in the context of posting.

In conclusion, we formulated as a new recommendation to the Member States that they could be more specific in identifying the different elements of 'pay' under Article 3(1)(c) (*recommendation 17 new*). Next to this, we reiterate our recommendation that there is need for a clarification at EU level of both the concept of minimum rates of pay in the PWD and the method to be used for comparison (*recommendation 18*).

## Health and Safety

Health and safety has to a great extent been harmonized in the EU. This does not mean, however, that workers could safely be assumed to be always adequately protected by the rules of the country of the sending state. On the contrary, in situations of posting the safety of the working environment will primarily be determined by local conditions in the host state. In the current study, the expectation was confirmed that the host states all apply their H&S provisions *to* postings at their territory. But a large number of the sending states covered by this study likewise apply their laws to posting *from* their territory (BG, CZ, EL, LT, SI and probably HU. Only LV specifically refers to the host state law on this issue). This leads to an unexpected degree of overlap in protection. However, there is not much information on how this extraterritorial application of the health and safety regulations is implemented in practice. Since the current study mainly covers sending states, it provides little information as to the exact application of H&S provisions in case of posting *to* the MS. However, the information given supports the conclusions of the first report. Hence we repeat the recommendation as to the clarification of the notion of safety and health and the relationship with other systems of protection in *recommendation 19*.

## Protection of specific groups

The special protection given in the Member States to pregnant women or recent mothers, children and young people is largely based on EU Directives. The directive 92/85 on pregnant women and recent mothers contains several types of protection to be offered to this specific category of workers, including the right to paid maternity leave. The protection of minors and young adults relates inter alia to the minimum age for gainful employment, special rules on working time and rules on safety and health.

The current study largely confirms the findings in the previous study that neither protection of minors nor protection of pregnant women and recent mothers constitute elements of major relevance as regards the protection of posted workers. With regard to minors the only interesting point raised in the reports (ES) was related to the question of the minimum age for gainful employment: is this to be considered as part as the protection offered under Article 3(1)(f) or rather an extension of protection under Article 3(10)?

In contrast, the theoretical potential for problems is quite large as regards protection of pregnancy and mother/parenthood. As was reported for NL and LU in the previous

study, also in some countries covered by the current study the rules on unfair dismissal (IE) and/or on equal protection/non-discrimination (ES) are included in the protection of this specific group of workers, whereas dismissal law is not in itself part of the hard core of protection applicable to posted workers. As to protection of motherhood and family, there is a striking difference in the length of the leave granted to pregnant women (for example: AT has a 16 weeks period in which the pregnant woman is not even allowed to work. CY has an 18 weeks period. IE has 26 weeks of paid leave plus 16 of unpaid leave. SK offers 34-43 weeks of leave depending on the circumstances). As regards to payment during leave both the level of payment and the source thereof are country specific. The payment is part of social security in AT, BG and IE whereas it is paid (in part) by the employer in MT. In IE, additional payments by the employer are usual, but these are not based on any statutory requirement. Accordingly, the right to leave under the law of the host state might not be supported by a claim to payment under the applicable labour law or social security regulation.

Although there is no great sense of urgency in regard to this subject, nevertheless three recommendations may be considered, if only in the slipstream of legislative activity on other elements of the PWD. Firstly, a clarification of the content and scope of the protection under Article 3(1)(f) would be welcome. Depending on this, a clearer demarcation between the PWD with regard to payment during maternity leave (Article 11(2) of Dir. 92/85/EEC) and the Regulation 883/04 on coordination of social security (regarding maternity benefits) would be welcome. Finally, and again depending on the outcome of the previous two points, it may be important to establish a method of comparison with regard to the protection offered in the field of maternity leave and parental leave, in particular how a longer leave against a lower remuneration/benefit should be compared to a shorter period of leave against a higher remuneration/benefit (*recommendation 20*).

## Protection against discrimination

The protection against discrimination does not seem to play a major role in the protection of posted workers. The relevant national laws and regulations are largely based on the relevant EU directives on discrimination at work. From a more theoretical point of view it is interesting to note (once again) the multitude of sources of protection in labour law. Protection against discrimination may be achieved through both the labour code (limited to workers) and special non-discrimination statutes (BG, CZ, SK). In some cases, even the criminal code may come into play. Each of these has a different scope of application in international cases. On the other hand, non-discrimination plays a more general role in workers' protection (inter alia in the areas of pay and safety and health) in CY, IE and ES. In these countries a single legal instrument/concept is used to protect a variety of interests.

## Provision of manpower

The rules on temporary work agencies do play a role in practice, especially insofar as Member States subject this economic activity to restrictions and/or special authorization. In the current study, licensing systems are reported from AT, IE, LT and LV. Though application of these restrictions to cross-border posting is in

accordance with Article 3(1)(d) PWD), the restrictions themselves will have to be evaluated in the light of Article 4 of the TWA Directive 2008/104. In several of the Member States covered by the current study, the regulation of TWA activity is fairly recent (MT, SK) or even non-existent (CY, BG, LT), and often triggered by the implementation of the 2008 TWA Directive. IE introduced proposals for a licensing requirement in 2009, which will most likely form part of the legislation to be introduced in late 2011 to transpose the TWA Directive. Noteworthy is the special fund created by PT for the repatriation of Portuguese agency workers who were posted by and have become the victim of unreliable Portuguese TWAs. This practice could inspire other Member States when they encounter similar difficulties.

The PWD also allows the protection offered to posted TWA workers to be extended to the level of protection offered to local TWA workers (Article 3(9) PWD). This provision interacts with Article 5 of the TWA Directive 2008/104. The extra protection offered under Article 3(9) PWD usually takes the form of the equal treatment principle under which the TWA worker has to be treated equally to a similar worker in the user enterprise. This principle is incorporated (albeit limited to a hard nucleus of protection) in Article 5 TWA directive. It is already applied (in full or to a limited extent) in AT, MT, EL and HU (albeit only after 183 days). The EC is advised to monitor the implementation of the latter Directive with special regard to the position of posted workers (*recommendation 21*).

## Extension of the substantive scope under 3(10) – public policy

The concept of public policy has become highly controversial after the judgment in case C-316/09 (Commission v. Luxembourg). Despite the Commission's communication from 2003, several Member States were confronted with an interpretation of the concept of ‘public policy’ in the PWD which was given by the ECJ in the light of the Treaty and which seems to differ, sometimes rather drastically, from the notion of public policy/ordre public in their national labour law and private international law systems. It is important to note, though, that the relevance of Article 3(10)(first indent) is directly related to the interpretation of the headings of protection under Article 3(1). Several ‘extensions’ of the protection could also be interpreted as coming within the scope of a heading of protection specifically mentioned in Article 3(1) and vice versa. This was noticed in the previous study with regard to e.g. FR and SE. Similar examples are found in the current study. For example: the minimum age for employment could be seen as part of the protection of minors. However, it is notified by ES as being an extension under Article 3(10). The application of the rules on per diems and reimbursement of costs to postings to LT might be part of the regulation on minimum rates of pay, but could also (partly) be considered to go beyond the hard core. Hence, we recommend as a first step in the discussion on the public policy clause in the PWD, the clarification on the scope of application of the headings of protection in Article 3(1) (*recommendation 22*).

The current study also confirms the finding in the previous study that not all Member States report the application of their ‘public policy’ laws to the European Commission. This lack of precise information on the content of national rules which are given a public policy status makes it hard to evaluate the necessity to change (the current interpretation of) Article 3(10). Hence, the second step in the evaluation of

Article 3(10) should in our view consist of a (more precise) inventory of provisions which are applied to posted workers but cannot be subsumed under one of the other headings of protection. These rules can only be applied when they are attributed a public policy status. Member States could aid this inventory by more specifically referring to the provisions of the PWD in their implementation (*recommendation 23*).

Finally, a lot is still unclear about the exact interpretation of the public policy provision in the PWD. Generally, collective rights, especially the right to collective negotiation and collective action, are deemed by the Member States to fall within the concept of public policy. This is supported by the ECJ. However, the public policy concept has only been clearly delineated in the context of migration law. The PWD operates in the context of private international law, in which the concepts of 'ordre public'/public policy may take on a different meaning. In any case, art 3(10) itself equally refers to the compatibility with the Treaty rules. There currently is a lack of clarity as to the exact relation between overriding mandatory provisions (lois d'ordre public) and public policy in private international law on the one hand, and the concepts of imperative requirements of the public interest and public policy in the framework of the internal market on the other hand. (*recommendation 24*).

## *4.1 Actors involved and their competences*

With regard to the monitoring and enforcement of the PWD, in our first study major difficulties and obstacles were identified. The twelve national reports clearly revealed and exposed the weaknesses in the national systems of labour law and their enforcement with regard to vulnerable groups on the labour market, such as (certain groups of) posted workers. Hence, it was concluded that compliance can and should be strengthened by the implementation and application of several monitoring and enforcement 'tools'. This also holds for the fifteen countries covered by our present study. Below we summarize the findings topic wise.

### Monitoring the terms and working conditions (i.e. the rights) of posted workers

In almost all the Member States examined in the current and the previous study, national host state authorities explicitly fulfil a monitoring and inspecting role in respect of posted workers. In most host countries the social partners are also involved. Regarding the public authorities involved, a situation where no or multiple actors are responsible, may be assessed as problematic from a viewpoint of transparency and accessibility of a system. In the current study, for CY this point of view was confirmed. However, no such critic was heard from stakeholders in AT. In both studies, the national reports displayed a great variety regarding the extent to which host state public authorities are involved in monitoring/enforcement of labour law. The vulnerability of host state systems that place excessive reliance on private law enforcement must be emphasized again here. This may lead to (abusive) situations of non-compliance where unreliable service providers are involved.

Thus, we repeat *recommendation 25* to create greater transparency in the monitoring systems of host countries with multiple authorities by appointing one authority as the

first contact point. Also we reiterate *recommendation 26* to implement more public enforcement measures in host countries where the national system insufficiently ensures the adequate enforcement of posted workers' rights.

Another problem concerns the mode of operation of the monitoring authorities. In the countries covered by the current study in their role as a host state, perhaps with the exception of AT, it seems that the inspectorates focus first and foremost on monitoring compliance with national labour law in general. As a consequence, no enforcement capacity is specifically allocated to monitor compliance with the rights conveyed in the PWD. Hence, the findings in the current study underpinned the need for a more targeted focus on posting of workers in the monitoring and enforcement policy of national host state authorities. Such focus can be achieved by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations (*recommendation 28).*

## Monitoring the presence of posted workers

In the previous study, no monitoring of the presence of posted workers within the meaning of the PWD was reported for IT, NL, UK, SE. In the current study, this is true for FI, HU and IE. In these seven countries, in their role as a host state, no government agency is notified of the presence of posted workers nor does any agency gather data on the number of workers posted to their territories in the meaning of the PWD. On the other hand, in total eighteen Member States (in their role as a host state) do run general notification or 'pre-declaration' schemes regarding posted workers, regardless of their nationality and their specific posting situation (BE, DK, FR, DE, LU and RO in the previous study, AT, BG, CY, CZ, EL, ES, LV, LT, MT, PT, SI and SK in the current study). In this context, *recommendation 27* was confirmed: it merits further study to assess whether a requirement on service providers and/or recipients to simply notify the presence of posted workers to authorities in the host state may be justified and proportionate as a precondition for monitoring the rights of posted workers.

## Domestic and cross-border cooperation

Despite considerable progress, the internal cooperation between national authorities (including social partners) responsible for monitoring the position under labour law, social security law and tax law of posted workers and their employers, still displays serious shortcomings, as was shown in both studies conducted. While in some Member States there is still no or only limited systematic cooperation, in others there is a clear gap between cooperation on paper and cooperation in practice. The same holds for cross-border cooperation of the national authorities involved in PWD-related monitoring/enforcement issues. The difficulties in cross-border cooperation are increased by the wide variety of functions performed by the competent authorities in the different countries (what the Labour Inspectorate does in one country falls under the competence of Tax authorities, or the Ministry of Finance in another). Hence, further implementation/application of the ongoing initiatives at EU and national level is necessary with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates (*recommendation 29*).

## Inspection activities, frequency of controls

With regard to the specific inspection activities of the host state authorities involved (based on risk assessment, on own initiative or on request) and the frequency of their controls, a great variety exists, as illustrated by the country findings in both studies. However, a common problem in several countries seems to be a shortage of staff involved in host state monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings could be addressed by national efforts and/or at EU level by stipulating appropriate minimum standards in a legal instrument (*recommendation 30*).

## Involvement of social partners – problems caused at national level

Apart from the Nordic countries DK and SE, it was found in the previous report that social partners in the host state are involved in monitoring / enforcing the rights of posted workers and their presence only to a very minor extent. This leads to a clear absence of monitoring and enforcement of rights at CLA level. This finding was largely confirmed in the country studies for the present report. Hence, we reaffirm our conclusion that more financial as well as institutional support of social partners is needed at national level. Besides this, it would be helpful to stipulate minimum standards, preferably at EU level, for adequate monitoring/enforcement of rights at the CLA level, as well as guidelines for cooperation between the authorities and social partners (*recommendation 31*). On a positive note, some best practice examples of cross-border cooperation between trade unions were observed, between Latvian and Norwegian, Austrian and Hungarian, Austrian and Slovakian, and Spanish and Portuguese unions, most of them funded by the EU.

## Posted worker or (posted) self-employed?

A specific problem related to monitoring the terms and working conditions of posted workers is the difficulty which is sometimes experienced by authorities of distinguishing between a (posted) worker and a self-employed person (service provider). Article 2(2) PWD stipulates that the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host state. For labour law purposes a comprehensive judgmental view on an individual basis is necessary in each country. In the previous report it was observed that the burden of proof is sometimes very hard.

However, in most countries covered by the current study it seems that the qualification of the worker's status is not perceived as a particular pressing problem (although in LV the difficulty to proof that someone is a bogus self-employed was noted). In fact, a disinterest in this problem was noticed in CY. In SK, labour inspectors do not seem to investigate the status of a worker in the case of posting, since they are not allowed to contest it before the court. In some country reports, the

A1/E 101 form is mentioned as one of the indications of the worker's status for labour law purposes, whilst in SI and perhaps also in IE it seems to be in use as *the* indicator.

### Recognition and execution of foreign judgments

In both studies, country reports confirmed that foreign judgments relating to infringements concerning the protection of workers can in principle be recognized according to Regulation 44/2001/EC on recognition and enforcement of judgments in civil and commercial matters, and sometimes this is (also) laid down in national Codes of Private International Law.

With regard to the usefulness of the existence of Council framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, as in the previous study, the responses from the national stakeholders in the current study varied from an acknowledgement of its existence to non-awareness or non-applicability because their system does not use these penalties in the context of posted workers. Hence, despite EU measures governing the recognition and execution of foreign judgments and decisions, enforcement of rights conveyed by the PWD still seems to stop at the national borders.

As was concluded in the previous study, for the part that the non-recognition and execution of foreign judgments and decisions is due to legal lacunae, additional measures should be taken at national and at EU level to enhance the cross-border recognition and execution of penalties used in the context of the PWD (*recommendation 32*).

## *4.2 Dissemination of information*

### Access to information in the host country

According to Article 4(3) of the Directive, monitoring authorities in the host state have responsibilities to provide information to the general public on posted workers' rights laid down in law and (generally binding) CLAs. From the previous study we know that in practice, the dissemination of information by the responsible authorities focuses on the statutory rights only and is mainly provided through websites. The social partners in the host state – in practice mostly the trade unions – are also involved. They offer information about the applicable CLA provisions. However, pursuant to the text of Article 3(1) PWD, the host Member States would be responsible, and therefore they only delegate part of the tasks to social partners, without any supervision. In practice this division of responsibilities leads to a situation of too little information about the entitlements of posted workers at CLA level. In the current study, this finding was confirmed.

Both studies together show that in eighteen of the twenty countries examined from a host state perspective (except CY, IT), websites are the most prominent means for the dissemination of information, followed by information on paper. Moreover, in the previous study, single points of contact (linked to the implementation of the Services

Directive (Dir. 2006/123) and special information campaigns were often mentioned. In the current study, only in Ireland such initiatives (the NERA road shows) were mentioned.

In the previous study it was established that especially in regard to information in a plurality of languages and the accessibility of the information, the situation has visibly improved in comparison to four years ago, when the European Commission in its Communication 159 (2006) concluded that there was a major scope for improvement. The current study displays a less optimistic picture in that regard. Hence, the conclusion was reinforced that further efforts to enhance accessibility in different languages, sufficiently precise and up-to-date information remain necessary, particular in IT and CY, but also at EU level (EU fiches) (see *recommendation 33*).

A point of attention concerns the amount of information available: too many sources of information may also endanger transparency. In this regards it is recommended that authorities designate one website/web gate as the central entry point for the provision of information, at both European and national level (*recommendation 34*). In the current study, this was explicitly recommended by stakeholders in e.g. Latvia. However, posted workers, in particular in the lower segments of the labour market, may not have internet access. This makes adequate information on paper and special information and awareness-raising campaigns focused on posted workers indispensable. Contrary to the previous study, in the current study almost no activity of host Member States in this respect was mentioned. Hence, *recommendation 35* to promote and sustain such initiatives with financial support and facilitation at EU and national level was neither confirmed nor denied.

## Access to information in the sending state

Currently, not much is done at national level to make information on host state terms and working conditions available in the workers' habitual country of work before they are posted. However, since awareness-raising should start as early as possible in order to enable the worker to make an informed decision on the posting, the authorities in sending countries should also be activated. Pursuant to Article 4 of Directive 91/533, employers have a duty (in addition to the obligation stemming from Article 2 to notify an employee in writing of the essential aspects of the contract or employment relationship including level of remuneration.

In the countries covered by both studies this obligation seems only to be subject to the supervision of the Labour Inspectorate in its role as a sending state in Estonia. This good practice deserves to be followed by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting. At EU level, amending Directive 91/533 is highly recommended, in order to establish an effective and dissuasive sanction in case of non-compliance and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533 also to the competent national authorities in the host and/or sending state. In case authorities in the latter state would be made primarily responsible, the cooperation

with the competent authorities in the host state should be clearly established (*recommendation 36*).

## *4.3 Duties on service providers*

### Notification requirements

Case law based on Article 49 EC/Article 56 TFEU allows national authorities of the host state to impose certain information duties on service providers and others, such as the service recipient.

In *six* Member States covered by the previous study (BE, DK, FR, DE, LU, RO) notification requirements are imposed on foreign service providers in order to enable the responsible government agencies to fulfil their monitoring and enforcement obligations under the PWD. The current study includes *ten* countries (AT, BG, CY, EL, LV, LT, MT, PT, SI, ES) where foreign service providers posting workers to their territories have to inform a designated authority (see section 4.3) in advance. All in all, *sixteen* of the 27 EU Member States in their role as host state do run more or less advance notification schemes for service providers in order to enable the responsible government agencies to fulfil their monitoring and enforcement tasks.

In the *eleven* Member States without notification requirements on the service provider, two (CZ and SK) impose such requirements on the service recipient (see below). Instead of imposing duties vis-à-vis state bodies, Finland and in case of TWA's also Hungary do impose duties on the service provider regarding their contractual counterpart in the host country (the user company). This leaves us with a clear minority of only seven Member States, including (paradoxically) five predominantly host states in practice, where no information duties (connected to the PWD) are imposed on the service provider (EE, IE, IT, NL, PL, UK, SE). In the current study, Ireland serves as the only country without any specific statutory duties for service providers and recipients related to posting in the context of the PWD.

As was concluded in the previous study, notification schemes in itself appear to be a good practice in the sense that the introduction of some kind of simple declaration system may be assessed as almost a conditio sine qua non for data collection on the size of the phenomenon of posting and for most monitoring and enforcement efforts. At the same time, it was admitted by national stakeholders in predominantly host countries that notification is by no means an infallible instrument. In the current study, no new information of any relevance could be added to this assessment on the effectiveness of notification schemes in practice. This may be explained by the fact that only *one* of the ten countries with a notification scheme in the current study, is a major host state (AT) and does, as a consequence, have considerable experience with notification in practice. The others are in practice either predominantly sending states (BG, LV, LT, PT) or report that posting (from and) to their territories is a relatively insignificant phenomenon (CY, EL, ES, MT, SI).

Whether it would therefore be recommendable to coordinate a notification system at EU level by laying down at least the minimum and maximum requirements of such a

system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. Inspiration may e.g. be drawn from Directive 2009/52 (*recommendations 37 and 38*).

### Additional administrative requirements

There are also differing situations in the Member States with regard to other and/or additional administrative requirements, such as the need to request prior authorization or to keep employment documents available for the authorities, or to appoint a representative, which may in certain cases be in breach of EU law. In our previous study, other or additional requirements were identified in BE, DE, FR, LU. In the current study such measures were identified in AT, FI and for a part in LT. In contrast to the previous study, where some interviewees stressed (as in Luxembourg) that the requirements go too far, in the current study the emphasis was on the problem of really enforcing these requirements or on the difficulty to apply general host state law on these matters to service providers.

In this regard Member States should exchange best practices with regard to 'balanced' additional administrative duties on service providers. At EU-level uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Article 2 and Article 4 of Dir. 91/533) (*recommendation 39*).

### Self-regulatory duties on service providers

According to the previous study in some Member States (DK, IT, UK), collective agreements also impose duties on foreign service providers, such as to provide pay receipts and employment contracts or documentation on the terms of employment upon request to the local branch of the trade union. In the present study, no such initiatives were reported. Hence, we stick to the recommendation that such initiatives may, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach with EU law (i.e. not too rigid and not too loose), be welcomed and exchanged as good practice, namely as a tool to enhance compliance with the PWD at the CLA level (*recommendation 40*).

## *4.4 Duties on recipients of services*

### Information requirements

In the previous study we saw that BE and DK (with regard to certain risk sectors), oblige recipients of the service to check whether foreign service providers, often in their role as foreign subcontractor(s) / temporary staffing agency, have complied with their notification duty.

In the current study, AT, in case of temporary agency work makes the user undertaking subject to penalties if the remuneration documentation is not available. Moreover, in CZ and SK, the service recipient (referred to as 'employer') is obliged to notify in writing all employees posted to him by filling out a specific form at the Labour Office, or, in Slovakia, to the Office of Labour, Social Affairs and Family in the district where the employee performs work. Quite recently, a similar notification duty for the service recipient was introduced in BG. In FI, the service recipient is responsible for collecting information from the service provider (e.g. on his reliability) and has to keep these documents available to inspectors in case of checks (sanctioned with fines). Also in HU, certain information duties are imposed on the service recipient, when he is making use of TWAs. In IE, similar duties on user companies of TWAs exist, but these are limited to agencies established on Irish territory.

Given the problem of non-notifying service providers witnessed in several Member States, it is understandable that the service recipient is made co-responsible to a certain extent. Thus, to enhance the effectiveness of notification schemes, these initiatives may be welcomed and exchanged as good practice, namely as a tool to enhance compliance with the PWD, including the CLA level. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined (see *recommendation 41*).

### Liability (or 'functional equivalents') with regard to pay and pay-related contributions/tax

In nine Member States (BE, DE, FR, IT, NL in our previous study, AT, EL, ES, FI in the current study) more or less far-reaching legal (sometimes combined with self-regulatory) mechanisms of liability/responsibility exist. Apart from FI, these are in particular joint and several liability schemes concerning the clients/main contractors/user companies. To enhance compliance with the PWD, most notably the payment of the applicable wages to posted workers, initiatives to make service recipient co-responsible may be welcomed. (Self-evidently) the content of the measures must not be disproportionate or in breach of EU-law, and must be shared as good practice, namely as a tool to enhance compliance with the PWD, including the CLAs level. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined (see - also - *recommendation 41*).

## *4.5 Supportive tools/remedies available for posted workers*

### Jurisdiction clause

Article 6 of the PWD stipulates that the posted worker must have the opportunity to institute judicial proceedings in the host Member State. Hence, all Member States in their role as a host state have had to ensure that possibility for workers posted to their

territory, covered by the Directive. In our first study we found that, with the exception of the UK, Article 6 of the PWD is explicitly implemented in the other eleven Member States covered by that study. With regard to the fifteen Member States covered by the present study, it was reported that only seven of them (AT, BG, CY, ES, FI, LV, MT) have explicitly implemented Article 6 of the PWD. The other eight Member States seem to have implemented Article 6 in an indirect manner, although in CZ and SK the situation is not fully clear.

## Support by social partners and/or other stakeholders

Apart from partial rights in IE for trade unions to bring cases to court independent of the individual worker, no other Member States covered by this study have independent locus standi for representative trade unions, as is the case in BE, FR and NL (see our previous study). Since trade unions (and employers' associations) in the host state may have an independent interest in enforcing host law labour standards on foreign service providers, this is good practice which deserves following by other Member States. Also worth mentioning are some additional supportive tools and/or institutions strengthening the chance that posted workers get what they are entitled to. In the current study these were reported in AU (BUAK, the 'Arbeiterkammer') and IE (the Labour Relations Commission comparable to the ACAS in the UK).

All in all, compared to the previous study, the findings on the implementation of Article 6 PWD in the current study were more worrying than in the previous report. Hence, it merits further study to ensure that in each Member States the jurisdiction clause is properly implemented (this extra recommendation is included in recommendation 42). Moreover, we reaffirm our recommendation in the previous study to make, at EU level, the option to give social partners locus standi in Article 6 PWD an obligation. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state. If not already provided for, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for purposes such as recovering outstanding wages) (*recommendation 42*).

## Access to legal aid for posted workers

In the previous study it was found that posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in BE, DE, FR, NL, LU, SE) as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU (except for DK). However, in accordance with the general principles operating in the UK in employment cases, no legal aid would be available for workers posted there. Nor do workers posted to RO have access to legal aid, with the exception of such legal aid as can be provided from the trade union.

In the countries covered by the current study, posted workers have equal access to the legal aid mechanisms provided by law in AT, BG, CZ, EL, ES, FI, HU, LT, PT, SI, SK, as long as they are EU nationals or regularly residing or domiciled in another

Member State of the EU. However, in EL and PT legal aid is not very well developed. In accordance with the general principles operating in CY, LV and MT, no legal aid would be available for posted workers there. In IE, (posted) workers taking claims before the employment tribunals have no access to legal aid; the applicable law does not allow for the granting of legal aid before an employment tribunal. Legal aid may be available for contractual claims pursued in the civil courts if the applicant satisfies the financial eligibility criteria.

Although these findings are in line with EU law (notably the legal aid directive) it may be recommended, for instance by an EU Communication, to provide access to legal aid for (posted) workers in countries where this is currently not available (*recommendation 43*).

## Complaint mechanisms

None of the host countries examined in both studies have specific complaint mechanisms for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the same methods of complaint as any other worker in the host countries, such as contacting the trade unions or the labour inspection services with their complaints. However, in practice most posted workers do not complain about non-compliance and abusive situations, in some instances because they are afraid to do so, or because it could cause them to lose their job. As another factor for non-complaining the difficulty for posted workers to understand and get access to general complaint mechanisms under host state legislation was mentioned. Nevertheless, there are some positive examples to note, such as in SI with regard to help provided to workers posted from former Yugoslavia and in IE and the UK the roles of ACAS and LRC in *collective* disputes. It is advised that the lack of access to and/or awareness of designated complaint mechanisms at national level should be remedied. At EU level, we recommend to facilitate access of posted workers to existing complaint mechanisms (*recommendation 45*).

## Non-use of jurisdiction clause by posted workers

In both studies, hardly any court cases related to posting of workers were reported. Hence, it seems apt to confirm the finding in the first study that the right to take legal action has at present hardly or never been used by posted workers or their representatives.

Together with the convincing (though anecdotal) evidence of (abusive) cases of non-compliance as reported in the national reports in the current and the previous study, this must be interpreted as a clear signal that the jurisdiction clause in the PWD alone is not sufficient to provide an effective remedy. To the extent that procedural problems are detected (in some national reports) efforts should certainly be made to remove them. However, the main point to underscore here is the indispensable role of trade unions which together with other actors at grassroots level, try to reach posted workers, raise their level of awareness as to their rights, and ‘empower’ them. Noteworthy are several accounts of both wildcat strikes and organized strikes on behalf of posted workers. At the same time it was found that efforts to unionize posted

workers are not very successful, mainly for non-legal reasons (disinterest / fear / distrust of unions due to bad experience / image in country of origin, costs of membership). However, there are also local signs of success, indicating that trade union efforts should be sustained and not abandoned for a lack of financial resources (which was also reported several times). Therefore, we believe it is important to emphasize the long-term need to structurally promote and support trade union (and/or social partner) initiatives in this regard (*recommendation 44*).

### Posted workers' rights denied under legislation or court attitude in the sending state

In several sending states mention was made of rules or court attitudes which may hamper the rights of workers posted from these states. Especially the so-called 'business-trip' legislation in several sending member states was sometimes interpreted as if host state rules do not apply during relatively short periods of posting (SI, BG, see also above at 3.2). Another example concerns the unclarity in Slovakian law regarding the recognition of a foreign judgment. An illustration of what may be called an unfriendly court attitude is the situation regarding workers posted by temporary work agencies established in PT.

Hence, the current study shows that posted worker's rights are sometimes denied under the legislation or court interpretation/attitude of the sending country. Legislation in the sending state stipulating that host state rules do not apply during relatively short periods of posting and/or practices of courts not recognizing host state judgments granting these rights to posted workers, run counter to Brussels I, Rome I and the PWD. The EC should act upon that, ultimately with an infraction procedure (*recommendation 46*).

## *5. FINAL REMARKS*

In this executive summary we listed the main contributions of the current study to the previous findings.

By and large, the current study confirms the analysis and recommendations made in the previous study. Almost all recommendations were unchanged (but sometimes renumbered) as regards their content, with only four of them slightly adapted or amended (recommendations 2, 4, 42, 45). Three new recommendations were added (14, 17 and 46) as a result of new findings in the current study.

In general, many of our recommendations in both studies boil down to clarification and a more precise application of the concepts and standards in the PWD to enhance the Directive's practical impact. Ideally, the clarification must occur mainly at EU level, with the more precise and accurate application at national level. In particular, where problems of application and enforcement of the PWD are concerned, we also advocate the development of new legal or policy instruments. A lot can be done at national level, but with an eye to the principle of effectiveness grounded in the TEU, (additional) legal action at European level would seem to be indispensable.

# Ergänzende Studie zu den rechtlichen Aspekten der Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen in der Europäischen Union

## Für die Europäische Kommission
## Kontrakt VC/2011/0096


## Aukje van Hoek / Mijke Houwerzijl

Unter Mitarbeit von
Florian Burger
Tomas Davulis
Michael Doherty
Kristīne Dupate
Joaquin Garcia Murcia / Angeles Ceinos
József Hajdú / Dora Sári
Petr Hůrka
Rajko Knez / Verena Rošic
Roselyn Knight
Ulla Liukkunen
Andrea Olsovska
Costas Papadimitriou
Eva Soumeli
Krassimira Sredkova
Júlio Manuel Vieira Gomes


**Zusammenfassung November 2011**


**Universität von Amsterdam**

## *1. Hintergrund und Ziel der Studie*

Die Stellung von Arbeitnehmern, die im Rahmen der Erbringung von Dienstleistungen in einen anderen Mitgliedstaat entsandt werden, ist seit geraumer Zeit ein europäisches Anliegen. Die Richtlinie für die Entsendung von Arbeitnehmern (im Folgenden „Entsenderichtlinie“ genannt, verabschiedet am 16. Dezember 1996) ist eins der konkreten Ergebnisse dieses Anliegens. Die Entsenderichtlinie hat das Ziel, die Ausübung des Rechts der Unternehmen auf freien Dienstleistungsverkehr beim Angebot von grenzüberschreitenden Dienstleistungen gemäß Artikel 56 AEUV (ex-Artikel 49 EGV) mit der Notwendigkeit abzustimmen, ein Klima des fairen Wettbewerbs und die Wahrung der Rechte der Arbeitnehmer sicherzustellen (Präambel Paragraf 5). Die Europäische Kommission hat die Einführung und Durchsetzung dieser Richtlinie regelmäßig kontrolliert, um beurteilen zu können, ob die Ziele der Entsenderichtlinie erreicht werden. Eine umfassende Kontrolluntersuchung, die 2006 von der Europäischen Kommission veranlasst wurde, führte zu dem Ergebnis, dass das Hauptdefizit der Richtlinie, unter Umständen sogar alle Defizite, auf eine Reihe von Problemen zurückgeführt werden können, die sich auf ihre Einführung, Anwendung und Durchsetzung in der Praxis beziehen.

Im Juli 2009 startete die Europäische Kommission das Pilotprojekt „Arbeits- und Lebensbedingungen von entsandten Arbeitnehmern“. Eins der Forschungsprojekte, die in diesem Kontext in Auftrag gegeben wurden (VT/2009/63), resultierte in der Studie „Die rechtlichen Aspekte der Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen in der Europäischen Union“ von Aukje van Hoek und Mijke Houwerzijl vom März 2011. Sie basiert auf zwölf nationalen Studien und untersucht die Fragestellungen und Probleme, die sich aus der praktischen Anwendung der Gesetzgebung zur Entsendung von Arbeitnehmern sowie aus deren Durchsetzung in der Praxis ergeben. Die vorliegende Studie soll die erste Studie durch Informationen über die Einführung, Anwendung und Durchsetzung der Entsenderichtlinie in den anderen fünfzehn Mitgliedstaaten ergänzen. In dieser Zusammenfassung beleuchten wir die wichtigsten Untersuchungsergebnisse der aktuellen Studie im Vergleich zu den Ergebnissen der vorherigen Studie.

## *2.1 Rechtsrahmen: die Interaktion von Rom I und Entsenderichtlinie*

Die Entsenderichtlinie befasst sich mit dem Recht, das auf das Arbeitsverhältnis von entsandten Arbeitnehmern anzuwenden ist. Zu großen Teilen ist diese Thematik ebenfalls von den Vorschriften des Internationalen Privatrechts (IPR) erfasst, jedoch ist, wie sich in der vorherigen Studie gezeigt hat und durch die aktuelle Studie bestätigt wird, das genaue Verhältnis zwischen den beiden Rechtsinstrumenten nicht klar festgelegt. Dies macht es leicht, die Verbindung zwischen der Entsenderichtlinie und der Konvention von Rom / der Rom I Verordnung zu übersehen, auch weil der EuGH lange keine Urteile zu diesen Instrumenten sprechen konnte. Entsprechend haben die Mitgliedstaaten unterschiedliche Auslegungen sowohl zu der Interaktion zwischen Artikel 8 und Artikel 9 der Rom-I-Verordnung entwickelt bzw. beibehalten als auch zu der Interaktion zwischen der Rom-I-Verordnung und der Entsenderichtlinie.

Das auf den individuellen Arbeitsvertrag anzuwendende Gesetz ist vor allem durch Artikel 8 der Rom-I-Verordnung determiniert. Diese Bestimmung bezieht sich in erster Linie auf das Gesetz des Landes, wo bzw. von welchem aus die Arbeit gewohnheitsmäßig ausgeführt wird. Die Entsenderichtlinie enthält diese Anforderung grundsätzlich in ihrer Definition von entsandten Arbeitnehmern in Artikel 2(1): „Als ‚entsandter Arbeitnehmer' gilt jeder Arbeitnehmer, der während eines begrenzten Zeitraums seine Arbeitsleistung im Hoheitsgebiet eines anderen Mitgliedstaates als demjenigen erbringt, *in dessen Hoheitsgebiet er normalerweise arbeitet*" [Hervorhebungen durch AH/MH]. In der vorherigen Studie haben wir jedoch festgestellt, dass diese Bestimmung gegenwärtig in den Mitgliedstaaten nicht adäquat praktisch durchgesetzt und eingeführt wird. Diese Feststellung hat sich in der aktuellen Studie bestätigt. Daher empfehlen wir, Artikel 2(1) der Entsenderichtlinie einsetzungsfähig zu machen und sich dabei von Artikel 12(1) Verordnung 883/04 und, vor allem, von Artikel 14 Verordnung 987/2009 leiten zu lassen. Wir halten dies für wichtig um sicherzustellen, dass das Konzept der Entsendung effektiv angewendet und durchgesetzt wird und dass es auf einer echten Verbindung zwischen dem „Entsendestaat" und dem Arbeitsvertrag des entsandten Arbeitnehmers basiert. Die Notwendigkeit einer echten Verbindung zwischen Entsendestaat und Arbeitsvertrag ist ein wichtiger Faktor, um dies zu erreichen. Aber auch die Tatsache, dass der Arbeitgeber die Kosten der Auswanderung übernimmt, kann relevant sein.

In unserem vorherigen Bericht haben wir zwischen verschiedenen nationalen Traditionen im Hinblick auf die Interaktion zwischen Arbeitsrecht und internationalem Privatrecht unterschieden. Die aktuelle Studie bestätigt die vorgenommenen Unterscheidungen. Im Besonderen unterscheiden sich die nationalen Traditionen in Bezug auf die Rolle, die dem für den Arbeitsvertrag anzuwendenden Gesetz unter Artikel 8 der Rom-I-Verordnung zugeschrieben wird und die Funktionen des „territorialen Anwendungsbereichs" des Arbeitsrechts. Arbeitsschutz wird oft über Statute organisiert, die bei internationalen Fällen einen unabhängigen Anwendungsbereich haben. Dies gilt besonders für eine Common Law Rechtsprechung wie in UK in der vorherigen Studie und in IE in der aktuellen Studie. Aber auch in anderen Staaten kann der spezielle Schutz in seinem Geltungsbereich auf Arbeit innerhalb des Hoheitsgebiets beschränkt sein. Als wichtiger Schluss ist hieraus zu ziehen, dass die Einführung der Entsenderichtlinie in die Gesetzgebung des Mitgliedstaates die Anwendung von übergeordneten Bestimmungen des Gastlandes harmonisiert haben könnte, dasselbe aber nicht in Bezug auf die Anwendung des vorgeschriebenen Schutzes der Gesetzgebung des Entsendestaates gilt. Im Besonderen gibt es, gemäß der aktuellen Interpretation der Interaktion zwischen der Entsenderichtlinie und der Rom-I-Verordnung, keine Garantie dafür, dass ein Arbeitnehmer durch zumindest ein Rechtssystem dauerhaft geschützt ist – sei es das des Gastlandes, das des regulären Arbeitsortes oder das des Landes, in dem der Arbeitnehmer niedergelassen ist. Die Ursache dieses Problems ist nicht die Entsenderichtlinie, es könnte aber hierdurch verschärft werden, da die Entsenderichtlinie die Möglichkeit des Gastlandes einschränkt, Arbeitnehmern, die unter ausländischem Recht in ihr Hoheitsgebiet entsandt wurden, zusätzlichen Schutz zu gewähren. Die Gefahr von Lücken ist in der Praxis besonders akut, wenn der Arbeitnehmer keine relevante Verbindung zum Land der Niederlassung des Dienstleistungsanbieters hat. Dies unterstreicht noch einmal die Bedeutung, die der

Sicherstellung einer echten Verbindung zum Entsendestaat bei allen Fällen der Entsendung gemäß Entsenderichtlinie zukommt.

Daher empfehlen wir eine Präzisierung der Beziehung zwischen der Rom-I-Verordnung und der Entsenderichtlinie sowie eine Auslegung des Entsendekonzepts gemäß der Entsenderichtlinie unter Berücksichtigung der Rom-I-Verordnung (*Empfehlung 1*). Darüber hinaus wird auf die Verantwortung des Entsendestaates in Bezug auf das Angebot adäquaten Schutzes für entsandte Arbeitnehmer hingewiesen (*Empfehlung 2*).

## *2.2 Die Entsenderichtlinie und die verschiedenen Systeme der Festlegung von Standards im Arbeitsrecht*

Seit den EuGH-Urteilen zum – wie es mitunter genannt wird – „Laval-Quartett" können zahlreiche Mechanismen, die in den Mitgliedstaaten angewendet wurden (und noch werden), um ein Mindestmaß an Schutz herzustellen, als im Konflikt mit der Richtlinie in Verbindung mit den Vertragsbestimmungen zum freien Dienstleistungsverkehr bewertet werden. Die Ursache hierfür liegt teilweise in der Formulierung von Artikel 3(8) und teilweise in der Auslegung der Richtlinie und des Vertrages durch den EuGH. Die Folge ist, dass die Richtlinie eher geeignet scheint, die Systeme zu umfassen, in denen Tarifverträge mit delegierter Rechtsetzung vergleichbar sind, wie die französischen/belgischen/luxemburgischen/deutschen/niederländischen Systeme der allgemeinverbindlichen Tarifverträge, als autonome Systeme wie UK/SW/DK.

Im Gegensatz zur vorherigen Studie wird in der aktuellen Studie von keinen großen Problemen in dieser Hinsicht berichtet. Die Situation in IE ist in Bezug auf das System von Tarifverhandlungen problematisch, dies scheint aber eher mit ökonomischen Gründen und verfassungsrechtlichen Bedenken in Verbindung zu stehen als mit Problemen, die durch das EU-Recht verursacht werden. Die große Häufigkeit von Verfahren für die Erweiterung von Tarifverträgen in Verbindung mit der geringen Relevanz von GAVs auf Branchenlevel in vielen der untersuchten Staaten könnte das Fehlen der berichteten Probleme in der aktuellen Studie erklären. Andere Erklärungen beinhalten das Vorherrschen der Perspektive des Entsendestaates unter den umfassten Mitgliedstaaten sowie das relativ geringe Bewusstsein für die Entsendung in einigen Mitgliedstaaten. Wenn allerdings die Anforderungen von Artikel 3(8) in Verbindung mit dem Fallrecht des EuGH verglichen werden mit der Praxis in den in der aktuellen Studie umfassten Mitgliedstaaten, zeigen sich gewisse Diskrepanzen. Diese betreffen bestimmte Aspekte des Systems in FI und, in geringerem Ausmaß, auch dessen in CY und LV. Daher können wir die Schlussfolgerung aus der vorherigen Studie aufrechterhalten, dass verschiedene Länder bei ihren Versuchen, die Entsenderichtlinie und das Binnenmarktrecht mit ihrem System der Aufstellung von Arbeitsnormen zu vereinbaren, auf Schwierigkeiten stoßen. Der Effekt des EuGH-Fallrechts kann in gewissem Maße durch Maßnahmen auf nationaler Ebene gemildert werden (siehe *Empfehlung 3*).

Allerdings können nationale Aktionen nicht alle berichteten Probleme und Unsicherheiten ausschalten. Das Fallrecht des EuGH beim Laval-Quartett hat in Bezug auf die Position der Gewerkschaften/das Recht auf Streiks und bezüglich der

Frage, ob Sozialklauseln bei (öffentlichen und privaten) Vergabeverfahren der EU-Gesetzgebung entsprechen, zu rechtlichen Unsicherheiten geführt. Im vorherigen Bericht haben wir geschlossen, dass diese Unsicherheiten durch Maßnahmen auf EU-Ebene behoben werden sollten. In der aktuellen Studie halten wir an dieser Schlussfolgerung fest, die im Folgenden weiter erläutert wird.

## Die EU und die Position der Gewerkschaften

Gewerkschaften erfüllen beim Schutz von entsandten Arbeitnehmern durch die Arbeitsnormen der Gastländer unterschiedliche Rollen. Kollektive (Solidaritäts-) Maßnahmen von Gewerkschaften im Gastland, die auf die Einhaltung von nationalen Tarifverträgen drängen, können als Mittel eingesetzt werden, die Standards des Gastlandes zu erzwingen, wenn sie nicht über den durch die Entsenderichtlinie angebotenen Schutz hinausgehen (Laval). Diese Art von kollektiver Maßnahme wird abgedeckt (und beschränkt) durch Artikel 3(8). Allerdings spielen Gewerkschaften auch eine Rolle bei der Überwachung und Durchsetzung von Arbeitsrechten – eine Rolle, auf die im Besonderen in Artikel 5, zweiter Satz, der Entsenderichtlinie eingegangen wird. Schlussendlich dürfen Gewerkschaften entsandte Arbeitnehmer bei Verhandlungen mit dem Arbeitgeber bezüglich der Bedingungen von Arbeit und Arbeitsverhältnis unterstützen. Der EuGH hat – im Kontext der Auslegung von Artikel 3(7) Entsenderichtlinie – durchgängig für Recht erkannt, dass Arbeitgeber sich freiwillig bereit erklären dürfen, ihre Angestellten mit einem besseren Schutz auszustatten als dem, der durch die Entsenderichtlinie angeboten wird. Allerdings ist gegenwärtig unklar, welche Verhandlungsmethoden von den entsandten Arbeitnehmern selbst eingesetzt werden dürfen, um ihre Arbeitgeber davon zu überzeugen, bessere Arbeitsbedingungen während der Entsendung zu schaffen – und welche Rolle die Gewerkschaften in diesem Zusammenhang spielen. Klarheit in Bezug auf die Unterscheidung zwischen den drei Arten von Gewerkschaftsaktivitäten wäre wünschenswert. Darüber hinaus wurde in mehreren nationalen Berichten, vor allem in der vorherigen Studie, die Sorge darüber ausgedrückt, welchen Effekt Schadensersatzansprüche auf die effektive Ausübung des Grundrechts auf Kollektivmaßnahmen haben werden. Da die Sanktionierung von Verstößen gegen das EU-Recht nicht allein im Ermessen der Mitgliedstaaten liegt, sondern im EU-Rahmen stattfindet, empfehlen wir Regelungen auf EU-Ebene bezüglich der Haftung der Gewerkschaften (*Empfehlung 4*).

## Sozialklauseln in (öffentlichen und privaten) Vergabeverfahren

In Bezug auf Sozialklauseln in *öffentlichen* Vergabeverfahren wiederholen wir unsere Empfehlung, die Vereinbarkeit von EU-Recht und ILO-Konvention Nr. 94 (C94) zu klären. In der aktuellen Studie erwähnen vor allem Experten aus IE, FI und MT die Bedeutung eines fairen Wettbewerbs für öffentliche Vergabeverfahren und berichten von den Anstrengungen, die unternommen wurden, um eine effektive Kontrolle der Anstellungs- und Arbeitsbedingungen in die Vergabeverfahren zu integrieren. Allerdings agieren Behörden, die in öffentliche Ausschreibungen involviert sind, nicht in ihrer Funktion als Gesetzgeber, sondern eher als Vertragspartner. Sozialklauseln sind ein integraler Bestandteil der sozialen Verantwortung von Unternehmen. Vor diesem Hintergrund stellt der Rüffert-Fall nicht nur die Fähigkeit von staatlichen

Behörden in Frage, in ihrer Vertragspraxis soziale Standards einzuhalten, sondern er könnte auch die Möglichkeit von privaten Vertragspartnern (einschl. Sozialpartnern) beeinflussen, dies zu tun. Solche Praktiken der sozialen Verantwortung von Unternehmen treten in den Mitgliedstaaten in unterschiedlichen Ausprägungen auf. In der vorherigen Studie berichteten wir von der Anwendung der Regeln der Mitbestimmung, um die Einhaltung der GAVs bei Subunternehmertum herbeizuführen (SE). Auch Tarifverträge dienen dazu, die Arbeitsbedingungen in der Untervergabekette zu regulieren. Ebenso können Tarifverträge das Outsourcing und die Anstellung von Leiharbeitern durch Unternehmen regulieren, die an die Tarifverträge gebunden sind. Im vorherigen Bericht wurde dargelegt, dass diese Methode in UK und IT von Bedeutung ist. In der aktuellen Studie wird berichtet, dass dies in FI und CY Anwendung findet. Unserer Ansicht nach verdient dieser Aspekt ein Überdenken (und eine Verdeutlichung) der Anwendung der Entsenderichtlinie in Bezug auf Sozialklauseln (*Empfehlung 5*).

## *3.1 Einführung und Anwendung des persönlichen Geltungsbereichs der Richtlinie*

### Das Konzept der Entsendung

Die Entsenderichtlinie enthält Kriterien für die Unterscheidung zwischen Entsendungen und anderen Arten von Arbeitskräftemobilität. Diese beziehen sich auf die Niederlassung des Arbeitgebers, die Erbringung von grenzüberschreitenden Dienstleistungen, den Kontext, in dem die Entsendung stattfindet und den temporären Charakter der Entsendung als solchen. Diese Kriterien führen zu Problemen in Bezug auf ihre Interpretation. Um solche Probleme zu vermeiden, haben verschiedene Mitgliedstaaten entschieden, die in der Entsenderichtlinie angewandten Kriterien des persönlichen Geltungsbereichs nicht in ihre Einführungsstatuten aufzunehmen, sondern stattdessen die relevanten Standards von Arbeitsgesetzen und -schutz (oder vergleichbare Kriterien) auf jeden anzuwenden, der innerhalb des Hoheitsgebiets arbeitet. In der vorherigen Studie haben wir diese Vorgehensweise in B, NL und UK gefunden, in der aktuellen Studie liefert IE ein Beispiel für diese Politik. Ein deutlicher Nachteil dieser letztgenannten Methode der Einführung ist, dass sie zu einer übermäßigen Anwendung der Einführungsmaßnahme führen könnte. Sie könnte in solchen Fällen angewendet werden, in denen die Anwendung des Rechts des Gastlandes ineffektiv und/oder unangemessen ist, aber auch in Fällen, in denen die volle (statt der beschränkten) Anwendung der Gesetze des Gastlandes indiziert wäre. Eine korrekte Einführung des Anwendungsbereichs der Entsenderichtlinie in das nationale Recht könnte dies verhindern – siehe *Empfehlung 6*.

Aus dem in beiden Berichten gesammelten Material – u. a. aus der Analyse von Fällen, die das Interesse der Medien auf sich gezogen haben – schließen wir, dass klare und durchsetzbare Definitionen der Entsendung und entsandter Arbeitnehmer auch helfen können, die „kreative Verwendung“ der Freizügigkeiten zu verhindern, wobei die Erbringung von Dienstleistungen dazu eingesetzt wird, die (volle) Anwendung der Gesetzgebung des Gastlandes zu umgehen. Kontroverse Fälle umfassen die Einrichtung von Briefkastenfirmen, die Arbeitnehmer speziell zu dem

Zweck einstellen, sie anschließend in andere Mitgliedstaaten zu „entsenden“, sowie Vorfälle von aufeinander folgenden „Entsendungen“ eines einzelnen Arbeitsnehmers in einen einzelnen Mitgliedstaat durch verschiedene „Arbeitgeber“ in verschiedenen Mitgliedstaaten. Die beiden wichtigsten Punkte, die Anlass zur Besorgnis geben, sind die Echtheit der Niederlassung des Arbeitgebers im Entsendestaat und die korrekte Einführung des Konzepts vom entsandten Arbeitnehmer gemäß Artikel 2 Entsenderichtlinie. Nur wenige Länder haben Anforderungen bezüglich der Niederlassung des Arbeitgebers eingeführt, und kein einziges Land hat das Konzept vom entsandten Arbeitnehmer vollständig eingeführt. Um den Missbrauch der freien Erbringung von Dienstleistungen zu bekämpfen, empfehlen wir eine weitergehende Einführung dieser beiden Kriterien. Diese Einführung wird am besten auf EU-Ebene erreicht. Dazu sind eine Reihe von Empfehlungen formuliert worden: siehe *Empfehlungen 7, 8 und 9*. Solange EU-Maßnahmen noch fehlen und abgewartet werden müssen, sollten die nationalen Vollzugsbehörden in Bezug auf die anzuwendenden Kriterien für die Festlegung des Status von entsandten Arbeitnehmern im Rahmen der Richtlinie eine Einigung erzielen: siehe *Empfehlung 10*.

Der aktuelle Bericht bestätigt auch die Schlüsse der vorherigen Studie, dass die Definition der Entsendung in der Entsenderichtlinie zu Interpretationsproblemen in Bezug auf eine Entsendung führen könnte, die nicht mit der Erbringung einer Dienstleistung in Verbindung steht (vor allem Trainees) sowie im Hinblick auf Vereinbarungen zwischen drei Parteien, bei denen der Arbeitgeber nicht der Erbringer der Dienstleistung ist. Daher wiederholen wir unsere Empfehlung, die Voraussetzungen für die Erbringung einer Dienstleistung und für einen Dienstleistungsvertrag zwischen dem Arbeitgeber und dem Empfänger der Dienstleistung zu verdeutlichen und, wenn nötig, zu verbessern, um den Zweck der Richtlinie zu erfüllen. Angesichts des Fehlens einer Lösung auf EU-Ebene wäre eine weitere Klärung durch die Mitgliedstaaten begrüßenswert (siehe *Empfehlungen 11 und 12*).

Die aktuelle Studie bestätigt auch den besonderen Status von Transportarbeitern, sowohl in Bezug auf die exakten Kriterien für die Anwendung des durch die Entsenderichtlinie angebotenen Schutzes als auch hinsichtlich deren praktischer Anwendung und Durchsetzung. HU, SK und CZ haben bzw. hatten bis vor Kurzem besondere Kollisionsnormen für Transportarbeiter. Grenzüberschreitende Mobilität von Transportarbeitern gilt möglicherweise nicht als Entsendung nach innerstaatlichem Recht und/oder der Einführungsmaßnahme in AT, HU, SI und PT. Diese Erkenntnisse unterstreichen die Bedeutung einer separaten Einführung der Entsenderichtlinie für Transportarbeiter, wie es auch bereits in der ersten Studie empfohlen wurde. Angesichts des Fehlens und in Erwartung einer europäischen Lösung, könnten die Mitgliedstaaten die nationalen Sozialpartner aus diesem Sektor evtl. mit einbeziehen, um die korrekte Anwendung und Durchsetzung der Entsenderichtlinie in dieser Branche festzulegen. Siehe *Empfehlung 13*.

### Die nationale Regulierung der Entsendung aus der Perspektive des Entsendestaates

Die Entsenderichtlinie richtet sich an die Mitgliedstaaten in ihrer Rolle als Gastland. Verschiedene Mitgliedstaaten, die in der aktuellen Studie untersucht wurden, haben allerdings in ihre Einführungsgesetze Bestimmungen zur Entsendung *von* ihrem Hoheitsgebiet eingebracht. Dies ist der Fall in BG, ES, HU, LV, LT, PT, SK – und bis vor Kurzem in CZ. Die Gesetzgebung in BG garantiert beispielsweise Schutz nach dem Recht des Gastlandes für Entsendungen aus seinem Hoheitsgebiet nur dann, wenn diese mehr als 30 Tage dauern. Die Gesetzgebung anderer Länder, z. B. SI, umfasst materiellen Schutz von entsandten Arbeitnehmern, die von ihrem Hoheitsgebiet/nach ihrem Recht entsandt wurden, aber keine Regelungen, die auf dem IPR-Effekt der Entsenderichtlinie basieren.

Im Prinzip kann die Aufnahme einer Verpflichtung in das Recht des Entsendestaates, die wichtigsten Standards des Gastlandes in Fällen der Entsendung zu respektieren, als ein Weg begrüßt werden, die effektive Durchsetzung der durch die Richtlinie übertragenen Rechte fortzusetzen. Dies könnte auch auf EU-Ebene festgelegt werden. Bezüglich der exakten Formulierung der Einführungsbestimmung sollte allerdings sehr sorgfältig vorgegangen werden. Die Bestimmung sollte nicht zu Verwirrung führen hinsichtlich der Anwendbarkeit des Rechts des Entsendestaates als auf den Arbeitsvertrag anwendbares Recht und die Bestimmung sollte nicht den einschlägigen Vorschriften im Gastland widersprechen, indem der Schutz nach Recht des Gastlandes von einer Mindestdauer der Entsendung abhängig gemacht wird (siehe das Beispiel von BG oben). Die Ergebnisse der aktuellen Studie haben daher zu der Formulierung einer neuen Empfehlung geführt: *Empfehlung 14 neu*.

## *3.2 Kriterien in Bezug auf den materiellen Anwendungsbereich der Entsenderichtlinie*

Die Entsenderichtlinie garantiert entsandten Arbeitnehmern einen Kernbereich des Schutzes im Gastland (Artikel 3(1) Entsenderichtlinie).
In beiden Studien haben wir, entweder auf Entsenderichtlinienebene oder auf der Ebene der innerstaatlichen Einführung und Anwendung, Probleme bezüglich der Arbeitsbedingungen der entsandten Arbeitnehmer (materieller Anwendungsbereich der Richtlinie) untersucht.

### Löhne und Arbeitszeit

Die Vorschriften zu Mindestlöhnen werden in den nationalen Berichten zu beiden Studien als überaus wichtig bezeichnet – neben Sicherheits- und Gesundheitsvorschriften und, in geringerem Maße, Arbeitszeit- und Urlaubsvorschriften. Sie können als „absoluter Kernbereich des harten Kerns“ der Schutzmaßnahmen bezeichnet werden. Die meisten der in der aktuellen Studie untersuchten Länder haben ein System der gesetzlichen Mindestlöhne (BG, CY, CZ, HU, IE, LV, LT, MT, PT, SK, SI und ES). In Zypern deckt der gesetzliche Schutz jedoch nur neun bestimmte Berufe ab. Tarifverträge sind die einzige Basis für eine

Festlegung des Lohnniveaus in AT, FI, EL und CY (neben den neun Berufen, die durch das gesetzliche System abgedeckt sind). Sie bilden – neben dem staatlichen Mindestlohn – in den anderen Ländern eine zusätzliche bzw. ergänzende (IE) Quelle der Lohnregelungen.

Wie in der vorherigen Studie dargelegt, ist die Auslegung der Konzepte „Löhne“ und „Mindestlohn“ ungewiss. Die Richtlinie delegiert die Auslegung des Konzeptes von „Mindestlohnsätzen“ an die Mitgliedstaaten. Darüber hinaus gestattet die Richtlinie den Mitgliedstaaten insbesondere, sich allgemein verbindlicher Tarifverträge als Mittel zur Etablierung eines Mindestmaßes an Schutz in den von der Entsenderichtlinie umfassten Bereichen zu bedienen. Jedoch bietet die Entsenderichtlinie keine klare Antwort auf die Frage, ob das Gastland nur einen einzigen Mindestlohn (Pauschalbetrag) oder aber eine Reihe von Vorschriften, die je nach Einzelfall einen gesonderten Mindestlohnsatz festlegen (Lohnstruktur/Karriereleiter), vorschreiben darf. Wie der Überblick in der aktuellen Studie erneut zeigt, können diese beiden Ebenen erheblich voneinander abweichen (z. B. in IE, HU). Demzufolge gilt: Wenn die Entsenderichtlinie gleiche Wettbewerbsbedingungen schaffen soll, ist die Anwendung der gesamten nationalen Mindestlohnstruktur überaus wichtig. Es sollte absolut klar sein, dass dies im Rahmen der Entsenderichtlinie erlaubt ist: siehe *Empfehlung 15*.

Ein gesondertes Problem betrifft das Verhältnis zwischen den gezahlten Löhnen und der Anzahl der geleisteten Arbeitsstunden. Dieses Problem wird teilweise durch die Vorschriften zu Mindestlöhnen in den Mitgliedstaaten selbst verursacht. Wenn Mindestsätze pro Stunde festgelegt werden, beeinflusst die Anzahl der geleisteten Arbeitsstunden unmittelbar die am Ende des Tages, der Woche oder des Monats gezahlten Löhne. Auf der anderen Seite können monatliche Lohnsätze zu sehr unterschiedlichen effektiven Stundenlohnkosten je nach Anzahl der geleisteten Arbeitsstunden führen. Probleme der Vergleichbarkeit können entstehen, wenn Stundenlöhne an monatlichen Standards gemessen werden und umgekehrt.

In den in der aktuellen Studie umfassten Ländern wird der Mindestlohn basierend auf einer Vielzahl von Faktoren bemessen – wir fanden Mindestlöhne, die auf Stunden- (IE), Tages- (ES), Wochen- (MT) und Monatsbasis (HU, SI) festgelegt werden. Stunden- und Monatssätze kamen bei Weitem am häufigsten vor. In einigen Ländern umfasst die Gesetzgebung sowohl ein monatliches als auch ein Minimum auf Stundenbasis (sowie die Methode, das eine aus dem anderen zu berechnen): siehe z. B. BG, CZ, LV, LT, SK. ES hat einen Mindestlohn sowohl auf Monats- wie auf Tagesbasis. AT verwendet unterschiedliche Berechnungen für Angestellte (monatlich) und für Arbeiter (auf Stunden-/Tages-/Wochenbasis).

Die Mitgliedstaaten werden ermutigt, einen Mindeststundenlohn einzuführen, wenn sie dies nicht bereits getan haben (*Empfehlung 16*). In Bezug auf die effektiven Stundenlohnkosten scheint jedoch die (nationale) Überwachung und Durchsetzung von Arbeitszeitvorschriften das größere Problem zu sein. Dies gilt auch für den Anspruch auf bezahlten Urlaub. Obwohl er offiziell Teil des harten Kerns ist, scheint dieser Anspruch in der Praxis kaum eine Rolle zu spielen. Nur dann, wenn der Anspruch auf bezahlten Urlaub über eine spezielle Urlaubskasse realisiert wird (in der aktuellen Studie betrifft dies die BUAK in AT), sind der Anspruch selbst und seine Durchsetzung in der Praxis von Bedeutung.

Im Kontext der Vergleichbarkeit von Löhnen betrifft ein Problem, das in der aktuellen Studie deutlich zutage getreten ist, die Erstattung von Kosten und die Zahlung von Tagespauschalen nach dem Gesetz des Entsendestaates und deren Berechnung gegenüber dem Mindestlohnniveau der Gastländer. Dieses spezielle Problem steht in direkter Verbindung mit der Tatsache, dass verschiedene Mitgliedstaaten Rechtsvorschriften in Bezug auf die Erstattung von Kosten und die Zahlung von Tagespauschalen im Fall von (sowohl inländischen als auch grenzüberschreitenden) Entsendungen (BG, CY, LV, LT, HU) haben. Das hohe Niveau der Tagespauschalenerstattungen in LV scheint sogar zu einer Umgehung der Entsendungsvorschriften zu führen, zugunsten entweder der direkten Anstellung im Gastland oder der irregulären Entsendung.

Welche Arbeitsbedingungen sollten bzw. sollten nicht bei der Festlegung der Mindestlöhne in Betracht gezogen werden? Die Erkenntnis der vorherigen Studie, dass das Konzept der „Mindestlöhne“ alles andere als klar ist, wurde eindrucksvoll durch die Länder untermauert, die durch die aktuelle Studie umfasst werden. Während manche Länder festlegen, dass die Tagespauschalen Teil der Mindestlöhne sind (FI, EL), scheint dies in BG nicht der Fall zu sein. Die Urlaubs- und Weihnachtszulagen, die gewöhnlich als Teil der Löhne betrachtet werden, sind nicht Teil der Berechnung der Mindestlöhne in SI. Für einige Länder in der aktuellen Studie weisen Experten darauf hin, dass das Binnenkonzept von dem Konzept abweicht, das im Kontext der Entsendung angewandt wird. In LT beispielsweise werden Tagespauschalen für Geschäftsreisen nicht als Teil des Mindestlohns für inländische Zwecke betrachtet, wohingegen sie es im Kontext der Entsendung jedoch sind. In gleicher Weise werden in ES Reisekosten, die über die tatsächlichen Kosten hinausgehen, für inländische Zwecke ausgeschlossen, aber im Kontext der Entsendung mit eingeschlossen.

Abschließend haben wir als neue Empfehlung an die Mitgliedstaaten formuliert, dass sie die verschiedenen Elemente von „Lohn” unter Artikel 3(1)(c) spezifischer definieren könnten (*Empfehlung 17 neu*). Daneben wiederholen wir unsere Empfehlung, dass es Bedarf gibt, sowohl das Konzept der Mindestlöhne in der Entsenderichtlinie als auch die Methode, die für Vergleiche angewandt wird, auf EU-Ebene zu klären (*Empfehlung 18*).

## Gesundheit und Sicherheit

Gesundheitsschutz und Sicherheit sind in weiten Teilen der EU harmonisiert worden. Dies bedeutet jedoch nicht, dass Arbeitnehmer mit Sicherheit davon ausgehen können, dass sie immer adäquat durch die Vorschriften des Landes der Entsendung geschützt sind. Im Gegenteil – bei Entsendungen wird die Sicherheit des Arbeitsumfelds in erster Linie von den lokalen Bedingungen im Gastland festgelegt. In der aktuellen Studie hat sich die Erwartung bestätigt, dass alle Gastländer ihre G&S-Bestimmungen auf die Entsendungen *in* ihren Hoheitsgebieten anwenden. Aber eine große Anzahl der durch diese Studie umfassten Entsendestaaten wenden ebenso ihre Gesetze auf Entsendungen *von* ihren Hoheitsgebieten an (BG, CZ, EL, LT, SI und wahrscheinlich HU. Nur LV bezieht sich in diesem Zusammenhang speziell auf das Gastland). Dies führt zu einem unerwarteten Grad von Überschneidungen des Schutzes. Es gibt jedoch nicht viele Informationen darüber, wie diese extraterritoriale

Anwendung der Gesundheits- und Sicherheitsverordnungen in der Praxis eingesetzt wird. Da die aktuelle Studie hauptsächlich Entsendestaaten abdeckt, liefert sie wenige Informationen über die exakte Anwendung der G&S-Bestimmungen im Falle der Entsendung *in* die Mitgliedstaaten. Die vorliegenden Informationen stützen jedoch die Schlussfolgerungen des ersten Berichts. Daher wiederholen wird die Empfehlung bezüglich der Klärung der Begriffe Sicherheit und Gesundheit und deren Beziehung zu anderen Systemen des Schutzes in *Empfehlung 19*.

## Schutz bestimmter Gruppen

Der besondere Schutz, der schwangeren Frauen, Wöchnerinnen, Kindern und Jugendlichen in den Mitgliedstaaten gewährt wird, basiert größtenteils auf EU-Richtlinien. Die Richtlinie 92/85 für schwangere Frauen und Wöchnerinnen umfasst verschiedene Arten des Schutzes, die dieser bestimmten Gruppe von Arbeitnehmern gewährt wird, einschließlich des Anspruchs auf bezahlten Mutterschaftsurlaub. Der Schutz von Minderjährigen und jungen Erwachsenen bezieht sich u. a. auf das Mindestalter für die Erwerbstätigkeit, spezielle Vorschriften zur Arbeitszeit und zu Sicherheit und Gesundheit.

Die aktuelle Studie bestätigt größtenteils die Erkenntnisse der vorherigen Studie, dass weder der Schutz von Minderjährigen noch der Schutz von Schwangeren und Wöchnerinnen Faktoren von großer Bedeutung in Bezug auf den Schutz von entsandten Arbeitnehmern darstellen. Hinsichtlich der Minderjährigen bezieht sich der einzige interessante Punkt, der in den Berichten dargelegt wird (ES), auf die Frage des Mindestalters für die Erwerbstätigkeit: Wird dies als Teil des Schutzes betrachtet, der unter Artikel 3(1)(f) gewährt wird oder eher als Erweiterung des Schutzes unter Artikel 3(10)?

Im Gegensatz dazu ist das theoretische Potenzial für Probleme hinsichtlich des Schutzes von Schwangerschaft und Mutter-/Elternschaft recht groß. Wie in der vorherigen Studie über NL und LU berichtet, sind in einigen von der aktuellen Studie umfassten Ländern die Vorschriften für ungerechtfertigte Entlassungen (IE) und/oder für Gleichbehandlung/Nichtdiskriminierung (ES) in den Schutzvorschriften für diese spezifische Gruppe von Arbeitnehmern enthalten, während der Kündigungsschutz an sich nicht Teil des harten Kerns des für entsandte Arbeitnehmer gültigen Schutzes ist. In Bezug auf den Mutter- und Familienschutz gibt es einen markanten Unterschied in der Dauer der schwangeren Frauen zugebilligten Fehlzeiten (z. B.: In AT dürfen Schwangere für einen Zeitraum von 16 Wochen nicht arbeiten. In CY beträgt der Zeitraum 18 Wochen. In IE sind es 26 bezahlte Wochen plus 16 unbezahlte Wochen. In SK sind, je nach der persönlichen Situation, 34-43 Wochen möglich). Bezüglich der Fortsetzung der Gehaltszahlung während der Abwesenheit sind sowohl die Höhe der Zahlungen als auch die Quelle, aus der die Gelder stammen, je nach Land unterschiedlich. Die Zahlung ist in AT, BG und IE Teil des Sozialversicherungssystems, während sie in MT (teilweise) durch den Arbeitgeber erfolgt. In IE sind Zusatzzahlungen durch den Arbeitgeber üblich, diese basieren aber nicht auf gesetzlichen Vorschriften. Entsprechend ist das Recht auf Freistellung nach der Gesetzgebung des Gastlandes möglicherweise nicht auf einen Zahlungsanspruch nach dem geltenden Arbeitsrecht oder nach Verordnungen zur sozialen Sicherheit gestützt.

Obwohl im Hinblick auf dieses Thema keine große Dringlichkeit besteht, sollten doch drei Empfehlungen in die Überlegungen einfließen, wenn auch nur im Sog von gesetzgeberischen Aktivitäten in Bezug auf andere Komponenten der Entsenderichtlinie. Erstens wäre eine Verdeutlichung von Inhalt und Anwendungsbereich des Schutzes gemäß Artikel 3(1)(f) wünschenswert. Dementsprechend wäre eine deutlichere Abgrenzung zwischen der Entsenderichtlinie im Hinblick auf die Lohnfortzahlung während des Mutterschutzes (Artikel 11(2) der Richtlinie 92/85/EWG) und der Richtlinie 883/04 zur Koordinierung der Sozialversicherung (bzgl. Mutterschaftsgeld) wünschenswert. Wiederum abhängig vom Ergebnis der zuvor genannten Punkte wäre es schlussendlich wichtig, eine Vergleichsmethode für den Schutz zu etablieren, der im Bereich des Mutterschaftsurlaubs und der Elternzeit angeboten wird; im Besonderen, wie eine längere Abwesenheit bei geringeren LohnfortzahlungenTransferleistungenGehalt/Verdienst verglichen werden soll mit einer kürzeren Abwesenheit bei höheren Lohnfortzahlungen/Transferleistungen (*Empfehlung 20*).

## Schutz vor Diskriminierung

Der Schutz vor Diskriminierung scheint keine bedeutende Rolle beim Schutz von entsandten Arbeitnehmern zu spielen. Die maßgeblichen nationalen Gesetze und Verordnungen basieren größtenteils auf den einschlägigen EU-Richtlinien zur Diskriminierung am Arbeitsplatz. Aus einer eher theoretischen Sicht ist (wieder einmal) die Vielzahl von Quellen des Schutzes im Arbeitsrecht interessant. Schutz vor Diskriminierung kann sowohl durch das Arbeitsgesetzbuch (beschränkt auf Arbeitnehmer) als auch durch spezielle Antidiskriminierungsstatuten (BG, CZ, SK) erreicht werden. In einigen Fällen kann sogar das Strafgesetzbuch ins Spiel kommen. Alle diese Quellen haben bei internationalen Fällen einen anderen Anwendungsbereich. Andererseits spielt Nichtdiskriminierung beim Schutz von Arbeitnehmern (u. a. in den Bereichen Lohn sowie Sicherheit und Gesundheit) in CY, IE und ES eine allgemeinere Rolle. In diesen Ländern wird ein einzelnes Rechtsinstrument/-konzept angewandt, um eine Vielzahl von Interessen zu schützen.

## Überlassung von Arbeitskräften

Die Vorschriften für Leiharbeitsunternehmen spielen eine Rolle in der Praxis, vor allem insofern, als Mitgliedstaaten diese Wirtschaftstätigkeit Beschränkungen und/oder einer besonderen Ermächtigung unterwerfen. In der aktuellen Studie wird aus AT, IE, LT und LV von Genehmigungssystemen berichtet. Obwohl die Anwendung dieser Beschränkungen auf grenzüberschreitende Entsendungen mit Artikel 3(1)(d) der Entsenderichtlinie in Einklang steht, müssen die Beschränkungen selbst vor dem Hintergrund von Artikel 4 der Richtlinie 2008/104 über Leiharbeit gesehen werden. In mehreren durch die aktuelle Studie abgedeckten Mitgliedstaaten ist die Regulierung der Aktivität von Leiharbeitsunternehmen noch recht jung (MT, SK) bzw. noch gar nicht existent (CY, BG, LT) und oft ausgelöst durch die Einführung der Richtlinie zur Leiharbeit von 2008. IE stellte 2009 Vorschläge für eine Genehmigungspflicht vor, die sehr wahrscheinlich Teil der Gesetzgebung sein wird,

die Ende 2011 eingeführt wird, um die Richtlinie für Leiharbeit umzusetzen. Erwähnenswert ist der spezielle, von PT gegründete Fonds für die Rückführung portugiesischer Leiharbeiter, die von unzuverlässigen portugiesischen Leiharbeitsunternehmen entsandt und deren Opfer wurden. Diese Vorgehensweise könnte andere Mitgliedstaaten beeinflussen, wenn sie ähnlichen Schwierigkeiten gegenüberstehen.

Die Entsenderichtlinie ermöglicht auch eine Ausweitung des Schutzes, der entsandten Leiharbeitern geboten wird, auf das Niveau des Schutzes für lokale Leiharbeiter (Artikel 3(9) Entsenderichtlinie). Diese Bestimmung interagiert mit Artikel 5 der Richtlinie 2008/104 über Leiharbeit. Der zusätzliche Schutz, der unter Artikel 3(9) der Entsenderichtlinie angeboten wird, hat üblicherweise die Form des Prinzips der Gleichbehandlung, nach dem der Leiharbeiter genauso behandelt werden muss wie ein vergleichbarer Arbeitnehmer im entleihenden Unternehmen. Das Prinzip ist in Artikel 5 der Richtlinie über Leiharbeit festgelegt (wenn auch begrenzt auf einen harten Kern des Schutzes). Es wird bereits (in Gänze oder eingeschränkt) in AT, MT, EL und HU (wenn auch erst nach 183 Tagen) angewendet. Der EU wird angeraten, die Einführung der letzteren Richtlinie zu überwachen und dabei besonderes Augenmerk auf die Position der entsandten Arbeitnehmer zu legen (*Empfehlung 21*).

## Erweiterung des materiellen Anwendungsbereichs unter 3(10) – öffentliche Ordnung

Das Konzept der öffentlichen Ordnung ist nach dem Urteil im Fall C-316/09 (Kommission gegen Luxemburg) sehr kontrovers diskutiert worden. Trotz der Mitteilung der Kommission von 2003, waren mehrere Mitgliedstaaten mit einer Auslegung des Konzepts der „Öffentlichen Ordnung“ in der Entsenderichtlinie konfrontiert, die vom EuGH gemäß dem Abkommen gegeben wurde und – manchmal sehr stark – von dem Konzept der öffentlichen Ordnung in ihrem nationalen Arbeitsrecht und internationalen Privatrecht abweicht. Es ist allerdings wichtig hervorzuheben, dass die Bedeutung von Artikel 3(10)(erster Gedankenstrich) in direkter Verbindung steht zur Auslegung der Schutzüberschriften unter Artikel 3(1). Verschiedene „Erweiterungen“ des Schutzes können ebenfalls so ausgelegt werden, dass sie in den Bereich einer Schutzüberschrift fallen, die speziell in Artikel 3(1) vermerkt ist und vice versa. Dies wurde in der vorherigen Studie beispielsweise in Bezug auf FR und SE festgestellt. Ähnliche Beispiele finden sich in der aktuellen Studie. Zum Beispiel: Das Mindestalter für die Erwerbstätigkeit könnte als Teil des Jugendschutzes betrachtet werden. Von ES wird es jedoch als eine Erweiterung unter Artikel 3(10) eingestuft. Die Anwendung der Vorschriften für Tagespauschalen und Kostenrückerstattung auf Entsendungen nach LT könnte Teil der Verordnung zu Mindestlöhnen sein, könnte aber (teilweise) auch über diesen harten Kern hinausgehen. Daher empfehlen wir als ersten Schritt in der Diskussion der Klausel zur öffentlichen Ordnung in der Entsenderichtlinie eine Klärung des Anwendungsbereichs der Schutzüberschriften in Artikel 3(1) (*Empfehlung 22*).

Die aktuelle Studie bestätigt auch das Ergebnis des vorherigen Berichts, dass nicht alle Mitgliedstaaten die Anwendung ihrer Gesetze zur „öffentlichen Ordnung” an die Europäische Kommission melden. Dieser Mangel an präzisen Informationen über den Inhalt der nationalen Vorschriften, denen ein Status der öffentlichen Ordnung

verliehen wurde, macht es schwierig, die Notwendigkeit einer Änderung von (der aktuellen Auslegung von) Artikel 3(10) zu bewerten. Daher sollte der zweite Schritt bei der Bewertung von Artikel 3(10) unserer Ansicht nach in einer (präziseren) Bestandsaufnahme der Bestimmungen bestehen, die auf entsandte Arbeitnehmer angewandt werden, aber nicht unter einer der anderen Schutzüberschriften zusammengefasst werden können. Diese Vorschriften können nur angewendet werden, wenn ihnen ein Status der öffentlichen Ordnung zugewiesen wird. Die Mitgliedstaaten könnten diese Bestandsaufnahme unterstützen, indem sie bei ihrer Einführung genauer auf die Bestimmungen der Entsenderichtlinie Bezug nehmen (*Empfehlung 23*).

Schließlich ist noch vieles unklar in Bezug auf die exakte Auslegung der Vorschrift zur öffentlichen Ordnung in der Entsenderichtlinie. Allgemein werden Kollektivarbeitsrechte, vor allem das Recht auf Tarifverhandlungen und auf Kollektivmaßnahmen, von den Mitgliedstaaten als unter das Konzept der öffentlichen Ordnung fallend erachtet. Dies wird vom EuGH unterstützt. Allerdings ist das Konzept der öffentlichen Ordnung nur im Kontext des Migrationsgesetzes klar umrissen worden. Die Entsenderichtlinie operiert im Kontext des internationalen Privatrechts, in dem die Konzepte von „ordre public"/öffentlicher Ordnung eine andere Bedeutung annehmen können. Auf jeden Fall bezieht sich Artikel 3(10) selbst auf die Vereinbarkeit mit den Vertragsbestimmungen. Es besteht gegenwärtig mangelnde Klarheit in Bezug auf die genaue Beziehung zwischen Eingriffsnormen (lois d'ordre public) und der öffentlichen Ordnung im internationalen Privatrecht einerseits und den Konzepten der zwingenden Erfordernisse des öffentlichen Interesses und der öffentlichen Ordnung im Rahmen des Binnenmarktes andererseits (*Empfehlung 24*).

## *4.1 Beteiligte Akteure und ihre Kompetenzen*

Im Hinblick auf die Überwachung und die Durchsetzung der Entsenderichtlinie wurden in unserer ersten Studie größere Schwierigkeiten und Hindernisse festgestellt. Die zwölf nationalen Berichte offenbarten deutlich die Schwächen in den nationalen Arbeitsrechtssystemen und deren Durchsetzung in Bezug auf die schutzbedürftigen Gruppen auf dem Arbeitsmarkt, wie (bestimmte Gruppen von) entsandten Arbeitnehmern. Daraus wurde geschlossen, dass die Einhaltung durch die Einführung und Anwendung verschiedener Aufsichts- und Durchsetzungs-„Instrumente" gestärkt werden kann und sollte. Dies gilt auch für die 15 Länder, die durch die aktuelle Studie umfasst werden. Im Folgenden fassen wir die Ergebnisse themenweise zusammen.

### Überwachung der Arbeitsbedingungen (d. h. der Rechte) von entsandten Arbeitnehmern

In nahezu allen der in dieser und der vorherigen Studie untersuchten Mitgliedstaaten üben die nationalen Behörden der Gastländer eine Überwachungs- und Kontrollfunktion in Bezug auf entsandte Arbeitnehmer aus. In den meisten Gastländern sind die Sozialpartner ebenfalls involviert. In Bezug auf die involvierten Behörden kann eine Situation, in der keine bzw. viele Akteure verantwortlich sind, im

Hinblick auf die Transparenz und Zugänglichkeit eines Systems als problematisch eingestuft werden. In der aktuellen Studie hat sich diese Ansicht für CY bestätigt. Von Interessengruppen in AT wurde eine solche Kritik allerdings nicht geäußert. In beiden Studien offenbarten die nationalen Berichte eine große Bandbreite in Bezug auf das Ausmaß, in dem Behörden des Gastlandes in die Überwachung/Durchsetzung der Arbeitsgesetzgebung involviert sind. Die Anfälligkeit von Systemen, die in hohem Maße auf die privatrechtliche Durchsetzung setzen, muss hier erneut unterstrichen werden. Dies kann zu (missbräuchlichen) Situationen der fehlenden Einhaltung führen, in denen unzuverlässige Dienstleister beteiligt sind.

Daher wiederholen wir *Empfehlung 25*, ein höheres Maß an Transparenz bei den Überwachungssystemen der Gastländer mit mehreren beteiligten Behörden zu schaffen, indem eine Behörde als erste Anlaufstelle bestimmt wird. Wir wiederholen ebenfalls *Empfehlung 26*, mehr staatliche Durchsetzungsmaßnahmen in Bezug auf Gastländer einzuführen, in denen das nationale System die adäquate Durchsetzung der Rechte entsandter Arbeitnehmer nur unzureichend gewährleistet.

Ein anderes Problem betrifft die Funktionsweise der Überwachungsbehörden. In den durch die aktuelle Studie in ihrer Rolle als Gastländer umfassten Ländern scheint es, vielleicht mit Ausnahme von AT, so zu sein, dass die Aufsichtsbehörden sich in erster Linie auf die Überwachung der Einhaltung von nationalem Arbeitsrecht im Allgemeinen konzentrieren. Das bedeutet also, dass keine Durchsetzungskapazitäten speziell zur Überwachung der Einhaltung der Rechte aus der Entsenderichtlinie bereitgestellt werden. Damit untermauerten die Ergebnisse der aktuellen Studie die Notwendigkeit eines zielgerichteten Fokus auf die Entsendung von Arbeitnehmern bei der Überwachungs- und Durchsetzungspolitik nationaler Behörden der Gastländer. Dies kann durch die Einsetzung einer Arbeitsgruppe und/oder durch die Aufstellung von Kontrollleitlinien, die speziell auf die Situation der Entsendung von Arbeitnehmern ausgerichtet sind, erreicht werden (*Empfehlung 28*).

## Überwachung der Präsenz entsandter Arbeitnehmer

In der vorherigen Studie wurde für IT, NL, UK und SE von keiner Überwachung der Präsenz von Arbeitnehmern im Sinne der Entsenderichtlinie berichtet. In der aktuellen Studie gilt dies für FI, HU und IE. In diesen sieben Ländern gibt es in ihrer Rolle als Gastland keine Dienststellen, denen entsandte Arbeitnehmer gemeldet werden bzw. die Informationen zur Anzahl der in ihr Hoheitsgebiet entsandten Arbeitnehmer im Sinne der Entsenderichtlinie sammeln. Andererseits gibt es in insgesamt 18 Mitgliedstaaten (in ihrer Rolle als Gastland) allgemeine Melde- oder „Vordeklarierungs-“Programme für entsandte Arbeitnehmer, unabhängig von deren Nationalität und spezifischen Entsendungssituation (BE, DK, FR, DE, LU und RO in der vorherigen Studie, AT, BG, CY, CZ, EL, ES, LV, LT, MT, PT, SI und SK in der aktuellen Studie). In diesem Kontext wurde *Empfehlung 27* untermauert: Die Frage, ob eine Verpflichtung für Dienstleister bzw. Dienstleistungsempfänger zur schlichten Meldung der Präsenz von entsandten Arbeitnehmern im Gastland als Voraussetzung für die Überwachung der Rechte von Arbeitnehmern gerechtfertigt und verhältnismäßig sein kann, verdient eine weitere Untersuchung.

## Nationale und grenzüberschreitende Kooperation

Trotz eines erheblichen Fortschritts weist die interne Kooperation zwischen nationalen Behörden (einschließlich Sozialpartnern), die für die Überwachung der arbeits-, sozial- und steuerrechtlichen Stellung von entsandten Arbeitnehmern und deren Arbeitgebern zuständig sind, noch immer ernsthafte Mängel auf, wie sich in den beiden durchgeführten Studien gezeigt hat. Während es in manchen Mitgliedstaaten nach wie vor keine oder nur eine eingeschränkte systematische Kooperation gibt, gibt es in anderen Mitgliedstaaten einen klaren Unterschied zwischen Kooperation auf dem Papier und Kooperation in der Praxis. Dies gilt auch für grenzüberschreitende Kooperation der nationalen Behörden, die an Überwachungs-/Durchsetzungsangelegenheiten in Bezug auf die Entsenderichtlinie beteiligt sind. Die Schwierigkeiten bei der grenzüberschreitenden Kooperation werden durch die große Vielfalt der von den zuständigen Behörden in den verschiedenen Ländern ausgeübten Funktionen verstärkt (was die Arbeitsaufsichtsbehörde in dem einen Land macht, fällt in einem anderen Land in die Zuständigkeit der Steuerbehörden oder des Finanzministeriums). Daher ist die weitere Einführung/Anwendung der laufenden Initiativen **auf EU- und nationaler Ebene** in Bezug auf die Verbesserung sowohl der nationalen als auch der (bilateralen) grenzüberschreitenden Kooperation zwischen Aufsichtsbehörden notwendig (*Empfehlung 29*).

## Überwachungsaktivitäten, Häufigkeit der Kontrollen

Im Hinblick auf die spezifischen Überwachungsaktivitäten der involvierten Gastländer (basierend auf Risikobewertung, auf Eigeninitiative oder auf Anfrage) und die Häufigkeit ihrer Kontrollen gibt es große Unterschiede, wie beide Studien in Bezug auf die Länderergebnisse gezeigt haben.
Ein generelles Problem in verschiedenen Ländern scheint jedenfalls ein Mangel an Mitarbeitern zu sein, die an der Überwachung und Durchsetzung von Aufgaben beteiligt sind, was sich negativ auf die Häufigkeit der Kontrollen auswirken kann. Um ein befriedigendes Level der effektiven, verhältnismäßigen und abschreckenden Durchsetzung zu erreichen oder aufrechtzuerhalten, könnten diese Mängel durch nationale Bemühungen und/oder auf EU-Ebene durch Vorschreiben angemessener Mindeststandards in einem rechtlichen Instrument verbessert werden (*Empfehlung 30*).

## Einbeziehung von Sozialpartnern – auf nationaler Ebene entstehende Probleme

Abgesehen von den nordischen Ländern DK und SE, stellte sich in der vorherigen Studie heraus, dass Sozialpartner im Gastland nur in sehr geringem Maße in die Überwachung/Durchsetzung der Rechte von entsandten Arbeitnehmern und ihrer Anwesenheit involviert sind. Dies führt zu einem deutlichen Mangel an Überwachung und Durchsetzung von Rechten auf GAV-Ebene. Dieses Ergebnis hat sich in den Länderstudien des aktuellen Berichts größtenteils bestätigt. Daher bekräftigen wir nochmals unsere Schlussfolgerung, dass eine größere finanzielle und institutionelle Unterstützung von Sozialpartnern auf nationaler Ebene notwendig ist. Daneben wäre

es hilfreich, Mindeststandards – vorzugsweise auf EU-Ebene – für die adäquate Überwachung/Durchsetzung der Rechte auf GAV-Ebene festzulegen, ebenso wie Richtlinien für die Kooperation zwischen Behörden und Sozialpartnern (*Empfehlung 31*). Positiv ist festzustellen, dass einige Beispiele für Best Practice von grenzüberschreitender Kooperation zwischen Gewerkschaften zu beobachten sind: zwischen lettischen und norwegischen, österreichischen und ungarischen, österreichischen und slowakischen und spanischen und portugiesischen Gewerkschaften, die meisten finanziert durch die EU.

## Entsandter Arbeitnehmer oder (entsandter) Selbstständiger?

Ein spezifisches Problem in Bezug auf die Überwachung der Arbeitsbedingungen von entsandten Arbeitnehmern ist die Schwierigkeit, die Behörden gelegentlich bei der Unterscheidung zwischen einem (entsandten) Arbeitnehmer und einer selbstständigen Person (Dienstleister) haben. Artikel 2(2) der Entsenderichtlinie schreibt vor, dass die Definition eines Arbeitnehmers diejenige ist, die nach dem Recht des Mitgliedstaates, in dessen Hoheitsgebiet der Arbeitnehmer entsandt wird, Anwendung findet. Somit sollte das Wesen der betreffenden Arbeit gemäß dem Recht des Gastlandes bestimmt werden. Zu arbeitsrechtlichen Zwecken ist eine widerlegbare Rechtsvermutung auf individueller Basis in jedem Land notwendig. In der vorherigen Studie hat sich gezeigt, dass die Beweislast mitunter sehr schwer wiegt.

Für die meisten der in der aktuellen Studie abgedeckten Länder scheint die Bewertung des Status des Arbeitnehmers allerdings kein drängendes Problem darzustellen (wenn auch für LV die Schwierigkeit zu beweisen, dass jemand scheinselbstständig ist, festgestellt wurde). Vielmehr wurde ein Desinteresse an diesem Problem in CY festgestellt. In SK scheinen Arbeitsinspektoren den Status eines Arbeitnehmers im Falle einer Entsendung nicht zu untersuchen, da sie ihn nicht vor Gericht geltend machen können. In einigen anderen Ländern wird das A1/E 101 Formular als einer der Indikatoren des Status des Arbeitnehmers in arbeitsrechtlichen Angelegenheiten genannt, während dieses Formular in SI und möglicherweise ebenso in IE als *der* Indikator Verwendung zu finden scheint.

## Anerkennung und Umsetzung von ausländischen Urteilen

In beiden Studien haben Länderberichte bestätigt, dass ausländische Urteile zu Verletzungen des Schutzes von Arbeitnehmern im Prinzip gemäß der Verordnung 44/2001/EU zur Anerkennung und Durchsetzung von Urteilen in Zivil- und Handelssachen anerkannt werden können, mitunter ist dies (auch) im nationalen Kodex des Internationalen Privatrechts festgelegt.

Im Hinblick auf den Nutzen der Existenz des Rahmenbeschlusses 2005/214/JI des Rates über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen variierten die Reaktionen der nationalen Interessenvertreter wie in der vorherigen so auch in der aktuellen Studie von der Anerkennung von dessen Existenz bis zur Unkenntnis bzw. Nichtanwendbarkeit, da ihr System diese Strafen im Kontext von entsandten Arbeitnehmern nicht anwendet. Trotz der Tatsache, dass EU-Maßnahmen die Anerkennung und Umsetzung von

ausländischen Urteilen und Entscheidungen regeln, scheint daher die Durchsetzung von Rechten aus der Entsenderichtlinie noch immer an der nationalen Grenze Halt zu machen.

Wie in der vorherigen Studie festgestellt, sollten, liegt dies an einer Gesetzeslücke, zusätzliche Maßnahmen auf nationaler und auf EU-Ebene ergriffen werden, um die grenzüberschreitende Anerkennung und Umsetzung von Sanktionen, die im Rahmen der Entsenderichtlinie angewendet werden, zu verbessern (*Empfehlung 32*).

## *4.2 Verbreitung von Informationen*

### Zugriff auf Informationen im Gastland

Gemäß Artikel 4(3) der Richtlinie sind Überwachungsbehörden dafür zuständig, der allgemeinen Öffentlichkeit Informationen über die Rechte entsandter Arbeitnehmer aus den Gesetzen und (allgemein verbindlichen) GAVs bereitzustellen. Aus der vorherigen Studie wissen wir, dass sich die Verbreitung von Informationen durch die zuständigen Behörden in der Praxis auf die gesetzlich gewährten Rechte konzentriert und hauptsächlich über Websites zur Verfügung gestellt wird. Die Sozialpartner im Gastland – in der Praxis meistens die Gewerkschaften – sind ebenfalls beteiligt. Sie liefern Informationen über die gültigen GAV-Vorschriften. Gemäß dem Text von Artikel 3(1) Entsenderichtlinie wären jedoch die Gastländer verantwortlich, und daher delegieren sie nur einen Teil der Aufgaben, ohne jegliche Supervision, an Sozialpartner. In der Praxis führt die Aufteilung der Aufgaben zu einem Mangel an Informationen über die Ansprüche entsandter Arbeitnehmer auf GAV-Ebene. In der aktuellen Studie wurde dieses Ergebnis bestätigt.

Beide Studien zusammen zeigen, dass in 18 der 20 untersuchten Länder aus Sicht der Gastländer (außer CY, IT) Websites die bedeutendste Art der Verbreitung von Informationen sind, gefolgt von Informationen auf dem Papier. Darüber hinaus wurden in der vorherigen Studie einzelne Kontaktstellen (verbunden mit der Einführung der Dienstleistungsrichtlinie 2006/123) und spezielle Informationskampagnen häufig erwähnt. In der aktuellen Studie wurden nur in Irland solche Initiativen (die NERA Roadshows) erwähnt.

In der vorherigen Studie wurde festgestellt, dass sich insbesondere in Bezug auf Informationen in mehreren Sprachen sowie in Bezug auf die Zugänglichkeit der Informationen die Situation im Vergleich zu vor vier Jahren, als die Europäische Kommission in ihrer Mitteilung 159 (2006) das Bestehen eines erheblichen Verbesserungspotenzials unterstrich, sichtbar verbessert hat. Die aktuelle Studie zeichnet in dieser Hinsicht ein weniger optimistisches Bild. Daher wurde die Schlussfolgerung bestätigt, dass weitere Bemühungen, die Zugänglichkeit in verschiedenen Sprachen zu verbessern, Informationen hinreichend zu präzisieren und zu aktualisieren, notwendig sind, insbesondere in IT und CY, aber auch auf EU-Ebene (EU-Karteien) (siehe *Empfehlung 33*).

Ein weiterer Punkt betrifft die Menge der verfügbaren Informationen: Zu viele Informationsquellen können die Transparenz auch gefährden. In dieser Hinsicht wird

empfohlen, dass Behörden eine Website/ein Webgate als zentrale Eingangsstelle für die Bereitstellung von Informationen sowohl auf europäischer als auch auf nationale Ebene bereitstellen (*Empfehlung 34*). In der aktuellen Studie wurde dies ausdrücklich durch Interessenvertreter z. B. in Lettland empfohlen. Allerdings sollte beachtet werden, dass entsandte Arbeitnehmer, und zwar insbesondere in den unteren Segmenten des Arbeitsmarktes, möglicherweise keinen Zugang zum Internet haben. Dies macht adäquate Informationen auf Papier und spezielle Informationen sowie aufmerksamkeitsfördernde Kampagnen mit dem Fokus auf entsandte Arbeitnehmer unverzichtbar. Im Gegensatz zu der vorherigen Studie wurde in dieser Studie von nahezu keinen Aktivitäten von Gastländern in dieser Hinsicht berichtet. Daher wurde *Empfehlung 35*, solche Maßnahmen mit finanzieller Unterstützung und Erleichterung auf EU- und nationaler Ebene zu fördern und zu erhalten, weder bestätigt noch verworfen.

## Verbreitung von Informationen im Entsendestaat

Derzeit wird auf nationaler Ebene nicht viel unternommen, um Informationen zu Arbeitsbedingungen in Gastländern im Herkunftsland der Arbeitnehmer vor deren Entsendung bereitzustellen. Da Bewusstseinsschärfung so früh wie möglich beginnen sollte, um dem Arbeitnehmer zu ermöglichen, gut informiert eine Entscheidung zur Entsendung zu treffen, sollten auch die Behörden in den Entsendestaaten aktiviert werden. Gemäß Artikel 4 der Richtlinie 91/533 sind Arbeitgeber verpflichtet (zusätzlich zu der Verpflichtung im Sinne von Artikel 2), einen Angestellten schriftlich über die wesentlichen Aspekte des Vertrages oder Arbeitsverhältnisses, einschließlich des Lohnniveaus, zu informieren.

In den von beiden Studien umfassten Ländern scheint diese Verpflichtung nur in Estland der Überwachung durch die Arbeitsaufsichtsbehörde in ihrer Rolle als Entsendestaat zu unterliegen. Diese Good Practice verdient es, von anderen Mitgliedstaaten in ihrer Rolle als Entsendestaat übernommen zu werden, um deren Pflicht in Bezug auf die Bereitstellung von Informationen zu konstituierenden Elementen der Entsendung zu unterstreichen. Auf EU-Ebene ist unbedingt eine Anpassung der Richtlinie 91/533 zu empfehlen, um eine effektive und abschreckende Sanktion im Falle der Nichteinhaltung zu etablieren und um ihren Geltungsbereich auf alle von der Entsenderichtlinie umfassten Entsendungssituationen unabhängig von der beabsichtigten Dauer der Entsendung auszuweiten. Darüber hinaus könnte der Dienstleister verpflichtet werden, seine schriftlichen Ausführungen an seine Arbeitnehmer gemäß Richtlinie 91/533 auch den zuständigen nationalen Behörden im Gastland und/oder Entsendestaat zukommen zu lassen. Für den Fall, dass Behörden im Entsendestaat primär zur Verantwortung gezogen würden, sollte die Kooperation mit den zuständigen Behörden im Gastland klar festgelegt werden (*Empfehlung 36*).

## *4.3 Pflichten für Dienstleister*

### Meldepflichten

Das auf Art. 49 EU / Art. 56 AEUV basierende Fallrecht erlaubt es nationalen Behörden des Gastlandes, Dienstleistern und anderen, wie z. B. dem Dienstleistungsempfänger, bestimmte Informationspflichten aufzuerlegen.

In *sechs* der von der vorherigen Studie umfassten Gastländern (BE, DK, FR, DE, LU, RO) werden ausländischen Dienstleistern, die Arbeitnehmer entsenden, Meldepflichten auferlegt, um es den verantwortlichen staatlichen Stellen zu ermöglichen, ihre Überwachungs- und Durchsetzungsaufgaben gemäß Entsenderichtlinie zu erfüllen. Die aktuelle Studie umfasst *zehn* Länder (AT, BG, CY, EL, LV, LT, MT, PT, SI, ES), in denen ausländische Dienstleister, die Arbeitnehmer in ihre Hoheitsgebiete entsenden, eine festgelegte Behörde im Voraus informieren müssen (siehe Absatz 4.3). Insgesamt setzen *16* der 27 EU-Mitgliedstaaten in ihrer Rolle als Gastland mehr oder weniger Vorabbenachrichtigungs-Systeme für Dienstleister ein, um es den verantwortlichen staatlichen Stellen zu ermöglichen, ihre Überwachungs- und Durchsetzungsaufgaben zu erfüllen.

In den *elf* Mitgliedstaaten ohne Meldepflichten für Dienstleister erlegen zwei (CZ und SK) diese Pflichten den Dienstleistungsempfängern auf (siehe unten). Anstatt Pflichten gegenüber staatlichen Organen aufzuerlegen, erlegen Finnland und, im Fall von GAVs, auch Ungarn dem Dienstleister Pflichten auf bezüglich seiner vertraglichen Vereinbarung im Gastland (das entleihende Unternehmen). Somit bleiben nur sieben Mitgliedstaaten, einschließlich (paradoxerweise) fünf in der Praxis vornehmlichen Gastländern, wo dem Dienstleister keine Informationspflichten (in Verbindung mit der Richtlinie) auferlegt werden (EE, IE, IT, NL, PL, UK, SE). In der aktuellen Studie ist Irland das einzige Land ohne spezifische Rechtspflichten für Dienstleister und -empfänger in Verbindung mit Entsendungen im Rahmen der Entsenderichtlinie.

Wie in der vorherigen Studie geschlussfolgert, scheinen die Meldesysteme selbst Good Practice dahingehend zu sein, dass die Einführung einer Art von einfachem Meldesystem eine unabdingbare Voraussetzung für eine Datenerfassung von der Größe des Phänomens der Entsendung und für die meisten Einführungs- und Überwachungsbemühungen ist. Gleichzeitig erklärten nationale Interessenvertreter in Staaten, die vornehmlich als Gastländer auftreten, dass die Meldung keinesfalls ein unfehlbares Instrument ist. In der aktuellen Studie konnten bezüglich der Effektivität von Meldesystemen in der Praxis zu dieser Einschätzung keine neuen Informationen von Bedeutung hinzugefügt werden. Dies kann durch den Umstand erklärt werden, dass nur *eins* von zehn Ländern in der aktuellen Studie mit einem Meldesystem ein bedeutendes Gastland ist (AT) und deshalb umfangreiche Erfahrungen mit dem Melden in der Praxis hat. Die anderen sind in der Praxis entweder vornehmlich Entsendestaaten (BG, LV, LT, PT) oder berichten, dass Entsendungen (von und) in ihre Hoheitsgebiete ein relativ unbedeutendes Phänomen sind (CY, EL, ES, MT, SI).

Ob es daher empfehlenswert wäre, ein Meldesystem auf EU-Ebene zu koordinieren, indem die Mindest- und Maximalpflichten eines solchen Systems festgelegt werden,

verdient eine weitere Untersuchung, insbesondere in Bezug auf die Effektivität und Verhältnismäßigkeit eines solchen Instruments sowie dessen Auswirkungen im Hinblick auf eine Belastung für die Verwaltungen. Eine Inspiration könnte sich aus Richtlinie 2009/52 ergeben (*Empfehlungen 37 und 38*).

## Zusätzliche administrative Pflichten

Unterschiedliche Situationen in den Mitgliedstaaten existieren auch in Bezug auf andere und/oder zusätzliche administrative Pflichten, wie etwa für die Pflicht zur vorherigen Einholung einer Erlaubnis oder die Pflicht, arbeitnehmerbezogene Dokumente zur Verfügung der Behörden zu halten, oder die Pflicht, einen Vertreter zu bestimmen, was in bestimmten Fällen eine Verletzung von EU-Recht sein kann. In unserer vorherigen Studie wurden andere bzw. zusätzliche Pflichten in BE, DE, FR, LU festgestellt. In der aktuellen Studie wurden solche Maßnahmen in AT, FI und teilweise in LT festgestellt. Im Gegensatz zur vorherigen Studie, wo einige der Befragten (wie in Luxemburg) betonten, dass die Pflichten zu weit gingen, lag in der aktuellen Studie die Betonung auf dem Problem der tatsächlichen Durchsetzung dieser Pflichten bzw. auf der Schwierigkeit, das allgemeine Recht des Gastlandes zu diesen Themen auf die Dienstleister anzuwenden.

In dieser Hinsicht sollten Mitgliedstaaten Best Practices hinsichtlich „ausgeglichener", zusätzlicher Pflichten für Dienstleister austauschen. Auf EU-Ebene sollten einheitliche Dokumente in Bezug auf Informationspflichten für Dienstleister entwickelt werden (oder es sollte auf einer Vielzweckverwendung der in Artikel 2 und Artikel 4 der RL 91/533 geforderten schriftlichen Angaben bestanden werden) (*Empfehlung 39*).

## Selbst-regulierende Informationspflichten für Dienstleister

Gemäß der vorherigen Studie beinhalten Tarifverträge in einigen Mitgliedstaaten (DK, IT, UK) Pflichten für ausländische Dienstleister dahingehend, auf Wunsch der örtlichen Zweigstelle der Gewerkschaft Zahlungsbelege und Arbeitsverträge oder Unterlagen zu den Arbeitsbedingungen bereitzustellen. In der aktuellen Studie wurde von keinen solchen Maßnahmen berichtet. Daher halten wir an unserer Empfehlung fest, dass solche Initiativen – selbstverständlich soweit der Inhalt der GAV-Maßnahmen nicht unverhältnismäßig ist oder gegen EU-Recht verstößt (d.h., weder zu starr noch zu locker ist) – als Good Practice, d. h. als Instrument zur Verbesserung der Einhaltung der Entsenderichtlinie auf der GAV-Ebene begrüßt und ausgetauscht werden können (*Empfehlung 40*).

## *4.4 Pflichten für Dienstleistungsempfänger*

### Informationspflichten

In der vorherigen Studie hatten wir gesehen, dass BE und DK (in Bezug auf bestimmte Risikobereiche) Dienstleistungsempfänger zur Überprüfung verpflichten, ob ausländische Dienstleister, insbesondere in ihrer Rolle als ausländische(r) Subunternehmer/Leiharbeitsunternehmen, ihre Meldepflichten erfüllt haben.

In der aktuellen Studie wird in AT im Falle von Leiharbeit das entleihende Unternehmen Sanktionen unterworfen, falls Zahlungsbelege nicht verfügbar sind. Darüber hinaus ist in CZ und SK der Dienstleistungsempfänger („Arbeitgeber“ genannt) verpflichtet, schriftlich alle von ihm entsandten Arbeitnehmer in einem speziellen Formular des Arbeitsamtes anzugeben, oder, in der Slowakei, beim Amt für Arbeit, Soziales und Familie in dem Gebiet, in dem der Arbeitnehmer die Arbeit ausübt. Kürzlich wurde seine ähnliche Meldepflicht für den Dienstleistungsempfänger in BG eingeführt. In FI ist der Dienstleistungsempfänger für die Erfassung von Daten des Dienstleisters (z. B. bezüglich seiner Zuverlässigkeit) verantwortlich und muss diese Dokumente für Prüfungszwecke zur Verfügung halten (sanktioniert durch Geldbußen). Auch in HU werden dem Dienstleistungsempfänger bestimmte Informationspflichten auferlegt, wenn er auf Leiharbeitsunternehmen zurückgreift. In IE existieren ähnliche Pflichten für von Leiharbeitsunternehmen entleihende Unternehmen, jedoch sind diese auf in irischem Hoheitsgebiet niedergelassene Unternehmen beschränkt.

Angesichts des in mehreren Mitgliedstaaten festgestellten Problems, dass Dienstleister ihrer Meldepflicht nicht nachkommen, ist es verständlich, dass der Dienstleister zu einem gewissen Grad mitverantwortlich gemacht wird. Um daher die Effektivität der Meldesysteme zu verbessern, können diese Maßnahmen als Good Practice begrüßt und ausgetauscht werden, vor allem als Instrument zur Verbesserung der Einhaltung der Entsenderichtlinie, auch auf GAV-Ebene. Gleichwohl verdient die Vereinbarkeit mit EU-Recht, insbesondere im Hinblick auf die Effektivität und Verhältnismäßigkeit eines solchen Instruments sowie dessen Auswirkungen im Hinblick auf eine Belastung für die Verwaltungen, eine weitere Untersuchung (*Empfehlung 41*)

### Haftung (oder „funktionale Äquivalente”) im Hinblick auf Lohn und lohnbezogene Abgaben

In neun Gastländern (BE, DE, FR, IT, NL in unserer vorherigen Studie, AT, EL, ES, FI in der aktuellen Studie) gibt es mehr oder weniger weitreichende rechtliche (mitunter kombiniert mit selbst-regulatorischen) Mechanismen zur Haftung/Verantwortlichkeit (FI). Abgesehen von FI sind dies vor allem Haftungsverbünde und verschiedene Haftungssysteme in Bezug auf die Kunden/Hauptauftragnehmer/entleihenden Unternehmen. Um die Einhaltung der Entsenderichtlinie zu verbessern, vor allem die Bezahlung der geltenden Löhne an entsandte Arbeitnehmer, können Initiativen, die dazu dienen, den Dienstleistungsempfänger mitverantwortlich zu machen, begrüßenswert sein. Der

Inhalt der Maßnahmen darf (selbstverständlich) nicht im Missverhältnis zum EU-Recht stehen bzw. dieses Recht verletzen und muss als Good Practice ausgetauscht werden, und zwar als Instrument zur Verbesserung der Einhaltung der Entsenderichtlinie, unter Einbeziehung der GAV-Ebene. Gleichwohl verdient die Vereinbarkeit mit EU-Recht, insbesondere im Hinblick auf die Effektivität und Verhältnismäßigkeit eines solchen Instruments sowie dessen Auswirkungen in Bezug auf eine Belastung für die Verwaltungen, eine weitere Untersuchung (siehe – auch – *Empfehlung 41).*

## *4.5 Unterstützende Instrumente/Mittel, die entsandten Arbeitnehmern zur Verfügung stehen*

### Gerichtsstandsklausel

Gemäß Artikel 6 der Entsenderichtlinie muss der entsandte Arbeitnehmer die Möglichkeit haben, im Gastland eine Klage zu erheben. Daher mussten alle Mitgliedstaaten in ihrer Rolle als Gastland in ihre Hoheitsgebiete entsandten Arbeitnehmern diese Möglichkeit, abgedeckt durch die Richtlinie, garantieren. In unserer ersten Studie stellten wir fest, dass, mit Ausnahme von UK, Artikel 6 der Entsenderichtlinie explizit in den anderen elf durch die Studie umfassten Mitgliedstaaten umgesetzt worden ist. Hinsichtlich der in der aktuellen Studie umfassten 15 Mitgliedstaaten wurde berichtet, dass nur sieben von ihnen (AT, BG, CY, ES, FI, LV, MT) Artikel 6 der Entsenderichtlinie explizit umgesetzt haben. Die anderen acht Mitgliedstaaten scheinen Artikel 6 indirekt umgesetzt zu haben, wobei die Situation in CZ und SK nicht ganz klar ist.

### Unterstützung durch Sozialpartner und/oder andere Interessenvertreter

Abgesehen von Teilbefugnissen in IE für Gewerkschaften, Fälle unabhängig von dem einzelnen Arbeitnehmer vor Gericht zu bringen, hat kein anderer der in dieser Studie umfassten Mitgliedstaaten unabhängige Klagebefugnisse für vertretende Gewerkschaften, wie es in BE, FR und NL der Fall ist (siehe unsere vorherige Studie). Da Gewerkschaften (und Arbeitgeberverbände) im Gastland ein eigenständiges Interesse an der Durchsetzung der im Gastland für ausländische Dienstleister geltenden arbeitsrechtlichen Standards haben können, kann dies als Good Practice klassifiziert werden, die es verdient, von anderen Mitgliedstaaten übernommen zu werden. Daneben verdienen auch einige zusätzliche unterstützende Instrumente und/oder Institutionen Erwähnung, die die Chancen fördern, dass entsandten Arbeitnehmern das Recht zugesprochen wird, das ihnen zusteht. In der aktuellen Studie wurde dies berichtet aus AU (BUAK, die „Arbeiterkammer“ und IE (die „Labour Relations Commission“, vergleichbar mit dem ACAS in UK).

Im Vergleich mit der vorherigen Studie sind die Ergebnisse bezüglich der Umsetzung von Artikel 6 der Entsenderichtlinie in der aktuellen Studie insgesamt besorgniserregender. Daher sollten weitere Untersuchungen das Ziel haben

sicherzustellen, dass in jedem Mitgliedstaat die Gerichtsstandsklausel korrekt umgesetzt wird (diese zusätzliche Empfehlung ist in Empfehlung 42 enthalten). Darüber hinaus bestätigen wir unsere Empfehlung aus der vorherigen Studie, auf EU-Ebene Artikel 6 Entsenderichtlinie dahingehend anzupassen, dass die Option, Sozialpartnern eine Klagebefugnis zu gewähren, in eine Verpflichtung umgewandelt wird. Davon abgesehen muss die Formulierung von Artikel 6 der Entsenderichtlinie auch verdeutlichen, dass die Mitgliedstaaten verpflichtet sind, einzelnen entsandten Arbeitnehmern eine Klagebefugnis für die Gerichte im Gastland zu gewähren. Wenn nicht bereits geschehen, könnten Mitgliedstaaten die Möglichkeit der Ermächtigung eines zuständigen Akteurs/einer zuständigen Behörde zur Erhebung einer Klage gegen einen nicht rechtstreuen Arbeitgeber (etwa zum Zwecke der Eintreibung ausstehender Löhne) und den darin enthaltenen Mehrwert erwägen (*Empfehlung 42*).

## Zugang zu Rechtshilfe für entsandte Arbeitnehmer

In der vorherigen Studie wurde festgestellt, dass entsandte Arbeitnehmer (obwohl nicht im Gastland ansässig oder wohnhaft) in BE, DE, FR, NL, LU, SE den gleichen Zugang zu den gesetzlich gewährten Rechtshilfemechanismen haben, solange sie die Staatsangehörigkeit eines EU-Mitgliedstaates besitzen oder regelmäßig in einem anderen Mitgliedstaat der EU (außer DK) ansässig oder wohnhaft sind. Gemäß den allgemeinen, in UK für arbeitsrechtliche Fälle geltenden Grundsätzen stünde allerdings entsandten Arbeitnehmern dort keinerlei Rechtshilfe zur Verfügung. Auch haben nach RO entsandte Arbeitnehmer keinen Zugang zu Rechtshilfe, davon ausgenommen ist die Rechtshilfe, die möglicherweise von der Gewerkschaft bereitgestellt wird.

In den von der aktuellen Studie umfassten Ländern haben entsandte Arbeitnehmer gleichen Zugang zu den in AT, BG, CZ, EL, ES, FI, HU, LT, PT, SI, SK gesetzlich gewährten Rechtshilfemechanismen, solange diese die Staatsangehörigkeit eines EU-Mitgliedstaates besitzen oder regelmäßig in einem anderen Mitgliedstaat der EU ansässig oder wohnhaft sind. Allerdings ist die Rechtshilfe in EL und PT nicht sehr gut entwickelt. Gemäß den allgemeinen Rechtsgrundsätzen in CY, LV und MT steht entsandten Arbeitnehmern dort keine Rechtshilfe zur Verfügung. In IE haben (entsandte) Arbeitnehmer, die vor Arbeitsgerichten ihre Ansprüche geltend machen, keinen Zugang zu Rechtshilfe; das gültige Recht erlaubt keine Rechtshilfe vor einem Arbeitsgericht. Rechtshilfe kann dann für vertragliche Ansprüche, die vor Zivilgerichten geltend gemacht werden, verfügbar sein, wenn der Antragsteller die finanziellen Kriterien für die Gewährung der Hilfe erfüllt.

Obwohl diese Erkenntnisse im Einklang mit EU-Recht (insbesondere mit der Rechtshilferichtlinie) stehen, könnte es empfehlenswert sein, beispielsweise auf dem Wege einer EU-Mitteilung, Zugang zu Rechtshilfe für (entsandte) Arbeitnehmer in Ländern zu gewähren, in denen diese Rechtshilfe derzeit nicht verfügbar ist (*Empfehlung 43*)

## Beschwerdeverfahren

Keines der in beiden Studien untersuchten Länder hat spezifische Beschwerdeverfahren, die es entsandten Arbeitnehmern ermöglichen, Beschwerden über die Nichteinhaltung der Entsenderichtlinie einzureichen. Entsandte Arbeitnehmer können die gleichen Beschwerdemethoden nutzen wie jeder anderer Arbeitnehmer in diesen Ländern, wie etwa Kontaktaufnahme mit den Gewerkschaften oder mit den Arbeitsaufsichtsbehörden. Allerdings beschweren sich in der Praxis die meisten entsandten Arbeitnehmer nicht über die Nichteinhaltung und missbräuchliche Situationen, in einigen Fällen deshalb, weil sie Angst davor haben oder eine Beschwerde sie den Job kosten könnte. Als weiterer Grund für die Nichteinreichung einer Beschwerde wurde genannt, dass entsandte Arbeitnehmer Beschwerdeverfahren gemäß dem Recht des Gastlandes als unverständlich und schwer zugänglich empfinden. Allerdings gibt es auch einige positive Beispiele, wie in SI, wo aus dem früheren Jugoslawien entsandten Arbeitnehmern Hilfe zugesichert wird, sowie in IE und UK die Rollen, die ACAS und LRC bei *Arbeits*konflikten einnehmen. Es wird empfohlen, das Fehlen des Zugangs zu und/oder des Bewusstseins für ausgewiesene Beschwerdeverfahren auf nationaler Ebene zu beheben. Auf EU-Ebene empfehlen wir, für entsandte Arbeitnehmer den Zugang zu bestehenden Beschwerdeverfahren zu vereinfachen (*Empfehlung 45*).

## Fehlende Inanspruchnahme der Gerichtsstandsklausel durch entsandte Arbeitnehmer

In beiden Studien wurden kaum Fälle von Gerichtsverfahren von entsandten Arbeitnehmern berichtet. Somit lässt sich das Ergebnis der ersten Studie bestätigen, dass das Recht zur Ergreifung rechtlicher Maßnahmen gegenwärtig von entsandten Arbeitnehmern oder ihren Vertretern kaum oder sogar nie in Anspruch genommen wird.

Vor dem Hintergrund des überzeugenden (wenn auch vereinzelten) Beweises für (missbräuchliche) Fälle der Nichteinhaltung, wie in den nationalen Berichten in der aktuellen und der vorherigen Studie beschrieben, muss dies als klares Signal dafür gedeutet werden, dass die bloße Klausel zur gerichtlichen Zuständigkeit in der Entsenderichtlinie nicht ausreicht, um effektive rechtliche Mittel zu gewährleisten. Soweit verfahrenstechnische Probleme aufgespürt werden (in einigen nationalen Berichten), sollten gewiss Bemühungen zu deren Behebung unternommen werden. Jedoch ist der in diesem Zusammenhang zu betonende Hauptaspekt die unverzichtbare Rolle von Gewerkschaften, die versuchen, zusammen mit anderen Akteuren entsandte Arbeitnehmer auf Basislevel zu erreichen und zu „ermächtigen“. Berichte sowohl über wilde als auch über organisierte Streiks im Namen entsandter Arbeitnehmer sind erwähnenswert. Gleichzeitig hat sich herausgestellt, dass Bemühungen, entsandte Arbeitnehmer gewerkschaftlich zu organisieren, nicht sehr erfolgreich sind, hauptsächlich aus anderen als rechtlichen Gründen (Desinteresse / Angst / Misstrauen gegenüber Gewerkschaften aufgrund schlechter Erfahrungen / Image im Herkunftsland / Kosten für Mitgliedschaft). Nichtsdestotrotz gibt es auch lokale Anzeichen für Erfolge, was darauf schließen lässt, dass Gewerkschaftsbemühungen aufrechterhalten und nicht aufgrund des Fehlens finanzieller Mittel abgebrochen werden sollten (wie in mehreren Berichten ebenfalls

angemerkt). Aus diesem Grund ist es aus unserer Sicht wichtig, die langfristige Notwendigkeit, Initiativen von Gewerkschaften (und/oder Sozialpartnern) in dieser Hinsicht strukturell zu fördern und zu unterstützen, besonders zu betonen (*Empfehlung 44*).

### Verweigerung der Rechte von entsandten Arbeitnehmern durch die Gesetzgebung bzw. die Haltung der Gerichte im Entsendestaat

In mehreren Entsendestaaten wurde von Vorschriften bzw. einer Haltung der Gerichte berichtet, die die Rechte der aus diesen Staaten entsandten Arbeitnehmer behindern könnten. Vor allem das sog. „Dienstreisen"-Gesetz in einigen Entsendestaaten wurde mitunter so ausgelegt, als ob die Vorschriften der Gastländer bei relativ kurzen Zeiträumen der Entsendung keine Gültigkeit hätten (SI, BG, siehe auch 3.2). Ein weiteres Beispiel betrifft die Unklarkeit in der slowakischen Gesetzgebung in Bezug auf die Anerkennung ausländischer Urteile. Ein Beispiel dafür, was als abweisende Haltung eines Gerichts bezeichnet werden kann, ist die in PT festgelegte Situation für von Leiharbeitsunternehmen entsandte Arbeitnehmer.

Somit zeigt die aktuelle Studie, dass die Rechte von entsandten Arbeitnehmern mitunter nicht unter der Gesetzgebung bzw. Gerichtsauslegung/-haltung des Entsendestaates anerkannt werden. Eine Gesetzgebung im Entsendestaat, die vorschreibt, dass die Vorschriften des Gastlandes während relativ kurzer Zeiträume der Entsendung keine Gültigkeit haben und/oder Praktiken von Gerichten, die Urteile von Gastländern nicht anerkennen, die diese Rechte entsandten Arbeitnehmern zusprechen, widersprechen Brüssel I, Rom I und der Entsenderichtlinie. Die EU sollte darauf im Grunde mit einem Vertragsverletzungsverfahren reagieren (*Empfehlung 46*).

## *5. Abschließende Bemerkungen*

In dieser Zusammenfassung haben wir die wesentlichen Beiträge der aktuellen Studie zu den vorherigen Ergebnissen aufgeführt.

Insgesamt bestätigt die aktuelle Studie die Analyse und die Empfehlungen der vorherigen Studie. Nahezu alle Empfehlungen sind in Bezug auf ihren Inhalt unverändert geblieben (manche allerdings anders nummeriert), nur vier wurden leicht angepasst bzw. korrigiert (Empfehlungen 2, 4, 42, 45). Als Resultat neuer Ergebnisse aus der aktuellen Studie sind drei Empfehlungen hinzugefügt worden (14, 17 und 46).

Generell laufen viele unserer Empfehlung in beiden Studien auf eine Klärung und eine präzisere Anwendung der Konzepte und Standards der Entsenderichtlinie hinaus, um die praktischen Auswirkungen der Richtlinie zu verbessern. Idealerweise sollte die Klärung hauptsächlich auf EU-Ebene vorgenommen werden, mit einer präziseren und akkurateren Anwendung auf nationaler Ebene. Besonders in Bezug auf Probleme der Anwendung und Durchsetzung der Richtlinie plädieren wir für die Entwicklung neuer rechtlicher bzw. politischer Instrumente. Viel kann auf nationaler Ebene getan werden, aber mit Blick auf das im EUV verankerte Effektivitätsprinzip scheinen (zusätzliche) rechtliche Maßnahmen auf europäischer Ebene unverzichtbar zu sein

# Étude complémentaire sur les aspects juridiques concernant le détachement des travailleurs dans le cadre des prestations de services dans l'Union européenne

## Pour La Commission européenne
## Nº de contrat VC/2011/0096


## Aukje van Hoek / Mijke Houwerzijl

Avec la coopération de :
Florian Burger
Tomas Davulis
Michael Doherty
Kristīne Dupate
Joaquin Garcia Murcia / Angeles Ceinos
József Hajdú / Dora Sári
Petr Hůrka
Rajko Knez / Verena Rošic
Roselyn Knight
Ulla Liukkunen
Andrea Olsovska
Costas Papadimitriou
Eva Soumeli
Krassimira Sredkova
Júlio Manuel Vieira Gomes



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**Université d'Amsterdam**

## 1. Contexte et objectif de l'étude

Depuis assez longtemps déjà, la position de travailleurs détachés dans un autre État membre, dans le cadre des prestations de services, est un sujet qui intéresse l'Europe. La Directive concernant le détachement de travailleurs (ci-après nommée DDT), entrée en vigueur le 16 décembre 1996, est l'un des résultats concrets en réponse à cette inquiétude. La DDT vise à concilier l'exercice de la liberté fondamentale des entreprises de fournir des services transfrontaliers conformément à l'Article 56 du traité de Rome (ex Article 49 CE) d'une part, et la nécessité de créer un climat de concurrence loyale et de respect des droits des travailleurs d'autre part (paragraphe 5 du préambule). La Commission Européenne a régulièrement contrôlé la mise en œuvre et l'application de la Directive afin de vérifier si les objectifs de la DDT étaient atteints. En 2006[1], un contrôle global, à l'initiative de la Commission Européenne, a donné lieu à la conclusion qu'un éventail de problèmes portant sur la mise en œuvre, l'application et l'exécution de la Directive dans la pratique sont à la base du défaut principal de la Directive, voire de tous ses défauts.

En juillet 2009, la Commission Européenne a lancé un projet pilote : « les conditions de travail et de vie de travailleurs détachés ». L'un des projets ordonnés dans ce contexte (VT/2009/63) porte sur les aspects juridiques du détachement de travailleurs dans le cadre des prestations de services dans l'Union Européenne, réalisé par Mme Aukje van Hoek et Mme Mijke Houwerzijl en mars 2011. Cette étude comparative est fondée sur 12 études nationales ayant trait aux questions et difficultés concernant l'application pratique de la législation relative au détachement de travailleurs, ainsi que son exécution dans la pratique. L'étude actuelle vise à compléter cette première étude, en fournissant des informations sur la mise en œuvre, l'application et l'exécution de la DDT dans les quinze autres États membres. Dans cette synthèse, nous soulignons les principales conclusions de l'étude présente en comparaison avec les résultats de l'étude précédente.

## 2.1 Contexte juridique : l'interaction entre Rome I et la DDT

La DDT porte sur le droit applicable à la relation de travail des travailleurs détachés. En grande partie, ce sujet relève également des règles du droit international privé (DIP) mais, comme nous l'avons démontré dans l'étude précédente et confirmé dans l'étude présente, la relation précise entre les deux instruments juridiques n'est pas clairement établie. Ainsi, le lien entre la DDT et la Convention de Rome/le règlement de Rome I se voit très aisément négligé, également en raison du fait que longtemps la CJUE n'a pas statué sur les questions de droit international privé. Par conséquent, les États membres ont développé et maintenu des interprétations différentes, tant sur l'interaction entre l'article 8 et l'article 9 du règlement de Rome I, que sur l'interaction entre le règlement de Rome I et la DDT.

[1] COM (2006) 159 et le Document de Travail des Services de la Commission SEC (2006) 439, ainsi que la communication de suivi COM (2007) 304, « Détachement de travailleurs dans le cadre de la prestation de services : Maximaliser ses avantages et son potentiel en garantissant la protection des travailleurs » et le Document de Travail des Services SEC (2007) 747.

La loi qui s'applique sur les contrats de travail individuels est déterminée, en particulier, par l'article 8 du règlement de Rome I. Cette clause renvoie premièrement à la loi du pays dans lequel le travail est habituellement accompli. La DDT contient, à la base, cette exigence dans sa définition de travailleur détaché visée à l'article 2(1) : « on entend par « travailleur détaché, tout travailleur qui, pendant une période limitée, exécute son travail sur le territoire d'un État membre autre que celui de *l'État dans lequel il travaille habituellement »* [italiques ajoutées par AH/MH]. Cependant, dans l'étude précédente, nous avons constaté que la mise en application ou la mise en œuvre adéquate de cette clause dans les États membres fait défaut à l'heure actuelle. Ce constat a été confirmé dans l'étude présente. Ainsi, nous conseillons l'application effective de l'article 2(1) de la DDT, en s'inspirant de l'article 12(1) du règlement 883/04 et plus particulièrement de l'article 14 du règlement 987/2009. Nous pensons qu'il est important de s'assurer que le concept de détachement est effectivement appliqué et mis en œuvre, et basé sur un véritable lien entre « l'État d'envoi » et le contrat de travail du travailleur détaché. L'exigence d'un lien réel entre l'État d'envoi et le contrat de travail est un facteur important en vue de la réalisation de ce concept. En outre, le fait que l'employeur se charge de payer les frais d'expatriation peut s'avérer pertinent.

Dans le rapport précédent, nous avons fait une distinction entre les différentes traditions nationales en ce qui concerne l'interaction entre le droit du travail et le droit international privé. L'étude présente vient confirmer ces distinctions. Les traditions nationales diffèrent en particulier quant au rôle attribué à la loi qui s'applique au contrat de travail conformément à l'article 8 du Règlement Rome I et les fonctions de « l'application territoriale » du droit du travail. La protection du travail est souvent régie par des lois d'application internationale indépendante ou immédiate. Cela est particulièrement vrai pour les systèmes de « Common Law », au Royaume-Uni, dans l'étude précédente et en Irlande dans l'étude actuelle. Dans d'autres États également, une protection spécifique peut être limitée au travail effectué sur le territoire. Une conclusion importante qu'on peut en tirer est que la mise en œuvre de la DDT dans la loi des États membres a peut-être harmonisé l'application des lois de police de l'État hôte, mais n'a pas eu le même effet sur l'application des lois de protection de l'État d'envoi. En particulier, si on prend en compte l'interprétation actuelle de l'interaction entre la DDT et le règlement Rome I, rien ne garantit qu'un travailleur soit toujours protégé par au moins un système juridique - que ce soit celui de l'État hôte, du pays de lieu habituel où le travail est accompli ou du pays d'établissement de l'employeur. La DDT n'est pas la cause de ce problème mais la DDT pourrait l'exacerber car la DDT limite les possibilités de l'État d'accueil d'offrir une protection supplémentaire aux travailleurs détachés, en poste sur leur territoire mais jouissant d'une loi étrangère. Le danger des lacunes dans la pratique est d'autant plus urgent lorsque le travailleur n'a pas de lien pertinent avec le pays d'établissement du prestataire de service. Ceci souligne à nouveau l'importance d'assurer un lien réel avec l'État d'envoi dans tous les cas de détachements prévus sous l'application de la DDT.

Ainsi, nous recommandons une clarification de la relation entre le règlement Rome I et la DDT et une interprétation du concept de détachement visé par la DDT à la lumière du règlement Rome I (*recommandation* 1). De plus, nous attirons l'attention sur la responsabilité de l'État d'envoi de fournir une protection adéquate aux travailleurs détachés (*recommandation 2*).

## *2.2 La DDT et les différents systèmes de mise en place de normes dans le droit du travail*

Depuis les arrêts rendus par la CJUE, nommés parfois « le quartet Laval », certains mécanismes qui étaient (et qui sont encore) employés par les États membres dans le but de créer des niveaux minimums de protection, peuvent être considérés comme étant en conflit avec la directive, en combinaison des clauses du Traité en matière de libre circulation des services. Ceci est en partie causé par la formulation de l'article 3 (8) et en partie par l'interprétation de la directive et du Traité par la CJUE. Pour ces deux raisons, le règlement semble être plus apte à s'adapter à des systèmes dans lesquels les conventions collectives sont comparables à la législation du pays d'accueil, comme les systèmes de conventions collectives étendus de France, Belgique, Luxembourg, Allemagne et Pays-Bas, plutôt qu'à des systèmes autonomes comme ceux du Royaume Uni/ Suède/Danemark.

Contrairement à la précédente étude, aucun problème majeur n'a été rapporté à ce sujet dans l'étude présente. La situation en Irlande en ce qui concerne le système de conventions collectives est problématique, mais ceci semble être lié à des raisons économiques et à des objections constitutionnelles, plutôt qu'à des problèmes causés par le droit communautaire. La prévalence élevée de procédures en vue d'extension des conventions collectives combinée à la faible pertinence des conventions collectives au niveau des secteurs dans la plupart des pays étudiés, pourrait expliquer l'absence de problèmes signalés dans l'étude présente. D'autres explications comprennent la prédominance de l'État d'envoi parmi les États membres étudiés et la prise de conscience relativement faible en ce qui concerne le détachement dans certains États membres. Néanmoins, quand on compare les exigences de l'article 3 (8) en combinaison de la jurisprudence de la CJUE à la pratique dans les États membres étudiés dans l'étude présente, on découvre certaines divergences. Cela concerne en particulier le système en vigueur en Finlande et dans une moindre mesure également ceux de Chypre et Lettonie. Ainsi, nous pouvons nous en tenir à la conclusion tirée dans l'étude précédente indiquant que plusieurs pays ont signalé avoir eu des difficultés à concilier la DDT et la jurisprudence applicable au marché interne avec leur système, pour l'établissement de normes de travail. L'impact de la jurisprudence de la CJUE peut dans une certaine mesure être atténué par des mesures prises au niveau national (voir la *recommandation* 3).

Toutefois, une action nationale ne peut pas résorber tous les problèmes et incertitudes signalés. La jurisprudence, rendue par la CJUE, dans l'affaire du « quartet Laval » a créé une incertitude juridique à la fois en ce qui concerne la position des syndicats/le droit à des actions dans l'industrie et en ce qui concerne la conformité avec les clauses sociales stipulées par le droit communautaire applicable aux marchés publics et privés. Dans le précédent rapport, nous avons conclu qu'il fallait remédier à cette incertitude par une action engagée au niveau de l'UE. Dans l'étude présente nous maintenons cette conclusion, qui sera expliquée en détail ci-dessous.

### L'UE *et* la position des syndicats

Les syndicats jouent différents rôles dans la protection des travailleurs détachés, en faisant jouer leurs normes de travail de pays hôte. L'action collective (de solidarité)

des syndicats de l'État d'accueil, dans le but d'imposer une adhésion à des conventions collectives nationales, peut être utilisée comme un moyen pour imposer les normes de l'État hôte, si celles-ci ne vont pas au-delà de la protection offerte par la DDT (Laval). Ce type d'action collective relève de l'article 3(8), (qui lui fixe des limites). Cependant, les syndicats sont également tenus d'assurer le suivi et l'application des droits du travail - un rôle spécifiquement visé à l'article 5, deuxième phrase, de la DDT. Enfin, les syndicats peuvent aider les travailleurs détachés dans leurs négociations avec l'employeur, en ce qui concerne les conditions de travail et l'emploi. Dans le contexte de l'interprétation de l'article 3(7) de la DDT la CJUE n'a cessé d'affirmer que les employeurs peuvent volontairement accepter de fournir à leurs travailleurs une meilleure protection que celle offerte par la DDT. Néanmoins, il est actuellement difficile de savoir quelles méthodes les travailleurs détachés peuvent utiliser pour convaincre leur employeur d'accepter de leur procurer de meilleures conditions pendant leur affectation - et quel rôle jouent les syndicats à cet égard. Il serait judicieux de faire la distinction entre les trois types d'activités syndicales. Par ailleurs, dans plusieurs rapports nationaux, particulièrement dans le contexte du rapport précédent, des préoccupations ont été exprimées quant à l'effet des demandes d'indemnisation sur la jouissance effective du droit fondamental à l'action collective. Étant donné que les sanctions sur les violations du droit communautaire ne sont pas entièrement à la discrétion des États membres, mais se déroulent dans un cadre européen, nous recommandons l'institution de règlements au niveau de l'UE en matière de responsabilité des syndicats (*recommandation* 4).

## Clauses sociales dans les marchés publics et privés

En ce qui concerne les clauses sociales dans les contrats de marchés *publics*, nous réitérons notre recommandation de clarification de la question de la compatibilité entre la législation européenne et la convention de l'OIT no 94 (C94). Dans l'étude présente, des experts d'Irlande, de Finlande et Malte ont spécifiquement mentionné la pertinence d'une concurrence loyale dans les marchés publics et des efforts déployés, afin d'inclure un contrôle efficace sur l'emploi et les conditions de travail dans la procédure d´attribution de contrats publics. Toutefois, les autorités étatiques impliquées dans les marchés publics n'agissent pas en leur qualité de législateurs, mais plutôt comme des homologues contractuels. Les clauses sociales font partie intégrante de la responsabilité sociale des « entreprises ». Dans ce contexte, l'affaire Rüffert vient non seulement remettre en cause la capacité des autorités d'État à adhérer à des normes sociales dans leur pratique contractuelle, mais risque également d'affecter la possibilité des parties privées (y compris des partenaires sociaux) de le faire. Ces pratiques de responsabilité sociale d'entreprise sont employées par divers États membres. Dans le précédent rapport, nous avons signalé l'utilisation de règles de cogestion pour faire appliquer le respect des conventions collectives en cas de sous-traitance (Suède). Les conventions collectives sont également employées pour réguler les conditions de travail dans la chaîne de la sous-traitance. De même, les conventions collectives peuvent réglementer l'externalisation de la main d´œuvre et l'embauche de travailleurs intérimaires par les entreprises liées par les conventions collectives. Dans le rapport précédent, cette méthode a été jugée d'importance au Royaume Uni et en Italie. Dans l'étude présente, elle est également signalée comme étant utilisée en Finlande et à Chypre. Cet aspect mérite, à notre avis, une nouvelle réflexion (et une clarification) sur l'application de la DDT aux clauses sociales (*recommandation* 5).

## *3.1 Mise en œuvre du champ d'application personnel de la DDT*

### La notion de détachement

La directive énumère les critères permettant de distinguer le détachement des autres types de mobilité de travail. Ceux-ci se réfèrent à l'établissement habituel d'employeur, à l'exécution du service transfrontalier, au contexte dans lequel le détachement a lieu et au caractère temporaire du détachement en tant que tel. Ces critères donnent lieu à des problèmes d'interprétation. Afin d'éviter de tels problèmes, plusieurs États membres ont décidé de ne pas inclure les critères de champ d'application personnel visés dans la DDT dans leurs clauses d'exécution, mais plutôt d'appliquer les standards pertinents du droit de travail et de la protection des travailleurs à toute personne travaillant sur le territoire (ou des critères similaires). Dans l'étude précédente nous avons constaté que cela s'applique pour la Belgique, les Pays-Bas et le Royaume Uni ; dans l'étude présente, l'Irlande a fourni un exemple de cette politique. L'inconvénient principal de cette méthode de mise en œuvre est qu'elle peut mener à une application excessive de la clause d'exécution. Elle pourrait être appliquée dans les cas où l'application des lois de l'État hôte est inefficace et/ou disproportionné, mais aussi dans les cas où l'application totale (plutôt que limitée) du droit de l'État hôte serait indiquée. Une mise en œuvre adéquate de l'application du champ personnel de la DDT au sein du droit national pourrait y remédier (voir la *recommandation 6).*

À partir du matériel recueilli dans les deux rapports - notamment dans l'analyse de cas qui ont attiré l'attention des médias - nous concluons que des définitions claires et applicables de détachement et de travailleurs détachés pourraient sans nul doute aider à éviter « l'usage créatif » des libertés dans lesquelles la prestation de service est exercée, de manière à éviter l'application (intégrale) du droit du pays d'accueil. Les cas qui prêtent à controverse comprennent la mise en place de sociétés dites « boîtes aux lettres » qui ensuite embauchent des travailleurs spécifiquement pour les mettre en poste dans d'autres États membres, ainsi que les cas de détachements consécutifs, d'un seul travailleur, dans un seul État membre par différents employeurs de différents États membres. Les deux thèmes principaux à vérifier sont le caractère authentique de l'établissement de l'employeur dans l'État d'envoi d'une part et la bonne application du concept de travailleur détaché visée à l'article 2 de la DDT, d'autre part. Alors que seuls quelques États ont mis en application des exigences quant à l'établissement de l'employeur, aucun n'a pleinement mis en œuvre le concept de travailleur détaché. Pour lutter contre l'abus de la libre prestation de services, nous recommandons la mise en œuvre de ces deux critères. Cette mise en application peut se réaliser au mieux au niveau européen. Un ensemble de recommandations a été formulé dans cette optique : voir les *recommandations* 7, 8 et 9. En l'absence et en l'attente d'une action de l'UE, les autorités nationales devraient s'entendre sur les critères utilisés pour déterminer le statut du travailleur détaché, sous le statut de la directive (voir la *recommandation 10).*

Le présent rapport confirme également les conclusions du précédent rapport indiquant que la définition du détachement, sous l'application de la DDT, peut causer des problèmes d'interprétation en ce qui concerne le détachement qui ne serait pas lié à la

fourniture d’une prestation de service (notamment les stagiaires) et les contrats tripartites dans lesquels l'employeur n’est pas le prestataire de service. C'est pourquoi nous réitérons notre recommandation de clarifier et au besoin modifier les exigences portant sur une prestation de services et sur un contrat de prestation service entre l'employeur et le destinataire du service, afin de s'adapter à la finalité de la directive. En l’absence de solution fournie par la Communauté européenne, une clarification fournie par les États membres serait la bienvenue (voir les *recommandations 11 et 12).*

L’étude présente confirme également le statut particulier des travailleurs du secteur du transport, tant en ce qui concerne le critère exact d’application de la protection offerte par la DDT qu’en ce qui concerne l'application pratique de celle-ci. En Hongrie, Slovaquie et République tchèque il y a ou il y avait jusqu'à très récemment des règles de conflit spécifiques s’appliquant aux travailleurs des transports. La mobilité transfrontalière des travailleurs du transport ne peut pas être considérée comme un détachement sous la législation nationale et/ou la mesure de mise en application de DDT en Autriche, Hongrie, Slovénie et Portugal. Ces résultats soulignent la pertinence d'une mise en œuvre séparée de la DDT pour les travailleurs du transport, comme la première étude le recommande. En l'absence et dans l'attente d'une solution européenne, les États membres peuvent impliquer les partenaires sociaux nationaux du secteur pour déterminer la bonne application et exécution de la DDT à ce secteur (voir la *recommandation 13).*

## La régulation nationale sur le détachement selon la perspective de l’État d’envoi

La DDT s’adresse aux États membres concernant leur rôle en tant que pays hôte. Plusieurs États membres, inclus dans l’étude présente, ont toutefois prévu des dispositions en matière de détachement *à partir de* leur territoire dans leurs lois d'application : Bulgarie, Espagne, Hongrie, Lettonie, Lituanie, Portugal, Slovaquie - et récemment la République tchèque. Pour donner un exemple, la loi bulgare prévoit une protection en vertu des lois de l’État hôte pour des détachements à partir de son territoire dépassant les 30 jours. Les lois des autres États, en Slovénie par exemple, contiennent une protection de fond pour le travailleur détaché à partir de son territoire/en application de ses lois, mais aucun règlement basé sur l'effet de droit international privé de la DDT.
En principe, l'introduction dans la loi de l'État d'envoi, de l’obligation de respecter les normes de protection de l'État hôte dans les situations de détachement, peut être considérée comme un moyen de favoriser la mise en œuvre effective des droits conférés par la directive. Ceci pourrait également être stipulé au niveau de l'UE. Cependant, des précautions doivent être prises quant à la formulation exacte de la disposition de mise en œuvre. Cette disposition ne doit en aucun cas causer de confusion quant à l'applicabilité de la loi de l'État d’envoi en tant que loi applicable au contrat de travail. Elle ne doit pas non plus contredire les règlements pertinents de l'État d'accueil en rendant la reconnaissance de la protection de l’État hôte dépendant d'une durée minimale de détachement (voir l'exemple de la Bulgarie ci-dessus). Les conclusions de l’étude présente nous ont conduits à formuler une nouvelle recommandation à cette fin (*nouvelle recommandation 14).*

## *3.2 Questions liées à la portée de fond de la DDT*

La DDT garantit aux travailleurs détachés un noyau dur de protection dans l'État d'accueil (article 3 (1) DDT).
Dans chacune des études, nous avons examiné les problèmes, que ce soit au niveau de la DDT ou au niveau de sa mise en œuvre et application nationale, concernant les conditions de travail du travailleur détaché (champ d'application matériel de la directive).

### Salaire et nombre d'heures de travail

Les règlements sur les taux de salaire minimum sont identifiés dans les rapports nationaux, dans les deux études, comme étant d'une importance primordiale, ainsi qu'outre la sécurité et la santé et, à un moindre degré, le nombre d'heures de travail et les congés payés. On pourrait les qualifier de « noyau dur » au sein du « noyau dur » de protection. La plupart des pays inclus dans l'étude présente ont un système de salaire minimum légal (Bulgarie, Chypre, République tchèque, Hongrie, Irlande, Lettonie, Lituanie, Malte, Portugal, Slovaquie, Slovénie et Espagne). À Chypre, en revanche, la protection statutaire ne couvre que neuf professions spécifiques. Les conventions collectives sont la seule base pour l'établissement de niveaux de salaire en Autriche, Finlande, Grèce et Chypre (en dehors des neuf professions couvertes par le système légal). Celles-ci forment une source supplémentaire ou complémentaire (Irlande) de dispositions relatives au salaire - outre le minimum légal - dans les autres pays.

Comme nous l'avons relevé dans l'étude précédente, l'interprétation des notions de « taux de rémunération » et de « salaire minimum » est incertaine. La Directive délègue la définition de la notion de taux de salaire minimal aux États membres. En outre, la Directive permet expressément aux États membres d'employer des conventions collectives d'application universelle comme moyen d'établir une protection minimale dans les domaines qui relèvent de la DDT. La DDT ne fournit pas pour autant de réponses claires à la question de savoir si un État d'accueil peut seulement imposer un taux de salaire minimal unique (montant forfaitaire) ou plutôt une panoplie de règles fixant le taux de salaire minimal dans un cas individuel (structure salariale/hiérarchie). Comme en témoigne à nouveau l'aperçu donné dans l'étude présente une différence importante peut exister entre ces deux niveaux de salaire (ex : Irlande, Hongrie). L'application de l'entière structure nationale au salaire minimum est donc fort importante pour permettre à la DDT de mener à des règles du jeu équitables. Il est impératif que ceci soit permis dans le cadre de la DDT (voir la *recommandation* 15).

Un autre problème, à l'égard de ce taux salarial, porte sur la relation entre le salaire payé et le nombre d'heures de travail effectuées. Ce problème tient en partie aux règles sur le salaire minimum en vigueur dans les États membres. Si le salaire minimum est fixé par heure, le nombre d'heures de travail effectuées a un impact direct sur le salaire payé en fin de journée, de semaine ou de mois. D'un autre côté, des taux de salaire mensuels peuvent donner lieu à des frais salariaux réels qui varient en fonction du nombre d'heures de travail effectuées. Il semble difficile d'effectuer

une comparaison quand les salaires horaires sont mesurés par rapport aux normes mensuelles et vice versa.
Dans les pays inclus dans l'étude présente, le salaire minimum est calculé sur des bases diverses - nous avons pu constater des niveaux de salaire minimum déterminé sur une base horaire (Irlande), quotidienne (Espagne), hebdomadaire (Malte) et mensuel (Hongrie, Slovénie). Les taux horaires et mensuels étaient de loin les plus communément utilisés. Dans plusieurs pays, la loi prévoit à la fois une base minimale mensuelle et horaire (ainsi qu'une méthode de calcul pour passer de l'une à l'autre) : par exemple pour les pays comme la Bulgarie, République tchèque, Lettonie, Lituanie, Slovaquie. Espagne ont à la fois une base minimale mensuelle et quotidienne. L'Autriche applique un calcul différent pour les employés (par mois) et les travailleurs (par heure/jour/semaine).

Les États membres sont encouragés à introduire un salaire horaire minimum si leur législation ne l'inclut pas encore (*recommandation* 16). En ce qui concerne les taux de salaire réels à l'heure, le problème le plus important semble être la supervision et l'exécution (nationale) des dispositions sur les heures de travail. Il en va de même pour le droit aux congés payés. Même si, officiellement, ce droit fait partie du noyau dur, il semble peu pertinent en pratique. C'est seulement quand le droit aux congés payés passe par un fonds spécial pour les congés (dans l'étude présente cela concerne le BUAK en Autriche) que le droit lui-même ainsi que son exécution deviennent pertinents en pratique.

Dans le contexte de la comparaison des salaires, un problème qui a clairement émergé dans l'étude présente concerne le paiement de frais et d'indemnités journalières selon la loi de l'État d'envoi et leur calcul par rapport au niveau de salaire minimum des États hôtes. Ce problème particulier est directement lié au fait que plusieurs États membres ont des règles statutaires sur le paiement des frais et des indemnités journalières en cas de détachement (national et transfrontalier) (ceci vaut pour : Bulgarie, Chypre, Lettonie, Lituanie, Hongrie). Le niveau élevé de rémunération 'per diem' en Lettonie semble même conduire à outrepasser les règles sur le détachement, au profit d'un emploi direct dans l'État d'accueil ou d'un détachement non conforme.

Quelles conditions de travail devraient ou ne devraient pas être prises en compte pour déterminer le taux de salaire minimal ? Dans l'étude précédente, nous avions constaté que la notion de « taux de salaire minimum » est loin d'être claire, les pays inclus dans l'étude présente ont fortement confirmé ce constat. Si certains pays stipulent que les indemnités journalières soient calculées en fonction d'un taux de salaire minimal (Finlande, Grèce), tel ne semble pas être le cas en Bulgarie. Les primes de vacances et de Noël, généralement considérées comme faisant partie des taux de rémunération, ne sont pas prises en compte dans le calcul de taux de salaire minimal en Slovénie. Pour certains pays inclus dans l'étude présente, les experts indiquent que le concept national diffère de celui qui est utilisé dans le contexte du détachement. Par exemple en Lituanie, les indemnités journalières pour les voyages d'affaires ne sont pas considérées comme faisant partie du salaire minimum pour calculer les taux nationaux, alors qu'elles en font partie dans le contexte du détachement. De même, en Espagne, les frais de déplacement dépassant les coûts réels sont exclus dans le concept national, mais sont inclus dans le contexte du détachement.

En conclusion, nous avons formulé une nouvelle recommandation aux États membres, leur demandant d'être plus précis quant à l'identification des différents éléments qui constituent la « rémunération » visée à l'article 3 (1) (c) (*nouvelle recommandation* 17). De plus, nous réitérons notre recommandation selon laquelle une clarification doit être apportée, au niveau européen, à la fois sur la notion du taux de salaire minimum selon la DDT, et sur la méthode utilisée pour effectuer une comparaison (*recommandation* 18).

## Santé et sécurité

La santé et la sécurité ont dans une large mesure été harmonisées dans l'UE. Cela ne signifie pas, toutefois, que l'on doive supposer que les travailleurs se trouvent toujours sous la protection des règles du pays de l'État d'envoi. Au contraire, dans les situations de détachement, la sécurité de l'environnement de travail est principalement déterminée par les conditions locales de l'État hôte. Dans l'étude présente, nous avons eu la confirmation que les États d'accueil appliquent tous leurs clauses de santé et sécurité sur les postes de détachement *sur* leur territoire. Mais un grand nombre d'États d'envoi, inclus dans cette étude, appliquent également leurs lois sur les postes de détachement *à partir* de leur territoire (Bulgarie, République tchèque, Grèce, Lituanie, Slovénie et probablement la Hongrie. Seule la Lettonie se réfère spécifiquement à la loi de l'État hôte sur cette question). Cela conduit à un degré de chevauchement inattendu à l'égard de la protection. Cependant, nous n'avons pas beaucoup d'informations sur la façon dont cette application extraterritoriale de réglementation de santé et sécurité est mise en œuvre dans la pratique. Étant donné que l'étude présente concerne principalement les États d'envoi, nous n'avons que très peu d'informations quant à l'application exacte des clauses de santé et de sécurité en cas de détachement *vers* un État d'accueil. Toutefois, l'information donnée renforce les conclusions du premier rapport. C'est pourquoi nous répétons la recommandation quant à la clarification de la notion de sécurité et de santé, et de la relation avec les autres systèmes de protection visée dans la *recommandation* 19.

## La protection de groupes spécifiques

La protection spéciale octroyée dans les États membres aux femmes enceintes ou devenues mères récemment, aux enfants et aux jeunes, se base en grande partie sur les directives de l'UE. La directive 92/85 sur les femmes enceintes ou les femmes devenues mères récemment contient un large éventail de protection offert à cette catégorie spécifique de travailleurs, comprenant le droit à un congé maternité payé. La protection des mineurs et jeunes adultes porte notamment sur l'âge minimum d'un emploi payé, les règles spéciales sur le nombre d'heures de travail et la sécurité et la santé.

L'étude présente confirme largement les conclusions de l'étude précédente instituant que ni la protection des mineurs ni la protection des femmes enceintes ou devenues mères récemment ne constituent des éléments de pertinence majeure en ce qui concerne la protection des travailleurs détachés. En ce qui concerne les mineurs, le seul point intéressant soulevé dans les rapports (Espagne) était lié à la question de l'âge minimum pour un emploi payé : peut-on considérer que ce point répond à la

protection visée à l'article 3 (1) (f) ou est-ce plutôt une extension de la protection conformément à l'article 3 (10) ?

En revanche, le potentiel théorique de problèmes, en matière de protection de la grossesse et de la mère, est assez important. Comme nous l'avons signalé dans l'étude précédente pour les Pays-Bas et le Luxembourg, et pour d'autres pays inclus dans l'étude présente, les règlements sur le licenciement abusif (Irlande) et/ou sur la protection de l'égalité/non-discrimination (Espagne) sont inclus dans la protection de ce groupe spécifique, alors que la loi sur le licenciement ne fait pas, en soi, partie du noyau dur de protection applicable aux travailleurs détachés. Pour ce qui est de la protection de la maternité et de la famille, il existe une différence frappante dans la durée du congé accordé aux femmes enceintes (par exemple : l'Autriche dispose d'une période de 16 semaines pendant laquelle la femme enceinte n'est même pas autorisée à travailler. Chypre impose une période de 18 semaines. L'Irlande stipule 26 semaines de congé payé et plus de 16 semaines de congé sans solde. La Slovaquie offre 34-43 semaines de congé, selon les circonstances). En ce qui concerne le paiement pendant le congé, à la fois le niveau de paiement et la source de paiement sont spécifiques à chaque pays. Le paiement fait partie de la sécurité sociale en Autriche, Bulgarie et Irlande alors qu'il est payé (en partie) par l'employeur à Malte. En Irlande, des paiements supplémentaires versés par l'employeur sont habituels, mais ne sont pas basés sur une exigence légale. Par conséquent, le droit à prendre un congé en vertu de la loi de l'État d'accueil pourrait ne pas être soutenu par une demande de paiement en vertu du droit du travail ou des règlements applicables de sécurité sociale.

Bien qu'il n'y ait d'urgence en ce qui concerne ce sujet, trois recommandations peuvent néanmoins être considérées, ne serait-ce que dans le sillage législatif d'autres éléments de la DDT. Tout d'abord, une clarification du contenu et de la portée de la protection visée à l'article 3 (1) (f) serait la bienvenue. Puis, en fonction de cette dernière, une meilleure démarcation entre la DDT en matière de paiement du congé de maternité (Article 11 (2) de la directive 92/85/CEE) et du règlement 883/04 au sujet de la coordination de la sécurité sociale (en matière d'avantages sociaux sur la maternité) serait la bienvenue. Enfin, dépendant de l'issue des deux points précédents, il paraît important d'établir une méthode de comparaison entre la protection offerte dans le domaine du congé de maternité et du congé parental, en particulier comment comparer un congé plus long pour une rémunération inférieure/allocation moindre à un congé plus court pour une rémunération plus élevée/avantage plus important (*recommandation* 20).

## Protection contre la discrimination

La protection contre la discrimination ne semble pas jouer un rôle majeur dans la protection des travailleurs détachés. Les lois et réglementations nationales pertinentes sont largement basées sur les directives de l'UE portant sur la discrimination au travail. D'un point de vue théorique, il est intéressant de noter (encore une fois) la multitude de sources de protection issue du droit du travail. La protection contre la discrimination peut être garantie par le code du travail (limité aux travailleurs) et les lois spéciales de non-discrimination (Bulgarie, République tchèque, Slovaquie). Dans certains cas, le code pénal peut aussi entrer en jeu. Tous ces règlements ont leur propre champ d'application dans les affaires internationales. D'un autre côté, la non-

discrimination joue un rôle plus général dans la protection des travailleurs (notamment en ce qui concerne le domaine de la rémunération et de la sécurité et de la santé) à Chypre, en Irlande et Espagne. Ces pays emploient un seul instrument/concept juridique pour un éventail d'intérêts.

## Travail intérimaire

Les règles applicables aux entreprises de travail intérimaire, quant à elles, jouent un rôle pratique, notamment dans la mesure où les États membres assortissent cette activité économique de restrictions et/ou d'autorisations spéciales. Dans l'étude présente, des systèmes de licences sont signalés en Autriche, Irlande, Lituanie et Lettonie. Bien que ces restrictions s'appliquent au détachement transfrontalier conformément à l'article 3 (1) (d) de la DDT), les restrictions elles-mêmes devront être évaluées à la lumière de l'article 4 de la directive 2008/104 relative au travail intérimaire. Dans plusieurs États membres inclus dans l'étude présente, la régulation du travail intérimaire est assez récente (Malte, Slovaquie) ou même inexistante (Chypre, Bulgarie, Lituanie), et souvent déclenchée par l'application de la directive de 2008 sur le travail intérimaire. L'Irlande a présenté des propositions pour une obligation de permis en 2009, qui fera probablement partie de la législation qui sera introduite fin 2011 pour transposer la directive sur le travail intérimaire. Il faut noter la création d'un fonds spécial créé par le Portugal pour le rapatriement de travailleurs intérimaires portugais détachés, victimes d'agences portugaises peu fiables. Cette pratique pourrait inspirer d'autres États membres lorsqu'ils rencontrent des problèmes similaires.

La DDT permet également d'étendre la protection offerte aux travailleurs intérimaires aux travailleurs intérimaires locaux (Article 3 (9) DDT). Cette disposition interagit avec l'article 5 de la directive 2008/104 relative au travail intérimaire. La protection supplémentaire offerte par l'article 3 (9) instaure le principe de traitement égal selon lequel le travailleur intérimaire doit être traité de la même manière qu'un travailleur similaire employé dans l'entreprise utilisatrice. Ce principe a été incorporé (bien que limité à un noyau dur de protection) à l'article 5 de la directive sur le travail intérimaire. Ce principe est déjà appliqué (en totalité ou de manière limitée) en Autriche, à Malte, en Grèce et en Hongrie (quoique seulement après 183 jours). On a conseillé à la CE de surveiller la mise en œuvre de la directive 2008/104 en accordant une attention particulière à la position des travailleurs détachés (*recommandation* 21).

## Extension du champ d'application de l'article 3(10) – ordre public

Le concept « d'ordre public » est devenu très controversé depuis le jugement prononcé dans l'affaire C-316/09 (Commission contre le Luxembourg). Malgré une communication de la Commission en 2003, plusieurs États membres ont été confrontés à une interprétation de la notion « d'ordre public » visée dans la DDT, mais rendue par la CJUE à la lumière du Traité, qui semble différer, parfois radicalement, de la notion « d'ordre public » du droit national du travail et du système de droit privé international de ces États membres. Il est important de souligner, cependant, que la pertinence de l'article 3 (10) (premier tiret) est directement liée à l'interprétation des positions de la protection visée à l'article 3 (1). Certaines «

extensions » de la protection pourraient être interprétées comme relevant du champ de la protection expressément mentionné à l'article 3 (1) et vice-versa. Ceci a été souligné dans l'étude précédente, en ce qui concerne la France et la Suède. Des exemples similaires ont été trouvés dans l'étude présente. Par exemple : l'âge minimum pour travailler pourrait être vu comme une partie de la protection des mineurs. Toutefois, l'Espagne considère cette protection comme une extension de la protection minimale prévue par l'article 3 (10). L'application des règles sur les indemnités journalières et le remboursement des frais de détachement en Lituanie pourrait faire partie de la réglementation sur les taux de salaire minimum, mais pourrait aussi (en partie) être considérée comme outrepassant le noyau dur. Aussi, nous recommandons, en tant que première étape dans la discussion sur la notion d'ordre public visée par la DDT, d'apporter une précision sur le champ d'application de la protection de l'article 3 (1) (*recommandation* 22).

L'étude présente confirme également les constats de l'étude précédente affirmant que les États membres ne présentent pas tous leurs lois « d'ordre public » à la Commission européenne. Ce manque d'informations précises sur le contenu des règlements nationaux ayant le statut « d'ordre public » rend l'évaluation difficile quant à la nécessité d'un changement (de l'interprétation actuelle de) de l'article 3 (10). Ainsi, la deuxième étape de l'évaluation de l'article 3 (10) devrait, selon nous, comporter un inventaire (plus précis) des dispositions s'appliquant à tous les travailleurs détachés, mais qui ne peuvent pas être incluses dans les catégories de protection de l'article 3(1). Ces dispositions ne peuvent être appliquées que lorsqu'on leur a attribué le statut « d'ordre public ». Les États membres pourraient faciliter le libellé de cet inventaire en se référant plus spécifiquement à la mise en œuvre des dispositions de la DDT (*recommandation* 23).

Enfin, une grande zone d'ombre pèse encore sur l'interprétation exacte de la disposition se référant à « l'ordre public » visé par la DDT. Généralement, les droits collectifs, en particulier le droit à la négociation et à l'action collective sont considérés par les États membres comme relevant de la notion « d'ordre public ». Ceci est le point de vue soutenu par la CJUE. Cependant, la notion « d'ordre public » a seulement été clairement délimitée dans le contexte du droit des migrations. La DDT opère dans le contexte du droit international privé, dans lequel la notion « d'ordre public » peut prendre un sens différent. Dans tous les cas, l'article 3 (10) se réfère à la compatibilité avec les règles du Traité. Il y a actuellement un manque de clarté quant à la relation exacte entre les lois de police (lois d'ordre public) et « l'ordre public » en droit international privé d'une part, et les concepts d'impératifs d'intérêt public et d'ordre public dans le cadre du marché intérieur, d'autre part (*recommandation* 24).

## *4.1 Acteurs impliqués et leurs compétences*

En ce qui concerne le suivi et l'application de la DDT, nous avons identifié dans notre première étude des difficultés et obstacles majeurs. Les douze rapports nationaux révèlent et exposent clairement les failles dans les systèmes nationaux de droit du travail et leur exécution, à l'égard de groupes vulnérables sur le marché du travail, comme les travailleurs détachés (ou certains groupes de travailleurs détachés). Nous avons donc conclu que la conformité peut et doit être renforcée par la mise en œuvre

et l'application de plusieurs « outils » de surveillance et d'exécution. Il en va de même pour les quinze pays inclus dans l'étude présente. Ci-dessous nous faisons le résumé de nos constats.

## Faire le suivi des conditions de travail (c'est-à-dire des droits) des travailleurs détachés

Dans presque tous les États membres examinés dans nos deux études, les autorités nationales du pays hôte remplissent explicitement un rôle de surveillance et d'inspection des travailleurs détachés. Dans la plupart des pays hôtes, les partenaires sociaux sont également impliqués dans ce rôle. En ce qui concerne les autorités publiques impliquées, les situations dans lesquelles aucun ou plusieurs acteurs sont responsables, peuvent être considérées comme problématiques du point de vue de la transparence et de l'accessibilité à un système. Dans l'étude présente, ce problème a été confirmé par Chypre. Toutefois, aucune critique n'a été formulée par les intervenants en Autriche. Dans chacune des études, les rapports nationaux ont révélé une grande variété quant à la mesure dans laquelle les autorités publiques de l'État d'accueil sont impliquées dans le suivi/la mise en œuvre du droit du travail. Il convient de souligner la vulnérabilité des systèmes des États d'accueil qui font confiance de manière excessive à l'exécution du droit privé , car cela peut mener à des situations (abusives) de non-conformité, dans lesquelles sont impliqués des prestataires de services non fiables.

Ainsi, nous réitérons la *recommandation 25* stipulant la création d'une plus grande transparence dans les systèmes de suivi des pays d'accueil. Nous réitérons, de plus, la *recommandation 26* visant à instaurer davantage de mesures d'exécution publique dans les pays d'accueil lorsque le système national assure de manière insuffisante une application adéquate des droits des travailleurs détachés.

Le mode opératoire des autorités chargées du suivi pose problème également. Les pays inclus dans l'étude présente pour leur expertise en tant que pays hôte, peut-être à l'exception de l'Autriche, ciblent visiblement surtout le suivi du respect du droit du travail national, en général. Par conséquent, aucun pouvoir d'exécution n'est spécialement octroyé pour contrôler le respect des droits accordés par la DDT. Ainsi les conclusions de l'étude présente soulignent le besoin d'une orientation plus ciblée à l'égard du détachement des travailleurs quant à la politique de suivi et d'exécution des autorités de l'État d'accueil. Ce ciblage peut avoir lieu en désignant une « task force » et/ou en formulant des lignes directrices en matière d'inspection axées sur la situation des travailleurs détachés (*recommandation 28).*

## Faire le suivi de la présence de travailleurs détachés

Dans l'étude précédente, aucune surveillance de la présence de travailleurs détachés au sens de la DDT n'a été signalée en Italie, Pays-Bas, Royaume Uni et Suède. Dans l'étude présente, ceci vaut également pour la Finlande, la Hongrie et l'Irlande. Dans ces sept pays, en ce qui concerne leur rôle en tant qu'État hôte, aucun organisme gouvernemental n'est informé de la présence de travailleurs détachés et aucun organisme ne recueille des données sur le nombre de travailleurs détachés sur leur

territoire au sens de la DDT. D'autre part, dix-huit États membres, dans leur rôle en tant que pays hôte, tiennent de registre général ou de projets de « pré-déclaration » concernant les travailleurs détachés, indépendamment de leur nationalité et de leur situation spécifique de détachement (Belgique, Danemark, France, Allemagne, Luxembourg et Roumanie dans l'étude précédente, Autriche, Bulgarie, Chypre, République tchèque, Grèce, Espagne, Lettonie, Lituanie, Malte, Portugal, Slovénie et Slovaquie dans l'étude présente). Dans ce contexte, la *recommandation 27* a été confirmée : une étude approfondie s'impose pour évaluer si l'exigence imposée aux fournisseurs de services et/ou aux bénéficiaires, consistant à simplement signaler la présence de travailleurs détachés aux autorités de l'État d'accueil, peut être justifiée et proportionnée en tant que condition préalable en vue de la surveillance des droits des travailleurs détachés.

## La coopération nationale et transfrontalière

Malgré des progrès considérables, la coopération interne entre les autorités nationales (incluant les partenaires sociaux) responsables du contrôle de la situation au niveau du droit du travail, du droit de la sécurité sociale et du droit fiscal des travailleurs détachés et leurs employeurs comporte de grandes failles, comme démontré dans les deux études menées. Alors que dans certains États membres, il n'existe toujours pas de coopération systématique ou si celle-ci a un caractère limité, dans d'autres pays on constate un écart évident entre la coopération sur le papier et la coopération dans la pratique. Il en va de même pour la coopération transfrontalière entre les autorités nationales impliquées dans des matières de contrôle/d'exécution liées à la DDT. Le large éventail de fonctions des autorités compétentes des différents pays augmente les difficultés en matière de coopération transfrontalière (ce que l'inspection du travail fait dans un pays relève de la compétence du service des impôts ou du ministère de finances dans un autre). Ainsi, une mise en œuvre/application plus poussée des initiatives en cours s'impose au niveau européen et au niveau national en ce qui concerne la nécessité de renforcer à la fois la coopération nationale et la coopération transfrontalière (bilatérale) entre les agences d'inspection (*recommandation* 29).

## Inspection, fréquence des contrôles

En ce qui concerne les tâches spécifiques d'inspection des autorités de l'État hôte impliquées (basées sur l'évaluation des risques, d'initiative propre ou réalisée sur demande) et la fréquence des contrôles, on peut constater une grande variété, comme l'illustrent les résultats des deux études.
Cependant, un problème commun constaté dans plusieurs pays peut se résumer par le manque de personnel impliqué dans les tâches de contrôle et d'exécution, entraînant probablement un effet négatif sur la fréquence des contrôles. Pour atteindre ou maintenir un niveau satisfaisant d'exécution effective, proportionnée et dissuasive, il faudrait remédier à ces points faibles par des efforts au niveau national et/ou au niveau de l'UE en établissant des normes minimales, appropriées au sein d'un instrument juridique (*recommandation 30*).

## Implication des partenaires sociaux – problèmes causés au niveau national

Outre les pays nordiques, Danemark et Suède, le précédent rapport a établi que les partenaires sociaux de l'État d'accueil sont très peu impliqués dans le suivi/l'application des droits des travailleurs détachés et de leur présence. Cela conduit à une absence manifeste de contrôle et d'application des droits octroyés par les conventions collectives. Ce fait a été largement confirmé dans les études menées par pays pour le présent rapport. Par conséquent, nous réaffirmons notre précédente conclusion soulignant que davantage de soutien financier et institutionnel de la part des partenaires sociaux est nécessaire à un niveau national. De plus, il convient de stipuler des normes minimales, de préférence au niveau de l'UE, pour un suivi adéquat et pour le respect des droits au niveau des conventions collectives, ainsi que des lignes directrices pour la coopération entre les autorités et les partenaires sociaux (*recommandation* 31). Pour rester malgré tout sur une note positive, quelques exemples de meilleures pratiques de coopération transfrontalière entre les syndicats ont été observés, entre les syndicats lettons et norvégiens, autrichiens et hongrois, autrichiens et slovaques, et espagnols et portugais, la plupart d'entre elles financées par l'UE.

## Travailleur détaché ou travailleur indépendant (détaché) ?

Un problème particulier, lié au contrôle des conditions de travail des travailleurs détachés, réside dans la difficulté pour les autorités de faire la distinction entre un travailleur (détaché) et un travailleur indépendant (un prestataire de services). L'article 2 (2) de la DDT stipule que la notion de travailleur est celle qui est d'application dans le droit de l'État membre sur le territoire duquel le travailleur est détaché. Ainsi, la nature du travail en question doit être déterminée conformément à la loi de l'État hôte. À des fins de respect du droit du travail, une évaluation globale sur une base individuelle devrait être esquissée pour chaque pays. Dans le précédent rapport, on a observé que la preuve est parfois très difficile à faire.

Cependant, dans la plupart des pays inclus dans l’étude présente, il semble que la qualification du statut du travailleur ne soit pas perçue comme un problème pressant (bien qu’en Lettonie la difficulté pour prouver que quelqu'un est un « faux indépendant » a bien été signalée). Chypre signale un désintérêt total vis-à-vis de ce problème. En Slovaquie, les inspecteurs du travail ne semblent pas s’informer du statut d'un travailleur dans le cas d’un détachement, puisqu’ils ne peuvent pas le contester devant le tribunal. Dans certains rapports nationaux, le formulaire A1/E 101 est mentionné comme l'une des indications du statut du travailleur à des fins de droit du travail, tandis qu’en Slovénie, voire aussi en Irlande, il semble être en cours d'utilisation comme l’indicateur par excellence.

### Reconnaissance et exécution des jugements et décisions de l’étranger

Dans les deux études, les rapports nationaux ont confirmé que les jugements étrangers relatifs à des infractions en matière de protection des travailleurs peuvent en principe être reconnus conformément au Règlement 44/2001/CE sur la reconnaissance et l'exécution des jugements en matière civile et commerciale, parfois cela est (aussi) prévu dans les codes nationaux de droit international privé.

En ce qui concerne l'utilité de l'existence de la décision-cadre 2005/214/JAI du Conseil sur l'application du principe de reconnaissance mutuelle des sanctions pécuniaires, comme dans l’étude précédente, les réponses des parties prenantes nationales dans l’étude présente, varient entre : la reconnaissance de son existence, le manque total de prise de conscience de son existence ou la non-applicabilité, car leur système n'utilise pas ces pénalités dans le cas des travailleurs détachés. Malgré des mesures prises par l’UE qui régissent la reconnaissance et l’exécution des jugements et décisions étrangers, l’exécution des droits impartis par la DDT semble encore s’arrêter à la frontière.

Comme dans l’étude précédente, en ce qui concerne la non-reconnaissance et l’exécution des jugements et décisions de l’étranger, ceci tient en partie à des lacunes juridiques, et à cet égard, des mesures supplémentaires devraient être prises au niveau national (par exemple en France) et peut-être également au niveau de l’UE pour améliorer la reconnaissance et l’exécution transfrontalière de sanctions prononcées dans le contexte de la DDT (*recommandation* 32).

## *4.2 Diffusion de l’information*

### Accès à l’information dans le pays hôte

Selon l'article 4 (3) de la directive, les autorités chargées de la surveillance dans l'État d'accueil ont la responsabilité de fournir les informations au grand public en matière de droits des travailleurs détachés prévus par la loi et les conventions collectives (généralement obligatoires). L'étude précédente nous a permis de conclure que dans la pratique, la diffusion des informations par les autorités responsables concerne principalement les droits statutaires et ces informations se trouvent principalement sur Internet. Les partenaires sociaux de l'État d'accueil - dans la pratique, principalement les syndicats - sont également impliqués. Ils proposent des informations sur les dispositions prévues par les conventions collectives. Toutefois, conformément à l'article 3 (1) de la DDT, les États membres d'accueil devraient être responsables, et pour cette raison, ils ne délèguent qu’une partie des tâches aux partenaires sociaux, sans aucune supervision. En pratique, cette division des responsabilités conduit à une diffusion trop faible de l’information sur les droits des travailleurs détachés en ce qui concerne les conventions collectives. Dans l’étude présente, nous confirmons ce constat.

Les deux études montrent que dans dix-huit des vingt pays examinés dans une perspective d'État hôte (sauf à Chypre et en Italie), les sites Internet sont le moyen le plus courant pour diffuser l'information, puis vient l'information sur papier. Par ailleurs, dans l'étude précédente, des points de contact uniques (liés à l'application de la directive sur les Services (Directive 2006/123) et des campagnes d'information spéciales ont souvent été mentionnés. Dans l'étude présente, de telles initiatives n'ont été mentionnées que par l'Irlande (the NERA road shows).

Dans l'étude précédente, nous avons établi qu'à l'égard de l'information en plusieurs langues et de son accessibilité, la situation s'est visiblement améliorée depuis quatre ans, lorsque la Commission européenne a conclu dans sa Communication 159 (2006) qu'on assistait à une importante amélioration. Malheureusement, l'étude présente dresse un tableau moins optimiste. Par conséquent, on peut conclure que des efforts supplémentaires pour améliorer l'accessibilité des informations dans différentes langues, suffisamment précises et mises à jour, doivent se poursuivre, notamment en Italie et à Chypre, mais aussi au niveau de l'UE (fiches EU) (voir la *recommandation* 33).

Nous tenons à nous arrêter sur la quantité d'informations disponibles : trop de sources d'informations peuvent aussi mettre en danger la transparence des informations. Il faudrait donc prévoir que les autorités désignent un seul site Internet/portail en tant que point central d'informations, tant au niveau européen que national (*recommandation* 34). Dans l'étude présente, les intervenants, par exemple en Lettonie, ont spécifiquement formulé cette recommandation. Toutefois, les travailleurs détachés, en particulier dans les segments inférieurs du marché du travail, n'ont pas toujours accès à Internet. Ainsi, les informations sur papier et les campagnes de sensibilisation axées sur les travailleurs détachés sont indispensables. Presque aucune activité en ce sens de la part des États hôtes n'a été mentionnée dans la présente étude, alors que c'était le cas dans l'étude précédente. Ainsi, la *recommandation* 35 visant à promouvoir et soutenir de telles initiatives, avec le soutien financier et les structures au niveau européen et national, n'a été ni confirmée ni démentie.

## Accès à l'information dans le pays d'envoi

Actuellement, très peu est fait au niveau national pour diffuser des informations sur les conditions appliquées par un État hôte et sur les conditions de travail disponibles, dans le pays habituel du travailleur avant le détachement. Toutefois, étant donné que la sensibilisation devrait commencer aussi tôt que possible afin de permettre au travailleur de prendre une décision éclairée sur le détachement, les autorités du pays d'envoi devraient aussi être plus actives. Conformément à l'article 4 de la directive 91/533, les employeurs ont le devoir (en plus de l'obligation découlant de l'article 2) de notifier à un salarié par écrit les aspects essentiels du contrat ou de la relation de travail, comprenant le niveau de rémunération.

Dans les pays couverts par les deux études, cette obligation ne semble être soumise à la supervision de l'inspection du travail, dans son rôle de l'État d'envoi, qu'en Estonie. Cette bonne pratique mérite d'être suivie par d'autres États membres dans leur rôle d'État d'envoi, afin de souligner leur devoir en matière d'informations sur les

éléments constitutifs du détachement. Au niveau européen, un amendement de la directive 91/533 est fortement recommandée, afin d'établir une sanction efficace et dissuasive en cas de non-conformité et d'étendre son champ d'application à toutes les situations de détachement couvertes par la DDT, indépendamment de la durée prévue du détachement. En outre, le prestataire de service peut se voir obligé de soumettre ses déclarations écrites envoyées à ses employés, conformément à la directive 91/533, également aux autorités nationales compétentes du pays hôte/ou d'envoi. Dans le cas où les autorités du pays hôte sont tenues responsables, la coopération avec les autorités compétentes de l'État d'accueil doit être clairement établie (*recommandation* 36).

## *4.3 Devoirs des fournisseurs de services*

### Exigences de notification

La jurisprudence fondée sur l'art. 49 CE/art. 56 TFUE [Traité de Rome] permet aux autorités nationales du pays d'accueil d'imposer certains devoirs d'informations au sujet du fournisseur de services, ou du bénéficiaire du service.

Dans *six* États membres concernés par l'étude précédente (Belgique, Danemark, France, Allemagne, Luxembourg, Roumanie) des exigences de notification sont imposées aux prestataires de services étrangers, pour permettre aux organismes gouvernementaux de remplir leurs obligations de surveillance et d'exécution en vertu de La DDT. L'étude présente comprend dix pays (Autriche, Bulgarie, Chypre, Grèce, Lettonie, Lituanie, Malte, Portugal, Slovénie, Espagne) où les fournisseurs de services étrangers détachant des travailleurs sur leurs territoires doivent informer une autorité désignée (voir section 4.3) à l'avance. En tout, *seize* des 27 États membres de l'UE, dans leur rôle de pays hôte effectuent plus ou moins à l'avance des notifications pour les fournisseurs de service afin de permettre aux organismes gouvernementaux de remplir leurs tâches de surveillance et d'application.

Dans *onze* États membres n'ayant pas d'obligation de notification sur le fournisseur de service, deux États membres (République tchèque et Slovaquie) imposent ces exigences au destinataire du service (voir ci-dessous). Au lieu d'imposer des devoirs à certains organismes d'État, la Finlande et, en cas de travail intérimaire également la Hongrie, imposent des devoirs au fournisseur de services concernant leurs cocontractants dans le pays hôte (l'entreprise utilisatrice). Cela ne laisse qu'une minorité de sept États membres seulement, y compris (paradoxalement) cinq États qui sont dans la pratique prédominant en tant que pays d'accueil, où aucun devoir d'informations (lié à la DDT) n'est imposé au prestataire de service (Estonie, Irlande, Italie Pays-Bas, Pologne, Royaume Uni, Suède). Dans l'étude présente, l'Irlande constitue le seul pays sans aucune obligation légale spécifique pour les fournisseurs de services et bénéficiaires par rapport au détachement dans le contexte de la DDT.

Comme conclu dans l'étude précédente, les régimes de notification semblent, en soi, être une bonne pratique dans le sens où l'introduction d'un système simple de déclaration peut être évaluée comme une condition sine qua non pour la collecte de données en vue de mesurer l'envergure du phénomène de détachement, et pour la

plupart des efforts de surveillance et d'application. Dans le même temps, les parties prenantes nationales des pays d'accueil prédominantes ont reconnu que la notification n'est pas un instrument infaillible. Dans l'étude présente, aucune nouvelle information d'une quelconque pertinence ne pourrait être ajoutée à cette évaluation sur l'efficacité des régimes de notification dans la pratique. L'explication de ce phénomène tient sans doute au fait qu'*un* seul des dix pays ayant un régime de notification, dans l'étude présente, soit un pays d'accueil majeur (Autriche) et par conséquent dispose d'une expérience considérable sur la notification dans la pratique. Les autres pays sont dans la pratique, soit principalement des États d'envoi (Bulgarie, Lettonie, Lituanie, Portugal) soit des États qui rapportent que le détachement (de et) dans leurs territoires est un phénomène relativement insignifiant (Chypre, Grèce, Espagne, Malte, Suède).

Serait-il nécessaire de recommander la coordination d'un système de notification au niveau de l'UE, en fixant au moins les exigences minimales et maximales d'un tel système ? Cette question mérite une autre étude, notamment en ce qui concerne l'efficacité et la proportionnalité d'un tel outil, ainsi que ses implications du point de vue de la charge administrative. À cet égard on pourrait s'inspirer de la directive 2009/52 (*recommandations* 37 et 38).

## Exigences administratives supplémentaires

On constate aussi des situations différentes selon les États membres en ce qui concerne les autres exigences administratives et/ou supplémentaires, comme la nécessité de demander une autorisation préalable ou de conserver les documents concernant l'emploi pour qu'ils restent disponibles pour les autorités, ou de nommer un représentant, ce qui peut, dans certains cas, être en violation avec le droit communautaire. Dans l'étude précédente, ces autres exigences ou exigences supplémentaires ont été indiquées par les pays comme : la Belgique, l'Allemagne, la France, le Luxembourg. Dans l'étude présente, ces mesures ont été signalées pour l'Autriche, la Finlande et en partie pour la Lituanie. Contrairement à l'étude précédente, où certaines personnes interrogées ont souligné (comme au Luxembourg) que les exigences vont trop loin, dans l'étude présente l'accent porte sur le problème de l'application réelle de ces exigences ou sur la difficulté d'appliquer la loi générale du pays hôte sur ces questions aux fournisseurs de services.

À cet égard, les États membres devraient échanger leurs meilleures pratiques en matière de tâches administratives supplémentaires « équilibrées » pour les prestataires de services. Au niveau de l'UE, des documents uniformes en matière de devoirs d'information sur les fournisseurs de services doivent être développés (ou il faudrait insister sur l'utilisation polyvalente des déclarations écrites requises à l'article 2 et à l'article 4 de la Directive 91/533) (*recommandation* 39).

## Devoirs d'autorégulation des fournisseurs de service

Selon l'étude précédente, dans certains États membres (Danemark, Italie, Royaume Uni), les conventions collectives imposent également des devoirs aux fournisseurs de services étrangers, comme la fourniture de bulletins de salaire et de contrats de travail ou la documentation sur les conditions d'emploi, à la demande de la branche locale du

syndicat. Dans l'étude présente, aucune initiative de ce type n'a été signalée. Par conséquent, nous gardons la recommandation indiquant que de telles initiatives peuvent, bien évidemment dans la mesure où le contenu des mesures des conventions collectives n'est ni disproportionné ni en violation avec le droit communautaire (c'est-à-dire ni trop rigide ni trop vague) être accueillies et échangées en tant que bonnes pratiques, à savoir comme un outil permettant d'améliorer la conformité avec la DDT au niveau des conventions collectives (*recommandation* 40).

## *4.4 Devoirs des bénéficiaires des services*

### Exigences sur les informations

Dans l'étude précédente, nous avons vu que la Belgique et le Danemark (à l'égard des certains secteurs à risques) obligent les bénéficiaires du service à vérifier que les fournisseurs de services étrangers, souvent dans leur rôle de sous-traitant étranger(s)/agence de placement temporaire, se soient bien conformés à leur obligation de notification.

Dans l'étude présente, pour le cas des agences de travail temporaire, l'Autriche rend l'utilisateur susceptible d'être soumis à des pénalités si les bulletins de salaire/rémunération ne sont pas disponibles. Par ailleurs, en République tchèque et en Slovaquie, le bénéficiaire du service (appelé « employeur ») est tenu de signaler par écrit tous les employés mis en poste chez lui, en remplissant un formulaire spécifique à l'Office du Travail, ou, en Slovaquie, à l'Office du Travail, aux Affaires sociales et familiales, dans le district où le salarié effectue les travaux. Tout récemment, une obligation de notification similaire, pour le bénéficiaire du service, a été introduite en Bulgarie. En Finlande, le bénéficiaire du service doit lui-même collecter les informations auprès du prestataire de services (par exemple sur sa fiabilité) et doit conserver ces documents pour qu'ils puissent être mis à la disposition des inspecteurs en cas de contrôle (sanctionné par des amendes). Également en Hongrie, des devoirs d'informations sont imposés au bénéficiaire du service, quand il fait appel à du personnel d'agences de travail intérimaire. En Irlande, des obligations similaires sur les entreprises utilisatrices d'agences de travail intérimaire existent, mais ces obligations sont limitées aux agences établies sur le territoire irlandais.

Compte tenu du problème de la non-notification des fournisseurs de services constaté dans plusieurs États membres, il paraît logique que le bénéficiaire du service soit rendu coresponsable, dans une certaine mesure. Ainsi, pour améliorer l'efficacité des régimes de notification, ces initiatives sont les bienvenues et peuvent être échangées en tant que bonnes pratiques, à savoir comme outil visant à améliorer la conformité avec la DDT, y compris au niveau des conventions collectives. Néanmoins, la compatibilité avec le droit communautaire et notamment à l'égard de l'efficacité et la proportionnalité d'un tel outil, ainsi que ses implications du point de vue de la charge administrative, mérite d'être examinée plus en détail dans une autre étude. (voir la *recommandation* 41)

### Responsabilité (ou « équivalents fonctionnels ») en matière de salaire et cotisations/impôts liés au salaire

Neuf États membres (Belgique, Allemagne, France, Italie, Pays-Bas dans notre précédente étude, Autriche, Grèce, Espagne, Finlande dans l'étude présente) disposent de mécanismes juridiques de responsabilité plus ou moins strictes (parfois combinés à une autorégulation). En dehors de la Finlande, il s'agit en particulier de régimes de responsabilité conjointe et solidaire concernant les clients/principaux entrepreneurs/ entreprises utilisatrices. Pour améliorer la conformité avec la DDT, notamment le paiement des salaires applicable aux travailleurs détachés, des initiatives pour rendre le bénéficiaire du service coresponsable seraient les bienvenues. Bien évidemment les mesures ne doivent pas être disproportionnées, ni se trouver en violation avec la législation européenne, et doivent être partagées comme de bonnes pratiques, à savoir comme un outil visant à améliorer la conformité avec la DDT, y compris au niveau des conventions collectives. Néanmoins, la compatibilité avec le droit communautaire et notamment à l'égard de l'efficacité et la proportionnalité d'un tel outil, ainsi que ses implications du point de vue de la charge administrative, mérite d'être examinée plus en détail dans une autre étude (voir également la *recommandation* 41).

## *4.5 Outils de soutien/voies de recours des travailleurs détachés*

### Clause attributive de compétence

L'article 6 de la DDT stipule que le travailleur détaché doit avoir la possibilité d'intenter une procédure judiciaire dans l'État d'accueil. Ainsi, tous les États membres, dans leur rôle en tant que pays hôte, doivent s'assurer de cette possibilité pour les travailleurs détachés sur leur territoire relevant de la directive. Dans notre première étude, nous avons constaté qu'à l'exception du Royaume-Uni, l'article 6 de la DDT est explicitement mis en œuvre dans les onze autres États membres visés par cette étude. En ce qui concerne les quinze États membres couverts par l'étude présente, on signale que seulement sept d'entre eux (Autriche, Bulgarie, Chypre, Espagne, Finlande, Lettonie, Malte) ont explicitement mis en œuvre l'article 6 de la DDT. Les huit autres États membres semblent avoir mis en œuvre l'article 6 de manière indirecte, bien qu'en République tchèque et Slovaquie la situation ne soit pas très claire.

### Soutien des partenaires sociaux et/ou autres intervenants

En dehors du droit partiel allégué aux syndicats, en Irlande, de pouvoir saisir la justice indépendamment du travailleur individuel, aucun autre État membre concerné par cette étude, n'allègue à des représentants de syndicats le droit de comparaître indépendamment, comme c'est le cas en Belgique, France et aux Pays-Bas (cf. notre étude précédente). Étant donné que les syndicats (et les associations d'employeurs) de l'État d'accueil pourraient avoir un intérêt indépendant dans l'application de normes du droit du travail du pays d'accueil sur les prestataires de

services étrangers, ceci est une bonne pratique qui mérite d'être suivie par d'autres États membres. Il est également judicieux de citer quelques outils supplémentaires de soutien et/ou institutions renforçant la possibilité des travailleurs détachés d'obtenir leur droit. Dans l'étude présente ces derniers ont été signalés en Autriche (BUAK, the 'Arbeiterkammer') et en Irlande (the Labour Relations Commission comparable to the ACAS au Royaume Uni).

Dans l'ensemble, par rapport à la précédente étude, les conclusions de l'étude présente sur la mise en œuvre de l'article 6 de la DDT sont plus inquiétantes. Par conséquent, nous recommandons une étude plus approfondie afin de vérifier que la clause attributive de compétence est correctement mise en œuvre dans chaque État membre (cette recommandation supplémentaire est incluse dans la *recommandation* 42). Par ailleurs, nous réaffirmons notre recommandation, faite dans l'étude précédente, de rendre obligatoire l'option du droit à comparaître octroyée aux partenaires sociaux visée à l'article 6 de la DDT. De plus, la formulation de l'article 6 de la DDT doit également souligner que les États membres sont tenus de donner aux travailleurs détachés le droit de comparaître individuellement devant les tribunaux de l'État hôte. Si ce n'est pas déjà prévu, les États membres peuvent envisager la possibilité et la valeur ajoutée de permettre à un acteur/une autorité compétent(e) de pouvoir engager des poursuites contre un employeur qui ne respecte pas les lois (par exemple pour récupérer des salaires impayés) (*recommandation* 42).

## Accès des travailleurs détachés à l'aide juridique

Dans l'étude précédente, nous avons conclu que les travailleurs détachés (même s'ils ne sont pas domiciliés ou résidents dans l'état d'accueil) ont une égalité d'accès aux mécanismes d'aide juridique prévus par la loi (Belgique, Allemagne, France, Pays-Bas, Luxembourg et Suède), à condition qu'ils soient ressortissants de l'UE ou qu'ils résident régulièrement ou soient domiciliés dans un autre État membre de l'UE (à l'exception du Danemark). Néanmoins, conformément aux principes généraux dans les affaires concernant l'emploi au Royaume Uni, aucune aide juridique n'est disponible pour les travailleurs qui y sont détachés. Les travailleurs détachés en Roumanie n'ont pas non plus accès à l'aide juridique, à l'exception de l'aide juridique que peut fournir le syndicat.

Dans les pays couverts par la présente étude, les travailleurs détachés ont une égalité d'accès aux mécanismes d'aide juridique prévus par la loi en Autriche, Bulgarie, République tchèque, Grèce, Espagne, Finlande, Hongrie, Lituanie, Portugal, Slovénie, Slovaquie, à condition qu'ils soient ressortissants de l'UE ou qu'ils résident régulièrement ou soient domiciliés dans un autre Etat membre de l'UE. Cependant, en Grèce et au Portugal l'aide juridique n'est que très peu développée. Conformément aux principes généraux en vigueur à Chypre, en République tchèque, Lettonie et à Malte, aucune aide juridique n'est disponible pour les travailleurs qui y sont détachés. En Irlande, les travailleurs (détachés) engageant des poursuites devant les tribunaux réservés aux affaires qui touchent l'emploi n'ont pas accès à l'aide juridique. La loi applicable ne permet pas l'octroi d'une aide juridique devant un tribunal du travail. L'aide juridique peut être disponible pour des réclamations contractuelles saisies devant les tribunaux civils, si le demandeur satisfait aux critères d'admissibilité financière.

Même si ces résultats sont conformes au droit de l'UE (notamment à la directive sur l'aide juridique) on pourrait conseiller, par le biais d'une Communication de l'UE par exemple, de fournir un accès des travailleurs (détachés) à l'aide juridique dans les pays où cette dernière n'est pas disponible actuellement (*recommandation 43*).

## Mécanismes de recours

Aucun des pays étudiés ne dispose de mécanismes de recours particuliers permettant aux travailleurs détachés de déposer une plainte pour non-respect de la DDT. Les travailleurs détachés peuvent employer les mêmes voies de recours que tout autre travailleur de ces pays, par exemple contacter les syndicats ou les services d'inspection du travail, au sujet de leur plainte. En pratique, donc, la plupart des travailleurs détachés ne se plaignent pas de non-conformité, ni de situations abusives, soit parce qu'ils ont peur de le faire, soit parce qu'ils craignent de perdre leur emploi. Un autre facteur de difficulté pour les travailleurs détachés, pour se lancer dans des poursuites, est de comprendre et d'accéder aux mécanismes de poursuites selon les lois générales de l'État hôte. Néanmoins, des exemples positifs peuvent être nommés, comme en Slovénie à l'égard de l'aide fournie aux travailleurs détachés à partir de l'ancienne Yougoslavie, ainsi qu'en Irlande et au Royaume-Uni, au sujet du rôle de l'ACAS et du LRC dans les conflits collectifs. Il serait judicieux de remédier au manque de mécanismes de recours mandatés au niveau national. Au niveau de l'UE également il faudrait faciliter et/ou introduire un mécanisme de recours adressé spécialement aux travailleurs détachés. (*recommandation 45*)

## Non-utilisation de la clause attributive de compétence par les travailleurs détachés

Dans les deux études, pratiquement aucune affaire judiciaire liée au détachement de travailleurs n'a été signalée. Par conséquent, nous pouvons confirmer la conclusion de la première étude instituant que le droit d'agir en justice, à l'heure actuelle, a peu ou n'a jamais été utilisé par les travailleurs détachés ou leurs représentants.

La preuve (même anecdotique) de cas (abusifs) de non-respect, comme indiqué dans les rapports nationaux dans l'étude précédente et actuelle, doit être interprétée comme un signal clair mettant en lumière que la clause attributive de compétence visée uniquement par la DDT ne suffit pas à fournir un recours efficace. Dans la mesure où des problèmes de procédure sont signalés (dans certains rapports nationaux), des efforts doivent certainement être mis en œuvre pour les éliminer. Toutefois, le principal point à souligner ici est le rôle indispensable des syndicats qui, avec d'autres acteurs au niveau local, essayent d'atteindre les travailleurs détachés, d'élever leur niveau de conscience quant à leurs droits, et de mettre en pratique ces droits. Il faut signaler plusieurs récits de grèves sauvages et annoncées conduites au nom des travailleurs détachés. Dans le même temps, on a constaté que les efforts visant à syndiquer les travailleurs détachés n'ont pas eu de succès, principalement pour des raisons non juridiques (désintérêt/peur/méfiance envers les syndicats en raison de mauvaises expériences/image dans le pays d'origine/frais d'adhésion). Cependant, il y a aussi des signes locaux de succès, ce qui indique que les efforts des syndicats

doivent être soutenus et non abandonnés en raison d'un manque de ressources financières (ce qui a également été signalé à plusieurs reprises). Par conséquent, nous croyons qu'il est important de souligner la nécessité à long terme de promouvoir et soutenir structurellement les initiatives de la part des syndicats (et/ou des partenaires sociaux) à cet égard (*recommandation 44*).

### Droits des travailleurs détachés refusés par la législation ou le tribunal de l'Etat d'envoi

Dans plusieurs États d'envoi, on a mentionné de règles ou des attitudes susceptibles d'entraver les droits des travailleurs détachés provenant de ces États. Spécialement la législation applicable au soi-disant « voyage d'affaires » a parfois été interprétée dans plusieurs États membres d'envoi comme si les règles de l'État hôte ne s'appliquaient pas pendant des périodes relativement courtes d'affectation (Slovénie, Bulgarie, voir aussi ci-dessus le point 3.2). Un autre exemple concerne le manque de clarté dans la législation slovaque concernant la reconnaissance d'un jugement étranger. En illustration, on peut nommer la situation concernant les travailleurs détachés par des agences de travail temporaire établies au Portugal, qui fait montre d'une attitude judiciaire pour le moins « inamicale ».

Ainsi, l'étude présente montre que les droits du travailleur détaché sont parfois refusés en vertu de la législation ou de l'interprétation/l'attitude d'un tribunal du pays d'origine. La législation, dans l'État d'envoi, stipulant que les règles de l'État hôte ne s'appliquent pas aux périodes relativement courtes de détachement et/ou la pratique des tribunaux ne reconnaissant pas les jugements d'un État hôte octroyant ces droits aux travailleurs détachés, va à l'encontre de Bruxelles I, Rome I et de la DDT. La CE devrait agir, finalement, en soumettant une procédure d'infraction (*recommandation* 46).

## *5. Remarques finales*

Dans ce résumé nous avons fait la liste des principales contributions de l'étude présente venant s'ajouter aux conclusions précédentes.

De très loin, l'étude présente confirme l'analyse et les recommandations faites dans l'étude précédente. Presque toutes les recommandations restent inchangées (mais ont parfois été renumérotées) quant à leur contenu, quatre d'entre elles seulement ont été légèrement adaptées ou modifiées (*recommandations* 2,4, 42, 45). Trois nouvelles recommandations ont été ajoutées (14, 17 et 46) à la suite de nouvelles constatations faites dans l'étude présente.

En général, beaucoup de nos recommandations se résument à clarifier et appliquer plus précisément les notions et les normes de la DDT pour améliorer l'impact pratique de la Directive. L'idéal serait que cette clarification se fasse surtout au niveau de l'UE, allant de pair avec une application plus précise et rigoureuse au niveau national. Quant aux problèmes d'application et d'exécution de la DDT, nous préconisons également l'élaboration de nouveaux instruments juridiques ou politiques. Beaucoup peut être fait au niveau national, mais si l'on considère le principe d'efficacité ancré

dans le Traité de Rome, un travail juridique (supplémentaire) au niveau européen semblerait indispensable.

# Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

## To the European Commission
## Contract VC/2011/0096


## Aukje van Hoek / Mijke Houwerzijl

With the cooperation of
Florian Burger
Tomas Davulis
Michael Doherty
Kristīne Dupate
Joaquin Garcia Murcia / Angeles Ceinos
József Hajdú / Dora Sári
Petr Hůrka
Rajko Knez / Verena Rošic
Roselyn Knight
Ulla Liukkunen
Andrea Olsovska
Costas Papadimitriou
Eva Soumeli
Krassimira Sredkova
Júlio Manuel Vieira Gomes



## Final report – November 2011
## University of Amsterdam

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# CHAPTER 1. INTRODUCTION

## *1.1 BACKGROUND AND POLICY CONTEXT*

As early judgments of the European Court of Justice in the cases *Manpower* (35/70) and *Van der Vecht* (19/67) show, employee posting was already a phenomenon in the late 1960s and early 1970s, even before the internal market was launched. The practice of hiring a (temporary agency) worker from a country with a 'cheaper' social security scheme, with the sole purpose of posting him to a Member State with a more expensive social security regime, were at that time labelled abusive and 'social dumping'. In the first half of the 1990s, in the context of the Delors project 'Europe 1992' for completing the single market, the proposal for a Posting of Workers Directive and the underlying question of the extent to which Member States must be allowed or should be required to apply their mandatory wages and other working conditions to workers posted to their territory, led to fierce debates in European Parliament and Council.[1]

It was only after a six-year process of negotiations, deadlocks and amended proposals that the Posting of Workers Directive was finally adopted. One of the controversies concerned the legal basis of the Directive, which was found in the Treaty provisions establishing the freedom to provide services. In fact, the ECJ judgment in the case Rush Portuguesa of 1990 paved the way for this legal base. In this case, the ECJ ruled (at para 15) that 'an undertaking established in one Member State providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from its own Member State for the duration of the work in question.' With regard to the terms and conditions of employment of the posted worker, the ECJ stated (at para 18) that 'Community Law does not preclude Member States from extending their legislation, or collective labour agreements, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.'[2]

With regard to both considerations two – separate – lines of case law were developed: (1) The first one (building on para. 15 of Rush) concerned the unjustified restrictions on the freedom of a service provider established in a Member State to post workers possessing a third-country nationality to another Member State. In this regard, the ECJ ruled that the authorities of the host state may not impose conditions relating to obtaining work permits, since workers who are regularly employed by the service provider and who are posted only temporarily in the host country for the duration of the service are not deemed to enter the labour market of that state. However, in its later judgments, the ECJ acknowledged that a duty to simply notify the presence of a posted worker who is a third country national to the host state authorities may be justified under certain conditions.[3] This line of case law was not influenced by the adoption and consequent implementation of the PWD, as the Directive does not regulate

[1] See for instance OJ 15, C 166/123.6.95, no. 4-464/204 and no. 4-464/206.
[2] See Case C-113/89 (Rush Portuguesa), points 19 and 18.
[3] See Cases C-43/93 (VanderElst); C-244/04 (Commission v Germany); C-445/03 (Commission v Lux); C-168/04 (Commission v Austria).

issues relating to the entry and residence of (third country national) posted workers but only coordinates which hard core of mandatory host state labour standards should be applicable to workers.
(2) The second line of case law (building on para. 18 of Rush) concerns conflicts involving the wages and other working conditions of posted workers. Many aspects were touched upon, but the main approach in these judgments starts with a comparison of labour law protection in the host Member State and that in the Member State where the employer is established.[4] If the protection is the same or 'in essence' the same, the social protection of the latter state has priority. A precondition for the application of host-state law is that it offers the posted worker a genuine and effective advantage and that it does not disproportionally restrict the free movement of services.[5]

The position of workers who are posted to another Member State in the framework of the provision of services has thus been a European concern for a considerable time. The Posting of Workers Directive (PWD), adopted on 16 December 1996, is one of the tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old art. 49 EC), on the one hand, with the need to ensure a climate of fair competition and respect for the rights of posted workers (Recital 5). The European Commission has regularly monitored the implementation of this Directive to ensure that the aims of the Directive were being met. The group of Experts, installed by the Commission as proposed in their Evaluation of July 2003,[6] took up the improvement of mutual administrative cooperation. Data concerning the persons to contact at the Ministries and liaison offices were exchanged, and the intention was to keep this information up-to-date. Moreover, the Member States were strongly recommended to improve the general public's access to this information.[7]

The comprehensive monitoring exercise launched by the European Commission in 2006[8] took place in the context of the debate about the initial proposal for a Directive on Services in the Internal Market (the so-called Services Directive).[9] Following the deletion of the specific provisions on posting of workers of the initial proposal (Articles 24 and 25), guidelines were adopted to clarify the prevailing Community law, notably the application of Article 56 of the TFUE (ex 49 EC), to the administrative requirements dealt with in Articles 24 and 25.[10] Directive 2006/123/EC, as adopted,[11]

[4] This comparison operates on the basis that the undertaking is already bound by the mandatory workers' protection of its country of establishment. See VanderElst para 24, Commission v. Austria para 49, Commission v. Luxembourg para 35.
[5] See ECJ judgments in cases C-164/99 (Portugaia); C-165/98 (Mazzoleni); C-49/98, C-50/98, C-52/98 -54/98, 68/98, 71/98 (Finalarte); C-366/96 and C-369/96 (Arblade); C-272/94 (Guiot). In all these rulings the facts of the case date from the period that the PWD was not adopted yet or still subject to implementation and thus not (fully) applicable.
[6] See COM (2003) 458 of 25 July 2003, p.19/20.
[7] See COM (2003) 458 of 25 July 2003, p.19/20.
[8] COM (2006) 159 and the accompanying Staff Working Document SEC (2006) 439, as well as the follow-up communication COM (2007) 304, "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.
[9] See for instance 14.02.2006 Commissioner Charlie McCreevy's Statement on the Services Directive at the European Parliament Plenary session of February 2006; SPEECH/06/84.
[10] COM (2006) 159, "Guidance on the posting of workers within the framework of the provision of services" and the accompanying Staff Working Document SEC (2006) 439.

does not affect labour law, i.e. terms and conditions of employment that Member States apply in compliance with EU law.[12] EU law in the area of labour law and employment conditions for posted workers includes the PWD and the Rome I Convention.

Based on the results of the comprehensive monitoring exercise, the assessment was that the Posting of Workers Directive's main shortcomings – if not all of them – could be traced to a range of issues relating to its implementation, application and enforcement in practice. The policy documents showed that many Member States rely solely on their own national measures and instruments to control service providers, in a way that does not always appear to be in conformity with either (old) Article 49 EC (now Art. 56 TFEU), as interpreted by the European Court of Justice (ECJ), or with the Directive. This situation was related to the virtual absence of administrative cooperation, unsatisfactory access to information, and cross-border enforcement problems.

The debate about the implementation, application and enforcement of the PWD took place in the context of the EU enlargement in 2004 and 2007 by 12 new Member States but also in relation to the debate on the initial proposal for a Services Directive from 2004[13] Moreover, the judgments of the ECJ in the Viking-Line, Laval, Rüffert and Commission against Luxembourg cases in 2007 and 2008, all fuelled intense scholarly and public debate [14] on the implementation and application of the PWD and, inter alia, led to a quest for clarification on a number of points. In the meantime, the issue of posting workers also led to intense debate in the European Parliament (EP), which adopted several resolutions on the issue.[15] The resolution of 22 October 2008 stresses (once again) the need to correctly implement, apply and enforce the Directive.[16] In this resolution, the European Parliament asks the Commission to continue examining the problems in this context, suggesting that a partial revision of the Directive should not be ruled out. In its resolution of 6 April 2011 on a Single Market for Europeans, the EP welcomed the announcement made by the Commission of a legislative initiative on the implementation of the PWD aiming at guaranteeing the respect of the rights of posted workers and clarifying the obligations of national authorities

[11] The Services Directive, after being substantially amended from the original proposal, was adopted on 12 December 2006 by the Council and the European Parliament, and published on the Official Journal of the European Union on 27 December 2006 as the Directive 2006/123/EC.
[12] See Article 1.6 and Recital 14 of the Services Directive.
[13] See for an account of the 'integration fatigue' and '(single) market fatigue' in the old Member States in western Europe due to the enlargements and the unemployment and discrediting of financial capitalism in the credit crisis, the recent report of Mario Monti, A new strategy for the single market, at the service of Europe's economy and society, May 2010.
[14] The 'Laval-quartet' gave rise to numerous conferences among scholars and policymakers and led to a 'tsunami' of (working) papers and articles in Academic journals. See also many ETUC press releases and reports on the aftermath of this case law.
[15] European Parliament resolution on the implementation of Directive in the Member States (2003/2168(INI), OJ C 92E, 16.4.2004, p. 404-407; Resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)), OJ C 313E , 20.12.2006, p. 452–457; Resolution of 11 July 2007 on the Commission Communication on the Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers (P6_TA(2007)0340).
[16] European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

and companies. The EP calls on the Member States to remedy shortcomings in the implementation and enforcement of the directive.[17]

In line with the conclusions laid out in its Communication of October 2007, the European Commission considered that urgent action is required to remedy shortcomings in implementing, applying and enforcing the PWD. It recognizes that properly functioning administrative cooperation among the Member States is essential for monitoring compliance. However, it also considers that the problems encountered cannot be resolved unless the Member States improve the way they cooperate with each other and, in particular, comply with their obligations regarding administrative cooperation and access to information under the Directive. Thus, on 3 April 2008,[18] the Commission published a Recommendation calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations. It sets out a series of practical measures to remedy shortcomings in the way the existing legislation is implemented, applied and enforced. It calls in particular for a more effective exchange of information, better access to information and exchange of best practice. The Recommendation was endorsed by Council conclusions on 9 June 2008, and followed up by a Commission Decision on 19 December 2008, establishing an Expert Group on the Posting of Workers.

In July 2009, the European Commission launched a pilot project 'working and living conditions of posted workers'. In the context of this project, two research projects were commissioned, which took off in December 2009/January 2010. One concerned the economic and social effects associated with the phenomenon of posting workers in the European Union (VT/2009/62). The other (VT/2009/63) concerned the legal aspects of posting workers in the framework of the provision of services in the European Union. In the same years, several other projects were funded which targeted specific aspects of the posting of workers. In 2010, the EIRO published its comparative study on "Posted workers in the European Union",[19] The results of the other EC studies were presented to an audience of stakeholders at the "Conference on Posting of Workers and Fundamental Rights" hosted by the European Commission on 27/28 June 2011 in Brussels:

- "The legal aspects of the posting of workers in the framework of the provision of services in the European Union", by Ms Aukje van Hoek and Ms Mijke Houwerzijl, March 2011
- "Economic and social effects associated with the phenomenon of posting of workers in the EU", by IDEA consult/Ecorys, March 2011
- "In search of cheap labour in Europe", by CLR/EFBWW, December 2010
- "Information delivered as regards posted workers", by Fabienne Müller/ Straatsburg, October 2010
- "Joining up in the fight against undeclared work in Europe. Feasibility study on establishing a European platform for cooperation between labour inspectorates, and other relevant monitoring and enforcement bodies, to prevent and fight undeclared work" by Regioplan, December 2010

[17] European Parliament resolution of 6 April 2011 on a Single Market for Europeans (2010/2278(INI)), point 43.
[18] One day after the judgment of the ECJ in the Rüffert case.
[19] http://www.eurofound.europa.eu/publications/htmlfiles/ef1073.htm.

Also in 2010, the European social partners issued a Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases[20] as well as separate policy statements.[21] In the mean time, the EC's Single Market Action Plan adopted as one of its key actions "Legislation aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, which will include measures to prevent and sanction any abuse and circumvention of the applicable rules, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights."[22]An impact assessment study is currently undertaken.

In this context, the current study is meant to supplement the first study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union with information on the implementation, application and enforcement of the Posting of Workers Directive in the 15 Member States not covered by the first study. Where necessary the conclusions and recommendations in the first study will be adjusted in the light of the new findings. The set-up of the present study is based on that particular purpose.

This comparative study starts with a succinct overview of both the labour law and the private international law context of the PWD (chapter 2). Chapter 3 deals with the implementation and application of the directive and discusses in detail its personal and substantive scope. Chapter 4 deals with monitoring and enforcement. In each chapter we compare the results from the current study with those from the previous study and formulate (and where necessary reformulate) our conclusions and recommendations. An overview of conclusions and recommendations is presented in Chapter 5. An executive summary and a list of all recommendations are provided separately.

[20]http://www.businesseurope.eu/DocShareNoFrame/docs/6/OFNDKNLBFNNOEMBJIBAPOPLJPDWD9DBWWY9LTE4Q/UNICE/docs/DLS/2010-00812-E.pdf.
[21] ETUC, Resolution on the Posting of workers directive March 2010; ETUC, A Revision of the Posting of Workers Directive: Eight proposals for improvement Final report of the ETUC EXPERT GROUP ON POSTING Brussels, 31 May 2010, http://www.etuc.org/IMG/pdf/final_report_ETUC_expert_group_posting_310510_EN.pdf. BusinessEurope, Briefing on Posting of Workers July 2010 http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=26815
[22] COM (2011) 206, April 2011.

## *1.2 THE POSTING OF WORKERS DIRECTIVE*

### Aims of the PWD

As already stated above, the PWD aims to reconcile the exercise and promotion of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old Article 49 EC), on the one hand, with the requirement to sustain a climate of fair competition and to take measures guaranteeing respect for the rights of workers temporarily posted abroad to provide the services, on the other. In order to do that it identifies at Community level which national mandatory rules of general interest in the host state must be applied to posted workers and establishes a hard core of clearly defined terms and conditions of work and employment for minimum protection of workers (laid down in article 3 (1) a - g) that must be complied with by the service provider in the host Member State. According to the Preamble of the PWD (Recital 7-11), the Directive thus makes the optional character of Article 7 Rome I Convention obligatory, by defining those subjects of employment law that must be seen as 'special mandatory'.

In this way, the Directive intends to provide a significant level of protection for workers, who may be vulnerable given their situation (temporary employment in a foreign country, difficulty in obtaining proper representation, lack of knowledge of local laws, institutions and language). The Directive also aims to play a key role in promoting the necessary climate of fair competition between all service providers (including those from other Member States) by guaranteeing a level playing field, as well as legal certainty for service providers, service recipients, and workers posted within the context of the provision of services.

### Personal scope of the PWD

The Directive applies to undertakings which post workers in the framework of the provision of services to work temporarily in a Member State other than the State in which they habitually carry out their work and whose legislation governs the employment relationship (excluding merchant navy undertakings in regard to seagoing personnel, see article 1(2)). Pursuant to article 1(3) it covers three transnational posting situations, namely:

- Posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended;
- Posting to an establishment or an undertaking owned by the group;
- Posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting, with the proviso, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker.

Furthermore, the Directive stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State (article 1(4)).[23]

## Substantive scope of the PWD

The hard core of rules to be respected, which are laid down in article 3(1) of the Directive, include in particular the following:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay;
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- equality of treatment between men and women and other provisions on non-discrimination.

These rules must be laid down either by law and/or by collective agreements or arbitration awards which have been declared universally acceptable[24] in the case of activities in the building work sector (referred to in the annex), while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work (according to article 3(10), second indent). They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions (according to article 3(10), first indent).[25]

## Information, control and jurisdiction clauses in the PWD

To ensure the practical effectiveness of the system as established, Article 4 of the Directive provides for cooperation on information between the Member States. Liaison offices and authorities are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States, for undertakings posting workers and for the posted workers themselves. Pursuant to article 4(3) of the Directive, each member state also takes the appropriate measures to make the information on the terms and conditions of employment referred to in article 3 generally available. Besides this it is stated in article 5 that the member states shall take appropriate measures in the event of failure to comply with

[23] See also Recital 20 of the Directive which indicates that the Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

[24] See in this respect also article 3 (8) which provides for further possibilities in the absence of a system for declaring collective agreements universally applicable.

[25] Article 3 (10). See for further details also the Communication of the Commission on the implementation of Directive 96/71/EC, COM (2003) 458 final, 25.7.2003.

the PWD. In particular, they have to ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the PWD. The Directive also contains a jurisdiction clause, in Article 6, which states that judicial proceedings may be initiated in the Member State in whose territory the worker is or was posted.

## Implementation of the PWD

As laid down in article 7, the PWD had to be implemented on 16 December 1999.

## *1.3 THE METHOD, LIMITATIONS AND AIMS OF THIS STUDY*

### Approach and methodology

As has already been mentioned, this comparative study is compiled on the basis of 15 national studies[26] which examined questions and difficulties arising in the practical application of the posting of workers legislation, as well as in its enforcement in practice. In this respect the study investigates not only the role of Member State authorities (primarily labour inspectorates) in enforcing the directive adequately, but also the relevant activities of social partners. To this end, the national rapporteurs have conducted structured interviews and have studied legislation and case law. The national rapporteurs were assisted in this process by a detailed questionnaire, composed by the lead researchers in close cooperation with the European Commission and the national rapporteurs.

Although a systematic review has been undertaken regarding the implementation, application and enforcement of the PWD in all the countries concerned, it should be noted here that the findings of some country studies are highlighted more often than others. There are two principal reasons for this uneven spread of attention. First, since the PWD addresses countries in their role as host state, countries which have predominantly a sending role have less experience with the application and enforcement of the Directive. Secondly, the extent to which a certain system stands apart from the others with regard to its method of implementation, the way it is applied and/or its monitoring and inspection tools, or with respect to the actors involved in its enforcement system, is an explanatory factor. Hence, we should emphasize that all the country studies have contributed to the comparative analysis in chapters 2, 3 and 4, including those which attract less attention because the implementation or practical impact of the PWD in their countries is less problematic or noteworthy.

### Choice of countries and sectors

The choice of countries is based on the complementary character of this study. The European Commission specifically tendered for the study to cover the countries that were not included in the previous study under contract nr. VC/2009/0541. Accordingly, the following countries were included: Austria, Bulgaria, Cyprus, Czech Republic, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Portugal, Slovakia, Slovenia, and Spain. Parallel to the first study, the countries were given slightly different questionnaires, depending on their position as predominantly hosting posted workers, or rather predominantly being a sending state. Austria, Cyprus, Finland, Ire-

[26] National experts were Florian Burger, Tomas Davulis, Michael Doherty, Kristīne Dupate, Joaquin Garcia Murcia / Angeles Ceinos, József Hajdú / Dora Sári, Petr Hůrka, Rajko Knez / Verena Rošic, Roselyn Knight, Ulla Liukkunen, Andrea Olsovska, Costas Papadimitriou, Eva Soumeli, Krassimira Sredkova, Júlio Manuel Vieira Gomes.

land and Malta answered the questionnaire for host states, whereas the others answered the questionnaire for sending states.[27] The expert for Lithuania answered both.

Part of the study is related to law and legal protection. To a great degree this depends on legislation and other generally applicable rules. However, protection through collective labour agreements (hereinafter mostly referred to as CLAs), enforcement by and cooperation between social partners and practical application of the directive may be sector-specific. In the interviews with social partners and government authorities it was deemed necessary to focus on specific sectors. Although national rapporteurs were encouraged to add individual cases or best practices from another sector, they were advised to restrict the systematic research to a few specific sectors. A choice was made for the construction sector and posting by temporary work agencies. This choice of sectors is identical to the choice made in the previous study and follows from the complementary character of the current study. A more detailed justification of this choice can be found in the first study.

The TWA sector is not recognized in all countries as a specific sector. In those cases the experts were free to include another sector that did have relevance for their country.

## Aims and outline of the study

Similar to the previous study, there are three main aims to this study:
(1) To provide a comprehensive overview of existing problems with the Directive's implementation and application in practice;
(2) To provide a comprehensive overview of existing problems in enforcement of the rights conveyed by the Directive;
(3) To assess the cause of the problems identified and make recommendations for their solution. In particular, the research study should determine whether difficulties and problems in implementing, applying and enforcing the PWD are caused by:

- The national implementation method and/or the national application of the Directive;
- The national system of enforcement;
- The Directive as such; and/or
- Insufficient transnational cooperation (or the lack thereof);
- Other reasons.

Consequently, suggestions are given on how to improve the legal and/or practical situation in that respect. Best practices are also established, with an assessment of whether they may possibly be helpful in addressing similar situations in other Member States. In line with the complementary nature of this study, we have chosen to compare in each chapter the results of the current study with those of the previous study and to subsequently formulate (and where necessary reformulate) our conclusions and recommendations. Please note that the analysis and recommendations offered in this study represent the personal views of the authors and may not be regarded as the official position of the European Commission.

[27] Please note that the questionnaire for predominantly sending countries, also contained questions from a host state perspective.

This study includes the following parts:

(1) Chapter 2 deals with the PWD in its legal context set against differing private international law (PIL) and national collective labour law systems of the countries covered by this study. The aim is facilitative: we believe it is crucial for the understanding of the analysis in the next two chapters.

(2) Chapter 3 is concerned with existing problems in the implementation and application of the Directive in practice. The focus in this part of the research concerns articles 1 and 2 (the concept of posting and of posted worker) and article 3 (terms and conditions of employment of the posted worker) of the Directive. Since the social partners may be involved in both the implementation and the application of these articles of the Directive, relevant aspects of their involvement are also studied. The goal is to describe the practice in the Member States and to identify, explain and assess differences in the interpretation and application of the relevant provisions.

(2) Chapter 4 deals with existing problems in enforcing rights conferred under the Directive. The objective of this part of the research is to describe and assess existing problems, difficulties and obstacles encountered by posted workers intending to enforce their rights stemming from the Directive, as well as by monitoring authorities in the host Member States when controlling the aspect of the working conditions under article 3 of the Directive and its enforcement in practice.

(3) Chapter 5 provides a comparative overview and analysis of the findings in the foregoing parts of the study. In the light of the complementary character of this study, this chapter also provides information on the differences and similarities between the findings in the two studies.

The report is followed by a list of all recommendations and an executive summary in which we list the main contributions of the current study to the previous findings.

# CHAPTER 2

## *2.1 INTRODUCTION*

In the first report on the legal aspects of posting of workers in the context of the free movement of services in the EU (VC/2009/0541) we stressed the path-dependency of EU law: the exact impact of directives depends to a large extent on the existing national framework in which it is incorporated. This finding is confirmed in the current study. There are considerable differences in the implementation, application and enforcement of the PWD as well as in the perception thereof in the countries concerned.

Again, it must be noted that the PWD is an atypical Directive in the sense that it does not predominantly address one main legal discipline but rather stands at the crossroads between national (collective) labour law, internal market law and private international law (PIL). Thus, before we turn to the actual implementation, application and enforcement of the PWD itself in Chapters 3 and 4, in this Chapter we pay attention to the PWD in its legal context and set against the different PIL and national collective labour law systems of the countries studied. In doing so, we also address the implementation and application of Article 3(8) in the Member States.

## *2.2. PWD IN RELATION TO PIL AND NATIONAL PIL TRADITIONS – PROBLEMS CAUSED BY THE UNCLEAR INTERACTION BETWEEN THE PWD AND PRIVATE INTERNATIONAL LAW*

### The Rome I Regulation

In the context of the Rome I Regulation it is important to distinguish between the law applicable to the contract of employment under Article 8 Rome I Regulation and overriding mandatory provision that apply regardless of the law applicable to the contract under Article 9 of the same. Article 8 harmonizes the law applying to an individual contract of employment. Though parties to the contract may designate the law applicable to the contract themselves, this choice of law by the parties may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law applicable in absence of such a choice. In the latter case the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country. In other words: the Rome I Regulation creates a fiction of stability of the work place to ensure that during a temporary posting the law applying to the contract does not change. This rule applies only when the work performed in another Member State is considered to be temporary in the meaning of this provision. The preamble (para 36) contains a specification of the concept of 'temporary': "As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily."

Article 8 contains a separate rule in case the country were the work is habitually carried out can not be identified. In that case the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. However, in the case Koelzsch v. Luxembourg the ECJ stressed that the referral to the place of establishment of the employer is strictly secondary. Even in the case of a truck driver working in international transport, the national court should try to establish whether, based on the circumstances as a whole, a country can be identified from which the work is actually performed.[28]
Both pre-established connecting factors may be set aside where it appears from the circumstances as a whole that the contract is more closely connected with another country. A prominent example of this would be when an expat contract is governed by the law of the common country of origin of employer and employee rather than by the law of the country where the work is performed. The expat contract is characterized not only by the common origin of worker and employer, but also by the special ar-

[28] ECJ 15 March 2011, C-29/10.

rangements made to compensate for the expatriation of the worker, such as travel arrangements, housing facilities and expat allowances.[29]

Accordingly, the provisions of the Rome I Regulation are based to some extent on the principle that the law of the place of work should apply to contracts of employment *(lex loci laboris)* but allow for the law applying to the individual contract of employment to deviate from the law of the actual place of work in three instances:

- The worker is temporary employed in another country than the country in which the work is habitually performed – posting in the meaning of Article 8 sub 2.
- There is no identifiable centre of activities, leading to an absence of a country were or from which the work is habitually performed and the application of the law of the place of establishment of the employer instead – Article 8 sub 3.
- The contract has a closer connection with another country, usually the country of common origin in case of expat contracts – Article 8 sub 4.

Article 9 contains a clause on overriding mandatory provisions. According to its first paragraph "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation." This definition was 'borrowed' from the ECJ in the Arblade case[30] which dealt with Belgian rules of labour protection (*lois de police*).

Article 9 sub 1 can be understood to limit the concept of overriding mandatory provisions in two ways: *countries themselves* must consider the specific rules to have an overriding effect and than these rules can be tested by *the ECJ* against the requirement that they should be crucial for safeguarding a public interest. The limits the latter criterion poses on the use of overriding mandatory provisions is currently unclear.

The Rome I Regulation is the direct successor of the Rome Convention. The relevant provisions have changed in text, but not drastically as to their contents.[31] Accordingly the old member states of the EU have quite some tradition in interpretation of the provisions. However, for lack of jurisdiction the ECJ until recently could not answer preliminary questions on the Rome Convention. The case of Heiko Koelzsch v. Luxembourg is the second case on the Rome Convention and the first on the provision regarding labour contracts. This allowed the Member States to interpret the provisions of the Convention in accordance to their own standards and perceptions. Especially as regards labour law, different approaches can be discerned. The new member states had little to no experience with the Convention before it turned into a Regulation. In several of the new member states, the old system of private international law is still present, though not applicable to postings within the EU.

In the previous report we distinguished four different traditions with regard to the interaction between labour law and private international law. The current study does not

[29] See on this issue inter alia, C.M.E.P. van Lent, Internationale intra-concernmobiliteit, Deventer: Kluwer 2000, p. 16.
[30] ECJ 23 November 1999, C-369/96, ECR I-8453.
[31] See as to the continuity between Art. 6 of the Rome Convention and Art. 8 of the Rome I Regulation: C-29/10 Heiko Koelzsch para 46. The provision on overriding mandatory provisions has changed however (Article 7 Rome Convention v. Article 9 Rome I Regulation).

contradict the distinctions made, but does provide some new perspectives. Hence, a short description of the different approaches seems useful to understand both the varying role ascribed to the law applying to the labour contract under Article 8 of the Rome I Regulation and the different functions of the 'territorial application' of labour law on the other.

## National systems and approaches

1) The first approach described in the previous report is based on a clear distinction between the contractual elements and the public law elements of labour law. We cited Germany and the Netherlands as examples of this tradition. These countries have a (more or less) clear distinction between the private law rules on the labour contract (e.g. as regards dismissals) and the public law rules on labour protection (e.g. in the area of safety and health). The first, contractual aspects are covered by Article 8 Rome I on the law applying to the contract. The public law rules have their own – often territorially defined – scope of application and are considered to be overriding mandatory provisions in the meaning of Article 9 Rome I. In the current study, Austria fits into this group. In AT the public provisions for worker protection which are monitored by the Labour Inspectorate ("*Arbeitsinspektorat*") as a state authority and where sanctions can be imposed (technical worker protection, protection of life, health and morality, maximum working hours, minimum rest periods, risk protection, young, handicapped, women's and motherhood protection) are understood to be overriding mandatory provisions in the sense of Article 9 Rome I. In contrast, provisions on working time in collective agreements which impose a lower limit on the maximum working time than the legal standard are not. Nevertheless, guarantees in collective agreements do apply to posted workers, but this is not based on a pre-existing interpretation of the Rome I Regulation, but on a special provision in the AVRAG, the Austrian law which also contains the implementation of the PWD.[32] Hence the PWD extends the protection of workers posted to AT beyond the prevailing private international law framework. This finding is in line with the conclusion as regards the Netherlands and Germany in the previous report.

2) A second group of countries covered by the first study was set in the 'ordre public' tradition. In this group of countries all labour law provisions are deemed to have a more or less strict territorial application, based on their 'ordre public' character. The public relevance attached to labour law provisions is evident from the fact that mandatory labour law provisions often are subject to criminal sanctions. The distinction between the law regarding individual labour contracts, labour protection law and collective labour law is largely irrelevant. Even provisions in collective agreements might carry criminal sanctions in case of breach. In some of the countries standing in this tradition (FR, LU), the unity of labour law is accentuated by the fact that all aspects of the labour relations (the contractual aspects, the public law protective aspects and collective labour law) are regulated in a single code. In parallel the distinction between the different types of labour regulations is also irrelevant for private international law purposes. For these countries the PWD in the interpretation given in the Laval–quartet

[32] Since 1st May 2011 the right to adherence to the working time regulations laid down in the collective agreements has been guaranteed also as regards workers from non-EEA countries (Sect. 7a Para. 3 No. 2 of the AVRAG).

limits the opportunity to impose national legislation to all work performed within the territory.

In the current study we did not identify a country as belonging to the ordre public group – with the possible exception of Spain.[33] But we did find more or less the mirror system in Bulgaria.

3) The system in BG seems comparable to the one found in Poland in the previous study. They have the recent transition to European law in common and can be revered to as the MEE-group[34].

BG also has a system in which all elements of labour law are contained in a single code (with only minor exceptions). Only – and in contrast to the 'ordre public' system – the application of this code in case of international postings and transfers depends on the law applying to the contract by virtue of Article 8 Rome I. Hence when a worker is posted abroad, also the rules on safety and health and special protection for pregnant women in BG law are deemed to apply, as long as BG law applies to the contract by virtue of Article 8 Rome I.

Another striking aspect of the system in BG is the existence of the specific private international law rule in the Labour Code. Again, the content of (especially the BG) rule is comparable to the one existing in Poland before the Rome Convention entered into force there. For quite some time, in Poland the posting abroad of Polish workers took place under governmental supervision, through a Polish intermediary. During their work abroad, these posted Polish citizens retained the protection of Polish law. Swiatkowski formulated this in his working paper for the Formula project as 'the absolute exclusivity of Polish labour law concerning employment relationships between Polish employees and Polish employers regardless of whether work is performed in Poland or abroad'. Accordingly, in private international law the common nationality of employer and worker took predominance as a relevant connecting factor over the place of work. This pattern can be seen in BG as well, though the rule has been adapted to take out the discriminatory element. Currently Article 10 of the BG Labour Code stipulates that the Labour code is applicable to the employment relationships of Bulgarian citizens, citizens of Member States of the European Union, of the Contracting Parties to the Agreement on the European Economic Area or of the Swiss Confederation with employers in Bulgaria, as well as with Bulgarian employers abroad, save as otherwise provided for in a law or in an international treaty which is in force for the Republic of Bulgaria.[35] It is also applicable to the employment relationships of Bulgarian citizens, of citizens of Member States of the European Union, of Contracting Parties to the Agreement on the European Economic Area or of the Swiss Confederation, sent by a Bulgarian employer to work abroad in a foreign enterprise or joint ven-

[33] Based on the information provided, we were unable to place Portugal in any of the traditions described.
[34] Middle and Eastern European Member States.
[35] The amendments were made to take into account the Rome Convention and Rome I Regulation and included citizens of Member States of the EU, of the contracting parties of the AEEA and Switzerland, putting them in the same footing as Bulgarian citizens.

ture, as well as of foreign citizens working in Bulgaria, save as otherwise provided for in a law or in an international treaty which is in force for the Republic of Bulgaria.[36]

Czech law and Lithuanian law seem to have a similar wide application as BG law: the core provisions of CZ law apply to workers posted to CZ whereas all provisions of CZ law apply to workers posted from CZ. The same is true for LT law. However, for issues with regard to the core protection under the PWD, both systems contain a more favourable right provision which ensures that the law applying to the contract will be applied if it is more favourable to the worker than the applicable provisions of the host state.[37]

4) Hungary is part of the same group but demonstrates more of a mixed picture. Like in BG the Labour Code of Hungary contains a general scope rule, which in its private international law elements is overruled by the Rome I Regulation and the provisions of the PWD. Like in BG the provision itself is retained however. In contrast to BG, in HU the different sections of the code may also contain scope rules, as do the Act on Labour Safety and the Act on Equal Treatment. All these scope rules are subservient to inter alia the provisions implementing the PWD in HU law. This creates a complex interaction of which the results are sometimes less than clear. An interesting provision is to be found in Subsection (5) (which deals with posting from Hungary) of Section 106/A of the Labour Code (which contains the implementation of the PWD in Hungarian law). Pursuant to this provision, the provisions of Subsections (1)-(4) shall be duly applied to a foreign posting (assignment, hiring-out) of workers employed by Hungarian employers if these aspects are not covered by the laws of the country where the work is performed. It would seem that for the areas of protection mentioned in the PWD, the host state laws apply and Hungarian law is only applicable on a subsidiary basis. Hence the PWD seems to have created a dichotomy in labour law between labour law provisions that are part of law applying to the contract under Article 8 Rome I Reg. (the *lex causae*) and labour law provisions covered by the PWD which are primarily applied on a territorial basis.[38]

The notion that for the areas of protection mentioned in the PWD, only the law of the host state applies unless specifically provided otherwise in the law of the home state, is also evident in the report from Latvia. The original implementation of the PWD covered only posting to Latvia, but in 2010 a provision on posting from Latvia was added to the Labour Code. The provisions covered by the PWD are deemed to be overriding mandatory provisions in the meaning of the Rome I Regulation. They apply territorially. Because Article 3(7) has not been implemented, only host state law applies. In case Latvian law offers better protection than the host state, this protection will not always be available to workers posted from Latvia to other EU or EEA states. This was stated specifically for the protection of pregnant women and women who have recently given birth. However, the LV statutory minimum wage provisions do

[36] See about the applicable law in employment relations in Bulgaria Мръчков, В. – In: *Коментар на Кодекса на труда*, 104—109.
[37] Until 31 December 2006 the law contained a specific provision on posting from CZ, but after strong debate this was withdrawn. See also section 3.2.
[38] Currently a proposal has been submitted for a new labour code, which is to replace to existing one. The new code does not contain any private international law elements, not even the provisions the implementing the PWD. The effect of this on the protection of posted workers is still unclear.

seem to be applicable also in case of postings from LV in case they are more favourable to the worker than the host state rules.

Hence, the implementation of the PWD in both HU and LV seems to restrict the possibility of those Member States to apply their national law to postings abroad. With regard to most of the topics mentioned in Article 3 of the PWD only the host state provisions will be applied, unless specific use has been made of Article 3(7). However, the exact interaction between the several provisions – Rome I Regulation, implementation of the PWD in national law, national choice of law rules and specific scope rules – is difficult to ascertain. Similarly the law of SK contains a mix of PIL sources in complex interaction. These findings underline the importance of a guiding interpretation on the interaction between the PWD and the Rome I Regulation.

5) Several countries in the current study belong to the common law family. In the previous study we noticed the difference in treatment between rights in common law and statutory rights in the UK. In the UK a strict distinction is made between common law – to which the choice of law rules of Rome I apply – and special statutory protection the application of which to international contracts is determined by special scope rules. As a result, the multilateral choice of law rule of Article 8 has no significance for the actual day to day protection of workers under the different statutes. Moreover, like in the Scandinavian countries, the system of collective labour relations operates largely outside the legislative framework for the individual contract of employment. The application of collective agreements is not based on a statutory duty, but rather on effective pressure exerted by the unions in a specific sector of industry (collective agreements are classified as 'gentlemen's agreements). This pattern was to some extent also found in CY, IE and MT.

6) In the previous study we found that countries from the Scandinavian system (DK and SW) do not tend to lay much weight on the law applying to the individual contract either, albeit for a totally different reason. In those systems, there is a rather strict division between the individual contractual relation covered in international cases by the Rome I Regulation in combination with the PWD on the one hand, and the system of collective labour law which operates independently from Rome I on the other hand. This point of view is closely related to the autonomous position of collective labour relations in those systems. The PWD was only deemed to be relevant with regard to the statutory protection of the individual worker. The collective labour relations (including the guarantees contained in collective agreements as regards working conditions) were, prior to the Laval judgment, treated as a separate issue which is not submitted to the choice of law rules for the labour contract. This specific aspect of the Scandinavian system is not represented in this study. Though FI belongs to the Scandinavian system, the position of collective agreement is highly regulated in law, also as regards their application to posted workers.[39]

[39] See inter alia Finnish, Industrial relations and labour legislation in Finland www.mol.fi 2006 Available through http://www.posting-workers.eu/content/default.asp?PageID=108&DocID=11563

## Conclusions and recommendations

The present preamble to the PWD makes reference to the Rome Convention, but the exact relationship between both legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention / Rome I Regulation. This can be explained in part by the fact that the ECJ did rarely (and until recently could not) judge conflict of law issues. Accordingly, different Member States have developed or maintained different interpretations both of the interaction between Article 8 and Article 9 of the Rome I Regulation and of the interaction between the Rome I Regulation and the PWD.

The PWD is based on the EU competences as regards the internal market and in particular the free provision of services. This freedom attaches primarily to the service provider (and/or recipient). When the service provider needs to send employees to another Member State to be able to provide the service, the labour law of the host state may cause an impediment to this activity by creating additional burdens and costs for the service provider who is already covered by the law of another country. This obstacle can be justified by the need to protect both the labour law system of the host state against wage-based competition (social dumping) and the posted workers themselves. However, the PWD limits the possibility of the Member States (and indirectly also the unions) to avail themselves of this justification to the hard core provisions of the PWD and public policy provisions. This restriction is based on the assumption that the posted workers are already adequately protected by the law of the country in which they normally work. Often, the country in which the employee normally works will coincide with the country of establishment of the employer (the service provider). However, it is important to note that the assumption that the posted worker is covered by the labour law protection of the country of establishment of the service provider is not necessarily true for two reasons:

1) The law applying to the individual contract of employment is determined by private international law (PIL), in particular Article 8 of the Rome I Regulation. This provision primarily refers to the place of *work*: the law of the country where or from which the work is habitually performed will apply to the contract of workers – posted or not. The actually place of performance of the work is the relevant factor here, not the contractual arrangements or the seat of the employer. When workers are posted abroad, and the work is actually performed in the host state, the law of the country in which the employer is established may nevertheless be applicable to their contracts when:

- the posted workers habitually work in (or from)[40] the country in which their employer is established and are only temporarily posted to the host country;
- it is impossible to identify a country in which or from which the workers habitually work, making the employer's place of business the most relevant connection;
- the country of establishment of the employer is for other reasons the most closely connected to the contract. These other reasons could involve the domicile of the worker, the place of recruitment, special travel arrangements and allowances to compensate the worker for working abroad etc.

[40] When the worker habitually works in more than one Member State, but has his center of activities in one of them, the law of the latter State applies. The term 'working from' does not refer to the country of origin of the employer.

Both the first and the last steps of this choice of law rule will only refer to the country of establishment of the employer if there is a genuine connection of both the worker and the contract of employment with that country. The rule of the closest connection also lays weight on the fact that in the case of expatriation on behalf of the employer, the employer bears the costs of labour mobility. If these requirements are not met, there is little or no justification for giving priority to the law of the country of establishment of the employer over the law of the place where the work is actually performed. Policy makers should bear this in mind if they consider clarifying the concept of 'posting' under the PWD. It should also be clear that the limitations which the PWD in the interpretation of the ECJ imposes on the application of the law of the host state do not apply when host state law is applicable to the contract by virtue of Article 8 Rome I.

2) Labour protection is often organized through statutes having an independent scope of application in international cases. In the current study, this statement is especially true in IE. But also in other states, specific protection can be limited in scope to work performed within the territory. We identified several provision containing such spatial limitation, for example in the law LV as regards the protection of specific groups under Article 3(1)(f), in EL as regards working time provisions and in BG and HU[41] as regards specific aspects of health and safety regulation (Article 3(1)(e)). In the previous study health and safety was already identified as being territorially restricted in for example Germany and the Netherlands. An important conclusion to be drawn from this is that the implementation of the PWD in the law of the Member States has harmonized the application of overriding mandatory provisions of the host state, but has not done the same as regards the application of the mandatory protection of the law of the sending state. In particular, under the current interpretation of the interaction between the PWD and the Rome I Regulation, there is no guarantee that a worker will always be protected by at least one system of law – be it that of the host state, the country of habitual place of work or the country of establishment of the employer. The problem that the statutory protection of the sending state may not – or only to a limited extent – apply to work performed outside the territory, is not a problem caused by the PWD.[42] However, the PWD does enhance the risk of creating legal lacunae by limiting the competence of the host state to offer (alternative) protection. The danger of lacunae seems to be most urgent when the worker does not have a relevant connection with the country of establishment of the service provider. This again underlines the importance of ensuring a real link to the sending state in all cases of posting under the PWD.

[41] See section 3.5 and 3.6.

[42] Currently there is no ECJ case law on the question whether such territorial restrictions would be compatible with Article 8 of the Rome I Regulation. See on the scope of protection of UK statutes Supreme Court UK – pending case no UKSC 2010/0154, Ravat v. Halliburton and House of Lords Lawson v. Serco [2006] UKHL 3
http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060126/serco-1.htm.

***Recommendation 1 - unchanged***

**At EU level>** The present preamble to the PWD makes reference to the Rome Convention, but the exact relationship between the legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention/Rome I Regulation, also because the ECJ did for a long time not judge PIL issues. Thus, to further a correct application of the law on posted workers, we would favour a clarification, stating that the concept of posting and the concept of posted worker in the PWD has to be interpreted in the light of the provisions of the Rome I Regulation.

In particular, it is important to ensure that the concept of posting is based on a genuine connection between the 'sending state' and the employment contract of the posted worker. The PWD basically contains this requirement in its definition of posted worker in Article 2(1) ('posted worker` means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in *which he normally works*). However, this provision currently lacks adequate practical enforcement and implementation. In this context we advise to make this provision operational while drawing inspiration from Article 12(1) Regulation 883/04 and, most notably, Article 14 Regulation 987/2009.

Moreover, we favour the introduction of a requirement that the employer has to bear the costs of the posting in order that the PWD be applicable (see art. 3(7) second indent).

See also recommendations 8-10 (formerly recommendation 11-13) below.

***Recommendation 2 - adapted, action at EU-level added***

**At national level>** In national law, special attention must be paid to the position of posted workers from a sending state perspective. In this regard, we consider it necessary to make sure that workers who are posted from that state will still be protected under its labour laws, in order to avoid lacunae in the legal protection of posted workers. This recommendation seems to be especially pertinent for the common law countries where statutory protection largely depends on the place of work, but it also applies to specific legislation in the other Member States.[43]

Action **at EU-level** would be helpful to impose a clear duty on the sending state to take responsibilities not only as regards the formal applicability of its norms to posted workers, but also as regards the monitoring of application and – if necessary – enforcement of those norms that continue to apply during the posting abroad.

See in this regard also recommendations 8, 36 and 39 below.

[43] For more details see below, section 3.5 and under recommendations 8-10 (formerly 11-13).

## *2.3 THE PWD AND THE DIFFERENT SYSTEMS OF STANDARD SETTING – PROBLEMS CAUSED BY ARTICLE 3(8) AND THE ECJ CASE LAW*

### Collective labour law and the PWD

Under Article 3(1), host states shall ensure posted workers the terms and conditions of employment covering the matters mentioned there which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8 insofar as they concern the activities referred to in the Annex.

Paragraph 8 specifically allows the Member States to refer to non-extended collective agreements, under the conditions mentioned therein. This provision was included in the Directive inter alia to allay Denmark's fears that the directive would not be able to accommodate their autonomous system of standard setting.[44]

Article 3(8) stipulates:

> 'Collective agreements or arbitration awards which have been declared universally applicable` means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.
> In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:
> - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
> - collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.
> Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:
> - are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
> - are required to fulfil such obligations with the same effects.

By including this provision, the PWD was supposed to cater for the wide variety of collective labour law systems which exist in the EU. However, since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection, might be seen as being in conflict with the Directive in combination with the Treaty provisions on free movement of services. In the following paragraph will we describe – summarily – the different systems covered by this study.

[44] Compare Kerstin Ahlberg, The Age of innocence – and beyond, Formula Working paper no. 21, 2010 p. 6

## Overview of the national reports

AT

In Austria Labour law is almost exclusively regulated at the federal level. The states only have legislative autonomy as regards their own employees and farming and forestry workers (but not for agricultural and forestry employees). The legal provisions are supplemented by agreements with the social partners (= collective agreement; "*Kollektivvertrag*"). Collective agreements serve the purpose not only of taking into account sector-specific differences but stress in a particular way minimum standards in labour law because the legal minimum common standards especially for workers are based on in part on the legal basis of the 19th century. In Austria for practically all labour contracts in the private sector there is no legal minimum wage. Collective agreements which frequently recognise a minimum wage are, therefore, particularly important.

In the vast majority of cases the collective agreements are agreed by the ÖGB (the largest Austrian union) and the WKÖ (the Austrian 'economic chamber'). The latter is part of the compulsory public law system of representation of workers (through the *Arbeiterkammer* – labour chamber) and employers (*Wirtschaftskammer* – economic chamber). As a matter of legal principle a collective agreement is binding for a particular individual labour relationship when the parties are members of the organisations concluding the collective agreement. However, as all employers are obliged to join the WKÖ the sector agreements have a de facto general applicability. Extension to non-unionised workers is acquired by Sect. 12 of the Labour Constitution Act. This homogenous organisational structure of the social partners results in the fact that in Austria there are no competitive collective agreements agreed by different social partners. Some 94% of all labour relations are subject to a collective agreement.

This particular structure of almost nation-wide collective agreements has as its result that in Austria there is little need for declaring collective agreements generally applicable. In those rare cases where the employer is not an obligatory member of a chamber and collective agreements on the part of the employer are concluded by a voluntary representation of interests (for example, in the sector of private health and social care) collective agreements can be concluded through the Federal Arbitration Board ("*Bundeseinigungsamt*") as a federal authority in the form of a statute which is declared to be generally binding and which covers employers who are not members of a voluntary employer representation.[45] A need to declare a collective agreement to be a statute can also arise if a collective agreement is not valid for the whole Federal region.

According to Article 3(8) of the PWD collective agreements are regarded as agreements which must be observed by all undertakings in the geographical area and in the profession or industry concerned. By means of the system described above the obligatory membership of all Austrian employers in the WKÖ concluding the collective agreement, the general opinion is that Austrian collective agreements are generally binding for their sector even if foreign employers are not members of the WKÖ. However, AT did not specifically invoke Article 3(8).

[45] The outsider effect of Sect. 12 of the Labour Constitution Act affects only employees, not employers!

BG

The basic protection of labour in Bulgaria is offered by the national statutes. Local governments do not play a role in standard setting.[46] Collective agreements may be concluded at the enterprise, as well as at the municipal, branch or industry level. The prevailing type of collective agreement is the company agreement.[47] There is a procedure in Bulgarian labour law for declaring collective agreements generally applicable but this opportunity is not very popular.[48] There are now four generally applicable branch collective agreements: "Wood-processing and furniture industry", "Collection, purifying and water-supply", "Brewing", "Cellulose-paper Industry".[49] BG does not have another way off granting general effect to collective agreements.

The Ordinance on the Terms and Procedure for Posting of Workers from the Member States or of Workers from Third Countries in the Republic of Bulgaria in the framework of Provision of Services[50] provides in Article 3 (3), that where the minister of labour and social policy has declared general effect of the collective agreement, the employer from a Member State applies the conditions of the collective agreements that are more favourable for the posted workers. This applies for instance to the generally applicable sector collective agreement for the economic sector of "Brewing".[51] There are several multinational companies in this branch established in BG which use posted workers. In practice, however, the BG sector agreement would hardly ever be applied, as the work conditions in BG are usually not more favourable than those already offered to the posted workers by virtue of the contract or the law of the country of origin. The situation is similar with other branches – usually posted workers come to BG with better work conditions, and in particular wages, in the sending states.

CY

The present system of industrial relations, as it has substantially been consolidated after the independence and the establishment of the Republic of Cyprus in 1960, developed on the basis of two fundamental principles, voluntarism and tripartite cooperation. Based on these principles, collective bargaining has traditionally played a leading role in regulating industrial relations, while legislation[52] has constituted a secondary regulating tool. In this context, up to very recently[53], industrial relations in Cy-

[46] They may set standards related to the employment relations in the correspondent territory (e.g. beginning and end of working time), but this opportunity is not often used.

[47] See the information system of registered collective agreements in the National Institute for Arbitration and Conciliation – www.nipa.bg.

[48] Article 51b (4) Labour Code lays down the procedure. Where the collective agreement at industry or branch level has been concluded between all representative organizations of workers and of employers in the industry or the branch, the Minister of Labour and Social Policy may, upon their joint request, extend the application of the agreement or of individual clauses thereof to all enterprises of that industry or branch.

[49] See www.gli.government.bg.

[50] Ordinance on the Terms and Conditions for Posting of Workers from the Member States or of Workers from Third Countries in the Republic of Bulgaria in the Framework of Provision of Services. Adopted with CM Decree No. 142 of 08.07.2002, promulgated, SG No. 68 of 16.07.2002, effective 17.09.2002, supplemented and amended, SG No. 45 of 02.06.2006, effective 01.01.2007.

[51] See www.nipa.bg.

[52] Labour law in Cyprus is made up by common law and statute law. As such, the employment relationship is regulated by ordinary contract law principles (Contract Law, Cap 149 as amended), supplemented by statutory rights and obligations where appropriate.

[53] Most legislation was introduced from 2002 on-wards in the framework of the enforcement of the EU acquis.

prus was regulated by a very limited number of statutes, the main being the Laws on the Termination of Employment as amended from 1967 until 2002 (159(I)/2002) and the Laws on Annual Holidays with Payment as amended from 1967 until 2002 (169(I)/2002). However, with the enforcement of the EU *acquis* in the area of labour law, legislation now regulates a significant number of terms of employment, and in some cases providing for more favourable terms than those provided for in collective agreements (e.g. annual leave).

There is no statutory regulation of collective agreements as such.[54] The system of free collective bargaining developed in the framework of the Industrial Relations Code that applies to both the private and the semi public sector. This Code is a gentlemen's agreement freely negotiated and signed by the social partners.[55] Hence the system does not provide for automatic and binding effect on the employment contracts that are covered by the collective agreements. This way, as Christodoulou, (1992) points out in accordance with the prevailing view, collective agreements as an autonomous *legal* institution creating legal rights and obligations, does not exist in Cyprus (p.281). When it comes to extension procedures, in Cyprus there is no mechanism, set either by law or collective agreement, providing for the extension of collective agreements.

Collective bargaining takes place at both enterprise and sector level. The largest number of agreements is concluded at enterprise level.[56] Despite this numerical preponderance of the enterprise level, however, the sectoral level is seen just as important, if not more important as far as coverage is concerned. In the case of posted workers, the law implementing the PWD (Law 137(I)/2002), explicitly states that undertakings falling under its scope, are obliged to guarantee posted workers the minimum terms and conditions of employment as set by legislative, regulative or administrative provisions or/and collective agreements as concluded by the most representative organizations of the social partners. The applicability of collective agreements is however restricted to the activities referred to in the Annex (Section 4 meaning the construction sector). That means that in other sectors of economy – e.g. the banking sector – the relevant collective agreements do not apply.

In the current context – of methods of regulation with regard to the posting of workers – it is interesting to note that the only major conflict in the area of posting has arisen in the banking sector. At the centre of the conflict was a provision in the relevant sector agreement under which the major CY union ETYK had to approve any outsourcing, use of TWA-services etc by banks located in Cyprus. The union refused to approve an intercompany transfer of two employees of the National Bank of Greece from Greece to Cyprus. This conflict led to major social unrest (see also section 3.4).

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[54] The right to collective bargaining is guaranteed and safeguarded mainly by the Constitution of the 1960. In specific, Article 26(2) of the Constitution provides that "*a law may provide for collective labour agreements of obligatory fulfillment by employers and workers with adequate protection of the rights of any person, whether or not represented at the conclusion of such agreement"*. However, up to now, a law as provided by Article 26(2) has not been enacted.

[55] The IRC that still remains in force, practically with no essential changes up to now, it was signed on 25 April 1977 by the Ministry of Labour on behalf of the government, the Pancyprian Federation of Labour (PEO) and the Cyprus Workers Confederation (SEK) on behalf of the trade unions and the Cyprus Employers and Industrialists Federation (OEB) on behalf of the employer organisations.

[56] Approximately 450 enterprise agreements are currently in place (Department of Labour Relations of the Ministry of Labour and Social Insurance).

CZ

Labour law is regulated at central level. Collective agreements are regulated in the Labour Code and the Collective Bargaining Act (the Act No. 2/1991 Coll., on Collective Bargaining, as amended). These statutes recognize two types of collective agreements: the 'company collective agreement' and the 'master collective agreements'. The prevailing type of collective agreement is the company collective agreement. Section 7 of the Collective Bargaining Act contains a procedure for declaring collective agreements generally applicable which can only be applied in case of 'master collective agreements'. There is no other way of granting general effect to a collective agreement.

FI

Labour legislation is drafted on a tripartite basis, in co-operation with the employers' and employees' organisations. Terms and conditions of employment are determined on the basis of labour legislation and collective agreements. Collective agreements negotiated by the labour market organisations play a significant role in setting minimum terms and conditions of employment. In Finland, a collective agreement can be confirmed as generally applicable if it has national coverage and is considered representative of the branch to which it applies.[57]

The Finnish Posted Workers Act[58] is based on the application of central provisions of Finnish mandatory labour legislation to workers posted to Finland. The Act contains detailed provisions referring to the applicable substantive provisions in other labour law statutes. Secondly, the Act is also based on the application of the central provisions in generally applicable collective agreements and contains provisions on the application of them. For example under Section 2.3 of the Posted Workers Act, posted workers shall be paid a minimum rate of pay, which shall be considered to refer to remuneration specified on the basis of a collective agreement as referred to in Chapter 2, Section 7, of the Employment Contracts Act. This means that as a starting point, minimum rates of pay are based on generally applicable collective agreements. In (the rare) case that there is no generally applicable collective agreement covering the posting, 'usual and reasonable wages' should be paid to the worker. For the interpretation of this latter term, guidance can be sought from the minimum wage levels in the collective agreement for the relevant sector even if this collective agreement is not generally applicable.[59]

Another way to extent the effect of collective agreements is found in the description of the case before the Finnish Labour Court (Työtuomioistuin) in 2009.[60] The court decision addressed the question of the application of a Finnish collective agreement in a case where Finnish and Spanish aircraft companies had made a wet lease contract. The relevant collective agreement contained a clause which required the employers covered by the collective agreement to include a term in their contracts under which a subcontractor binds himself to apply both the collective agreement and Finnish labour and social legislation. According to the Labour Court the wet lease contract was an

[57] The Confirmation Board confirms the general applicability of collective agreements. The Employment Contracts Act (Työsopimuslaki No 55/2001) contains rules on the confirmation procedure.
[58] Laki lähetetyistä työntekijöistä No 1146/1999.
[59] See Hallituksen esitys (Government Proposal) Eduskunnalle laiksi lähetetyistä työntekijöistä annetun lain muuttamisesta, HE 142/2005 vp.
[60] Työtuomioistuin TT:2009-90 (Ään.).

example of subcontracting as meant in the Finnish collective agreement. However, the requirement to uphold the Finnish collective agreement and Finnish labour and social legislation could not be applied to foreign subcontractors because it violated EU law. The application of the entirety of terms and conditions would have gone beyond the requirements provided by the Posted Workers Act and the Directive.

Another relevant Act is the Act on the Contractor's Obligations and Liability when Work is Contracted Out (Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä No 1233/2006) which came into force on 1 January 2007. The objectives of the Act are to promote equal competition between enterprises, to ensure observance of the terms of employment and to create conditions in which enterprises and organisations governed by public law can ensure that enterprises concluding contracts with them on temporary agency work or subcontracted labour discharge their statutory obligations as contracting parties and employers.

EL

National statutes offer an important level of protection to working people in Greece. They constitute the most important source of Greek Labour Law. But also the role of social partners is very important. The minimum rates of pay are fixed by collective agreements. There are several types of collective agreements, the more common types being the national interprofessional collective agreement, the branch agreement and company agreement. Two other types of agreements of minor importance are provided by law: the professional collective agreements and the local (branch of professional) collective agreements.
Art. 11 of Law 1876/1990 provides that the Minister of Labour may, in consultation with the High Council of Labour, decide to extend a collective agreement or an arbitration award and make it binding upon all the workers of a given economic branch or profession (occupation), provided that the agreement in question already binds employers employing 51 per cent of the workers in that sector or occupation. Art. 8 par. 1 of Law 1876/1990 provides that national interprofessional collective agreements shall set minimum standards concerning conditions of work and shall apply to all workers throughout the country, including state employees, workers employed by public law corporations and local government authorities, in so far as these workers are bound by an employment relationship under private law. It is the general interprofessional collective agreement which provides the general minimum salary for Greek workers.

HU

The general rules applicable to the employment relationship are regulated under Act XXII of 1992 on the Labour Code. The goal of the Labour Code replacing the rules in effect prior to the systems change in 1989 is to create a private-law-type regulation which conforms to the market conditions and matches the specifics of the employment relationship better, State intervention is cut radically, and the cogent rules applicable to the subjects of the employment relationship are restricted exclusively to the determination of the guaranteed components of the employment relationship, i.e. the identification of the so-called minimum standards.
The Labour Code contains both the rules on individual employment relationships and on collective labour law. It is a typical feature of labour relations in Hungary that the country has a relatively advanced national macro-level interest reconciliation system. Several institutions serve as framework for the co-operation, consultations and nego-

tiations of the government and the national workers' and employers' confederations. It is typical of Hungarian labour relations that at sectoral level, too, there are mostly consultations between the government actors and the social partners. Direct negotiations by the social partners and the conclusion of sectoral collective agreements are very rare indeed. Sectors that at present have an effective sectoral system of collective negotiations are the construction industry, the bakery industry, catering and tourism industry, agriculture, electricity and private security. In Hungary the decisive level for collective negotiations is that of the workplace or enterprise. But even at this level it is mostly the multinational companies that conclude collective agreements, while in the case of SMEs the number of collective agreements is significantly lower. There is a system for declaring sectoral agreements to be generally binding, with slightly different procedures and requirements for collective agreements negotiated in the context of a sectoral dialogue committee and agreements concluded outside this official pre-established framework.

IE

The Irish voluntarist system of industrial relations is derived from that of the UK. In recent years, however, various factors (e.g. the decline in trade union density levels and obligations associated with membership of the European Union) have combined to hasten a 'legalisation' of labour relations. There is now a considerable body of labour legislation on the statute books in Ireland. As a common law jurisdiction, however, the role of the courts remains important in standard-setting in areas not covered by statute law (breach of a contractual term, for example) and in legislative interpretation (e.g. in determining who can be classified as an 'employee').

Collective bargaining in Ireland takes place on a voluntary basis, usually at a company level and collective agreements are not generally legally enforceable. There is no universal power to declare collective agreements generally applicable. However, there are two important caveats to this. First, under Part III of the *Industrial Relations Act 1946*,[61] collective agreements made between unions and employers that are *registered* with the Labour Court[62] are legally binding. While many of these are company agreements, they can be applied to *all* employers and employees working in a particular sector or industry, so long as the parties to such agreements are 'substantially representative' of workers and employers in that sector.[63] The most important of these Registered Employment Agreements (REAs) are undoubtedly the REA for the Construction Industry and the related, but separate, REA for the Electrical Contracting Industry. These set minimum levels of pay (which exceed the national minimum wage) and other terms and conditions for workers in these industries. The second manner in which the social partners have a role in legally binding standard setting relates to Joint Labour Committees (JLCs). These are statutory bodies established under Part IV of the *Industrial Relations Act 1946* to provide for the fixing of minimum rates of pay and the regulation of employment in industries and sectors where there is little or no collective bargaining and where pay and skill levels tend to be low. JLCs make Employment Regulation Orders (EROs), which the Labour Court may confirm as the

[61] All Irish statues can be found on the Irish Statute Book website (www.irishstatutebook.ie).
[62] Note that, despite its moniker, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions, employers and chaired by a Government nominee. The Labour Court, depending on the nature of the dispute before it, may grant legally binding 'Determinations' OR 'Recommendations', which are *not* legally binding.
[63] Industrial Relations Act 1946, s 27.

statutory minimum remuneration and conditions of employment, which employers are not permitted to undercut in the contract of employment. [64] The most significant JLCs exist in industries such as catering, hotels and retail.

The Posting of Workers Directive was transposed into Irish law by section 20 of the *Protection of Employees (Part-Time Work) Act 2001* (hereinafter referred to as 'the implementing measure'), which simply extended all Irish employment protection legislation to eligible posted workers. This extends to the provisions of REAs and EROs where these are in existence.

At the time of writing, both systems are under severe threat. First, a series of legal challenges have been launched by loose groupings of employers. These have, essentially, focused on two issues; that the 'designated' employer groups are not, in fact, 'representative' of employers in the relevant sectors and that the REA/ERO systems are unconstitutional in that they allow an impermissible delegation of legislative functions (the setting of minimum wages) to a body other than the Oireachtas (the Irish Parliament). In July 2011, in *John Grace Fried Chicken & Ors v The Catering JLC & Ors*[65] the High Court confirmed the latter contention and declared the JLC/ERO system to be unconstitutional. Although the ruling applies to the JLC, rather than the REA, system the ruling will undoubtedly have consequences for the latter also. The Government has pledged legislation to reform both systems in the light of the ruling. Parallel to these court challenges, a second threat to the system has emerged as a result of Ireland's financial and banking crisis and the subsequent need for financial support from the International Monetary Fund and the EU. The Memorandum of Understanding outlining the terms of the package[66] included a specific commitment to review these systems with follow-up actions to be agreed with the European Commission. This review has now been completed and recommended reform, rather than abolition, of the systems.[67] However, with employer opposition mounting and with the Commission's views to be considered before legislative action is taken, considerable uncertainty remains about their survival.

LV

The primary sources of Latvian labour law are laws adopted by the Parliament (primary law) and regulations adopted by the Cabinet of Ministers. The main statutory source of labour law is the Labour Code.[68] Consequently the Labour Code contains the main implementing measure of the PWD. Formally the Labour Code provides for a system of announcing collective agreements universally applicable. This system was introduced recently, in 2010.[69] The Labour Code distinguishes between two types of collective agreements – (1) collective agreements and (2) general agreements.[70] Collective agreements are usually concluded within an undertaking or institution while general agreements are concluded within a particular territory of branch. The main distinction concerns their personal applicability. Collective agreements are applicable to employers and employees (via workers' representatives or trade unions) who are

[64] Industrial Relations Act 1946, s 42.
[65] High Court, unreported, 7 July 2011.
[66] See http://www.merrionstreet.ie/wp-content/uploads/2010/12/EUIMFmemo.pdf.
[67] See *Industrial Relations News*, 25 May 2011.
[68] OG No.105, 6 July 2001, with amendments until 2011, OG No.62, 20 April 2011.
[69] Amendments to the Labour Law, OG No.47, 24 March 2010.
[70] Article 18 of the Labour Law.

parties to such collective agreements while general agreements may become binding to employers and employees who are not parties to particular general agreements. It happens in case a general agreement has been concluded between employers and employees where respective employers employ more than 50% of employees working in particular sector (branch) or their turnover of goods or services constitute more than 60% of turnover of particular sector (branch). In such situation the general agreement will become binding on all employers and employees of a particular sector (branch) when it is published in the Latvian official gazette '*Latvijas Vēstnesis*' by common application of both parties (employers and employees) to the particular general agreement.[71] There is to date little experience with this procedure. The only general agreement published so far concerns the only railway company operating in Latvia which is owned by the state 'Latvijas Dzelzceļš'. The author of the national report was unable to find it on internet among official publications.
Besides that, the Confederation of Trade Unions of Latvia is concerned about the lack of remedies against employers who would be bound by a general agreement but refuse to comply with the respective obligations. In particular, there are no criteria to establish that an undertaking belongs to a particular sector of economic activities and there is no national provision regulating the right to contest non-application of the general agreement by an undertaking which is not a party to the agreement.[72] In these circumstances the national expert expresses doubts whether it would be legitimate to require application of the provisions of a general agreement by foreign undertakings which post workers to Latvia.

LT
Labour legislation is a main source of employees' protection. The laws – acts of Parliament – regulate employment relationships in a strict and imperative manner. The Labour Code of 4 June 2002[73] (in force since 1 January 2003) is the primary source of the law regulating individual relations between the employer and the employee as well as collective relationship.
Collective agreements (*kolektyvinės sutartys*) at national, sectoral, territorial and enterprise level are recognised as legal acts having a normative effect. The dominant type of the collective agreement is the enterprise level collective agreement – the national, industry and branch level agreements do not exist in practice.
There is a procedure for declaring collective agreements to be generally applicable. If the provisions of a sectoral or territorial collective agreement are of consequence for an appropriate sector of production or profession, the Minister of Social Security and Labour may extend the scope of the sectoral or territorial collective agreement or separate provisions thereof if such a request has been submitted by one or several employees' or employers' organisations which are parties to the sectoral or territorial agreement (Art. 52 (2) Labour Code). However, in the absence of agreements at branch level, this tool has not been used yet.

MT

[71] Article 18(3) of the Labour Law
[72] Report of Confederation of Trade Unions of Latvia, Legal subjects of general agreements and national collective agreements, October – November 2010, available in Latvian at http://www.lbas.lv/upload/stuff/201012/tiesibu.subjekti_generalvienosanas.slegsana_30112010.pdf, (accessed on 9 September 2011).
[73] State Gazette, 2002, no 64-2569.

When presenting specificities of Malta's social dialogue and industrial relations one cannot forget that in Malta everything is a dual system. The two main political parties, Labour and Nationalist, are traditionally linked with two trade unions, respectively: General Workers Union (GWU) and Union Haddiema Maghqudin (UHM). Employers in Malta are represented by The Malta Employers Association and this is a constituted body which brings together employers from all sectors of industry and commerce in Malta. It is formally registered as such under the Employment and Industrial Relations Act (2002).
In Malta there are no universally applicable collective or sectoral agreements. However there are a number of companies who have collective agreements in place. If workers are then posted to an undertaking where collective agreements are applicable, the posted worker's conditions of employment are governed by the collective agreement which is in place, in order to ensure that the conditions of work of the posted employee are not less than those provided for in the collective agreement. With regard to the setting of minimum wages, Malta has various Wage Councils or Wage Regulation Orders (WRO) which set the wages for specific industries. There are WRO both for 'Hotels and Clubs' and 'Construction'.

In an article published in May 2008, the general secretary of the GWU welcomed the instructions issued by the minister responsible for labour so that tenders for public works from private contractors will start obliging these contractors to declare in advance what the workers' conditions of employment would be.

PT
The Portuguese labour Law, namely the Labour Code, recognizes four sources of labour rules: the law, the collective agreement, the regular practices or usages, and the individual labour contract. Traditionally the main rules were of legislative origin.
The Portuguese law allows for the existence of three types of collective agreements, depending strictly on the party to the agreement on the employer's side. Traditionally collective contracts, bargained at the most general level were prominent but recently there has been a significant growth of enterprise agreements.
The collective agreement in Portugal only applies directly to the workers affiliated in the trade union or trade unions who were parties of the agreement and to the employers who were directly subjects of the agreement or indirectly being represented by an employers association. It is the so-called affiliation principle. Since only a relatively small number of workers is affiliated to trade unions (probably less than 20%), the most important feature of the system is, in a certain sense, the so-called "Portaria de Extensão", the administrative tool that allows the extension of a collective agreement outside its direct subjective scope of application. The labour department has a discretionary power to extend collective agreements or even parts of a collective agreement (since it can choose not to extend the collective agreement as a whole but only partially).

SK
In Slovakia employment relationships together with rights and duties of their subjects are regulated mainly by a set of normative legal acts (generally binding regulations).

Slovak labour law recognizes several types of collective agreements between unions and employer.[74] For the private sector only the distinction between company agreements and higher level agreements is relevant. The latter are collective agreements of higher grade concluded between a higher union body and organisations of employers;[75] Collective agreements at this level are most frequently concluded on the basis of economic-sector principles. They usually regulate working conditions in a more general way, while collective agreements at the company level make this regulation more specific.

The extension of collective agreements is regulated in Section 7 of Act No. 2/1991 Coll. This provision admits expansion only for collective agreements of high level order and only in relation to concrete employers. Since 1st January 2011 the extension is possible only with the consent of affected employers.[76]

SI

In the Republic of Slovenia the relationship between workers (employees) and employers, based on the employment contract, is governed by the Employment Relationship Act.[77] Alongside this Act, several separate acts exists which protect workers or regulate aspects of the labour market. The Posting of Workers Directive (hereinafter PWD) was implemented in the Slovenian legal order by means of these various acts.

In the Slovenian legal system three types of collective agreements co-exist. These are:

- General collective agreements which bind all employers in either the economic or the non-economic sector of the Republic of Slovenia,[78]
- Collective agreements for a specific profession or activity (sector based collective agreements) which determine rights and duties for employees and employers of certain profession or of certain activity for which it applies (for example tourism, construction, transport etc.)
- Enterprise's (undertaking's) collective agreements concluded between a representative union for the specific employer and the employer himself which determines rights and duties for employees of said employer.

Collective agreements are applicable to all employees of the employer(s) to which the collective agreement relates (and not only to members of union(s)), if the collective agreement is concluded by one or more representative unions. Additionally, Slovenian legal system enables the extension of collective agreements in Article 12 of the Collective Agreements Act. If a collective agreement covering one or more profession/activity is concluded by one or more representative unions and one or more rep-

[74] According to Section 229 (6) of the Labour Code this right to enter into collective agreements belongs only to trade unions. Other employees' representatives, i.e. work council/employee trustees, do not possess it. However, the amendment to the Labour Code, Act no. 257/2011 Coll., effective from 1 September 2011 establishes the possibility of concluding an "Agreement with the Employees' Council or the Employees' Trustee" in the Section 233a. Such agreement may be made only if there is no trade union representation in the employer's organization.

[75] Act No. 2/1991 Coll.

[76] Before this amendment the regulation was stricter towards employers and extension was possible even without their consent.

[77] Official Journal of the RS, No. 42/2002,79/2006-ZZZPB-F, 46/2007 Odl.US: U-I-45/07, Up-249/06-22, 103/2007, 45/2008-ZArbit, 83/2009 Odl.US: U-I-284/06-26. The act was adopted on 24th April 2004 and entered into force on 1st January 2003.

[78] Currently in Republic of Slovenia only General Collective Agreement for Non-Economic Sector is in force, General Collective Agreement for Economic Sector was revoked on 1st July 2006.

resentative employers' organisation, each party to the collective agreement may submit to the Ministry of Labour a request to extent the collective agreement (whole or part of it) to all employers or professions to which the collective agreement applies. This is possible only if the more than 50% of the employees in the sector or profession are already bound by reason of membership. Collective agreements with expanded validity exist in the following sectors: 1.) commerce, 2) production of metallic materials and foundries, 3.) electro industry, 4.) metal industry, 5.) textile, clothing, leather and leather manufacturing industry, 6.) road passenger transport, 7.) chemical and rubber industry.[79]

## Comparison

The overview given above demonstrates the large variety in labour law systems and traditions in the Member States. Whereas in AT, CY and IE (in certain sectors) collective agreements at sectoral level are the main source of rights and obligations of workers and employers, collective agreements only seem to play a minor role in countries such as HU and LV. On the whole, and due to historic reasons, the MEE countries report a lower impact of collective agreements than the old Member States.

In all of the MEE countries covered by this study a system of extensions is provide for by the national legislation. However, it is rarely, if ever used. The main reason for this seems to be that the prevailing type of collective agreement is the company agreement. Sector agreements are rare. LT never used the extension mechanism, LV just once. SI has extended agreements in seven sectors of economy, BG in four, HU in six.

Extension also exists in PT and EL, and in these countries is used inter alia to provide for a minimum wage level. AT also has a system for extension, but this is hardly ever used. In this case, the main reason for this is that due to a system of compulsory membership of all undertakings in the central employers' organisation that is party to almost all sector agreements, collective agreements tend to have general applicability anyhow.

Of the systems from the common law and Scandinavian traditions, only CY is purely voluntaristic. Collective agreements are not legally binding and there is no system for making collective agreements generally applicable. Yet the collective agreement in the construction sector (as defined in the Annex to the PWD) is applicable to workers posted to CY. The law implementing the PWD specifically states that undertakings in the sector that post workers to CY are obliged to guarantee their workers the minimum terms and conditions of employment as set by … collective agreements as concluded by the most representative organizations of the social partners.
The other systems within these families (MT, IE, FI) all have a system of extension of collective agreements (FI, IE) and/or a system of setting minimum wages through bipartite or tripartite bodies (MT, IE).

[79] The source: http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/socialno_partnerstvo/evidenca_kolektivnih_pogodb/.

In several of the reports other mechanisms are referred to which could be used for regulating certain types of posting. IE, FI and MT mentioned the relevance of fair competition in public procurement and the efforts made to include an effective check on employment and labour conditions in the procurement procedure. Another point of entry is the regulation of subcontracting, outsourcing and the hiring-in of workers in collective agreements or under the rules of workers' information and consultation. The Finnish collective agreement applicable to a conflict in the aviation sector contained a clause which required the employers covered by the collective agreement to include a term in their contracts under which a subcontractor binds himself to apply both the collective agreement and Finnish labour and social legislation. The FI court ruled this clause to be in violation of EU law.
In CY a major conflict arose around a provision in the sector agreement for banking under which the major Cypriot union ETYK had to approve any outsourcing, use of TWA-services etc by banks located in Cyprus. The Advocate-General of the Republic did not object to this provision from the point of view of European law but considered the provision not to be binding on the foreign bank, party to the conflict (See also under 'cases').

## Conclusions and recommendations

Since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection, might be seen as being in conflict with the Directive in combination with the Treaty provisions on free movement of services. This is caused in part by the wording of Article 3(8) and partly by the interpretation of the Directive and Treaty by the ECJ. The result is that the Directive seems to be more apt at accommodating the systems in which collective agreements are comparable to delegated legislation, such as the French /Belgium/Luxembourg/German/Dutch systems of generally applicable CLAs than at accommodating autonomous systems such as the UK/SW/DK.[80]

However, in the current study no major problems are reported which are directly linked to this 'legistic bias' of the PWD. The situation in IE as regards the system of collective negotiations is problematic, but this seems to be linked to economic reasons and constitutional objections, rather than to problems caused by EU law. The high prevalence of procedures for extension of collective agreements in combination with the low relevance of sector agreements in many of the countries studied, might explain the absence of reported problems in the current study.[81] Reversely, LV reports on the problems experienced by undertakings in that country when posting workers to the Scandinavian countries. Both a lack of transparency and factual activities of trade unions are reported as causing obstacles to LV service providers.

Yet, some potential areas of conflict can be identified in the current set of data which correspond to a large extent with the problem points identified in the previous study.

[80] See also Swiatkowski, Polish response to the European development, Formula Working paper no 18, 2010, p. 34 and 42.
[81] Other explanations include the predominance of the sending state perspective amongst the Member States covered and the relatively low awareness as to posting in some MS.

When the requirements of Article 3(8) in combination with the case law of the ECJ are compared to practice in the Member States, certain discrepancies are revealed.

- The provision seems to permit recourse to non-extended collective agreements only in case a Member State does not have a system for declaring collective agreements to be generally binding. If a system exists but is not (often) used in practice, recourse to agreements entered into by the most representative organizations and/or agreements that are generally applied might be problematic. In the previous study we noticed this requirement to be problematic for Germany and possible Italy. The position of AT is interesting in this respect, as this country has a procedure for extending collective agreements. This procedure is rarely used because most collective agreements must be observed by all undertakings in the geographical area and in the profession or industry concerned[82] anyhow. The binding effect of such non-extended agreements is based on the compulsory membership of employers in the employers' representative signing the collective agreements. Both systems – extension and compulsory membership – seem to fit the definition of 'collective agreements or arbitration awards which have been declared universally applicable' in Article 3(8).
- The collective agreements entered into by the most representative organizations must have national coverage, excluding the referral to generally applied regional and/or local agreements. However, CLAs with a more limited, local reach may be used when these are generally applicable. Depending on the exact interpretation of these terms, this restriction was deemed to affect inter alia the systems in Germany and Denmark. Due to an absence of non-national CLAs, this problem seems to be irrelevant in the Member States covered by this study.
- The ECJ lays great weight on transparency, which entails that the employer should be able to discover in advance what his obligations are with respect to collective agreements (probably even before tendering for the contract). In the previous study we remarked that this requirement rules out bargaining at company level, as is/was usual with regard to wages in Denmark and Sweden. This particular problem, linked to the layered system of collective negotiations in those countries, is not reported in the current study. However, transparency was mentioned by the Latvian expert as a potential problem with the LV system of extension. Here the problem mainly pertains to the accessibility of the relevant agreements.
- The ECJ seems to demand that the Member States explicitly base themselves on Article 3(8). In this study, Cyprus and Finland have made use of the possibility opened up by Article 3(8). However, it is unclear whether they actually fulfil the requirements of the ECJ.[83] But also the FI method of referring to 'usual and reasonable wages' in case there is no extended collective agreement is questionable in this respect.
- The application of a non-extended collective agreement is subject to the requirement of equal treatment. In the previous study this requirement was deemed problematic as to the implementation of the PWD in Italy.

Thus we can uphold the conclusion drawn in the previous study that several countries experience difficulties in their attempts to reconcile the PWD and internal market case

[82] This formulation is taken from the text of Article 3(8).

[83] As explained above, the application of non-extented CLAs in AT is based on practice rather than on specific implementation of Article 3(8). However, this practice may fit the definition of 'collective agreements or arbitration awards which have been declared universally applicable' in which case it does not have to be reported on Article 3(8).

law with their system of establishing labour standards. The "erga omnes" approach as well as the conditions laid down in Article 3(8) have given rise to difficulties not only in Sweden and Denmark, with their tradition of autonomous standard setting, but also in Germany and Italy and even the UK (in sectors such as the construction industry where relatively strong trade unions still exist). In the current study we identified potential problems as regards the implementation and application of Article 3(8) of the PWD in particular Cyprus and Finland.

The impact of the ECJ cases can be mitigated by measures at the national level with regard to the problems identified above (see below recommendation 3). However, national action can not eliminate all the reported problems and uncertainties. Accordingly there is a wide array of literature and policy documents in which proposals are made to alter the text of Article 3(8) PWD. All together these documents reveal a clear lack of consensus among the Member States as well as among the different stakeholders as regards both the identification of the problems to be addressed and their preferred remedy.[84] This lack of consensus precludes us from giving a recommendation as to action to be taken at EU level as regards Article 3(8).

The overview of standard setting mechanism reveals other problems as to the compatibility of those mechanisms with EU law. This is due to the Laval and Rüffert judgments in which the ECJ extended the effect of the PWD beyond the methods of standard setting covered by Article 3(8). These judgments call into question the legitimacy of several practices which exist in the Member States. In the previous report we reported on the use of the Swedish codetermination act to induce respect for CLAs in case of subcontracting. Also collective agreements are used to regulate the working conditions in the subcontracting chain. In the previous report this method was found to be of importance in the UK and Italy. In the current study it is reported as being used in FI and CY. Likewise, collective agreements may regulate outsourcing and the hiring in of temporary agency workers by the companies bound by the CLA.

The ECJ has consistently held - in the context of the interpretation of Article 3(7) PWD - that employers may voluntarily agree to provide their workers with better protection than that offered by the PWD.[85] In case of subcontracting and outsourcing, the basic commitment to abide by the collective agreement is entered into by the main contractor (or service recipient/contracting party). This commitment may be assessed as voluntary. It is currently unclear, however, how the ECJ would evaluate the position of the subcontractors/service providers who are confronted by a contractual demand to abide by the collective agreement entered into by their contract partner. This uncertainty also affects the position of the unions as regards their right to strike in support of such demands.

[84] See in this respect also the Report on joint work of the European Social Partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases.

[85] Rüffert para 34 reads: "Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a *commitment made to their own posted staff (emphasis added)*, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81).

The case law of the ECJ in the Laval quartet has created legal uncertainty with regard to both the position of the unions/the right to take industrial action and the conformity with EU-law of social clauses in (public and private) procurement. In the previous report we recommended that this uncertainty be remedied by action at EU level. We repeat this recommendation here.

## The EU and the position of the unions

Regarding the position of the unions and the right to take collective action, in some national reports it was observed that the threat of an action for damages by employers, which could ultimately even bankrupt trade unions, makes unions more cautious in exercising their right to strike in situations with a cross-border element.[86] This consequence of the Viking and Laval judgments has been criticized by the ILO Committee of Experts on the Application of Conventions and Recommendations.[87] Currently, the Member States have widely divergent rules on liability of unions and damages awarded in collective action cases. However, the rules on liability for breach of EU law are not entirely at the discretion of the Member States. In several fields of EU law, most notably competition law, European law sets detailed guidelines for the remedies which national law should provide in case of breach of EU law.[88] Currently, there are no ECJ cases in which similar rules are applied to collective actions taken in breach of the rules on international market. In this respect, we favour a solution to the problems which are caused by the level of damages awarded to be found at EU level, too.

As far as the right to strike itself is concerned, it remains to be seen if and how the line of reasoning in Viking and Laval fits with recent case law of the European Court of Human Rights on the freedom of association laid down in Article 11 of the European Convention on Human Rights.[89] Finally, it is not clear how the Viking and Laval judgments must be read in the light of the recent ratification of the Lisbon Treaty which confers a binding power on the Charter of Fundamental Rights. This reinforces the status of social fundamental rights in the EU, including the "right to collective bargaining and action" (Article 28). The fundamental rights status of the right to col-

[86] As reported in the UK in relation to the BALPA-case (see T. Novitz, Formula paper September 2010), and in Sweden re final judgment in the Laval case of the Swedish Labour Court on 2 December 2009. The main issue was under which conditions a trade union shall be liable for damages.
[87] See Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), ilolex nr 062010GBR087.
[88] For competition law, see Commission staff working paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}, SEC(2008) 404; for discrimination in employment see e.g. C-14/83 (Von Colson).
[89] Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008, Enerji Yapi-Yol Sen v Turkey, Application No 68959/01, 21 April 2009 and Danilenkov and others v Russia, Application No 67336/01, 30 June 2009. An interference with the freedom of association according to Article 11 ECHR may be justified if 'prescribed by law', pursued by one or more legitimate aims and if 'necessary in a democratic society' for the achievement of those aims. As Malmberg notices: "…the justification according to Article 11 asks whether the interference with the trade union rights could be justified. In Laval and Viking the question is put the other way around:could the restriction of the economic freedoms be justified? See J. Malmberg, The impact of the ECJ Judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, Study requested by the European Parliament's Committee on Employment and Social Affairs, IP/A/EMPL/ST/2009-11 MAY 2010, PE 440.275, p. 11.

lective bargaining and collective action is also reflected by the fact that several Member States have indicated that their collective labour law provisions are part of public policy in the meaning of Article 3(10).[90] In short, the case law of the ECJ in the 'Laval Quartet' raises questions with regard to the commitment to fundamental rights undertaken by the EU itself and its Member States. However, it should not be left to future litigation to resolve these queries, as unions can simply not afford to 'get it wrong' and thereby risk the payment of damages.

When dealing with this issue, it should be kept in mind that the position of the unions and the safeguarding of the right to strike also play a role in the interpretation of Article 3(7). With regard to Article 3(7) the ECJ has consistently held that better protection may be offered under the law of the sending state, but employers can also of their own accord bind themselves to apply more favourable (host state) standards to posted workers.[91] However, the ECJ has not given a clear indication as to the role collective bargaining (and hence collective action) may play in achieving consensus between the posted workers and their employer on the application of more favourable provisions. In our opinion two situations can be distinguished:
Firstly, the situation in which unions in the host state organise collective (solidarity) action to impose host state standards on foreign services providers based on their interest to prevent unfair competition to their members working regularly in the host state (the Laval case). This type of collective action is covered (and limited) by Article 3(8).
Secondly the situation in which posted workers themselves strive for better employment conditions during their posting and ask for union support in doing so. This support could be offered either by the union in the sending state or the union in the host state – depending on the specific circumstances and purpose of the negotiation. These types of representation should be covered by Article 3(7) rather than Article 3(8). Hence, in our view, it would be advisable to clarify the distinction between union activity as a means of imposing host state standards under Article 3(8) PWD and union activity as a means of collective representation of and negotiation by posted workers under Article 3(7) PWD.
In addition, under Article 5 Member States shall ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. In some Member States collective action is a procedure for the enforcement of obligations and hence should – as such – be available to posted workers.

## The EU and social clauses

Regarding the issue of social clauses in procurement contracts, a similar mix of problems arises. In its Rüffert judgment the ECJ did not discuss the specific public procurement aspects of the case, such as the impact of the Public Procurement Directive

[90] See section 3.6 'Extension of the protection under 3(10) – public policy'.
[91] See inter alia C-341/05 Laval para 81: "Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff…"

2004/18, in particular Article 27, and ILO Convention No. 94 (C94).[92] Thus, the relation between these instruments and the PWD (and Article 56 TFEU) merits further investigation and clarification.[93] This is all the more true as several Member States ratified C94 before their accession to the E(E)C.[94] According to Article 351 TFEU (ex 307 EC), public international law obligations undertaken by a Member State before acceding to the EU shall not be affected by the EU Treaties. However, to the extent that such agreements are not compatible with the Treaties, the Member State concerned shall take all appropriate steps to eliminate the incompatibilities established. This may result in the obligation of the Member States to denounce those treaty obligations, as has been done in the case of ILO Conventions prohibiting night work for women. According to the ECJ in Commission v Austria this obligation to denounce a Convention only exists if the incompatibility between the Convention and EU law has been sufficiently clearly established.[95] At the moment, it is not established that Convention No. 94 is incompatible with EU law and therefore must be denounced by the Member States that have ratified it.[96]

The issue of social clauses, again, has an overlap with Article 3(7) PWD. State authorities involved in public procurement do not act in their capacity as legislators, but rather as contractual counterparts. Social clauses are an integral part of 'corporate' social responsibility. In this regard, the Rüffert case does not only call into question the ability of state authorities to adhere to social standards in their contracting practice, but may also affect the possibility of private parties (including social partners) to do so. The overview given above illustrate that such practices of corporate social responsibility occur in different varieties in the Member States. This aspect, in our opinion, also merits a rethinking (and a clarification) of the application of the PWD to social clauses.

[92] The fact that Germany has not ratified ILO C94 may be the reason why neither the Advocate General in his Opinion nor the ECJ discussed the Convention. It must be noted that the referring national judge also didn't include public procurement law in his preliminary questions.
[93] See on social clauses in public procurement the reasoned opinion of the EFTA Surveyance Authority against Norway 29 June 2011, http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/1480. Compare Niklas Bruun, Scope of Action from a Scandinavian (Nordic) Angle, presentation given at "The Impact of Case-Law of the European Court of Justice upon the Labour Law of the Member States - Scope of Action from a Scandinavian (Nordic) Angle" Symposium organized by the German Federal Ministry of Labour and Social Affairs, Berlin 26.6.2008 http://www.bmas.de/portal/26966/property=pdf/2008__07__16__symposium__eugh__bruun.pdf
[94] Ratified *before joining the E(E)C* by Belgium (1952), Denmark (1955), Finland (1951), France (1951), Italy (1952), Netherlands (1952), Spain (1971), Austria (1951) and the United Kingdom (1950). The UK denounced ILO Convention No. 94 in 1982. Among the new Member States, Bulgaria (1955) and Cyprus (1960) have ratified the Convention. Also Norway, Member State of the EEA agreement, has ratified the Convention.
[95] ECJ 30.3.2004, Case C-203/03 Commission v. Austria [2005] ECR, I-935, para.62.
[96] The next possibility of denunciation is 20 September 2012. If this deadline passes without denunciations then the Member States remain bound to ILO Convention No. 94 until 20 September 2023. See in more detail: Niklas Bruun, Antoine Jacobs, and Marlene Schmidt ,ILO Convention No. 94 in the aftermath of the Rüffert case. Transfer: European Review of Labour and Research November 2010 16: 473-488.

***Recommendation 3 – no substantive changes***

**At national level>** The impact of the 'Laval quartet' can to some extent be mitigated by measures of national law, which would include:

- Explicit reference by the Member States to the autonomous method as a means of setting minimum standards.
- Identification of the relevant CLAs and the relevant norms within those CLAs.
- Transparency of norms contained in CLAs.
- Measures to ensure non-discrimination.

***Recommendation 4 – second paragraph slightly adapted***

**At EU level>** To eliminate legal uncertainty about the meaning of the fundamental right to collective action within the context of the fundamental economic freedoms of the single market, a new legislative initiative is necessary. We recommend that the EU uses the adoption of a new legislative initiative to improve the implementation, application and enforcement of the directive to clarify the distinction between collective action meant to impose host state standards in the meaning of Article 3(8) on the one hand and collective action by posted workers in order to reach agreement on better working conditions as covered by Article 3(7) or enforce rights granted under Article 5 on the other hand. In doing so, the instrument should confirm the right of posted workers to initiate or take part in industrial actions in the host country.[97]

Another aspect which merits attention is the effect of damages on the effective enjoyment of the right to strike. As the right to damages for breach of EU law - though based on national law – is subject to EU requirements, attempts to mitigate this threat should be made at EU level.
It may also be worthwhile to consider the suggestion in the 'Monti report' to introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services does not affect the right to take collective action.[98]

[97] This (also) involves PIL-aspects which merit further investigation; Article 9 of the Rome II regulation on non-contractual obligations states that the law applicable to damages arising out of collective action is the law of the country where the action is to be or has taken place. Nonetheless, where both the employer and the worker have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
[98] Modeled after Regulation (EC) No 2679/98 (the so-called Monti Regulation). See: M. Monti, A new Strategy for the single market, 9 May 2010; see also the follow-up in Proposals 29 and 30 of the Communication from the Commission, Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another Brussels, 27.10.2010. COM(2010) 608 final.

***Recommendation 5 - unchanged***

**At EU level>** To take away legal uncertainty with regard to the scope for Member States to include social clauses in public procurement contracts, this issue should be clarified not only in the light of the Rüffert judgment, but also taking into account the Public Procurement Directives which explicitly leave the Member States free to decide on how to integrate social policy requirements into public procurement procedures and ILO Convention No. 94.

Moreover, it should be clearly established to what extent the obstacle which social clauses may cause to the freedom of services may be justified by imperative requirements of the public interests, taking into account that Convention No. 94 promotes the observance of the universally applicable Fundamental Rights and Principles at Work, which are guaranteed by Article 21 and 28 of the EU Charter of Fundamental Rights.[99]

[99] See Niklas Bruun, Antoine Jacobs, and Marlene Schmidt, above n. 19, also for a more extensive examination of this issue and possible solutions.

# CHAPTER 3. PWD IMPLEMENTATION AND APPLICATION: DETAILED REVIEW

## *3.1 INTRODUCTION*

This chapter deals with existing problems in the *implementation* and *application* of the Directive in practice. The focus here is on Articles 1 and 2 of the PWD, regarding the concept of posting and of posted worker (see section 3.2), and Article 3, regarding the posted worker's terms and conditions of employment (see sections 3.5 and 3.6). Since the social partners may be involved in both the implementation and the application of these articles of the Directive, relevant aspects of their involvement are also examined.

The concept of posting as it is implemented in the Member States is studied in detail in section 3.2. In section 3.3 we deal with both third country posting and the transitional regime implemented upon the accession of the new Member States in 2004 and 2007. Section 3.4 presents an overview of cases. These sections serve as an illustration as to the problems that arise in practice, in regard to both the concept of posting and the legal position of the posted worker.

Sections 3.5 and 3.6 are dedicated to the different aspects of the protection of posted workers. Section 3.5 focuses on pay and working time arrangements, whereas section 3. 6 covers the other aspects of the protection mentioned in Article 3 PWD.

The chapter follows to a large extent the outline of the previous study. However, this chapter does not contain a separate section on the impact of domestic law on the legality of the different types of posting. As far as relevant, this issue is included in section 3.2. The section on the transitional measures is extended to include information on third country postings.

## *3.2 ISSUES RELATED TO THE CONCEPT OF POSTING IN THE PWD*

### Preliminary remarks

The PWD contains both a definition of posting (Article 1, paragraphs 1 and 3) and a definition of posted worker (Article 2). The two concepts should be combined to determine the scope of directive's application. The elements of the definition are:

- Undertaking established in a Member State, posting to another Member State.
- A transnational provision of services.
- The posting is undertaken in the framework of the said provision of services.
- The posting can be subsumed under one of the posting types mentioned in 1 sub 3:

(a) posting of workers to the territory of a Member State on the account and under the direction of the undertaking making the posting, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
(b) posting of workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
(c) being a temporary employment undertaking or placement agency, the hiring out of a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

- The worker is posted for a limited period of time.
- To a Member State other than the one in which he normally works.

The Directive creates an obligation on the Member States to ensure that, whatever the law applicable to the employment relationship, the posting undertakings guarantee the workers posted to their territory the terms and conditions of employment included in the local laws and generally applicable collective agreements with regard to specific areas of protection.[100] If a worker is not covered by the Directive, no such obligation exists.[101] Hence the Member State could choose to offer no protection at all to a worker present in its territory. The Member State in which a conference is held may not feel obligated to apply its labour standards to the scientists visiting the conference. Likewise, an incidental visit to a client in a specific country may not trigger the application of local law to the travelling salesman's contract of employment. If the law of the host state is not deemed to apply because the worker does not fulfil the criteria for being a posted worker, we call this the lower limit of the concept. To avoid possible misunderstandings, it should be emphasized here that the term 'lower' does not express any value judgment but refers purely to the degree to which the worker is integrated in the host state and the contract's level of impact on the host state and vice versa.

[100] Simplified description of the content of Article 3.
[101] Apart from duties arising under the free movement of workers and non-discrimination requirements.

Based on the case law of the ECJ in inter alia the case of Commission v. Luxembourg (C-319/06), the PWD leaves only limited room to extend the protection of posted workers beyond the hard nucleus mentioned in the Directive. Hence, whereas migrant workers are entitled to equal treatment, posted workers only receive the protection which is allowed under Directive.[102] It can be argued that the definitions of posting and posted worker in the Directive also contain criteria for making the distinction between a posted worker under limited protection and a worker entitled to full application of the law of the host state.[103] From the perspective of the host state, the definitions of posting in the PWD limit the possibility of the host state to impose more than the hard core of protection. Hence the definition of posting in the PWD creates a borderline between limited protection and extended or even full protection – the 'upper' limit of the concept of posting. Thus, under the interpretation offered here, the Directive lays down a middle regime between the absence of any duty of the Member States to apply local standards (lower limit) and the freedom (or even duty) to apply host state law in full (upper limit).[104]

In this part of the study we are interested in identifying problems experienced by the Member States with regard to the criteria used in the Directive, their implementation and application. First we discuss the national implementation with regard to posting to the Member State concerned. In particular, we are interested how and to what extent Article 1 and 2 are actually transposed in national law. But also the exemptions for short term postings are discussed here. Based on the findings in the previous study, we pay special attention to the position of trainees as an indicator of the requirement that posting should take place in the context of the provision of services. A separate sub-section is devoted to workers in international transport: because of the specific cross-border character of their work performance the definition of 'posting' turns out to be problematic. Finally the protection of workers posted from the Member States covered by the study is discussed in a separate sub-section. The position of temporary agency workers is discussed in more detail in section 3.6.

## The concept of posting and posted worker: an overview

AT

Austria makes a distinction between postings under Art. 1(3) indent a and b of the PWD and postings under Art. 1(3) indent c. Whereas the first two types of posting are regulated by the Employment Contract Law Adaptation Act ("*Arbeitsvertragsrechts-Anpassungsgesetz"* / AVRAG), the third type of posting is regulated by the Temporary and Agency Workers Act ("*Arbeitskräfteüberlassungsgesetz*" – AÜG), Federal Law Gazette No. 196/1988 in the version Federal Law Gazette I No. 24/2011. A specific legal regime exists for agricultural and forestry workers, which are regulated at

[102] However, after the judgment of the ECJ in the cases C-307-309/09 (Vico plus), it would seem that an intermediate category has come into being, because posted agency workers qualify – to some extent – as both a posted worker and a migrant worker.

[103] The position of TWA workers creates special problems of delimitation in this respect. See also Section 3.6 'provision of manpower.

[104] As a right of the host state to impose its labour law in full (within the limits of the Treaty) and/or the right of the worker to equal treatment.

the level of the *Bundesländer* rather than at federal level.[105] However, the PWD is not implemented at this level, showing a deficit in the implementation of the PWD for agricultural and forestry workers to the extent that the inner-Austrian provisions are not per se understood as applicable in accordance with Art. 9 of the Rome I Regulation.

Sect. 7b of the AVRAG is the main implementation norm. Sect. 7b Para. 1 of the AVRAG applies to workers who are posted to Austria by an employer with seat in the EEA or Switzerland to undertake work. This area of application is in accordance with the concept laid down in Art. 1 Para. 1 and 3 and Art. 2 of the PWD. In legal terms posting in accordance with Sect. 7b of the AVRAG presupposes that the usual working location is in the country of origin. The term country of origin is interpreted in accordance with Art. 8 Para. 2 of the Rome I Regulation. However, employment in the country of origin before posting a worker is not a pre-requirement for posting;
Sect. 7b of the AVRAG also applies to those workers whose employment started on their first day in Austria. Only long-term postings in which the wish and/or requirement to return is absent, quash the posting and create Austria as the habitual place of employment. A certain maximum duration for posting is neither covered by law or legal judgement with the result that a posting for several years is conceivable (for example, Supreme Court of 28th November 2005, 9 ObA 150/05g: Posting from Croatia to Austria for more than ten years).

According to Sect. 7b Para 1 of the AVRAG the worker is posted "to provide continued employment services". The phrase "to provide a continued employment service" in Sect. 7b Para. 1 of the AVRAG means that a posting only takes place when it is more than occasional spells of employment such as carrying out short training exercises or repairs. Accordingly short periods in the transport sector would not be covered by the AVRAG protection (like, for example, entry, exit and transit but not cabotage). However, doubts are raised if this phrase is an exception in accordance with Art. 3 Para. 5 of the PWD which is why it is to be interpreted narrowly.
The term "employment" is interpreted broadly as to refer to all employment which is offered on the labour market. But it has not been clarified if posted workers who simply receive a service in Austria (e.g. occupational training), are providing a service in accordance with Sect. 7b Para 1 of the AVRAG or not.

In cases of posting according to Art. 1 Para. 3 indent c of the PWD in the form of personnel leasing the implementation measures are not covered by the AVRAG, but by the Temporary and Agency Workers Act ("*Arbeitskräfteüberlassungsgesetz*" – AÜG), Federal Law Gazette No. 196/1988 in the version Federal Law Gazette I No. 24/2011. According to Sect. 10 Para. 1 of the AÜG the worker leased from abroad to work in Austria – as is the case with temporary workers within Austria – for the period of leasing (as of the first day) has the right to the minimum wage laid down in the collective agreement as paid to the comparable workers doing comparable work in a company.

Austria has created two specific exceptions for posting of limited duration. These apply to posted workers who carry out necessary work in assembly and repair work in relation to deliveries of plant and machinery to a company or in making such plant

[105] The Federal Agricultural Labour Act of 1984 is a framework provision regarding minimum wages.

and machinery operational. This exception only applies where the work cannot be done by workers with their habitual place of employment is Austria; hence the exception is dependent on a labour market test.

- In regard to remuneration covered by a collective agreement AT protection only applies if the work requires a minimum period of more than 3 months altogether (Sect. 7b Para. 2 No. 1 of the AVRAG);
- In regard to guaranteed holiday leave the work should be of a minimum duration of 8 days altogether (Sect. 7b Para. 2 No. 2 of the AVRAG).
  Completely in accordance with Art. 3 Para. 2 last sentence of the PWD these exception are not applicable to workers involved in construction work as defined in the Annex. These workers are covered by the measures for implementing the PWD from the first day of their posting. The assembly privilege does not apply to TWA workers either.

BG

Directive 96/71/EC has been implemented in the Bulgarian legal system through the amendment of existing laws - amongst which the Labour Code and the pre-existing Ordinance on the Posting of Workers from Member States and from Third Countries to the Republic of Bulgaria in the Framework of Provision of Services - as well as the adoption of special acts. Article 121 (3) LC delegates to the Council of Ministers the power to adopt an act on posting of Bulgarian nationals, but such act has not been yet adopted. There is only a – non-public – draft prepared by the Ministry of Labour and Social Policy together with the Employment Agency, the Main Labour Inspectorate and the social partners at national level.
The concepts of "posting" and "posted workers" are defined by the Ordinance on the Posting of Workers from Member States and from Third Countries to the Republic of Bulgaria in the Framework of Provision of Services. These definitions to a large extent repeat Article 1 and 2 of the PWD.

The following criteria define the concept of "posting":

- Undertaking established in a Member State or a third country, posting to Bulgaria
- A transnational provision of services
- The posting is undertaken in the framework of the said provision of services
- The said activities are carried out for a limited period of time

The concept of "posted worker" requires:

- Employment relationship between the foreign employer and the posted worker
- Carrying out an activity in implementation of a contract for provision of services parties to which are the foreign employer and the local person accepting the posted worker
- Fulfilment of specific tasks related to the activity of the foreign employer enterprise in the Republic of Bulgaria

The posting employer must post the worker to carry out activities for the provision of services under a contract concluded by that employer and Bulgarian person (Article 1(3)(a)PWD) *or* in an enterprise in Bulgaria owned by that employer (Article 1(3)(b)).

The implementation measure does not contain any requirements as to the normal place of work of the worker. Neither is there a specification as to the temporary character of the posting or the activities of the undertaking in the home country. The protection offered isn't in any way dependent on the length of stay. The only exception

provided for regards workers posted to supply goods and take the goods supplied into use (Article 3 (4) OTCPWMS). This exception implements Article 3(2).
There isn't any explicit provision in the implementation measure for its application to workers sent to Bulgaria to receive services as part of their duties to their employer. According to information by the Employment Agency there aren't such cases in practice.

CY
In Cyprus the Posting of Workers Directive (hereafter the PWD) was transposed by Law no. 137(I)/2002, concerning the Protection of Workers who are Posted to Carry out Temporary Work within the Republic in Accordance with the Framework of the Transnational Provision of Services, known under the brief title the "*Posting of Workers within the Framework of Provision of Services Law of 2002*", which was passed on 19 July 2002 (Official Gazette, No. 3623) for the purposes of harmonization with Directive 96/71/EC. A summary of the relevant legislation in English can be found on the website of the Ministry of Labour and Social Insurance (MLSI).[106]

In terms of its scope, the Cypriot legislator has essentially copied the content of the PWD, transposing to the letter the provisions of Article 1 of the Directive into national law, providing this way a detailed description of the three types of posting covered, and without imposing restrictions of any kind. Similarly the Law 137(I)/2002 contains an almost verbatim transposition of the definition of posted worker, where according to the provisions of the Article 2 on definitions, "*posted worker*" means a worker who usually works in a Member State and who is posted to Cyprus according to Article 3, Paragraph 2 of the Law, to carry out work for a limited period. Accordingly, whether or not postings of trainees or business trips for the purpose of receiving training are covered by the implementing act is a matter of interpretation of the terms used in the PWD itself. The implementation measure does not contain any further requirements as to the link between the worker and the sending states. It makes no distinction as to the nationality of the posted workers e.g. with regard to a minimum period of previous employment.

CY made no use of the possibilities offered by Article 3 to partially exclude either postings of short duration, or postings of non-significant work (paragraphs 3, 4 and 5). The implementation of the compulsory exemption stipulated in Article 3(2) for either cases of initial assembly, or cases of first installation, is again a carbon copy of the text of the Directive. Hence, in general, the protection of CY law will apply from the first day of posting. However, labour legislation contains certain provisions according to which either the protection of a worker or his right to certain benefits comes into force only after a specific time has elapsed from the inception of the employment relationship. Specifically, in accordance with the provisions of the Termination of Employment Laws of 1967-2002, any employer retains the right to dismiss a worker without prior notification during the first six months of the employment relationship, while time limits also exist with regard to the right of an employee to sign up with a provident fund.

[106] http://www.mlsi.gov.cy/.

CZ

The PWD is implemented by Section 319 of the Labour Code.[107] Czech implementation of the PWD is quite succinct and there are no specific rules going above the standard required by the PWD. According to Section 363 (1) of the Labour Code, the provision of Section 319 is one-sidedly cogent provision – parties can not adopt different arrangement unless it is favourable for the employee.

The definition of posting comprises any expatriation (= posting) of an employee of an employer from another member state of the EU to the Czech Republic within the framework of a transnational provision of services in the Czech Republic. Czech implementation of the PWD does not define the three types of posting defined by the PWD, leaving the definition rather open in order to cover more labour law relationships than to restrict the implementation contrary to the PWD. This means inter alia that also the provision of manpower not performed by an employment agency shall be subject to Section 319 of the Labour Code.

Section 319 of the Labour Code specifically refers to Article 49 of the Treaty on the Functioning of the European Union. This means that posting of workers, that does not meet the criteria set therein, shall not be covered by Section 319 of the Labour Code. However, Section 319 of the Labour Code does not include specific requirement of remuneration, which, especially in "type 2" of posting (posting within a group of companies), will not be present at every posting. The exact wording of Section 319 (1) of the Labour Code states that it covers workers who are posted to *perform* services. On the basis of this provision the expert concluded that Section 319 (1) does not cover posting with the purpose of receiving services.

There are no other requirements as to the normal place of work of the worker or a period of previous employment in the sending state. Neither does the law contain any specifications as to the activities of the employer in the country of origin. The only requirement is that the employer is actually established in another Member State.

There are no requirements as to the temporary character of the service provision or the posting of the worker either, with the exception of some rules not applying to employees posted for less than 30 days per calendar year. This exemption, provided for in Section 319 (2) of the Labour Code, is an almost verbatim implementation of Article 3 (3) of the PWD. This implementation measure makes a distinction between the types of posting mentioned in Article 1 (3) paragraphs a) and b) and Article 1 (3) paragraph (c) of the PWD: it does not apply to TWA activity. This is the only distinction between the types of posting defined in Article 1 (3) of the PWD.
The possibilities outlined by Article 3 (4) and Article 3 (5) of the PWD were not used by the Czech legislator. The Czech implementation measure did not choose to exempt initial assembly as referred to in Article 3 (2) of the PWD either. However if the initial assembly of goods takes less than 30 days the same effect may be reached by Section 319 (2) of the Labour Code as was described hereinabove, thus no special regulation was deemed necessary.

[107] The PWD was first implemented into the previous Labour Code (the Act No. 65/1965 Coll., the Labour Code, as amended), Section 6 (2) to 6 (5). This implementation was effective from May 1, 2004 (the date Czech Republic joined the European Union). In 2006 a whole new Labour Code (the Act No. 262/2006 Coll., the Labour Code, as amended) was adopted, with effectiveness date January 1, 2007.

FI

The Posted Workers Act closely follows the wording of the Directive.[108] The Act (Laki lähetetyistä työntekijöistä, No 1146/1999) came into force on 16 December 1999. Under Section 1, the Posted Workers Act applies to work carried out under an employment contract by a worker posted to Finland. The meaning content of an employment contract is defined in Chapter 1, Section 1, of the Employment Contracts Act. For the purposes of the Posted Workers Act, according to Section 1 of the Act 'posted worker' means a worker who normally carries out his or her work in a country other than Finland and whom an employer undertaking established in another country posts to Finland for a limited period within the framework of the transnational provision of services, if

- the worker is posted to perform work under the direction and on behalf of the undertaking under a contract concluded between the employer and the user of the services operating in Finland,
- the worker is posted to work for an establishment or undertaking owned by the group of undertakings concerned, or
- the worker is hired out to a user undertaking and the employer is a temporary employment undertaking or placement agency.

This Act does not apply to the seagoing personnel of merchant navy undertakings.

Apart from what is provided in Section 1, the Posted Workers Act does not contain requirements concerning the previous employment of a posted worker in the country of origin. The Act does not provide particular requirements of the nature of the employer either, except those provided in Section 1 (see the wording of the Section above). Similarly, the Act does not provide requirements concerning the normal place of work of the worker, temporary character of the service provision or the posting of the worker. Section 4 of the Act contains the mandatory threshold of eight (8) days concerning certain types of work (initial assembly or first installation of goods). The legislator has not used the options given in Article 3 sub 3, 4 or 5 of the Posted Workers Directive. The concept of the provision of services is not specified in the Act. The point of departure is the broad concept of services in EU law.[109]

EL

Art. 3 of P.D. 219/2000 implementing Directive 96/71 provides that "Posted worker" means a worker who normally works in the territory of a Member State and is posted in Greece in order to carry out his work only for a limited period. The Act does not contain any other requirements as to the temporary character of the services and/or the posting. The act does not contain any requirements as to the activities of the undertaking in the home country either.

It is generally mentioned that P.D. 219/2000 is applied to workers who are sent abroad in the context of services. However, postings within a group of companies are covered by P.D. 219/2000, even if there is no underlying provision of services (against remuneration) between the companies within the group. It is unclear if trainees are covered by the implementation measure P.D. 219/2000.

[108] Ulla Liukkunen, Lainvalinta kansainvälisissä työsopimuksissa, 2002, p. 161.
[109] Hallituksen esitys (Government Proposal) Eduskunnalle laiksi lähetetyistä työntekijöistä sekä eräiksi siihen liittyviksi laeiksi 138/1999.

Provision of manpower is covered to the extent that this service is performed by a temporary employment undertaking or placement agency; other types of hiring-out of workers are not. For example: A Greek trucking company is allowed to temporarily "borrow" drivers from another foreign trucking company. However, this hiring-out is not covered by the P.D. 219/2000 and only the rules of Rome Convention/Rome I Regulation are applied. Therefore, it is not absolutely sure that Greek hard core standards will be applied.

Art. 4 par. 3 of P.D. 219/2000 contains the exemption clause for initial assembly and/or first installation of goods which is provided for in Article 3.2 PWD. The case of posting by a temporary employment undertaking or placement agency is not covered by this exemption. Neither are activities in the field of construction.

HU

Hungary has no separate legal regulation dedicated specifically to the regulation of posting, assignment and/or the hiring-out of workers. The relevant rules are contained in the Labour Code. They were included in the national legislation following the amendment of the Labour Code by Act XVI of 2001 for the purpose of legal harmonisation (amongst which compliance with Directive 96/71/EC and Regulation Rome I).

The Labour Code regulates three forms of the posting: posting (LC, Chapter V, Section 105), assignment (LC, Chapter V, Section 106, Section 106/A-B) and the hiring-out of workers (LC, Chapter XI). The rules on posting and assignment are regulated among the rules on the regulation of the performance of work (more precisely, the employer's instruction right) whereas the hiring-out of workers is introduced in a separate chapter. When employers post and/or assign workers under their unilateral right of instruction, rather than under special agreement, the law contains limitations as to the maximum period of posting or assignment per year.[110]

The implementation of the PWD is in the chapter which also deals with domestic posting, namely in Article 106/A and 106/B. As a result of this method of implementation, the Labour Code applies differing provisions with regard to a) posting within Hungary (domestic posting); b) posting from Hungary (foreign posting); and c) posting to Hungary. The interrelationship between these different provisions is still a matter of debate. Uncertainties as to the precise interpretation of the provisions are difficult to clear up due to a lack of cases.

The domestic rules on posting distinguish between "work at other places than the normal place of work" (which is referred to as 'posting'), and cases in which the employee works at another employer, either through assignment (within a group of companies) or hiring-out of workers. This distinction roughly coincides with the three types of posting distinguished in the PWD. However, according to a further rule it shall not qualify as 'posting' if the employee usually performs work out of the branch of the employer due to the nature of the work. If work is performed at various locations, the normal place of work shall be the employer's place of business specified as the principle place of work in the employee's job description. Both 'posting' and assignment are limited in duration (unless otherwise provided for by mutual agreement).

[110] The limits are 44 working days/year for posting and 110 working days/year for the aggregate of work performed elsewhere. These periods can be extended by collective agreement.

With regard to cross-border posting, §106/A (1) stipulates "As regards the employment - by virtue of agreement with a third party - of a foreign employer's employee in the territory of the Republic of Hungary in accordance with the provisions of Sections 105 [posting], 106 [assignment] and Chapter XI [hiring-out], such employee shall be subject Hungarian labour laws in terms of

- maximum working time and minimum rest periods,
- minimum annual paid leave,
- minimum rates of pay,
- conditions of the hiring-out of workers,
- occupational safety,
- access to employment or work by pregnant women or women who have recently given birth, of children and of young people, furthermore,
- the principle of equal treatment for men and women and of non-discrimination regulations."

Despite the specific reference to Section 105, 106 and Chapter XI, the domestic rules on posting (and the limitations imposed by them) are not deemed to be applicable to cross-border posting to Hungary. The protection offered by domestic law (for example as to the limitation in duration) is seen as going beyond the hard core of protection under the PWD.
§ 106/B contains the exemptions to the application of host state law:
"(1) The provisions of Section 106/A shall not apply to merchant navy enterprises as regards seagoing personnel.
(2) In the case of initial assembly and/or first installation of goods where this is an integral part of a contract and carried out by workers posted by the supplying enterprise, the provisions of Section 106/A shall not apply in terms of minimum paid annual holidays and minimum rates of pay if the period of posting does not exceed eight days, with the exception of the activity defined under Subsection (2) of Section 106/A." Other exemptions are not provided for.

The provisions implementing the PWD do not contain any further requirements as to the temporary character of the posting and/or the activities of the employer in the country of establishment. This leads to a lack of consistency with the social security rules on posting.[111] As a result posting under the Labour Code/PWD may be feasible in cases in which the application for an A1 certificate would be rejected.

The status of trainees under the implementation provisions is unclear. The Labour Code does contain rules on training of employees[112] but the interaction of these rules with the rules on domestic and cross-border postings is unclear. The problems of interpretation are worsened the taxation regulations[113] which define the circle of eligible expenses in case of posting abroad/foreign service abroad. These contain definitions of posting and service abroad which would allow foreign training of employees to be classified as posting for the purpose of tax deductions.

[111] In the context of social security the posting enterprise must have substantial economic activity in HU during and prior to the posting. This requirement however does not apply when an HU employer wants to posts the employee to a related company as defined under the Accounting Act.
[112] Subsection (4) of Section 103.
[113] Act CXVII of 1995 on Personal Income Tax and Government Decree No. 168/1995 (XII.27) on the Acknowledged Costs Relating to Posting Abroad.

Hungary is currently preparing a new labour code. The draft new Labour Code contains no rules with regard to posting as such. Neither does it contain a chapter dedicated to hiring-out of workers: the latter topic will be regulated in a separate law. Also the special implementation of the PWD has been omitted. It is currently unknown how this will affect the protection of workers posted to HU.

IE

The Posting of Workers Directive was transposed into Irish law by section 20 of the Protection of Employees (Part-Time Work) Act 2001 (hereinafter referred to as 'the implementing measure'), which simply extended all Irish employment protection legislation to eligible posted workers. This extends to the provisions of REAs and EROs where these are in existence. The implementing measure does not define 'posted worker' (it simply refers to the definition in the Directive). It applies to all persons irrespective of their nationality or place of residence. All that is required of the worker is that he or she has entered into a contract of employment that provides for his or her being employed in Ireland *or* works in Ireland under a contract of employment.

The implementing measure, therefore, is silent on a range of issues, including the duration or temporary nature of the posting, the activities of the undertaking in the home state, the nature of services provided by the employer or the fact that an employment relationship must be maintained with the home state employer. The protection offered to posted workers is not made dependent on the length of stay, but, in limited situations, the Irish legislation will require the employee to satisfy service requirements before protection kicks in; most importantly, an employee must have one year's continuous service with the employer before the Unfair Dismissals Acts 1977-2007 apply. No specific exemptions relating to initial assembly, postings of short duration or non-significant work (under Article 3 of the Directive) have been applied.

The implementing measure is also silent on the question of provision of services. The issue of whether workers sent to Ireland to receive services (e.g. trainees or those attending seminars) attract the protection of employment legislation is somewhat unclear. Given the broad nature of the Irish transposition, it would appear to be the case that postings within a group of companies or the provision of manpower other than by a temporary work agency (for a fee or on the basis of reciprocity) would be covered by the implementing measure.

According to the national informants the Directive is (still) not seen as hugely significant in the Irish situation. This is due, to some extent, to Ireland's island status (workers can move more easily where land borders are shared) and to the relatively small numbers of workers covered.[114] A problem, however, given that the implementing measure does not define posted workers, can relate to the classification and frequent misconceptions about the status of non-Irish workers. All the informants mentioned that there can be a tendency to consider *all* non-Irish workers as a homogenous category (where, in fact, such workers could be posted, self-employed, employed by an Irish company temporarily or on a permanent basis, working for a foreign company

[114] Recent figures from the Commission regarding E101 forms indicate that approximately 2,000 Irish workers were posted abroad in 2009 (this represents less than 0.1% of the population) and approximately 6,000 workers were posted to Ireland in 2009 (this represents just under 0.2% of the population), of which the majority (5,000) were posted from a country in the 'old' EU-15. The vast majority of Irish workers posted abroad go to the UK, the Netherlands and France.

with a registered operation in Ireland, etc). This relates to the all-encompassing nature of the transposition. As far as the Department of Jobs, Enterprise and Innovation (DJEI) officials, the National Employment Rights Authority (NERA- the Irish labour inspectorate), employers and unions are concerned, Irish legislation and the relevant REAs/EROs apply to all employees working in Ireland *irrespective* of nationality or status. A recent Recommendation of the Labour Court affirms this view in respect of the Construction REA.[115]

LV

The implementation of the PWD into LV law closely follows the text of the PWD itself. Article 1(3) of the PWD is implemented by Article 14(1) of the Labour Law which contains an almost copied-out provision.[116] As regards the definition of 'posted worker', the Article 14(2) of the Labour Code contains the transposition of Article 2(1) PWD whereas the definition of worker itself is based on national law. The implementation does not contain any definition of employer either. As a result the implementation of the PWD is not restricted to employers in another Member States.

The Labour Code does not contain any further specifications or requirements. There are no provisions specifying the 'limited period' during which a worker is posted and no requirements as to the normal place of work or the length of previous employment.

LT

Article 2 (6) LGPW provides with the notion of "posted worker". "Posted worker" shall mean a worker who is habitually employed in the territory of the Republic of Lithuania, but has been posted by the employer temporarily to perform work in another Member State as well as a worker who is habitually employed in another state, but has been posted temporarily to perform work in the territory of the Republic of Lithuania. The same Article states that the definitions of employee and employer are the same as they are provided in the Labour Code.

The LGPW contains no requirements as to the normal place of work of the worker, regular activities in the country of origin, a minimum period of previous employment in the country of origin, etc. It is neither contains any particular requirements as to the temporary character of either the service provision or the posting of the worker. The law only requires that the posting to another member state shall be temporary. The length of stay is not considered a part of the definition of posting. The protection is also not offered in any other way dependent on the length of the stay. There is only a rule which enables the supervision of the application – if the worker is posted to the territory of Lithuania for a period exceeding 30 days or to carry out construction work the employer shall, in accordance with the procedure laid down by the Ministry of So-

[115] *Construction Industry Federation v Irish Congress of Trade Unions* (LCR 19847/2010).

[116] Article 14(1) of the Labour Law provides:

*'Within the meaning of this Law, posting of an employee shall mean those cases where, in connection with the provision of international services:*

*1) the employer, on the basis of a contract which he or she has entered into with a person for whose benefit the work will be performed, sends an employee to another state;*

*2) the employer sends an employee to another state to a branch or to an undertaking that is part of the group of companies; or*

*3) a placement agency as employer sends an employee to a person for whose benefit the work will be performed if the undertaking of such person is located in another state or it performs its operations in another state.'*

cial Security and Labour of the Republic of Lithuania, notify in advance the territorial division of the State Labour Inspectorate of the posted worker's place of employment and guarantees provided.

The legislator has made use of the possibilities offered by Article 3 to (partially) exclude postings of short duration (sub 3 and 4) and/or non-significant work (sub 5). In the cases of provision of cross-border services and posting within the group of undertakings, the guarantees related to the minimum rates of pay, including overtime rates, shall not apply where the period of posting does not exceed 30 days (Art. 4 (4) LGPW). Art. 4 (5) LGPW provides that the guarantees related to minimum pay and minimum annual leave shall not apply where initial assembly and/or first installation of goods is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and is carried out by the skilled and/or specialist workers of the supplying undertaking, if the period of posting does not exceed eight days.

The implementation legislation makes no distinction as to the type of posting. The postings within the group of companies are covered by the implementation legislation even if there is no underlying provision of services (against remuneration) between the companies within the group. But there is no practice which could prove this statement. Other forms of provision of manpower (either for a fee or on the basis of reciprocity) would be covered by the implementation measure, even when this service is not performed by a temporary employment undertaking or placement agency.

The situation where workers are sent to another MS to receive services (e.g. occupational training) as part of their duties to their employer is not covered by the implementation law. However, for workers employed under LT law who are send abroad for training, the protection which LT law offers in case of business trips will remain applicable during their posting. Trainees are covered by the LGPW if they fulfil the criteria of employees (remuneration, subordination, provision of services).

MT

Regulation 2 of LN 430/02 defines a posted employee as an employee of a foreign undertaking who does not normally work in Malta, but who for a limited period of time is sent by the foreign undertaking to work in Malta. The definition of worker is contained in Article 2 of the Employment and Industrial Relations Act (EIRA, 2002). There is no specification of the concept "limited period of time". In particular, the Posting of Workers in Malta Regulations does not specify a maximum period for considering a worker a posted worker rather than a resident worker. A foreign undertaking is defined as an undertaking which is established in a state other than Malta. The Posting of Workers in Malta Regulations applies to all three types of postings described in Article 1(3) PWD.[117]

[117] The Regulations apply to undertakings that 1) Send posted employees in Malta on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or 2) Send posted employees to an establishment or to an undertaking in Malta which is owned by the foreign undertaking, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or 3) Being temporary employment undertakings or placement agencies, hire out a worker to a user undertaking established or operating in Malta, provided there is an

The Maltese Regulations contain both the initial assembly privilege and the exemption for postings lasting less than one month (Article 3(2) and (3) PWD) The latter exemption does not apply, however, in the case of temporary work agencies that post workers in Malta.

PT
The posting directive is presently implemented by articles 6.º to 8.º of the Labour Code (Lei 7/2009 de 12/2). These Articles closely follow the working of the Directive. According to article 6.º n.º1 The following situations are subject to the regulation of posting, whenever the employee hired by an employer established in another State, performs his/her activity in Portuguese soil: a) in performance of a contract between the employer and the beneficiary of the activity, as long as the worker remains under the direction or authority of the employer; b) in an undertaking of the same employer or an enterprise of another employer with whom there is a corporate relation of mutual participations, domain or group; c) at the service of an user at the disposal of whom he/she was placed by a temporary work enterprise or another enterprise; According to section 2 of Article 6 the posting also encompasses situations in which the user or recipient of the services is established in another State provided that the labour contract remains during the period of the posting. The legal treatment of the posting of the labour code does not apply to maritime workers in the merchant navy. The posting to another State, that is the situation in which the host State is another country than Portugal, is foreseen in article 8.º of the Labour Code.[118]

The PT law does not contain any further requirements as to the temporary character of the service or the posting. Nor does it contain any other requirements. In the Directive itself there is no indication of what amounts to be a limited period and hence the Portuguese law does not establish the duration of the posting in its rules. As a result the protection of the worker – either a Portuguese worker posted abroad – or a foreign worker posted in Portugal – is not dependant or restricted in any way as regards the length of the stay. There is no legal definition in Portugal of what amounts to a temporary posting. As a result it is for the courts to decide in a particular case if they consider the posting still to be temporary or whether the law of the country where the work is actually performed applies in full (on the basis of the Rome I Regulation).

Neither the Portuguese legislator nor the social partners made any use of the possibility of partially excluding postings of short duration and/or no significant work. The implementation measure does not contain special rules concerning initial assembly either.

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employment relationship between the temporary employment undertaking, or placement agency, and the worker during the period of posting.

[118] Art. 8.º n.º1 The worker hired by an enterprise established in Portugal who performs his/her activity in the territory of another State in the cases referred to in art. 6.º is entitled in working conditions foreseen in previous article [implementing Article 3(1) PWD – AH], not withstanding a more favourable regulation resulting from the contract or from the law applicable to the contract.; n.º2 The employer must inform, five days beforehand, the inspective service of the ministry (the governmental department) responsible for labour the identity of the workers who are to be posted, the user, the workplace, the foreseeable beginning and end of the posting.; n.º3 The infringement of the previous number is a serious infraction [“contra-ordenação”]

The Portuguese law does not contain any requirement as to the underlying service contract. If the companies belong to the same group, for instance, it seems that that is enough for the posting to take place. As a principle there are no other forms of provision of manpower covered by the implementation measure then the performance of a service's contract or a triangular temporary employment relationship. However in the context of a group of enterprises the Portuguese law allows an employer occasionally to gratuitously provide another enterprise of the same group with the services of an employee.[119] In this kind of provision of manpower an employee remains bound by a labour contract with his/her employer but renders his/her work to another recipient who pays the salary and controls and supervises the performance of the labour. Such an arrangement may last for a year but it may be renewed to a maximum duration of five years. According to the expert a Portuguese worker with a labour contract with a Portuguese corporation might be posted abroad in another corporation of the same group using this device. In that case, he would still be covered by the provisions on posting.

Normally one is concerned only with dependant or subordinated workers. In PT law trainees as such do not have a labour contract and so it seems that they would not be covered by the provisions. This might be different if under foreign law, trainees would be considered to have a labour contract. In the expert's opinion the sending of a worker, even if it was a subordinated worker, to receive training would not be considered a posting; the opposite situation, however, a worker sent abroad to provide training, under a fee, would be a posting.

SK

The implementation of the PWD into Slovak legislation is relatively brief. PWD has been implemented by Section 5 (2-6) of the Labour Code[120] and the legislation subse-

[119] Provided the worker gives his/her written consent and he/she is not under a fixed-term contract

[120] 5(1) of the Labour Code the employment relations between employees performing work in the territory of the Slovak Republic and foreign employer, as well as between aliens and stateless persons working in the territory of the Slovak Republic and employers registered in the territory of the Slovak Republic shall be governed by Slovak laws, unless stipulated otherwise by legal regulations on international private law.

(2) Labour-law relations of employees who are posted by their employers for the performance of work to other employers from a European Union Member State territory to the territory of the Slovak Republic shall be governed by this Act (i.e. Labour Code), special regulations or a relevant collective agreement, and which regulate a) the length of the working time and rest periods, b) the length of vacation, c) minimum wage, minimum wage claims and overtime wage, d) health and safety at work, e) working conditions for women, juvenile and employees caring for children younger than three years of age, f) equal treatment for men and women and a prohibition of discrimination, g) working conditions of temporary agency work.

(3) The provision of paragraph 2 shall not prevent against the implementation of condition of work more favourable for the employees. Advantages shall be judged for each labour-law claim independently.

(4) A posted employee is the employee who, in a specified period performs work in the territory of a Member State other than the State of his normally performed work.

(5) The provisions of paragraph 2(b) and 2(c) shall not be applied in cases of initial assembling, or first installation of goods which are the main component of the contract for the delivery of goods, which are necessary in order to start using the goods delivered, and which are executed by qualified employees or specialists of the supplier, unless the time of delegation of the employee exceeded eight days within the last 12-month period from commencement of his/her delegation; this shall not apply to the following work: [ … in brief: the types of construction work mentioned in the PWD]

quently refers to Section 58 of the Labour Code, which regulates temporary assignment of employees. The Slovak Labour Code does not define the concept of posting of workers itself; Article 1(3) PWD has not been implemented. Section 5 only refers to posting of employees by their employers for the performance of work to other employers from a European Union Member State territory to the territory of the Slovak Republic. A posted worker (employee)[121] is defined as an employee who in a specified period performs work in the territory of a Member State other than the State of his/her normally performed work.

The law does not contain any further specifications as to the temporary character of the posting or the service, the requirement of previous work in the sending state etc. Following the recommendations of the National Labour Inspectorate, the period of the posting of the employee should not exceed the one to two year period which also applies in social security. However, there is no legal limitation in time of posting under the PWD. Trainees are covered by implementation measures as far as they are in a legal position of employees and the type of training they are receiving is considered as a work performance

The Slovak Labour Code contains the assembly privilege of Article 3(2) PWD including the derogation contained therein for construction work. The other exemptions are not implemented.

SI
The rules on posting of workers, if the Republic of Slovenia is sending or hosting state are determined in the Employment Relationship Act, Articles 211- 213.
Article 211 determines under which conditions an employer may temporary post a worker to work abroad (the Republic of Slovenia is sending state). The basic condition for such posting is that the worker's obligation to work abroad is agreed in his employment contract. If such obligation is not included in the contract, it is necessary, according to Article 211, paragraph 3, a new employment contract should be concluded for the temporary work abroad. Article 211, paragraph 2 contains a list of reasons for which the worker may refuse posting.
The employment contract of a posted worker must (beside other necessary provisions) include some additional information on inter alia the duration of the posting and a supplemental insurance for health services abroad (Article 212 of the Employment Relationship Act).
According to the *Commentary of the Employment Relationship Act*,[122] the provision of Article 211 represents also a provision, with which the PWD is implemented into Slovenian legal order.

In situations where a worker is posted to the Republic of Slovenia (the Republic of Slovenia is in this case hosting state) he performs services under provisions of the Work and Employment of Foreigners Act (Article 213 of the Employment Relationship Act). The employer shall ensure working time, rest, annual leave, night work,

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(6) If the employee is posting according to Section 58 of the Labour Code to member state, working conditions and employment conditions shall be governed by the law of a state where the work is being performed.

[121] The Slovak Labour Code uses the term "employee".

[122] Bečan I et altera, Zakon o delovnih razmerjih (ZDR) s komentarjem, GV založba, Ljubljana 2008, page 916.

wage, safety, health, special protection of certain category of workers and equality in accordance with legislative acts and sector based collective agreements, in force in the Republic of Slovenia, if these provisions are more favourable to the worker, despite the fact, that their employment contract is based on foreign law. Generally this applies to all workers posted to the Republic of Slovenia, except:

- in case of temporary initial works, which are an integral part of the contract for the supply of goods, which do not exceed eight working days and are carried out by skilled workers of the supplier, provisions of minimal annual leave and wage is not applied (Article 213, paragraph 3 of the Employment Relationship Act);
- provisions regarding to wage are also not used if starting work of posted workers are not longer than one month in each year (Article 123, paragraph 4 of the Employment Relationship Act).

However, both of mentioned exceptions do not apply to the construction sector (Article 213, paragraph 5 of the Employment Relationship Act).

Posted worker to the Republic of Slovenia is defined in Article 4, point 13 of the Work and Employment of Foreigners Act. A posted worker is

*"a foreigner, in employment relationship with foreign employer and which in time of performance of services works on territory of the Republic of Slovenia, and for which employee pays contributions for social insurance."*

As the definition of a posted worker is not given in the *Employment Relationship Act*, the above mentioned definition defines a posted worker also for the purpose of labour law protection under the PWD and is appropriately used also as a definition for domestic worker posted from the Republic of Slovenia to another EU Member State.

The definition of posting expressly mentions that a worker "performs services or other work". Accordingly, it would seem that these provisions do not apply if a worker is posted to receive services in the Republic of Slovenia – e.g. in the situation in which the worker comes to Slovenia for training purposes. As regards the immigration regulations for third country nationals, different provisions apply to posted workers and employees who are sent abroad for on the job training respectively. For example: training needs a work permit, posting does not need a work permit, training may only take up to one year, where posting might take up longer period.

Beside foreign employer being established in Member Sate of EU, EEC or Swiss Confederation to be able to post workers to the Republic of Slovenia and registration of such work, there are no additional requirements for employer. Also the law does not make any distinction relating to type of posting – although the Directive makes difference among three different types, Slovenian law does not mention any distinction.

ES

The PWD was implemented through Act 45/1999, 29th November. This act applies to the European Union companies – or companies located in the European Economic Area; or in other states, by international convention - when they decide a posting of workers to Spain as part of a transnational provision of services, including temporary employment agencies. It also refers to companies based in Spain that post workers to

those territories. The staff of the merchant navy is excluded; it is also excluded the posting with the sole purpose of training.

Particularly, Act 45/1999, 29th November, applies to 1) posting of workers for the implementation of a service contract, 2) movement to establishments of the company itself or of another company in the same group; 3) movements of workers engaged with temporary employment agencies. Other types of provision of manpower are not covered by the Act.

According to Act 45/1999, 29th November, a posted worker is an employee contracted for a company based in another country who is moved to Spain for a «limited period of time» –there is no more specification about that- as part of a transnational provision of services, regardless of their nationality. These movements must be communicated to the Spanish labour authorities, including their starting date and duration. As a general rule, there is no need for communication when posting does not exceed eight days. Moreover, Art. 3.3 Act 45/1999 states that working conditions established in the Spanish labour law regarding paid annual leave and the rates of pay shall not apply when the posting do not exceed eight days, unless the posting was decided by a temporary employment agency. This exemption is not restricted to initial assembly, but has a general character. Otherwise, the possibilities offered by Article 3 to (partially) exclude postings of short duration (sub 3 and 4) and/or non-significant work (sub 5) haven't been used.

Article 1.3 Act 45/1999 provides that the Act does not apply to postings made on the occasion of the development of training activities that do not comply with a provision of services of a transnational nature. However, it would apply if the reason for moving was not training, although some training may be acquired.

## The concept of posting: comparative remarks

The concept of posting in the PWD does not stand in isolation. Several countries which have extensive regulation of posting and assignment in their national laws (in the current study: BG, HU, PT, SK, SI), demonstrate interactions between the domestic concepts and the concept used in the PWD. In particular as the national concept of posting often only covers specific types of postings under the PWD, this interaction may create confusion and uncertainties. But the concept of posting under the PWD also interacts with similar concepts in private international law (Rome I) and the concepts of posting used in social security and tax regulations (SK). Finally also migration law may have a posting concept (SI – see also section 3.3).

With regard to the concept used in the PWD, the member states apply different techniques in their implementing acts. In the previous study we made a distinction between states with more or less verbatim transpositions of Articles 1 and 2 and states with absent or atypical implementation of the said provisions.
When the same distinction is applied here, we notice a predominance of states in the first group: CY, FI, EL, HU, LV, LT and MT all have more or less literally transposed both provisions. CZ and SK have also transposed the provisions, but they leave out part of the definition. In CZ and SK the distinction between the three types of posting is not made at all. In the CZ report the absence of specific implementation of the types

of posting is explained by the wish not to restrict the application of host state laws unduly. Absent or atypical implementation can be found in IE and SI. The first doesn't make a clear distinction between migrants and posted workers, the second uses a definition in migration law for the purpose of labour law protection. A specific situation arises in AT, where the position of forestry and agricultural workers is within the jurisdiction of the *Bundesländer* rather than the State. This results in an incomplete transposition of the PWD in AT law.

As regards the exemptions for short term postings in the PWD the current study confirms the finding that the possibility to exempt certain postings for a short duration and/or insignificant work from the application of certain minimum standards is not often used by the Member States. Only AT, CZ, ES, LT, MT and SI made use of the possibility to partially exclude postings of less than one month and/or work of minor significance. The other Member States only exempt initial assembly – though in the case of IE and LV the implementation does not even provide for that.
Some states contain specifications for the exemptions, both in the case of the assembly privilege and in the short term exemption. CZ, EL and MT specifically exclude TWA activity from the exemptions they granted whereas AT applies a labour market test to their short term exemption (which is deemed to encompass the assembly privilege as well).

Based on these findings one would assume the host state laws to apply even in cases of short and transitory postings. However, in some member states the definition of posting itself precludes to application of host state law in those cases. This is stated in particular in the AT report. Only 'continued employments services' are covered by the AVRAG – the national implementing act. Training activities, short repairs and transit activities in transport are excluded from this term and hence are not covered by the AVRAG. In SK the legal definition of 'business trips' in national law led to a similar effect in the period 2004-2008. In most states covered by the current study, practical experience as regards the application of the PWD to short and transitory postings is lacking.

In the questionnaire, the experts were specifically asked to discuss any requirements as to the temporary character of the posting, the normal place of work of the employee and/or previous employment in the sending state as well as checks as regards the genuine character of the establishment of the employer in the sending state. None of the states covered by this study have implemented any requirements on these points. As regards the need for an underlying transnational provision of services, the overview demonstrates that this requirement is not present in all states and/or all cases either. Two situations stand out in this respect: training received in another Member States and inter-company transfers.
When Member States have specified that the posted worker should *perform services* within the territory, trainees who only receive services will in general not be covered (see for example CZ). On the other hand, when the law uses the criterion of *working* within the territory, trainees might be covered when the training is part of the duties vis-à-vis the employer (CY). The only state with a specific provision on trainees is ES: Article 1.3 of the implementing act (Act 45/1999) provides that the Act does not apply to postings made on the occasion of the development of training activities that do not comply with a provision of services of a transnational nature. However, it

would apply if the reason for moving was not training, although some training may be acquired.
The requirement that posting should be related to the performance of a service against remuneration can also be problematic in case of intra-company transfers. Several experts commented that in case of ICT, an underlying service against remuneration is not a precondition for application of the PWD (e.g. EL, LT, PT).

Finally, little specification can be found as regards the temporary character of the posting. An unofficial limit of one to two years, inspired by the social security regulation, is used by the SK authorities. AT and PT refer to the Rome I Regulation for the upper limit of the concept: a worker is deemed to be posted until host state law becomes applicable under the Rome I Regulation. The decision in the individual case is up to the court. Under this definition, posting might last several years: the AT report refers to an example in which foreign law was still deemed to apply after 10 years of work in AT.

## Application to transport workers: an overview

AT Sect. 7b of the AVRAG is valid for all employment relations based on a contract concluded under private law. There are no sectoral exceptions to its area of application which is why Sect. 7b of the AVRAG is also applicable to work contracts in the trans-border transport sector and for ships' crew provided the workers are located in Austria. Shipping is of lesser significance for Austrian domestic transport but much more significant for shipping on the Danube. However, application of AT law is restricted to workers providing 'a continued employment service'.[123] Accordingly short periods of presence within the territory, such as entry, exit and transit, would not be covered by the AVRAG protection. Cabotage activity is covered.

BG
Bulgarian implementation measure is not applicable to seagoing personnel in merchant navy undertakings (§ 4 of the Final provisions OTCPWMS). The other sectors of transport are not specifically excluded. This means that for other types of transport the implementation measure is applicable. There are no special adaptations for this sector and there is no information on how the PWD is applied in practice. According to the National Revenues Agency there are hardly any cases of posting in the transport sector.

CY
Apart from the category of seagoing personnel in merchant navy undertakings, the Law 137(I)/2002 does not explicitly exclude the transport sector from its scope but does not contain any special adaptations for the specific sector either. Given that there are no relevant references in the introductory report of Law 137(I)/2002, in the opinion of the Labour Department the extension of the legislation to the transport sector has not been of concern to the Cypriot legislator quite possibly because, always in the opinion of the Ministry, the transport network is limited to the interior of Cyprus and does not extend beyond its borders. In any event, there are concerns on the ministerial level about whether the categories of workers working from a place rather than in a

[123] Sect. 7b Para. 1 AVRAG.

place fall within the provisions of the law for the purposes of posting, and in the same context the Ministry believes that if the legislation is extended to the transport sector it would be extremely difficult to identify and distinguish cases of posting.

CZ
The CZ implementation measure does not contain any specific rules for workers in the transport sector, hence the general rule applies. In the transport sector Czech law is deemed to apply to Czech employees of a Czech employer, based on the criterion of habitual place from which the work is carried (which is interpreted to refer to the seat of the employer). There is not enough experience with the application of the PWD to say whether the PWD is actually applied in transport.

FI
The Act does not apply to the seagoing personnel of merchant navy undertakings. Other workers in the transport sector are governed by the Act if the work fulfils the requirements provided by Section 1 of the Posted Workers Act. No particular adaptations concerning the transport sector are provided for in the Act.

EL
The provisions of P.D. 219/2000 do not apply to merchant navy undertakings as regards seagoing personnel. Other types of transport are covered. The Act does not contain any specific rules for this group of workers.

HU
The HU transposition exempts merchant navy enterprises as regards seagoing personnel. Other sectors of transportation are not excluded. It is interesting to note that the Act XVI of 2001, which transposed the PWD into HU law, was also used to amend the Law-Decree on International Private Law. Under the 2001 provision, which was repealed in 2009, the HU labour code covered the employment relationship of an employee serving on a vessel or on air transport vehicles if the vehicle concerned travelled under Hungarian flag or marking, whereas the LC was to be applied to the employment relationship of an employee serving on a road or other (land) transport vehicle if the employer's personal law was the Hungarian law. These rules were replaced by the rules of the Rome I Regulation.
Nevertheless, concerning the workers active in the transport sector Subsection (1) of Section 105 of the LC regulating the posting of workers should be highlighted. This rule *expressis verbis* states that 'the employee who performs work at a place other than the normal place of work due to the nature of the work in question shall not be considered posted'. Workers in the transport sector, among others, are typically considered as workers who perform work at a place other that the normal place of work (or perform work from the normal place of work). It, therefore, seems that the rules with regard to the posting of workers (as defined under Section 105 of the LC) are not applicable to workers in the transport sector. If and how the rules on cross-border posting are applied to this sector is yet unclear.

IE
The implementing measure makes no reference to transport workers. It is perhaps the case that Ireland's status as a small, geographically peripheral island makes this less of an issue than in countries on mainland Europe.

LV
The provisions of the PWD implemented into the Labour Code concern all employees falling under national definition of 'employee' (Article 3) except for merchant navy undertaking as regards seagoing personnel, consequently there is no legal grounds for non-application of the PWD in other sectors (for example, road, air, rail). However, there is very little if any practical experience with the application of the PWD to these sectors.

LT
The implementation measures also apply to workers in the transport sector (road/air/rail) except the seagoing personnel of merchant ships (Art. 3 (3) LGPW). There is no additional stipulation on this exception. The law contains no adaptation measures for the transport sector but no arguments were put forward to justify or soften the regulation. This goes back probably to the small chance that the legislation is well perceived and applied in this business.

MT
The Posting of Workers in Malta Regulations are not applicable to personnel employed on vessels which fall under the provisions of the Merchant Shipping Act. This is the only sector which is excluded from the Regulations.

PT
The implementation measures only exclude maritime workers in the merchant navy. As a result there is no exception to workers in the transport sector (road/air/rail). However, if workers in these sectors transport people or goods from Portugal to another State and vice-versa they are not considered to work abroad and therefore they are not posted workers.

SK
The Slovak regulation of posting of workers does not contain any specifications with regard to sectors of industry and/or category of workers. It is assumed, therefore, that these rules may apply to employees in the transport sector as well. However, according to Section 8(2) of the Rome I regulation employment relations in international transportation shall be governed by the law of the country from which the employee habitually carries out his/her work in performance of the contract. Hence, the legal regime shall depend on the character and duration of work performance abroad. Similarly, according to Section 16(2) of the Act No. 97/1963 Coll. on International Private and Procedural law as amended, employment relations of employees at transport companies in rail and road transport shall be governed by the law of the country where the employer is established, employment relations in the sector of river and air transport shall by governed by the law of the country of registration and in respect to maritime transport, the law of the State whose flag the vessel takes shall be determining. It is assumed, that the regime under Act No. 97/1963 Coll. and the Rome I regulation is mostly preferred in practice because it enables to keep the employment relationship to be governed by the law of one Member State.

ES
There is no a specific provision about that. But the answer must be affirmative. Art. 2.1.1.a) Act 45/1999 provides that the Law applies when the workers are posted under the direction of their company in pursuance of a contract between it and the recipient

of services, which is established or who carries on business in Spain. That provision should include the workers in the transport sector.
There is not any specific provision in Spanish Law, except the exclusion of merchant navy undertakings as regards seagoing personnel. There are no criteria in the law or the case law.

## The sending state perspective: an overview

AT
For workers who have their habitual place of work in Austria and are posted to another Member States neither the legislation nor the collective agreement takes into account the minimum wage in the receiving State. From the Austrian perspective only the minimum wage agreed by collective agreement in Austria is guaranteed. The Austrian collective agreements apply to postings abroad on condition that Austrian law is applicable according to Rome I Regulation. The agreements can continue to be binding, because the Austrian employer who posted his workers outside Austria is still a member of WKÖ.
If, however, the receiving State in the form of intervention standards in accordance with Art. 9 of the Rome I Regulation pays a higher minimum wage that the Austrian minimum wage, Austrian courts must consider this intervention standard as applicable law.
For workers in the sector of temporary work agency, whose habitual place of employment is Austria, and are posted to another Member State, Sect. 10 Para. 1 of the AÜG states that for the period of agency work the worker has the right to the minimum wage laid down in the collective agreement as paid to the comparable workers doing comparable work in a company. Sect. 10 Para. 1 of the AÜG is also valid for domestic agency work and for foreign agency work as well as for foreigners undertaking agency work in Austria.

BG
BG law contains a specific provision on posted of workers from BG to other countries. Article 121 (3), sent. 2 of the Labour Code provides: "Where the posting period related to the provision of services in another Member State of the European Union, in another State party to the Agreement on the European Economic Area or in the Swiss Confederation is longer than 30 calendar days[124], the parties shall provide, within the period of posting, for at least the same minimum work conditions as those established for workers who perform the same or similar work in the host country." This provision is deemed to be an implementation of Article 3 (3) PWD.
The Industry Collective Agreement for the Sector "Construction, Industry and Water-supply", concluded between the Chamber of the Constructors in Bulgaria", the Federation "Construction. Industry and Water-supply" – "Podkrepa" and the Federation of the Independent Construction Syndicates of CITU[125], contains several provisions for posting from Bulgaria to another Member State.

[124] In such a way the possibility offered by Article 3 (3) PWD is used.
[125] See www.knsb-bg.org/pdf/OKTD_2011.pdf.

CY
The statutory framework, as it has developed to date, does not cover cases of posting from the territory of the Republic of Cyprus to another member state. In this context, both Law 137(I)/2002 and the content of the sectoral collective labour agreements refer exclusively to cases of posting to the territory of the Republic of Cyprus and not vice versa. On the practical level, according to information from the Social Insurance Services, the few cases of postings from Cyprus to another country of the EU/EEA are monitored on the basis of the applicable Community legislation, and Regulations 883/2004 and 987/2009 in particular.

CZ
The implementation of the PWD in the old Labour Code (effective until December 31, 2006) was explicitly applicable also to situations, when a Czech worker was posted to another member state of the EU. This was however subject to strong debate among experts and as a result Section 319 of the Labour Code applies only when a worker is posted to the Czech Republic. The controversy was that the Czech provision on posting from CZ might contradict the applicable provisions in the country where the employee was posted to.

FI
The Posted Workers Act does not contain provisions on workers sent from Finland to another Member State.

EL
Neither the law nor the collective agreements in the sectors of construction/temporary work agency contain any special provision for posted workers sent from Greece to another Member State.

HU
Subsection (5) of Section 106/A of the Labour Code stipulates the provisions of Subsections (1)-(4) which transpose the PWD into HU law, shall be duly applied to the foreign posting (assignment, hiring-out) of workers employed by Hungarian employers if these aspects are not covered by the laws of the country where the work is performed. This provision has caused some confusion as to whether the HU rules on (domestic) posting also apply to postings from HU.

As to regulation of foreign postings through CLAs: There is a sectoral agreement in the construction sector which contains rules on (domestic) posting and assignment which differ slightly from the statutory provisions.[126] These rules also apply to those workers of an employer covered by the EAKSZ, who are, on a temporary basis working at an employer who is not covered by the EAKSZ. The CLA does not contain any territorial restriction but does not contain specific provisions for posting abroad either.

LV
Latvia as a host state must provide the PWD protection to the posted workers from the third-countries[127] while Latvia as a sending state shall not apply PWD if Latvian

[126] The current one is the *Construction Industrial Sectoral Collective Agreement (hereinafter: ÉÁKSZ)* concluded in December 2009.
[127] Article 14(3) of the implementing law.

workers are posted in a third country.[128] Latvian undertakings, especially in construction business, send their employees to non-Member States predominantly to Russia and Belorussia. The 'flow' of services to mentioned countries started after conclusion of mutual agreements with Latvia on economic cooperation.

LT
Article 2 (6) LGPW provides with the notion of "posted worker". "Posted worker" shall mean a worker who is habitually employed in the territory of the Republic of Lithuania, but has been posted by the employer temporarily to perform work in another Member State as well as a worker who is habitually employed in another state, but has been posted temporarily to perform work in the territory of the Republic of Lithuania. Hence, it also applies to postings from LT to another Member State.

PT
PT law contains a specific provision on posting from PT in Art. 8.º of the Labour Code.[129] This provision guarantees the worker posted from PT the protection of host state law in the areas in which Portuguese law would also apply to worker posted to PT. More favourable rights from the applicable law or the contract are maintained.

SK
Section 5 (6) of the Labour Code states that working conditions and employment conditions of an employee posted to another EU Member State shall be governed by the law of the state where the work is being performed. This provision has been criticized by professionals as inappropriately constructed. It is generally deemed that the original employment relation between the posted worker and the sending employer, established under Slovak law, shall be retained during the period of posting abroad. The legal theory interprets this provision in accordance with the PWD and along this line as requiring the law of the temporary workplace to be applied only to the extent of core terms and conditions of employment stipulated in article 3 (1) of the PWD, as long as it is more favourable to employee than application of Slovak law. However, the actual extent to which the law of the host MS shall apply will depend on the host MS legislation. There is neither an official or binding interpretation of this provision, nor any court ruling on this matter for the time being.
In the period 2004-2008 the domestic law institute of the business trip was applied to postings from SK as an alternative to applying the PWD provisions. This led to non-application of host state protection for short postings from SK. However, currently this is seen as not in accordance with the PWD.

SI
Article 211 determines under which conditions an employer may temporary post a worker to work abroad (the Republic of Slovenia is sending state). The basic condition for such posting is that the worker's obligation to work abroad is agreed in his

[128] Article 14(5).
[129] n.º1 The worker hired by an enterprise established in Portugal who performs his/her activity in the territory of another State in the cases referred to in art. 6.º is entitled in working conditions foreseen in previous article [implementing Article 3(1) PWD – AH], not withstanding a more favourable regulation resulting from the contract or from the law applicable to the contract.; n.º2 The employer must inform, five days beforehand, the inspective service of the ministry (the governmental department) responsible for labour the identity of the workers who are to be posted, the user, the workplace, the foreseeable beginning and end of the posting.; n.º3 The infringement of the previous number is a serious infraction ["contra-ordenação"]

employment contract. If such obligation is not included in the contract, it is necessary, according to Article 211, paragraph 3, a new employment contract should be concluded for the temporary work abroad. Article 211, paragraph 2 contains a list of reasons for which the worker may refuse posting.
The employment contract of a posted worker must (beside other necessary provisions) include some additional information on inter alia the duration of the posting and a supplemental insurance for health services abroad (Article 212 of the Employment Relationship Act). According to the *Commentary of the Employment Relationship Act*,[130] the provision of Article 211 represents also a provision, with which the PWD is implemented into Slovenian legal order.
The CLA for the construction sector contains some additional guarantees for the workers who are posted abroad. These pertain inter alia to extra grounds for refusing the posting and an increase in salary for working abroad.

ES
The first additional provision of Law 45/1999 states that undertakings established in Spain that move workers to other member states of the European Union should guarantee them the conditions of employment provided in the place of posting by the national rules implementing Directive 96/71/EC. However, they must be applied the more favourable working conditions arising from the provisions of law applicable to their contract of employment, collective agreements or individual contracts.
Collective agreements do not include specific provisions concerning the posting of workers.

## Conclusions and recommendations: a variety of problems with a variety of causes

### The concept of posting

As mentioned in the introduction, the Directive aims to coordinate the laws of the Member States by laying down clearly defined rules for minimum protection of the host state which are to be observed by employers who temporarily post workers to perform services on their territory. For this type of services the PWD - as interpreted in the light of the ECJ case law – creates a legal framework in which the labour protection of the host country is deemed to apply, but only to a limited extent. Hence, according to the authors of this study, the category of posted workers form a middle ground between mobile workers who are temporarily present in the territory of another Member State but are not covered by its laws[131] and mobile workers who are deemed to have become part of the labour force of the host state and hence are covered by its laws in their entirety.

The Directive contains criteria for distinguishing postings from other types of labour mobility. These relate to the establishment of the employer, the performance of a cross-border service, the context in which the posting takes place and the temporary

[130] Bečan I et altera, Zakon o delovnih razmerjih (ZDR) s komentarjem, GV založba, Ljubljana 2008, page 916.
[131] E.g. a worker employed in a Member State attending a seminar or training in another Member State.

character of the posting as such. These criteria cause problems of both interpretation and delineation. In order to avoid such problems several Member States have chosen not to include the personal scope criteria used in the PWD in their implementing statutes, but to apply instead the relevant[132] standards of labour law and labour protection to anyone working within the territory (or similar criteria). In the previous study we found this to be true in B, NL and the UK; in the current study, IE provides an example of this policy. A clear disadvantage of the latter method of implementation is that it may lead to over-application of the implementation measure. This may result in excessive burdens on the free movement of services insofar as the national protective laws also apply in situations where such application is ineffective and/or disproportionate. On the other hand, a lack of implementation of the definition of posting and posted workers tends to obscure the special position of this group of workers. In this respect a definition also helps to set the 'upper limit' of the concept. Hence Member States that have not done so are advised to introduce the concept of posting in their legislation.

***Recommendation 6, adapted only with regard to the states covered by this study***

In general, we advise as action **at national level >** that Member States should bring their implementing law and the application and enforcement thereof into line with the more precise concept of posting in the PWD. Of the countries covered by the current study this recommendation seems to be particularly relevant for IE and SI.

From the material gathered in the previous report – inter alia in the analysis of cases that have attracted media attention[133] – we concluded that a clear and enforceable definitions of posting and posted worker may help to avoid 'creative use' of the freedoms in which the provision of services is used to avoid (full) application of the host state's law. Controversial cases include the setting up of letter box companies which then hire workers specifically to 'post' them to other Member States and incidences of consecutive 'postings' of a single worker to a single Member State by different 'employers' in different Member States.

The use of letter box companies is a more general problem as regards the freedom to provide services (see e.g. in art 4(5) of the Services directive 2006/123/EC) and can be countered by clear requirements as to the activities in the home state as well as the temporary character of the service provision. However, most of the states covered by the current study have not included such requirements in their national law. In the previous study only a few (most notable LU and FR) had done so. A similar lack of practical implementation can be found as to the definition of posted worker in Article 2 PWD. Consecutive and rotational posting of workers can – to some extent – be prevented by stricter checks on the absence or presence of a country in which the work is normally performed (as required under Article 2 PWD). However, of the 27 Member States covered by the two studies, not one had any specific rules on the interpretation and application of this criterion.[134] To the contrary, some states, such as MT only re-

[132] The PWD contains a list of standards which are relevant in this respect, but some Member States extend the protection beyond the fields of protection enumerated in the directive. For example, IE applies all of its statutory protection to posted workers.
[133] See previous study, section 3.5 and the current study, section 3.4 and Annex.
[134] France has a provision which excludes employees hired in France from the scope of application of their implementing rules. L 1262/3, see Chapter 3.2, p. 32 and p. 46 of the first report.

quire the workers to normally work *outside the host state*, without requiring any relevant link of the worker to the state in which the employer is established. As is demonstrated inter alia in section 3.3, checks do exist as to the status of the posted worker on the labour market of the sending state and/or the length of previous employment, but those are invariably linked to migration law and only apply to third country national and/or third county postings.

To fight abuse of the free provision of services, we recommend further implementation of the requirements with regard to both the establishment of the posting employer in the sending state and the link of the employment contract to the sending state. We are fully aware that the Member States are not entirely free to implement the requirements in their national laws. The concepts used are based on European law and should be interpreted autonomously. Moreover, extra requirements put in place by national authorities invariably will cause obstacles to the free provision of services which must be justified under the EU rules. Hence, it would be preferable if working definitions of the main concepts used in the Directive could be developed at EU level.

These working definitions could take the form of rebuttable presumptions. This would mean that certain requirements are formulated in a European instrument. Postings which fulfil these requirements are presumed to be postings in the meaning of the PWD. This presumption can be rebutted by the relevant authorities and/or the workers involved. Reversely, when a posting does not fulfil the requirements, prima facie host state law applies in full, unless the employer demonstrates that the 'posting' is indeed a posting in the meaning of the Directive.

As regards the temporary character of the posting it should be kept in mind that the Rome I Regulation also contains a concept of temporary posting. During a temporary posting, the law of the habitual place of work will continue to apply to the contract of employment. If the worker is relocated to another country indefinitely, however, the law of the new habitual place of work will normally become applicable – unless a closer connection with the country of origin is maintained. The latter is judged on the basis of inter alia the intention of the party to repatriate the worker and facilities in the contract to compensate for the expatriation.[135] If host state law applies to the contract under Rome I, there is no legitimated reason to restrict this application to the hard core provision of the PWD.[136] This should be kept in mind when developing a working definition of posting under the PWD. For practical reasons, inspiration may also be drawn from the rules on posting in social security law. Though the posting-concepts in the two instruments serve distinct purposes, in practice the A1 declaration plays an important role in identifying posted workers. Also, from the perspective of fair competition it is noted that both labour law and social security law play an important role in the total labour costs for the employer.

Regarding the definition of 'a limited period of time', we recommend that the definition of temporary posting in Art. 2 PWD should be clarified, either by including a rebuttable presumption of permanent mobility in case the duration of the posting exceeds a specific period, and/or by indicating which minimum links to the country where the posted worker normally works should exist in order for that mobility to

[135] See also Chapter 2 of this report.
[136] See inter alia the reports from AT and PT.

qualify as posting under the PWD. In both cases, care should be taken to comply with the Treaty requirements under the free movement of services.

To stress the distinction between 'passive mobility' of a worker posted in the framework of service provision of his employer and 'active mobility' of a worker entering the labour market of another Member State to take advantage of job opportunities, it may be advisable to amend the text of Article 3(7) second sentence of the PWD by making the reimbursement of expenditure on travel and lodging/accomodation an obligation on the service provider. We would like to point out, that several states already have such an obligation in their labour law.[137] The experience of those states should be integrated in the discussion on the level of compensation to be offered under the proposed obligation.

In any case, but in particular if no agreement on these points can be reached at EU level, the Member States themselves should ensure that the genuine nature of the temporary posting is maintained in a transparent and effective way by the monitoring and enforcing authorities.[138]

***Recommendation 7 (formerly rec 7 second part) – unchanged_***

**At EU level or at national level >**
To prevent employers from circumventing and abusing the rules it is necessary to establish a clear definition of "undertakings established in a Member State" (see e.g. in art 4(5) of the Services directive 2006/123/EC). Only genuinely "established" companies may benefit from the freedom to provide services and hence from the PWD.
In the absence of an EU solution, Member States could clarify this issue in their national systems, although this carries the risk of substituting a European concept for a national one.

***Recommendation 8 ( formerly rec 11) – unchanged***

**At EU-level >** To enhance possibilities to combat abusive situations, the definition of temporary posting in Article 2 PWD should be amended or clarified.

- Whether a rebuttable legal presumption of 'structural' employment in the host state should be introduced in case the length of employment in the host state exceeds a certain period of time (which may be partly left to the sectoral social partners to fill in, as for example in Article 5(3) Directive 2008/104 on TWA), merits further study. In any event, care should be taken to comply with the Treaty requirements under the free movement of services
- Another option would be to indicate which minimum links to the country where the posted worker normally works should exist in order for that mobility to qualify as posting under the PWD. This merits further study as well, in particular with regard to the care that should be taken to comply with the Treaty requirements under the free movement of services.[139]

[137] BG, CY, HU, LV, LT. See for specifics, section 3.6 'per diems'.
[138] See also Chapter 4.
[139] See also Section 2.2 and recommendation 1.

- The sending state should have a clear responsibility in preventing abusive situations (compare Article 30 (1)(2) Dir 2006/123/EC)

See also recommendations 2 and 7 above and recommendations 36 and 39 below.

***Recommendation 9 ( formerly rec 12) – no substantive changes, last sentence added regarding Member States.***

**At EU level >** To stress the distinction between 'passive mobility' of a worker posted in the framework of service provision of his employer and 'active mobility' of a worker, entering the labour market of another member state to take advantage of job opportunities, we advise to amend the text of Article 3(7) second sentence of the PWD by making the reimbursement of expenditure for travel, board and appropriate lodging/accommodation an obligation on the service provider.

The experience of several Member States with such obligation should be taken into account when formulating the obligation.

***Recommendation 10 (formerly rec 13) – unchanged***

**At national level>** In the absence of or while awaiting EU action, a clear understanding should be reached between enforcement authorities as to the necessary link of worker, undertaking and/or contract to the sending country. The posting declaration (A1 form) under the social security regulation may be a starting point for this discussion (see in particular Article 12 Regulation 883/04 and Article 14 Regulation 987/2009). Another indication of the fact that posting is temporary and undertaken on the employer's account, would be the fact that the employer reimburses costs of travel, lodging and subsistence.

See also Recommendation 1 and 9 above.

**Specific problems with regard to the definition of posting**

A transnational provision of services: The PWD must be situated in the context of the free provision of services as protected by Article 56 TFEU. However, not all national implementation measures restrict their application to cases in which a cross-border service is provided by the employer to a service recipient in another Member State. A case in point, which raises discussion in several Member States, is the trainee who is sent abroad as part of his or her training program. Trainees are present in the territory of the host state for professional reasons and in case of on the job training, might be posted in the context of fulfilling a contract of employment. However, they are benefiting from the freedom to *receive* services, rather than *providing* such. Other situations in which the service provision might not be present include intra-company transfers and postings without underlying service contract. The latter group was not identified as such in the current study, but did feature in the first study in which mention was made (inter alia by the FR legislator) of film crews which might work in the host state without performing services for third parties.

Three party arrangements: With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and a recipient of the service in the host state.[140] A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider.[141] This problem was identified in the previous report by the Swedish and German experts. In our opinion the existence of an intermediary between the employer and the recipient of the services should not prevent application of the Directive in cases which otherwise fit the objectives of the Directive. It is advisable to clarify and if necessary amend both requirements to fit the purpose of the Directive. In the absence of a solution at EU level, a further clarification by the Member States would be welcomed.

***Recommendation 11 (formerly rec 7 first part) – unchanged***

**At EU level or at national level >** With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and the recipient of the service in the host state. A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider. In our opinion the existence of an intermediary between the employer and the recipient of the services should not prevent application of the Directive in cases which otherwise fit the objectives of the Directive. Hence, we recommend clarifying this, in line with the purpose of the PWD.

***Recommendation 12 (formerly 7 third part) – unchanged***

**At EU or national level >** The requirement of a cross-border service provision needs clarification. A trainee is present in the territory of the host state for professional reasons, and may be benefiting from the freedom to receive services, rather than providing such. Hence, the (non-) application of the PWD to trainees and other workers receiving services abroad should be clearly established as well as the extent to which the PWD applies to intra-company transfers and postings.

In the absence of an EU solution, Member States could clarify these issues in their national systems, although this carries the risk of substituting a European concept for a national one.

**Problems with regard to specific sectors: transport**

Several member states (HU, SK, CZ) have a tradition of treating transport workers as a separate category for private international law purposes. The contract of transport workers was traditionally submitted to the law of the place of establishment of the employer (road) and/or the country of registration of the means of transportation (ship/air). Hence the place of work was not a relevant factor for determining the ap-

[140] Explicitly required in Art 1(3)a, and implicit as regards Art 1(3)c postings.
[141] The Swedish expert discussed the position of the driver in international transport performing a cabotage activity in a situation where a forwarding agent has entered into the contract of cabotage. The German expert mentioned the situation of double posting in which is worker is posted domestically to a user company which then posts the worker to another Member State.

plicable law. Though these rules are currently superseded by the Rome I Regulation and the interpretation thereof by the ECJ in the Koelzsch case (C-29/10), this tradition may still affect the application of the PWD-protection in those states. Moreover, for lack of a habitual place of work, the mobility of transport workers may not qualify as posting under domestic law and/or the implementation measure. This seems to be the case – to some extent at least – in AT, HU, SI and PT.

The national reports contain very little information as to the practical application of the PWD to transport – an absence of practical cases is seen as the main explanation for this. Only the AT expert confirms the finding in the previous report that the PWD will most likely be applied to cabotage activities, but not to transit and first deliveries. The latter activities are not deemed to fulfil the requirement under the AVRAG (the national implementation of the PWD) that the posted worker should perform 'continued employment activities' in AT.

These findings underscore the relevance of a separate implementation of the PWD for transport workers, as was recommended in the first study. Though the Directive does apply to transport workers (with the exception of seagoing personnel of the merchant navy), the system of the Directive is ill fitted to deal with workers who do not work *in* a specific country but rather *from* a specific country. It seems advisable to formulate a sub-rule for applying the PWD to transport workers. In absence of and awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application and enforcement of the PWD to this sector.

***Recommendation 13 (formerly rec. 9 and 10)***

**At EU level or national level>**
There is reason to formulate a sub-rule for applying the PWD to transport workers. This should be the subject of further research and should be formulated in cooperation with the relevant stakeholders and experts in the field of transport regulation.
In the absence of and while awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application of the PWD to this sector.

**The regulation of posting from the state of implementation.**

The PWD primarily addresses the Member States in their role as host state. Several member states have, however, included provisions on posting from their territory in their implementing laws. Such is still the case in BG, HU, LV, LT, PT, SK and ES – and was until recently the case in CZ.[142] AT (amongst others) has not done so. The AT report explicitly states that application of the standards of the host state must be achieved through Article 9 of the Rome I Regulation. Under paragraph 3 of this Article "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard

[142] Laws of other states, e.g. SI contain substantive protection of posted worker posted from their territory/under their laws, but no rules based on the private international law effect of the PWD.

shall be had to their nature and purpose and to the consequences of their application or non-application." There is little case law on the interpretation of this provision and none coming from the EC J.[143] Hence we do not know whether disrespect for the rules on minimum protection which apply to posted workers, would 'render the performance of the contract unlawful' in the meaning of this provision.[144] Moreover, under Article 9 Rome I Regulation the courts of the Member State are allowed, and not obliged, to give effect to the rules of the host state. When the duty to apply host state law to posted workers is not implemented in the law of the sending state, such a duty could only arise from the Directive itself.[145]

Hence, the implementation in the law of the sending state of a duty to respect the host state core protection standards may further the effective enforcement of the rights conveyed by the directive. However, care should be taken as to the exact formulation of the implementing provision. As demonstrated by the overview two risks attach to such clauses:

- The provision might cause confusion as to the applicability of the law of the sending state as the law applicable to the contract of employment. This risk was commented upon in the SK report. When implementing the PWD for postings from their territory, the Member States should respect the 'more favourable right' provision of Article 3(7) first indent.
- The provision might contradict the relevant rules in the host state. An example of this can be found in BG law, which grants protection under host state law for postings lasting longer than 30 days. This short term exemption is deemed to be an implementation of Article 3(3) PWD. However, Article 3(3) is directed at the host states: these may introduce a short term exemption in their law, but may also (and often do) refrain from doing so. The sending state should respect the position of the host state on this issue and not overrule the provisions of the latter. In the example of posting from BG, the relevant host state law may not contain a 30 days exemption and claim application from the first day of posting. The CZ expert reported exactly this complication as the reason for abrogation of a similar provision in CZ law. However, rather than not providing for protection to workers posted from their territory, states can avoid any conflicts by simply recognizing the protection offered by the host state, without imposing unilateral requirements.

***Recommendation 14 ** NEW****

**At national level >** Member states that have not yet done so, should consider introducing a specific clause in their law, recognizing the application of core standards of the host state during postings taking place from their territory and/or under their law. Member states that already have such clause in their national law, should if necessary correct such clauses to ensure the full respect for (the nucleus of) host state law as well as full respect for the protection offered by the law applying to the contract of

[143] The text differs from the corresponding text in Article 7 of the Rome Convention.
[144] In some countries not all elements of protection of the PWD were considered to be overriding mandatory provisions in the meaning of the Rome Convention/Rome I Regulation. This complication will not be dealt with here, but poses another argument for specific implementation of a duty to respect host state law directed at the courts of the sending states.
[145] And the duty of conform interpretation this imposes.

employment, under application of Article 3(7) PWD (see in this regard also recommendation 2 above).

It may also be helpful to stipulate at **EU-level** the full respect by the sending state for the core standards of the host state during postings from its territory**.**

## *3.3 TRANSITIONAL REGIME AND THIRD COUNTRY POSTINGS*

### Introduction

Several 'old' Member States (EU15) applied or still apply a transitional regime in regard to the free movement of workers from eight of the ten new Member States in 2004 (EU8) and of the two other new Member States (Romania and Bulgaria, EU2) which acceded in 2007. Only Germany and Austria also negotiated the possibility of imposing restrictions to the free movement of services insofar as these involved cross-border posting of workers. A study of the transitional regime was included in the first study for several reasons: the actions taken by the Member States during this period may provide information as to the areas which are deemed problematic in respect of labour mobility within Europe. In countries that allow the free provision of services (Article 56 TFEU) but not the free movement of workers (Article 45 TFEU), the transitional regime sheds light on where the Member States draw the line between the two freedoms, and thus on the distinction between a 'posted worker' and a migrant EU worker, using Article 45 TFEU.

In the current study, which complements the previous one, the questions on the transitional regime were maintained. However, as the first study mainly covered host states and the current study predominantly sending states, the information retrieved will be quite different. In several host states the lifting of the transitional measures was heavily debated and made dependent on the introduction of specific measures to counter the effect of migration and posting of workers. This effect will not be found in sending states. However, also sending states have measures as regards third country postings. These regimes will also – to some extent - provide information on the topics mentioned above. Hence, we will discuss both in the current chapter.

### Overview of national reports

AT
In the case of the EU expansion to the east Austria claimed the maximum transition phase of the 2+3+2 model. For this reason up until 30th April 2011 the access of nationals of EU-8 countries to the Austrian labour market was hindered – also as posted workers (the barriers were the same like Romanian or Bulgarian still have). For nationals of Romania and Bulgaria accession barriers will exist until 1st January 2014. These pertain to both the free movement of workers and the free provision of services. In specified sectors the posting of workers from Bulgaria and Romania is equivalent to the posting of workers to Austria from third countries.[146] The posting of workers from Bulgaria and Romania in other sectors is treated as equivalent to the posting of workers from other Member States.

[146] Annex VI and VII, 1 Freedom of movement for persons, No. 13 Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, OJ 2005 L 157, 104.

Third-country nationals posted from outside the EEA and Switzerland to Austria require a work permit ("*Beschäftigungsbewilligung*") according to Sect. 18 of the Employment of Foreigners Act ("*Ausländerbeschäftigungsgesetz*" – AuslBG), Federal Law Gazette No. 218/1975 in the version Federal Law Gazette I No. 25/2011. If the period of work does not exceed 4 months and does not concern the construction sector, in the place of a work permit, an assignment permit ("*Entsendebewilligung*") is required. The act implementing the PWD (AVRAG) also applies to third country postings.

BG

A transitional regime was adopted against Bulgaria. For the most part, however, the restrictions have been lifted.[147] There appeared some problems during the transitional period especially related with posting. Immediately after 01.01.2007 some Bulgarian employers together with employers from receiving Member States tried to misuse the posting regime in order to conceal a de facto hiring of workers, pretending these workers were in labour relationship with the Bulgarian employer in order to have lower costs for contributions and taxes (as due in Bulgaria) and to escape the work permits regime. That fraud, the moment we understood about them in Bulgaria, were cut off and the control on posting situations was tightened. Bulgaria transferred that control, as regards contributions and taxes, to the National Revenue Agency. But in order to stop such frauds it is necessary for the receiving Member States to also enhance their control over their employers.

As regards posting to BG, the implementing measure of the PWD includes also service providers established in third countries.[148] There are no exact data about the quantity of service providers, but the general impression of the Employment Agency and of the social partners is that service provision through the posting of workers by undertakings established in third countries occurs in practice. Mainly posted workers come from Russia as Bulgaria has significant business projects with that state.

Work permits may be issued where the conditions of work and pay offered are not less favourable than the conditions available to Bulgarian citizens for the relevant work category; where the labour remuneration provides the necessary means of living in Bulgaria conforming to an amount fixed by an act of the Council of Ministers (Art. 69 EPA). In specific cases a lighter procedure may be used in which only registration takes place but no work permit is needed. This procedure is available for up to 3 months within 12 months in which the employee fulfils concrete tasks such as giving training related to the operation and servicing of ordered facilities, machines or other equipment.[149] Third country nationals, posted by an EU company will be treated as EU nationals, if they fulfil the conditions for free movement of workers.

CY

No transitional period was adopted against CY. As regards posted workers from third countries, the Labour Department has noted that in all cases of posting all workers are protected by the provisions of Law 137(I)/2002, and no distinction is made as to the

[147] Austria and Germany have used the option to prolong the transitional regime until 31.12.2013.
[148] According to the title and to Article 1 (1) OTCPWMS
[149] Article 4 (3) of the Ordinance for the Conditions and the Order for Issuing, Refusal and Revoking of Work Permits to Foreigners in the Republic of Bulgaria**.** Adopted with CM Decree № 77 of 09.04.2002, promulgated, SG, No. 39 of 16.04.2002, effective 17.04.2002, amended, SG, No. 118 of 20.12.2002, effective 01.12.2002, supplemented and amended, SG, No. 53 of 10.06.2003, effective 10.06.2003, No. 92 of 15.10.2004, No. 56 of 10.07.2007.

nationality of the posted workers, on condition however that the case falls within one of the three categories of posting covered by the relevant legislation. Article 3, paragraph 4 of Law 137(I)/2002, which is a faithful copy of Article 1, paragraph 4 of the PWD, expressly stipulates that "*undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.*"
In practice, based on the experience to date, the Labour Department has identified two categories of posting of third country nationals. The first category includes cases where third country nationals are posted from another Member State, and the second category includes cases where third country nationals are posted from non-EC countries or countries in the European Economic Area. Both are protected by the law implementing the PWD, but the latter has to fulfil the requirements of immigration law as well. However, in the context of posting for services, even if residence and work permits must be granted by the immigration authorities, the criteria for employing non-nationals from third countries are not applied, and in parallel the competent authorities make efforts to facilitate and speed up the issuance of the relevant permits. The statement of information the enterprise that posts a worker in Cyprus receives on the basis of the provisions of Article 8 of Law 137(I)/2002 is automatically deemed to be a guarantee for the immediate issuance of residence and work permits.

CZ
A transitional regime was imposed against CZ. However, no relevant effects or specific conflicts regarding this regime were reported. As regards third country postings to CZ, the implementation of the PWD in Section 319 (1) of the Labour Code provides that the posting employee must be established in another member state of the EU. Also, the employee must be posted from another member state of the EU. The implementation measure does not make distinctions as to the nationality of the posted workers. Hence the provisions do not apply to third country postings. Posting of workers within the EEA is exempt from the requirements associated with the employment of foreigners.[150]
In the Czech Republic it is a widely known fact that many workers working here come from non-EU member states in the East (especially Ukraine, Russia and Viet Nam). These workers are not usually posted by foreign employers, but they become employees of Czech employers. Shall such foreign worker be posted by a foreign employer to the Czech Republic it would underlie many restrictions set by the Employment Act. All such workers must have proper work permit and also residence permit.

FI
The Act implementing the PWD governs workers posted from Member States and non-Member States. The Act also governs undertakings established in the third countries. Foreign employees (non-EU citizens) basically need a residence permit in Finland. However, workers who are citizens of third countries and who are posted to Finland in the framework of the free provision of services do not need a residence permit. No statistics are available concerning either the amount of postings from Member States or non-Member States to Finland or the amount of postings from Finland to Member States or non-Member States. In general, posting is a significant phenomenon.

[150] Section 95 and 98 paragraph k) of the Employment Act; Section 319 Labour Code.

EL

Greece was addressed as a sending state. As one of the old EU members, it did not have a transitional regime installed against it. This, in combination with the low number of postings, explains the absence of relevant findings as to the transitional period. As regards third country postings, Art. 2 par. 1 of P.D. 219/2000 implementing Directive 96/71 provides that the above decree is applied only to undertakings established in a Member State. The Act does not make any distinction as to the nationality of the posted workers. Third country posting does not occur often and is governed by the rules of the Rome Convention and the Rome I Regulation. The regulations on immigration contain a special provision with regard to third country posting for the provision of services: Art 19 of Law 3386/2005 provides that third-country nationals lawfully employed as specialised personnel in an undertaking established in a third country who must provide specific services, in the context of a services contract between the said undertaking and a corresponding undertaking active in Greece shall be issued a residence permit, provided that they meet the following conditions: a. They hold a current passport and visa; and b.The undertaking from which third-country nationals are transferred has entered to a contract for the provision of specific services exclusively relating to the installation, test operation and maintenance of the supplied items, the period of provision of services, the number and speciality of the persons to be employed, as well as the payment of the employees' travel expenses, medical and pharmaceutical care and return costs.

HU

A transitional regime was applied as regards HU workers. According to our knowledge, temporary agency work was not considered to be covered by the restrictions with regard to the free movement of workers. We have not been able to find data on shifts in migration due to the transitional regime. This can partly be explained by the fact that the majority of employees posted in the framework of the provision of services are active in the grey/black economy, making it difficult to find any data about them. Moreover, in many of the cases discussed in Section 3.4 the legal institution of posting was used to circumvent the existing labour market restrictions and provisional measures under the transitional period. Neither the employers nor employees are able and/or willing to openly discuss such.

The implementation of the PWD does not make any distinction based on the nationality of the worker. Neither is the application of the provisions on protection of posted workers limited to posting from the EU/EEA. As regards third country nationals, a special regime is created in which there is no need to acquire a work permit and only a notification obligation exists.[151] This regime applies to posting

a) for commissioning, warranty, repair and guarantee activities – not exceeding 15 working days within a period of 30 days per occasion -- in virtue of a private law contract concluded with an undertaking established in a third country;

b) for work at an employer in Hungary in order to fulfil a private law contract by an employee who is the resident of a state which is party to the European Economic Area (hereinafter: EEA) agreement, in the form of cross-border service provision by way of posting/assignment;

[151] Subsection 2 of Section 1 of Government Decree No. 355/2009. (XII. 30.) on the Rules of the Employment without Permit in the Territory of the Republic of Hungary of Third-country Nationals.

c) for work in the form of hiring-out of workers by an employee hired out to an employer in Hungary by an undertaking active in the hiring-out of workers established in a state which is party to the EEA agreement.

IE

Ireland allowed full labour market access to citizens from the EU10 from 2004. However, restrictions have been imposed on nationals of Bulgaria and Romania, both of which joined the Union on 1 January 2007. No special rules apply to any sector (including temporary agency work). Around 2007, there was a significant perception amongst unions (and a campaign of action was launched by SIPTU)[152] of a problem relating to exploitation of migrant workers generally and agency workers in particular (at the time the economy boasted more or less full employment). This was, according to a number of the informants, largely an issue relating to nationals of the EU2. As these nationals were allowed to travel to Ireland, but not seek employment, many sought work in the black economy or as 'self-employed' (a status that was frequently bogus). Union informants contest this view, arguing that there was, and continues to be, exploitation of migrant workers, and particularly those supplied by temporary agencies.

The implementing measure makes no distinction between service providers established inside or outside of the EU. Thus, workers posted to Ireland from outside the EU have the same labour rights as workers posted from another Member States. However, workers who do not come from an EEA state (or from Switzerland) will require an employment permit to legally work in Ireland under the Employment Permits Acts 2003 and 2006.[153] The Government has also restricted access to the Irish labour market for nationals of Bulgaria and Romania (although this decision is to be assessed comprehensively before the end of 2011). Bulgarian and Romanian nationals require an employment permit to work in Ireland, but only for the first continuous twelve months of employment in the State. Applications for permits must be made by the employer or the foreign national employee; applications from recruitment agencies, agents, intermediaries, or companies who intend to outsource or subcontract the prospective employee to work in another company are not accepted.

LV

There was a transitional regime against Latvia for 7 years after accession to the EU with regard to free movement of workers, but there was no transitional period for provision of services. Even more there were provisions on free movement of services provided by Association agreement with Latvia.[154] Although case-law of the ECJ show that there were problems regarding enforcement of such right for some Eastern European countries[155] with regard to Latvia neither employers have complained, nor trade unions and SOLVIT centre have received any complaints on particular issue.

[152] http://www.siptu.ie/campaigns/siptuorganisingcampaigns/agencyworkers.

[153] See a guide to employment permits at http://www.citizensinformationboard.ie/publications/providers/booklets/entitlements_employmentrights/publications_entitlements_employmentrights20.html

[154] O*fficial Journal L 026 , 02/02/1998 P. 0003 - 0255*

[155] See, for example, C-268/98, Aldona Malgorzata Jany and Others v Staatssecretaris van Justice, *European Court reports 2001 Page I-08615*

Article 14(3) of the Labour Law formally requires application of the working conditions stated by the Article 3(1) (a-g) to all workers posted in Latvia irrespective of the nationality of the sending undertaking. However it is of doubt whether in practice workers posted by undertakings of non-Member States are effectively provided rights under Article 14(3) of the Labour Law (Article 3(1)(a-g) of the PWD).
With regard to posting by undertakings established in a non-Member State there is no clear regulation in the field of immigration law. Namely, immigration law does not explicitly recognize such situation. Third country postings do however occur in practice, especially from the neighbouring ex-Soviet Union countries. In such a case posted workers are granted temporary residency permits on the basis of Article 23(1)(6) of Immigration Law providing that residency permits by reason of employment are granted for period of employment but no longer than 5 years.

LT
There was a transitional regime for the free movement of workers adopted against the Republic of Lithuania with the longest period imposed by Germany, Austria – 7 years after accession in 2004. German and Austria also restricted the provision of services in specific sectors. [156]There is no evidence that during this transitional period there were problems with regard to the posting of workers. Temporary agency work was mentioned in LGPW in the way the directive deals with it, but this form of work is not explicitly regulated by national law. The law allowing the temporary agency work was adopted on 19 May 2011 and will be in force from 1 December 2011.

The shift in labour migration from free movement of workers to services or self-employed person was not noticed in Lithuania. The target countries for Lithuanian migrants were always Ireland and United Kingdom because of the language, liberal approach and flexibility of the labour market. Those countries lifted their restrictions very quickly allowing big immigration from Central and Eastern Europe, including Lithuania.

The act implementing the PWD (the LGPW) applies to both postings from the EU/EEA and third country postings. However, as regards postings from LT, it is restricted to posting to other Member States. More favourable treatment of undertakings established in a non-Member State is explicitly forbidden in Article 1 (1) LGPW. Workers from third countries may be posted to the territory of the Republic of Lithuania only if they have a special "work permit". The work permit may be issued by Labour Exchange Office (in analogues lengthy procedure as employment of third country nationals under contract of employment) in accordance with Regulation no A1-500 adopted by the Ministry of Social Security and Labour on 19 August 2009 (State Gazette, 2009, no. 98-4134

MT
As for free movement of workers, when Malta joined the EU in 2004 it was granted a safeguard clause as regards the free movement of workers. Until seven years after accession, Malta may retain its work permit system for nationals of other Member States

[156] Germany (construction including related branches, industrial cleaning, decoration works); Austria (Horticultural service activities, cutting, shaping and finishing of stone, manufacture of metal structures and parts of structures, construction, including related branches, security activities, industrial cleaning, home nursing, social work and activities without accommodations).See in particular http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:236:0836:0845:EN:PDF

provided permits are issued automatically. To date, the only restrictions imposed were on Bulgarian and Romanian nationals whose application must go through a screening process.[157] According to the Department of Employment and Industrial Relations no problems were encountered during the transitional period.

The Regulations implementing the PWD apply to all postings to MT, regardless of the country of origin of worker and employer. Nevertheless in 2011 the law was changed to introduce the Article 1(4) PWD into Maltese law.[158] Therefore the law now states the following "Undertakings established in a non-Member Sate shall not be given more favourable treatment than undertakings established in a Member State."

Workers who are habitually based within the EEA/Switzerland and who have an employment relationship with an employer in that country, but who are being seconded or posted for a stipulated period to Malta, shall be dispensed from the need of an employment license. Nevertheless, such works should file a notification letter within 24 hours prior to commencement of their employment in Malta. In all other cases non EU nationals require a work permit to work in Malta. Such work permits are issued to employers wishing to engage foreigners for a determined period and for a specific purpose, after it has been ascertained that every effort has been made to engage a suitable Maltese citizen. The work permit is only issued when the minimum wage provisions are abided by.

PT

The implementation measures are drafted in such a way that they make no distinction between Member States and non Member States. As a result the legal treatment is exactly the same regardless of whether Portuguese workers are posted in a Member State or a non Member State and the same applies to workers posted in Portugal. However when the workers are sent to Portugal by enterprises from third countries there are no exemptions from the rules on labour and residency permits.

SK

There were transitional regimes adopted against Slovak republic in respect to both free movement of workers and services. Transitional regime on free movement of services regarded posting of employees to the Germany and Austria in specific sectors. The relevant authorities did not provide any information regarding problems during the transitional regime.

The Slovak Labour Code regulates only situations in which the employees from another EU Member State are posted to the territory of the Slovak Republic and vice versa. Postings from and to third countries are not regulated by the PWD provisions, but by the Rome I Regulation. Third country posting does occur in practice: for example cases are known in which employees were posted from South Korea, India and Japan to the territory of Slovakia.

[157] These safeguards can only be applied up to the year 2011 and after this period, in the event of a disproportionate influx of EU workers, Malta may still seek a remedy, this time acting through the EU institutions, rather than unilaterally. This arrangement will apply indefinitely and will cover Malta's position at any time in the future in the event of possible difficulties relating to the movement of workers into Malta.

[158] Legal Notice 205 of 2011 – Posting of Workers in Malta (Amendment) Regulations 2011.

In general, according to Act No. 5/2004 Coll. on Employment Services and Act No. 48/2002 Coll. on the Residence of Foreigners[159], foreign employees (citizens from states other than EU Member State) are required to obtain a work permit and a resident permit before commencing work in the Slovak Republic. In addition, some foreigners need to acquire a visa before entering the territory of the Slovak Republic. However, there are some cases when the obligation to obtain a work permit and residence permit shall not apply. This involves e.g. employees providing supplies of goods or services or conducting installation on a commercial contract basis, or warranty and repair work, provided that employment in the Slovak Republic does not exceed seven consecutive calendar days or a total of 30 calendar days in a calendar year.

SI

A transitional period was adopted against the Republic of Slovenia, after its accession on 1st of May 2004. This period has not been fully used by some of the EU Member States which applied it at first. The neighbouring countries, especially the Republic of Austria, have not, however, taken place in this reduction, but rather persisted by it until the end. After the termination of described transitional period, there has been an increase in employment migration and posting to Austria and Germany. In the later case many workers from the construction sector are posted, whereas in the Republic of Austria there is more employment, especially in the Styria region. The employments are especially in the sector of car mechanics and health care.

As regards third country postings to Slovenia, the employer will have to, before performance of services in the Republic of Slovenia obtain working permits as well as act in accordance with special provisions in Articles 38-41 of the Work and Employment of Foreigners Act. An employer from a third country (foreign employer) may use the posting of workers to perform cross-border services, with or without market presence, in two instances[160]:

posting of workers on their account and under their direction, under a contract concluded with person, to whom the services are intended;

posting of his workers to an organizational unit with which he is market present in the Republic of Slovenia

Only workers, employed by such service provider for at least one year may be posted.[161] For the duration of the posting a foreign employer must ensure posted workers at least minimal rights, regarding working time, breaks, rests, night work, minimal annual leave, security and health and special protection of certain category of workers, as are determined in the Employment Relationship Act and collective agreements, valid in the whole territory of the Republic of Slovenia.

Such services may only be provided for limited period of time. For employers not present in the market in Slovenia the maximum duration is three months, to be extended in exceptional circumstances only with one more month. For foreign employers which are present in the market in the Republic of Slovenia work permits may be issued for

[159]Act No. 48/2002 Coll. on the Residence of Foreigners and amending particular laws as amended, adopted on the 13.12. 2001, and entered into force as of 1.4.2002. In respect to legal nature, the act has a character of a law and was published in the official journal (Collection of Laws) no. 23/2002, page 518 on the 2.2.2002.

[160] Article 38, paragraph 2 of the Work and Employment of Foreigners Act.

[161] Paragraph 3 of the Article 38 of the Work and Employment of Foreigners Act.

period of 1 year.[162] The posted worker may only be posted again after an interim period.[163] Posting within a group of companies is only allowed for certain levels of employment: managers, leaders of organizational units, with special knowledge etc.)[164]

For employment and work in the Republic of Slovenia working permit is not necessary and the Work and Employment of Foreigners Act is not applicable for foreigners, members of ship crews, airplane crews or perform transports by road or rail and are employed by foreign employer (Article 5, paragraph 2, point 6 of the Work and Employment of Foreigners Act). These workers, either sent to or from the Republic of Slovenia will normally have their place of work in their employment contract determined differently as workers as such and will not be regarded as posted workers. Rather special provisions will apply, for example: in the Employment Relationship Act special provisions regarding employment contract in the case of sea transport are determined (Articles 218-223).

ES
The Additional Provision Fourth Act 45/1999 states that the rules of the Act shall apply to undertakings established in States not members of the European Union under the provisions of international conventions. However, third country posting does not occur in practice.

Articles 63 and following of the Royal Decree 2393/2004, 30th December -by reference of article 43 of Organic Law 4/2000, of 11th January, on the rights and freedoms of foreigners in Spain and their social integration-, set up a specific authorization of residence and work for posted workers. These authorizations shall be granted when the following conditions are met:

- The residence of the worker in the country of origin should be stable and regular.
- The occupation of the posted worker in the country of origin must be habitual, he must have been spent on such activity for at least a year and he must have been in the service of such an undertaking at least nine months.
- The company that moves the worker must ensure that the posted workers will enjoy working conditions that derive from Act 45/1999.

Nationals of third States which are displaced by companies established in a Member State do not need a work permit, but only a residence visa. This rule is not in the Law 45/1999. It is an interpretation of the Labour Ministry that has not been published officially.

## Comparative remarks and conclusions

[162] Unless an international agreement set a longer period.
[163] The suspension of the posting should last as long as the validity of working permit, but not more than 6 months (Article 40 of the *Work and Employment of Foreigners Act*).
[164] Exceptionally, if service is of special importance for the state, the limitation may be ignored – this is decided by the Ministry of Labour (Article 38, paragraph 6 of the *Work and Employment of Foreigners Act*). The Ministry of Labour, may, after obtaining the opinion from Ministry of Economy, competent confederation or representative union on the level of the state, also prohibit or limit cross-border performance of services, where there is no reciprocity, if further performance of services would have negative influence on the employment level, an effect on competition of domestic providers in foreign markets or would have negative consequences on the labour market (Article 38, paragraph 7 of the *Work and Employment of Foreigners Act*).

The transitional regime permitted Member States to treat workers from the designated new states as third-country nationals. This basically means that those workers needed (and in some instances still need) permits before being permitted to enter the labour market of the host state. The permit requirement in turn made it possible for the host state to impose further requirements, for example with regard to housing and/or employment conditions, in conformity with their migration law regimes governing foreign labour from outside the EU. These requirements address concerns which also arise in regard to mobility outside the transitional period. Otherwise, no specific extensions of the protection offered were reported.

In some countries the transitional period offered political and legal opportunities to address the problems associated with posting of workers and/or migration more systematically. This was reported in the previous study from Belgium and the Netherlands. In the current set of countries the transitional period seems not to have led to such debates and law reforms. The Irish report rather refers to two specific cases as the major incentives for law reform (see section 3.4).

In countries which imposed a transitional period for free movement of workers from the new Member States, it was often suggested that this would create an incentive for workers to 'switch' to other channels for labour migration to the old Member States, such as through the free movement of services (as a posted worker or as 'posted' self-employed or through the freedom of establishment (as self-employed). To different degrees, the national reports do indeed mention suspected or demonstrated shifts in migration modalities from regular labour migration to undeclared work, true or bogus self-employment and posting of workers.[165] In the previous study, a particularly problematic point concerned the status of workers from the EU8 /EU2 countries who are posted to EU15 Member States by TWAs. The national reports revealed that a major conflict has arisen around this issue: Several Member States (Belgium, Denmark, Luxembourg and the Netherlands) consider those 'posted' agency workers as subject to the restrictions on the free movement of workers – a view that is strongly opposed by other Member States (e.g. Romania) and the EC. In its judgment of 10 February 2011 the ECJ sided with the former and deemed the Dutch transitional regime at this point to be in conformity with EU law.[166] This conflict again highlights the problematic position of TWAs in the context of cross-border posting.[167] This special status of posting through TWAs is mirrored in the rules on third country posting and immigration of IE and SI. In IE third country TWA workers must apply for work permits themselves. Applications from recruitment agencies, agents, intermediaries, or companies who intend to outsource or subcontract the prospective employee to work in another company are not accepted. In SI posting through third country TWA's is only possible using the extended procedure for migrant workers.

In the previous report we reported on the fact that several countries have adopted a sectoral approach to the transitional regime, only imposing it in specific sectors (e.g. the restrictions on posting of workers in Germany) or lifting parts of it in some sectors

[165] In the previous report such shifts were reported from Romania, the Netherlands, Denmark, Italy, France. In the current study, BG, HU and IE address this issue.
[166] C-307-309/09, Vicoplus, not yet reported. Conclusion AG delivered on 9 September 2010.
[167] The French report acknowledges that indirect obstacles for TWAs from the EU8 and EU2 may have been caused by the French requirement (also applied in Luxembourg) that posted workers should have a certain period of previous employment with the posting firm before being posted.

while retaining it in others (Belgium/France/Italy/the Netherlands). The Italian report, for example, mentions agriculture, tourism, construction, and the food processing industry. France has relaxed requirements in such sectors as construction, agriculture, tourism and catering. Due to fact that the current study covers mainly sending states, often themselves subject to the transitional regime, the national reports do not provide much information in this respect. Of the host states covered by the study, only AT imposed sectoral restrictions on the free provision of services against the EU-8 and EU-2.

In Austria, also the immigration rules for third country employment have a sectoral element: the lighter procedure for third country postings (as opposed to migration) does not apply to postings in the construction sector. Such specific procedures for third country postings exist not only in AT, but also in BG, CY, EL, HU, SK, SI, and ES. These special regimes differ widely in scope, from very restricted in HU to quite extensive in SI. Of the countries applying a special regime, AT, BG, HU, SK and SI apply strict temporal restrictions. These range from 15 days for installation and repair work in HU to 1 year for intra-company transfers in SI. Several countries specify the purpose of the postings: BG law demands that the posted worker comes to BG to perform a specific concrete task; EL and HU only seem to allow postings associated with the delivery of goods (installation, repair under warranty etc). SI allows both the performance of a service and intra-company transfers, but seems to exclude postings though TWAs and other types of provision of manpower. In some instances (EL, SI) posting is restricted to specialized personnel. ES and SI have requirements as to the length of previous employment of the posted worker. Finally EL has a specific requirement as to the payment of costs.

Several of the requirements for applying a special procedure for third country postings also figure in the debate on posting within the EU/EEA. We mention here the possibility to impose a time limit to posting, the requirement that the posting should be for a specific task, the distinction between provision of services and intra-company transfers, the problematic position of provision of manpower and the payment of the costs of expatriation. The experience with these requirements in third country posting might be used as information and inspiration in the discussion on EU/EEA posting.

## *3.4 CASES*

### Purpose of this overview

In their reports the national experts have given an overview of contentious cases, both in court and in the media. There were three main aims to this exercise:

- To identify trends as to the countries and sectors in which problems are reported.
- To identify whether the contentious cases concern aspects of posting or rather other forms of labour mobility.
- To identify general trends as to the application and enforcement of the PWD.

Host states were specifically asked for cases on workers posted to their country, sending states were asked to focus on problems reported in the context of posting from their country.

Annex I contains a full list of cases reported in the media, with references. Annex II contains a list of court cases related to the posting of workers. The specific aspects of enforcement by bringing cases to court are dealt with in greater detail in section 4.5.

### Overview of national reports

*Host states*

AT
There are very few problematic cases of posted workers which have been examined by a larger circle than legal experts. One major problem is that of foreign subcontractors present in the construction sector who tender at low prices that can only be achieved through wage and social dumping. In the middle of 2005, for example, the media reported on a particularly disgusting case of posted workers who were the victims of wage and social dumping, which was dealt with in a parliamentary enquiry (Enquiry 3263/J, 22nd Legislative Period, <http://www.parlament.gv.at/PAKT/VHG/XXII/J/J_03263/fname_045886.pdf>): Up to some 150 assembly workers from South Korea and Indonesia were posted by an Indonesian employer to Austria and for whom Assignment Permits had been granted. In the course of an official check based on details from the ÖGB it was established that the weekly working hours of the workers were 62 hours at an average hourly wage of € 1.30. The workers lived herded together in an old factory hall and the condition of the kitchen, dormitory and toilet facilities was catastrophic.

In the eyes of the media but also the interest groups of the workers, there are fewer cases of posted workers than cases of real wage dumping by Austrian employers of their own workers. Fake self-employment is also an obvious issue (for example in the case of 1,138 workers checked by the BUAK, 136 were identified as fake self-employed) but this is not regarded as a particular problem related to posting. During the transition period an increase in trade licenses in Austria for employers with headquarters in EU-8 countries was noted. In regard to fake self-employment, the differing trade regulations and deviations in the definition of worker were identified. In the

eyes of the Austrian authorities fake self-employment can be confirmed while according to foreign legislation this is not the case.

Frequently in the case of posted workers wage and social dumping is identified through the fact that the workers are for example officially hired for only 30 hours a week (with pay and contributions to social security for only that amount of hours) while they work 40 hours or more. Because of the great wage gap between Austria and several sending states the Austrian wage for 30 hours might be more than the foreign wage for 50 hours. In that case the posted workers will not object to the construction. Posted workers have little interest in leisure time when posted to Austria for only a few weeks which encourage them to work overtime which is either remunerated only in part or not at all.

The issue of the maximum duration of a posting was the subject of a court case in 2005 (Supreme Court 28 November 2005, 9 ObA 150/05g). The case concerned a posting from Croatia to Austria which had lasted more than 10 years.

CY
In Cyprus, the only ambiguous case of posting to date involved the banking sector, specifically the posting of two employees from the parent company, the National Bank of Greece, to the National Bank of Greece (Cyprus) Ltd in September 2005. This case in fact sparked a series of strikes, along with the split of the Cyprus Union of Bank Employees (ETYK), until then the only trade union organisation in the banking sector, and the establishment of the Union of National Bank of Greece Employees (Cyprus) (SYPETE). This brought the case into the forefront of publicity by the mass media, particularly the printed press.

As regards more specifically the labour dispute between the National Bank of Greece (Cyprus) and the trade union ETYK, the point at issue referred to ETYK's failure to approve the postings. ETYK argued that the practice of approving postings of employees from a bank located either in Cyprus or in another member state, or from a member state to the bank located in Cyprus, constitutes part of the current sectoral collective labour agreement which is binding on the National Bank of Greece (Cyprus). ETYK refused the approval, making the posting irregular. Points at issue in the legal debate were the applicability of the PWD provisions to the case at hand, the binding character of the collective agreement and the compatibility of the requirement for special permission for each and every posting with EU law (and in particular the fundamental freedoms).
The Ministry's position, as made known to ETYK and the management of the National Bank of Greece (Cyprus) in August 2006 can be essentially summarised in the two following points:

- The law implementing the PWD (Law 137(I)/2002) does not apply in the case of the two employees of the parent company of the National Bank of Greece that were employed at the National Greek of Greece (Cyprus) for a number of years.
- This particular labour dispute is mainly labour-related, in the sense that the two employees were employed at the National Greek of Greece (Cyprus) for a number of years, and on the basis of a practice recognised by the employers' side. The Industrial Relations Department determined that this practice had clearly been violated by the employers' side and thus any continuation of the employment of the two employees would have been irregular and needed to be terminated.

In the expert opinion of the Attorney General of the Republic dated 29 May 2007, the basic questions arising was whether Community law:

- allows the implementation of a practice on the basis of which ETYK would have to approve every posting of an employee from a bank located in Cyprus or another member state to a bank located in Cyprus, or
- grants banks the right to post their employees to each other without being subject to approval by ETYK.

In the above context, referring to a broad web of Community provisions and cases of the European Court of Justice[168], the Attorney General judged that the position of the Ministry, according to which the employment of the two posted employees of the National Bank of Greece to the National Bank of Greece (Cyprus) was characterised as irregular and subject to termination, did not reflect the applicable law, and more particularly did not take account of the right in this regard granted to both banks, by Article 49 of the Treaty Establishing the European Community.
However, as regards the position of ETYK, the Attorney General pointed out that the relevant provisions of the sectoral collective labour agreements, according to which part-time and seasonal work, as well as outsourcing, are regulated restrictively, do not constitute a restriction of the right to post employees between banks. Hence the crucial question is whether the practice of approval of posted employees by ETYK has become, in Cyprus law, part of the collective labour agreements in force. In the expert opinion of the Attorney General, none of Cyprus's laws dealing with collective agreements makes provision for such a practice to be part of collective labour agreements, so as to be binding on the National Bank of Greece (Cyprus)[169].

No court cases are reported in Cyprus.

FI
The Finnish Labour Court (Työtuomioistuin) gave a decision in 2009[170] which addressed the question of the application of a Finnish collective agreement in a case where Finnish and Spanish aircraft companies had made a wet lease contract. By virtue of this contract, the Spanish company had hired an aeroplane with personnel to the Finnish company. The personnel had employment contracts with the Spanish company and Spanish legislation and collective agreement were applied to the personnel

[168] Specifically the expert opinion makes reference to the following provisions/decisions of the ECJ:
- Case C-243/01 criminal proceedings against Piergiorgio Gambelli and others, ruling of the ECJ dated 6/11/2003, recitals 51, 55 and 58.
- Case C-65/05 Commission of the European Communities v Hellenic Republic, ruling of the ECJ dated 26/10/2006, recital 48.
- Case C-42/02 proceedings brought by Diana Elisabeth Lindman, ruling of the ECJ dated 13/11/2003, recital 20.
- Recitals (13) and (14) of the Preamble and the substantive provisions of Directive 96/71/EC, in particular Article 1, paragraph 3, point b.
- Case C-118/00 Gervais Larsy v. INASTI, ruling dated 28/6/2001, recitals 52-53.

[169] The Attorney General makes specific reference to the following laws:
- the 1966 Law ratifying ILO Convention 98 of 1949 on the Implementation of the Principles of the Right to Organise and Collective Bargaining,
- the 2005 Law establishing a general framework for employee information and consultation incorporation Directive 2002/14/EC, and
- the 2002 and 2003 Laws on the establishment of a European Works Council, incorporating Directives 94/45/EC and 97/74/EC.

[170] Työtuomioistuin TT:2009-90 (Ään.).

of the aeroplane. According to the Labour Court, the contract was an example of subcontracting as meant in the Finnish collective agreement. This collective agreement required a term under which a subcontractor will follow the collective agreement and Finnish labour and social legislation. However, according to the Labour Court, the Finnish company had no obligation to include a term of applying the Finnish collective agreement in question and Finnish labour and social legislation in the wet lease contract. The Court held that such a term would have meant such a restriction to the free provision of services which is against EC 49 Article. The entity of the terms of employment would have gone beyond the requirements provided by the Posted Workers Act and the Directive. The Court thus considered the terms of employment from the point of view of the application of the Posted Workers Act.

Main problems concerning posted workers' position in the labour market have related to the weakness of their terms of employment. According to the information provided by the supervision authorities, the posted workers seldom demand their rights. The workers are pleased with their terms and conditions of employment even if they were low. Court cases concerning posted workers have been rare.

IE

In Ireland there are two cases involving a larger group of workers that attracted a lot of public attention. Added to this are three individual cases: an employment tribunal decision on the scope of protection under the implementation of the PWD, a criminal case involving a foreign contractor and a decision on non-discrimination law by the Equality Tribunal .

The Gama case involved the posting of Turkish workers by a parent Turkish company (Gama Endustri Tesisleri Imalat Montaj A.S.) to its Irish Subsidiary (Gama Construction Ireland Ltd.) to work on a number of *public* projects. In February 2005, it came to light that Gama was paying the Turkish workers rates far below the REA minimum rate and, indeed, below the national minimum wage. These workers were accommodated off-site by their employers and spoke little or no English. Although the majority of the workers were members of *Irish* trade unions, it was Socialist Party TD (Member of Parliament), Joe Higgins, who brought the issue to public attention. Following Higgins' claims the (what is now) DJEI began an immediate investigation. The inspection uncovered a complex tale of destroyed work records and workers' money being paid, in some cases without their knowledge, into Irish, Turkish and Dutch bank accounts. The inspectors found that Gama did pay workers less than the minimum construction rate, that workers not covered by the REA (caterers, for example) were paid less than the national minimum wage, and that, while work records appeared to have been compiled on an informal basis, they had been destroyed. It also came to light that Gama had benefited substantially from a scheme whereby exemption from payment of social insurance for a period not exceeding 52 weeks can be granted in respect of the temporary employment of people who are not ordinarily resident in the state. Of the 1867 workers had been covered by the scheme since it began in 2003, 1324 had been employed by Gama.

A remarkable feature of the Gama case was the fact that the company had a fully unionised workforce and was a member of the Construction Industry Federation (CIF). The unions became actively and visibly involved in the dispute as the facts came to light, particularly the State's largest union, the Services, Industrial, Professional and

Technical Union (SIPTU) which adopted a fuller role in representation and negotiation on behalf of the 600 workers involved. The workers also took industrial action in pursuit of their outstanding monies. The Gama dispute, which eventually involved three trade unions and a protracted series of unofficial and official industrial action, was finally resolved through the Labour Relations Commission (LRC; State's the third-party mediation and conciliation service which has a key role in dispute resolution involving groups of workers) and the Labour Court[171] in August 2005. At this point almost all of the original 600 workers had returned to Turkey, with only 83 left in Ireland. On foot of a Labour Court Recommendation,[172] Gama agreed to pay these employees €8,000 per year of service to cover overtime worked. The Turkish employees also received the monies from the Dutch bank accounts and were also compensated for underpayments. In February 2011, the Irish High Court, (applying the Brussels Regulations 44/2001), ruled that a claim on behalf of 491 other, named Turkish workers against Gama Ireland, for € 40.3 million in unpaid wages, should be heard in Ireland rather than Turkey, as the company had contended.[173]

Whilst the Gama case attracted significant political and media attention, it was the dispute at Irish Ferries in late 2005 that really impacted on public consciousness and introduced concepts such as migrant worker exploitation, social dumping and the race to the bottom into general discourse. In September 2005, Irish Ferries announced plans to re-flag all of its ships to Cyprus. The company wrote to 543 Irish staff offering them a choice between voluntary redundancy and continued employment at a lower rate of pay. Those who accepted the redundancy package were to be replaced by temporary agency workers, primarily from Latvia, who were to be paid €3.57 per hour, less than half the Irish minimum wage. The company refused to attend talks at the Labour Court, despite calls from Government to do so and, as a result, the ICTU decided to postpone the decision to enter social partnership talks on a new national agreement, which were due to commence in November 2005. The company subsequently refused to accept two Labour Court Recommendations that Irish workers who wished to remain with the company should do so on their existing terms and conditions.[174] Subsequently, the dispute escalated dramatically when the company began bringing agency workers onto the ferries accompanied by security personnel. In December 2005, more than 100,000 people took part in protests around the country in support of Irish Ferries workers, in the largest national demonstration in over 20 years.

The dispute was finally resolved (through talks mediated by the LRC) in mid-December. The agreement reached allowed Irish Ferries to proceed with the outsourcing of labour, replacing more than 500 seafarers with cheaper migrant labour hired through an employment agency. However, all new crew were to be paid, at least, the Irish minimum wage and work fewer hours than originally proposed. The terms and conditions of existing staff were protected, and all crew members had the right to join a trade union. Just a year later, Irish cabin crew accounted for a mere 1% of the work-

[171] Together, the LRC and the Labour Court have a duty to promote harmonious industrial relations in Ireland; they are equivalent to the UK's ACAS service in this regard, but deal generally with collective disputes. Individuals looking for advice and information on employment rights can contact NERA.
[172] *Gama Endustri v SIPTU* (LCR 18214/2005).
[173] *Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS* (High Court, February 25 2011; not yet reported).
[174] *Irish Ferries v SIPTU* (LCR 18389/2005); *Irish Ferries v SUI* (LCR 18390/2005).

force on board Irish Ferries' ships. None of the predominantly Latvian, Lithuanian and Polish staff had joined a union. The agreement expired in 2008, at which point, Irish Ferries was free to pay the agency workers whatever rates it chose. Irish Ferries' ships currently sail under the Cypriot flag and are not bound by Irish employment legislation.

These two disputes brought the issues of posted workers and migrant agency work onto the national stage in Ireland for the first time. In response to the disputes, the social partners agreed in the national partnership agreement, *Towards 2016*, to the establishment of a new Labour Inspectorate, the National Employment Rights Authority (NERA) and a detailed package of measures relating to employment rights compliance, contained in the *Employment Law Compliance Bill 2008* (which has not yet been passed into law).[175] A further commitment in *Towards 2016* was that the number of labour inspectors would be trebled from 30 to 90 (because of the moratorium on recruitment and promotion in the public service announced in 2009, it appears this commitment has not been met). As a direct response to the threat of an 'Irish Ferries on Land' situation, the *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act* was enacted in May 2007. The Act provides that a dismissal by reason of compulsory collective redundancy shall not be deemed a redundancy, where the dismissed employees are replaced by new workers effectively doing the same job and performing the same tasks and where the new workers' terms and conditions of employment are materially inferior ('exceptional collective redundancies'; section 4).

*Taylor v David Lloyd (UD2366/2009)* - Employment Appeals Tribunal
The claimant in this case started work in the UK with the respondent company in 1998. Some years later, he was seconded to its Irish based outlet. The general terms of the arrangement between the parties were set out in a letter dated January 31, 2003. The letter stated that 'the current terms and conditions within (your) contract will remain, except where legislation relating to Ireland, or the local area, or any overriding European legislation means we are unable to do so'. The claimant moved to Ireland during 2003, remaining until at least July 2009, at which stage his employment was terminated. Taylor considered the dismissal to be unfair under Irish law and approached the Employment Appeals Tribunal (a non-judicial body that can grant compliance and compensation orders upon the request of the workers).

The Tribunal discussed *Directive 96/71*, which it pointed out 'hoped to apply minimum terms and conditions into the working conditions of employees being moved from place to place within the EU body'. It noted that the Directive is particularly concerned with matters such as minimum pay rates, health and safety, the employment of pregnant women and equality and non-discrimination (Article 3). The Tribunal decided that the claimant *could* be a 'posted worker' within the meaning of the Directive but also could be a person in the State under a contract of employment or a person whose contract of employment provides for him being employed in the State. In any of these circumstances the Claimant fell within the parameter of section 20 of the *Protection of Employees (Part-Time) Work Act 2001* and, so, the claimant's application was correctly within the jurisdiction of the Tribunal.
The final comments of the Tribunal are worth quoting in full:

[175] Available at www.taoiseach.gov.ie.

'The Respondent has sought to limit the meaning of section 20 whereby there can be no doubt that *all the employment protection legislation* on the statute book in the State was intended to apply to "posted workers" (and by extension to persons employed here under contracts of employment) in the same way as it applies to Irish workers. The *full range of protective legislation* must include the unfair dismissals legislation under which the Claimant brings this claim to the Employment Appeals Tribunal. *The Respondent's suggestion that the legislative intended to only to deal with the narrow range of issues referred to in Article 3 and intended further to specifically exclude Acts such as the Unfair Dismissals Acts is not accepted by the Tribunal.*

For example a posted female worker unfairly dismissed by reason of being pregnant is clearly protected under section 20 (enacting the Directive) and her recourse is to have her issue heard before the Employment Appeals Tribunal under the Unfair Dismissals Acts. Any interpretation of Section 20 as it applies to "posted workers" includes the full range of legislation. In addition, therefore, the worker here under a contract of employment must also *have the full range of legislation applicable to the workings of his contract of employment in this state'*.

In 2011, the National Employment Rights Authority (NERA) successfully prosecuted a Portuguese subcontractor for falsifying employment records in the Circuit Court, one of the first ever labour law prosecutions of a construction contractor based outside Ireland.[176] It cannot be conclusively determined from the information available if the workers were posted to Ireland, but this appears to have been the case. The subcontractor, RAC Contractors, was actually comprised of three Portuguese companies and was engaged as subcontractor on a motorway construction project undertaken by the local authority in Limerick. NERA brought the case after an inspection of the company's records in July 2008. One of the factors which flagged a risk of non-compliance in the case was that all of the documentation provided by the company (including the workers' terms and conditions of employment) was in *English*, despite the fact that virtually none of the workers involved spoke the language. NERA flew in six Portuguese workers (from a number of different countries in which they were by now based) to give evidence that their working day had, in fact, been considerably longer than the company's records suggested. Each of the three firms comprising RAC was fined €1,000 (the maximum fine in these circumstance is €2,500). It appears that the company is going to appeal the verdict. It should be noted that the workers in question do not benefit from the criminal prosecution, but the media have reported that a number of RAC's workers are understood to be pursuing cases for unpaid wages as a result of the NERA investigation.

Finally an interesting case concerns the right of workers to be informed of the health and safety risks in the work place in a language they can understand. In 58 named complainants v. Goode Concrete the Equality Tribunal found that the complainants were treated less favourably on the grounds of race when this language requirement is

[176] The Circuit Court is one of the courts of 'local and limited' jurisdiction under the Irish Constitution. Essentially, it hears cases in particular localities (there are eight geographical circuits in Ireland) that are provided for by statute. The Circuit Court hears most criminal labour law prosecutions at first instance (other than relatively minor offences, which are prosecuted in the District Court). Unfortunately, decisions of the Circuit Court are rarely published. As a result the information relied on in relation to this case is provided by the national informants and by media coverage; see, for example, 'Construction Firm Fined for Falsifying Work Records' *Irish Times*, 7 February 2011.

not abided by. The case is currently under appeal. While there is much case law on foreign nationals using the complaint and redress procedures, it is difficult to establish whether any of these are related to posted workers.

*Sending states*

BG
There aren't debates in the public or political arena about contentious examples referred to situations and conflicts involving the treatment of workers from Bulgaria in other Member States. Some cases were discussed in the specialized bodies – e.g. the Ministry of Labour and Social Policy, the Labour inspectorate, the Employment Agency. The cases mainly related to the conditions of work and living of Bulgarian workers in another Member State – e.g. Ireland, and were not connected to posting. The public and the political actors are not involved in this issue. There still aren't any court cases related to the treatment of Bulgarian workers posted abroad.

CZ
There is no case law in the Czech Republic on application and implementation of the PWD so far or the posting of workers in general. Relevant written documents confine themselves to quoting only ECJ judgments.
Are there any cases reported in practice by the stakeholders and/or discussed in the media.

EL
No examples could be found in which the posting of workers from Greece to other member states was discussed in the public or political arena. There are no data concerning recourse to the Courts by posted workers. Apparently, the small number of posted worker does not allow this phenomenon to be recorded.

However, the Greek Inspectorate of Labour has intervened as a mediator between a company and the Greek Confederation of Workers (GSEE) in a case of posting to Greece. The case concerned 20 Belarusian and Lithuanian workers posted to the Greek company Hellenic Petroleum by a Belarusian company in order to provide services at lower level of pay. As the employees did not possess the required professional licenses, their posting was suspended.
The Greek Inspectorate also intervened in a case of fictitious posting in 2010. A Cypriot company had hired workers in order to post them to Greek hotels. In this way the company wanted to profit from lower social security charges. The Greek Inspectorate concluded that the employees had not habitually carried out their work in Cyprus.

HU
Few data are available on this issue. First, because there are no statistics on posted employees employed in Hungary, and only the number of E101/A1 forms issued provides some guidance concerning the employees posted from Hungary. Secondly, it is difficult to monitor the relevant cases in the court statistics, because they are usually recorded under some other heading (e.g. wage claim etc.).
The only issue recurrently covered in the media was that of the transitional arrangements, but even there the attention of the domestic media focused not on persons posted abroad in the framework of service provision, but rather on persons engaged/desiring to be engaged in work in other Member States of the EU.

One issue provided substantial media coverage was the so-called SoKo Pannonia, SoKo Bunda case, which is in the focus of attention to this day. In 2004, Hungarian Firms suffered from two successive control campaigns of the German labour inspectorates. The so-called SoKo Pannonia and the SoKo Bunda in 2005 – as the campaigns were referred to - were based on the fact that E101 forms and paid insurance in Hungary were not sufficient for lawful activity in Germany, according to some peculiarity of the German law. Several Hungarian firms, out of the 250-300 Hungarian firms active in Germany at the time (48 mainly active in construction) were involved in the action and had to face prosecution.[177] The disputes ended with a series of court rulings stating that the firms in question were not acting unlawfully. Nevertheless, criminal procedures resulted in bankruptcy of several firms.[178] As things are, some of the undertakings concerned plan to bring an action against the Hungarian state on the ground that it failed to protect them against the German actions.

According to another piece of news dating from 2006, an Irish trade union initiated an investigation of the salaries of Hungarian workers employed at the Dublin Spencer Dock construction works: the builders worked 69 hours a week for less than one third of the statutory minimum wage. The implementation of this Irish public investment was awarded to the company John Sisk & Son, which transferred the task to an Austrian company, Konhausner, and it went through them to subcontractor *Csaba Boros*. The Hungarian employer paid around EUR 4.50 hourly wage in cash, without filling any official papers, whereas the standard set for the construction industry is around EUR15.[179]

Another case that placed posted (hired-out) employees into the focus was the strike called by Hungarian airport security employees in December 2008. At that time Budapest Airport called in and employed Greek workers in order to ensure the operation of the airport. In April 2011 the Hungarian court of second instance concurred with the verdict handed down by the court of first instance which termed the procedure followed by Budapest Airport as unlawful. However, the case was not about the rule on posting workers in the framework of providing services, rather about how to interpret the currently valid Hungarian law on strikes.[180]

According to the 2010 report on the operation of the SOLVIT Centre in 2010, the Centre received 75 registered inquiries. The experiences gained since 2006 indicate that the majority of the cases are complaints related to social security. The next large categories include the recognition of vocational qualifications and cases of EU citizens and their third-country family members related to entry, stay and permanent residence. Compared to those, there were few, or even a negligible number of cases related to the freedom of services.

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[177] Eurofound study on Posting of workers in Hungary, http://www.eurofound.europa.eu/eiro/studies/tn0908038s/hu0908039q.htm.
[178] Eurofound study on Posting of workers in Hungary, see previous footnote.
[179] http://www.opendemocracy.net/democracy-europe_constitution/globalisation_3378.jsp, http://ec.europa.eu/enlargement/pdf/5th_enlargement/facts_figures/20065_en.pdf (Footnote 21, p.65).
[180] It should be noted that Budapest Airport still does not accept the arguments set forth by the court, whereby the employment of the Greek workers was realized explicitly to replace the workers on strike, and upholds that the Greek workers were employed in a full-time status, in a manner allowed by the frameworks set down in the laws.

A spokesperson confirmed the absence of cases concerning the PWD. To date almost all posting cases stemmed from the fact that Hungarian employees tried to use cross-border posting as a way to take a job in Member States still applying limitations on their labour market. The last case was related to the hiring-out-of-workers type of posting, in relation to which the decision of the European Court of Justice in cases C-307/09 and C-309/09 created a new situation by permitting the Member States applying a transitional period to use limitations also in the case of the hiring-out of workers, which falls within the scope of the Directive.
One of the successfully resolved cases published on the SOLVIT website affected compliance with the provisions of the Posting Directive:
"A Hungarian company intended to perform construction work in the Netherlands. However, pursuant to the Dutch legal regulations the employees of the company needed a work permit in order to work in the Netherlands. Pursuant to the Treaty of Accession the freedom of services applies between Hungary and the Netherlands, and therefore the Netherlands would not have had the right to set this requirement. The permit procedure lasted for five weeks, which caused a delay in the commencement of the work at the time agreed in the agreement. It was revealed that the Dutch authorities continued to apply the rules of individual work permits to the case. As a result of the intervention of the Dutch SOLVIT Centre, the Dutch Government approved a new legal regulation, according to which registration was introduced for employment related to the supply of services. Therefore there is no longer any need for individual permits in relation to such type of employment."

LV
There has been no discussion in political arena on posting of workers. Even Laval case where Latvian company was involved was not widely discussed in Latvia. Such discussion was concerned only from the perspective of business interests of free movement of services not from the perspective of the rights of posted workers.
Since there is no publicly accessible data base on judgments in civil cases the author of the national report was unable to find any case (judgment) on posting of workers. Interviewed trade unions and administrative authorities could not mention any case on this matter as well except one where the first court proceedings were scheduled on 5 July 2011. In this particular case a Latvian employer – construction enterprise refused to the minimum pay as defined by the generally applicable collective agreement for Norwegian construction sector to Latvian workers posted in Norway. Even before court the employer claimed that it has to provide the pay agreed in employment agreement and minimum pay defined at host Member State has nothing to do in this case. In other words particular case demonstrated total lack of knowledge of employers on legal regime applicable to posted workers.[181]

LT
No discussions in the public or political arena were registered on the treatment of workers from Lithuania. The level of working conditions in the most Member States is much higher than in LT, therefore there is no frustration about the level of guarantees for Lithuanians in the host state. A very few discussions in the public on brain draining from Lithuania revealed that there is no general perception about the differ-

[181]The court session of 5 July 2011 was postponed to 16 September 2011 on account of late submission of documents on the minimum salary provided by Norwegian collective agreements and on the fact that it is generally applicable (source, lawyer of Latvia Trade Union of Construction Workers (25 July 2011).

ences between free movement of workers and posting of workers or movement of self-employed. Illegal work cases have won more public attention. There are a few cases concerning Rumanian and Chinese workers who were invited to conclude the fixed-term contract of employment with one Lithuanian company as construction workers but than, after construction works had been frozen because of crisis, were transferred to another Lithuanian employer to work as simple workers in the chicken farm.

In cases involving the metal sector (Belgium) and the construction sector (Norway) the Lithuanian State Labour Inspectorate was asked to provide information about particular working condition in particular enterprises. No breaches were established by Lithuanian authorities. This fact that a low minimum wage is compensated by a high entitlement to per diem allowances in case of business travel seems to play a role here.
Statistics from the State Labour Inspectorate showed that in 2010 there were 28 complaints on the non-compliance with LT implementation of the PWD registered, mostly in Vilnius. 16 complaints were found reasonable, 6 complaints partially reasonable and 6 unreasonable. But only in two cases administrative sanctions were applied. The majority of cases were dealing with application of statutory minimum guarantees to posted workers providing services. Only one case concerned posting of workers of temporary agency and no cases of secondment.
Some State Labour Inspectors reported on cases of third country nationals (from Uzbekistan, Russia, Belarus and other former countries of Soviet Union) which are posted to Lithuania by Latvian companies in the gastronomies sector. Lithuanian companies sometimes cannot simply employ those nationals directly due to strict requirements of employment of third country nationals. The solution which is popular to use in this case is the posting of workers from Latvia. The Inspectors have no legal tools to define and to check whether this posting is indeed a temporary one.

The courts have not been dealing with classical cases of posting much. There is only one case reported which has specific relevance for the interpretation of the provisions on posting. Case no. 3K-3-449/2009 was decided on 22 September 2009. The question put before the court concerned unpaid per diem allowances. In the decision the court made a distinction between a business trip and a posting under the LT law implementing the PWD. According to the court, if the employee is sent abroad to perform services the uniform minimum standards established by the PWD shall apply. If the duration of the posting exceeds 30 days, the LT employee shall be entitled to the local foreign minimum wage and the fulfilment by the employer of this obligation shall be checked by the LT courts ex officio.

The few other relevant court cases did not concern the guarantees provided by labour law for workers but rather other subjects. One of the cases on posting is a taxation case. The dispute in the Commission on Tax Disputes under the Government of Lithuania[182] concerned the problem of tax liability of Swedish company for provided works in the Lithuania. The Swedish company has posted its workers (some of them were of Bulgarian nationality) to provided services of repair and painting of ships as well as related consultancy services for a Lithuanian company. The question whether the foreign entity could be considered to be acting through a permanent establishment

[182] The Resolution of Tax Dispute Commission of 2 October 2009 in case no. S-299(7-251/2009).

in LT was answered after examination of the nature of the work provided by the workers of Swedish company. The commission posed no additional requirements as to relationship between the Swedish company and the Bulgarian workers. The decision of the Commission concerned only taxation issues but it has examined some labour law issues without going into much debate on one essential problem – whether the temporary work in principle was allowed in Lithuania at that time.

MT
No cases involving posted workers were registered in Court.
Malta's two largest Unions: The General Workers Union (GWU) and the Union of United Workers (Union Haddiema Maqghudin, UHM) expressed their concern about the ECJ ruling on the Rüffert case. The general secretary of the GWU stated in an article published in May 2008, that it was still unclear what the impact of this ruling would be on the Maltese labour market, especially in view of the lack of statistics on the number of undertakings that employ posted workers and whether these are granted the same rights as Maltese workers. The general secretary welcomed the instructions issued by the minister responsible for labour so that tenders for public works from private contractors will start obliging these contractors to declare in advance what the workers' conditions of employment would be.

PT
The national expert was not able to find case law related to the posting of Portuguese workers abroad or the posting in Portugal of posted workers, having looked for the key word "destacamento" (posting) and others similar in both public (www.dgsi.pt) and private sites (Colectânea de Jurisprudência; www.legix.pt). Although many of the cases of posting decided by the Court of Justice refer to Portuguese enterprises and workers (to begin with Rush Portuguesa) those who have had the most serious impact in the public opinion and in the media occurred a decade ago and were related to Portuguese temporary work agencies that sent Portuguese temporary workers to Germany and the Netherlands and then left them stranded with no salary and no means to return back home. These problems were related to the PT regulatory framework for TWA's at the time. Portuguese temporary work agencies are not companies or legal persons, but physical persons and frequently they received the price of the contract from the client and simply vanished, without having paid the salary (or a substantial part of it). In the Portuguese Law there is, as a rule, no joint liability of the employer (the temporary work agency) and the client/user. The law was however changed and now if a temporary work agency sends workers abroad it must provide an additional gage (*caution*) and there is a public fund that will pay the workers, through the Portuguese Embassy or consulate, the travel expenses, with a right of reimbursement against the employer.

SK
There were no cases involving posting of employees in the centre of political or public debate. In general, no such cases related to employees posted from/to the territory of the Slovak republic are known. Neither are there any court cases on claims of employees posted from or to the Slovak Republic. However Slovak National Labour Inspectorate (national liaison office for posting of workers) refers to a case, relating to employees in meat industry, posted from Slovakia to Belgium. An inspection conducted by Belgian authorities revealed failure to meet wage conditions under Belgian

collective agreement. Belgian inspection authority ordered the owed wages to be paid out. Neither a Belgian nor a Slovak court got involved in this case.

SI

From the practice of the Health Insurance Institute of Slovenia, it derives that most of the workers posted abroad, are posted to Germany and Belgium, the Netherlands and Luxembourg. The employers that post workers, are mostly registered for performance of construction activity, in more detail within construction sector, the workers are most often posted to perform: finalization works, installation works and general construction. The main difficulties the Slovenian administrative authorities face, especially at the Health Insurance Institute which issues the E-101-forms, are inadequate submission forms, submitted by the employers. In the verification of provided information also consulates are taking part, especially the German consulate.

Additionally it derives from the interviews, that in practices, both sides – employers and employees – are not acquainted enough with the regulation of posted workers. The situation is improving, however the number of posted workers is expanding, hence it is impossible to state, that the quantity of difficulties has decreased.

The main difficulty employers face, based on the practice of the Health Insurance Institute of Slovenia, is that workers are obliged to present E-101-form by themselves, otherwise they are not allowed to enter the construction site in Member State. Especially the German Embassy demands a copy of the E-101-form from Slovenian posted workers. Moreover, the entities posting workers abroad, usually have to pay some additional contributions for social security, that are not regulated in the Slovenian legal order (for example: a contribution for compensation for time of worker's absence from his home. The mentioned contribution is given to the worker, because of his/her separation from family and home – it may be paid in monetary form or provided as payment in kind).

By analysis and research of relevant case law of Slovenian courts it was determined that there is no case law of cases initiated by service providers established in the Republic of Slovenia with regard to the rules in host Member States concerning the posting of workers. Regarding the enforcement of rights of posted workers the situation is practically the same: only one single court case was found where the court mentioned (implemented) provisions relating to the posting of worker. In this case[183] the worker refused to go to Serbia (hence not a Member State) on several business trips, claiming that these trips were actually temporary work abroad, not provided for in his employment contract.[184]

The case load of the SOLVIT centre provides little indication that posting is a major problem – much cases put before it are related to other topics. The only posting related issue concerns the refusal to grant residence permits to posted third country nationals. The cases pertained to Croatian and Serbian nationals who were regularly em-

[183] Supreme Court of the Republic of Slovenia, judgment VIII Ips 215/2007 of 7th October 2008.

[184] There is a distinction between business trips based on travel order by the employer and posting of workers. Whereas by posting the worker will be protected by the Slovenian law plus host State core protection, this would not be so in the case of business trips. By the latter the provisions on posting of workers are not relevant, as the work is not continuous (as held by the Supreme Court) and commonly last only up to a week. A worker on a business trip would not be protected by host state core protection; solely Slovenian employment law would be relevant in assessing his rights and duties.

ployed and resident in Slovenia and were posted by their Slovenian employer to ship yards in the Netherlands in order to do vessel repair work.

ES
There are no media cases on posting, because posting is not a major issue in Spain. The possibility for posted workers to enforce their rights through the Spanish courts is not used in practice.

## Comparative remarks

In the first report we concluded that presence of cases both in the media and in courts seemed to depend on the position of the Member State as regards posting of workers. Predominantly sending states with low average wage levels encounter other problems than predominantly receiving states with high wage levels. This finding is confirmed in the current report. A geographical element is added, however: Greece, Malta, Cy and Ireland do not have other EU countries at their direct borders, which gives them a more isolated position as to posting. Little to no cases and low interest in the general public were reported from BG, CZ, EL, MT, PT, SK, SI and ES.

However it is interesting to note that also some of the predominantly sending states are reporting problems in their role as receiving states. LT reports on a Swedish company sending workers (some of which have Bulgarian nationality) to Lithuania. In this case there was a dispute on the temporary or permanent character of the establishment in LT. This member state also reports on problems with regard to the posting of third country nationals through employers established in Latvia. This is seen as a way to evade the LT immigration restrictions. EL reports problems with postings from CY in the hotel sector. HU reports problems with regard to temporary workers from Greece who were allegedly employed in order to replace local workers on strike. Partly due to these kind of incidents, the awareness of the countries studied with regard to the problem of posting seems to be rising. The fact remains, however, that in several countries the issue of cross-border posting is low on the agenda.

In the previous report three sectors stand out as far as the incidence of cases is concerned: TWA's, construction and transport by road. Other sectors mentioned in the first study were agriculture health services, shrimp peeling and cleaning as well as meat cutting and other food processing industries. The findings in the current study are less conclusive. The small number of cases identified in the national reports might play a role in this. The constant factor seems to be the construction sector, which figures in the national reports of AT, HU, IE, LT and LV. Sectors that are mentioned only on an incidental basis are the metal sector LT, ship repair LT/SI, the hotel and restaurant sector LT/EL, banking CY, transport (by air in FI and ferries in IE), airport security HU, petroleum industry GE and the meat industry SK. TCA work was only identified as problematic in the report on PT, though this may be caused also by the fact that several countries studied in this report do not treat TCA activity as a separate sector of industry.
It is worth mentioning that subcontracting is reported as problematic in several reports (AT, FI). IE specifically refers to the fact that compliance with labour standards is problematic with regard to public service contracts.

The overview of cases confirms the finding in the previous report that in practice posting is not distinguished sharply from other types of mobility. Problems may relate to irregular work, fake self-employment and underpayment rather than specifically to postings (AT, FI, IE, LT, and HU). For those cases that are related to posting, the specific type of posting (under a service contract, intercompany transfer or the provision of manpower) can not always be identified. Among those that do specify the type, the posting under a service contract is predominant (mentioned in the reports on AT, LT, HU, LV, SI), but in both the CY and the IE reports the posting cases reported were related to inter-company transfers rather than the provision of services under a cross border service contract. Provision of manpower rarely figured as such (only in LT/PT). The only FI case reported regarded a wet lease contract in civil aviation which was considered by the unions to be a type of subcontracting.

When to the problems encountered in effective enforcement of labour standards is concerned, the overview of cases in this study confirms the findings in the previous study. The workers themselves may lack the incentive to enforce when their wages are below the minimum of the host state, but acceptable according to the standards of the sending state (AT/IE/LV). But they may also face practical difficulties when trying to enforce their rights. Involvement of the unions is important, both from the point of enforcement and from the point of public awareness (CY, IE). Public enforcement, however, plays a large role in the identification of the problems related to posting in the current study. Cases are triggered by tax law (LT), social security (HU) or special funds with independent enforcement authority (BUAK in AT). The role of the public authorities is not always perceived as positive, however: they are also identified as causing problems for the posting employers (e.g. the Soko Bunda case in HU, see also SI).

Finally, it is interesting to note the lack of complementarity with regard to the cases reported in the two studies. Quite often a case which is controversial in the host state is not reported as attracting public attention in the sending state or vice versa. The LV expert commented on the lack of discussion of posting in the political arena. Even the Laval case was not widely discussed in the media. In a similar vein the lack of reported problems with regard to posting from their country in the CY en IE reports is interesting, given that these countries were frequently mentioned as sending states in contentious cases from other (host) states. But sometimes the underreporting works the other way. The HU report mentions two highly controversial actions of the German authorities towards HU companies, which lead to bankruptcy of several of them. These actions were not reported in the DE report for the previous study.[185]

With regard to the problems identified in the cases (both media and court cases) concerns about wage levels and social dumping are by far the most prominent. Other issues which are mentioned more often are the applicability of CLAs of the host state to posted workers from other Member States and problems as regards the concept of posting in social security, tax law, the Rome I Regulation and the PWD. Finally, strikes and the breaking of strikes with posted workers are mentioned incidentally, as is fake self-employment and problems caused by the national rules on posting and business trips.

[185] SoKo Pannonia, SoKo Bunda.

## *3.5 ISSUES RELATED TO THE SUBSTANTIVE SCOPE OF THE PWD: RATES OF PAY AND WORKING TIME*

### Minimum wage

The Directive includes in the hard nucleus of protection maximum work periods and minimum rest periods, minimum paid annual holidays and minimum rates of pay. These elements each have a distinct function in the overall protection of workers. However, they are closely correlated when considered from the perspective of fair competition. Especially when wages are calculated at the monthly or weekly rate, it is crucial to study how many hours a week/month the worker actually performs work in order to qualify for full pay. Likewise, holidays constitute direct wage costs and hence determine the actual cost per hour worked.[186]

In this section we mainly look at the regulation of wages, but we also discuss some problems relating to working time and holidays.

In this regard, it is interesting to note that the Directive seems to employ two terms when referring to remuneration: in Article 3(1) the English language version uses the term 'rates of pay', whereas in Article 3(7) the term 'minimum wage' is used. In contrast, the Danish and Dutch language versions use identical terms for both (minimumlonen, mindsteløn).[187] Several other language versions use slightly different concepts in the two paragraphs.[188] It is unclear whether, in the context of the PWD, one has to distinguish between minimum wages and minimum rates of pay – the latter being a more extensive notion – or whether the two terms may be used interchangeably.

In the chapter we give an overview of the different models for prescribing minimum wages, as well as their approximate levels in the Member States covered by this study. But we also pay attention to other element of remuneration which may be included in the notion of the 'rates of pay'. Finally we pay attention to the issue of comparing wage levels: both in order to check compliance of the service provider with the minimum wage provisions of the host state and to compare the level of protection offered by the host and sending state respectively.

#### Standard setting - overview

In Austria there is no legal basis for a minimum wage. Minimum wages are almost exclusively set by collective agreements. Thus they vary by sector and differ even in sectors in the individual federal states. Sect. 7b Para. 1 No. 1 of the AVRAG guaran-

[186] Compare C-165/98 Mazzoleni para 39. "Second, in order to ensure that the protection enjoyed by employees in the Member State of establishment is equivalent, they must, in particular, take account of factors related to the *amount of remuneration and the work-period to which it relates* (emphasis added AH/MH), as well as the level of social security contributions and the impact of taxation."
[187] Compare also the Czech version: minimální mzda; minimální mzdy
[188] DE: Mindestlohnsätze – Mindestlohn ; FR: taux de salaire minimal - salaire minimal; ES las cuantías de salario mínimo - del salario mínimo ; IT: tariffe minime salariali - salario minimo ; PT: Remunerações salariais mínimas; salário mínimo

tees that at least the statutory remuneration determined by ordinance or collective agreement to which comparable workers employed by comparable employers are entitled at the place of work. Hence, all minimum wages stipulated in collective agreements also apply to posted workers. The minimum wages set out in collective agreements are usually graded depending on the main activity/qualifications as well as length of employment of the workers and in certain circumstances by adding on previous working time with other employers.
Collective agreements use different time-periods for the minimum wage: for workers there is usually as a minimum wage per hour, for employees a minimum salary per month

Bulgaria has a national minimum wage set according to Article 244, item 1 of the Labour Code by the Council of Ministers. This wage is both monthly and per hour. The minimum wage is defined for normal working time under normal working conditions.[189] Its rate from the 1st of September 2011 will be 270 BGN (135 Euro) per month and 1,61 BGN (0,80 Euro) per hour.[190] The minimum wage is determined by a Decree of the Council of Ministers every year.
The Order for the Structure and the Organization of the Wages regulates the ways of determination of wages, the wage factors and the minimum level of the different additional labour remunerations – e.g. not less than 0,25 BGN for night work, 0,10 BGN for the time at a disposal to the employer without work, 50 BGN for the scientific degree "Doctor", etc. They are not included in the minimum wage, but are due where the conditions for their payment exist.
Higher rates of minimum wage may be set by collective agreements (arg. Art. 50 LC). The Collective Agreement for the "Construction, Industry and Water-supply"—Sector[191] provides for in Article 12, that the minimum wage for the sector is 1,25 of the national minimum wage.

Cyprus: In most sectors of economic activity, collective agreements are the sole basis for setting wage levels. The concept of collective bargaining on the central national level, through setting minimum terms and conditions of employment that are binding for all workers, does not exist in Cyprus. However, current legislation, and specifically the Minimum Wage Law (Chapter 183), sets minimum salaries and wages determined on a monthly basis for nine occupations: sales staff, clerical workers, auxiliary healthcare staff, and auxiliary staff in nursery schools, in crèches and in schools, security guards, caretakers and cleaners, which are implemented by relevant decree of the Council of Ministers. According to the most recent Order (No. 172/2011) issued on 09 May 2011 but effective retroactively from 1 April 2011, the minimum monthly salary for new job entrants is set at € 855 (from € 835 in 2010), while for employees who have worked for the same employer for six consecutive months, the minimum wage is set at € 909 (from € 887). For the occupational category of cleaners the hourly minimum rate is set at € 4,48 and € 4,76 accordingly, while the hourly minimum rates for the occupational category of security guards is set at € 4,81 and € 5,12. It is not entirely clear how the six month waiting period for full entitlement is applied in case of postings to Cyprus. However, in the opinion of the Department of Labour it is not

[189] See Василев, Ат. – In: *Коментар на Кодекса на труда*, 270—272; Мръчков, В. Трудово право, 378—379.
[190] It was raised from 240 BGN (120 Euro) per month.
[191] See www.knsb-bg.org/pdf/OKTD_2011.pdf.

expected that there will be posting cases in the occupations covered by the Minimum Wage Law.
The collective agreement for the construction industry distinguishes four wage groups, each with their own minimum wage requirement. The minimum wage in this sector is calculated at a weekly base. According to the latest wage adjustment in January 2011, the minimum wage for the category of workers with general duties (the lowest scale but from the special scale for apprentices) was 385,72 per week.

Czech Republic: There are two labour law instruments that contain minimum rates of pay in Czech labour law. First is the Labour Code, which in Section 111 regulates the minimum rate of pay and then in Section 112 the guaranteed rate of pay. Second is the Government Decree No. 567/2006 Coll., on Minimum Wage and the Lowest Levels of Guaranteed Wage, Delimitation of a Hazardous Work Environment and Extra Pay for Work in a Hazardous Work Environment, as amended (hereinafter the "Minimum Wage Decree"). The minimum wage is a general minimum wage. However there is a guaranteed wage level which exists in eight heights depending on job requirements. The division of jobs into the guaranteed wage categories is included as an annex to the Minimum Wage Decree.
There are two applicable calculations of the minimum wage. First calculation is on hourly base, the minimum wage is CZK 48.10 per hour (≈ EUR 1.97 according to Czech National Bank exchange rate valid on June 3, 2011). Second calculation is on monthly base, the minimum wage is CZK 8,000 per month (≈ EUR 327.27 according to Czech National Bank exchange rate valid on June 3, 2011). These rates are applied since January 1, 2007.

Finland: There is no one general minimum wage in Finland. In most branches, collective agreements determine minimum pay. In general, wages in the collective agreements are determined according to the employee's professional skills, experience and the geographical situation of the workplace (there are so called I and II cost regions in Finland).[192]

Greece: A general interprofessional collective agreement provides the general minimum salary for Greek workers. The agreement contains a general minimum wage concerning manual workers and another general minimum wage concerning employees. The minimum wage levels are increased by seniority and marriage allowances. Minimum rates of pay are also provided in branch or company collective agreements.

Also the Hungarian labour code as well distinguishes between the mandatory minimum wage and the guaranteed wage minimum. The latter depends on the education level or vocational qualification required for the job. Government Decree No. 337/2010. (XII. 27.) defines the mandatory minimum amount of the personal base wage and distinguishes monthly, weekly and daily wages. It contains a further distinction based on school qualification (guaranteed wage minimum of persons employed in jobs requiring minimum secondary-level qualification or secondary-level vocational qualification), and orders to apply higher wages if higher qualification requirements are met.[193] Currently the mandatory minimum wage is 78.000 HUF monthly (≈ €

[192] Source: occupational safety and health administration.
[193] Mandatory minimum wage: monthly – 78.000 HUF; weekly – 17.950 HUF; daily – 3.590 HUF; hourly – 449 HUF. Guaranteed minimum wage for those employed in a position requiring minimum

281).[194] The guaranteed minimum wage for those employed in a position requiring minimum secondary level education is 94.000 HUF monthly.[195]
In the construction industry, in addition to the nationally defined minimum wages, the collective agreement stipulates binding minimum wages. The wage negotiations are usually terminated after the agreement of OÉT on the national minimum wages, and the newly set wages enter into force on 01 April every year. The wage table is contained in an annex to the sectoral collective agreement, and can be deviated from only by a new agreement. For the year 2010 the highest wage scale is the scale for mid-level managers which is set at HUF 250 000 monthly. The lowest wage scale is set at HUF 73 700 monthly (hence, below the statutory minimum wage set in 2011).

Until recently, the social partners represented in the National Interest Reconciliation Council (Országos Érdekegyeztető Tanács, OÉT) were involved in establishing the mandatory minimum wage. However, the legislation that replaced the OÉT by the 'National Social and Economic Council' has also repealed the provisions guaranteeing social partners' participation in the procedure of setting the minimum wage. The draft labour code categorically states under its section 153 (2) that the amount and scope of the obligatory minimum wage shall be determined by the Government.

Ireland The National Minimum Wage Act 2000 allows the Minster for Jobs, Enterprise and Innovation to set a minimum hourly rate of pay. Wage levels are also contained in collective agreements, usually at company level. Though there is no general system for declaring collective agreements to be generally binding, Ireland until recently had two systems of setting employment standards in a collective manner through Registered Employment Agreements and the Joint Labour Committees respectively. Both systems led to generally binding wage standards (as well as other employment conditions). The most important of these Registered Employment Agreements (REAs) are undoubtedly the REA for the Construction Industry and the related, but separate, REA for the Electrical Contracting Industry. The most significant JLCs exist in industries such as catering, hotels and retail. At the time of writing, both systems are under severe threat, with the JCL-system being declared unconstitutional in the recent decision *in John Grace Fried Chicken & Ors v The Catering JLC & Ors*.[196]

The national minimum wage is presently € 8.65 per hour. The National Minimum Wage applies to all employees except:

- Employees in sectors or industries which are covered by REAs or those covered by EROs entitling their workers to a higher minimum wage;
- Employees who are under 18 years of age (€ 6.06 per hour);
- Employees who are in their 1st year of employment since turning the age of 18 (€ 6.92 per hour); or their 2nd year since turning 18 (€ 7.79 per hour);[197]
- Employees who are close relatives of the employer;
- Employees undergoing structured training such as an apprenticeship.

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secondary level education: monthly – 94.000 HUF; weekly – 21.650 HUF; daily – 4.330 HUF; hourly – 541 HUF.

[194] This would be 17.950 HUF weekly, 3.590 HUF daily and 449 HUF hourly

[195] 21.650 HUF weekly; 4.330 HUF daily and 541 HUF hourly.

[196] High Court, unreported, 7 July 2011. See also Chapter 2.3.

[197] See http://www.employmentrights.ie/en/informationforemployers/nationalminimumwage/.

Under the Construction REA, the minimum hourly wage applicable from February 2011 for a general labourer (new to the industry) is € 13.77. The minimum for a craft-worker (carpenter, blocklayer, etc) is € 17.21. REA rates rise with rising experience and skill levels.[198]

Latvia The Labour Code contains some general provisions on pay, whereas the exact level of the minimum statutory pay is defined in a separate act. The current level of statutory minimum pay in Latvia is defined by the Cabinet of Ministers Regulations No.1069 'Regulation on minimum monthly salary and minimum hourly rate'.[199] This regulation contains both a statutory minimum monthly salary and a minimum hourly rate. Both are very low – LVL 200 (EUR 285) monthly and LVL 1,189 (EUR 1,69) hourly. After deduction of taxes minimum monthly salary constitutes LVL 144 (EUR 204).[200] Statistics show that average salary is much higher that statutory minimum pay - on 2010 average brut pay was LVL 445 (EUR 633) and net LVL 316 (EUR 449).[201]

Lithuania The determination of the minimum hourly pay and the minimum monthly wage is regulated in the Labour Code. The Governmental Decree no 1368 of 17 December 2007 established the current minimum hourly pay (4,85 Litas = 1,4 EUR) and the minimum monthly wage (800 Litas = 231,69 EUR). The current average gross pay in the private sector amounts to 1999 Litas = 578 EUR, whilst in construction sector the average wage was 1734 Litas = 502 EUR[202]. Upon the recommendation of the Tripartite Council, the Government may establish different minimum rates of the hourly pay and the minimum monthly wage for different branches of economy, regions or categories of employees. However, no such different treatment was introduced so far. The 800 Litas minimum monthly wage and 4,85 Litas minimum hourly pay shall be obligatory if the contract is governed by Lithuanian law. They also shall be obligatory if the posted worker works in the territory of Lithuania.

Malta: According to Maltese law, Malta's national minimum wage per week for 2011 is:

- €153.45 for employees aged 18 years and over
- €146.67 for employees aged 17 years
- €143.83 for employees aged under 17 years

It is worth noting that although a minimum wage is stipulated, most wages are paid above this rate.
The minimum employment remuneration for various sectors is governed by the Government's Wages Councils or through collective agreements specific to the various

[198] Full REA and ERO rates of pay can be found at www.labourcourt.ie.
[199] OG No.193, 7 December 2010
[200] Regulation No.1069 provides for higher minimum hourly rate for adolescents. It is LVL 1,36 (EUR 1,93). Such special regulation is due to the fact that on the basis of implementing measures of Directive 94/33 adolescents may be employed for more than 7 hours daily and 35 hours weekly (Article 132(3) of the Labour Law)
[201] Central Statistical Bureau, http://data.csb.gov.lv/Dialog/varval.asp?ma=DS0020&ti=DS02%2E+STR%C2D%C2JO%D0O+M%C7NE%D0A+VID%C7J%C2+DARBA+SAMAKSA+PA+DARB%CEBAS+VEIDIEM+%28latos%29&path=../DATABASE/Iedzsoc/Ikgad%E7jie%20statistikas%20dati/Darba%20samaksa/&lang=16 (accessed on 3 June 2011)
[202] See current information provided by Lithuanian Statistics http://www.stat.gov.lt/lt/news/view?id=9148&PHPSESSID=a699f899d9e2732dd66fe5b1260d6044 (accessed July 6, 2011).

industries. These legally binding agreements are applied uniformly to Maltese and foreign workers.
Like LU, MT has a system of automatic indexation: All employees receive annual pay increases linked to the cost of living. This increase applies regardless of the level of pay.

Portugal
Minimum wages are fixed in the law as general minimum wages, independently of age, qualification or job seniority. The Portuguese law draws a distinction between what it calls the "basic salary" and other elements of the salary. The concept of "basic salary" encompasses the payment of the activity of the worker during his/her normal working hours.[203] The concept has practical importance because it is taken into account for instance when assessing the compensation to the worker in case of wrongful dismissal.
In this matter there was in Portugal a tradition, born in collective agreements but that has now the nature of a legal obligation, of paying the salary not just in twelve instalments matching the twelve months of the year, but also two other instalments, one during the holidays and the other in Christmas. The exact amount of these instalments is not the same of the others since during holidays the extra payment is only equal to the basic salary and other payments given as direct consideration for the type of the work rendered.

Slovakia
In Slovakia, the contractual freedom as regards pay is limited by the statutory minimum wage and the minimum wage claims according to Section 120 of the Labour Code, depending on the degree of difficulty of work demand in the relevant position. The level of minimum wage is provided in a special regulation – Act No. 663/2007 Coll. on the Minimum Wage.[204] The Slovak government every calendar year, always effective from 1 January, adjusts the amount of statutory minimum wage. Under the Ordinance of the government of the Slovak republic No. 408/2010 Coll. laying down the amount of the minimum wage[205] effective as of January 1, 2011, the minimum monthly wage is € 317, - and the minimum hourly wage is € 1,822. The minimum wage claim as regulated by Section 120 of the Labour Code is the minimum wage times a statutory coefficient, determined for each level of work difficulty. There are 6 levels of work difficulty, with the coefficients rising from 1,0 up to 2,0. Remuneration of employees may also be regulated by a collective agreement. If this is the case, provisions on the minimum wage claims (Sec. 120 of the Labour Code) shall not apply. However, statutory minimum wage pursuant to Act no. 663/2007 Coll. and ordinance of the government for the respective calendar year still has to be observed.

Slovenia

[203] Article 262., nr. 2, al. of the Labour Code.
[204] Act No. 663/2007 Coll. on the Minimum Wage as amended, adopted on the 5.12.2007, and entered into force as of the 1.2.2008. With respect to legal nature, the act has a character of a law and was published in the official journal (Collection of Laws) no. 268/2007 on the 31.12.2007.
[205] Ordinance of the government of the Slovak republic No. 408/2010 Coll. laying down the amount of the minimum wage, adopted on 13.10, 2010, and entered into force as of 1.1.2011. With respect to legal nature, the governmental ordinance is adopted by the government and has a lower legal force compared to a law. The ordinance was published in the official journal (Collection of Laws) no. 156/2010, page 3408, published on 29.10. 2010.

Minimum rates of pay are determined in the Minimum Wage Act, in which right to minimum wage, the amount, method of determining the amount, its publication, conditions, under which preliminary amount of minimal wage are paid, are determined (Article 1 of the Minimum Wage Act).
The amount of minimum wage for next month after enforcement of the Minimal Wage Act in March 2010 was € 734,15 (Article 4). The Minimal wage is once a year harmonized with growth of consumer prices, basing on information of the Statistical Office of the Republic of Slovenia (Article 5). Currently, i.e. for year 2011, minimum wage is € 748, 10 (gross).[206] There is only one general minimum wage and not several minimum wages, depending on qualifications or job characteristics.

In accordance with the Employment Relationship Act the Minimal wage Act applies to workers, posted to the Republic of Slovenia, if provisions on minimal wage are more favourable to them. If a worker is posted to another Member State the provisions of the Minimum Wage Act will be applicable only if legislation in other Member State is less favourable for such a worker.

Spain.
The minimum rates of pay are established in collective agreements, which have erga omnes effect. The salary established in the collective agreement can never be less than the minimum wage fixed annually by the Government. For the year 2010 is set at € 633,30 a month or € 21,11 a day, according to Royal Decree 2030/2009 of 30 December 2009 (http://www.boe.es/boe/dias/2009/12/31/pdfs/BOE-A-2009-21170.pdf).

**Standard setting – comparative remarks**

*System*
Most countries included in this comparative study have a system of statutory minimum wages (BG, CY, CZ, HU, IE, LV, LT, MT, PT, SK, SI, and ES). In Cyprus, however, the statutory protection only covers 9 specific professions.
The minimum wage legislation might establish a single minimum, but often contains a lower minimum for young workers[207] and in the case of Cyprus and Ireland also a lower minimum for new entrants to the labour market.
In several countries however, a distinction is made with regard to the worker's qualification even at the level of statutory regulation. These countries make a distinction between the mandatory minimum wage and the guaranteed wage minimum. This is the case in CZ, HU and SK. These countries all have a single minimum wage in combination with a nationally applicable system of wage coefficients, which determine the 'guaranteed wage minimum' for each wage group.[208] Slovakia, to give an example distinguishes 6 wage groups, whereas CZ has 8.

[206] Determined in *The Amount of the Minimum Wage and the Amount of the Provisional Minimum Wage Act*, Official Journal of the RS, No. 3/2011. The Ministry adopted the Act on 6th January 2011 and published it on 14th January 2011.
[207] The age at which the worker is entitled to a full minimum wage may differ between the Member States.
[208] These coefficients (which are contained in a generally binding national CLA) also apply when the basic wage is not the national minimum wage, but is agreed at a higher level within a specific company. For example: skilled workers should be paid at 1.2 x the minimum rate, staff in positions that require a higher education 2.0 x the minimum rate.

Collective agreements are the sole basis for setting wage levels in AT, FI, EL and CY (outside the 9 professions covered by the statutory system). They form an additional or complementary (IE) source of wage provisions - besides the statutory minimum - in the other countries. The minimum wages set out in collective agreements are usually graded depending on the main activity/qualifications as well as length of employment of the workers. Specific criteria were found in EL and FI. The Greek interprofessional agreement contains separate minima for workers and employees and salary increases are based not only on seniority, but also on marital status. FI collective agreements make a distinction as to the geographical area in which the work is performed (based on the costs of living in those areas) when determining wage levels.

The minimum wage is calculated on a variety of bases – we found minimum wage levels determined on an hourly (IE), daily (ES), weekly (MT) and monthly (HU, SI) basis. Hourly and monthly rates were by far the most common. In several countries, the law contains both a monthly and an hourly minimum (as well as the calculating method to get from the one to the other): see e.g. BG, CZ, LV, LT, SK. Spain has both a monthly and a daily minimum. Austria uses a different calculus for employees (by the month) and workers (by the hour/day/week).

*Levels*

The wage differences between the Member States are still considerable. More details can be found in the description above. Here we just give some indication as to the extent of income inequality. The lowest minimum wage level is reported from Bulgaria, which currently has minimum wage of 270 BGN (≈ € 135 Euro) per month – which translates to 1,61 BGN (≈ € 0,80 Euro) per hour. CZ, HU, LV, LT and SK likewise report minimum wage levels below € 2 per hour. On the other end of the scale, Ireland currently has a minimum wage of € 8.65 per hour. Countries like Cyprus (€ 855/m), Malta (€ 153/wk), Slovenia (€ 748, 10/m) and Spain (€ 633,30/m) seem to form a middle range.

The research also shows a considerable difference between the statutory minimum wage levels and wage levels in collective agreements (where relevant).
For example in Ireland, under the generally applicable agreement for the construction sector, the minimum hourly wage applicable from February 2011 for a craft-worker (carpenter, blocklayer, etc) is € 17.21[209] – more than twice the statutory minimum of € 8.65. In CY the collective agreement for the construction industry, since the latest wage adjustment in January 2011, contains a minimum wage for the category of workers with general duties (the lowest scale but from the special scale for apprentices) of € 385,72 per week – which again is considerably higher than the statutory minimum of € 887 a month. The collective agreement for the construction sector in HU has a very elaborate wage structure in which the lowest wage level for apprentices and unskilled workers was HUF 73.700 (≈ € 270) in 2010, compared to HUF 250.000 for mid-level managers (the highest wage level in the collective agreement).
Yet another picture might emerge when minimum wage levels are compared to actual wage levels: the statutory minimum wage in LT is 800 Litas (≈ € 231) per month compared to an average wage of 1999 Litas (€ 578) in the private sector and 1734 Litas (€ 502) in the construction sector. In Ireland the minimum wage is € 8.65

[209] Statistics for 2009 show the average wage for skilled operatives in construction to be € 21.22.

whereas statistics for 2009 showed an average wage for skilled operatives in construction to be € 21.22.

### Conclusions and recommendations

The PWD seems to delegate the definition of minimum rates of pay to the Member States. Moreover, the Directive specifically allows the Member States to use collective agreements as a means to establish minimum protection in the areas covered by the Directive. However, the PWD does not provide a clear answer to the question whether there can be only a single minimum pay rate or rather a set of rules determining the minimum wage level in the individual case of a posted worker. Collective agreements – and to a lesser extent even minimum wage statutes – contain wage structures which determine wages based on job classification, qualification and/or experience. With its judgment in the Laval case, the ECJ has created uncertainty about the compliance of such wage structures with the PWD. The Member States interpret their competences in this area differently – in the previous study it was observed that Germany seemed to be reluctant to apply anything but a single minimum wage, whereas the Netherlands applies the wage structures in CLAs in their entirety.[210] Insofar as the Directive is aimed at creating a level playing field, the application of the entire wage structure is of paramount importance. The current overview demonstrates clearly that there may be a considerable difference between the statutory minimum wage and the binding wage level for a particular worker in the relevant collective agreement. Likewise, the difference between the lowest wage group in a CLA and the highest one can create a relevant competitive advantage if foreign service providers were only to respect the first, whereas domestic providers would also be bound by the second.

***Recommendation 15 (formerly rec 14) – unchanged***

**At EU level >** It should be made clear that minimum rates of pay can be set at different levels (alternatively or simultaneously) and that each may constitute a binding minimum for the purpose of the Directive.

## Working time and holidays

### Inventory and comparison of national systems

Problems of comparability may arise when hourly wages are measured against monthly standards and vice versa. Some countries have a calculus included in their minimum wage legislation. In other cases this transposition calculus must be derived from the rules on working time and holidays. The reports contain specific numbers for LV (168 hours a month), BG (ditto), HU (174 hours a month) and AT (173 h/month based on the statutory rules, 169 h/month in construction and 167 h/month in TWAs).

[210] See in this respect also the pending Norwegian case E 2/11 STX Norway Offshore at the EFTA Court.

PT uses the formula (monthly pay x 12) : 52 x normal working hours per week = hourly pay.

Although working time is harmonized at the European level there is still a relevant difference in amount of hours per week and the amount of weeks per year which are considered as the standard. As far as working time is concerned, several Member States have 40 h/wk working weeks. This is the case inter alia in AT, EL, MT, SK and LV. Slovenia has a slightly lower standard of 36-40 h/wk with even shorter hours in case of dangerous and stressful work. Specifically in the field of construction it is worth noticing that the standard working week in construction is 39 h in AT and 38 h in CY, whereas it is between 43-45 h in IE.

The holiday rules show an even larger variety both in length and in reasons for the extension. The standard might be set in hours (MT), working days (AT, BG, HU, FI, EL, ES), calendar days (LT) or weeks (CZ, LV, SK, SI), but in general closely follows the four weeks minimum of the working time directive. AT is an exception, with a statutory minimum of 30 working days. In FI normally holiday leave accumulates 2 days or 2½ days for each holiday credit month. Malta has a 192 hour holiday entitlement for full-time (40h/wk) employees. In all cases this minimum can be added on considerably. IE for example adds 9 national holidays to the 20 holidays.[211] Austria has 13; Malta has 14 and Lithuania even 15 public holidays.[212] Specific additions can be earned on the basis of seniority (referring either to age or the years of employment)[213], extra-professional duties such as child care[214], handicaps of the worker[215] or on the basis of the specific risks of the job.[216] A good example of an extensive regulation of holidays can be found in HU in which statutory provision grant workers a 20 days minimum. This increases gradually with age to 30 days from the age of 45 y onward. Extra days are awarded to minors (+2), people taking care of children under 16 (+ 2 to + 7 depending on the number of children), blind people (+ 5) and people performing specific dangerous professions (e.g. exposure to radiation or working under ground + 5).

A specific feature of the holiday entitlement in AT is that in the sector of construction, this entitlement is implemented through a special fund the BUAK. This fund collects contributions from employers from which it pays the holiday allowances and holiday bonuses of construction workers. A special feature of the holiday entitlement in the construction sector in IE is that most holidays are to be taken in predetermined periods: 10 days to be taken in July, 4 at Christmas time and 5 at Easter, leaving just 2 days at the disposal of worker and employer.

[211] This entitlement is based on performance of work during at least 1365 h per year
[212] Three of those are always on a Sunday.
[213] Sla +1wk upon 15 years of employment; EL +5d depending on seniority
[214] LT +7d for specific groups (child care, minors etc)
[215] HU + 5.
[216] LT up to a total entitlement of 58 days. Accordingly, different profession may have different holiday entitlements. BG: +5 for hazardous work and/or work with open ended working hours; AU: +2 to +6wk for night-shift heavy workers.

**Conclusions and recommendations**

The rules on working time and holiday entitlements are crucial elements when it comes to determining effective hourly rates – the remuneration employers end up paying per hour effectively worked.[217] If minimum rates are fixed by the hour, the number of hours worked directly impacts on the wages paid at the end of the day, week or month. Monthly wage rates, however, may result in very different effective hourly wage costs, depending on the number of hours worked. Hence, hourly rates seem more effective in preventing wage competition between domestic and foreign companies. For those countries were minimum wages are calculated by the month, week or day, it seems advisable to introduce hourly minimum wages instead.

However, in regard to effective hourly wage costs, the greater problem seems to be the inadequate enforcement of working time provisions. Both a lack of state supervision and a lack of interest of the workers concerned play a role in this. One of the practices reported is that the workers are reported to the relevant authorities to work part-time whereas in reality they work more than full-time. As long as the effective hourly rate thus achieved is well beyond the average pay in the sending state, the workers have little incentive to object. A similar lack of enforcement is reported as regards the right to paid holidays. Though officially part of the hard nucleus, this right hardly seems relevant in practice. Posted workers tend to take their holidays after the posting rather than during it. This makes it difficult, if not impossible, to check the effective enjoyment of acquired rights during the posting itself. Only when the right to paid holidays is effectuated through a special holiday fund (e.g. the BUAK in AT) does the right itself and its enforcement take on practical relevance. The issue of enforcement is addressed more in general in Chapter 4.

***Recommendation 16 - unchanged***

**At national level>** An hourly minimum wage rate is more effective in offering protection to posted workers than a daily, weekly or monthly rate. Member States that currently do not have minimum hourly rates are advised to introduce these in their national laws.

## Rates of pay: other types of remuneration.

In the previous paragraphs we discussed the problem of relating a specific monthly minimum wage to the hours effectively worked per year. This difficulty is caused by the variety of rules of standard working hours and yearly holidays. But these differences alone are not the only problem when comparing wage levels. An even thornier issue is which elements of workers' protection can constitute an element of the minimum 'rates of pay'. As stated above, the Directive refers for the concept of minimum rates of pay back to the national law and/or practice of the Member State to whose territory the worker is posted. These concepts and definitions may vary considerably.

[217] The gross/net problem is discussed below on p. 131-132.

**Overview of national provisions**

For the purpose of this overview we have made a distinction between host states and sending states. In the sending states we focused on the application of the provisions in case of posting *from* the state in question, whereas in host states we were interested in the application of the wage system *to* posting to the said state. Not all countries are discussed with the same level of detail. This depends inter alia on the availability of relevant information due to the presence or absence of relevant practice in the country concerned.

*Host states*

AT
There is no statutory minimum wage. Hence, the relevant provisions are found in collective agreements only. These usually provide for two special payments (holiday bonus, Christmas bonus) usually to the amount of one month's earning. For time dependent earnings such as compensation for termination of employment or payment in lieu of holidays these special payments are calculated aliquot and thus are part of the minimum wage. Particularly in the construction sector the collective agreements also provide for hardship allowances for working under difficult conditions, these supplementary payments are also part of the minimum wage. Supplements and payments which actual are the costs of the workers such as travel are distinguished from the term salary as expenses.

In the calculation of wages it is not taken into consideration if the workers are posted or not. Sect. 7b Para. 1 No. 1 of the AVRAG guarantees that at least the statutory remuneration determined by ordinance or collective agreement to which comparable workers employed by comparable employers are entitled at the place of work. Further provisions for comparative calculation do not exist.

The issue of comparable calculations of more favourable legal provisions is not limited to cases of posting workers and legal provisions exist everywhere. As a solution in Austria recourse is made usually to Sect. 3 Para. 2 of the Labour Constitution Act ("*Arbeitsverfassungsgesetz*" – ArbVG), which creates standards in the relationship between collective agreements and special agreements: "In assessing if a special agreement … is more favourable than the collective agreement those provisions are to be collated and compared which bear a legal and relevant relationship". The comparative method is known as "group comparison" because legally and factually standards which belong together are put into groups. This does not have automatically that all Austrian individual wage components are combined into one total wage and is compared to the foreign total wage but that account is taken of the function of the individual wage components. In detail there are naturally differences of opinion: For example on account of a lack of connection higher Austrian special payments cannot be offset with higher foreign hourly wages. On the other hand Austrian special payments are not undermined if the monthly wages paid only 12 times yearly in total exceed the 14 monthly minimum wage payments (including the holiday bonus and Christmas bonus).

In practice the following calculations are made:
- Allocation of the posted worker to the applicable collective agreement.

- Classification of the posted worker in the correct wage group of the collective agreement (depending on qualifications, experience).
- Addition of the base wage for overtime.
- Inclusion of wage-like supplements, additional payments (for example, overtime and public holiday supplements).
- Inclusion of aliquot special payments.
- Inclusion of per diem allowances. If the per diem of the country of origin differs from that of the Austrian domestic per diem (usual case) the higher per diem is applicable.

The question has still not been answered if the comparison should take place on the basis of the gross or net amounts although preference is given to the gross amount. In the case of the gross option the Austria gross minimum wage is compared with the gross payment of the posted worker. In the case of the net option fictitious social security payments, allowances and other public payments to be borne by the workers as well as the income tax according to Austrian law are deducted from the Austrian minimum wage and a fictitious net minimum wage is calculated; this wage which the posted worker receives directly from his employer must be at least equivalent to the net minimum wage. This can mean that the posted worker receives more than a comparable domestic worker.

Cyprus

As regards in particular the definition and meaning of minimum rates of pay, the law implementing the PWD defines minimum pay as the emoluments which have been set by current legislation or the collective agreements currently in force that have been concluded by the most representative organisations of the social partners, consisting of wages along with any individual allowances and additional benefits that have been provided for, including compensation for overtime work.[218] Minimum pay does not, however, include contributions to supplementary occupational pension schemes, or the benefits they provide. Also not included are any benefits granted to posted workers on grounds of the posting, provided that such benefits are paid in the form of return of expenses incurred due to the posting, such as travelling, accommodation or food expenses.

As concerns the regulation of the terms and conditions of employment of posted workers, the Cypriot legislator has essentially copied the content of Directive 96/71/EC, transposing to the letter the provisions of Article 3[219] of the Directive into national law (Article 4). In this context, statutory protection in relation to the minimum salaries and wages as provided for by the minimum wage law, and given that the relevant legislation does not provide for any territorial restrictions, also applies to workers posted in Cyprus. However, the protection offered by collective agreements is restricted to collective agreements covering the activities listed in the Annex of the PWD.[220] As a result, apart from the construction sector, no other collective agreements have been rendered a compulsory source of terms and conditions of employment for posted workers.

[218] Article 4, paragraph 2 of Law 137(I)/ 2002.
[219] However, the Cypriot legislator made no use of the possibilities offered by Article 3, paragraphs 3, 4, 5, 9 and 10.
[220] Article 4, paragraph 1 of the Law 137(I)/2002.

According to the latest sectoral agreement that has expired in 31 December 2010, there are certain wage supplements that are applicable for all workers employed in construction companies, members of OSEOK, and cover transfer, dangerous, hard and unhealthy work and Christmas holidays. These provisions also apply to workers posted to Cyprus.
In case of a temporary transfer, meaning a transfer that will last less than 30 months, the employer is obliged to provide a transfer allowance equal to € 178,72 per month, as well as free transportation, while in case of a permanent transfer, meaning a transfer that will last more than 30 months, the employer is obliged to provide a rent allowance no less than € 93,80 per month.[221]
For the purposes of dangerous, hard and unhealthy work, specifically for any work of excavation, tunnelling (dark and humid areas) and at a high over 20 feet, the employer is obliged to provide for a 10% increase of usual hourly wages. Employees working on asphalt (premix) during summer time, from July until end of August, should be paid 15% over usual hourly wages.
As far as Christmas allowance is concerned, any employer is obliged to pay € 0,11 for each earning Euro of the employee earned by work during normal working hours. Earnings due to overtime do not count as part of the minimum wages.

A basic factor of the pay equation is the implementation of the system of pay indexation, which is in force since 1944 and is considered to be one of the most important achievements of the Cypriot trade union movement. In accordance with the present system of calculating the cost of living allowance, workers' total earnings at the end of each six-month period are readjusted on the basis of the percentage change in the Consumer Price Index for the preceding six-month period. In this context, in all sectors of economic activity, every six months, pay is subject to automatic indexation.

As regards comparison of protection offered, Article 7 of the Law 137(I)/2002 has essentially copied the content of the PWD, transposing to the letter the provisions of Article 3, paragraph 7 into national law. Neither the competent national authorities, nor the social partners follow a method of comparison between protection in the country of origin and protection in Cyprus.

FI
Under Section 2.3 of the Posted Workers Act, posted workers shall be paid a minimum rate of pay, which shall be considered to refer to remuneration specified on the basis of a collective agreement as referred to in Chapter 2, Section 7, of the Employment Contracts Act. This means that as a starting point, minimum rates of pay are based on generally applicable collective agreements. According to Section 2.3 of the Posted Workers Act, in case a generally applicable collective agreement is not applicable to the employment relationship, usual and reasonable wage should be paid to the worker, if the remuneration agreed between the employer and the worker is essentially lower than this. In most branches, however, collective agreements determine minimum pay. The determination of which benefits are included in the concept of ‘rates of pay’ is left to the social partners, party to the relevant collective agreement.

[221] The employer has the right to transfer an employee at any place inside the Republic according the needs of work to be done.

When it is considered whether a posted worker's pay meets the requirements laid down in Section 2 of the Posted Workers Act, special allowances paid due to the worker's posting, unless they are paid in reimbursement for actual costs incurred because of the posting, shall be considered part of the worker's pay. Otherwise, it depends on the nature of the benefits whether they should be taken into account when calculating the rates of pay. No guidance is provided by the Posted Workers Act in this respect. According to the information provided by the supervising authorities these authorities can ask interpretation of the applicable collective agreements from the labour market organizations. The same is true with regard to the comparison between home state and host state protection under Article 3(7).

From a practical point of view, the answers given by the representatives of Finnish authorities show that the Posted Workers Act is clear by content but there are problems concerning its supervision. According to the answers given by the Department for Occupational Safety and Health of the Ministry of Social and Health (Sosiaali- ja terveysministeriön työsuojeluosasto, later: Ministry Department)[222], the content of generally applicable collective agreements is often complicated and the supervisory authorities have no right to interpret these agreements. According to the representative of Regional State Administrative Agency of the Southern Finland (Etelä-Suomen aluehallintovirasto), in some cases, the authorities for the supervision of the posted workers legislation ask help from trade unions for the interpretation of collective agreements.

IE

The Posting of Workers Directive was transposed into Irish law by section 20 of the *Protection of Employees (Part-Time Work) Act 2001* (hereinafter referred to as 'the implementing measure'), which simply extended *all* Irish employment protection legislation to eligible posted workers. This extends to the provisions of REAs and EROs where these are in existence. There is no distinction drawn between posted workers and other workers, be it foreign or domestic. Hence the concepts used in the Directive are not implemented in Irish law at all. Interesting in the current context of wage levels is the term 'reckonable pay'.

'Reckonable pay' refers to those payments or benefits-in-kind that are *allowable* in calculating the average hourly rate of pay of an employee, in order to determine if the employee has been paid his or her *minimum* hourly rate of pay entitlement under the minimum wage legislation. This would include, for example, piece and incentive rates, commission and bonuses, which are productivity related and the monetary value of board and lodgings.[223] It would not include, *inter alia*, overtime payments, tips and gratuities paid into a central fund, expenses incurred by the employee in carrying out his or her employment (including travel allowance, subsistence allowance, tool allowance and clothing allowance), or payments-in-kind or benefits-in-kind other than appropriate board and lodgings.
Outside of the statutory *minimum* wage, the *Payment of Wages Act 1991* defines 'wages' (under section 1) as any payment in return for work done. This includes regu-

[222] The Department guides the Regional State Administrative Agencies' divisions of occupational safety and health.
[223] The maximum rate for board and lodgings that can count as reckonable pay is laid down by Ministerial Order; the present rate for a full week's board and lodging, for example, is €54.13 (*National Minimum Wage Act 2000 (National Minimum Hourly Rate of Pay) Order 2000 (SI No 95 of 2000)*).

lar basic pay, overtime pay, bonuses and commission, holiday pay, maternity leave pay, sick leave pay, shift payments and payment in lieu of notice. This definition of wages does *not* include expenses incurred by employees during the course of their employment, redundancy payments, benefits-in-kind, pensions, or any payment to the employee in a capacity other than that of employee.

The Irish implementing measure makes no reference to the subsidiary character of national law, where the country of origin offers better protection. In terms of workers posted to Ireland, the approach of the Irish authorities is to simply check for conformity with Irish law. Only if there are breaches in this regard, is the issue of the home state protection likely to be raised. In any case, given the relatively high levels of pay and employment protection in Ireland, the authorities do not see the issue of comparing Irish and home state protections as being particularly problematic. In fact, one interesting case referred to by the representative of the employers' organisation in construction (CIF) relates to Irish workers being posted to the UK. On comparing rates, the Irish posting firm found the Irish rates to be higher than those applicable in the UK, yet the UK client instructed the firm to pay only UK rates. The Irish firm granted 'special allowances' to the posted workers in order to maintain their pay at Irish rates!

MT

The minimum employment remuneration for various sectors is governed by the Government's Wages Councils or through collective agreements specific to the various industries. These legally binding agreements are applied uniformly to Maltese and foreign workers. Collective agreements sometimes guarantee special conditions and privileges in certain industries. Extra wages are paid for national holidays and Sunday work and for overtime, except for grades earning high wages, usually associated with managerial grades. Employees can also get extra reimbursement in the form of a company vehicle, lodging, communication expenses, and health insurance. High end benefits such as company cars are considered as taxable income and are thus set a taxable value by the tax authorities.

All employees receive annual pay increases linked to the cost of living. This system of indexation also applies to posted workers.

Minimum rates of pay are established by:

- A minimum wage that is fixed on a yearly basis by a national standard order issued under the Employment and Industrial Relations Act, taking into account the indexation of cost of living,
- Statutory bonuses, comprising a bonus as established in article 23 of the Employment and Industrial Relations Act (CAP 452) and a weekly allowance as established under the 'Weekly Allowance National Standard Order' (S.L. 452.62)
- Wage Regulation Orders that regulate particular sectors of industry and which establish particular minimum wages and overtime rates of pay applicable to that sector and which may also include additional shift allowance.

In comparing minimum rates of pay, the basic wage paid to the posted worker should not be less than the minimum wage that is applicable in the sector by virtue of the relevant Wage Regulation Order or by virtue of the National Minimum Wage National Standard Order where the sector is not regulated by any Wage Regulation Order. However, the posting undertaking would be satisfying the minimum rates of pay

if the basic wage paid to the posted worker, including any allowance specific to the posting (unless such allowance is paid as a reimbursement of expenses actually incurred on account of the posting, including expenditure on travel, board and lodging), is at least equal to or exceeds the equivalent of the relevant minimum wage plus statutory bonuses and any shift allowance as universally applicable under Maltese labour law.

*Sending states*

BG
When calculating the rates of pay in Bulgaria only the wages are taken into account. The other possible benefits may be a part of social services at the enterprise (e.g. working cloth) or of health and safety requirements (e.g. personal protective equipment). The additional labour remunerations for length of service, higher qualifications, etc. are also not included in wages. Article 6 of the Draft-ordinance for Posting of Bulgarian Citizens provides explicitly for that the expenditures for the posting are also not included in the rates of pay.

Pursuant Article 215 LC upon posting the worker is entitled, in addition to his/her gross labour remuneration, to travel and accommodation expenses as well as a per diem payment under terms and in amounts determined by the Council of Ministers – these benefits are not a part of the wage. The compensation for expenses depends on the type of the transport and the costs of accommodation (the latter up to 130 Euro for the EU countries). The separate per diem payment is 35 Euro for the EU countries. These expenses are due for every foreign posting, regardless of the length thereof.

CZ
As explained above, Czech law has both a minimum wage and a guaranteed wage. This guaranteed wage is regulated by Section 112 of the Labour Code and by the Minimum Wage Decree. The guaranteed wage exists in eight heights depending on job requirements. In the Czech law there are no benefits which would be taken into account when calculating the minimum rate of pay. The minimum rate of pay must be observed even if there are other monetary benefits. Key reason of this is that taxes and social system contributions are calculated of the wage. Considering the fact that the retirement pay is partially calculated from height of social contributions during working life it would not be fair and equal treatment to lower the minimum rate of pay in cases where the employee receives other benefits.

Greece
All benefits in return for the work performed are taken into account when calculating the rates of pay. Any form of goods with economic value may be considered a form of pay. However, goods given to the worker in order to facilitate the execution of work or for reasons of hygiene and security are not taken into account.
Allowances specific to the posting shall be considered to be part of the minimum wage unless they are paid in reimbursement of an expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. Contributions to supplementary retirement schemes and relevant benefits are not included in the minimum rates of wage.

HU

Under the current regulations, either a rule pertaining to the employment relationship or the agreement of the parties can prescribe the payment of a wage supplement. The wage supplement is remuneration for work performed under other than normal work conditions, under circumstances not taken into account at the time of the determination of the personal base wage. The Labour Code provides for the payment of a wage supplement in (amongst others) the following cases: shift work, overtime, on-call duty and stand-by duty.

Subsection (4) of Section 106/A of the Labour Code (posting, assignment, hiring out of foreign employer's employee to Hungary) contains an express interpretative provision in regard of the 'minimum rates of pay'. This term refers to the personal base wage, supplement paid for overtime and allowances paid for work abroad. Supplemental payments to pension funds and the part of reimbursed expenses in connection with work abroad such as the costs of travel and room and board that is not subject to personal income tax shall not be included in the minimum rates of pay. Accordingly the supplements described above – with the exception of supplement for overtime - shall *not* be included in the concept of the minimum wage in the event of posting to Hungary. The same is true for so-called 'fringe benefits' such as a monthly ticket for the local transport system.

According to Subsection (5) of Section 106/A of the LC the above provision on the minimum rates of pay shall be duly applied to the foreign posting (assignment, hiring-out) of workers employed by Hungarian employers if it is not covered by the laws of the country where the work is performed).[224] Moreover, it should also be recalled, that the provisions of the Labour Code regarding the posting of workers require that the employers shall reimburse employees for all necessary and substantiated costs incurred in the course of fulfilling their work-related obligations, as well as for all other required expenses incurred in the employer's interests, if the employer has approved such in advance. (LC, §153). (see Government Decree No. 168/1995. (XII. 27.) on Eligible Costs Related to Posting Abroad and the relevant sections of Act CXVII of 1995 on Personal Income Tax).

Latvia

From the sending state perspective it is important to note that the employer must provide to posted employee not only with at least the minimum salary under the rules of host Member State but also with travel, boarding and lodging costs as required by Latvian law. This is seen as an effect of Article 3(7) of the PWD. Latvian employers are bound by the Regulations on reimbursement of expenses during business trips.[225] Such requirement involves high additional costs, for example, in Western Europe and Scandinavia daily subsistence allowance is around EUR 45-55. If the employer has to provide such allowance for one month it constitutes an additional payment of EUR 1350 – 1650. This is considered to be a very large sum especially compared to the statutory minimum monthly salary being just LVL 200 (EUR 285). Thus it is not surprising, as was said by Trade Union of Construction Workers and employers,[226] that employers avoid sending employees to another Member State as posted workers but

[224] However, there is some uncertainty with regard to the entitlement to fringe benefits.
[225] The Cabinet of Ministers Regulations No.969 'Procedure on reimbursement of expenses in connection with business trips', OG No.169, 26 October 2010.
[226] Telephone interview with Company A (16 June 2011).

rather find other constructions such as opening daughter enterprise and employ persons directly in host Member State.

Lithuania

The basic provisions on remuneration are provided by Labour Code. Article 186 Labour Code states that a *wage* shall be remuneration for work performed by an employee under a contract of employment. It shall comprise the basic salary and all additional payments directly paid by the employer to the employee for the work performed. The Decree no 650 of the Government of 27 August 2003 (State Gazette, 2003, no. 2006, Nr. 105-4011) regulates what income of the employee and in which way shall be considered when calculating its *average pay*. Usually all the payments made by the employer are taken into account. It is easier to say what is not taken into account - compensations for travel costs, accommodations and daily allowances when on business trip, allowance for transfer to another place of work, compensations for damages made by employer. Taxes and obligatory social and health insurance contributions are definitely not considered as pay. The average wage of a particular employee is calculated on the basis of three months preceding the month of calculation.

Article 4 (1) of LGPW (the law implementing the PWD) provides explicitly that where the legal provisions of a state whose law is applicable to an employment contract or employment relationship provide to workers more favourable conditions than the provisions of Lithuanian law, the legal provisions of the state whose law is applicable to the employment contract or employment relationships shall apply. However, it is not clear which standards are used for this comparison. For lack of relevant court cases we can not answer this question with any authority, but is likely that the courts would apply the national rules on calculation of average pay of an employee (see above). Article 4 (2) LGPW provides only that per diem allowances, with the exception of expenditure on travel, board and lodging actually incurred on account of the posting, shall be considered to be part of the minimum wage.

For workers posted from LT on a business trip, the entitlement to a per diem and reimbursed of the costs relating to the posting is guaranteed by the Labour Code. This entitlement depends on the definition of business trip, and is independent of the application of the rules on posting (the two concepts are not identical). The amounts of, and the procedure for paying these entitlements shall be established by separate act of government.

Portugal

In principle, according to article 258.º, nr. 1, salary is whatever the employee is entitled to as counter-performance for his/her labour. The Portuguese law draws a distinction between what it calls the “basic salary” and the remainder of the payments made. The concept of “basic salary” encompasses the payment of the activity of the worker during his/her normal working hours (article 262., nr. 2, al. a). The concept has practical importance because it is taken into account for instance when assessing the compensation to the worker in case of wrongful dismissal.
In this matter there was in Portugal a tradition, born in collective agreements but that has now the nature of a legal obligation, of paying the salary not just in twelve instalments matching the twelve months of the year, but also two other instalments, one during the holidays and the other in Christmas. The exact amount of these instalments is not the same as the others since during holidays the extra payment is only equal to

the basic salary and other payments given as direct consideration for the type of the work rendered.
The Labour Code contains, in its article 258.º, nr. 4, a refutable presumption that any performance of the employer to the employee is a part of the salary of the latter. The subject matter of the salary is one in which particular attention is paid to the practices or usages of the professions or the enterprise. For instance a bonus is not generally considered salary, as stated in article 260.º, unless the worker has a contractual right to a bonus, even if that bonus depends upon the achievement of a certain performance, or if the bonus is given regularly so that it becomes of a permanent nature as a result of a common practice.
Expenses and cost allowances are also not considered as salary, as long as their true nature is the reimbursement of expenses or costs incurred by the employee. However, if a permanent amount is paid which exceeds the expenses made, it becomes a part of the salary (article 260.º, nr. 1). The participation in the profits of the employer, which in Portugal is never imperative for the employer, is not considered as salary, as long as the employee has a fixed, variable or mixed salary which is adequate for the work rendered.

Slovakia
In terms of the wage calculation, there is a very important term used in the Labour Code, referred to as average salary. Average salary is used for the purpose of calculation of various salary compensations, e.g. compensation for overtime or compensation salary for a holiday. The average salary is primarily calculated as an average hourly salary.

The payment made by an employer to an employee for work upon the occasion of his/her work anniversary or personal anniversary, if such is not provided from net profit or from the social fund, is considered as wage. All other fulfilments are not considered as a wage. This involves all kinds of wage compensations (for overtime, for work on a public holiday, night work, or onerous work performance), severance allowance, discharge benefit, travel reimbursement, contributions from the social fund, revenues from capital stocks (shares) or bonds, and compensation for work stand by.

For the purpose of calculating the minimum wage claims according to Section 120 of the Labour Code, wage for the inactive part of the standby service at workplace, wages for overtime work, wage surcharge for work on a public holiday, wage surcharge for night work, and wage surcharge for work in a constrained and health detrimental working environment shall not be included.

The implementing law specifically states that application of host state laws in the specified areas of protection shall not prevent the application of condition of work more favourable for the employees. According to the Section 5 (3) of the Labour Code the advantages of the working conditions are to be considered separately for each claim. However, according to the available professional comments to the issue the consideration should be carried out according to functional categories e.g. remuneration, rest periods, vocational training etc. Therefore an employee may not be entitled to a wage under regulation of MS X and to overtimes rates according to law of MS Y, since both these entitlements are subsumed under the same functional category - remuneration.

Slovenia

The Employment Relationship Act contains basic provisions on wage/salary system in Articles 126-140. Worker's payment for work under employment contract is constructed from wage/salary, which must always be determined in monetary form, and other types of payment. The most important payment for worker is the wage. The wage is structured from basic wage, part of wage for work efficiency and additions. Part of a wage is also payment for business performance, if this is determined in collective agreement or employment contract (Article 126, paragraph 2 of the *Employment Relationship Act*). The minimal wage includes all listed elements, except payment linked to business performance.

Basic wage was originally defined in the General Collective Agreement for the Economic Sector as payment for full working time, normal working conditions and working results, determined in advance. Since this General Collective Agreement was cancelled, most of sector based collective agreements (wood industry, non-metals, agriculture, road passenger traffic, metallic material, electro industry, hotels and restaurants) determined a new term, i.e. the lowest basic wage, as wage for full working-time, representing the lowest evaluated work of the tariff group. The basic wage must be than at least equal to lowest wage in tariff group. The Public Sector Salary System Act[227] determines basic wage as part of wage that is paid to the worker for working full-time and expected work result in each individual month (Article 2, paragraph 1, point 10.)

Additions are determined and calculated only when they are not already included in complexity of work, special conditions of work, regarding to working time (night work, work on bank holidays, Sundays etc.), specific burdens at work, disadvantage influence of environment and danger at work. The only permanent addition is the addition for seniority, determined in Article 129 of the Employment Relationship Act.

There are also other types of payment which not regulated in the Employment Relationship Act and are not a component of the wage. The most usually agreed other types of payments in practice are: the use of business car for private use, the use of computers and mobile phones for private purposes, different types of insurance, accommodation, etc.[228] Additionally, also a so called Christmas bonus has been invented in later practice. It is paid to the workers around Christmas. Its definition is not given in the Employment Relationship Act or other legislative acts; however it is determined in some newest sector based collective agreements. It is paid either in monetary or non-monetary form and can be subordinated under type of wage for business performance or considered as other types of payment. In either case it is not part of the basic wage.

Beside the wage and other type of payment, the worker is entitled also to some additional payments. Particularly relevant for posting are the right to remuneration of costs for food, transport to and from work, remuneration of work, arising by performance of certain works and tasks on business travel (Article 130 of the Employment Relation-

[227] Official Journal of the RS, No. 108/2009 – thirteenth official consolidated text, 8/2010 Odl.US: U-I-244/08-14, 13/2010, 16/2010 Odl.US: U-I-256/08-27, 50/2010 Odl.US: U-I-266/08-12, 59/2010, 85/2010, 107/2010, 35/2011. The Act was adopted 7th May 2002 and entered into force 13th July 2002. It is used from 1st July 2004.

[228] Korpič Horvat E., Zakon o delovnih razmerjih s komentarjem, GV Založba, Ljubljana, 2008, page 608.

ship Act); and the annual holiday bonus (Article 131 of the Employment Relationship Act). The Collective Agreement for the Construction Industry grants workers a special compensation for separation from his family (Article 50a), as well as terrain addition, when he works on terrain/field (Article 50).

Spain
Article 4 Act 45/1999 provides a guaranteed wage for posted workers. It cannot be lower than the wage set for their professional status in the Spanish collective agreement applicable to their activity. The salary guaranteed is constituted by the base salary and bonuses, overtime and, if any, compensation for additional overtime and night work. It is calculated on a yearly basis, without discounting taxes, payments on account and Social Security contributions. Voluntary improvements of the protective action of Social security are never included in this calculus.

In order to compare the amount of salary that corresponds under the applicable law and the one guaranteed in Spain for posted workers, travel allowances (travel, accommodation or meals) should be included if they are not paid as reimbursement of expenditure actually incurred by such displacement. There is no difference it this point with art. 3(7) of the PWD. Travel allowances are not considered wages according to the Spanish domestic legislation.

**Overtime rates**

In the previous study, the problem was raised of combining a high minimum wage level due under the law of the host country with a high overtime allowance under the law applicable to the contract. This point was raised in particular by the Polish expert. To get an idea of the differences in overtime rates, we include a comparison of the overtime rates granted in several of the member states studied here. The issue was not reported as problematic by any of the experts.

In AT the worker is entitled to a 50% increase for overtime on workdays. This is often raised to 100% for work after 22.00 in collective agreements. The supplement for work on public holidays is 100%. In BG the Labour Code guarantees a surcharge of 50% for overtime on weekdays, 75 % for weekends and 100% for public holidays. CY works with a 50% entitlement on Monday to Thursday, increasing to 100% on Fridays, weekends and national holidays. FI has different supplements depending on the hours worked: 50% for the first 2 hours, 100% for the following hours. In PO the overtime rates are 50% for the first hour and 75 % for second hour of working day; restdays and holidays are paid at a 100 % surcharge.
In LT the surcharge is 50 % (overtime work and night work: 22.00-06.00 h) or 100 % (public holidays). Similar percentages are used in HU. Though these countries have comparable percentages (50-100%), the exact point at which the higher percentage is due differs slightly in the different countries.

This basic similarity seems to be absent with regard to EL, SK, CZ, ES and IE.
EL pays an extra 20-80 % depending on the number of hours overtime. SK and CZ both have a minimum of 25%. This is considerably lower than the average of the Member States discussed in the previous paragraph. ES and IE are even more of an exception in that they do not provide for a statutory right to overtime pay at all. The

Irish Organisation of Working Time Act 1997 only provides for a right to compensation (in pay or time off) for working on Sundays. The construction REA, however, has a familiar pattern: Mo-Fri 50%, Weekends 100%. Overtime rates are one of the main points of contention with regard to EROs - the Irish system of standard setting through Joint Labour Committees which is currently under attack.

When reading these figures it should be kept in mind that in some cases overtime payment can be excluded for certain categories of workers (in practice this in mainly done for managers and executives) or compensated in time-off.

### Per diems

A point of interest in the current set of national reports is the 'per diem' system of statutory allowances in case of domestic and crossborder posting which exists in several of the Member States covered by the current study. In BG the worker is entitled to compensation for expenses limited to € 130 for accommodation and a separate per diem of € 35 a day when posted to another EU country. CY grants the worker the right to free transportation as well as a transfer allowance. The amount of the latter depends on the length of posting: for postings shorter than 30 months, the allowance is € 178,72 a month, for longer postings it is lowered to € 93.80. The per diem in Latvia is approximately € 45-55. This amount also applies in cases of extended posting and constitutes an additional € 1350 – 1650 a month. This is considered to be a very large sum especially compared to the statutory minimum monthly salary being just LVL 200 (€ 285). In LT all employers are required to pay a per diem allowance of 195 Litas = € 56 if the employee is posted to Belgium or Germany, or 142 Litas = € 41 if the employee is posted to Ireland.[229] There is a legal possibility for private companies to agree individually with an employee about a reduction of the per diem to 50 per cent of the official amount but this option is rarely exercised, except in the transport sector. Per diems and statutory rights to compensation of expenses are also reported from HU.

### The gross/net problem

The identification of the constituent elements of 'rates of pay' (and their comparison) is further obscured by the gross/net debate: should wages be compared before or after tax and deduction of social security premiums? This question was raised in the previous report and surfaces again in the AT and LV reports. In the previous report we already stipulated that in general it is the gross wages that are relevant under the case law of the ECJ on posting of workers.[230] This means that social security contributions paid in the home state also have to be taken into account when comparing wage levels. This question is distinct from the question of whether certain insurances as are obligatory in the host state (e.g. as part of a collective agreement) can be considered part of the minimum rates of pay and hence be imposed on foreign providers. Nevertheless, the two problems are not entirely unrelated. Social protection is organized in a

[229] Resolution no 116 of 21 November 1996 of the Ministry of Finances of the Republic of Lithuania (State Gazette, 1996, no 114-2660)
[230] Commission/Germany para 29, confirmed in e.g. Laval (C-341/05).

wide variety of ways: specific protection may be offered through contractual obligations, through statutory insurance covered by the EU regulation on social security, or by means of additional insurances and/or funds contained in collective agreements. This divergence may cause extra problems regarding the comparability of protection (see also section 3.6 with regard to the insurance against industrial accidents and maternity leave).

**Conclusions and recommendations**

The overview given in the previous paragraphs basically confirms the finding in the report under contract VC/2009/0541that the concept of 'rates of pay' show considerable variation between the Member States. And even within the Member States, different concepts of 'rates of pay' may exist, depending on the purpose of concept. It is used inter alia to calculate entitlements to benefits (unemployment benefit, redundancy payment, pension) and/or to calculate taxes. For each purpose, the definition might be different. It is often unclear which concept of pay is used in the context of posting.
The variation found, affects all aspects of the protection of wage levels to wit

- the question which elements of the remuneration as regulated in the host state are due to workers posted to the territory – the scope of Article 3 (1)(c))
- the question which elements of remuneration are taken into account in order to compare the actual wage level to the compulsory minimum applicable in the host state.
- the comparison of protection under the home state rules with protection under the host state rules under Article 3(7) first sentence.

In some cases, the experts indicate that the domestic concept differs from the one used in the context of posting. For example in Lithuania per diem allowances for business trips are not considered to be part of the minimum wage for domestic purposes whereas in the context of posting they are. Similarly in Spain travel expenses going beyond the actual costs are excluded for domestic purposes, but included in the context of posting. These differences are to a large extent inspired by the text of the Directive itself[231] but do not add to the clarity of the concept.

In parallel to the first report it might be helpful to distinguish (without pretending to be exhaustive)

- Basic wages including allowances and supplements based on job qualification.
- Allowances and supplements which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, such as overtime rates and hardship bonus provided on an incidental basis.
- Payments such as bonuses in respect of the 13th and 14th salary months that are based on the basic wage and are paid regularly.

[231] Article 3(7) stipulates that "Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging." Article 3(1)(c) on the other hand guarantees the posted worker the application of host state rules with regard to "the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;"

- Flat-rate sums calculated on a basis other than that of the basic wage.
- Fringe benefits such as mobile phones, computers, company cars etc.
- Contributions to supplementary occupational retirement pension schemes and other elements of enhanced social protection including compulsory insurances.
- The amounts paid in reimbursement for expenses actually incurred by reason of the posting.
- Per diems and other payments linked to the posting that are paid irrespective of (or in excess to) costs incurred.
- Automatic indexation clauses (MT/CY).

For some of these (e.g. pension schemes and reimbursement of expenses) the PWD itself already contains a provision that they are not part of the minimum wage in the context of posting. This is mirrored in the national implementation measures. However, as to the other aspects, there is less uniformity. Where several countries stipulate that the per diems are part of the minimum rates of pay (LT, FI, EL), such does not seem to be the case in BG. The holiday and Christmas bonuses, which are usually considered to be part of the rates of pay, are not part of the calculation of the minimum rates of pay in SI. Similarly a standard of comparison for the purpose of Article 3(7) is lacking as well. Hence we repeat our recommendation that there is need for a clarification at EU level of both the concept of rates of pay in the PWD and the standard to be used for comparison. The ECJ judgment in the case Commission v. Germany (C-341/02) provides a good starting point for the discussion on this issue.[232]

In the context of the comparison of wage levels it is interesting to note that several countries have established a statutory right to compensation in case of business trips and similar travel on behalf of the employer. The high level of per diem remuneration is deemed prohibitive in for example the LV report. This leads to evasion of the rules on posting, to the benefit of either direct employment in the host state or irregular posting. Though the regulation of per diem allowances and the application thereof to postings of the types covered by the PWD is a matter of national law, it would help if all host states would except the per diem allowances (over and above the compensatory level) to be part of the rates of pay for comparison with the minimum rates due to posted workers under their laws and regulations.

***Recommendation 17 ** NEW****

**At national level >** The member states should clarify – in as far as they have not already done this – which provisions in the national laws or collective agreements are applied to workers posted to their territory as an implementation of Article 3(1)(c).

[232] In this respect also the EFTA Court Judgment of 28 June 2011 in Case E-12/10 EFTA Surveillance Authority v Iceland is noteworthy. The Court held that since the Icelandian sickness pay is not set at a minimum rate, i.e. neither as a flat rate of minimum compensation, nor calculated on the basis of a minimum wage, but corresponds to the regular wage the worker receives under his employment contract, the entitlement could not fall within the notion of "the minimum rates of pay". The Court also found that the provision on accident insurance concerns the terms and conditions of employment and, consequently, is a matter to which Article 3 of the Directive applies. However, the Court found that this obligation falls outside the matters listed in Article 3(1) of the Directive, and is thus contrary to the Directive.

***Recommendation 18 - (formerly rec 15) unchanged***

**At EU-level >** A European framework should be developed to enable Member States to articulate their standards and allow service providers easily to check the conformity of their 'own' employment conditions with the local rates of pay in the host state. From a practical point of view it may be a defensible tactic to allow a comprehensive comparison first and only perform an item-by-item comparison when the comprehensive comparison shows considerable discrepancies in protection. Such a practice, however, would need European backing to ensure conformity with the Directive.

## *3.6 SUBSTANTIVE SCOPE: OTHER AREAS OF PROTECTION*

### Health, safety and hygiene at work

#### Introduction

The European health and safety regime is based on Framework Directive 89/391/EEC[233] and consists of several ingredients, including:

- Safety requirements with regard to the workplace, to equipment and to personal protection;
- The right to leave the workplace in case of serious, imminent and unavoidable danger;
- Rules with regard to a regular risk assessment and formulation of a prevention policy;
- Information and consultation of workers' representatives;
- Information and training of individual workers;
- Organizational rules with regard to a medical service/ safety and health officers;
- Additionally, the national systems may contain rules with regard to the civil liability for industrial accidents and occupational diseases, entitlements to additional benefits and/or compulsory insurances.

This paragraph deals with those issues of health and safety regulation which are relevant in the context of posting. That means that no comprehensive description is given of the H&S systems in the MS – which are largely based on European Directives anyhow. We are concerned mainly with the problems identified in the previous study. These pertained to:

- The scope of application of the H&S regulations both as regards the host states and the sending states.
- The complex structure of H&S regulation, which may lead to a varied interpretation of the reach of Article 3(1)(e) of the directive.
- Specific national requirements which may lead to problems of mutual recognition, in particular training requirements and health checks.

#### Overview of the national provisions

*Host state perspective*

Austria Specific health and safety provisions are contained in the *Arbeiternehmerinnenschutzgesetz*. These public law provisions for worker protection, which are monitored by the Labour Inspectorate ("*Arbeitsinspektorat*"), are understood as overriding mandatory provisions in the sense of Article 9 of the Rome I Regulation. Regardless of the law applicable to the labour contract, these provisions apply from the first day

[233] This framework directive further provides the base for directives on working time, special protection for young workers and female workers who are pregnant or have recently given birth.

of being posted to Austria. This rule does not only apply to the work place precautions, but also to the other duties of the employer under the H&S regulations. Even when the actual behaviour has taken place outside Austria, as may be the case of breach of certain preventive and organisational health and safety obligations, the place of the infraction is considered to be domestic (= in Austria).
Problems of coordination may arise as to payment during illness: During periods of illness an (Austrian) worker is entitled to full wages for 6 – 12 weeks and half of wages for further 4 weeks. Only when payment of the half of the wages no longer applies is sick pay provided by the public health insurance funds as remuneration in the form of an income. Sick pay is not regarded as part of the minimum wage in the sense of Sect. 7b Para. 1 No. 1 of the AVRAG. There are differences of opinion on the question if this obligation to continued payment is to be considered as an overriding mandatory provision.

In Cyprus health and safety is currently regulated in approximately ten different laws and twenty nine regulations. This statutory protection – as is the case in relation to all elements covered by Article 4, paragraph 1 e-h of the Law 137(I)/2002, provided that the relevant legislation does not contain any territorial restrictions - also applies to workers posted in Cyprus.
According to the provisions of the Law 174/1989 on Employer's Liability Compulsory Insurance, all employers are required to have in force an insurance cover for their legal liability for accidents and occupational diseases. The cover envisaged under the legislation extends to all Cypriot employees of the employer abroad, provided that they are permanently residing in Cyprus.[234] There are no specific provisions concerning liability in case of accidents or occupational diseases for posted workers. Given however that employer's liability is for insurance purposes, it is not clear whether the posted worker is covered, or continues to remain under the social insurance scheme of the country of origin

The Finnish Occupational Safety and Health Act (Työturvallisuuslaki No 738/2002) and the Occupational Health Care Act (Työterveyshuoltolaki No 1383/2001) apply to workers posted to FI. This means that posted workers are governed by the basic protection provided by the mandatory legislation on health and safety as well as occupational health. Both the minimum standards and the related organisational provisions apply to posted workers. Also the rules on liability in the Occupational Safety and Health Act apply without exceptions.

Likewise, the Irish Health and Welfare at Work Act 2005 applies in full to posted workers. The area of health and safety is quite heavily regulated in Ireland and the laws apply to *all* workers without any exceptions. As a result, the national informants were of the view that enforcement by the HSA was relatively effective. There is also, it was noted, a culture of compliance with health and safety rules that far exceeds that in relation to labour law compliance generally. Nevertheless, non-national workers are consistently over-represented in occupational injury statistics.[235]

[234] The requirement for insurance cover provided by the legislation affects all persons who employ other persons for more than eight hours per week, also including foreign workers and domestic workers.
[235] See www.hsa.ie for recent statistics.

It is interesting to note that also the equality laws are used to protect the health and safety of workers. In *58 Named Complainants v Goode Concrete*[236] the Equality Tribunal found that the complainants were treated less favourably on the grounds of race when all safety documentation was not translated into a language they understood. This case is currently under appeal.

MT

As to H&S regulations, the entire array of acts implementing EU law in this area is applicable to workers posted to MT. Special mention is made of the right to sick leave (which could be grouped under different headings). Employees must notify the employer as soon as possible when they fall ill. A doctor's certificate is required. Employees are entitled to wages during illness according to Maltese law or applicable collective agreements. When the sick leave entitlement is exhausted the employer is no longer obliged to pay wages. The employee is entitled to sickness benefits from the Social Security Department. These rules are included in the protection offered to workers posted to Malta. For postings from MT, the rules of the host state would be applicable. This is possible due to the general clause in the MT implementation law which states that "the conditions of work which are given to posted employees while working in Malta shall not be less than the minimum conditions of work that are generally applicable by virtue of the law, to a comparable employee, employed in the same place of work". The implementation of Article 3(1)(a-g) of the PWD, which is repeated in the MT implementing law, is seen as merely a non-exhaustive enumeration of areas of protection.

*Sending state perspective*

Bulgaria has a comprehensive labour code which also contains the basic rules on health and safety. All these rules, including the ones on health, safety and hygiene at work, are applicable to workers posted from Bulgaria as long as Bulgarian law applies to their labour contract. That means that also the minimum standards on health, safety and hygiene at work are applicable to workers posted from Bulgaria. However, it is deemed impossible to apply Bulgarian organizational measures (compulsory risk assessment, medical facilities) to Bulgarian citizens posted abroad, except when these activities have to be performed in Bulgaria – e.g. as regards prior medical examinations.

In the Czech Republic the minimum standards of employer's duties on health, safety and hygiene at work are set by Section 103 of the Labour Code. Under Section 366 (1) and Section 366 (2) of the Labour Code the employer is liable for both accidents at work and occupational diseases. Czech law applies on worker posted from the Czech Republic in these issues if it contains more advantageous conditions for the posted worker than the foreign law. There is however a lack of experience as to the practical application of H&S provision to workers posted abroad.

In Greece, the H&S provisions are deemed to apply also to postings from Greece

[236] DEC-E2008-020, see www.equalitytribunal.ie

HU
Subsection (2) of Section 102 of the Labour Code states that employers shall ensure proper conditions for occupational safety and health in observation of the provisions pertaining thereto. The relevant provisions are contained in the Act XCIII of 1993 on Labour Safety (hereinafter: LSA). The LSA-provisions apply to work performed in Hungary – the duty-free zones included – 'unless ordered otherwise by the law, by international treaty or in the absence of the latter by international private law'. This latter proviso recurs in other parts of HU labour law, making it difficult for outsiders to fully comprehend the applicability thereof in a specific case.
Based on the implementation of the PWD in art. 106/A of the Labour Code, the H&S provision apply to workers posted *to* HU. As regards workers posted *from* HU a possible interpretation is that the relevant provisions of the Labour Code will apply as long as HU law is applicable to the contract under Article 8 of the Rome I Regulation. However, for lack of case law this is not entirely clear.
Pursuant to Section 69 of the LSA if an employee with Hungarian citizenship of a Hungarian-registered employer suffers an industrial accident in the course of his foreign assignment (foreign service), the employer shall fulfil his obligation of reporting and registration as defined by HU law.

LV
Article 14(3) of the Labour Code implements Article 3(1)(a-g) of the PWD. Article 14(3)(5) deals with health, safety and hygiene at work. Article 14(3)(5) it regulates the protection of workers posted to Latvia as well as workers posted from LV to another EU Member State (via Article 14(5)). According to Article 14(5) workers sent from Latvia must be subject to rules on health, safety and hygiene of the host Member State.

In LT all elements of H&S are contained in the general Labour Code. For lack of specific regulation, these may be deemed to apply in all cases in which LT law is applicable to the contract.

In Portugal the system of reparation of working accidents is based upon a mandatory duty for the employer of entering into a private insurance contract since the public fund has only a residual and subsidiary role. Differently there is a public fund responsible for the help to the employee in case of occupational diseases. The employer's liability for working accidents is considered to be a tortious liability (and not a contractual one), with obvious consequences for the conflict of laws rules.

Slovakia: The obligations in the area of health and safety of work are laid down in Section 146-147 of the Labour Code, in the Act No. 124/2006 Coll. on Health and Safety at Work, and in many regulations (act, internal rules) depending on the character of work. The employer's liability for accidents at work and occupational diseases is construed in the Labour Code as a specific liability (Section 195-198 of the Labour Code). Further compensation is provided under Act No. 461/2003 Coll. on Social Insurance as amended (effective from 1.1.2004). If the posted employee falls in the social security system of the sending state – Slovak Republic, the posted employee is entitled under conditions laid down by Act No. 461/2003 Coll.

Slovenia The rules on H&S are in general determined under Article 43 of the Employment Relationship Act, whereas liability for accidents at work and occupational

diseases is regulated in Article 184 of the Employment Relationship Act, in conjunction with the Code of Obligations. Specific and concrete provisions on health and safety measures are given in the Occupational Health and Safety Act. There are no special provisions on posted workers and protection of them in relation to health, safety, pregnancy etc. – all workers, including posted workers, are treated equally. Standards that are set in the Slovenian legal system apply to workers posted to other countries, as long as Slovenian legislation is applicable to their contract.

Spain: the Spanish rules on liability for accidents at work arising from civil law or prevention of occupational risks law are applicable to posted workers.

**Comparison**

In the previous study the application of health and safety provisions depended to a large extent on the way in which labour protection is organized: countries with specific (public law) statutes regarding safety and health (NL, DE) treated these provisions as overriding mandatory provisions in the meaning of Article 9 Regulation Rome I, applying largely on the basis of territorial criteria. In these countries, the H&S provisions are not part of the law applying to the contract by virtue of Article 8 Rome I Reg. This strictly territorial application of H&S legislation is reported by some experts in this study as well (e.g. LV) but another approach is far more prominent. In the current study, several sending states report that H&S protection is part of the law applying to the contract of employment under Article 8 of the Rome I Regulation (BG, CZ, EL, LT, SI). This means the relevant statutes are applied to workers posted from their country on the condition that their law is still applicable to the labour contract. This trend coincides largely with the presence of a single labour code, covering all aspects of the individual and collective labour relationship (see e.g. BG, SI).

In the questionnaire the host states focused on the application of H&S provisions to workers posted to their country, whereas the sending states mainly discussed the extraterritorial effect (or not) of their own regulations. The host states all apply their H&S provisions *to* postings to their country. But most of the sending states covered by this study likewise apply their laws to posting *from* their country. This leads to an unexpected degree of overlap in protection.

Since this study mainly covers sending states, it provides little information as to the exact application of H&S provisions in case of posting *to* the MS. However, the information given supports the conclusions of the earlier report. Problems might arise in particular as regards

- The application of organizational requirements in case of posting (HU, BG).
- Sick pay (AT, MT), liability for accidents at work and occupational diseases (PT) and compulsory insurances (SK, PT, AT) might cause problems, not in the least because of the overlap of these issues with social security. [237]
- Special mention should be made of the fact that liability for accidents at work is classified as tortuous in PT, leading to the application of the Rome II regulation on

[237] See also the EFTA Court judgment in case E-12/10 referred to in nt. 232 above.

non-contractual liability instead of the Rome I regulation on contractual obligations.

- In contrast to the previous study no problems were reported which relate to the different systems of health checks and training requirements. Hence we simply repeat the recommendation of the previous study that where applicable and as much as possible mutual recognition should be granted to training and health checks performed in the home state of the workers.

***Recommendation 19 (formerly 17 and 18 – no substantive changes***

**At EU level>** A clarification of the notion of safety and health in Article 3(1)(e) may remedy the confusion caused by the fact that the notion may cover different elements such as on-site protective measures, health checks, as well as liability for industrial accidents. The relationship with other systems of protection should be clarified.

**At national level >** Member States should as far as possible apply the rules of mutual recognition to each other's system of training and health care. This requires cooperation and exchange of information between the authorities involved.

## Protective measures aimed at special groups

### Introduction

The special protection given in the Member States to pregnant women or recent mothers, children and young people is largely based on EU Directives.[238] The directive on pregnant women and recent mothers contains several types of protection to be offered to this specific category of workers, including;

- Additional rules on safety and hygiene in the workplace with special regard to exposure to toxic substances and radiation (Article 3-6).
- Rules on night work (Article 7).
- The right to maternity leave (Article 8).
- Payment of and/or entitlement to an adequate allowance during maternity leave (Article 11 sub 2).
- Protection against dismissal (Article 10).
- Some countries have added to this list a specific prohibition on working during a limited period around the expected date of childbirth (e.g. Austria, ES).
- Other rights associated with this group of workers concern the right to return to the same or a similar job after the period of leave and/or continued seniority during leave. Such protection was found in the previous study to exist in Luxembourg.[239]

[238] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) – OJ L 348, 28 November 1992, pp. 1-8; and Directive 94/33/EC of 22 June 1994 on the protection of young people at work – OJ L 216, 20 August 1994, pp. 12-20).

[239] These rights, which only become relevant after the worker returns from leave, are hardly ever relevant in practice, as the worker on pregnancy leave is likely to return to the country of origin.

The protection of minors and young adults relates inter alia to the minimum age for gainful employment, special rules on working time and rules on safety and health.

Again, this report does not intend to give a full description of the different systems of protection of special groups such as pregnant women, recent parents and minors. The purpose is merely to highlight problems in the application thereof in case of cross-border postings. The point of departure are the findings of (and recommendations in) the previous study.

## Overview of national reports

*Host state perspective*

Austria
The public provisions for worker protection which are monitored by the Labour Inspectorate ("*Arbeitsinspektorat*") as a state authority and where sanctions can be imposed are understood as overriding mandatory provisions in the sense of Article 9 of the Rome I Regulation. Such provisions include the rules on the protection of children and young people, handicapped employees, women and and motherhood. Independent of the law applicable to the labour contract, the relevant provisions apply from the first day of being posted to Austria.

Hence the special provisions protecting pregnant workers regarding periods of rest, ban on night work and the like apply to posted female workers from the first day on as overriding mandatory provisions. These provisions include an absolute ban on work from 8 weeks before to 8 weeks after the birth of a child. During this period the employer is not obliged to pay a wage. Maternity allowance is paid from the sickness insurance fund as income replacement only to those female workers which are covered by the Austrian social system in accordance with Regulation 883/2004/EC on the coordination of social security systems – in the case of posting for postings for a period exceeding 24 months

Cyprus: The Maternity Protection Regulations (255/2002) were introduced into CY law are part of the CY implementation of the EU system of H&S protection. The latest amendment of the Law 100(I)/1997 that took place in July 2007, amongst others extended the right to maternity leave from 16 to 18 weeks (Article 3, paragraph 2).

Finland: The terms and conditions of employment of pregnant women and women who have recently given birth are specified in the Employment Contracts Act (see Section 2 of the Posted Workers Act). The special provisions of the Young Workers' Protection Act (Laki nuorten työntekijöiden suojelusta No 998/1993) provide protection for young employees under the age of 18.

Ireland: Directive 92/85 (on pregnant workers) was transposed into Irish law by the Maternity Protection Acts 1994 and 2004. The Acts apply, in full, to posted workers.

Pregnant employees are entitled to 26 weeks' paid maternity leave and the option to take an additional 16 weeks unpaid leave.[240] It should be noted that *employers* are not legally obliged under the Acts (section 22) to pay employees for the period of maternity leave; payment is made by the Department of Social Protection (DSP) and is dependent on social security contributions. However, the employee may be paid as normal during the maternity leave period; subject to the provisions of the contract of employment (it is relatively common for employees to receive full pay minus the amount of maternity benefit payable). Under the Unfair Dismissals Acts 1977-2007, an employee's dismissal is deemed to be automatically unfair if the dismissal is due to her pregnancy, unless there are substantial grounds justifying the dismissal.

The Protection of Young Persons (Employment) Act 1996 sets minimum age limits for employment, rest intervals and maximum working hours and prohibits the employment of anyone under 18 on late night work. The Act also requires employers to keep specified records for workers under 18. This act applies in full to posted workers.

Malta: An employee is entitled to maternity leave for an uninterrupted period of fourteen weeks with full wages. Employees in the private sector may take up to 4 months unpaid parental leave.

*Sending state perspective*

In Bulgaria the protection of pregnant women is contained in the Labour Code. The mandatory period of maternity leave is 410 days for each child, 45 days of which shall compulsorily be used before the confinement. During this leave the female worker is entitled to social insurance compensation of 90 percent of her gross remuneration under Article 49 of the Social Insurance Code.
The minimum age for employment is 16 years. As an exception, persons aged between 15 and 16 years may be employed in work which is light and which is not hazardous or harmful to their health and to their proper physical, mental and moral development and whose execution would not be detrimental to their regular attendance at school or to their participation in vocational guidance or training programs. As an exception, girls who have attained the age of 14 years and boys who have attained the age of 13 years may be appointed to apprentice positions at circuses, and persons who have not attained the age of 15 years may be recruited for participation in the shooting of films, in the preparation and performance of theatrical and other productions under relaxed conditions and in conformity with the requirements for their proper physical, mental and moral development. The working conditions in such cases are determined in an ordinance of the Council of Ministers.
Persons who have not attained the age of 18 years are employed after a medical examination and a medical conclusion that they are fit to perform the respective work and that the said work will impair their health and impede their proper physical and mental development. Persons who have not attained the age of 18 years are employed by permission of the Labour Inspectorate in each particular case.

[240] Maternity Protection Acts 1994 and 2004, sections 8(1) and 14(1) s amended by Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006 (SI No 51 of 2006).

CZ: Special work conditions for pregnant women and / or women who have recently given birth are set out in Section 238 (2) and Section 238 (3) of the Labour Code. According to Section 195 (1) of the Labour Code a female employee is in connection with childbirth and care for a newly-born child entitled to 28 weeks of maternity leave. If she gave birth to multiple children, she is entitled to 37 weeks of maternity leave. Special protection of children and young people (hereinafter "adolescents") is set out in Sections 243 to 246 of the Labour Code. In Hungary: Protective rules for pregnant women and other special groups can be found in both the Labour Code and the Labour Safety Act. Pursuant to Section 138 of the Labour Code, women in the pregnancy period or giving birth shall be entitled to twenty-four weeks of maternity leave. The right to maternity leave in Latvia extents to 126 days and regulated in the Article 154 Labour Code. In LT it extents to 70 calendar days before the childbirth and 56 calendar days after the childbirth (in the event of complicated childbirth or birth of two or more children – 70 calendar days).

Portugal: Maternity and paternity leave constitute prominent social values protected by the Portuguese Constitution (article 68º). The Labour Code contains rules on i.a. night work, overtime and protection against dismissal. The leave period granted to pregnant women exceeds the minimum level of protection stated in article 8 of the Directive 92/85/EEC and also of the European Social Charter.
The mother is entitled to 30 days of the leave period before the childbirth (article 41.º, nr. 1). The employee who is a mother or a father is entitled to a 120 or 150 consecutive days of parental leave (that will be split among them), which will be increased, in the event of multiple births, by 30 days for each twin in addition to the first (article 40.º, nr. 1 and nr. 3). The employee may choose between 120 or 150 days, taking into account that the subsidy that she/he will receive shall be the equivalent to 120 days of salary. The absences from work due to these leaves do not determine the loss of any rights and are deemed as effective work, except regarding payment. Nonetheless, the employee will receive a subsidy from social security (Decreto-Lei n.º 89/2009 of April the 9th).

The Portuguese law allows the labour contract with children, although the minor has, as a rule, to be 16 years old, at least. However even minors who are less than 16 years old may enter into a valid labour contract if they have finished the compulsive school (nine years) and their legal representatives (normally their parents) have agreed in writing.

Slovakia: The Labour Code grants the worker a right to maternity leave of 34 weeks.[241] For single women the maternity leave lasts 37 weeks and in the case of multiple childbirth the maternity leave lasts 43 weeks.[242] Men are entitled to a similar leave if they care for a new born child. After this period expires, in order to extend childcare women and men are entitled according to Section 161 (2) of the Labour Code to parental leave until the child reaches three years of age. During the first period of leave (of 37-43 weeks) the employee is not entitled to salary paid by the employer, but she/he receives a sickness insurance benefit according to Act No. 461/2003 Coll. on Social Insurance as amended.
The Labour Code contains a minimum age for contracts of employment of 15 years.

[241] Section 166 (1) of the Labour Code. Before 1.4.2011 the maternity leave was 28 weeks.
[242] Before 1.4.2011 the latter was only 37 weeks.

Slovenia: Different kinds of protection related to pregnancy and parenthood are regulated in the Employment Relationship Act. For example: In time of pregnancy and during breastfeeding, a mother–worker may not perform work which could harm her health or the health of child. (Article 189 of the Employment Relationship Act).[243] But the ERA also provides for the right to parental leave.[244] More detailed provisions on leave are included in the Parental Protection and Family Benefit Act.
The latter act provides for a right to pregnancy leave for the duration of 105 days. During this leave a mother has the right to wage compensation; the amount is an average amount from which contributions for social security system were calculated, in the last 12 months before submission of application.[245] A child nursing leave is intended for nursing and protection of a child and lasts 260 days directly after the expiry of pregnancy leave. Either mother or father may make use of this leave (but not both of them at the same time or for full time). Also during this leave the parent is entitled to wage compensation. During fatherhood leave on the other hand, no right to wage compensation exists. This is a special leave up to 90 days of full absence from work, 15 days of which must be used up before the child's 6 months, whereas 75 days may be used up to child's 7 years.

Also workers who have not turned 18 years of age enjoy special protection in the employment relationship. The *Employment Relationship Act* determines that the certain types of work may not be given to a worker who has not yet turned 18 years of age.[246]

Spain: Article 3.1 e) 45/1999, Posting Workers Act, establishes the application of the Spanish law with respect to the protection of the maternity. This rule includes legislation on prevention of risks and the first six weeks of obligatory leave for the mother after giving birth. During the period of leave no wages are due; the worker is covered by social security provided employee meets the requirements established in the legislation of Social Security. Article 3 45/1999, Posting Workers Act does not include the benefits of the security system. Article 3 e) 45/1999, Posting Workers Act, includes the rules of protection of the maternity, that include the protection against dismissals. In addition Article 3.1.c) 45/1999, Posting Workers Act also establishes the application to the posted workers of the rules on equal treatment, which prohibits all discrimination because of sex and a dismissal during the period of leave would have this consideration.

Article 3.d) Posting Workers Act refers also to the work of minors. In agreement with these rules minors of 16 years could not carry out night work, nor perform activities that the Government considers dangerous or non-beneficial for his health or its professional and personal development.

[243] The latter article is implemented by the Rules on protection of health at work of pregnant workers and workers who have recently given birth and are breastfeeding.
[244] Article 191 of the Employment Relationship Act.
[245] Article 17-22 and Article 41-41 of the Parental Protection and Family Benefit Act
[246] These types are described in more detail in an executive act – the Rules on protection of health at work of children, adolescents and young persons.

**Comparison**

This study largely confirms the findings in the previous study. Neither protection of minors nor protection of pregnant women and recent mothers are deemed by the relevant stakeholders to constitute elements of major relevance as regards the protection of posted workers. However, the theoretical potential for problems is quite large, especially as regards protection of pregnancy and parenthood (less as regards minors). The only interesting aspect as regards minors related to the question of the minimum age for gainful employment: is this to be considered as part as the protection offered under Article 3(1)(f) or rather an extension of protection under Article 3(10)?

As to protection of motherhood and family, there is a striking difference in the length of the leave granted to pregnant women. AT has a 16 weeks period in which the pregnant woman is not even allowed to work. CY has an 18 weeks period. IE has 26 weeks of paid leave plus 16 of unpaid leave. SK offers 34-43 weeks of leave depending on the circumstances. Interesting is the position of PT where protection of parenthood and family life is considered to be a constitutional value. Pregnant women are granted 30 days of leave before confinement whereas leave after childbirth can be taken by either the mother or the father.

As regards to payment during leave both the level of payment and the source thereof are country specific. The payment is part of social security in AT, BG and IE whereas it is paid (in part) by the employer in MT. In IE, additional payments by the employer are usual, but these are not based on any statutory requirement. Regardless of the exact source of payment, the right to leave under the law of the host state might not be supported by a claim to payment under the applicable labour law or social security regulation.

With respect to the different aspects of protection of pregnant women etc. it is interesting to note that in some countries the rules on unfair dismissal (IE) and/or on equal protection/non-discrimination (ES) are included in the protection of this specific group of workers, especially as dismissal law is not in itself part of the hard core of protection applicable to posted workers.[247]

Although there is no great sense of urgency in regard to this subject, nevertheless the following recommendations may be considered, if only in the slipstream of legislative activity on other elements of the PWD.

***Recommendations 20 (formerly rec 19, 20 and 21 – no substantive changes)***

**At EU level >** With respect to the protection under the heading of Article 3(1)(f), a clarification of the contents of the special protection offered in this provision would be welcome.
As far as is relevant in light of the first recommendation, a clearer demarcation between the PWD with regard to payment during maternity leave (see Article 11(2) of Dir. 92/85/EEC) and the Regulation 883/04 on coordination of social security (regarding maternity benefits) would be welcome.

[247] This problem was also reported by the Dutch and Luxembourg experts to the previous report.

Depending on the outcome of the previous two points, it may be important to establish a method of comparison with regard to the protection offered in the field of maternity leave and parental leave, in particular how a longer leave against a lower remuneration/benefit should be compared to a shorter period of leave against a higher remuneration/benefit.

## Protection against discrimination

The protection against discrimination does not seem to play a major role in the protection of posted workers. The relevant national laws and regulations are largely based on the relevant EU directives on discrimination at work. However, LV does report problems as regards discrimination on the ground of nationality of posted workers. These problems stem from the absence of this specific ground of discrimination in national law on the one hand, and complaints as regards discriminatory behaviour by enforcement authorities on the other.

From a more theoretical point of view it is interesting to note (once again) the multitude of sources of protection in labour law. Whereas the protection of safety and health often is based on a general rule in the labour code in combination with specific provision in H&S regulation, in the case of protection against discrimination protection may be achieved through both the labour code (limited to workers) and special non-discrimination statutes.[248] In some cases, even the criminal code may come into play. Each of these has a different scope of application in international cases. How this affects the protection of posted workers is illustrated above by a description of the BG system.

Another point of interest is that in Cyprus, in the absence of a general employment protection law, guaranteeing basic core rights for all workers, irrespective their employment status, discrimination law is the key tool of legal redress in a number of circumstances. A similar wide application of non-discrimination rules seems to apply to IE (see below) and ES (see above in the section on maternity protection).

We will not present an overview of all legislation in the Member States covered by this study, but will limit ourselves to present two country reports which highlight the different aspects of equal protection in relation to posted workers.

Ireland The Employment Equality Acts 1998-2008 prohibit discrimination in relation to access to, or termination of, employment, or in relation to terms and conditions of employment, on any of the nine grounds specified in the legislation. The Acts apply in full to posted workers. It is interesting to note that these equality laws are used to protect the health and safety of workers. In *58 Named Complainants v Goode Concrete*[249] the Equality Tribunal found that the complainants were treated less favourably on the grounds of race when all safety documentation was not translated into a language they understood. This case is currently under appeal.

[248] BG Protection against discrimination act; CZ Antidiscriminatory Act No. 198/2009 Coll.; LV Ombudsman Law; SK Antidiscrimination Act; effective from 1.7.2004
[249] DEC-E2008-020, see www.equalitytribunal.ie

There are no specific procedures for complaints applicable to posted workers, but most Irish labour legislation (e.g. on equality, health and safety, part-time work, etc) contains 'non-victimisation' provisions. These apply to posted workers in the same manner as indigenous workers. While there is much case law on foreign national workers using the Irish complaint and redress procedures, outside of the Gama case, it is difficult to establish many cases relating specifically to *posted* workers.
It should be noted that the very robust protections of the Employment Equality Acts 1998-2008, which prohibit discrimination in terms of pay and other conditions on employment, on the grounds of race (including *nationality*) apply to posted workers. However, equal pay claims under the Acts do require a *comparator*; as a result, the Acts are of limited use where a particular workforce contains *no* Irish comparator in relation to pay and terms and conditions. Moreover, temporary agency workers are only entitled to equal treatment with other agency workers (not direct employees); this situation however, will likely be addressed in the context of the transposition of the Agency Directive.

BG
The prohibition of discrimination in employment relationships is provided for in Article 8 (3) Labour Code. This provision applies to workers posted from Bulgaria under the application of BG law as much as to workers posted to BG. But this provision is not the only one pertaining to non-discrimination:
There are several complaint procedures against discriminatory acts:

- Under the Protection Against Discrimination Act, the competent authority is the Commission against discrimination. Article 3 (1) of this act prescribes, that "this Act shall protect against discrimination all natural persons in the territory of the Republic of Bulgaria".[250] This means that the complaint procedure is not open for discriminatory acts abroad, but it is opened for such acts performed by Bulgarian employers in relation with posting abroad.
- Under the Labour Code, there are two opportunities:
  a. the worker discriminated against can inform the Main Labour Inspectorate, which may impose an administrative penalty. This procedure is accessible also from abroad as the complaint may be entered in written form and there is also special telephone number for calls from abroad.[251] The Main Labour Inspectorate may impose administrative sanctions when the discriminatory act has been committed by a Bulgarian employer. In case of violations by foreign employers, the Labour Inspectorate may inform the foreign competent institution abroad but it can not impose sanctions.
  b. the worker can start a labour dispute before the civil courts.
- Under the Criminal Code. There are cases where discriminative acts are proclaimed to be crimes. The jurisdiction of the criminal courts is decided upon according to the general principles of criminal jurisdiction.

[250] Compare the HU Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. This Act applies to all private individuals *abiding in the territory* of the Republic of Hungary and any groups thereof, as well as legal entities and organisations without legal entity. Likewise the SK law has a territorial scope of application. However as an employee posted from SK is still employed by an employer in the Slovak Republic, the Slovak antidiscrimination law will still be applicable to the posted employees (of course, only when the law of the host state is less favourable according to PWD).
[251] See www.gli.government.bg.

## Provision of manpower

### Introduction

The PWD contains two separate provisions regarding the activity of TWAs and the provision of manpower. Article 3(1)(d) stipulates that provisions regulating the activities of TWAs are part of the hard nucleus. Article 3(9) allows MS to extend the protection offered to temporary agency workers to create equal treatment. Both aspects of TWA protection are dealt with here. Again, we make a distinction between host states and sending states.

### Overview of national legislation

*Host states*

Austria
The Austrian Act on Temporary Work (AÜG) covers not only domestic employment agencies but also workers who are posted from abroad to Austria (both from within and outside the EEA) even if in principle foreign law is applicable. There are no sectoral limitations. Only the hiring from third countries to Austria requires official approval: hiring within the EEA does not require approval (Sect. 16a of the AÜG); registration is required at the latest one week before commencing work in Austria. Conversely, worker leasing from Austria to foreign countries outside the EEA requires official approval which will be granted if, among other things, the protection of the workers is not put at risk (Sect. 16 Para. 2 of the AÜG).

According to Sect. 10 of the AÜG for the duration of employment in the company of the user undertaking (leasing companies) the latter is regarded as employer in the sense of the worker protection provisions = equivalence principle. This means inter alia that temporary workers can claim wages equivalent to that of (the obligation imposed by collective agreement as to) workers employed by the user company who do comparable work in the user company in which the temporary worker works.

Cyprus
The practices of finding and assigning temporary work by special temporary employment agencies are not implemented in Cyprus, at least not within a clearly defined institutional framework. In other words, no provision is made for the term temporary agency work as a separate type of employment relationship either by the law or by collective labour agreement. In this framework, according to the Ministry of Labour, the placement of temporary employees in companies by means of specialized agencies is non-existent. It should be noted however that since 1997 the law has allowed the establishment of Private Employment Agencies (IGEEs), whose main activity is to find, on behalf of an employer, jobs for Cypriot and foreign workers. Although in terms of its scope, the law implementing the PWD (Law 137(I)/2002) covers all three types of posting, also including temporary employment undertakings or placement agencies, the Cypriot legislator made no use of the possibilities offered by the Article

3, paragraph 9 of the PWD, as to extend the protection offered to temporary agency workers to create conditions of equal treatment
In the absence of a statutory framework for temporary agency work, it is evident that the Department of Labour does not know how to deal with the cases of temporary agency undertakings that express the interest to be located in Cyprus and post workers abroad. The Department of Labour believes that they have begun to operate in Cyprus in the last two or three years. In most cases these are enterprises from other member states that come to Cyprus because the rate of taxation for companies is so low.

Finland
The minimum terms of employment as set out in the Posted Workers Act apply to temporary agency workers posted to Finland. For example, temporary workers' working hours are determined according to the provisions of the Working Hours Act referred to in the Posted Workers Act. In addition, a temporary worker is entitled to annual holiday according to the same provisions as in other postings. The Act does not contain specific provisions on temporary work but temporary workers have been paid attention to when the Posted Act was amended in 2006. According to Section 2.3 of the Posted Workers Act, in case a generally applicable collective agreement is not applicable to the employment relationship, usual and reasonable wage should be paid to the worker, if the remuneration agreed between the employer and the worker is essentially lower than this. This provision was added to the Posted Workers Act in 2006. According to the explanatory note to the Government Proposal for the 2006 amendment the provision on usual and reasonable pay aims at ensuring equal treatment and equal pay between posted workers, taking into account temporary work.[252]

Another relevant Act is the Act on the Contractor's Obligations and Liability when Work is Contracted Out (Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä No 1233/2006) which came into force on 1 January 2007. The objectives of the Act are to promote equal competition between enterprises, to ensure observance of the terms of employment and to create conditions in which enterprises and organisations governed by public law can ensure that enterprises concluding contracts with them on temporary agency work or subcontracted labour discharge their statutory obligations as contracting parties and employers. The Act is applied if the duration of the work by temporary agency workers exceeds a total of 10 days, or the value of the subcontract agreement exceeds € 7,500, excluding value added tax.

Ireland
It is important to note here that there is still considerable confusion and uncertainty in Irish law about the status of individuals who obtain work through employment agencies. At *common law*, in *Minister for Labour v PMPA Insurance Company*[253] the High Court found that, where an agency assigns an agency worker to an end-user on a temporary basis, the worker is engaged under contract *sui generis*, a 'unique' kind of contract. In practice, it is unlikely at common law for the *agency* to be identified as the employer, as the agency generally exercises little or no control over the actual performance of the work. Various pieces of labour *legislation*, however, may provide for the agency, the end-user or both to carry employer's obligations and liabilities.

[252] See Hallituksen esitys (Government Proposal) Eduskunnalle laiksi lähetetyistä työntekijöistä annetun lain muuttamisesta, HE 142/2005 vp
[253] [1986] 5 JISLW 215.

Under Irish law, agency workers (irrespective of nationality) are not entitled to the same rates of pay as *direct* employees of the end-user/client, where these exceed minimum rates. Section 7(2) of the *Employment Equality Act 1998*, for example, states that agency workers seeking equal pay or equal treatment on any of the nine grounds covered by Irish employment equality legislation[254] may only use another agency worker (and not a direct employee) as a comparator.
A crucial, and controversial, aspect of temporary agency work in Ireland relates to the coverage of the generally applicable wage regulations (REAs and EROs) to these workers. At present, the predominant legal view (although this is not universally shared) is that agency workers who are sent to end-users in the construction sector are *not* covered by the terms of the Construction REA, but are simply entitled to basic employment rights, such as the national minimum wage. This is because that REA applies to workers employed by 'a Building or Civil Engineering Firm' (defined under the Second Schedule to the REA). The existing situation will be significantly altered when the Directive 2008/104 is transposed into Irish law. At the time of writing, the Government is consulting unions and employers on the issue.
Also the regulatory framework in which TWAs operate is about to change. The Employment Agency Regulation Bill 2009 will repeal the existing legislation on temporary work agencies, the Employment Agency Act 1971, and seeks to ensure that all recruitment agencies operating in Ireland are properly licensed. At present, agencies established in another jurisdiction are not required to be licensed; few, if any, checks appear to be carried out on such agencies by the Department of Jobs, Enterprise and Innovation. Under section 19 of the 2009 Bill it will be an offence for any individual to enter into an agreement with an employment agency that is not licensed in Ireland or is not a recognised agency from another EEA State.

Malta
Only recently has there been a Legal Notice put in place (Legal Notice 461 of 2010) to regulate Temporary Agency Work and this shall come into force on 5 December 2011. Prior to this there was no specific legal framework regulating TAW in Malta. Indeed, TAW is governed, albeit inadequately, by the general regulations under the Employment and Training Services Act (1990) (including the Employment Agencies Regulations, 1995), and the Employment and Industrial Relations Act (EIRA, 2002) (including the Contracts of Service for a Fixed Term Regulations, 2007; and the Part-Time Employees Regulations, 2002).
If workers are posted to an undertaking where collective agreements are applicable, the posted worker's conditions of employment are governed by the collective agreement which is in place in the user enterprise, in order to ensure that the conditions of work of the posted employee are not less than those provided for in the collective agreement

*Sending states*

Bulgaria
Temporary Work Agencies exist in Bulgaria although without special regulations. The existing legal possibilities are used in their functioning. Only the Health and Safety at Work Act and the Ordinance for health and safety at Work in temporary and

[254] These are gender, race, sexual orientation, religion, disability, family status, marital status, age and membership of the traveller community.

fixed-termed employment relations have explicit provision for implementation of their rules also to employees of Temporary Work Agencies. There were three draft laws for amendments and supplements of the Labour Code in the 40th National Assembly, but they have been not adopted. A new draft law is under preparation now. It is expected that the 41st National Assembly will adopt it this autumn in order to implement Directive 2008/104. Because of the absence of the phenomenon of TWAs in BG law, only the provision of manpower as a posting by an employer for provision of services for remuneration is covered by the implementing measure.

CZ
TWAs established in CZ need a work mediation license issued by the Ministry of Labour and Social Affairs in order to operate as such. There are no specific rules on TWAs in the act implementing the PWD except that the exception which is made there for short term postings does not apply to TWA activity (see also section 3.2).

Greece
TWA activity is covered by the Act implementing the PWD (P.D. 219/2000). Other forms of provision of manpower (either for a fee or on the basis of reciprocity) are not. Hiring-out of workers is allowed under Greek law. A Greek trucking company is allowed to temporarily "borrow" drivers from another foreign trucking company. However, this hiring-out is not covered by the P.D. 219/2000 and the rules of Convention of Rome/Rome I Regulation are applied. Therefore, it is not absolutely sure that Greek hard core standards will be applied.

Pursuant to the provisions of Law 2956/2001, the remuneration of temporary workers during the assignment is the one that would be applied if they had been recruited directly by the user company to occupy the same position. The above provision concerns temporary workers employed in Greece and not temporary workers posted to other member states. This will apparently change upon the implementation of the Directive on temporary work agencies by all EU members and particularly the provision concerning the equal treatment of temporary workers.
Art. 4 par. 3 of P.D. 219/2000 implements the exception for initial assembly in the PWD according which the provisions concerning minimum paid annual holidays and the minimum rates of pay are not applied if the period of posting does not exceed eight days. The case of posting by a temporary employment undertaking or placement agency is not included in this exception.

Hungary
Under HU law, a temporary employment company must be a limited liability business association that is domiciled in Hungary, or a co-operative in respect of employees other than its members; it must satisfy the requirements specified under the LC and other legal regulations, and it must be registered with the Public Employment Service centre competent by the place where the placement agency is established (hereinafter referred to as "PES centre"). This part of the Labour Code is applied only to temporary work agencies having their registered seat within the country; the conditions listed above are not set as requirements for agencies which have their registered seats abroad. After the accession the temporary work agencies of the neighbouring countries (especially Slovakia) appeared on the Hungarian temporary work agency market, and have been competing with the Hungarian service providers for years. However, the register of the Public Employment Service contains only temporary work agencies

having their registered seats within the country. According to the Hungarian Government foreign companies hiring out employees within the framework of the service must take into account only the 'hard core' of the rules providing protection (see Rani case C-298/09). There are no specific provisions concerning terms and conditions applicable to temporary workers as envisaged – by means of optional implementation – in Article 3(9) of the Directive.

HU law does contain a requirement of equal treatment of workers who are hired-out (amongst which TWA workers). Equal treatment has to be applied in regard of the 'permanent' employees and the agency worker with regard to the personal base wage, the shift supplement, remuneration for overtime, on-call and stand-by duty on condition that the following requirements are met: continuous work for 183 days (more than six months) at the user enterprise; or work for 183 days altogether during the previous two years based on hiring-out. The provision of equal treatment shall not be applied to the hired-out worker if his employment relationship at the temporary work agency is subject to more favourable conditions.

Latvia

Under Latvian law temporary employment agencies may operate only with a license issued by the State Employment Agency.[255] Such rule was introduced with an aim to fight numerous fraudulent activities of local undertakings and to protect Latvian jobseekers.

Stakeholders from LV report that as regards the practice in other Member States that the national implementing measures of those States are often unclear and the practical application inconsistent; in particular as regards the status and functioning of temporary employment agencies;

Lithuania

Temporary agency work was mentioned in LGPW in the way the directive deals with it, but this form of work is not (yet) explicitly regulated by national law. The law allowing temporary agency work was adopted on 19 May 2011 and will be in force from 1 December 2011. This Law no IX-1379 on Temporary Employment of 19 May 2011 (State Gazette, 2011, no. 69-3289) implements the provisions of the Temporary Agency Directive 2008 /104/EC. It does not define how it is applicable to foreign temporary work agencies sending employees to the territory of Lithuania. By virtue of Articles (1) and 3 (1) c) the LT implementation of the PWD (LGPW) requires that the provisions of the Law on Temporary Employment shall apply to Lithuanian companies posting employees abroad as well.

Portugal

Although many of the cases of posting decided by the Court of Justice refer to Portuguese enterprises and workers (to begin with Rush Portuguesa) those who have had the most serious impact in our public opinion and in the media occurred a decade ago and were related to Portuguese temporary work enterprises that sent Portuguese temporary workers to Germany and the Netherlands and then left them stranded with no salary and no means to return back home. The background of this was that many Por-

[255] The Regulation of the Cabinet of Ministers No. 458 'The procedure on licensing and supervision of merchants – providers of recruitment services' (*Ministru Kabineta 2007.gada 3.jūlija noteikumi Nr.458 "Komersantu – darbiekārtošanas pakalpojumu sniedzēju – licencēšanas un uzraudzības kārtība"*), OG No. 108, 6 July 2007

tuguese temporary work enterprises are not companies or legal persons, but physical persons. Frequently they received the price of the contract from the client and simply vanished, without having paid the salary (or a substantial part of it). Contrary to many other systems in Portuguese Law there is, as a rule, no joint liability of the employer (the temporary work agency) and the client/user. The law was however changed and now if a temporary work agency sends workers abroad it must provide an additional gage (caution) and there is a public fund that will pay the workers, through the Portuguese Embassy or consulate, the travel expenses, with a right of reimbursement against the employer. All temporary work enterprises are subject to a mandatory register. In order to operate as a temporary work enterprise, a physical person must comply with certain requirements, such as having no criminal record, not being partner or manager of a company that has previously entered into bankruptcy, as well as providing a the above mentioned caution.

According to the Portuguese Labour Code the temporary worker is entitled to a salary equivalent at least to the salary of a worker of the user with similar functions. So, if the collective agreement applied to the user foresees a higher salary than the salary practiced in the temporary work enterprise, the temporary worker is entitled to this higher salary.[256] The Portuguese law does not foresee any exception and so the rule must also be applied whenever a temporary worker with a contract with a Portuguese temporary work enterprise is posted abroad.

Article 8.º nr. 2 of the Labour Code requires an employer whenever he/she wishes to post an employee abroad to inform the Portuguese labour inspectorate ACT.[257] However, one of the stakeholders consulted reported that frequently, particularly if temporary work enterprises are concerned, this duty is not fulfilled and the employer makes no communication whatsoever to the ACT.

Slovakia

In the Slovak Republic, agency work has been developing mainly since 2004, after adoption of Act No. 5/2004 Coll. on employment services, regulating a legal status of the temporary employment agencies.
Section 58 of the Labour Code regulates a temporary assignment of an employee to a user employer in two forms:

- through a temporary employment agency (a so-called agency work) or
- through the employer itself. If the employee is temporarily assigned by the temporary employment agency, it is in a legal position of an employer.

However, it was not clear whether it is possible to use this institute for cross-border posting of workers. In practice the employers temporarily assigned employees abroad, but provided them with the working conditions (especially in the field of remuneration) under Slovak Collection of Laws, which were less favourable than the working conditions of the host state. Accordingly, Section 5 (6) of the Labour Code[258] was introduced which provides that in case that the employee is posted to another EU member state, his/her working conditions and conditions of employment shall be governed by the law of the state, where the work is being performed, reversing the pre-existing situation. Since then, according to the Ministry of Labour, Social Affairs and Family

[256] Art. 185 n.º5 Labour Code
[257] Autoridade para as Condições de Trabalho.
[258] Effective from 1.9.2007 (amendment of Labour Code – Act No. 348/2007).

as well as the specialized literature, temporary assignment according to the Section 58 of the Labour Code is for domestic situations, and Section 5 of the Labour Code (where the temporary assignment has not been mentioned before) is used for the cross-border posting

Another change occurred in domestic rules of assignment as well, due to the implementation of Dir 2008/104. Employers made use of temporary assignment in the period 2004 – 2010, because during this period, in the temporary assignment there did not have to be preserved the same conditions in the area of financial remuneration (salary), if the assignment lasted less than six months (Section 58 (7) of the Labour Code - legislation effective from 1.2.2004 to 31.8.2007), or if the assignment lasted less than three months (Section 58 (7) of the Labour Code - legislation effective from 1.9.2007 to 28.2.2010). Given that this legislation allowed to treat the employees unequally in the area of financial remuneration (salary) and it was not in accordance with the European legislation, it was necessary to modify it. An amendment of the Labour Code (Act no. 574/2009 Coll. has become effective from 1.3.2010. The amendment removed these discriminatory cases in accordance with the objectives of Directive 2008/104. Salary conditions of the posted employee thus must be the same as the salary conditions of a comparable employee of the user employer, so there should not be an "abuse" of the temporary assignment, because of savings in the employees' income expenses.)

According to the Section 6[259] of the Act no. 283/2002 Coll. on travel expenses, during temporary assignment an employee is entitled to reimbursement of travel (and other) expenses in the same amount as an employee on a business trip.

Slovenia

Temporary employment relationships are regulated by Articles 57 to 62 of the Employment Relationship Act. These provisions do not contain any specific provisions concerning posted workers. On the other hand there are however some additional criteria, when temporary work agencies as undertakings are considered. In accordance with the *Labour Market Regulation Act* an employer providing workers to another user, is every natural or legal person that conducts employment contracts with employees with the intention to post workers to user, where these workers work temporarily under the control and instructions of the user, and is by Ministry of Labour registered in the *Register of domestic temporary work agencies* or the *Record of foreign temporary work agencies*. An employee conducts an employment contract with the employer (agency) in accordance with the Employment Relationship Act and is posted to user, where he works temporarily under control and instructions of user (Article 163). Registration of such occupation will only be possible, if the employer:

- in last two years did not act contrary to labour law provisions;
- in last two years he does not have unpaid obligations in the area of taxes and contributions for social security;
- he fulfils personnel, organizational, spatial and other conditions, determined in the Rules adopted by Ministry of Labour, i.e. Rules on conditions for performing the

[259] Title of the Section 6: Compensation for a temporary assignment, for posting to the EU Member State and during the creation of an employment

activity of providing workers to another user and the method of the employer's cooperation with the Employment Service of Slovenia.[260]

These conditions must be satisfied also all the time during the performance of such activity (Article 164).

The Labour Market Regulation Act implements Directive 2008/104/EC of the European Parliament and of the Council of 19th November 2008 on temporary agency work.

Spain

The Temporary Agency Work Act, 14/1994, of June 1, establishes special rules, such as the prohibition of this kind of companies in certain cases. Spain made use of the possibility to extend the protection of this category of posted workers (Art. 1(3c), laid down in Art. 3(9) by adopting Chapter VI of the Temporary agency work Act. This Chapter was added by the 45/1999 Posting of Workers Act. The TWA Act establishes that rules for posted workers will not be applicable, except the question related to salary. In this case the rule that prevails is the TWA Act which states that posted workers salary should be in accordance with the collective agreement to which the company belongs to.

**Comparative remarks**

In the previous study we described the different ways in which TWA activity is regulated in the Member States. We noticed that most of the Member States covered by that study had imposed some kind of restriction on TWA activity, through one of three models, to wit:

- Regulating the provision of temporary agency workers through a system of authorization, registration, licensing, certification etc. Such systems, either compulsory or adopted voluntarily within the sector, were found in e.g. France, Sweden, Italy, the Netherlands and Luxembourg.
- Limiting the use of temporary agency workers in certain sectors (notably construction and transport by road, e.g. the Netherlands, and until recently Belgium and Germany).
- Limiting the use of TWA workers to specific situations usually connected to a temporary increase in demand. This restriction can be found inter alia in Belgium, France, Italy and Luxembourg.

In the current study, licensing systems are reported from AT, IE, LT and LV. The other types of restriction were not reported. Pursuant to Article 4 of the Temporary agency work directive (2008/104) the Member States shall review any restrictions or prohibitions on the use of temporary agency work before 5 December 2011 in order to verify whether they are justified on the grounds mentioned in the Directive.[261] However, the implementation of the Directive does not necessary lead to a reduction in regulation. In several of the Member States covered by this study the regulation of TWA activity is fairly recent (MT, SK) or even non-existent (CY, BG, LT), and often triggered by the implementation of the 2008 TWA Directive. IE introduced proposals

[260] Official Journal of the RS, No. 106/2010. The Act was adopted on 23rd February 2010 and entered into force on 1st January 2011.

[261] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327/5.

for a licensing requirement in 2009, which will most likely form part of the legislation to be introduced in late 2011 to transpose the TWA Directive.

The extra protection offered under Article 3(9) PWD usually takes the form of the equal treatment principle under which the TWA worker has to be treated equally to a similar worker in the user enterprise. This principle is incorporated (albeit limited to a hard nucleus of protection) in Article 5 of the Temporary agency work directive. It is already applied (in full or to a limited extent) in AT, MT, EL and HU (albeit only after 183 days).

Other interesting aspects of the regulation of TWA activity are the following

- CZ and EL both have an exception in their PWD implementation for short term postings and initial assembly respectively. However, these exceptions do not apply to TWA activities.
- FI applies its Act on the Contractor's Obligations and Liability when Work is Contracted Out to TWA activity, creating liabilities in the contracting chain.[262]
- In LV stakeholders explicitly complain about the obstacles they encounter through the regulation of TWA activity in the other member states.
- PT has created a special fund for the repatriation of PT workers who have become the victim of unreliable TWAs. This practice could inspire other Member States when they encounter similar difficulties.

**Conclusions and recommendations**

The concept of posted worker for the purposes of the PWD includes the posting of temporary agency workers (Art. 1(3)(c)). However, the status of these workers in the context of the internal market has been a matter for debate in particular in the specific context of the transitional measures on the free movement of workers under the Accession Treaties. The ECJ noted in the Vicoplus case that although an undertaking engaged in the making available of workers is taking advantage of the free movement of services, the activities it carries out are specifically intended to enable workers to gain access to the labour market of the host Member State. The ECJ concluded that a law that continues to restrict the posting of temporary workers by way of a work permit during the transitional period may therefore be justified by reasons relating to the need to prevent disturbances on the labour market of the host Member State. The effect of this judgment on the status of TWA workers in other contexts (such as the PWD) is currently unclear.

The Directive in Article 3(9) permits more extensive protection in the case of TWA workers. Not all Member States have availed themselves of this possibility. Article 3(9) presupposes that the domestic law of the host state contains special protection for agency workers. At the time of writing this is not true of all Member States (yet). The TWA directive (2008/104) will create a minimum level of harmonization on this point.

[262] See with regard to wage liability also section 4.6 and Houwerzijl/Peters, Liability in subcontracting processes in the European construction sector, European Foundation, Dublin 2008.

Article 3(1)(d) PWD includes the "conditions of hiring-out of workers" in the hard nucleus of protection to be offered to posted workers. The Member States apply widely differing rules in this area. Whereas this activity is not regulated more than any other service activity in some Member States, others apply restrictions on the sectors in which the use of TWA workers is permitted or the situations in which recourse can be made to TWA workers. Additionally, they may have a licensing system for TWAs or demand certain sureties. These restrictions (often enforced through public means) are often being justified as a means to combat abuses. Though the application of "conditions of hiring out of workers" to cross-border posting is provided for in Article 3(1)(d) PWD), the restrictions will nevertheless have to be evaluated in the light of Article 4 of the TWA Directive (and 56 of the TFEU, if need be).

***Recommendation 21 (formerly rec 8 – unchanged)***

The regulation of TWA activity is within the competence of the Member States – which must of course operate within the confines of the EU Treaties. **At the European level >** the consequences of the implementation of the TWA Directive should be monitored. The relationship between the PWD and the TWA directives should be made clear, especially in regard to the question of whether Member States that apply a full equality principle (which goes beyond the minimum required by the TWA directive) can or (with regard to the ruling in Vicoplus) even should also impose this full equality principle on foreign service providers.

## Extension of the protection under 3(10) – public policy

### Inventory

In its judgment in the Commission v. Luxembourg case of June 2008 the ECJ made it clear that any extension of the protection not envisaged under other headings of the directive has to be justified on the basis of public policy. It was also made clear that the notion of public policy has to be interpreted restrictively. In the previous report we noticed that this has encouraged several member states to re-evaluate their systems (e.g. Luxembourg, Denmark, Sweden) in order to check for inconsistencies. The most notable example of this was Luxembourg, which has limited the application of its indexation clause for wages to minimum wages only.

The Luxembourg example draws attention to one of the problems regarding to the notion of ‘extension of protection’. Apparently, indexation of minimum wages is part of the rates of pay, one of the hard core conditions to be applied to posted workers. But as such its application is restricted to the indexation of the wage level that constitutes the going minimum rate of pay. Indexation as such is neither hard core protection nor a public policy provision. Hence it can not be imposed on its own to apply to remuneration over and above the minimum level. Therefore, it becomes crucial to decide which worker protection rules can be subsumed under the hard core provisions. In the previous report we already referred to the discussion inter alia with regard to the rates of pay, health and safety and protection related to pregnancy and childbirth. Is a compulsory insurance against industrial accidents extra protection under Article 3(10), part of health and safety regulation or a constituent element of the ‘minimum rates of

pay'? In the two latter cases, the application of this type of protection will not be notified under Article 3(10). In a similar vein, we reported that Sweden applies its national implementation of the directives on part-time and fixed-term work to workers posted to Sweden. This is not considered to be a matter of extension under Article 3(10) as the relevant provisions are assumed to be part of non-discrimination law. In contrast, France had notified the compulsory contributions to a paid holiday fund and a bad weather scheme in construction as falling under Article 3(10), apparently considering it to be a public policy extension, rather than an element of the rates of pay or an element of the right to paid holidays. However, the application of its rules on paternity leave and days off for family events were not reported as constituting an extension of protection for public policy reasons. This clearly demonstrates that the relevance of Article 3(10) for effective protection of posted workers is directly related to the (so far differing) national interpretations of the hard nucleus of protection under Article 3(1). Moreover, it is clear that an overview of measures reported by the Member States under Article 3(10) does not necessarily give a representative picture of the application of additional protection in the several states.

In the current study the sending states were specifically asked to report on the problems which companies established within their territory encounter when posting workers to other Member States. Hence, these reports mainly contain information on the use other countries may have made of Article 3(10). However, not all Member States have relevant experience with posting. In other cases pertinent information is lacking. The national experts from CZ/EL/LV/PT/SK/ES did not report any problems as regards the extension of protection in other states. The Bulgarian expert reported that in cases involving postings to Ireland and Austria, problems occurred with regard to host state requirements as to the working time and living conditions of the posted workers. It was noted that the requirements as to living conditions are beyond the minimum protection by the Directive. Hungary referred to the SoKo Bunda case discussed earlier (section 3.4) as regards problems encountered by HU employers posting workers to other Member States. These cases concerned formalities and insurance obligations imposed by Germany. The Lithuanian expert specifically commented on the application of CLAs to posted workers. The minimum level of protection in Western European member States is much higher than the average social standard in Lithuania therefore the posting brings additional costs. The complaint would lie in the fact that minimum working conditions are established not by law but by sectoral (and sometimes territorial) collective bargaining agreement. This is very unusual for the country where imperative regulations come from the legislator. The Slovenian expert noticed an absence of official complaints. The Labour Inspectorate, however, stressed that several applications of the employers, before beginning of posting, lack necessary (mandatory) information, from which it may be concluded, that the employers, regarding posting of workers, mostly struggle with formalities (administrative actions).

Very few experts reported an explicit extension of protection under Article 3(10). But in the reports examples can be found in which protection is offered which may or may not be covered by the headings of protection enumerated in Article 3(1). Both are mentioned here. Austria has used the possibility to extend the protection offered by collective agreements to all sectors of industry (Article 3(10) second indent) Moreover, in Sect. 7b Para. 1 No. 4 of the AVRAG the posted workers, in addition to a minimum wage, minimum paid leave and adherence of the collective agreement also under Austrian law have the right to have these noted in the sense of Directive

91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.
Article 3 (1) of the Bulgarian implementation act (OTCPWMS) provides for not only the conditions under Article 3 of the Directive, but also the special protection for disabled persons. The Cypriot legislator made no use of the possibilities offered by Article 3(10). However, in the meetings the national expert had with all the representatives of the competent authorities, it was obvious that the competent authorities support the position according to which the protection provided by the whole web of national provisions, constitutional and legislative, covers every worker coming to work in Cyprus, precisely as it also covers Cypriot workers. This position constitutes the basic argument of the competent authorities against any specialised monitoring and control structures for posted workers. Similarly, the Finnish Ministry Department stated that posted workers should be guaranteed equal rights to the other workers in the host country at the EU level. If this is not possible, the Posted Workers Directive should be followed as it is and the workers' rights should not be delimited from those provided by the Directive. Currently the protection of posted workers is extended beyond the hard core by the fact that the provisions of the Finnish Employment Contracts Act concerning the freedom of association and the right of assembly are applied to the posted workers.[263] This extension is based on Article 3(10) of the Directive.[264] Lithuania made use of Article 3(10) to extent the core protection to all sectors of industry. No other extension is reported. However, Article 220 of the Labour Code, which contains inter alia the entitlement to a per diem and reimbursement of costs in case of posting, also applies to workers posted to LT under foreign law. Malta applies an indexation clause to all employees working in Malta. Spain made use of the possibility to extend their public policy rules to posted workers – as provided for in Article 3(10) with regard to the rules on the minimum age of access to the work for minors. Moreover, the 45/1999 Posting Workers Act also includes the protection of the rights of free union, strike and meeting (art. 3.1.h). However, the application of the latter rules has not been declared under Article 3(10).

The most extensive and problematic extension of protection is found in IE. This country seems to overextend its protection by applying all labour provisions to posted workers. The application in full of registered collective agreements (REAs) exacerbates the issue. All construction workers, for example, must be enrolled in the industry pension and sick pay scheme (Construction Workers Pension Scheme-CWPS)[265] and contributions must be made for duration of posting *unless* it can be shown workers are covered by an alternative scheme with equivalent benefits.
Other countries that seem to apply non-generally binding collective agreements to posted workers are AT, FI, CY and MT. This specific problem is discussed in Chapter 2, which also covers the use of social clauses in public procurement contracts.

[263] Liukkunen, Ulla, The role of ***mandatory rules*** in international labour law - a comparative study in the conflict of laws, 2004, p. 197.
[264] See Hallituksen esitys (Government Proposal) Eduskunnalle laiksi lähetetyistä työntekijöistä sekä eräiksi siihen liittyviksi laeiksi.
[265] See in this respect the Judgment of the EFTA Court in case 12/10 of 28 June 2011, referred to in footnote 232 above.

**Conclusions and recommendation**

The concept of public policy has become highly controversial after the judgment in case C-316/09 (Commission v. Luxembourg). Several Member States were confronted with an interpretation of the concept of 'public policy' in the PWD which seems to differ rather drastically from the notion of public policy/ordre public in their labour law and private international law systems. It is important to note, though, that the relevance of Article 3(10)(first indent) is directly related to the interpretation of the heads of protection under Article 3(1). Several 'extentions' of the protection could be interpreted as coming within the scope of a head of protection specifically mentioned in Article 3(1) of the Directive and vice versa. Examples of this are also found in the current study. For example: the minimum age for employment could be seen as part of the protection of minors. However, it is notified by Spain as being an extension under Article 3(10). The application of the rules on per diems and reimbursement of costs to postings to Lithuania might be part of the regulation on minimum rates of pay, but could also be considered to go beyond the hard core.

The current study also confirms that finding in the previous study that not all Member states report the application of their 'public policy' laws to the European Commission. This lack of precise information on the content of national rules which are given a public policy status, makes it hard to evaluate the necessity to change (the current interpretation of) Article 3(10). Hence, the second step in the evaluation of Article 3(10) consists of a (more precise) inventory of provisions which are applied to posted workers but can not be subsumed under one of the other heads of protection. These rules can only be applied when they are attributed a public policy status.

Finally, a lot is still unclear about the exact interpretation of the public policy provision in the PWD. Generally, collective rights, especially the right to collective negotiation and collective action, are deemed by the Member States to fall within the concept of public policy. This is supported by ECJ. However, the public policy concept has only been clearly delimitated in the context of migration law. The PWD operates in the context of PIL, in which the concepts of 'ordre public'/public policy may take on a different meaning.[266] There is currently a lack of clarity as to the exact relation between overriding mandatory provisions (loi d'ordre public) and public policy in PIL on the one hand, and the concepts of imperative requirements of the public interest and public policy in the framework of the internal market.[267] The inventory of national rules applied under Article 3(10) could provide a point of entry for the Commission to seek further clarification of the concept of public policy from the ECJ.

[266] See inter alia H. Verschueren & M.S. Houwerzijl, Toepasselijk arbeidsrecht over de grenzen heen, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009.
[267] See inter alia Com(2003)458 p. 13 for an indication of the confusion caused by the overlapping notions. For an assessments of the impact of PIL on the current interpretation of Article 3(10) see inter alia C. Barnard The UK and Posted Worker, ILJ Vol 38, 2009, p.130; and A.A.H. van Hoek, Openbare orde, dwingende reden van algemeen belang en bijzonder dwingend recht, De overeenkomsten en verschillen tussen internationaal privaatrecht en interne marktrecht, in: H. Verschueren & M.S. Houwerzijl, Toepasselijk arbeidsrecht over de grenzen heen, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009, p. 55-90.

***Recommendation 22 - unchanged***

**At EU-level>** Clarifying the scope of application of the headings of protection mentioned in Article 3(1) will help clarifying the remaining scope of application of the public policy provision in Article 3(10) (first indent).

***Recommendations 23- unchanged***

**At national level>** Member States could help to clarify the scope of application of the headings of protection mentioned in Article 3(1) and the scope of application of the public policy provision in Article 3(10) (first indent) by more explicitly referring to the relevant provisions in their implementation. Besides this, a more detailed identification of applicable provisions will help illustrate the breadth of the concepts used in the Directive.

***Recommendations 24 - unchanged***

**At EU-level>** The concept of public policy is used both in the context of the free movement of services and in the context of private international law. It is currently unclear whether the concept of public policy used in the case law on free movement of services is also valid in the context of the Rome I Regulation and if not, what impact the PIL concept may have on the interpretation of the PWD. Thus, further specification of the concept of public policy, taking into account the PIL context of the PWD, seems necessary.

# CHAPTER 4. ENFORCING RIGHTS CONVEYED BY THE PWD

## *4.1 INTRODUCTION*

In contrast to the provisions in the PWD with regard to the personal and substantive scope of the Directive, the PWD does not contain any guidance or minimum requirements with regard to the level/character of monitoring and enforcement (Art. 5). Besides this, only few requirements are included regarding the provision and exchange of information (Art. 4) and legal remedies for posted workers and/or their representatives (Art. 6). Thus, at the time of writing, the monitoring and enforcement of the PWD will in principle be largely (if not entirely) based on the level provided for in the national systems of the Member States.

In general, compliance with EU law is based on a decentralized system of enforcement. EU law is predominantly applied by the national authorities and adjudicated by the national courts according to the national (procedural) rules. However, this does not (necessarily) mean that the responsibility of the Member States to guarantee compliance with EU law should stop when the limits of their own system are reached. In fact, as may be gathered from the case law of the ECJ, the Member States have a responsibility to guarantee the 'effet utile' of EU law. This is based on the so-called principle of effectiveness grounded in Article 4(3) sentences 2 and 3 of the TEU (old Art. 10 EC). In line with that principle, Member States need to implement, apply and enforce effective, proportionate and dissuasive sanctions to guarantee compliance with EU rules, such as the PWD.

This chapter deals with problems in monitoring and enforcing rights conveyed by the PWD.
The objective of this part of the research is to describe and analyze on the one hand the existing problems, difficulties and obstacles encountered by posted workers if they intend to enforce their rights stemming from the Directive, on the other hand the difficulties experienced by monitoring authorities in the host Member States when trying to make companies comply with the working conditions under Article 3 (1) of the PWD and its enforcement in practice.

In our first study, major difficulties and obstacles were identified for posted workers and monitoring authorities alike. The twelve national reports summarized and analyzed in that study clearly revealed and exposed the weaknesses in the national systems of labour law and their enforcement with regard to vulnerable groups on the labour market, such as (certain groups of) posted workers. Such a situation where the weaknesses in the national systems of enforcement are also the weaknesses of EU law on posting of workers, does not have be accepted as a 'fait accompli' but may and should be reversed as far as feasible. In this regard, some help at European level would seem indispensable. Preferably, national tools and rules on enforcement should be embedded in a European framework of legislation and cooperation between the main actors involved, in order to achieve an effective level of compliance with the

PWD on the one hand and to prevent unfair competition and legal confusion hampering the cross-border provision of services on the other. In this context, we advised to strengthen compliance by the implementation and application of several monitoring and enforcement 'tools'.[268]

In order to test whether the conclusions and recommendations in our previous study also hold for the fifteen countries covered by our present study, this chapter is structured slightly different then chapter 4 of the first study. The current chapter 4 includes an analysis of the causes of the problems and our main recommendations made in chapter 5 of the first study. Therefore, the sequence of the recommendations in the first study is closely followed. To this end, the chapter is organised as follows. Section 4.2 introduces the different actors and authorities involved in monitoring compliance with the rights guaranteed by the Directive. Section 4.3 consists of an overview of the authorities monitoring the presence of posted workers within the territory. Another part of the comparative analysis, described in section 4.4, concerns the inspection and enforcement activities of the monitoring actors in practice. This section deals with the frequency of workplace control, the way labour inspectorates and other inspectorates assess self-employed persons rendering services in the receiving Member State, and how they verify whether an undertaking is properly established in the country of origin. The extent to which cross-border cooperation occurs and the recognition of foreign penalties/judgments is also examined. In section 4.5, we turn to the monitoring actors' responsibilities for providing information to the general public. Section 4.6 describes and examines the duties such as notification and information requirements imposed on service providers by authorities in the host state. Subsequently, in section 4.7, attention is paid to statutory duties and/or self-regulatory tools imposed on recipients (clients/main contractors/user companies) of a service carried out by posted workers. This concerns information requirements and also (chain) liability schemes, in order to prevent the non-payment of wages, social security contributions and fiscal charges by employers of the posted worker. Finally, the legal remedies available to posted workers and their representatives are also examined, as well as any other means of support for posted workers in section 4.8.

[268] For more details see Report March 2011, Chapter 5.5, p. 185 - 191 and 5.6, p. 192 – 201.

## *4.2 ACTORS INVOLVED IN MONITORING THE RIGHTS OF POSTED WORKERS*

In all the Member States examined in the current study and the previous one, with the exception of the UK, national authorities in the host state explicitly fulfil a monitoring and inspecting role in respect of workers posted to their territory. In most countries, in their role as a host state, the social partners are also involved. They may play multiple roles, such as acting as advisers, representatives and providers of legal aid to individual members (see also below under 4.8), or performing monitoring and compliance tasks alongside the local or national authorities. In section 4.3, the actors involved in monitoring the *presence* of posted workers within the territory of the host country will be listed. But first we introduce the actors in the host state involved in monitoring *the rights* guaranteed by the PWD. In this respect, in most countries covered by the current study only one single authority is involved. Only in AT and CY, multiple actors play a role.

### Involvement of public authorities

#### Multiple authorities

Austria
The Federal Ministry of Labour, Social Affairs and Consumer Protection ("Bundesministerium für Arbeit, Soziales und Konsumentenschutz" – BMASK) monitors and implements labour law provisions. The Labour Inspectorate ("Arbeitsinspektorat") is established within BMASK and is assigned with monitoring and controlling the employee protection laws and their implementation by employers. Where indicated the LI should report transgressions of protection laws to the law enforcement and judicial authorities. It consists of approx. 500 staff sub-divided into 19 regional labour inspectorates and one special labour inspectorate for the construction sector, situated in the city area of Vienna.

As the carrier of legal health insurance, the Regional Health Insurance Service ("Gebietskrankenkassen") is also active in the control network dealing with illegal workers by inspecting domestic operations and trying to discover employment of illegal aliens. 242 investigators are active throughout Austria, 42 additional investigators are planned for 2010. The Vienna Regional Health Insurance Service that is basically exclusively responsible for the State of Vienna, since 1st May 2011 holds a special position due to the establishment of the "Competence Centre for the Control of Wage- and Social Dumping"(Competence Centre LSDB) over there. It gathers Austria-wide statistical results especially from the Financial Police, makes additional inquiries, brings charges with the district administrative authorities, presents the evidence of AVRAG transgressions and participates as a party in the administrative penalty procedures.

Bulgaria
The body competent to monitor compliance with the rights guaranteed by the Directive to posted workers is the Labour inspectorate as the public authority exercising the

overall control over observance of labour legislation in all sectors and activities [Art. 399 LC; Art. 4 (1) of the Organizational Regulations for the Executive Agency "Main Labour Inspectorate"]. There is special provision of Article 8 OTCPWMS, stating that 'the Executive Agency "Main Labour Inspectorate" shall carry out the specialized control activity on compliance with the working conditions".

In *general*, a system of state bodies monitors compliance with the labour law in general in Bulgaria. These bodies are pointed out in Articles 399—401 and 406 LC and in special legal acts.

- Overall control over observance of labour legislation in all sectors and activities is exercised by the *Main Labour Inspectorate Executive Agency* with the Minister of Labour and Social Policy.
- *Other state bodies* (e.g. regional inspections for health control) exercise general or specialised control over the observance of labour legislation by the operation of law or an act of the Council of Ministers.
- *Ministers, heads of other central-government departments, as well as local government authorities* exercise control over the observance of labour legislation through their own specialised authorities. Every ministry or central government department has its inspectorate for its authority.

Cyprus

As regards the existing mechanisms for compliance with and implementation of the legislation on protection of workers in cases of posting, Cyprus has adopted a somewhat centralised system.

Article 9 of Law 137(I)/2002 stipulates that oversight and monitoring of the enforcement of the existing legislation is assigned to the competent authority, i.e. the Ministry of Labour and Social Insurance (MLSI). In this framework, the public actor directly commissioned to monitor both the presence of posted workers in Cyprus, as well as the rights guaranteed by the relevant legislation, is the Department of Labour of the Ministry of Labour and Social Insurance. In legal terms, the monitoring of the rights guaranteed by the Law 137(I)/2002 is also the responsibility of the Department of Labour (see above Article 9). In practice, however, the Labour Department has not established any mechanism for the purposes of monitoring the enterprises that fall within the scope of Law 137(I)/2002, and aimed at observing the terms and conditions of employment as well as all the rights of workers posted to Cyprus, as they emanate from the relevant legislation.

Moreover, there is no unified corps of labour inspectors, for the purposes of coordinating inspection activities. As such, the labour inspectorates report to separate departments of the Ministry of Labour and Social Insurance according to the specialisation, jurisdiction and competences of each department. In the above context, as regards specifically the practical responsibilities of the different divisions of labour inspectorates, for the purposes of protecting the rights of posted workers, the competences of the industrial relations division that reports to the Industrial Relations Department, covers the area of basic terms of employment, as well as equality of treatment between men and women (Article 3, paragraph 1 a, b, c, d and g of the PWD); the safety and health division that reports to the Labour Inspectorate Department, covers the area of health and safety (Article 3, paragraph 1 e of the PWD) and the Labour Department covers the protection in the workplace of women who are pregnant or have recently given birth (Article 3, paragraph 1 f) of the PWD.

**One single authority**

Czech Republic
In the Czech Republic multiple public actors monitor the compliance with labour law. Key public actors are the Labour Inspectorates with a general scope of powers. In specific sectors other public actors monitor the compliance instead of the Labour Inspectorates. For example the State Office for Nuclear Safety or State Mining Office. There is no special agency or department designated to monitor compliance with the rights guaranteed by the PWD. Hence, the monitoring is done by Labour Inspectorates for private labour law.

Finland
Supervision of the compliance with the Posted Workers Act is the responsibility of the occupational safety and health authorities. However, as to the provisions of the Equality Act applied to posted workers, the supervision is on the responsibility of the Equality Ombudsman and the Equality Board. There are six Regional State Administrative Agencies (Aluehallintovirasto) that started operating on 1 January 2010. The agencies' tasks consist, among other things, of those of the former occupational health and safety districts. The Act which provides the basic framework for the supervision is the Act on the Supervision of Occupational Safety and Health and Cooperation on Occupational Safety and Health at the Workplace (Laki työsuojelun valvonnasta ja työpaikan työsuojeluyhteistoiminnasta No 44/2006).

The occupational safety and health authorities supervise also compliance with the Act on the Contractor's Obligations and Liability when Work is Contracted Out, and the basic framework for the supervision is the Act on the Supervision of Occupational Safety and Health and Cooperation on Occupational Safety and Health at the Workplace.

According to the answers given by the Ministry Department, the Posted Workers Act does function as such, but there are problems which relate to the non-compliance with the Act and the nature of the supervision of the posted workers legislation in Finland. One of the reasons for the non-compliance with the legislation is according to the Ministry Department that it might not be easy to get information on Finnish labour life and Finnish legislation applicable to posted workers.

Greece
The Corps of Labour Inspectors (SEPE) constitute the state monitoring mechanism whose main task is to monitor the implementation of labour legislation. The Corps of Labour Inspectors is also entitled to monitor compliance with the rights guaranteed by the Directive to posted workers.

Hungary
In general, labour inspection tasks are performed by the Hungarian Labour Inspectorate (OMMF) in Hungary. The Hungarian legislation assigns the task of monitoring the rights of posted workers also to the authority of the OMMF. As a central public administration body, the OMMF performs its tasks within the statutory framework and applies measures against employers in break of the law. Remits and powers of the

OMMF are determined in Act LXXV of 1996 on Labour Inspection. The procedures of OMMF are regulated in Act LXXV of 1996 on Labour Inspection and in Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services. The OMMF checks compliance with the statutory requirements regarding the following in particular: the establishment of the employment, the mandatory substantial elements of employment contracts, working and resting time, salary payment, assurance of the minimum wage level, special employment conditions (women, young employees, employees with changed working abilities), registration of employment, posting, assignment, hiring-out of workers, and the employment in Hungary of foreigners.

Apart from the OMMF, the National Tax and Customs Office (NAV) may play a role in monitoring the rights of posted workers. This may be the case when there is a connection with undeclared labour. The National Tax and Customs Office (NAV) set up as of January 2011 with the merger of the former Hungarian Tax Authority (APEH) and the Customs and Finance Guards (VPOP), is primarily responsible for the full control of taxes and incomes of a tax nature, and to ensure the effective protection of such. However, within this organisation the Criminal Main Directorate is separated from the customs authority and carries out criminal investigations. It is entitled to initiate criminal proceedings on behalf of the state for the reimbursement of damage caused by crimes related to compulsory payments or budgetary support. The aim of the independent specialized criminal area is to implement an effective and successful crime prevention activity, by taking a firmer stand against black economy, thereby ensuring the full protection of the state's tax and tax-related incomes, and the interests of the legal economic players.

Ireland

NERA is the principal actor monitoring *compliance* with, and the *practical implementation* of, Irish employment legislation. Other state-funded agencies, such as the Health and Safety Authority (HSA) and the Equality Authority (which monitors compliance with employment equality laws and also posts information in 14 languages on its website) have a role in relation to specific legislation.

Latvia

The main official institution in Latvia in charge of supervision on compliance with labour law is the State Labour Inspectorate. The State Labour Inspectorate controls any labour law issues (starting from health and safety and ending with collective labour law).

Lithuania

Control over compliance by employers with the regulatory provisions of the Labour Code, labour laws, other regulatory acts and collective agreements shall be exercised by the State Labour Inspectorate and other institutions, within their competence established by laws (for example, tax authorities may establish the fact of illegal work too) (Art. 32 Labour Code). Hence, the State Labour Inspectorates are also responsible for inspection of posted employees and their employers.

Malta
The duty of enforcement falls on the Director responsible for Employment and Industrial Relations, who can access all information about a posting and the terms and conditions of service.

Portugal
The ACT (Autoridade para as Condições de Trabalho) was created by the Decreto-Lei 211/2006 de 27 de Outubro and replaced the so-called IGT (Inspecção-Geral do Trabalho). Among others, it is the ACT who is responsible for all measures concerning the labour foreigners and the posting of workers (al. v)) as well as the cooperation with other EU Members as well as members of the EEA. The ACT has its headquarters in Lisbon but has jurisdiction in continental Portugal. It is presently divided into five regions with five regional directions: North, Centre, Lisbon and the Tagus valley, Alentejo and Algarve. It also encompasses decentralizes services with inspective functions.
No other entity has supervising or monitoring functions although the ACT may obviously act at the request of an employee or of a trade union.

Slovenia
Generally in the Slovenian legal system the compliance with labour law is monitored by the Labour Inspectorate of the Republic of Slovenia. The Labour Inspectorate is established as a body within the Ministry of Labour (Article 2, paragraph 1). The work is performed by the Labour Inspector (Article 6). By a specific rule, given in Article 1 of the *Labour Inspection Act* the Labour Inspector also monitors the compliance and enforcement of rights granted by the Directive to posted workers.

Slovakia
In the case of posting employees to Slovakia, the Slovak Labour Inspection (labour inspectorates in the respective district cities) is responsible for checking the compliance with the Slovak provisions. They shall inform about the outcome of the investigation to the National Labour Inspectorate, which transmit the information to the liaison office in the country from which the employee is posted.

According to the § 2. Act 1. 125/2006 of Coll. on the Labour Inspection, the labour inspection is defined as:

- a supervisor of compliance
    1. of the labour laws,
    2. of laws and other regulations to ensure the safety and health safety at work
    3. of laws governing the prohibition of illegal work and illegal employment,
    4. of obligations arising from the collective agreements,
    5. of the Act. 650/2004 Coll. on supplementary pension savings (in the area of the supplementary pension savings for certain categories of employees)
- drawing the consequences for infringements referred to in point a) and a violation of the obligations arising from collective contracts,
- provision of free consulting.

Spain
The Labour Inspectorate looks after the fulfilment of the Law and imposes sanctions when infractions are committed. The penalty when infractions are committed is imposed by the regional authorities (of the so-called 'Autonomous Communities', but

the sanction proposal is realised by the labour inspectorate which is a central authority that depends on the national government.

**Assessment and recommendations**

A situation where no (UK) or multiple actors are responsible (in the previous study this concerned BE, DE, IT, in the current study AT, BG and CY), may be assessed as problematic from a viewpoint of transparency and accessibility of a system. For Cyprus this point of view was confirmed, however, no such critic was heard from stakeholders in Austria. In this country a positive consensus on the structure of the system of enforcement was observed. Another finding in the previous study concerns the extent to which public authorities are involved in monitoring/enforcement of labour law. As may be clear from the overview above (see also section 4.4), this varies. The vulnerability of systems that place (excessive) reliance on private law enforcement must be emphasized again here (CY, SW, DK, IE, NL, UK in general, and DE specifically with regard to health & safety law). This may lead to (abusive) situations of non-compliance where unreliable service providers are involved.

However, this variety reflects the choice in the PWD to leave monitoring and enforcement of the rights conveyed in the Directive fully to the host state's national level (see Article 5 PWD), without any detailed requirements or guidelines (of minimum harmonization) as to the appointment of certain responsible actors and their tasks. In that sense, the problem is caused not by one factor alone, but instead by the 'silence' at EU level combined with the application/enforcement of the PWD at national level. Nevertheless, the fact that the Directive is not more explicit or even silent does not imply that Member States should not respect prevailing EU law as interpreted by the Court while applying national monitoring and enforcement instruments/systems.

In this regard, it was recommended to create greater transparency in the monitoring systems of the host countries with multiple authorities involved by appointing one authority as the first contact point. In addition, the implementation of more public enforcement measures is advocated in respect of countries where the national system insufficiently ensures the adequate enforcement of posted workers' rights. Insofar as both problems would endanger the 'effet utile' of the PWD, such measures may be stipulated at EU level (see recommendations 25 and 26 below).

***Recommendation 25 – no substantive changes***

**At national level >** Create more transparency in the monitoring systems of host countries with multiple monitoring authorities, by appointing one authority as the first contact point/first responsible actor in respect of monitoring the rights conveyed by the PWD and/or the presence of posted workers. Implement – if politically feasible – more public enforcement in case the national host state system prevents the adequate enforcement of rights for posted workers which may endanger the 'effet utile' of the PWD.

***Recommendation 26 – no substantive changes***

**At EU-level >** Stipulate in a recommendation or in a legal instrument that one government agency at national host state level should be the first contact point/first responsible actor on posting of workers issues. Furthermore (if it is assessed that effective measures cannot be sufficiently achieved at national level), it could be stipulated in a legal instrument that sanctions based on private law alone are not likely to be sufficient to deter certain unscrupulous employers. Thus, compliance can and should be strengthened by the application of administrative or, in some situations, even criminal penalties.

*The mode of operation*

Another problem concerns the mode of operation of the monitoring authorities in the host state. For instance, it was found that in Germany, customs authorities specifically control compliance with and enforcement of (part of the applicable) regulations on the posting of workers. At regional level there are 40 main customs offices (Hauptzollämter) which are competent to do so. In contrast, in all the other host countries covered by both studies, perhaps with the exception of the recently established Competence Centre for the Control of Wage- and Social Dumping"(Competence Centre LSDB) in Austria, it seems that the inspectorates focus first and foremost on monitoring compliance with national labour law in general. Hence, no enforcement capacity is specifically allocated to monitor compliance with the rights conveyed in the PWD. As a result, host state inspecting bodies act within their ordinary prerogatives, which means in practice that they essentially interpret existing national labour law following both "local practices" and domestic policy guidelines, with or without a limited awareness of the *presence* and specific legal situation of posted workers. We believe that a more targeted focus on this group would be helpful in the monitoring and enforcement policy of national authorities. This can be achieved by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations (see recommendation 28 below).

***Recommendation 28 – no substantive changes***

**At EU-level >** Since the enforcement bodies in the host Member States do not specifically focus on the specific legal position of posted workers on their territories and thus tend to overlook them, a more targeted focus on this group can also be furthered by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations at EU level. Possible sources of inspiration: Osha (European Agency for Safety and Health at Work); SLIC; Europol; Administrative Commission in the context of social security coordination.

## Social partner involvement

Austria

Membership of AK, which offers its members as personal services legal advice and protection is laid down in law (Sect. 10 of the Labour Chamber Act of 1992 ["*Arbeiterkammergesetz*" – AKG], Federal Law Gazette No. 626/1991 in the version Federal Law Gazette I No. 147/2009). Workers who have concluded their employment

contract abroad or work occasionally abroad belong to the AK according to Sect. 10 Para. 4 of the AKG if the focus of their working relationship is domestic and the employer is liable to the Austrian social security system. Workers who are posted to Austria for short or medium-term periods are not members of the AK. According to Sect. 10 of the AKG transborder voluntary membership is not possible. However, in serious cases of wage and social dumping foreign workers can also be granted protection for political reasons. Usually cooperation with foreign authorities is maintained by the ÖGB or the AK representation in Brussels.

Concerning the issue of mandatory membership WKÖ represents the interests of the employer. It informs, in its own interests, foreign employers because these often include subcontractors of members of the WKÖ. For advice the WKÖ makes use of its foreign trade offices abroad. There is little language barriers in this context as foreign employers or the lawyers representing them usual speak English or French.

Bulgaria
Trade union organisations have the power to alert the control authorities of any violations of labour legislation, as well as to demand administrative sanctions against the offenders. Trade union organizations are also entitled to alert the control authorities of any violations of labour legislation, as well as to demand administrative sanctions against the offenders (Art. 406 LC). The control authorities are obligated to inform the trade union organisations of the measures taken within one month. However, complaints by posted workers are extremely rare, as the payment (even if under the minimum level guaranteed by the PWD) often is still higher than in Bulgaria. In addition, very few posted workers are members of trade unions.

Czech Republic
Trade unions are the main private actor monitoring the compliance with labour law as they have to be informed about various situations and many other must be discussed with them.

Greece
Trade unions could play an important role concerning effective application of labour law. Usually, trade unions representatives receive complaints from employees and sometimes consult employees to inform the Corps of Labour Inspectors and are present during their visit. Pursuant to Art 16 par 7 of Law 1264/1982, representatives of the executive council of the basic trade union of the undertaking shall be entitled to be present during any inspection carried out by the competent bodies of the Ministry of Labour and to submit their observations.

Hungary
Alongside the OMMF, trade unions may be involved in monitoring posted worker's rights. Trade unions have the right to raise an objection against any unlawful employer action (default) that affects the employees or their interest representation organisations directly

Ireland
The social partners play a role at sectoral level in monitoring compliance. Given the voluntarist system of industrial relations in Ireland, it is largely down to trade unions to 'police' and monitor compliance at the workplace (there are no mandatory works

councils, for example). The extent to which unions can fulfil this role, however, is very sector specific. Many sectors in which agency work is common, for example, such as cleaning and catering have relatively low levels of unionisation (which was the rationale for the establishment of the ERO system). By contrast, unionisation is higher in sectors like construction. There, unions have a greater presence on site and have negotiated more robust policing mechanisms than exist in other sectors. For example, the Construction Industry Monitoring Agency (CIMA), and its counterpart in the Electrical Contracting sector (EPACE) are non-statutory bodies, set up by the unions and employers, that monitor employer compliance with obligations under the statutory pension and sick pay scheme (EPACE has a wider remit of monitoring compliance with the REA for the sector). CIMA also monitors compliance with the industry's mandatory pension and sick pay scheme (Construction Workers Pension Scheme-CWPS). Unions can also refer cases to NERA, the Rights Commissioners or the Labour Court on behalf of workers.

Latvia
Trade unions are involved into supervision of the rights of posted workers only as far they receive particular complaints from employees. Their capacity (financial and human) is restricted thus in practice they are able only to provide information on rights of employees in case of posting and give a guidance to administrative institutions in charge of supervision of the rights or to trade unions of a host state with whom our trade unions have a cooperation.

Lithuania
The so-called non-state control over compliance by employers with the regulatory provisions of labour law is also vested in trade unions and its inspection bodies but the trade unions have only the right to complaint to the court in case of non-compliance of the employer. Works councils have the same right.

No mention of trade union involvement was made in the Maltese and Portuguese reports.

Slovenia
The enforcement of labour law rights, adopted in legislative and other acts as well as collective agreements is also monitored by trade unions (on all levels) and trade union representative at the level of the employer: They all have the competence to notify the employer about breaches and violations. They can also demand to eliminate or stop with the irregularities.

Slovakia
Regarding the monitoring of the working conditions of posted workers, social partners have no significant role.

Spain
The unions would have to guard by the fulfilment of the rules and to denounce the irregular situations. Also elected workers' representatives play a role.

## Other actors involved

Austria
As an institution under public law, the Construction Workers' Annual Leave- and Severance Payment Fund ("Bauarbeiter-Urlaubs- und Abfertigungskasse" – BUAK) is tasked with the administration of holiday- and severance pay of workers in the construction sector. Employers in the construction sector must report the posting of workers to BUAK. BUAK employees are authorized to enter employers' construction sites as well as common areas, to obtain information from persons present and determine their identity. BUAK has 12 inspectors for construction sites and approx. 25 auditors for domestic employers at its disposal.

The Chambers (employers: WKÖ, employees: AK) as well as the ÖGB predominantly act as representing the group interests. On the employers' side a multitude of voluntary entities representing entrepreneurs of individual businesses exist but do not enter into collective contracts on their own.

*Local actors*
Austria
Exercising federal responsibilities has also been transferred to District Administrative Authorities ("Bezirksverwaltungsbehörden") in their capacity of state institutions. For instance, they appear as trade administrations in the first instance for the administration of contract work. They are also responsible for the prosecution for violations of the requirement for the protection of workers including the AVRAG.

Bulgaria
Pursuant to Article 400 LC the local government authorities exercise control over the observance of labour legislation through their own specialised authorities. Their competence includes the municipal enterprises. This is only a legal opportunity that isn't used really in practice. The control authorities exercise their rights in *co-operation* with *the employers, the workers* and their *organisations* [Art. 402 (4) LC].

Ireland
Local authorities have no formal role in ensuring compliance with the rules on posted workers. Although public procurement contracts do include employment law compliance clauses, which should be monitored by local authorities, in practice, this seems rarely to occur.

## 4.3 ACTORS INVOLVED IN MONITORING THE PRESENCE OF POSTED WORKERS

Monitoring the presence of posted workers in the host state entails a more 'migrant law'-style of supervision (namely regarding access to the territory of a state). In this context, specific monitoring and enforcement tools targeted at the posting of workers do exist in several host Member States. The existence in all Member States included in this study of requirements to notify to the relevant (sending state) national social security authorities the posting of workers for social security purposes (E-101 forms, based on Reg. 1408/71 (now A1-forms based on Reg. 883/2004)) or to register for tax purposes was mentioned. At the end of this section we make mention of some peculiarities regarding such notification duties from a sending state perspective. However, for the rest of this study we restrict ourselves only to such (equivalent) requirements in the host state, related to the posting of workers within the meaning of the PWD (i.e., on monitoring the presence of posted workers for the purpose of checking the respect of the relevant nucleus of applicable labour law provisions in the host state).[269]

In this respect we found in the previous study that no host state authority monitors the presence of posted workers in general in SE, IT, NL and UK. In the current study, this is the case in FI, HU and IE[270] (see also section 4.5). In these countries, no host state government agency is notified of posted workers nor does any host state agency gather information relating to the number of workers posted to their territories in the meaning of the PWD. However, AT, IE, IT, NL and UK do run permit or visa requirement schemes for (some) posted workers who are third country nationals (so for migration law and/or transitional regime purposes). As already stated above in the section on 'transitional regimes', such schemes may cause problems of compatibility with EU law (be disproportionate).[271]

In this context, the question whether a requirement on service providers to simply notify the presence of posted workers may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study (see recommendation 27 below). In total eighteen Member States do run general notification or 'predeclaration' schemes for posted workers, regardless of their nationality and their specific posting situation (BE, DK, FR, DE, LU in the previous study as well as RO,[272] AT, BG, CY, CZ, EL, LV, LT, MT, PT, SK, SI and ES in the current study). Below,

[269] The definition of 'posted worker' for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines). See Chapter 4, p 93 – 156.

[270] The competent Irish institution dealing with posting of workers is the DJEI. In practice, however, no one agency takes responsibility for monitoring the presence of posted workers in Ireland. The DJEI, according to informants, gets very few notifications of postings to Ireland (these are not mandatory). It was suggested that there had been fewer than 6 in the past 3 years. All construction employers are required to notify the Health and Safety Authority (HSA) if initiating work on a new building site.

[271] See in particular the VanderElst (C-43/93), Commission-Luxembourg (C-445/03), Commission v Austria (C-168/04) and Commission v Germany cases (C-244/04) and the Vicoplus cases (C-307-309/09).

[272] That RO runs a prenotification scheme is not based on our previous study but on the Eurofound study on posting of workers in the EU, October 2010, p. 10-13. In our previous study only the countries labeled as 'predominantly host states' in practice, reported about this issue.

firstly an overview is given of the actors involved in monitoring the presence of workers in these ten countries. Section 4.6 (and for CZ and SK also section 4.7) provides more details on the notification systems in place. Secondly, as already mentioned above, we present some peculiarities regarding such notification duties from a sending state perspective.

## Overview of the involvement of public host state authorities

Austria
The Central Coordination Agency for the Control of the Employment of illegal Aliens ("Zentrale Koordinationsstelle für die Kontrolle illegaler Ausländerbeschäftigung" – KIAB) has been established in 2002 as a part of the Federal Ministry of Finance ("Bundesministerium für Finanzen" – BMF). This agency was responsible for the collection of assignment reports. Since 1 January 2011 the KIAB is renamed into "Financial Police", and is assigned specifically with the control of those guidelines applicable to posting cases. Unlike the Labour Inspectorate, the Financial Police does not control the labour protection provisions, but specifically monitors compliance of the laws pertaining to assignments, foreign employment, commercial law, and also social security and unemployment insurance, right of establishment and residence plus the gambling laws. Core objective is the creation of fair and equal conditions for the economy, the protection of the domestic labour market and the legally functioning authorities through strict controls of illegal labour and the associated welfare fraud. In order to accomplish this, the Financial Police is authorised to enter and monitor operations, check employees, determine their identity, stop vehicles and secure evidence.

Bulgaria
The Employment Agency monitors the presence of posted workers and must keep a database on the posted workers on the territory of the Republic of Bulgaria.
The employer (service provider) must submit to the Employment Agency, a document certifying the existence of a valid employment relationship with the posted worker according to the legislation of the country where the employer has its seat. However, not all employers actually comply with the requirement to submit such a declaration.

Cyprus
As far as monitoring of the presence of posted workers is concerned, the responsibility of the Department of Labour to control and monitor the rules related to the scope of posting refers to all posted workers, irrespective of the country of origin, while the actual gathering of information on the number of workers posted in Cyprus, is made possible through the compliance of enterprises with the procedure provided for by Article 8 of the Law 137(I)/2002.

However, in the view of the Labour Department there are indications that many of the enterprises that post workers to Cyprus either fail to comply with the procedure provided for by law or are late in complying. As a result, the Department does not have precise data available either on the number of posted workers or on the type of posting. Despite the violation of Article 8, paragraph 1, as is described above, no measures have been taken in order to address the specific problem, no sanctions have been imposed, nor have any monitoring procedures been introduced in order to become aware of such violations. Since it has been noted that in many of the registered cases

of posting the authorities have been notified at a later date, i.e. after the date the posting began, the Ministry is of the opinion that in the case of short postings the possibilities for implementing and monitoring the existing legislation are seriously limited. In this context, although in the opinion of the Labour Department the total number both of postings and also of posted workers remains at low levels, it is estimated to be much higher than the number of registered cases.

Czech Republic
Labour Offices play a role in monitoring the public law employment duties. Competences and functions of the Labour Offices are set by the Employment Act. According to Sections 85 to 102 Labour Offices monitor (among other) adherence to public law duties connected with employment of foreigners. According to Section 87 (1) of the Employment Act every employer settled in the CZ must inform Labour Office in writing about hiring an EU-citizen.

According to Section 102 (1) of the Employment Act the Labour Office maintains evidence of EU-citizens working in the Czech Republic. According to Section 102 (2) of the Employment Act every employer must maintain evidence of EU-citizens employed by or posted to such employer.[273] Both evidences contain general personal data plus type and place of work, expected length of employment / posting as well as other necessary data.

Greece
There is an obligation to notify to the Labour Inspectorate of the presence of workers (see for details below section 4.6, 'duties on service providers').

Latvia
The State Labour Inspectorate is monitoring the presence of posted workers on the Latvian territory. If a worker is to be posted in Latvia an employer prior posting (the particular period is not specified) is under obligation to provide the State Labour Inspectorate with certain data. This requirement has been complied with only twice.

Lithuania
Pursuant to Article 5 LGPW the employer posting a worker to perform temporary work in the territory of the Republic of Lithuania for a period exceeding 30 days or to carry out building work as provided for the Republic of Lithuania Law on Construction shall, in accordance with the procedure laid down by the Ministry of Social Security and Labour of the Republic of Lithuania, notify in advance the territorial division of the State Labour Inspectorate of the posted worker's place of employment of the provisions applied to this worker.

Malta
It shall be the duty of the undertaking posting the worker to Malta to notify the Director responsible for Employment and Industrial Relations of the intention to post a worker to Malta prior to the date of posting of the worker. During 2010, the Department of Employment and Industrial Relations received 524 notifications related to posting of workers in Malta.

[273] Please note that the term 'employer' refers to the service recipient, see for more details below in section 4.7)

Portugal

Companies posting workers to Portugal are obliged to inform the local authorities five days in advance. The Labour Inspectorate estimates that there are few posted workers in Portugal. The General Confederation of Portuguesa Workers (CGTP-IN) believes they work mainly in managerial and technical positions, with some central and eastern European workers posted to work in agriculture in the south.

Slovakia

The number of posted employees from other EU Member States into the Slovak Republic can be detected from the number of notifications that employers[274] posting their employees to the Slovak Republic are obliged to send to the relevant Office of Labour, Social Affairs and Family, because of the collection of statistic data. The employees are posted mainly from Romania, Hungary, Poland, Czech Republic and France.

Some additional statistic information regarding posting of the employees (for the year 2010):

- the Social Insurance Agency issued approx. 21 243 forms E 101,
- the employees are posted mainly to Germany (7 084 forms E 101), Czech Republic (4 205 forms E 101) and France (1 814 forms E 101),
- the employees are posted to the area of industry, construction (building) and "other" services.

Slovenia

An employer – legal or natural person - with its seat or residence in an EU Member State – may post workers, regardless of their nationality, to the Republic of Slovenia to perform services (Article 16 of the *Employment and Work of Foreigners Act*). Such employer shall, before actual commence of work, register its activities at the Employment Service of the Republic of Slovenia.

From the *Annual Report of the Employment Service* for year 2010[275] it derives that in 2010, 613 employers have registered the performance of service in the Republic of Slovenia for posting of 2.670 of workers. In the *Annual Report of the Employment Service* for year 2009[276] there is no information how many registrations were made in year 2009. From the *Annual Report of Labour Inspectorate for year* 2010[277] there is no detail information how many requests or registrations of work of posted workers have been made in year 2010; rather solely data on unlawful activities are given. It derives from this report that in year 2010 two cases, regarding non-fulfilment of duty of registration of posted worker at the Employment Service were detected.

From the *Annual Report of Labour Inspectorate for year* 2009[278] it derives, that in four cases Labour Inspectors determined breach of duty of registration of the work of posted worker. It was also stressed in the Report that the Labour Inspectors noted that posted workers are often given an undeclared work, because of a lack of appropriate provisions in the *Employment and Work of Foreigners Act*. This deficiency is now

[274] Please note that the service recipient is defined as the 'employer' in this context. For more details see section 4.7.
[275] http://www.ess.gov.si/_files/2540/letno_porocilo_Zavoda_2010.pdf.
[276] http://www.ess.gov.si/_files/886/letno_porocilo_zrsz_%202009.pdf.
[277] http://www.id.gov.si/fileadmin/id.gov.si/pageuploads/Splosno/Letno_porocilo_IRSD_2010.pdf.
[278] http://www.id.gov.si/fileadmin/id.gov.si/pageuploads/Splosno/porocilo_2009.pdf.

abolished (the old Employment and Work of Foreigners Act did not provide for a list of personal names of every posted worker, that is why it was easier not to declare a worker). With the adoption of a new rule[279] in the *Work and Employment of Foreigners Act* that workers must be, in application before posting, listed by their name, this problem will in future be diminished.

One additional difficulty is also the language in which the documentation of the employer is written. The Labour Inspectorate must, before issuing a decision examine all necessary data; however the documentation is mostly in the language of the sending state. Most of the workers come from Poland, Slovakia, Bulgaria and Romania, hence from language areas which are difficult to be understood by Slovenian inspectors. The translations take time. The time is also needed for necessary documents to be obtained from abroad. In cases, where the employers and employees are aware of their unlawful actions, many times, after the departure of the Inspector, they immediately leave the construction site and disappear without a trace. The situation is the same also when the Inspector wants to research a working accident – the injured and even uninjured workers are nowhere to be found.

Spain
Notification is required if a posting exceeds 8 days and is needed for each individual posting of a worker. The communication must be submitted to the Regional Labour Authority of the Autonomous Community where the posted worker is going to work.

***Recommendation 27 – no substantive changes***

**At national level >** A closer focus is needed in the host state national authorities' monitoring and enforcement policy. This can be achieved by issuing inspection guidelines specifically targeted at posting of workers situation. In this respect, the question whether a requirement on service providers and/or recipients to simply notify the presence of posted workers to authorities in the host state may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study. It may help the national actors to detect posting of workers situations and it gives insight into the size and occurrence of this phenomenon at sectoral level.

## Notification duties from a sending country perspective

With respect to predominantly sending countries we looked at the notification/registration requirements that exist there for workers posted *from* their territories. As in the previous study, in all countries covered the duties pursuant to Reg. 1408/71 / Reg 883/2004 apply. Pursuant to this Regulation, the responsible authorities register posted workers sent to another Member State by issuing A1/E-101[280] forms to employers (service providers).

[279] This rule was adopted by changes of the Employment and Work of Foreigners Act, adopted on 12th of June 2007. The changes entered in force 27th June 2007. The *ratio* behind adoption of such provision was mostly to prevent unregistered work and to ensure identification of every worker.
[280] From 1 May 2010 on, the A1replaced the E101, as document certifying the social insurance registered status in the sender state (with the exception of Iceland, Liechtenstein, Norway and Switzerland, with regard to which the 1408/71/EEC Regulation must still be applied, and where the E101 form needs to be requested).

The role of the (old) E-101 form (now A1 form) is to indicate the applicable legislation for establishing the social security rights of migrant workers, employees and the self-employed as well as where the respective contributions should be paid. The information in the E-101(A1) form reflects relevant information for establishing the social security rights[281] but does not reflect the salary level or working conditions. However in BG and LT, the employer must submit additional information which gives an indication of the wage levels. Also in HU and PT additional information (though not always effective) requirements apply for the sending employer, but not concerning the wages or other labour conditions of the workers.

*Additional information requirements*
In Bulgaria, the National Revenues Agency is the state authority competent to register the posting of workers from Bulgaria to another Member State (for the purposes of Reg. 883/04). However, also the employment contracts, their amendments and their termination have to be registered with it [Art. 62 (3—4) LC]. The Employment Agency and the Labour Inspectorate may use this information. Also in Lithuania, if the employer applies for a E101/A1 declaration for workers posted to another Member State at the State Social Insurance Fund Board, additionally, he should also give an indication of the gross salary level of the posted worker.

Hungary
The Health Insurance Fund Administrative Agency of the County Government Office is competent according to the employer's seat. This authority is responsible for issuing the E101/A1 documents, which can be considered as a de facto registration of workers posted abroad.
Alongside the above the ÉÁKSZ contains a registration requirement. According to that provision employment via posting, assignment and hiring-out must be ordered in writing, and shall be recorded as part of the labour (personnel) register as regulated under the LC, which the employee can inspect at any time, and request conciliation on it. Pursuant to yet another stipulation, employers wishing to have recourse to assignment shall certify proprietary or employer interest.

Portugal
Apart from the Regarding postings *from* Portugal, Article 8.º nr. 2 of the Labour Code requires an employer whenever he/she wishes to post an employee abroad to inform the ACT ("Autoridade para as Condições de Trabalho") beforehand (5 days before the date of the posting) of the identity of the workers who are going to be posted, the identity of the client, the place of work and the foreseeable dates of beginning and end of the posting (the collective agreements in the field of the building industry, as stated below, refer to the same duty with an identical content). The infringement of this duty is a serious offence according to article 8.º, nr. 3 of the Labour Code.
However, according to one of the Portuguese informants frequently, particularly if temporary work enterprises are concerned, this duty is not fulfilled and the employer makes no communication whatsoever to the ACT. On the other hand if the information is made with the relevant data, no further research is made at this stage by the ACT. It must be emphasized that according to the Portuguese Law the employer in

[281] Sickness benefits, maternity and paternity leave, retirement, invalidity, work accidents, professional diseases, unemployment, and family allowances.

case of temporary work enterprises may be a physical person and does not need to be a corporation or a legal person. As all temporary work enterprises are subject to a mandatory register, it is expected that there was already an assessment of some of the qualities of the employer, since in order to operate as a temporary work enterprise, a physical person must comply with certain requirements, such as having no criminal record, not being partner or manager of a company that has previously entered into bankruptcy, as well as providing a gage in money.

*Operational remarks regarding the issuing of A1/E101 forms*
Regarding Cyprus, as far as the form E-101 is concerned, as it is now replaced by the form A1, in the opinion of the Social Insurance Services, although in theory the Social Insurance Services are in a position to help identify and record cases of posting through the use of the form A1; in practice the possibilities are limited. The basic reason is that there is no computerised system for registering document E101, and the replacement of document E101 by document A1, partly due to its more complex form, significantly slows down completion of the procedure. In this context, and given that the categories of mobile workers and posted workers are not registered separately, the Social Insurance Services do not have the necessary number of staff for the purposes of registry and recording. In Greece, no authority is specifically involved in registering the posting of workers from Greece to another Member State. Even when E 101 certificates are issued, a special procedure of central registration is not provided.

Hungary
As for registration of posted workers, the social security registration (A1 form) would be enough. From 2012 on the social security coordination system will use the so called SED (Structured Electronic Document) documents. The aim is that all of the SED documents will be available on line by every member state social security institutions. According to the Regulation 987/2009 at the beginning it will be available only for social security institutions, but a future step could be to make this information (SED) available for other institutions which are involved in posting issues.

Latvia
The A1/E-101 form has to be submitted to the State Social Insurance Agency. Although there is no possibility to control if the E-101 form is required in all posting cases, according to information provided by an informant of the Agency such document is required frequently for the purpose of control of such a document by the host state (especially Germany). At the same time an interviewee of one of the Latvian temporary employment agencies claimed that once a request for a workforce was so urgent that it was unable to provide workers with the E 101 form because it takes at least several weeks to receive such a certificate from the State Social Insurance Agency. Under Administrative Procedure Law, A1E 101 must be provided within a month from submission of application. In practice, the length of the procedure depends on the number of applications received in a particular period and thus on the capacity of the State Social Insurance Agency. However, the State Social Insurance Agency claims that in case an employer needs an A1/E 101 urgently it is provided in the shortest possible term.

Apart from the problem that it takes at least several weeks to obtain an A1/E101 form, various other problems were mentioned in the Latvian report from the sending state perspective:

- unclear procedure of payment of social security contributions - if the salary is paid abroad (if required by authorities of host state), there is nothing to show on the tax declaration as income, consequently there are no grounds to pay statutory social insurance contributions in Latvia;
- unclear tax rules, in particular it is often unclear in which country the posted worker must pay income tax – in the sending or the hosting state.

All in all, this seems to lead to situations were Latvian employers avoid sending their employees under the legal regime of the PWD but rather under free movement of workers regime or they chose to keep the worker formally employed in Latvia.[282] This presumption is founded on the following observations: (1) the biggest Latvian construction companies deny posting of workers, while having projects on provision of services in other EU member states; (2) only two out of seven temporary employment agencies responded that they try to comply with all legal requirements but not always successfully; (3) the Latvian Trade Union of Construction Workers and the State Labour Inspectorate are almost certain that due to too demanding legal obligations (financial burdens, in particular the obligation to provide daily subsistence allowance) the Latvian employer sends its employees for service provision in another EU Member States under another legal regime than applicable to posted workers (free movement of workers of self-employed).

Slovenia

From practice of the Health Insurance Institute of Slovenia, it derives that most of the workers posted abroad, are posted to Germany and Belgium, Netherlands and Luxembourg. The employers that post workers, are mostly registered for performance of construction activity, in more detail within the construction sector, the workers are most often posted to perform: finalization works, installation works and general construction.

The main difficulties administrative authorities face, especially at the Health Insurance Institute of Slovenia which issues the A1/E-101-forms, are inadequate submission forms, submitted by the employers. In verification of provided information also consulates are taking part, especially the German consulate. Workers are obliged to present the A1/E-101-form by themselves; otherwise they are not allowed to enter the construction site in some host Member States. Especially the German Embassy demands a copy of the E-101-form from Slovenian posted workers.
Additionally it derives from the interviews, that in practices, both sides – employers and employees – are not acquainted enough with the regulation of posted workers. The situation is improving, however the fluctuation of posted workers is expanding, hence it is impossible to state, that the quantity of difficulties has decreased.

[282] In such a situation the worker formally remains working in Latvia, but in reality works in another MS. The national expert identified at least one of such an illegal situation.

## 4.4 INSPECTION, ENFORCEMENT AND COOPERATION

### Competences, sanctions, nature of inspections

An observation in the previous study was that in all hosting Member States, with the notable exception of the UK, there seems to be a policy trend towards greater emphasis on stringent enforcement.[283] This trend was also noticed in several host states in the current study (AT, IE, and SI). At the same time, the traditions in the Member States are very different regarding the competences of the authorities involved, their inspection activities, the nature of their controls and sanctions, as was confirmed again in the current study. Below, an impression of the situation in each country covered by this study is given.

Interesting – but beyond the scope of this research study – would be a much more detailed comparison of the different host state national authorities and their competences, including their use in practice, in order to shed more light on the effectiveness of the different enforcement systems in situ.

#### Overview of country findings

Austria
The Labour Inspectorate (LI) is primarily responsible for monitoring the regulations for the technical and sanitary worker protection. Both the LI and the Financial Police are not authorised to penalize but must transmit the results of an investigation to the Competence Centre LSDB or else directly bring charges. Further details on competences, sanctions and the nature of inspections are given below under the specific headings in sections 4.6 and 4.7.

Bulgaria
Within the limits of the competence thereof, state *control authorities* have the rights:

- *to visit* at any time the ministries, the other central-government departments, the enterprises and the places where work is performed, the premises used by workers, as well as to require from the persons found within the territory thereof *to identify themselves* by means of an identity document;
- to require from the employer to provide *explanations, information and to produce all documents, papers and certified copies* thereof as may be necessary in connection with the exercise of control;
- to obtain information *directly from workers* on all matters related to the exercise of control, as well as to require from workers *to declare in writing* facts and circumstances related to the performance of the work activity, including data on pay for work;
- *to take specimens, samples and other such materials* for laboratory tests and analyses, *to use technical devices and apparatus* and *to take measurements of fac-*

[283] For an account of the similar trend in DK, Sw, NL and Germany, see also the respective Formula papers.

*tors* of the working environment in connection with the exercise of control over the work activity performed;
- to establish the causes and circumstances where under *accidents at work* have occurred.

The state control authorities may impose administrative sanctions for violations of the labour legislation (Art. 413—418 LC; Art. 79—86 PRA). Where the control authorities detect any violations of the law which give them reason to believe that a criminal offence or other wrongful acts have been committed, the said authorities are obligated to inform the prosecuting authorities.

The control authorities exercise their rights in *co-operation* with *the employers*, *the workers* and their *organisations*. For prevention and cessation of violations of labour legislation, as well as for prevention and elimination of the harmful consequences of any such violations, the state control authorities, acting on their own initiative or on a motion by the trade union organisations, may apply the following *coercive administrative measures:*

- *to give mandatory prescriptions* to employers and officials for elimination of the violations of labour legislation, including of the obligations with respect to social and welfare services for workers and the obligations to inform and consult the workers, as well as for elimination of flaws in the provision of health and safety at work;
- *to suspend the commissioning* of buildings, machinery and plant, production lines and entities, if the rules for health and safety at work and social and welfare services have not been observed;
- *to suspend the operation* of enterprises, production lines and entities, including the construction and remodelling thereof, as well as machinery, facilities and work stations, where the violations of the rules for health and safety at work pose a hazard to human life and health;
- *to stay the execution* of unlawful decisions or orders of employers and officials;
- *to suspend from work workers* who are not familiarised with the rules for health and safety at work and do not possess the required licensed competence, as well as workers who have not attained the age of 18 years, in respect of whom the permission for employment has been withdrawn;
- *to give prescriptions* for introduction of a special pattern of safe work if the working persons' life and health are exposed to a serious and immediate hazard, should it be impossible to apply suspension of operation;
- *to suspend operations* on the work site or the operation of the enterprise until elimination of the violation;
- *to give mandatory prescriptions* to employers and officials for elimination of a violation related to the charging in payrolls of an amount understating the amount which the employer, the appointing authority respectively, has paid the worker for the work performed thereby; in case of a failure to fulfil any such prescription within the time limit stated therein or in case of a repeated violation, the labour inspection control authorities may suspend the operation of the enterprise until elimination of the violation;
- *to declare the existence of employment relationship* where it is found that work is performed without an employment contract. Where a company is found to have

failed to submit a declaration, the Labour Inspection issues an ordinance and imposes a fine. However, the fines are from an average European perspective, (but not from a national perspective!) quite insignificant: for general violations of labour legislation the fine is 125-500 EUR, and for repeated violations – 250-1,000 EUR approximately. Therefore, the data on the number of received posted workers based on this database is an underestimation of the real number of posted workers.

CZ

Competences and functions of the Labour Inspectorates are set by the Act on Labour Inspection (the Act No. 251/2005, on Labour Inspection, as amended). The Labour Inspectorates monitor adherence of duties connected with work safety, hygiene, working time, holidays, minimum wages, employment of women, pregnant, adolescents etc. In this scope the Labour Inspectorates are empowered to:

- control adherence to labour law duties at particular employer´s undertaking,
- impose fines for infringements of law,
- monitor remedy of infringements,
- monitor causes of accidents at work etc.

Finland

Occupational safety and health authorities inspect workplaces and other locations of supervision and take other actions required by legislation. Under Section 4 of the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces, to carry out enforcement activities, occupational safety and health authorities and inspectors have the right, to such an extent as is necessary for enforcement purposes, to:

1) have access to any place where work is performed or, for a good cause, is expected to be performed, to any other premises which employers, according to an act to be enforced by occupational safety and health authorities, are obliged to provide for employees' use, and to any place where products to be placed on the market or supplied for use are manufactured, stored or displayed;

2) receive from employers for inspection documents which they, according to provisions to be enforced by occupational safety and health authorities, shall draw up or keep, and to receive any other analyses of matters which employers, according to provisions to be enforced by occupational safety and health authorities, shall keep or have in their possession in some other way than in writing;

3) discuss with a person working in a place referred to in paragraph 1), or with any other person otherwise occupied there, in private or in the presence of witnesses and from this person receive information necessary for their duties and documents required of the person by provisions to be enforced by occupational safety and health authorities;

4) receive from employers a description of any other analyses, besides those referred to in paragraph 2), made by the employer which are related to the work, the work environment and the work community and which affect the employees' safety and health, as well as a description of any other essential plans which affect the structures of the workplace, the work and production methods and the employees' safety and health;

5) receive from employers for inspection an agreement on the provision of occupational health care concluded between the employer and an occupational health care service provider or the employer's description of occupational health care services it

has provided, as well as an occupational health care action plan, workplace analysis and any other description of occupational health care activities necessary for enforcement purposes;
6) take samples, after informing the employer of the matter, of raw materials or other materials used at the workplace, or of products manufactured or used at the workplace, for a separate analysis or investigation; a current price must be paid for a sample, unless its value is insignificant;
7) carry out hygiene measurements at the workplace and, by permission of the employer or for a cause justified by enforcement purposes, take photographs there;
8) receive from employers other information necessary for enforcement purposes and copies of the documents

Greece

Pursuant to Art 7 of Law 2639/1998 the SEPE's inspectors are entitled to:

- freely enter all workplaces in the private and public sector, at any time of the day or night, even without prior notification;
- carry out necessary examinations, monitoring or investigations of all types, with a view to determining whether the provisions of labour legislation and collective agreements are being observed;
- temporarily suspend operation of the whole or part of an enterprise, if the SEPE deems that workers' safety and health are directly at risk;
- impose, or take legal action to impose, administrative penalties;
- have access to archives, documents, registers, books and other data concerning an enterprise;
- investigate the causes of fatal and serious industrial accidents and draw up accident reports;
- investigate the causes of occupational diseases and the conditions in which they occur;
- collect samples, conduct analyses, measure natural, chemical and biological factors and take photographs; and
- take action to reconcile any individual or collective labour disputes which may arise.

Hungary

The OMMF has a wide range of measures to choose from: In minor cases it warns the employee to follow the law. If the breach persists at the time of the inspection, it will oblige the employer to terminate the breach by an administrative decision. The OMMF monitors implementation of the decision and if it establishes that the employer did not fulfil the obligation of the decision, it enforces it by official means (e.g., a procedural fine of up to one million HUF).
For a serious breach, the OMMF applies a labour fine against the employer in breach. The amount of the labour fine ranges between HUF 30 thousand to HUF 20 million. The OMMF may ban the further employment of employees employed in breach of the laws and risking their health.
It may oblige the employer to pay a determined amount to the Labour Market Fund for unauthorised employment of a foreigner. The level of the amount is adjusted to the paid salary (twice the salary), but for the first time it may not be less than eight times the actual minimum wage by foreign employee employed without a permit. It may qualify the relationship between the parties.

The remit of the OMMF covers the verification of occupational/labour safety too. The OMMF is entitled to check any work in the territory of Hungary, regardless of residence and nationality or the title by which the job is being performed in Hungary.

Ireland

The advent of NERA in 2007 represents something of a departure in terms of monitoring and enforcement in the Irish labour market. Previously, the employers and unions jointly managed this function through the voluntarist industrial relations system (with the small labour inspectorate unit of the Department of Enterprise playing an important, but low-key role). Problems with compliance were dealt with via traditional industrial relations structures and procedures (negotiations, agreements, collective action, mediation via the Labour Court and the LRC, etc), and outcomes often reflected the pragmatism of the voluntarist system. NERA, by contrast, sees its role as enforcing the (increasing volume of) employment law, through the regular courts if necessary. See for more details below in this section (domestic and cross-border co-operation).

Malta

It appears that enforcement by the Directorate is carried out in two ways. First, whenever, during one of the random checks carried out by the duly appointed inspectors, it discovers that a particular enterprise employs posted worker, the inspectors ask for information related to the posted workers' conditions of work as proven by the documents. In the event of any breach, the employer posting the worker is informed about the requirements envisaged by the law and asked to rectify his/her position. Whenever it discovers that a particular company may be employing foreign workers, they visit the latter and check whether the persons concerned are posted workers or otherwise. If the company is employing posted workers, the inspectors ensure compliance with the law and take the appropriate action in case of breach. In case the company does not employ posted workers as defined by the law, the inspectors still bring to the attention of the persons concerned the applicability of the legal notice and the obligations it imposes on the host undertakings.

Any person contravening the Regulations shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than 116.47 Euros and not more than 1,164.69 Euros.

Portugal

According to article 12 of DL 211/2006 the ACT has the scope of promoting the improvement of the working conditions, monitoring the compliance with the labour rules, both legal and conventional, concerning the labour relations, private and public. In addition to this supervision and monitoring functions, the ACT must prevent the use of children's work, promote health and safety work policies, inform the subjects of labour relationships and their associations, give technical support in the identification of professional hazards, represent the country in international forums in the area of labour law and cooperate with similar institutions of other countries. Other functions are foreseen in article 3 of DL 326-B/2007 de 28 de Setembro.

The labour infractions may be, according to the law (art. 553.º of the Labour Code), light, serious and very serious. The concrete fine applied to an infraction depends on a number of criteria. First, the fine is determined by the ACT (Labour Inspection) but

that decision may be challenged in a court that will ultimately decide what sanction must be applied. In a case of an infraction which is considered serious the minimal and maximal amount to pay are the following: a) if the enterprise has a volume of affairs less than €500.000, six account units (the accounting unit according to art. 3.º of DL323/2009 is equal to €102,00) to a maximum of twelve account units in cases of negligence and thirteen to twenty six in case of intent; b) if the enterprise has a volume of affairs equal or greater than €500.000 but less than €2.500.000, seven to fourteen accounting units in case of negligence and fifteen to forty in case of intent; c) if the enterprise has a volume of affairs equal or greater than €2.500.000, bit less than €5.000.000, ten to twenty accounting units in case of negligence and twenty one to forty five in case of intent; d) if the enterprise has a volume of affairs equal or greater than €5.000.000 but less than €10.000.000, twelve to twenty five accounting units in case of negligence and twenty six to fifty in case of intent; e) if the enterprise has a volume of affairs equal or greater than €10.000.000, fifteen to forty accounting units in cases of negligence and fifty five to ninety five accounting units in case of intent. There are other criteria: for instance in cases of repeating offender (art. 561.º). As a rule these sanctions are not subject to publicity (the publicity is in itself a secondary sanction and not at all frequent).

Slovenia

In accordance with the *Labour Inspection Act* it is the competence of the Labour Inspector to check whether employers respect legislative and other acts, collective agreements and general acts, relating to employment relationships, wage and other benefits, arising from employment relationship, employment of workers at home and abroad, workers' participation in management, strike[284] and security at work (Article 1 of the Labour Inspectorate Act). Beside this the Labour Inspectorate also provides professional consultation to employers and employees, regarding the enforcement of legislative and other acts, as well as cooperates with research organizations in the area of labour (Article 4). The Labour Inspectorate is established as a body within the Ministry of Labour (Article 2, paragraph 1). The work is performed by the Labour Inspector (Article 6).

The specific competence of the Labour Inspector by monitoring of the compliance and the enforcement of labour law are:

- by inspection and supervision the Labour Inspector has the right to examine work equipment and areas, working conditions, books, contracts, documents and other acts of the employer. The employer or authorised person must enable to the Labour Inspector access to mentioned resources (Article 12 of the Labour Inspection Act);
- without prior notification and permission of the employer, regardless to working time, the Labour Inspector has the right to enter into work place, to equipment or other areas, where work is performed. If the employer is available, he has to be notified on such entrance (Article 13 of the Labour Inspection Act);
- when it is needed the Labour Inspector may, for maximum of 8 days, take the documentation he has found by the employer (Article 14, paragraph 3 of the Labour Inspection Act);

[284] In relation to strike, the Labour Inspector mostly monitors whether the strike is legal; meaning if it is organised in accordance with provisions determined in the legislative act. Further the Inspector also monitors that working equipment is not destroyed or damaged on purpose and that no other damage is caused (also in relation to workers who refuse to participate in the strike).

- after the inspection the Labour Inspector has the right and the duty with its decision to order to the employer to act in accordance with legislative and other acts, as well as collective agreements and general acts of the employer (Article 15 of the *Labour Inspection Act*). The complaint against such decision does not has suspensive effect;
- the Labour Inspector may also, with his decision, prohibit the continuance of working process or use of work equipment, until irregularities are eliminated; if by inspection he determines that: 1.) the employer did not provide working equipment without defects or did not ensure appropriate working environment and process; or 2.) because of given working equipment or environment the danger for emergence of injury or health impairment of workers is given or when appropriate instructions to prevent such danger where not given to the employees; or 3.) the employer prevented the Labour Inspector to carry out the supervision; or 4.) the employer did not conclude employment contracts in accordance with the law; 5.) the employer did not register the worker into social security systems or did not pay social security contributions in accordance with the law; or 6) direct danger for life and health of workers is given (Article 16 and 17 of the *Labour Inspection Act*);
- inadequate equipment or work space may be sealed by the Labour Inspector (Article 20 of the *Labour Inspection Act*);
- if the Labour Inspector determines the above described irregularities more than two times in 6 months by the same employer, its licence for operation shall be taken away (Article 21 of the *Labour Inspection Act*);
- the Labour Inspector may also impose a penalty, if he determines the breach of legislative or other acts or agreements (Article 22 of the *Labour Inspection Act*).

Slovakia

In the cases when the labour inspectorate according to an incentive (or during the control without any incentive) finds infringement by the employer, the labour inspector issues a protocol on the outcome of labour inspection, it obligates in it the employer to take measures to recompense the infringement. Labour Inspectorates can also impose a fine (up to EUR 200,000) to the employer if any infringement is found out.
In case of violation of the labour laws there is stated in the law a possibility to impose a fine for any violation of labour laws, it is a general fine, not only for the purposes of the violation of labour legislation in the area of the posting.
The amount of the fine for the administrative offense is determined as follows:

- Violation of labour laws - up to 100, 000 EUR
- Violation of the prohibition of illegal employment from 2, 000 EUR to 200,000 EUR.

Spain

The Labour Inspectorate looks after the fulfilment of the Law and imposes sanctions when infractions are committed. The formal defect in the communication of worker's movement to Spain is a slight infraction. To communicate the movement after it has taken place is a serious infraction. Also it is an administrative infraction not to guarantee to the displaced workers the minimal conditions of work. All the questions related to the communication of the displacement are the competence of the regional authorities.
The penalty when infractions in this matter are committed is imposed by the regional authorities of the Autonomous Community, but the sanction proposal is realised by

the labour inspectorate which is a central authority that depends on the national government. In practice, regional authorities do not play an active role in ensuring compliance with the rules on posted workers; they only receive the communication of the displacement.

## Domestic and cross-border cooperation

Despite considerable progress, the internal cooperation between national authorities (including social partners) responsible for monitoring the position under labour law, social security law and tax law of posted workers and their employers, still displays serious shortcomings, as was shown in both studies conducted. While in some Member States there is still no or only limited systematic cooperation, in others there is a clear gap between cooperation on paper and cooperation in practice. The same holds for cross-border cooperation of the national authorities involved in PWD-related monitoring/enforcement issues. The difficulties in cross-border cooperation are increased by the wide variety of functions performed by the competent authorities in the different countries (what the Labour Inspectorate does in one country falls under the competence of Tax authorities, or the Ministry of Finance in another). Hence, further implementation/application of the ongoing initiatives at EU and national level is necessary with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates[285] (see below recommendation 29).

### Country findings

Austria

The quality of *domestic governmental cooperation* throughout Austria varies by region and depends on the individual players. The functioning of the governmental networking is mostly seen in a positive light.

Opinions vary regarding *cross-border cooperation* with foreign administrative bodies. While the cooperation with the German authorities is largely perfect, the cooperation with other countries is usually impeded by language barriers. The Internal Market Information System (IMI) that is temporarily connected to 12 Austrian government bodies is presently still in the experimental state and since the legal basis is still with Parliament no experience values are available at this time. Recently, from the 1st August 2011, a legal base for a direct cooperation of the Labour Inspectorate with other Member States of the EEA was created (Federal Law Gazette I No. 51/2011). The BUAK reports an interesting problem with the cooperation among administrative bodies: Within the framework of the paid vacation fund it presently also collects the social security contributions for the domestic vacation entitlement. Poland has not even established a location where the contributions can be sent.

With regard to providing information to other (foreign) authorities:

[285] See in this respect Commission's Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services and Commission's communications COM (2006) 159 final 4th April 2006 and COM (2007)304 final, 13 June 2007. See Report March 2011, Chapter 4.6, p. 147-155 for more details on cooperation in and between the Member States covered by that study.

According to Sect. 7b Para. 7 of the AVRAG and subject to the data protection regulations the authorities also have to cooperate with the authorities of other EEA membership countries responsible for monitoring the compliance with labour- and social legislations or the control of illegal trade activities and on the other hand may provide information whether an employer abides by the rules of the trade as well as providing information in response to justified queries by authorities of other membership countries. Providing mutual administrative assistance is without charge.

Bulgaria

The cross-border cooperation of the labour inspectorate with its counterparts in other Member States is only incidental. There are not general policies agreed. However, a special division in the Main Labour Inspectorate – "International Labour Migration" is established. Its competences are concentrated on the organization and coordination of the cooperation with the other state bodies and the social partners. There are several bilateral agreements with France, Germany, the Netherlands, all signed in 2008. With Belgium an agreement is still in process of negotiating.

Czech Republic

The Ministry of Labour and Social Affairs and the State Office for Labour Inspection in Opava have been identified as being contact points in the Czech Republic for communication with respective EU Member State bodies. There is no crossborder cooperation directly between the individual labour inspection offices in the Czech Republic and the labour inspection offices in other Member States. This is also due to the fact that the inspection of the observance of employment law relationships and conditions is systematically-wise somewhat different in most Member States compared to those in the Czech Republic. It is intertwined with the inspection (control) of illegal employment, social security, tax levy, etc.; in the Czech Republic it is divided based on the competencies awarded by the respective laws to specific bodies.
When the State Office for Labour Inspection in Opava receives a request from another Member State for information regarding posted workers, it effects direct investigation through the locally competent regional labour inspection office. The said labour inspection office then investigates the employer of the posted workers or deals otherwise with the request. It informs the State Office for Labour Inspection in Opava about the result of its investigation and the State Office for Labour Inspection in Opava then prepares a reply (report) for the requesting Member State. In this way, all Member State requests for information regarding posted workers are centrally recorded for the entire Czech Republic for further processing, various reports for other bodies, analyses, etc. This procedure helps to protect regional labour inspection office workers from further administration and translations, which is all arranged by the State Office for Labour Inspection in Opava.

An exception where mutual cooperation between Member States is concerned resulting from a joint past is the National Office for Labour Inspection in the Slovak Republic. Regular meetings are held by and between the said National Office for Labour Inspection in Slovakia and the State Office for Labour Inspection in Opava and the regional labour inspection office inspectors of both countries undertake exchange stays. A close cooperation also exists with the Polish labour inspection in which case several important meetings have already been held. Cooperation with other EU Member State labour inspection bodies is effected only at an administrative level.

EU Member States have together been pilot testing, since May 2011, the handling of requests for information about the posting of workers using the IMI electronic system. A new module for the posting of workers where services are concerned has already been introduced. The module should speed up the handling of requests between Member States, it should simplify administration, integrate procedures, etc. and it will also reduce costs and maintain personal data protection. The State Office for Labour Inspection in Opava will continue to centrally handle all requests filed by other Member States.

Specifically:
- As things stand, the State Office for Labour Inspection in Opava handles no more than four cases per year, i.e. requests filed by other Member States for information regarding worker posting. However, we expect that the number of requests will steadily increase given the fully opened labour market in Germany and Austria. Where a request touches on the competency of another body, it is then passed on to that body. The Czech Republic places about 2 requests per year with other Member States asking for information regarding posted workers.
- The cross border agreement on mutually exchanging information has at this point in time only been signed with probably two other Member States (DE and FR). Other Member States do not seem to be interested in extending the duties and obligations stipulated by the Directive.

Most requests for information regarding posted workers regard:

- failure to provide minimum wages to posted workers in such an amount that is more favourable for them from the point of view of the posting and hosting Member State,
- verification whether those workers identified through on-site inspection are employees of the business person that renders certain services in another Member State or whether such workers are self employed.

Cyprus
There is no unified corps of labour inspectors, for the purposes of coordinating inspection activities. As such, the labour inspectorates report to separate departments of the Ministry of Labour and Social Insurance according to the specialisation, jurisdiction and competences of each department. It should be noted that the Labour Inspectorate Department was set up in 2002 in the context of ILO Convention 81. As also mentioned above, however, it is not a unified body of inspectors but covers the area of workplace health and safety exclusively. Since 2009, the practice of labour inspection teams has come under the Industrial Relations Department; these are teams that operate in the form of multidisciplinary bodies staffed by three labour inspectors from three different departments, the Industrial Relations Department, the Labour Department and the Social Insurance Services. This is an initiative of the Ministry of Labour, in the framework of combating the phenomenon of illegal and undeclared work, which is part of a wider package of measures announced in autumn 2008. It is noted that of all the enterprises/employers inspected, 72.5% had not provided written information on their employees' terms and conditions of employment of their employees.

Although the Labour Department works closely with the Social Insurance Services, there is no predetermined procedure for cooperation between the Labour Department

and other departments of the Ministry of Labour and Social Insurance, and with other government services, are not laid down in law, any form of cooperation takes place through entirely unofficial communication channels, which do not operate on a fixed basis, but are used where and when necessary.
The Labour Department is of the opinion that although by law and officially the responsibility for monitoring and implementation of Law 137(I)/2002 falls exclusively within its own competences, on the practical level there is an issue of collective responsibility among all the authorities involved and according to the specialisation, the jurisdiction and the competences of each authority. However, specific authorities do not share the opinion of the Labour Department, since they recognise the Labour Department as the one and only competent authority for the purposes of monitoring and implementation of Law 137(I) 2002. In this context, their responsibility results indirectly, i.e. in the context of the labour inspections they carry out (see above), and provided that the irregularity is proven to have been prejudicial to a posted worker. According to data provided by the two authorities, to date no cases of charges of irregularities or established irregularities prejudicial to a posted worker have been recorded.

The only more permanent structures involve the collaboration of the Labour Department with the Civil Registry and Immigration Department of the Ministry of the Interior, and with the Social Insurance Services, which are one of the six departments of the Ministry of Labour and Social Insurance. As also mentioned above, the cooperation between the Labour Department and the Civil Registry and Immigration Department mostly involves the posting of workers from third countries. In practice, a specific procedure has been established, albeit unofficially.

On the cross-border front, no provision has been made for procedures or mechanisms for information and cooperation with the competent authorities of the other member states. The minimal form of cooperation that has existed to date, which exists more on paper than in practice, in the opinion of the Department of labour is expected to become more organised with the implementation of the Internal Market Information System IMI, which came into operation on a pilot basis on 16 May 2011. The Department of Labour Inspection reports that collaboration of the department with other member states is achieved through the online system Knowledge Sharing Site (KSS), on the basis of which communication is facilitated among the competent authorities in the member states, always for purposes of observing and applying the provisions of the laws in the health and safety sector.

In practice, however, to date no provision has been made for procedures or mechanisms for information and cooperation with the competent authorities of the other member states, and there is no available information material either in electronic or in printed form. According to information from the Department, cooperation with the countries from which the greatest number of posted workers comes is under way, specifically Bulgaria, Greece and Romania, for the purpose of better monitoring the situation and resolving any problems; however, there is no clear framework regarding the form and manner of such a collaboration.

Finland
Domestically, there is co-operation between the supervision authorities and the labour market organisations in particular when preventing grey economy, which also relates to posted workers.

The experiences with cross-border co-operation are limited. Tools for cross-border co-operation between supervision authorities of the Member States could be further developed.

Greece

In general, labour inspectors or other actors involved do not often get requests for information in cases of unlawful activities concerning the posting of workers. Nevertheless, an agreement among Greece, Bulgaria and Romania is recently concluded concerning their cooperation and exchange of information.

The Greek Inspectorate of Labour has intervened as a mediator between a company and the Greek Confederation of Workers (GSEE) in order to avoid the negative consequences of an international posting. The case concerned 20 Belarusian and Lithuanian workers posted to the Greek company Hellenic Petroleum by a Belarusian company in order to provide services at lower level of pay. As the employees did not possess the required professional licenses, their posting was suspended.
The Greek Inspectorate also intervened in a case of fictitious posting. A Cypriot company had hired workers in order to post them in Greek hotels. In this way the company wanted in 2010 to achieve a status of social affiliation of workers providing lower charges for employers. The Greek Inspectorate concluded that the employees had not habitually carried out their work in Cyprus.

Hungary

The only cross-border cooperation seems to be an agreement between the national inspection authorities of Romania and Hungary, signed in 2008. The principle objective of the cooperation was the establishment of a mutual exchange of information, experience and best practices between the two authorities. The information exchange aimed to focus on issues, such as the registration practices, the conditions of the legal employment and the means of fight against undeclared work. At the time of the agreement, there was an increasing cross-border movement between the Romanian and Hungarian companies and employees. It, however, should also be noted that that movement did not necessarily involved the use of posting, but rather resulted in the increasing number of the so-called cross-border workers, who worked as an employed worker in one country, but lived in the other one.

Ireland

NERA, the Revenue Commissioners and the DSP all carry out inspections (some joint; see below) *but* these are not systematic and are undertaken, for example, in response to a complaint received, a random check or a periodic sectoral focus. CIMA allows workers arriving in Ireland a 6 month ‘grace’ period before seeking contributions to the CWPS.
A major advance since 2007, according to the national informants, has been the increasing coordination between State organisations with an interest - albeit often different interests - in enforcement and compliance. Under the national social partnership process, the *Hidden Economy Working Group* was set up to monitor the ‘black economy’ in all sectors, including construction. This body has survived the collapse of the national process, and was, according to the national informants, instrumental in convincing the Revenue Commissioners to take a stronger line on combating ‘bogus self-employment’, as well as getting agreement amongst the various State agencies (the

Revenue Commissioners, the DSP and NERA) to conduct joint investigations into alleged breaches of employment, tax and social security law.[286]

As noted, the designated body required to ensure the cross border co-operation required by Article 4 of the Directive is the DJEI. According to the national informants, although the Department grants E101 (A1) declarations, it, in reality, gets very few requests for information regarding posted workers specifically. It was suggested that there had been approximately 4 requests in the past 6 years. Most of these apparently came from France; one such request cited was from the French Authorities seeking information on the status of an employment agency established in Ireland which had posted Polish construction workers to France. In practice, the Department passes any queries or requests relating to the Directive onto NERA. In the case mentioned, NERA provided the French Authorities with the relevant tax and social security information. At that stage, from the Irish point of view, the case was closed. As a result, it might be inferred that cross-border administrative co-operation (both pre-posting, during the posting and after the posting has ended) is limited.

The Department and NERA have *informal* contacts with their counterparts in other Member States (notably, and unsurprisingly, in the UK). However, no formal cross-border agreements exist between NERA and their counterparts in other jurisdictions regarding enforcement of the Directive. It should be noted that section 46 of the *Employment Law Compliance Bill 2008*, if passed, provides for the Minister or NERA to enter into arrangements with a competent authority in another state to provide mutual assistance and information for the purposes of securing compliance with employment legislation and the detection or investigation of breaches of employment legislation.

Latvia

The State Labour Inspectorate cooperates with respective inspectorates in other Member States. There is tripartite agreement among Labour Inspectorates of the Baltic States (Estonia, Latvia, Lithuania) with close practical cooperation and there is agreement with Inspectorate of Norway. So far there is also cooperation with other inspectorates when necessary in cases regarding abuse of employment rights by foreign employers (Latvian companies established by foreigners) against local employees and in cases regarding free movement of workers.

The Latvian administrative institutions have the impression that also their EU colleagues do not posses sufficient information on the factual situation and knowledge of law on posting of workers.

Lithuania

Systematic administrative cooperation with social partners and/or with other enforcing authorities (e.g. for social security, immigration or fiscal matters) *within* Lithuania related to monitoring and enforcing the rules on the posting of workers does not exist. Generally speaking, in these days the observance of the compliance with LGPW is clearly not the priority of the Inspectorate. However, the State Labour Inspectorate investigates complaints and provides help to foreign liaison offices with regard to working conditions in Lithuania in general or in particular enterprises. To say that the

[286] Such joint investigations are now possible by virtue of the *Social Welfare and Pensions Act 2007*, section 38.

issue of posting is not among the priorities of stakeholders would be too gentle. There is a general impression that the law is not known and perceived well in the society and among stakeholders. The employers' organizations and the trade unions are also not concerned with the topic.

Neither does any systematic cross-border cooperation with regard to posting issues exist. There were in 2010 few cases where Norwegian and Belgium authorities asked to provide them with information about working conditions in a particular Lithuanian enterprise. No breaches were found in Lithuania. It is not clear whether the authorities in Norway and Belgium in some way have sanctioned the specific Lithuanian employers.

Malta

On a national level, there is no systematic administrative cooperation with social partners. However, it has been agreed with the Social Security Department, to include in the acknowledgement issued by the Department of Industrial and Employment Relations (DIER) to the posting undertaking, contact information of the Social Security Division, for the posting undertaking to check about the posted worker's social security rights and obligations during the posting period in Malta. Next to this, The Department of Employment and Industrial Relations (competent authority on PWD) and the Employment and Training Corporation (competent on work licences to TCN) have regular contacts were it concerns posting and work licence issues.

There are no cross-border agreements between labour inspectorates. Regulation 6(1) provides that the Director of Employment Relations must cooperate with the European Commission and other authorities having corresponding responsibilities in other Member States on issues relating to the application of Directive 96/71/EC. This includes requests for the provision of information on trans-national hiring-out workers. The Commission Code of Conduct on Cooperation Standards has been implemented by the local Department, and brought to the attention of all inspectorate staff. Besides the code, the Department is in possession of a set of forms to be used by the requesting administration. These forms should be used whenever a request for information is made by the national authority. Where there a doubts if a posting situation exists or not, the DIER is the liaison authority and can make use of the IMI system on exchange of information between Member States that is currently in its pilot phase. To date, no requests have been put forward to other MS.

Portugal

The ACT has a number of agreements with other similar institutions but it seems that the most effective is the one signed with the Spanish Labour Inspection in 2003, which allows for mixed teams of inspectors. It is particularly important because it concerns thousands of cross-border Portuguese workers that reside in Portugal but go, every day or every week, to work in Galicia (Galiza). As a result the workplaces (in Spain) are inspected by a team with Spanish and Portuguese inspectors and the same applies to the offices of the Portuguese companies.

Slovakia

Cooperation on information between the liaison offices exists, reflected in the obligations of the National Labour Inspectorate in the Section 6 (1) n) Act. No. 125/2006 Coll. on Labour Inspection. By this provision Article 4 of the PWD was implemented,

under which each Member State is responsible for mutual cooperation between the respective liaison offices.
Cooperation on information is currently performed by standardized forms, however there is currently established a pilot program which implements the exchange of information on posting between liaison offices into IMI system (Internal Market Information System) and it is expected that the exchange of information will be performed fully by electronic means through this system.

In case that controlling bodies from a host state find a violation of working conditions, they require relevant documentation (especially documentation related to financial remuneration, i.e., contracts, payslips from the employer) from the National Labour Inspectorate, as has been done by Belgian counterparts. The National Labour Inspectorate shall forward the request to a competent Regional Labour Inspectorate. The Regional Labour Inspectorate obtains the necessary documentation from the employer and sends it to the National Labour Inspectorate. Subsequently, the National Labour Inspectorate will send requested documents to the inspection authority in the host country.
The inspection authority in the host country will send the information on the outcome of the proceedings to the National Labour Inspectorate, which will contact the competent Regional Labour Inspectorate. The Regional Labour Inspectorate will check whether the employer eliminated deficiencies. Materials thus obtained are sent back to the requesting party abroad, to enable it to compare the working conditions (e.g., compare the amount actually paid with the amount that should be paid according to minimal standards valid in the host country). In the case that some irregularities are detected, the inspection office in the host state can order the compensation (e.g., payment of the salary). The National Labour Inspectorate as a liaison office in this case requests feedback from the Liaison Office in the host state. Information that it receives by this feedback, is sent to the competent Labour Inspectorate to complete the already begun inspecting work.

Slovenia
In relation to cross-border agreements between Labour Inspectorates and other competent authorities, informal agreements on providing mutual assistance exist, especially with Labour Inspectorates from neighbouring states (Austria, Italy, Hungary, Croatia). This communication is not systematic but only incidental/ad hoc cooperation; however the Inspectorate evaluated the existing contacts as good.

Furthermore, the Labour Inspectorate is of the opinion that the Information System for the Internal Market (IMI) will be of great help (the pilot project began with operation on 16th May 2011). The Information system establishes the principle of the single market and enables the system's users a search of competent institutions and authorities in other EU Member State and interstate communication with the help of questions and answers provided for and translated in advance. This in practice means that the monitoring of unlawful activities, connected with posting of workers, will be simplified as the System will enable direct exchange of information among competent authorities in Member States. Local administration and submission of requests to the IMI System is performed on the seat of the Labour Inspectorate of the Republic of Slovenia.

In relation to posting of workers, the IMI System may be used for the inquiries or requests for information in the scope of PWD, relating to concrete situations. Inquiries for obtaining the information in general or exceeding the scope of the PWD is not (yet) possible. However, the Labour Inspectorate anticipates that in near future, due to fast development of communication systems, such inquiries will also be possible.

Spain

The international cooperation through the mechanisms of exchange of information of Directive 96/71 exists, however the times of response are long. There is cooperation between the Labour Inspectorates of different countries. For example, in summer 2010, the Spanish Labour Inspectorate has asked information to the Czech Republic regarding a great number of posted workers in Ibiza. The reason behind this request was that the Labour Inspectorate had some suspicions regarding this flow of workers to Ibiza. There have also been several requests to the Labour Inspectorate from Belgian authorities. In relation to questions on security and labour health a system of fast exchange of information (SLIC-KSS) exists. It allows knowing details of the workers and their conditions of work from one country to another one.

There have been signed some agreements of operative cooperation between the Inspections of Portugal and Romania and there are in routes of possible signature other agreements (France and Poland). The most effective up to the moment is the agreement with Portugal, which allows mutual exchange of information and joint inspection actions cross-border, especially in the frontier zones.
Finally, it is interesting to mention the special relation of cooperation between Spain and Portugal, in particular between Galicia and North of Portugal. The Labour inspectorate, the Labour Authority of Galicia and the North of Portugal, Small and Middle Size Enterprise (PYMES) and the representatives of the workers are working in a project that include the elaboration of protocols of action directed to regulate and coordinate the activities of inspection and follow up of cross-border work by the public authorities. This also includes the accomplishment of studies on the professional profiles of the workers who move. That information is in Spanish and Portuguese.

The main issue regarding Portuguese posted workers in Spain is the application of Portuguese collective agreements, which in general establish less favourable working conditions for the workers than Spanish collective agreements. The issue is how to stop this difference in the working conditions. The trade unions try to press the Labour Inspectorate to minimise the impact of this issue. Currently there are some works in order to extend the areas of cross border cooperation, creating what is called the Macro-regions: Galicia, Castilla y Leon and the North of Portugal, although no cooperation agreements have been signed yet.

***Recommendation 29 - unchanged***

Further implementation/application of initiatives **at EU and national level** already taken with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates is indispensable. It depends on the situation in each Member State what concretely should be done from an operational point of view. To keep authorities continuously focused on the need for a smooth and effective coopera-

tion, we advise to evaluate and monitor the situation on paper and in practice regularly (for instance once or twice a year).[287]

## Inspection activities, frequency of controls

With regard to the specific inspection activities of the host state authorities involved (based on risk assessment, on own initiative or on request) and the frequency of their controls, a great variety exists, as illustrated by the country findings below.

Austria
The BUAK collecting the posting reports for workers in the construction sector annually inspects just about 500 operations with 3,500 workers who are subject to BUAG. During these inspections approximately 400 fake self-employed are taken. It is not known, how many of the inspected workers had been posted from foreign countries. Inspected are primarily major construction sites; although the BUAK responds to tips, the majority of inspections are routinely conducted. In order to detect fake self-employed workers BUAK utilizes questionnaires with simple questions translated into all relevant languages that the worker completes and also checks the presented documentation such as the contract for services.

The Financial Police that had previously monitored all illegal alien employments and since 1st May 2011 has also been responsible for the detection of salaries below basic wage infractions. During 2010 it has inspected a total of 28,770 operations with 66,340 employees. Of those 11,961 were employed illegally and 11,172 had no social security registration. During 2010 a total of 12,893 complaints were filed; of those 927 were for violations of the obligation to register according to AVRAG. Primary inspections were conducted in the risk prone sectors like construction, hospitality- and taxi industry.

Bulgaria
The controls carried out by the Main Labour Inspection are provoked by requests, signals or complaints which are not numerous, and only rarely by spontaneous checks.

Cyprus
Frequency of labour inspections depends on the quantitative goals of the different divisions of labour inspectorates as described above. The Labour Inspection Department reports that total number of inspections per inspector is around 200 inspections a year.

The Department of Labour Relations reports that labour inspections are carried out on a daily basis, most of the time following complaints from the workers themselves, which are made by telephone and in direct connection with an inspector, and the number of 35 inspections per month is considered to be a minimum goal for each inspector. It is, however, a goal which is impossible to meet, almost exclusively due to the inspectors' workload. According to a representative of the Industrial Relations

[287] See in this respect Commission's Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services and Commission's communications COM (2006) 159 final 4th April 2006 and COM (2007)304 final, 13 June 2007. See Chapter 4.6, p. 147-155 on the national initiatives.

Department, 90-95% of employers fail to meet their obligation regarding written notification to the Ministry of the basic terms governing the employment relationship.

The only department where inspections are based *on risk assessment* is the Labour Inspection Department. Specifically, with regard to the work of the front-line inspectors, who constitute the core of the department, around two-thirds of their work involves predetermined campaigns, and the other one-third is allocated to complaints. The predetermined campaigns, or in other words the annual inspection programme, are planned in accordance with the objectives of the department, which may be divided into three categories. The first category includes the strategic objectives which are decided upon on the basis of the predetermined needs that have been identified in the context of implementation of the European strategic programme on safety and health (2007-2012), and the second and third categories include the qualitative and quantitative objectives.

With reference to the qualitative objectives, these are decided upon on the basis of risk evaluation, using various determining factors (e.g. sector of economic activity, number of accidents, time period, etc.). For example, during summer season, there are more inspections in the hotels and restaurants sector, as well as in the sectors that include a wide range of outdoor work, such as the construction industry.

Finland

The sectors under particular supervision of the regional occupational safety and health authorities are chosen on the basis of an agreement between the ministry in charge of occupational safety and health and each Regional State Administrative Agency. These supervised sectors are determined on the basis of the knowledge there is concerning the use of posted workers in different sectors. Typical sectors are construction, transport and metal industry. The total frequency of inspection activities is difficult to estimate. The total amount of work place visits concerning posted workers is also difficult to estimate. The numbers of the visits of the supervision authorities are based on an agreement between each Regional State Administrative Agency and the Ministry of Social Affairs and Health.

Ireland

Inspections are carried out by NERA in various ways. The Authority will respond to, and investigate, complaints made by individuals *and* employers (or their respective representatives). In fact, around 40 per cent of calls to NERA stem from the latter. The Authority also carries out targeted inspections, focusing on particular sectors (for example, the contract cleaning, construction, security and mushroom sectors). NERA also carries out routine inspections and 'spot checks'. No breakdown is available on how many foreign service providers were inspected.
From January to September 2010, NERA Inspectors carried out inspections of 3,903 employers (equating to 12,000 inspections under individual pieces of employment legislation) and recovered €742,848 in unpaid wages due to employees; 294 inspections were carried out in the construction sector. Here, a compliance rate of just 43 per cent was uncovered and €169,620 in unpaid wages was recovered.
According to the NERA representative, the Authority does look for 'risk' factors, which would be relevant when discussing posted workers; examples given included workers operating in sectors where there is a tradition of variable compliance with labour law (such as construction); workers being housed on site or in specific 'camp'

accommodation; and any general evidence of an isolation of workers from the host population. Interestingly, given that Ireland does not require an advance declaration or any notification to be made by posting firms, the Authority notes that, in the limited circumstances that such firms *do* make contact (formally or informally) with the authorities, there is a presumption that such firms *are* compliant with labour law.

It was noted by some union informants that compliance with *pension and sick pay contributions* in the construction sector (monitored by CIMA and enforced by NERA) was an extremely good proxy for compliance generally. It should be noted that pensions and sick pay are not covered by Article 3(1) of the Directive (the hard nucleus). However, after the 6 month 'grace' period, CIMA generally adopts the presumption that the workers are, in fact, resident, should be contributing to the CWPS scheme and seeks contributions. It seems the manner in which employers respond to this approach (if they are evasive or hostile, for example) can suggest a risk of non-compliance in relation to other labour law obligations.

It is interesting that, despite the fact the issue of posted workers is relatively low on the radar, the Gama dispute and the recent challenges to the REA/ERO systems have been the catalyst for the most significant reforms in the area of employment law compliance in the history of the State, particularly with the publication of the Employment Law Compliance Bill 2008 and the establishment of NERA. In addition, the Irish Ferries dispute undoubtedly provided an impetus for the reform of laws relating to the regulation of temporary work agencies (the 2009 Bill). These developments have significantly impacted on Ireland's traditional, voluntarist approach.

It is in relation to *practical* enforcement against service providers established in other jurisdictions that the restriction of the services rules are felt. Most of the national informants would favour rules requiring the service provider to maintain some sort of *physical* presence in Ireland (to provide information and records; in order that criminal papers can be served, etc.) but understand such a requirement to be prohibited under EU law. Ireland's transposition of the Directive (the universal applicability of *all* of the provisions of protective labour legislation, as well as the terms of the REAs and EROs) would seem to be questionable in terms of the wording of the Directive and ECJ jurisprudence but it does have the advantage (in terms of enforcement and monitoring) of simplicity and clarity. As a result, the dominant approach of the labour market actors is to focus on compliance with labour law *generally*, irrespective of the status or origin of workers or firms.

The parties do recognise specific challenges that face posted workers (especially relating to language and awareness of rights) and posting firms (in terms of awareness of obligations), but have aimed to deal with these within the context of general monitoring and enforcement procedures (so, unions and NERA, for example, have employed organisers and inspectors with foreign language skills and employer groups- like the CIF and IBEC- have provided information to posting firms).

Various problems can be identified:

- *Enforcement*. This is an issue that far exceeds the boundaries of labour law. NERA points to the practical and logistical difficulties in enforcing orders and penalties against undertakings established in other jurisdictions. Essentially, if

breaches are not detected in time (while the foreign service provider remains within the jurisdiction) there is little the enforcement agencies can do in practice.
- Problems in monitoring and enforcement relate to the fact that firms do not have to notify the Irish authorities of postings; employment records are not always required to be kept at the workplace (especially in the construction sector) and can be difficult to trace, making it difficult to monitor the employment relationship in the home country.
- A low awareness of the issues involved in postings (especially amongst some public officials, particularly at local authority level) and relatively poor cross-border information provision and exchange.
- Temporary work agencies established in other jurisdictions are not required to hold an Irish licence; few, if any, checks on such agencies are undertaken.
- A surprisingly poor level of compliance with labour legislation on public contracts; labour legislation compliance clauses are regarded as 'box-ticking' exercises.
- An underdeveloped 'culture' of employment rights compliance in Ireland. This is explained in part by Ireland's voluntarist traditions, whereby unions and employers 'self-policed', generally voluntary, agreements.

Good practices identified include:
- Social partner initiatives (e.g. the Hidden Economy Working Group; the recent negotiated, self-policing compliance mechanisms in the construction sector); the Irish experience suggests that effective compliance with the Directive requires social partner involvement.
- A strengthening of the labour inspection system (via NERA).
- Joint investigations by various State agencies (co-ordinated by NERA).
- The publication of legislation providing for tighter controls on temporary work agencies established in other jurisdictions.
- The Ireland contribution to the EFBWW-FIEC website and the Citizens Information Board website.

<u>Hungary</u>
The OMMF performs its inspection via the regional supervision authorities. An employee may submit a complaint, a request or another filing to the supervisory authorities. The complaint may be submitted in writing, orally or electronically, too. The Supervisory Authority examines the complaint and takes measures to terminate the breach of law.
In spite of the existing institutional framework and the legal provisions that specifically delegates the task of monitoring and data collection to the authority of the OMMF, it has not been implemented in practice so far. According to the source this is partly due to the lack of infrastructure on the side of the OMMF, but also to the lack of/or non-existence of the available information, arising from the lack of obligation on the employer's side to register posted workers, but also from the lack of interest on both the employer's and sometimes the worker's side to make this form of employment more visible.

Posting of foreign workers to Hungary is relatively rare case. Also, the universally applicable collective agreement (arbitration even more) is a rare case in Hungary. Therefore, in practice employers have a rather domestic and workplace oriented think-

ing, and even though the LC stipulates, are not aware of or do not specifically consider the rights of posted workers, as stipulated in the PWD.

Latvia
Latvian administrative institutions - the State Labour Inspectorate, State Social Insurance Agency and other actors in general mainly respond to particular complaints. Administrative institutions receive information on compliance with law by local and foreign employers mainly on a case-by-case basis.

Lithuania
In most cases the State Labour Inspectorates react after a claim of an employee. In 2010 there were 28 individual complaints concerning the implementation of the law but there is no information how many were related to the posting of employees to the territory of Lithuania.

Malta
When inspectors monitor and enforce no specific difficulties are met. Inspectors check the presence of posted workers and their conditions of work while carrying out routine inspections. However, in practice inspectors seldom encounter posted workers. Information on the posting is sought through interviewing the worker directly and also from information requested to the local undertakings making use of the services of posted workers. Occasional targeted inspections are also carried out in any type of sector. These are planned according to the information received through a notification process. It is an obligation of the posting undertaking to notify the Department of Industrial and Employment Relations with details of posting to Malta. Thus, with such information at hand it is easier for the inspectorate to target inspections at workplaces to monitor the rights of posted workers.

The Department of Industrial and Employment Relations, being the competent authority on the PWD has never received any complaints from unions or posted workers on issues related to employment conditions in respect of posted workers in Malta.

Portugal
The impression is that the ACT seldom or almost never sanctions the non-fulfilment of the duty to inform. As a result there are no data available that would allow giving an estimation on how frequently it undertakes controls.

Slovenia
In practice, many decisions of the Labour Inspectorate, determining the breach of law in relation to posted workers, are not even delivered to the unreliable service provider, for instance because the work on the construction site is already finished. Due to this fact the Labour Inspectorates make full use of the competence of immediate prohibition of working process or demand for immediate use of appropriate working equipment.

From the *Annual Report of Labour Inspectorate for year 2010* it derives, that the Labour Inspectors have determined in two reported cases a breach of employer's duty to ensure posted workers rights, in accordance with Slovenian law and collective agreements. The cases were about violations regarding the working time, breaks and rests,

the night work, the minimal annual leave, the wage, the health and security, special protection of the workers and equality, where this was more favourable for worker.

Spain
Inspections by the labour inspectorates are done by the Spanish autonomous communities (comunidades autonomas). Inspection is planned on own initiative or after a complaint, but also through joint visits with trade union representatives to verify the respect of prevention rules.
With regard to the frequency of work place controls, in 2009, 1847 inspecting activities related to posted workers have been realised and 213 sanctions have been imposed. Data of previous years have not been registered, although it is estimated that figures for those years would be similar or slightly less. The total number of inspecting activities in 2009 was 1.122.513. Total number of open expedients was 94.034. The main sector of inspection is the building and industrial construction.
The inspection is not based on risk assessment. When there is a posted worker, the Labour Authority needs to be notified. The Labour Authority will notify it to the Labour inspectorate.
The labour inspectorate acts when the labour authority communicates the existence of posted workers. Usually, the Labour inspectorate acts as per its own initiative instead of 'on demand'.
The difference between the Labour Authority and the Labour Inspectorate, is that the first one, other that receiving the notifications of posted workers, sanctions possible infractions, while the Labour Inspectorate visits the companies to check working conditions, at its own will, or as per a denuncia.

Trade unions complain of the limited administrative control of the working conditions of posted workers, and accuse the Labour Inspectorate of not checking whether companies comply with regulations. On its turn, the administration says that the control task is complex because information concerning the movement of workers is often limited to the number of posted workers, but not to their working conditions. In this scenario, the administration is trying to develop protocols for actions in order to regulate and coordinate the activities of inspection and monitoring the posting of workers; besides, they have been developing studies of the professional profiles of workers who are posted.

*Shortage of staff*
Furthermore, in several countries a shortage of staff was reported, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings could be ameliorated by national efforts (by recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) and/or at EU level by stipulating appropriate minimum standards in a legal instrument. The advantage of an EU-level measure would be that it may reduce, as far as possible, the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD (recommendation 30).

In Austria, considering the new Competence Centre LSDB's extensive responsibilities the social partners express concerns regarding the insufficient personnel increases by the Vienna Regional Health Insurance Agency where at this time only three additional office staff are anticipated for the Competence Centre.

Regarding the Financial Police, during the past years this authority has been successively expanded and at 1 January 2011 it consists of approx. 336 staff distributed nationwide. The plan is to increase personnel to 500 staff. However, in Germany (with a ten-times larger population than Austria) the main customs office alone employs 6,500 inspectors. In this respect, the Austrian situation should be further enhanced (up to 650 staff = 10% of Germany's 6,500 inspectors).Hence, some within the social partnership strongly criticise the staff shortfall and suggest that the expected fines may well finance the additional resource requirements.

The main problem for Bulgaria is the lack of administrative capacity for effective activities related to posting. As it has been already said, there are not enough officials in the competent state bodies. They don't have enough knowledge and experiences. The state has to pay greater attention to these issues. According to all stakeholders, the existing control mechanisms and enforcement-instruments used by our country and by major host countries are good and do not need change. The problem is to improve the real activities of the competent bodies.

Although on the legislative front Cyprus is fully harmonised with the basic provisions of the PWD, nevertheless and despite the limited extent of the phenomenon, the existing structures, or the lack of specialised structures, fail to ensure the implementation of the Directive in practice. One of the basic weaknesses of the system is the shortages noted on the level of the labour inspectorates, and therefore the level of protection of the rights of posted workers, as they emanate from the existing legislation. In all the divisions of labour inspectorates there is understaffing, i.e. the operation of the departments with a marginal number of staff, and also the structure of the departments (pyramidal), and specifically the immediate need to reinforce intermediary grades. For instance, in the Industrial Relations Department, which among other things is responsible for promoting and implementing the labour legislation regarding the terms and conditions of employment, a body of labour inspectors operates which is responsible for monitoring enterprises for the purpose of compliance with all relevant laws. On the practical level, of the 19 approved inspectors' eight positions have remained vacant due to a shortage of the necessary funds. This makes the work of the department even more difficult, one of its basic problems being its understaffing.
In the opinion however of the social partners, another weakness is that inspections are carried out by officers who lack both the experience and the necessary qualifications and who are employed on a temporary basis. It should be noted that the lack of adequate monitoring mechanisms is also recognised by the MLSI itself.[288] Although it emerged from the interviewees with the competent authorities that there is a willingness on the part of the Ministry to take initiatives in the future, with the objective of improving the situation on all levels, it is obvious that posting of workers is not one of the Ministry's immediate priorities.

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[288] In addressing the particular problem, in February 2007, the government introduced a series of legislative changes aimed at a more effective implementation of harmonising legislation and at the better protection of workers. Specifically, five amending laws came into force, through the addition of six new common articles specifying the powers and duties of the labour inspectors, with a view to more effectively implementing five basic laws. Nevertheless, Law 137(I)/2002 was not part of the amendments.

In the Finnish report, it was observed that at the national level, it would be necessary to increase the amount of inspectors in the supervision administration. According to some interviewees also sanctions should be hardened. In their vision supervision authorities should have broad rights to inspect the information concerning undertakings from different databases of various authorities.

***Recommendation 30 – no substantive changes***

Several countries reported a shortage of staff involved in host state monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings should be dispelled by **national** efforts (recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) **and/or at EU level** by stipulating minimum standards in this respect in a legal instrument (Directive 2009/52 may serve as a source of inspiration in this respect). The additional advantage of a measure at EU level would be that it may reduce as far as possible the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD.

## Social partners involvement / cross-border cooperation

Apart from the Nordic countries Denmark and Sweden, it was found in the previous report that social partners in the host state are involved in monitoring / enforcing the rights of posted workers and their presence only to a very minor extent. In all countries covered by that study it was observed that they lack sufficient (financial) sources and access to data necessary for the adequate performance of their tasks. Since most authorities do not feel (especially) responsible for monitoring compliance with labour law at CLA level, nor do they cooperate very smoothly with social partners, this situation leads to a clear absence of monitoring and enforcement of rights at CLA level. This finding was largely confirmed in the country studies for the present report (see also above under 4.2 and below under 4.8). Hence, we reaffirm our conclusion that more financial as well as institutional support of social partners is needed at national level. Besides this, it would be helpful to stipulate minimum standards, preferably at EU level, for adequate monitoring/enforcement of rights at the CLA level, as well as guidelines for cooperation between the authorities and social partners (*recommendation 31*). On a positive note, some best practice examples of cross-border cooperation between trade unions were observed, between Latvian and Norwegian, Austrian and Hungarian, Austrian and Slovakian, and Spanish and Portuguese unions, most of them funded by the EU.

Austria
The ÖGB cooperates in the form of Interregional Trade Union Councils with trade unions in neighbouring countries. For the region bordering on Hungary there is the Interregional Trade Union Council Burgenland/West Hungary, funded by the European Union as a seven year project ("*Zukunft im Grenzraum*" <http://www.igr.at>) until 31st December 2014 as part of European Territorial Co-operation. Among other things, Hungarian workers posted to Austria receive advice in Hungarian; since 2004

28,300 personal, written and telephone consultations have taken place. This trans-sectoral platform is viewed as a best practice.
Other Interregional Trade Union Councils exist, where cooperation is in part sector-dependent and are as extensive as in the example provided above. For the Slovenian trade unions there is the Interregional Trade Union Council Kärnten/Gorenjska/Koróska and the Interregional Trade Union Council Steiermark-Podrajve/Pomurje. For trade unions in western neighbouring countries there is the Interregional Trade Union Council Lake Constance (Switzerland, Germany and Liechtenstein) and the Interregional Trade Union Council Alpes Centrales (Switzerland, Italy). Interregional Trade Union Councils with Czech trade unions are also funded by the project for European Territorial Co-operation called "ZUWINS – *Zukunftsraum Wien-Niederösterreich-Südmähren*". The Interregional Trade Union Council Interalp exists especially for Bavaria. However there are no trans-border collective agreements.

Foreign workers posted to Austria are usually not members of the ÖGB but receive information free of charge. Protection is granted if the worker is a trade union member in the country of origin. Although mutual recognition agreements exist with foreign trade unions to date it has been more common that the services of the ÖGB are offered to foreign trade union members. The ÖGB offers written information in the form of flyers in different languages available from the regional offices of the ÖGB and from works councils who distribute these directly on construction sites. It has not been deemed necessary to provide extensive information on the Internet because those workers affected by wage dumping are under-skilled and have little Internet knowledge.

Bulgaria
There are cross-border cooperation agreements between the Confederation of the Independent Trade Unions in Bulgaria and the Worker's Confederation in Greece and between the Confederation of the Independent Trade Unions in Bulgaria, the Confederation of Labour "Podkrepa" and the Trade Union Congress in Great Britain. Negotiations with trade unions in Austria and Spain have been performed, but there are still no agreements with these countries. The existing agreements concern mostly the protection of the migrant workers and less the posted workers, but they are a step forward in the trade union's cooperation and may be developed in respect with the minimum protection of the posted workers in the host-state.

Cyprus
Theoretically, every worker in Cyprus can become affiliated to trade unions of his/her own preference. Both the Industrial Relations Code and the Trade Unions Law (Law 71/1965) provide neither territorial restrictions, nor restrictions related to the nationality of the employee. In practice however, there isn't a single case of posted worker who has been affiliated in Cypriot trade unions. There isn't a system of mutual recognition either in the form of affiliation or in the form of assistance offered to each other's members with unions in other countries.

As far as cooperation of the labour department with social partners is concerned, and in particular the cooperation of the competent authority with the social partners, from the information we received from the Labour Department no real cooperation has been observed. Although the Labour Department reported that a meeting of an infor-

mational nature was held with regard to the content of Law 137(I)/2002, the relevant meeting was not confirmed by the social partners that cooperated for the purposes of this study. Generally, both the informants of the employer organisations and of the trade unions, do claim, that they have not been provided with information by the competent authorities, nor have they sought to obtain any such information with regard to procedures for the implementation of their obligations under the Law 137(I)/2002, as provided by Article 5 of the PWD.

In the view of the Department of Labour however, due to the shortages of human resources that have been noted, for the purposes of labour inspections, as well as the absence of inspectors who have even partial responsibility for monitoring the implementation of Law 137(I)/2002, the role of the unions is of decisive importance for identifying undeclared cases of posting.

On the sectoral level, the report by the Federation of the Building Contractors Associations of Cyprus (OSEOK) on the implementation of the Directive in the construction industry describes in quite a bit of detail the basic provisions of labour legislation and the collective labour agreements as they apply to the construction sector, but does not manage to examine the subject in relation to its practical implementation.[289] As OSEOK itself states, its inability to approach the practical side of the subject is the result of ignorance of what is happening in practice. This is a problem directly linked with the lack of knowledge most interviewees from the social partners displayed, with the exception of OSEOK, regarding the content of the PWD, having only heard of it, or they believe that this Directive is not related to the sectors of economic activity they represent.
In the above context, even in the construction industry, which according to the Labour Department is the sector with the most registered cases of posting, the Cyprus Building, Wood, Mine and General Workers' Trade Union, a member of the Pancyprian Federation of Labour (PEO[290]) reports that it is not up to date on these cases, and as regards the protection of the rights of posted workers, PEO points out that workers in the construction industry are not distinguished on the basis of their employment status. In this context, although the use of workers from other Member States as a cheap source of labour and in violation of the provisions of current labour legislation and the collective labour agreements is of a special concern for the trade union movement, PEO is not interested in whether they are employed in the status of posted workers or not, a position shared also by the trade union organisations in the hotels sector.

Czech Republic
In CZ there seems to be no system of mutual recognition of affiliation and/or assistance offered to each other's members with unions in other countries. Securing better working conditions for workers posted abroad can be a part of collective bargaining. This is mostly the case in collective bargaining between large employers with international involvement and trade unions representing their employees. Provisions on posting workers are implemented into general collective bargaining agreements; special collective agreements are rarely used in the Czech Republic. In most cases, however,

[289] The specific study is the contribution of OSEOK to the study carried by the European Construction Industry Federation (FIEC), on Posting of Workers in the Construction Industry, published in 2009, (http://www.posting-workers.eu/)
[290] http://www.peo.org.cy/

working conditions for workers posted abroad are specified in the employer's internal rules, generally called an Expatriation Policy. These internal rules must be consulted with the relevant trade union before they can be issued.

Finland

Posted workers can become members of trade unions in Finland. Some trade unions offer advice even if the workers were not members of the union. There is no established co-operation or assistance between Finnish and foreign trade unions in cases of posting. On the basis of the information received from the representatives of the labour market organisations for this report, in general collective bargaining procedures do not include specific negotiations concerning posted workers. However, when it comes to spreading information, co-operation is being made in some cases between employers' and employees' organisations in order to spread information on the rules concerning posted workers etc. For example, social partners of the construction sector, Rakennusteollisuus RT and Rakennusliitto, have together published a Guide to employment of foreigners in Finland (Opas ulkomaalaisten työskentelystä Suomessa), which is also available through internet. Similarly, written guides have been published in some other branches too. In addition to information on applicable labour law legislation, these guides typically include information on applicable collective agreements and social security. On the basis of the information given by the representatives of the employers' and employees' organisations there are no cross-border arrangements concerning the comparability of protection offered by collective agreements.

The informants from the social partners have differing views on the practical functioning of the posting of workers legislation. According to the answers received from the representative of the Central Organisation of Finnish Trade Unions (Suomen Ammattiliittojen Keskusjärjestö SAK ry) the legislation on posted workers functions poorly in practice and it is not followed by the undertakings posting workers. The position of trade unions in the supervision is weak. Employers do not give information on their posted workers, representatives cannot give information and posted workers are afraid and they do not know what their rights are. Many workplaces lack representatives of personnel. There is no co-operation between trade unions cross borders. Often there is no foreign trade union to contact.

The representatives of the Confederation of Finnish Industries EK (Elinkeinoelämän Keskusliitto EK) consider in their answers that the posted workers legislation functions well in Finland. General applicability of collective agreements guarantees, among other things, that it is relatively easy for undertakings to settle the minimum pay requirements in each branch. In addition, the obligation of the enterprises to have a representative in Finland ensures that there is someone to contact in case of unclear questions concerning terms of employment, social security etc. Both shop stewards and elected representatives have a right to receive information concerning posted workers and often also concerning their central terms of employment. The sanctions which Finnish supervision authorities can use are large and they function well. The functioning of the legislation is advanced by the Act on the Contractor's Obligations and Liability when Work is Contracted Out, based on tripartite law drafting. In the field of construction and technological industry, the social partners have published a guide on working in Finland.

The employers' organisations have together sought to prevent problems concerning grey economy. It is essential that the information on minimum terms and conditions of employment can be easily settled by the employer. This cannot be advanced by cross-border co-operation. According to the representatives of the Confederation of Finnish Industries EK, there is more need to clarify conditions concerning living, taxes etc. which in practice make it difficult to post workers within the EU. The possibility of foreign undertakings to receive information on minimum terms and conditions applicable in the host country should be further developed. Problems in this respect might occur also because it can be difficult to get information on some collective agreements and on central legislation in other languages than those of each Member States.

Greece

In 2009 the Greek General Confederation of Labour and the Bulgarian Confederation of Independent Trade Unions signed a protocol of cooperation providing establishment of cross-border consultancy infrastructure and information centres and other forms of international trade union cooperation. Cross-border cooperation arrangements regarding special enforcement of the Directive do not exist between social partners/trade unions. Posting is not considered a question of priority due to the small number of posted workers.

Hungary

There is cross-border co-operation of trade unions in Burgenland - West Hungary border regions (http://www.igr.at) On the Austrian-Hungarian border a unique co-operation of the Hungarian and Austrian trade unions is active with the aim to provide posted and migrant workers with legal protection in Austria's border region. The primary aim is the protection of employees active in the region, as well as to protect those involved in free movement of services. The 7-year project (from 1 January 2008 to 31 December 2014) is financed by the EU, the Austrian Federal Ministry of Labour, Social Affairs and Consumer Protection (Bundesministerium für Arbeit, Soziales und Konsumentenschutz), as well as from Hungarian public funds.
Main objectives of the project:

- Information supply to employees on issues concerning cross-border employment in the Burgenland-West Hungary border regions; legal advice
- Measures for overcoming the shortage of skilled workers in Burgenland and West Hungary
- Ensuring the minimum social standards of employees
- Regular and constant development of employment relations
- Cross-border training
- Long-term co-operation and co-ordination network building
- Elimination of prejudice

Ireland

The social partners maintain informal links with their counterparts in other Member States and occasionally (mainly on the employer side) get requests for information relating to postings.
The national informants of unions and employers mentioned that they would have *informal* contacts with their counterparts in other Member States (notably, and unsurprisingly, in the UK). However, no formal cross-border agreements exist between the

social partners and their counterparts in other jurisdictions regarding enforcement of the Directive.

Workers posted to Ireland may, of course, join Irish unions as ordinary members. Many Irish unions (particularly SIPTU and the retail, grocery and bar workers union, Mandate) have made considerable efforts and devoted substantial resources in recent years to organising migrant workers. Some unions have employed staff specifically to interact with workers who may not speak English and have also made strides to create linkages with unions in sending countries (particularly amongst the 'new' Member States like Poland, Latvia and Lithuania). In December 2005, SIPTU entered into a partnership agreement with the Wielkopolski Region of Solidarnosc in which both committed to persuading and facilitating workers from each country to become trade union members when at work in the other (this to include mutual recognition of union membership cards, provision of pro-union information, etc.) and to provide mutual support in dealing with governments, employer organisations and other trade unions. However, this link is aimed primarily at those exercising their free movement rights as workers; there are no formal systems of mutual recognition of affiliation or assistance, and no specific collective bargaining takes place, concerning posted workers. There are no cross-border arrangements in existence with regard to the comparability of protection offered by collective agreements. Some foreign service providers do, even if only temporarily, join employer representative bodies.

Latvia

There is no system of mutual recognition of affiliation and/or assistance offered between trade unions of Latvia and other Member States under Latvian law. It depends on mutual cooperation between trade unions. One good example of cooperation was mentioned by the Latvian Trade Union of Construction Workers. This trade union very effectively cooperates with the Norwegian trade union of construction workers. They have concluded an agreement in 2007 which is now prolonged on mutual assistance to migrant workers (including posted workers) and also grants right to mutual recognition of affiliation to any of the trade unions and consequent right to protection offered by both trade unions. Such cooperation was possible due to the membership of Latvian Trade Union of Construction to the European Federation of Building and Woodworkers (EFBWW).

Lithuania

The Law on Trade Unions no. I-2018 of 21 November 1991 (State Gazette, 991, no. 34-933) foresees no obstacles for foreign worker to become a member of the Lithuanian trade union. There is no a system of mutual recognition of affiliation and/or assistance offered to each other's members with unions in other countries. No bargaining is taking place with the specific purpose of securing (better) working conditions for posted workers during their posting. There are no sectoral cross-border arrangements in existence with regard to the comparability of protection offered by collective agreements.

Malta

In Malta, foreign posted workers can easily become affiliated with a trade union. The UHM has confirmed that it does have a number of posted workers as members. In Malta's case the majority (if not all) posted workers work at big international companies. One would not easily find posted workers in small companies. The GWU stated

that they have some members who go directly to them or become members through their shop stewards. They also have agreements with foreign trade unions, mainly Italy (CGIL) and Bulgaria (FEDROPA) to represent their members if workers need assistance. They also represent seamen with the International Transport Federation who are in Malta on ships. There is no system as such of mutual recognition between unions. However GWU said that they have agreements with other trade unions and when the Maltese members are posted abroad they give them details of the Unions in the country receiving them and sometimes even given details of contact persons. In practice not many people ask for this kind of assistance even though GWU has very good contact points in practically all EU states.
There is no collective bargaining specifically for posted workers; they are included in general collective agreement with provisions relating to posted workers. GWU said that in some agreements they may have clauses that determine wages and allowances for Maltese travelling and working abroad but these are not the all the same and vary from one agreement to another. These clauses are normally discussed before workers are sent and then such clauses are inserted into the agreement next time the agreement is negotiated.
Both Unions (UHM and GWU) have commented that in practice as is happening with foreign workers in general, we do encounter cases in which posted workers are offered inferior working conditions than their Maltese counterparts. The Unions do assist when asked and they usually go on case by case basis to correct the situation.
GWU said that the problem with foreigners working in Malta is becoming bigger and each time they believe that Malta is ending up with foreigners taking the jobs of Maltese mainly because of the fact that they are paid less. Recently this was the case with a nurse at Mater Dei hospital and with employees at Palumbo ship yards, just to mention 2 examples. The hospitality sector is the worst hit with hotels and restaurants employing young foreigners not Maltese. It is practically impossible to enrol such employees as union members. According to GWU, if the Management only "smells the union", jobs are terminated instantly. Workers are continuously threatened not to join and not even to talk to the Union. On the other hand Maltese sent abroad, if they are GWU members they are given all the assistance they ask for from a good package, to union services in the receiving country.

The Malta Employers Association does get queries (from time to time) on posting of workers and it assists its members with any clarifications required. However the Association's concern lies more with illegal working.

Slovakia

In the Slovak Republic the position of social partners in the process of law-making and in the process of negotiation with employers is not particularly strong; the rate of employees' association in unions is only 20%[291] (the reason why the Slovak union movement does not enjoy much public confidence may be traced back before the year 1989. During the socialism era the only union organisation was largely politicized.)

With respect to the position of trade union organizations in Slovakia there are no valid higher collective agreements regulating posting of employees from the Slovak Repub-

[291] http://www.worker-participation.eu/National-Industrial-Relations/Countries/Slovak-Republic (13.6. 2011).

lic to another EU Member State and their working conditions or working conditions for employees posted from another EU Member State to the Slovak Republic (neither is there acquaintance of collective agreements concluded at the company level, which would set up working conditions of posted employees), eventually the proceedings for the case of employees posted from Slovakia to whom the working conditions according to PWD are not granted. According to available information employees working in temporary agencies are not associated in unions at all, therefore there are no collective agreements concluded in this sector, neither at company, nor at any higher level

There is no special cooperation regarding help and providing of information for the posted employees between the trade unions. However, cooperation in the area of social dialog between trade unions / association of trade union organizations exists, namely between the Austrian ÖGB and Slovak KOZ SR (project Wien – Bratislava) with financial help of European Union (http://sk.zuwinbat.at/projekt/projekt-zuwinbat/).

Spain

In agreement with the statutes of the most representative unions in Spain there is no rule that prohibits the affiliation of posted workers to trade unions in Spain. There is a cross-border agreement signed by Unions from Galicia and Portugal. That agreement is used to meet periodically to discuss the problems about the posting workers in that area. That kind of agreement does not assure better conditions of work for the posted workers.

To meet various practical problems and propose solutions, in Spain there are six inter-union councils (four for Portugal and two for France) formed by unions including in the European Trade Union Confederation (ETUC). By Spain are CCOO and UGT, and by Portugal are the CGTP and UGTP. There is a similar composition in the French border, although there are more trade unions for France (CGT, CFDT, FOR).

***Recommendation 31 - no substantive changes***

More (e.g. financial as well as institutional) support of social partners **at national level** together with more supervision / stipulation of minimum standards **at EU-level** for adequate monitoring / enforcement of rights at the CLA-level in the host state, is necessary as well as guidelines for cooperation between the authorities and social partners.

In this regard, countries may also learn from each other's 'best practices', such as the requirement in Estonia that a supervisory authority must reply to a written appeal by a trade union in regard to violations of labour law no later than within two weeks. Other inspiring practices may be found in the Italian report on (support for) local trade union initiatives and in the Dutch report on 'compliance offices' set up by social partners to monitor compliance with their branch CLA.[292] In the current study the cross-border cooperation between trade unions in AT-HU, AT-SK, LV-NO and ES-PT deserves following.

[292] See Report March 2011, section 4.2, p. 98 under social partners' involvement.

## Assessment of the worker's status

A specific problem related to monitoring the terms and working conditions of posted workers is the difficulty which is sometimes experienced by authorities of distinguishing between a (posted) worker and a self-employed person (service provider). This may be problematic even in purely national situations, but in cross-border situations the problems are even worse, since different legal regimes may apply to those categories. With regard to the applicable social security system, the Member State in whose territory the person concerned is normally (self-)employed is responsible for (issuing the A1/E 101 certificate) determining the nature of the work in question. Consequently, in so far as an A1/E 101 certificate establishes a presumption that the self-employed person concerned is properly affiliated to the social security system of the sending State, it is binding on the competent institution of the host state. In the context of the PWD it works the other way around: Article 2(2) PWD stipulates that the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host state. For labour law purposes a comprehensive judgmental view on an individual basis is necessary in each country.

In the previous report it was observed that the burden of proof is sometimes very hard. Hence, for labour law purposes, Dutch law provides a rebuttable legal presumption of an employment relationship. It was assessed that this good practice may inspire other Member States to implement similar provisions, however with the caveat that a similar (albeit more stringent) legal presumption in French law was considered to constitute a disproportionate restriction of the free movement of services incompatible with EU law. Nevertheless, it was concluded that even if this judgment would make Member States hesitant to adopt a legal presumption of an employment relationship in certain situations of posting, the European legislator could still consider this option. This again highlights the problems Member States experience in effectively monitoring the proper application of the Directive without violating EU law.

In most countries covered by the current study it seems that the qualification of the workers' status is not perceived as a particular pressing problem (although in LV the difficulty to proof that someone is a bogus self-employed was noted). In fact, a disinterest in this problem was noticed in CY. In SK, labour inspectors do not seem to investigate the status of a worker in the case of posting, since they are not allowed to contest it before the court. In some country reports, the A1/E 101 form is mentioned as one of the indications of the worker's status for labour law purposes, whilst in SI and perhaps also in IE it seems to be in use as *the* indicator. Below we give an overview of the country reports on this aspect.

Bulgaria

Neither the implementing measure nor another legislative act in Bulgaria contains a legal definition of the concepts "worker" and "self-employed". These concepts are established by the legal science and the judicial practice on the base of labour and social insurance legislation. As "worker" every natural person is treated who provides manpower against remuneration under employment relationship. As "self-employed" a natural person is treated, who performs labour activities for his/her own (who performs independent work). Close to the concept "self-employed" is the concept "Freelance activity", defined in § 1, item 9 of the Additional provisions of the Foreigners in

the Republic of Bulgaria Act. Pursuant to this provision "a freelance activity" means any business activity performed in a personal capacity without any commitment to an employer, except for the activities under Article 24, paragraph (1), subparagraphs (2) and (11). The Ordinance on the Terms and Conditions for Posting of Workers from the Member States or of Workers from Third Countries in the Republic of Bulgaria in the Framework of Provision of Services regulates only the posting of workers – "who are posted by their employer". The same is the situation with the draft-order for posting of Bulgarian citizens. There are very few cases of posting of self employed in practice – mainly vocalists, medical doctors. The labour inspectors are competent only for monitoring workers (employees), but not self-employed.[293] They are competent on all working persons (employed and self-employed) only with respect to safety and healthy work conditions at the enterprise.

Cyprus

For the purposes of the Law 137(I)/2002, *an employee* is defined as "*any person who works for another person, either under a contract of employment or apprenticeship or in circumstances where a relation of employee and employer is understood to exist*", exactly the same definition as the one used in accordance with the provisions of the Termination of Employment Law 24/1967. However, since the existing legislation does not define any individual circumstances provided for by the law, the specific definition is rather problematic/restrictive in practice. In this framework, it is striking that the legislator has not decided to use the definition of more recent legislation. In particular, the Equal Treatment in Employment and Occupation Law 58(I)/2004, which transposes EU Directives 2000/78/EC and 2000/43/EC into Cypriot legislation, extends the concept of employee to include "*all persons working or apprenticed full time or part time for a fixed or indeterminate period, continuously or not, irrespective of the place of employment, including home workers but not including self-employed persons*".

The concept of self-employment is only mentioned in relation to social insurance, where Social Insurance Law 41/1980, as amended up to 2006, makes a clear distinction between employees and self-employed persons as the two categories requiring mandatory insurance.

In this context, any violations by employers who, when drawing up employment contracts, conceal a relationship of subordination under the guise of self-employment bring into play the issue of social security coverage. These violations are judged by the competent courts through a process of defining criteria in order to prove whether a relationship of paid employment exists. As regards such criteria, the courts have consistently ruled in the past that the decision to create a relationship of paid employment is in principle a matter of choice, but not a choice of naming or designating other terms and conditions of employment that objectively conceal it.

According to the courts, however, no specific criteria or fixed factors exist which define either form of employment. For example, determination of compensation for services provided is an element which may support the existence of an employer-

[293] The distinction between employed and self-employed persons is made on the base of these concepts: employed person is a person performing hired work under employment relationship or performing civil service in the state administration; self-employed person is a person performing labour activities in his/her extent

employee relationship; however, it does not by itself provide a basis for the employment relationship. In this context, the relationship is generally proved on the basis of the following criteria:

- the employees' obligation to provide their services; and
- the employer's right to monitor the employees' work.

Also taken into account as criteria are factors such as: payment of a salary; the ability to determine the manner, the place and conditions of work; ownership of the equipment necessary to perform the work; ownership of capital; engagement of assistants to carry out the work; responsibility for supervising the work; the element of risk undertaken; and anticipated profits.

As it is stated above, the different divisions of labour inspectorates don't keep data based on posting status. Same line, it seems that they are no interested in making a distinction between posted workers and posted self-employed.

CZ

Section 319 of the Labour Code does not define a "worker". However, a definition of worker is provided indirectly by Section 2 (4) of the Labour Code (definition of dependent work) and Section 6 (1) of the Labour Code (definition of employee´s capacity to have rights and duties as an employee), which shall be applied also to the "worker" concept under Section 319 of the Labour Code. Self-employed person do not meet the criteria of "dependent work" defined in Section 2 (4) of the Labour Code and Section 319 of the Labour Code is therefore not applicable on such persons.

When checking posted workers the labour inspection office verifies whether the workers concerned are actually employed by the employer stated in the information request. Should an employment relationship not be established, the office further investigates whether the person concerned is registered with the trade license register or the companies register as a self employed person. Persons operating as business persons can be checked with the appropriate social security administration office.

Finland

The supervision authorities base their supervision on the content of the Posted Workers Act. The Employment Contracts Act determines an employment contract. This is decisive when settling whether a worker is a posted worker or self-employed. The point of departure is the definition in the Employment Contracts Act. It seems this does not cause particular problems.

Greece

Art. 3 of P.D. 219/2000 provides that a worker is defined as any person linked with a dependent employment relationship with an undertaking. Concerning the concept of 'dependent worker' or 'dependent relationship' no other definitions are given. Apparently, general principles of dependent relationship are applied.

Hungary

The social security rules on posting include some rules applicable to the posting of self-employed persons. Act XVI of 2001 transposing Directive 96/71/EC, however, contained no special provision on this group of employees (and neither does the LC). Several sources moreover indicated (e.g. OMMF document on posting) that in case of the posting of self-employed it is essential to meet the relevant criteria applicable to

both the employers and to the employees and also the requirements for individual businesses in the state of the posting.

Ireland

Under the national social partnership process, the *Hidden Economy Working Group* was set up to monitor the 'black economy' in all sectors, including construction. This body was, according to the national informants, instrumental in convincing the Revenue Commissioners to take a stronger line on combating 'bogus self-employment', as well as getting agreement amongst the various State agencies (the Revenue Commissioners, the DSP and NERA) to conduct joint investigations into alleged breaches of employment, tax and social security law. An important aspect of this was the social partners convincing the DSP to allow workers in a 'bogus self-employment' position to retrospectively assert their right to social welfare on the determination of the relationship; the Department will pursue the guilty employer for the social insurance contributions that should have been made, but will allow the worker to access social welfare payments while this is happening. State agencies now also employ a number of foreign language inspectors.

Malta

Under Article 2 of the EIRA an employee is any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or services performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service. Worker has the same meaning as employee under the EIRA, apart from the law dealing with industrial relations.

Latvia

It is problematic to prove the status of a posted worker, because he/she does not possess an employment agreement with the sending employer at the actual workplace. If so, the employment agreement is usually in foreign language, so, since majority of labour inspectors do not know even English they require translation in Latvia legally attested by notary which is costly.

Slovenia

There is no special definition of a posted worker in the Employment Relationship Act. Neither are there any criteria in order to make a definition. A posted worker falls within the definition of a worker as such: According to Article 5 of the *Employment Relationship Act* a worker is a natural person who has, on the basis of a contract of employment, entered into an employment relationship with an employer and who, on the basis thereof, has been provided with compulsory social insurance by the employer.

The definition of posted worker is given under the *Work and Employment of Foreigners Act* (as mentioned above), whereas the definition of self-employed may be found in the *Work and Employment of Foreigners Act* and the *Labour Market Regulation Act*: by both of them in general *self-employed is a person ensuring his income by performance of independent business and is bound to pay contributions for social security from such grounds* (Article 4, point 11 of the *Work and Employment of Foreigners Act*; Article 5, point 11 of the *Labour Market Regulation Act*).

Finally, *regarding the distinction between employed and self-employed*, the Health Insurance Institute of Slovenia is of the opinion that the distinction between workers and self-employed persons is relatively easy, as this is controlled on the basis of application of insurance application. This is a methodological and electronic database and as soon a person is employed in the Republic of Slovenia, he/she is included in the social security system, which determines her status. This status then is visible from all centrally-managed databases. Also the status of a self-employed person derives from his/her insurance (insurance basis). As the database is one single database, kept by the Health Insurance Institute of Slovenia, the information on status of person (employed or self-employer) is accessible to all regional units, issuing the A1/ E-101-form. Hence, from the health insurance number it is visible whether the insured person is an employee or self-employed. Since the health insurance numbers are mandatory information for state authorities (i.e. also the Labour Inspectorate can ask for it) it can be easily established also by the Inspectorate whether someone is employee or self-employed. The distinction between employed and self-employed persons therefore in practice does not cause any difficulties.

Slovakia

Part of the labour inspection nowadays is also monitoring compliance with the prohibition of illegal employment. Often, the identity of all natural persons present at the workplace of the inspected entity is verified and subsequently the employer is asked by the labour inspector to prove the existence of an employment contract to each natural person present at the workplace.

In case there are present also posted employees at the workplace, they must submit to the labour inspectors the E 101 / A1 (in SK in this transition period there is still in use the form E 101 with an adjusted contain according to the document A1, and it is referred to as E 101 SK to be easily differentiated from the E 101 form), thus showing that they are posted employees and not employees of the inspected entity. The Labour inspectors draw from the fact that for the issue of the portable document A1 it is necessary to prove the existence of an employment relationship. However, in the case there are reasonable doubts, the Labour Inspectorate appeals the National Labour Inspectorate, which subsequently as a liaison office appeals for cooperation to the liaison office in the country from where the employee was posted to verify the existence of an employment relationship. Based on the statements provided by the National Labour Inspectorate, in the case of posting the labour inspectors do not investigate the status - whether it is an employee or a self-employed person.

But, concerning the criteria to identify whether someone is an employee, the Labour Code provides in the Section 1 (2) a definition of the dependent work. As a dependent work can be identified a work which is carried out in respect of the employer's superiority and employee's inferiority, only the work which is performed by the employee in person for the employer, as instructed by the employer, on his behalf, for pay or reward, within certain working time, at the expense of the employer, by employer's means of production and on the employer's responsibility and it is the performance of work which consists mainly of repetition of certain activities. According to the Section 11 (1) of the Labour Code an employee is a natural person who is in labour relations and performs a dependent work for the employer. According to the Section 1 (3) of the Labour Code a dependent work shall be carried out exclusively according to an employment, or a similar labour relation or, exceptionally, under the provisions of this Act in another employment relation. Not to be considered as a dependent work is a

business or other business activities based on a civil or commercial contractual relationship under special regulations.

Labour inspectors may only check whether it is an illegal employment, in other words, whether the bodies carrying out work have an employment contract, but if they find that their work which is carried out has shown signs of a dependent work and is covered by commercial or civil contracts, the labour inspectors are not competent to determine that it is an employment and the entity is an employee performing work. The only body which can determine whether it is employment is a court. But it can act only on a proposal of a person performing the work or an entity for which she/he performs the work. A third party can not submit such a proposal to the court.
Regarding social security law – the social insurance law contains no definition of a dependent work or of an employee (the system of social insurance is connected to the system of incomes, which are subject to the income tax).

Spain
Article 2.1.2 Act 45/1999 limits the application of this law to employees, but offers no criteria for distinguishing them from self-employed people. As an indication of the status of the worker the A1/ E-101 form is used. If the Spanish inspection suspects an irregular situation, it would need to communicate it to the inspection of the country of origin, either through the Social Security, or through the administrative Commission of the Social security. However, although the E101-form is used to differentiate between these two statuses regarding the Social Security, it is not binding at the time of qualifying from a labour law point of view whether someone is a (posted) employee or a self-employed.

## Recognition and execution of foreign judgments and decisions

In both studies, country reports confirmed that foreign judgments relating to infringements concerning the protection of workers can in principle be recognized according to Regulation 44/2001/EC on recognition and enforcement of judgments in civil and commercial matters, and sometimes this is (also) laid down in national Codes of Private International Law.[294] However, on the base of Slovakian law it is not fully clear whether a foreign judgment would be recognized in this respect, since according to Section. 64 of the Act No. 97/1963 Coll. a foreign judgment shall not be recognized or enforced if the foreign court would not be competent to rule in the case, should the jurisdiction be considered under Slovak regulations. According to the National Labour Inspectorate, which acts as a liaison office in terms of posting of employees, only the Slovak court has jurisdiction on claims involving posting of employees *from* Slovakia to the territory of another member state, since the employment relation between the employee and the sending employer remains maintained in the full scale and the Slovak employer is responsible for all the working conditions and conditions of employment to be met during the term of posting. However, according to the national expert this view may be disputed in the relation between two EU Member States. Then, Regulation 44/2001 (Brussels I) shall prevail over Act No. 97/1963 Coll. According to article 35 (3) Brussels I regulation the jurisdiction of the court of the Member State of origin may not be reviewed.

[294] Until 1 July 2007 this did not include Denmark.

With regard to the usefulness of the existence of Council framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, as in the previous study, the responses from the national stakeholders in the current study varied from an acknowledgement of its existence to non-awareness or non-applicability because their system does not use these penalties in the context of posted workers. Hence, despite EU measures governing the recognition and execution of foreign judgments and decisions, enforcement of rights conveyed by the PWD still seems to stop at the national borders.

As was concluded in the previous study, for the part that the non-recognition and execution of foreign judgments and decisions is due to legal lacunae, additional measures should be taken at national and at EU level to enhance the cross-border recognition and execution of penalties used in the context of the PWD (recommendation 32). The agreement concerning mutual administrative and legal assistance in administrative matters between Germany and Austria of 31 May 1988 was mentioned as a best practice. This does make cross-border enforcement of administrative sanctions possible. Interestingly, the problem to execute across borders was the reason behind the introduction of a new responsibility of service recipients in Austria (see below and in more detail section 4.7). In Slovenia, the Labour Inspectorates avoids the problem by making full use of their competence of immediate prohibition of working processes or a demand for immediate use of appropriate working equipment.

**Overview of country findings**

Austria

The prosecution abroad has to be considered the primary real problem because threats of penalties lose their impact when foreign employers don't have to be concerned about being prosecuted in their country of origin. A bilateral agreement covering administrative- and legal assistance in administrative matters is only in force with Germany, Federal Law Gazette No. 526/1990, where German authorities must enforce legally valid Austrian penalty notices independent of the severity of the penalty. Due to the common language and the fact that this agreement has already been in existence for 20 years, the prosecution of German employers is guaranteed.

The Council Framework Decision 2005/214/JHA that was replaced in Austria by the EU-Administrative Sentence Execution Enforcement Act ("EU-Verwaltungsstrafvollstreckungsgesetz", Federal Law Gazette I No. 3/2008, does enable the Austrian Administrative Authority acting as the criminal prosecution authority to request execution by foreign authorities. However, due to the two following problems prosecution is largely hopeless:

- Because the PWD itself does not dictate penalty sanctions to the member countries, it is unclear whether the punishable offences of the AVRAG can be subsumed to the last indent of Art. 5 Para. 1 of the Council Framework Decision 2005/214/JHA. All institutions expressly desire a clarification in this matter, possibly by way of a specific mentioning of the PWD in Art. 5 of the Council Framework Decision 2005/214/JHA.
- In Austria a legal remedy against administrative penalties by the district administrative authorities lies in the possibility to call upon the Independent Administra-

tive Court ("*Unabhängiger Verwaltungssenat*"). Because in Austria these courts are a part of the administration, other countries (for instance France, Czech Republic, Hungary) have doubts regarding their quality and do not recognize them as a tribunal within the meaning of Article 6 of the European Convention on Human Rights and therefore legal assistance in sentence enforcement is being denied.

These enforcement shortcomings cause discrimination to domestic employers. The as of 1st May 2011 newly established surety (see below section 4.7) is intended to alleviate the shortcomings as an additional safety net where the Council Framework Decision 2005/214/JHA fails. By the threat of a surety the domestic principals are to be cautioned to commission only those foreign employers who provide their workers with the protection guaranteed by the PWD.
Another shortcoming hindering the effective enforcement of penalties is the absence of legal assistance[295] from foreign authorities to Austrian authorities for obtaining proof during administrative penalty procedures.

Cyprus
Given that the Department of Labour was not even aware of the existence of the specific council framework decision, the only information that we found on 2005/214/JHA is that it was transposed into national legislation in 2007, through the enactment of the Law 179(I)/2007, and the competent authority for its practical application is the Ministry of Justice and Public Order.

Ireland
Ireland has not yet implemented *Council Framework Decision 2005/214/JHA* on the application of the principle of mutual recognition to financial penalties. A particular problem in relation to posted workers relates to the time involved in an inspection and prosecution process or, for workers, in pursuing a claim through the employment tribunals/civil courts (as was noted regarding the Gama dispute, Gama workers are still in the court system 6 years after the dispute ended). In terms of enforcement, there is a huge practical problem in serving court papers or enforcement orders on foreign companies. It is logistically extremely difficult for an agency such as NERA to pursue such companies; effective enforcement seems to heavily depend on detecting breaches at the right time (i.e. before the company/its employees or agents can leave the jurisdiction).

Lithuania
No experience on application of Council Framework Decision on the application of the principle of mutual recognition to financial penalties (no. 2005/214/JHA) exists.

Slovenia
The Labour Inspectorate acknowledged that serving of the administrative decisions to the employers with its seat in other EU Member State takes too long. In accordance with the *Act on International Co-operation in Criminal Matters between the Member States of the European Union*[296] the administrative decisions may be served directly by post, together with confirmation of personal service, however such decisions must

[295] For example with the inspection of working time records at the service provider's place of establishment outside Austria, which may help to calculate the correct basic wage.
[296] Official Journal of the RS, No. 102/2007, 9/2011 –ZP-1G. The Act was adopted on 25th October 2007 and entered into force on 24th November 2007.

be translated in cases, if the authority is aware that foreign employer solely understands some other language. The Act in Article 50 also enables a service of (non-translated) documents over competent authorities in EU Member State. Hence, because of necessary translation of (whole or part) of the document or procedure in accordance with provisions on legal aid among competent institutions, a much longer time period for the conclusion of proceedings of inspection control is needed.

In practice this means that many decisions of the Labour Inspectorate, determining the breach of law in relation to posted workers, are not even served, when work for example on the construction site is already finished. Due to this fact the Labour Inspectorates make full use of the competence of immediate prohibition of working process or demand for immediate use of appropriate working equipment.

Spain
The Framework Decision nº 214/2005 has contributed to improve the situation, but not in all cases, because is not possible to recognize administrative sanctions. Due to this regulation, it is possible that Spain executes the sanctions imposed related to Health and Safety (even "penal" sanctions, but is not possible to execute the same penalties for sanctions imposed in Spain, if those sanctions are based on the administrative procedure for the Spanish law. This is important because a third of the European countries have a mix of an administrative and penal sanctions system. For instance, if there is an accident involving a worker's death, if it is sanctioned through the administrative procedure, it will not be possible to execute the sanctions.
There is to be applied the rule of prohibition of the principle 'solve et repete', as a result of the Spanish Constitution, the principle of presumption of innocence, right of defence and the jurisprudence of the Constitutional Spanish Court. Not even the Framework Decision would allow direct execution if it is not demonstrated that these procedural rules were applied and one could have exercised the right of defence, since these may be "grounds for non-recognition ".

***Recommendation 32 - no substantive changes***

For the part that the non-recognition and execution of foreign judgments and decisions is due to legal lacunae, additional measures should be taken **at national** and also **at EU level** to enhance the cross-border recognition and execution of penalties in the context of the PWD.

## *4.5 ACCESS TO INFORMATION*

In this section we describe and examine the *information responsibilities* of the monitoring authorities towards the general public, based on Article 4(3) of the Directive. According to Article 4(3) of the Directive, monitoring authorities have responsibilities to provide information to the general public on posted workers' rights laid down in law and (generally binding) CLAs.[297]

### Access to information in the host state

From the previous study we know that in practice, the dissemination of information by the responsible authorities focuses on the statutory rights only and is mainly provided through websites. The social partners – in practice mostly the trade unions – are also involved. They offer information about the applicable CLA provisions. In practice, this division of responsibilities leads to a paucity of information on the entitlements of posted workers at CLA level. In the current study, this finding was confirmed. For more information on national details please see below.[298]

Austria

There is no central, multilingual accessible Internet portal where really interesting questions can be answered for workers posted to Austria (as: what is the amount of the minimum wage in the collective agreement in his/her national currency?). Hence, for a worker unsure of his labour rights it is difficult to find an answer to this question anonymously via Internet. The issue is anything but trivial as to what is the classification in the specific collective agreement and what is the correct placement in the correct wage group. Such issues are prone to employment law difficulties thus leaving little hope for setting up an expert system which, via the Internet, can automatically provide information on the amount of the minimum wage. Consultation of the ÖGB is possible but does not overcome the language barrier.

Nevertheless, all Austrian laws and provisions are accessible free of charge through the legal information service of the Office of the Federal Chancellor in the Internet (<http://www.ris.bka.gv.at>). The fact that this information is only available in the German language is a problem for foreign workers as only few relevant federal laws are available in English. The problem is particularly difficult in the case of collective agreements: pursuant to Sect. 7b Para. 8 of the AVRAG it is a legal obligation without a sanction to make concluded collective agreements available in a suitable form. In practice, not all collective agreements are accessible on the Internet free of charge and certainly not in a foreign language. In principle collective agreements are not translated into other languages because the ÖGB refuses to agree translation even though the need is increasing. In the meantime BMASK displays wage tables on the Internet

[297] On this subject see also the study 'Information provided on the posting of workers, by F. Muller and others, Université de Strasbourg, September 2010 (EC commissioned study: VP/2009/001/0160).

[298] No information from the host state perspective was requested in the questionnaire for predominantly sending countries. Where this information was nevertheless provided, it is included in this part of the section. Hence, no information was collected on the situation in CZ, EL, LT and PT (and in the previous study on EE, PL, RO).

(<http://www.bmask.gv.at/cms/site/liste.html?channel=CH2066>), although only in German.

As long as the issue of accessibility to collective agreements is not resolved, the adequate implementation of Article 4 of the PWD is doubtful. However, posted workers should at least have access in the company to the relevant collective agreement. Violation of this obligation is an administrative offense punishable with a fine.

Apart from providing general information to the public, important – but difficult to realise – is the availability of correct expert information in the correct language. Some institutions offer pieces of this information: for example, the BUAK does disseminate folders in various languages for the construction sector. It also informs every worker who registers with the holiday fund process for the first time through a cover letter. Usually there is no translation during the consultation due to the lack of skilled resources. The Finance Police and the BMASK also provide any information available to their staff.

Bulgaria

Information is available online through the websites of the labour inspectorate (MLI), the local offices, the central offices, the National Revenue Agency, and the Ministry of Labour and Social Policy, in special brochures and other thematic publications, through trade unions and a special 'hot line' opened by the MLI for workers in Greece. In general, there is enough information, but this is not always well used. The lack of information is not due to a lack of sources but is due to the low awareness of workers of the possibility to have their rights guaranteed and to the lack of initiative on their behalf to get informed.

Cyprus

In terms of the existing national statutes, the responsibility for information on statutory protection lies exclusively to the government authorities. In full harmonisation with Article 4 of the PWD, for the purposes of cooperation and information, in accordance with the provisions of Law 137(I)/2002, the Labour Department, as the competent authority, is responsible for all actions relating to provision of information to the enterprises falling within the scope of the relevant legislation.
Specifically, Article 10(1) stipulates that the competent authority shall provide information of all kinds on the terms and conditions of employment, referred to in Articles 4-6 of Law 137(I)/2002.

Officially, no actor involved takes the responsibility for information on collective agreements and/ or other instruments containing mandatory protection. Although the Department of Labour recognises that the social partners are called on to play an important role, no relevant initiatives have been taken in this direction. There was no collaboration of any kind between the government and the socials partners, not even initiatives from either the government, or the social partners to disseminate any relevant information. According to a representative of the Department of Labour, due to the limited interest on the part of enterprises and therefore the small number of posted workers in Cyprus, to date the need has not arisen to hold an information campaign in this regard. Neither the Labour Department as designated authority, nor the trade unions are using the fiches available at the EU website for identifying the applicable

standards. In fact, there is no available information material either in electronic or in printed form.

However, there are initiatives to provide information on collective agreements, usually stemming from trade unions. For instance, in the hotel industry, as a result of the constant violations against migrants, the two most representative trade unions in the hotel industry, the Federation of Hotel Industry Employees (OYXEB), affiliated to the Cyprus Workers' Confederation (SEK) and the Union of Hotel and Recreational Establishment Employees of Cyprus (SYXKA), affiliated to the Pancyprian Federation of Labour (PEO),have intensified the efforts they are making both with regard to providing information to migrants about their rights, and also with regard to membership of migrants in Cypriot unions. On the information front, the two unions jointly had the sectoral collective labour agreement in the hotels sector translated into eight languages, specifically Greek, English, Bulgarian, Russian, Polish, Romanian, Slovakian and Czech. For membership purposes, both OYXEB/SEK and SYXKA/PEO, along with DEOK, operate a special migration bureau, whose competencies include finding work for migrants.

Finland

By virtue of Section 10 of the Posted Workers Act, the ministry in charge of occupational safety and health (the Ministry of Social Affairs and Health, Sosiaali- ja terveysministeriö) and its supervision is responsible for the implementation of the Act, the provision of related information, and cooperation with the authorities of other Member States. The ministry shall, if necessary, collaborate with the ministry responsible for law-drafting concerning employment relationships and working hours in matters concerning implementation.

The Posted Workers Act identifies the applicable rules in a detailed way. Giving information on statutory protection is the responsibility of the occupational safety and health authorities. They also spread information on generally applicable collective agreements. However, also employers' and employees' organisations spread the information on both. The information on the applicable rules is spread by websites, leaflets etc. Among other things, information is included in the website of the supervision authorities and the Ministry of Employment and the Economy. Sectoral information is provided by the labour market organisations. It appears that the practical value of EU website has remained marginal. However, according to the Ministry Department, the internet page upheld by the European Commission is useful to those who seek information.

One of the reasons for the non-compliance with the legislation is according to the Ministry Department that it might not be easy to get information on Finnish labour life and Finnish legislation applicable to posted workers. There is no one and single source which would provide all necessary information concerning posting. In particular, language problems make it difficult to get information. Through internet, information is provided in Finnish and Swedish[299] and generally in English. Language problems also relate to collective agreements. Finnish authorities publish generally applicable collective agreements in Finnish and Swedish but they do not have an obligation to publish them in other languages. Labour market organizations have translated some

[299] Finnish and Swedish are the two official languages of Finland.

collective agreements or shorter texts concerning wages and working hours in collective agreements and published these translations in internet. However, supply does not meet demand.

Hence, there are concrete problems with the efficiency of the supervision of the posted workers legislation in Finland. These problems also relate to availability of information on rules applicable to posted workers. The content and amount of information on the applicable rules could be improved. The information is needed in different languages.

Hungary

The only complex information available in several languages (English, German) can be downloaded from the OMMF website. However, it has a great disadvantage, because it does not contain the latest changes on legislation and it does not cover the practical issues of employment as a service. It does not make any reference to any other organisation important in relation to the subject matter and remains at a level of theory that does not assist the applicants of the law.
(http://www.ommf.gov.hu/index.html?akt_menu=123&set_lang=123)

- The EU Vonal (Line) (http://www.euvonal.hu/) has collected a lot of information, valuable to users. It should be especially highlighted that it contains regularly updated data for taxation - employment all the way to the national holidays of each Member State.
- The PES website contains general information, some of which is already obsolete (http://en.munka.hu/engine.aspx?page=en_posting).
- With regard to OEP (National Health Fund) the documents describing the social security rules of employees posted abroad need to be recognised, even if they are available exclusively in the Hungarian language and are difficult to find.
- The trade union descriptions provide short information focusing mainly on the theoretical aspects of the subject matter, but they do not cover the possibilities of law enforcement and are silent about the potential role of the trade unions.

On the whole it should be noted that the information available with regard to the posting of workers in the framework of the provision of services in Hungary is mostly incidental and in many cases obsolete. And in spite of the legal provisions assigning the task of information collection to the Hungarian Labour Inspectorate, neither this authority, nor any other organ fulfils it sufficiently.

Ireland

Information on statutory protection and REAs/ERO's (where relevant) is provided by the DSP and the DJEI. This generally takes the form of information posted on the respective websites.[300] This information tends to be rather patchy and fragmented; it would certainly not be easy for a posted worker (or indeed a posting firm) to 'navigate' the system. The sites often simply repeat Commission information. For example, the DSP website states that a direct employment relationship should be maintained between the posted worker and the posting undertaking; however, it is not specified how this is to be monitored or evidenced.[301] Much better is the Citizens Information

[300] www.welfare.ie; www.deji.ie.
[301] In practice, it seems this is not really monitored at all by the Irish authorities!

Board website; this is a statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services.[302]

In practice, the most important institution for disseminating information is NERA. NERA does periodic 'road shows' on employment rights, i.e. targeted campaigns relating to particular legislative provisions (for example, the protection of young persons and payment of the minimum wage)[303] and provides a telephone service. NERA also provides information on employment rights in fourteen languages on its website.[304] There is also a specific website on posting of workers for the construction sector (set up by the European social partners), which is a good source of information for that sector.[305] The Ireland 'fiche' on the EU website is difficult to locate (via google, for example), relatively inaccessible in that it describes legislative provisions in quite legalistic terminology, and, in some cases (e.g. maternity leave rights), is inaccurate and out of date.

Trade unions also provide information on statutory and collective agreement protections, but this is aimed at migrant workers in general (rather than posted workers, specifically). The ICTU and some of the individual unions have put great efforts into tailoring services to migrant workers, including translating materials into various languages. Employer organisations tend to provide information on a sectoral basis. National informants suggested, for example, that firms posting workers to and from Ireland in the construction sector are more likely to contact the CIF than the competent institution itself.

Lithuania

It shall be ensured that information about the provisions of the regulatory enactments of the Republic of Lithuania, including extended sectoral or territorial collective agreements is available to employers of the Member States. The State Labour Inspectorate has been appointed as a liaison office for the purpose of posting of workers but its competence is limited to the relations with competent bodies of member states. It is also obliged to provide a necessary information to foreign employers (Article 5 (3) LGPW). The site of State Labour Inspectorate which is also announced in the official site of EU Commission[306] gives only a summary of relevant Articles of Labour Code[307]. The information fiche can only be found on the site of the EU Commission[308]. The fiche is more informative, but, again, it provides only an extensive summary of legal provisions which are difficult to understand without the help of a Lithuanian labour law professional. The fiche is also not complete – for example, the Law on Health of Employees is not mentioned at all in this fiche.

Malta

Regulation (6) 3 stipulates that the Director has the duty to facilitate access to information on the terms and conditions of employment. The local Directorate now has its own web page which directs the user to the main legislation, the Employment and In-

[302] www.citizensinformationboard.ie
[303] See NERA Review of 2009 available at: http://www.employmentrights.ie.
[304] www.employmentrights.ie.
[305] http://www.posting-workers.eu.
[306] See http://ec.europa.eu/social/main.jsp?catId=726, accessed on 6 July 2011.
[307] See http://www.vdi.lt/index.php?210178657, accessed on 6 July 2011.
[308] See http://ec.europa.eu/social/main.jsp?catId=726, accessed on 6 July 2011.

dustrial Relations Act, and to all legal notices issued there under, including the Wage Regulation Orders. The Department also has on its website specific information on the posting of workers.[309] The Malta Employers Association also has own it own web page all the legislation relevant to employers and this includes the regulation on the posting of workers.[310] Furthermore all the relevant legislation and information can be accessed on the Ministry for Justice Website and basic information has also been posted on the EU portal and on the EURES Malta website.
The Employment and Training Corporation, through EURES (EURES is the European job mobility portal, which makes it easier to find information on jobs and learning opportunities in other European Countries) has done a lot of work in educating the general public and employers on free movement of workers and their campaigns and website are to be commended.
EURES Malta has been up and running since the 1st May 2004. The EURES Office falls within the responsibility of the Employment Services division at ETC.
Through the EURES network, ETC[311] is now contributing to the provision of services offered throughout the EU. This is being done together with the other Public Employment Services (PESs) of the European Union and European Economic Area. To date this network consists of over 5.000 employment offices with more than 100.000 staff offering services to job-seekers and employers throughout Europe.

Slovenia
Article 213, paragraph 6 of the Employment Relationship Act establishes obligations regarding the monitoring and information. The designated body for monitoring and for cooperation and dealing with requests is the Employment Service. Accordingly, the Employment Service will monitor and provide information on the terms and conditions of employment of workers who are posted to work in the Republic of Slovenia by a company registered in another Member State. Additionally, also the Ministry of Labour and Social Affairs is the main designated body which has a duty to provide necessary information.

Slovakia
Under the provisions of the Article 4 of PWD, Member States shall provide in accordance with their national law one or more liaison offices. They are responsible for the mutual cooperation in the field of posting of workers and in this context; they are responsible especially for the publication of the working conditions set out in the hard core. In the case of the Slovak Republic the National Labour Inspectorate as a liaison office is designated by Act No. 125/2006 Coll. on Labour Inspection (Section 6 (1) m)).

In the case that an employee is posted to the Slovak Republic, the National Labour Inspectorate is required (Section 6 (1)m) and n)) to provide information on the 'hard core' of working conditions in the Slovak Republic. The National Labour Inspectorate publishes the working conditions in terms of the hard core in the Slovak Republic on

[309] http://www.industrialrelations.gov.mt/industryportal/employment_conditions/posting_of_workers_in_malta/pow.aspx
[310] www.maltaemployers.com
[311] The Employment and Training Corporation (ETC) is Malta's Public Employment Service. The Corporation was set up 1990 to: Provide and maintain an employment service; Find suitable employment and to assist employers to find suitable employees; Provide training service to clients seeking new jobs and to clients already on the job but wanting to improve their knowledge and skills.

its website - www.nip.sk. In 2008 it also released three information brochures for Slovak citizens, Slovak employers, the EU citizens and EU employers intending to post their employees to Slovakia. They contain and clarify the term – posting of an employee, its types, characteristics, and in what it differentiates from the term – working abroad. It also contains information on the working conditions in Slovakia regarding the "hard core", all mentioned above in Slovak, English, German and French versions.

In relation to the collective agreements arranging the working conditions according to the hard core, the National Labour Inspectorate is primarily obliged to publish them on websites so that this information is easily available. The Slovak Ministry of Labour, Social Affairs and Family announces to the National Labour Inspectorate the implementation of collective agreement of a higher order in the Slovak Collection of Laws and sends a copy of each collective contract directly to the National Labour Inspectorate. In the case that some entity from abroad requires information on a particular collective agreement, the Slovak National Labour Inspectorate will provide this information. Subject of requests addressed to the Ministry have been two cases in which the Ministry was asked about information on the working conditions in Slovakia by the embassies. Other practical experiences of bigger importance are not available in this area.

Based on the obtained information it can be stated that the National Labour Inspectorate as one of the "key bodies" in the area of posting of employees is adequately prepared to solve any problems concerning the working conditions of posting (involves call centre operators). The professional level of the competent employees can be positively evaluated. In terms of collecting the information (especially by employees) there is a significant deficiency in the structure of the website and in lack of information. The employee thus must call for the National Labour Inspectorate with his/her requirements.

Spain

The responsibility to disseminate information is designated to the regional labour authority of the Autonomous Community where posted workers are going to work in Spain. They are also responsible for information on collective agreements and/or other instruments containing mandatory protection.
The Department of Employment of the Ministry, the regional Labour Authority and the Unions did identify the applicable provisions in their statutes/collective agreements corresponding to the subject matters listed in Article 3(1) of the PWD. In all cases the information refers to the content of the Act. As means are used websites and information number. Usually the information is in Spanish, but there is information translated into the Polish language in the Ministry of Employment Website. According to the Spanish business association, the information that offers the Autonomic Authority Labour or the unions is used. Fiches of the EU website are not the main source of information, although their existence is known.

In some border areas where a sufficient number (not defined in any legislation) of posted workers exists, EURES cross-border services have been developed. In the case of Spain, there is only running one of these 'border-Eures' so far, related to Galicia and Northern Portugal. This Eures cross-border service is composed of public employment services in Spain and Portugal, the Galicia Placement Service, trade unions CCOO, UGT, UGTP and CGTP, employers' organizations, the universities of Vigo

and Minho and associations of the two border towns countries. More information is provided in http://www.eures-norteportugal-galicia.org/html/ga/vivindo_index.html.

According to the Spanish informants, it seems that many of the practical problems could be solved if the authorities involved provided the employer full and clear information on the law applicable to the contract, which identifies prior to posting what working conditions are governed by the laws of the sending country and what are the minimum conditions that must necessarily be respected in the country of destination. The representative from the employers' side also reported complaints from service providers in Spain about difficulties caused by the different languages in which they have to communicate not only with the employees, but also with the authorities involved. They ask at this point for better information in the language of the company.

## Dissemination of information – problem caused by national practice

In all Member States, in practice the dissemination of information by the responsible authorities focuses on statutory rights only. In most countries, the social partners – in practice mostly the trade unions –, are also involved in offering information about the applicable CLA provisions. However, pursuant to the text of Article 3(1) PWD, the Member States would be responsible, and therefore they only delegate part of the tasks to social partners, without any supervision. In practice this division of responsibilities leads to a situation of too little information about the entitlements of posted workers at CLA level. In the previous study only from Denmark, the Netherlands and Sweden initiatives were reported on the identification of the applicable rules regarding the hard nucleus listed in Art. 3(1) PWD at CLA level and subsequently to make this information available to the public. In the present study, it seems that in Spain such initiative has been taken.

Both studies together show that in eighteen of the twenty countries examined from a host state perspective (except CY, IT), websites are the most prominent means for the dissemination of information, followed by information on paper. Moreover, in the previous study, single points of contact (linked to the implementation of the Services Directive (Dir. 2006/123) and special information campaigns were often mentioned. In the current study, only in Ireland such initiatives (the NERA road shows) were mentioned.
In the previous study it was established that especially in regard to information in a plurality of languages and the accessibility of the information, the situation has visibly improved in comparison to four years ago, when the European Commission in its Communication 159 (2006) concluded that there was a major scope for improvement. The current study displays a less optimistic picture in that regard. Hence, the conclusion that further efforts to enhance accessibility in different languages, sufficiently precise and up-to-date information remain necessary, particular in IT and CY, but also at EU level (EU fiches), was reinforced.

In both studies, the recent initiative of the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC) was referred to as a good practice. They launched together an internet portal with information on the working conditions applicable to posted workers in the construction

industry. Also worth mentioning (again) is the reference in the Estonian and Maltesean reports to the website and offices of EURES as a source for informing posted workers on applicable protection in the country of destination. In the Spanish report, mention was made of a special EURES cross-border services centre, which is to be established in every border region where a sufficient number (not defined in any legislation) of posted workers exists. In the case of Spain, there is one related to postings between Galicia and Northern Portugal.

A point of attention concerns the amount of information available: too many sources of information may also endanger transparency. In this regards it is recommended that authorities designate one website/webgate as the central entry point for the provision of information, at both European and national level. In the current study, this was explicitly recommended by stakeholders (e.g. Latvia).

***Recommendation 33 - unchanged***

**At national level >** Continue the efforts to improve access to and content of the information on host country labour law standards, especially respecting entitlements in CLAs. **At EU level**, these efforts can and should be facilitated as far as possible (best practice of social partners at EU level: EFBWW/FIEC joint initiative), by practical measures and/or legislative amendments, stipulating more detailed minimum standards than in the current Art. 4(3) of the PWD.[312]

***Recommendation 34 – no substantive changes***

In almost all host countries websites are the most prominent means for the dissemination of information. If too little (clear) information was available through internet before 2006, now it sometimes seems to be the opposite: too many sources of information may also endanger transparency. In this respect it is recommended that host state authorities designate one website/webgate as the central entry point for the provision of information on posting of workers in the context of the PWD, at **both European and national level** .( Inspiration may be drawn from the setting up of 'Points of Single Contact' (PSCs) in the context of Directive 2006/123 (Services Directive).

***Recommendation 35 - unchanged***

It should be noted that posted workers, in particular those in the lower segments of the labour pool, may not have internet access. In this respect adequate information on paper and special information and awareness-raising campaigns focused on posted workers will remain indispensable, which several host Member States mentioned in the previous study have put into practice.[313] However, such special grass-roots projects are costly and time consuming. To promote and sustain such initiatives, financial support and facilitation **at EU and national level** is an absolute prerequisite.

[312] See in this respect Commission's Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, under point 2 (on access to information).

[313] Examples were given in some country reports of special activities of the trade unions, such as a volunteer project focusing on language groups among posted workers (BE), the publication of a paper newsletter on the applicable law in five languages, and temporary projects called "Poolshoogte" (BE) and 'Kollega' (NL). See Report March 2011, section 4.3, p. 108-109.

## Access to information in the sending state

Currently, not much is done at national level to make information on host state terms and working conditions available in the habitual country of work before workers are posted.

*Initiatives of host states to make information available in sending states*
In this respect, in the previous study attention was drawn to recent initiatives of host states to target information at workers and firms in the sending countries (through their embassies, for example).
In the national reports for the current study, such an upcoming initiative was mentioned regarding Cyprus. According to information from the Department, cooperation with the countries from which the greatest number of posted workers comes is under way, specifically Bulgaria, Greece and Romania, for the purpose of better monitoring the situation and resolving any problems; however, there is no clear framework regarding the form and manner of such a collaboration. In the view of the Ministry, posted workers should know their rights before coming to Cyprus. In this context the Ministry is thinking about conducting a campaign modelled on the "*Know before You Go*" campaign begun in 2006 by the Irish National Training and Employment Authority in (FAS).

Such initiatives deserve following, since awareness rising should start as early as possible in order to enable the worker to make an informed decision on the posting. To further this goal, the authorities in sending countries should also be addressed.

*Information made available by employers in the sending states*
We asked the rapporteurs of the sending states if public authorities and/or social partners in any way provide (or assist in providing) information to workers who will be posted on the applicable protection in the country of destination (the host state)? In this regard, frequently the implementation of Directive 91/533 was mentioned.[314] Pursuant to Article 4 of Directive 91/533, employers have a duty (in addition to the obligation stemming from Article 2 to notify an employee in writing of the essential aspects of the contract or employment relationship including level of remuneration – basic amount and other components – paid leave, length of the working week, applicable CLA) to inform a worker who will be posted longer than one month before his departure on at least: (a) the duration of the employment abroad; (b) the currency to be used for the payment of remuneration; (c) where appropriate, the benefits in cash or kind attendant on the employment abroad; (d) where appropriate, the conditions governing the employee's repatriation.

Bulgaria
At the moment, the state does not provide ex official information on the applicable protection in the country of destination to workers who will be posted. There are discussions now in the process of preparation of the draft-order for the posted Bulgarian workers to impose this duty to the Labour inspectorate. The information is provided upon request of the worker. Pursuant to information of the Main Labour Inspectorate

[314] For a general overview please see EC-report on the implementation of Dir. 91/533.

and the Employment Agency there are not many requests. The workers usually receive the necessary information by the employers.
The social partners (trade unions in particular) provide such information as far as it is accessible. It is early to present good practices. In the draft-ordinance on posting of workers from Bulgaria it is envisaged the Labour Inspectorate to provide such updated information.

Cyprus
As far as the implementation of Directive 91/533/ECC is concerned, this was transposed by Law no. 100(I)/2000, concerning the Employers' obligation to inform employees of the particulars of their contract of employment or their employment relationship, as amended by Law 12(I)/ 2007. It should be mentioned that although the amending law came into force, through the addition of six new articles specifying the powers and duties of the labour inspectors, with a view to more effectively implementing the specific legislation, according to information from the Department of Labour Relations, the Law 100 (I)/2002 remains among the most violated statutes.

Czech Republic
No special help or information provided to workers on the applicable protection in the country of destination is provided. Everybody may file a query for information according to the Act on Provision of Information (the Act No. 106/1999 Coll. on Provision of Information, as amended), and the respective administrative body must provide him with the demanded information unless the Act on Provision of Information prohibits it to do so (e.g. when the information is state secret). This procedure may be used also in these cases. The state organs also help by giving informally the information necessary in the posting procedure. Also the Social security administrations help by assisting during the posting procedure with social security issues. There is much information available freely on websites of state organs (including e.g. steps necessary for obtaining the A1 form); also state organs may be informally contacted via e-mail or telephone without formal procedure. The information is given to anyone upon request. According to the national informants, this is a sort of best practice in the Czech Republic not only in posting procedure, but state organs usually help this way the recipients in all sorts of administrative procedures.

Latvia
There is no explicit law requiring provision of information in written on employment conditions in host Member State. However such obligation indirectly derives from Articles 40 and 41 of the Labour Law which requires a written form of the employment contract and any amendments (modifications) to it. In fact, since Soviet occupation, there has already been a strong tradition to have all employment contracts in written form only. Here, Latvian labour law sets higher standards than required by Directive 91/533. Due to the lack of both financial and human resources, neither the state institutions nor the trade unions have taken any systemic proactive actions to inform employees on their rights in case of posting. Administrative institutions and trade unions do take reactive actions, namely, they provide legal assistance in case of particular claim.

Portugal
In principle the employer must inform the worker, by writing, on all aspects relevant for the labour contract, namely (art. 106 n.º3) the identification of the employer and if

it is a corporation, the existence of a group or other cooperation relations (for instance crossed participations in the capital of one another) with other corporations, the place of work or if there is no fixed place of work the indication that the work may be executed in several places, the functions of the worker, the date of the labour contract and beginning of its effects, the foreseeable duration of the contract, the duration of the annual holidays or at least the criteria for its determination, the previous delay of any warning given by the employer or the employee for the cessation of the contract, the amount of salary and its periodicity, the number of working hours per day and per week, the insurance contract against work accidents and the identification of the insurer and the collective regulation instrument that can be applied to the worker. However, additional information is due to the employee in case of a posting that may last more than one month. In such a case if the employee has a labour contract to which the Portuguese law applies, the employer must provide, once again in writing, information before the departure on the foreseeable duration of the posting abroad, what will be the currency and the place of payment of the salary, the conditions for the return of the worker and the access to health care. However, if such information is available in the collective regulation instrument or the internal rules of the enterprise (which must be published) the information may be replaced by a reference to those rules. The infringement of this duty to inform amounts to a serious labour infraction (art. 108 n.º3) and is subject to a fine.

The collective contract between AECOPS and SETACCOP addresses the posting of a worker outside the country in clause 32. In case of posting abroad the employer must inform the ACT (Autoridade para as Condições de Trabalho) five days before end and must give the ACT information concerning the identity of the workers that are going to be posted, the identity of the user if there is one, the place of work, the beginning and the foreseeable duration of the posting (clause 32 n.º3). According to clause 32 n.º1 the rules concerning the posting of a worker outside continental Portugal (to the islands of Azores or Madeira as well as abroad) must always be agreed upon by the worker and the employer. This written agreement, if the posting takes place for more than one month must imperatively encompass the foreseeable duration of the posting, the identification of the currency in which the salary will be paid and the place of payment, the terms of travel and the access to health care.

Slovakia

Neither social partners nor the state do provide information to the posted employees from the Slovak Republic to another Member State. If any information is requested in relation to the valid collective agreement, the National Labour Inspectorate directs the applicants to a website created and supervised by the European Commission. In the section about the liaison offices the applicants can find links to the websites of the respective liaison offices. In case there is no sufficient information available on these websites, the National Labour Inspectorate can submit a specific request to a designated liaison office in the Member State. According to the interviewees, employees and employers usually ask about working conditions - if it is a case of posting of workers from Slovakia, the competent employees of the Ministry of Labour, Social Affairs and Family direct them to the websites of the country of posting where such information is available.
The Ministry in response to these requests indicates that this kind of information can be obtained in the country of posting.

Hungary
There is a relatively large amount of information about employment in Germany and Austria, yet it concentrates mainly on employment abroad under the principle of free movement (e.g., http://www.evosz.hu/; EU Line).

***Recommendation 36 - no substantive changes***

**National level >** In the countries covered by the current study and the previous one the obligation to provide written information on certain issues as defined in Art. 4 Dir. 91/533, seems only to be subject to supervision by the Labour Inspection in its role as a sending state in Estonia. Here, failure by an employer to submit information is punishable by a fine. This good practice deserves following by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting.

**At EU level**, amending Directive 91/533 is highly recommended, in order to establish effective and dissuasive sanctions in case of non-compliance with the obligations laid down in Articles 2 and 4 of this Directive and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533 also to the competent national authorities in the host and/or sending state.[315]
In case authorities in the latter state would be made primarily responsible, the cooperation with the competent authorities in the host state should be clearly established.

See in this regard also recommendations 2 and 8 above and recommendation 39 below.

[315] An obligation to submit conformal certificates to the directive 91/533 EC, or the written working contracts (copies are sufficient) of the posted workers currently exists in Luxembourg and Germany (as host states). See Report March 2011, Chapter 4.3.

## 4.6 DUTIES ON SERVICE PROVIDERS

According to case law based on Art. 49 EC / Art. 56 TFEU, National authorities of the host state may impose certain information duties on service providers and others, such as the service recipient. In this section we give an account of our examination of statutory and self-regulatory duties on service providers. However, we refrained from describing possible requirements to submit information on the posting of workers in the host (or sending) country only for social security and tax purposes,[316] and for the single purpose of monitoring posted workers with a third country nationality (as in NL, AT[317] partly, and fully in IE,[318] IT, UK).[319]

### Notification requirements

In *five* of the predominantly host Member States covered by the previous study (BE, DK, FR, DE, LU) notification requirements in the context of the PWD are imposed on foreign service providers and also in *one* predominantly sending country (RO) in its role as host state.[320] The current study includes *ten* countries in their role as host state (AT, BG, CY, EL, LV, LT, MT, PT, SI, ES) where service providers posting workers have to inform a designated authority (see section 4.3) in advance.

CZ and SK also run notification systems in their role as a host state, but impose these information requirements on the service recipient (user company) (see also section 4.7). They require all companies established on their territory to which workers are posted or which benefit from such workers to inform the designated authority and to provide detailed information on the content and location of the activities to be performed.

[316] The definition of 'posted worker' for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines). Parts of this recommended angle of approach is taken in the study 'Information provided on the posting of workers, by F. Muller and others, Université de Strasbourg, September 2010 (EC commissioned study: VP/2009/001/0160).

[317] Employers residing inside the EEA require a work permit for third-country nationals who are legally employed in their country of origin and are posted for temporary agency work to Austria (Sect. 18 of the AuslBG), because a facilitated access to the labour market is only valid for posting and not for temporary work (ref. also Administrative Court, 15th May 2009, 2006/09/0157; This decision concerns the same situation as in the ECJ ruling on Vicoplus (C-307-309/07), just instead Polish provider and Polish workers, a Slovakian provider and Slovakian workers during the transitional regime. But if for example a German temporary agency employs a Russian worker (for whom the agency has a German work permit), he will still need an Austrian work permit for posting this agency worker to the Austrian labour market).

[318] According to the country report: For entry into Ireland, employees just need a valid passport or, in the case of third-country nationals, an employment permit (including workers posted to Ireland).

[319] Information requirements with the single purpose of monitoring posted workers with a third country nationality presence of posted workers are part of national migration law rather than of national labour law and therefore not relevant for the monitoring and enforcement of the PWD as such.

[320] According to the Eurofound study on posting of workers in the EU, October 2010, p. 10-13.

Remarkably enough, the *three* remaining countries (FI, HU, IE) which impose notification duties neither on the service provider nor on the service recipient, include two predominantly host countries (Finland and Ireland).

In Finland, the service recipient ('contractor') is made responsible for collecting detailed information from the foreign service provider ('contracting partner') and its posted workers, as specified in the Act on the Contractor's Obligations and Liability when the Work is Contracted Out (1233/2006). However, in this system there is no duty to notify these data to a designated authority. The service recipient only needs to keep the documents and make them available to inspectors on request (in case of checks).

In Hungary, a similar requirement exists limited to user companies of TWAs (see section 4.7).

This leaves Ireland as the only country in the current study without any specific statutory duties for service providers and recipients related to posting in the context of the PWD. There is no prior authorisation, or advance declaration procedure specifically related to posting of workers. However, apart from social security and/or tax related obligations, all employers are also required to notify the Health and Safety Authority (HSA) if initiating work on a new building site. According to the national informants, the DJEI, in reality, gets very few voluntary notifications from posting firms (it was suggested that there had been fewer than 6 in the past 3 years).

**Overview of countries with a notification system**

Austria
According to Sect. 7b Para. 3 of the AVRAG, any foreign employer residing inside the EEA or in Switzerland must report the employment of workers who are being posted to Austria for the purpose of continuous service to the Central Coordination Authority for the Control of illegal Foreign Labour at the BMF a week prior to the commencement of work, at the latest. Should this be technically impossible, the report must be submitted electronically, per e-mail or per fax.[321] In cases of emergency or involving work that cannot be postponed or short-term jobs, the report must be submitted immediately prior to the work's commencement. Where the employer has failed to provide his representative or the posted worker with a copy of the report, the representative or worker is obliged to immediately report his posting at the time when the work commences.
The report contains the following information:

- Name and address of the employer and the representative;
- Name and address of the domestic principal (general contractor);
- The names, birthdates and social security numbers plus the nationality of the workers being posted to Austria;
- Commencement and expected duration of the work in Austria;

[321] (German: https://www.formularservice.gv.at/forms/fscasp/content/bin/fscvext.dll?ax=COO.1.1001.1.83288&sol_createclass=COO.3000.550.1.501535&dx=COO.1.1001.1.83191; English: https://www.formularservice.gv.at/forms/fscasp/content/bin/fscvext.dll?ax=COO.1.1001.1.83288&sol_createclass=COO.3000.550.1.501535&dx=COO.1.1001.1.83191&lx=en;.

- Amount of the compensation due each individual worker;
- Locale of the work in Austria (as well as other job sites in Austria);
- Worker's occupation and utilization;
- In so far as the worker posted for the job requires an official license for his profession in his employer's home state, in each case the issuing authority, the file number, the date of issue and validity or a copy of the license.
- In so far as the posted workers require a residence permit in the employer's home state, in each case the issuing authority and the file number, date of issue and validity or copy of the permit.

For the employers in the construction sector per Sect. 33g of the BUAG the report is issued to the BUAK. The report is electronically transmitted by the Central Coordination Authority to the appropriate health insurance carrier. Where the posted workers are not nationals of an EEA membership state or Switzerland, the report is also transmitted to the regional office of the labour market service.

As we shall see below, apart from this notification system directly related to posting of workers in the context of the PWD, Austria also imposes several additional obligations on service providers (see under 'additional requirements') and on service recipients as well(see section 4.7). Moreover, the Austrian country report draws attention to notification duties applying to service providers (including self-employed) in the field of trade law. According to Sect. 373a of the Trade Regulation Act of 1994, foreign employers residing inside the EEA intending to temporarily provide a border crossing service within the scope of the free movement of services as the first time activity regulated in Austria (for instance a variety of construction jobs but also temporary work) must first notify the Federal Ministry for Economics, Family and Youth. In case the foreign employer intends to provide services temporarily or occasionally during the year in question, this notification must be renewed annually. In case the cross-border service is not merely temporary or occasional, foreign employers require an Austrian trade license.

Bulgaria

The employer (service provider) from the other EU Member State must submit to the Employment Agency, a document certifying the existence of a valid employment relationship with the posted worker according to the legislation of the country where the employer has its seat.
The information that should be available in the competent authorities is determined in Article 7 OTCPWMS. This employer has to submit through the local person (the user undertaking) the confirmation letter, that there is an employment relationship with the posted worker under the legislation of the sending state (Art. 6 OTCPWMS).

Cyprus

The only obligation of the service provider is to submit a prior declaration to the Department of Labour about the posting regardless of the duration of provision of services (Article 8, paragraph 1).
Article 8 (1) of Law 137(I)/2002 states that enterprises falling within the scope of the existing legislation which post workers to Cyprus must, before the inception and regardless of the duration of provision of services, submit to the competent authority the following documents drawn up in Greek or English:

- A written statement containing the following data: a) the name or corporate name of the enterprise, its headquarters, address and legal form; b) the details of the legal representative of the enterprise, as well as the details of the enterprise's representative in Cyprus, if such a representative exists, during provision of the services; c) the address of the place or places where the posted workers will provide their labour, along with the name or corporate name, headquarters, address and legal form of the enterprise or enterprises to which the posted workers will provide their labour; d) the date of inception of provision of services and posting of the workers, as well as their likely duration; e) The nature of the activity carried out.
- A list of posted workers including data to be specified by the competent authority, on each individual.

In addition, in accordance with the provisions of Article 8, paragraphs 3 and 4, the employment of posted workers without prior submission of the documents provided for in paragraphs 1 and 2, as presented above, is not permitted, and the provisions of Article 8 do not affect other obligations in relation to the announcement, information or statement of actions that the enterprises falling within the scope of Law 137(I)/2002 must carry out vis-à-vis the public authorities under other provisions.

However, in the view of the Labour Department there are indications that many of the enterprises that post workers to Cyprus either fail to comply with the procedure provided for by law or are late in complying. As a result, the Department does not have precise data available either on the number of posted workers or on the type of posting. Since it has been noted that in many of the registered cases of posting the authorities have been notified at a later date, i.e. after the date the posting began, the Ministry is of the opinion that in the case of short postings the possibilities for implementing and monitoring the existing legislation are seriously limited. In this context, although in the opinion of the Labour Department the total number both of postings and also of posted workers remains at low levels, it is estimated to be much higher than the number of registered cases.

Greece

As specified by Article 5 of P.D. 219/2000, undertakings falling within its scope and posting workers to Greece must, prior to the commencement of the provision of services and regardless of its duration, submit to the labour inspectorate of the place where the service is provided:

- A written statement in the Greek language containing the following data: a) the name or business name of the company, its headquarters, its address and legal form, b) the identity (first name and surname, name of father, name of mother, date of birth, address, etc.) of the legal representative of the company c) the same information for the representative of the company in Greece during the period of the provision of services, d) the address(es) of the place(s) where the posted workers will be providing their services and the name or company designation, headquarters, address and legal form of the company or companies where these posted workers will be providing their services, e) the start date of the provision of services and the posting of the workers and the probable duration, and f) the nature of the activities undertaken and the use or not of dangerous materials or methods.
- The above undertakings must also submit a table of the posted workers, issued in two copies, on which will appear for each of them the following information: a) first name and surname, age and specialism, b) date of signature of contract of

employment, similar previous employment with other employers and family situation, d) working hours (daily and weekly), starting times, break times, end times of their daily work and their weekly rest days, and d) remuneration of any kind.
One copy of this certificate must be displayed in a prominent place at the workplace, whilst the other remains in the files of the competent department of the labour inspectorate.

Latvia
Article 14(4) of the Labour Law requires submission of certain information on workers to be posted in Latvia to the State Labour Inspectorate.

If a worker is to be posted in Latvia an employer prior to the posting (the particular period is not specified) is under obligation to provide the State Labour Inspectorate with the following information:
(1) name, surname; (2) time of commencement of work; (3) expected length of employment; (4) a place of performance of a work (if work to be performed in several places employer must provide that work will be carried out in several places); (5) a representative of employer in Latvia; (6) a person in favour of which a work will be performed (recipient of service); (7) notification that a posted worker who is a third country national is employed legally by the EU employer.
According to the informant of the State Labour Inspectorate, the requirement of Article 14(4) has been complied with only twice. It means that the State Labour Inspectorate has received respective information on workers posted in Latvia only two times, both in 2010.

Lithuania
Article 5 LGPW provides that the employer posting a worker to perform temporary work in the territory of the Republic of Lithuania for a period exceeding 30 days or to carry out building work as provided for the Republic of Lithuania Law on Construction shall, in accordance with the procedure laid down by the Ministry of Social Security and Labour of the Republic of Lithuania, notify in advance the territorial division of the State Labour Inspectorate of the posted worker's place of employment of the provisions applied to this worker.
There are two different information obligations with regard to employees posted to the territory of Lithuania:

- if the worker is posted to perform temporary work in the territory of the Republic of Lithuania for a period exceeding 30 days or to carry out building work, the employer shall notify in advance the territorial division of the State Labour Inspectorate of the posted worker's place of employment and applicable working conditions;
- in all other cases the LGPW just requires that foreign employers shall keep these documents within the time limits and in accordance with the procedure laid down in the legislation of the appropriate state, however, not shorter than the duration of a worker's posting to the Republic of Lithuania.

The first option is regulated in Lithuania in some more details The Resolution no. A1-169 of 16 June 2005 of the Ministry of Social Security and Labour (State Gazette, 2005, no. 77-280) requires employers to provide the Inspectorate with the written form in Lithuanian language containing information on personal data of the worker as well as the service recipient. In addition, the information shall contain: a) date of

commencement of posting; b) duration of posting; c) place of work; d) profession / functions of an employee; e) place of documents of an employee; f.) employees working conditions: length of working time and rest periods; remuneration; overtime remuneration; safety at work conditions (what is meant by this and how this is possible to define in the two lines of the written form remains unclear); measures of protection of youth workers, pregnant, breast-feeding women and women who has just given birth (what is meant by this and how this is possible to define in the two lines of the written form remains also unclear); conditions of employment of temporary workers (if applicable).

It is not stipulated what documents the foreign employers which do not fall under the first option shall keep available.

Stakeholders suggest that the control mechanism should be strengthened The possibility of State Labour Inspectors, State Tax Inspectors or courts to obtain the documents about paid sums and benefits for the posted worker exists. However, the introduction of the duty to keep the documents on posting separately from documents of general information would help to ease the access to them. There shall be a duty also for employers to provide the related information to posted employees in advance.

Malta

It shall be the duty of the undertaking posting the worker to Malta to notify the Director responsible for Employment and Industrial Relations of the intention to post a worker to Malta prior to the date of posting of the worker. This notification shall include:

- The name, date of birth and nationality of the posted worker;
- The address in the country where the worker habitually carries out his work;
- The dates of commencement and anticipated termination of his posting in Malta, and the type of work to be carried out, and;
- The address of the undertaking in Malta to which the worker is to be posted.

A copy of the notification together with updated records sufficient to show that the provisions of these regulations are being complied with, shall be kept at the undertaking in Malta making use of the services of the posted worker. Non-EU/EEA Workers who are habitually based within the EEA/Switzerland and who have an employment relationship with an employer in that country, but who are being seconded or posted for a stipulated period to Malta, shall be dispensed from the need of an employment license. Nevertheless, such works should file a notification letter within 24 hours prior to commencement of their employment in Malta.

Portugal

In 2009 a notification requirement was introduced, stipulating that companies posting workers are obliged to inform the local authorities five days in advance about the identity of the workers and the user (company), the workplace and the expected duration of posting.

Slovenia

An employer – legal or natural person - with its seat or residence in EU Member State – may post workers, regardless of their nationality, to the Republic of Slovenia to perform services (Article 16 of the Employment and Work of Foreigners Act). Such an

employer shall, before actual commence of work, register its activities at the Employment Service of the Republic of Slovenia. The registration is made on a special form, including the following data: a) the firm and seat or address of the employer, b) the responsible person of the employer, c) the number of posted workers, d) the type of service, e) place and duration of performance of service, f) information that posted workers, who are third country nationals, are legally employed and have arranged accommodation in the state of employer's seat, g) personal name of the posted worker, who will be a link between foreign employer and competent authorities and the recipient of the service (Article 18 (1) of the Employment and Work of Foreigners Act).

Spain

Notification is required if the posting exceeds 8 days. The employer who posts workers has the obligation to communicate the displacement prior to the commencement unless the displacement is less than eight days. If the worker is displaced by a temporary work agency the communication is compulsory, regardless of the duration of the displacement. Notification is needed for each individual posting of a worker. The communication must be submitted to the Local Labour Authority in the area where the posted worker is going to work. The labour inspectorate will apply the Directive to the displacement from the date as of which it is possible to be tried that displacement has existed.

The data that must be included in that communication are: a) name of the company; b) fiscal address and VAT number; c) personal and professional data of the displaced workers; d) the identification of the company or companies and, where appropriate, of the centre or centres of work where the displaced workers will work; e) the date of beginning and the expected duration of the displacement; f) the type of work that will be carried out.

If the company that posts the worker is a temporary work agency work the communication has to include more information: g) the fulfilment of the requirements demanded by the Law of its original country of establishment to act as a temporary work agency; h) the temporary needs of the user undertaking.
With regard to TWA's also the following obligations apply: they have to declare in written contract in order to comply with the Royal Decree 4/1995 of January 13, which applies to contracts concluded by a temporary employment agency and a user enterprise. This contract should include the following information (article 14):

- Data identifying the temporary employment agency, indicating the approval number and its temporary validity, tax identification number and account code for Social Security contributions.
- Data identifying the user enterprise, indicating, explicitly, tax identification number and account code for Social Security contributions.
- Reason of the contract, with specific expression of the cause that justifies it.
- Contents of the work done and training required.
- Occupational hazards of the job to cover.
- Estimated duration of the contract provision.
- Location and working hours.
- Agreed price.

**Assessment – problems caused at national and EU level**

All in all, sixteen of the 27 EU Member States do run more or less advance notification schemes for service providers in order to enable the responsible government agencies to fulfil their monitoring and enforcement tasks. Remarkably, five of these countries are predominantly sending states (BG, LV, LT, PT, RO). Five other states with notification duties, report that posting (from and) to their territories is a relatively insignificant phenomenon (CY, EL, ES, MT, SI). So, paradoxically, only six of these sixteen states are major host countries, which presumably should have the biggest interest in a notification system.

In the eleven Member States without notification requirements on the service provider, two (CZ and SK) impose such requirements on the service recipient (see section 4.7). Instead of imposing duties vis-à-vis state bodies, Finland and in case of TWA's also Hungary do impose duties on the service provider regarding their contractual counterpart in the host country (the user company). This leaves us with a clear minority of only seven Member States, including (paradoxically again) five host states, where no information duties (connected to the PWD) are imposed on the service provider (EE, IE, IT, NL, PL, UK, SE).[322]

As was concluded in the previous study, notification schemes in itself appear to be a good practice in the sense that the introduction of some kind of simple declaration system may be assessed as almost a conditio sine qua non for most monitoring and enforcement efforts (as explained in Chapter 4.2). At the same time, it must be admitted that notification is by no means an infallible instrument; first of all notification requirements may cause problems of compatibility with EU law (i.e. be disproportionate); secondly many national stakeholders point to the problem that a lot of service providers 'forget' to notify. Nevertheless, they all seem to agree on the advantages of this instrument with regard to facilitating enforcement and also for policy purposes. Indeed, effective policy making is impossible when no reliable data exist about size and character of the phenomenon of posting in the framework of the PWD. The advantages seem to outweigh the disadvantages, especially when a user-friendly and easy accessible system is implemented, as in Belgium. The notification systems as applied to posting of workers in Belgium and Denmark may be labelled good practice with regard to the exemptions they contain for insignificant and specific postings as well as, in Belgium, exemptions from more far-reaching information requirements.[323] Such tools may act as an incentive for service providers to notify. The requirement in Germany and Luxembourg to submit the documents service providers have to provide to their employees pursuant to Directive 91/533 and, in Luxembourg, the possibility for 'repeat players' to submit only a 'light declaration' may also be shared as good practice, subject to further assessment in the light of the case law of the ECJ.

[322] Notwithstanding the fact that NL and IT do impose more or less sophisticated liability schemes on service recipients (see below section 4.7) and SE, UK and even IE seem to have at least some kind of functional equivalent (at least a form of social clause). Hence, at the end of the day, only EE and PL seem to be fully 'dutyfree' in this respect.

[323] Please note that this qualification of the Belgium system as a best practice is restricted to the notification with respect to posting of workers. See pending ECJ case 577/10 as regards the compatibility with Article 56 TFEU of the same registration/notification as applied to self-employed.

***Recommendation 37 - no substantive changes***

**National level >** The initiatives to enact a notification system for service providers in a majority of Member States (in their capacity as host state) merit further study.

***Recommendation 38 – no substantive changes***

From an EU perspective, notably with regard to further cross-border service provision, the differences between Member States with and without notification systems may create confusion and uncertainty, as also may the different content of notification requirements in force. Whether it would therefore be recommendable to coordinate a notification system **at EU-level**, by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. In this respect, inspiration may be drawn from Directive 2009/52 and from the old proposals (see COM (1999) 3 and COM (2000) 271) to adopt a residence Directive for posted workers (note that both are/were only meant for workers with a third country nationality, which may put the protection of intra-EU posted workers at a disadvantage).

## (Other or) additional administrative requirements

There are also differing situations in the Member States with regard to other and/or additional requirements, such as the need to request prior authorization or to keep employment documents available for the authorities, or to appoint a representative, which may in certain cases be in breach of EU law.[324]
In our previous study, other or additional requirements were identified in BE, DE, FR, LU.[325] In the current study such measures were identified in AT, FI and for a part in LT. A short account of the content of these measures in Austria and Finland is given below, supplemented by sparse information on some other countries which reported related measures. An example is Cyprus, where the law does not impose additional requirements on service providers as such, but nevertheless the Inspectorate tries to collect information. Also information from the Irish and Latvian reports is presented below, which shows how inspectorates struggle with the difficulty to apply general duties on the keeping of employment documents for employers established on their territories to foreign service providers.

### Appointment of a representative

Austria
The foreign employer is not obliged to appoint a representative in Austria. However, obligations are sometimes legally transferred to the person who exercises authority to issue instructions on behalf of the foreign employer to the posted foreign workers in

[324] See in this respect the guidance of the European Commission on the case law of the ECJ with respect to control measures concerning the posting of workers in COM (2006) 159.
[325] See Report March 2011, section 4.3, p. 121-123.

Austria (a 'representative': for instance the person in charge of the party). In such a situation no formal appointment is necessary. If no one in Austria exercises the right to issue instructions, any obligations are passed on to the posted worker him/herself. While in case of a violation the posted worker is not subject to a penalty, the representative who can also be a posted worker is subject to penalties just as the employer.[326] In the case of temporary work the obligations will be passed to the Austrian user undertaking (regarding duties on the service recipient, see section 4.7)

Finland

Section 4 a of the Posted Workers Act provides that in case the employer of a posted worker does not have a business location in Finland, the employer shall have a representative in this country, who is authorised to act for the foreign company in a Finnish court and to receive on behalf of this company writs of summons and other documents issued by the authorities. The representative shall be selected no later than at the date when the posted worker starts working and the authorisation shall be valid for a minimum of 12 months after the date at which the posted worker ceases working in Finland. The parties for which the work is performed shall through their contracts with the company posting the worker or by other means at their disposal ensure that the company posting the worker selects the representative intended herein. A representative need not be selected in case the posting of the worker is no more than 14 days in duration. In case several consecutive employment contracts concerning the posting without interruption or with only short-term interruptions have been concluded between the posted worker and his/her employer, the posting shall be regarded as having been continuous.

According to Section 8 a of the Posted Workers Act, in case the posting of a worker is more than eight days in duration, the employer or the representative intended in Section 4 a shall, subject to authorisation by the posted worker, give the shop steward elected by the staff group in question or elected representative the information pursuant to Section 4 b.1, subparagraph 3 of this Act (see below under ''keeping employment documents available') on the terms and conditions of work applicable to the employment contract of the worker. An authorization has to be given by each posted worker. The position of elected representatives is based on Section 4 a of the Posted Workers Act described above. Under Chapter 13, Section 3 of the Employment Contracts Act, employees who do not have a shop steward referred to in a collective agreement applicable to the employer under the Collective Agreements Act (Työehtosopimuslaki No 436/1946)) may elect a representative from among themselves. The duties and scope of competence of such an elected representative are determined in the manner laid down separately in this Act and elsewhere in the labour legislation. The employees may further take majority decisions to authorize the elected representative to represent them in matters of employment relationships and working conditions specified in the authorisation.

Section 9 a of the Posted Workers Act contains penal provisions. In case an employer or their representative or a representative selected pursuant to Section 4 a intentionally or through negligence violate the provisions on possession of information and reports

[326] The District Administrative Authorities (responsible for the criminal prosecution) have to prove that the posted worker is the representative. Statistics don't differentiate between the foreign employer and his posted representative: For example in 2010 the Financial Police lodged 464 complaints for not holding the E101/A1-document for posted workers in readiness.

or duty to report intended in Section 4 b, or neglect to give the information intended in Section 8 a to a staff representative, they shall be sentenced to a fine for the violation of the Posted Workers Act.

In *practice*, however, employers do not select their representatives. According to the informants of the Ministry Department, it is often impossible for the authorities to receive information on all foreign service providers operating in Finland. Since the authorities do not know the amount of foreign enterprises, it is difficult to estimate the amount of supervision needed and how the supervision should be focused. In addition, the service providers are difficult to reach. It may be difficult to reach the service providers also because there is no one present in the host country (Finland) with a power to represent the enterprise in relation to the authorities. This also makes it difficult to receive the documents necessary for the supervision.

According to the Ministry Department, the posted workers should be guaranteed equal rights to the other workers in the host country at the EU level. If this is not possible, the Posted Workers Directive should be complied to as it is and the workers' rights should not be delimited from those provided by the Directive. The Ministry Department also says that at the EU level the possibilities of the supervision authorities should be ensured. The use of representatives of service providers, a model which can be held "light" from an administrative point of view, should be allowed in the EU also in the future. The supervision authorities should be allowed to require that foreign enterprises and/or workers must register in the host country before starting the work. At the EU level, a common register of the EU countries together could be considered. This register could be used by the authorities and could also give information of business prohibitions. Also sanctions should be hardened. Supervision authorities should have broad rights to inspect the information concerning undertakings from different databases of various authorities.

Cyprus
Pursuant to Article 8 (1) of Law 137(I)/2002, among the documents that have to be submitted is also a written statement containing detailed information of the legal representative of the enterprise, as well as the details of the enterprise's representative in Cyprus, *if such a representative exists*, during provision of the services.

**Keeping employment documents available**

Austria
In order to document the posted worker's legal status the following documentation must always to be available at the place of work/operating site in Austria. Officers of the tax authorities (Finance Police, health insurance auditors) are authorized to monitor the availability and to make copies of this documentation.

1. *Posting report*:
The employer must give the representative a copy of the posting report. When only one worker has been posted, the copy must be handed to him/her.
Information sheet:

According to Sect. 7b Para. 1 No. 4 of the AVRAG the foreign employer residing inside an EEA-membership state or his representative must maintain an information sheet as prescribed by the Directive 91/533/EEC at the job site. This is intended to assist the posted worker with the legal enforcement of his demands in Austria.

Particularly in the case of temporary workers from the EEA the Austrian user undertaking must retain certain notes for three years. These notes include the temporary workers' names, dates of birth, gender and nationality compartmentalized according to workers and employees, assignment commencement and termination of each temporary worker as well as a report on behalf of the temporary worker dealing with the important circumstances of the assignment' the expected duration of the temporary worker's job and the remuneration due him/her.

2. *Social security document*:
To keep an eye on the social security status of posted workers, according to Sect. 7b Para. 5 of the AVRAG per the Council regulation 1408/71/EEC the social security document E101 and the social security document A1 as per the Regulation 883/2004/EC on the Coordination of Social Security Systems is to be maintained at the Austrian job site/operating place provided that the posted worker is not subject to social contributions in Austria.

3. *Remuneration documentation*:
Per Sect. 7d of the AVRAG since 1 May 2011 the foreign employer must make the remuneration documentation available at the job site/work location in German language for the duration of the posting. Should the job site/work location change for a day, the remuneration documentation is to be held at the first job site/work location. If it is unreasonable to make the documentation available on the job site/work location, the documentation must still be made verifiably available in the country and presented to the taxing authority upon demand within 24 hours. Where a representative has been designated, he/she is obligated to have the remuneration documentation available. In case of a temporary agency work, this obligation remains with the user undertaking. Remuneration documentation consists of the documents required for the verification of the remuneration due the posted worker in accordance with Austrian law. In addition to the work contract and the information sheet, they also include work- and salary records.
It is unclear whether proof of remuneration payments is also part of this documentation. In one respect the legal mandate is only concerned with the remuneration due but not with its payment, on the other hand proof of the actual salary disbursement is necessary for effectively combating 'salary- and social dumping'. In practice, proof of the salary disbursement (for instance bank transfer receipts or cash disbursement receipts) is required. Because it is in pursuit of an objective in the common interest namely the worker's social protection and the guarantee of such protection, making all remuneration documents available in German is not to be understood as a limitation on the free movement of services.

<u>Finland</u>
The labour legislation contains obligations of keeping records of certain issues. The employer must keep records of all hours worked by each employee and any remuneration paid for these. The employer must also keep annual holiday records of the employee's annual holidays and saved leave, as well as of the holiday pay and holiday

compensation determined on the basis of the Annual Holidays Act. The supervising authorities have a right to see these documents. The Posted Workers Act contains an obligation of keeping records of posted workers.

Section 4 b of the Posted Workers Act provides rules of liability to keep records of posted workers. As the posted worker starts working, the employer or, if the employer does not have a business location in Finland, the employer's representative intended in Section 4 a, shall have in their possession the following information in writing:

- The identifying details of the company posting the worker and information on the responsible persons in the country in which the company posting the worker is located;
- Identifying details of the posted worker,
- Written information pursuant to Chapter 2 Section 4 of the Employment Contracts Act on the working conditions applicable to the employment contract of the posted worker; and
- Information on the basis of the employment rights of the posted worker.

In case the company posting a worker is not obliged to select a representative pursuant to Section 4 a, the company shall also be in possession of the information intended above when it does not have a business location in Finland.
In order to safeguard the minimum working conditions applicable to the employment relationship of a posted worker, the company posting the worker shall, before the work performed in Finland is initiated, let the party for whom the work is performed know who is in possession of the information intended in this Section during the worker's posting. This information shall be kept on file for two years after the posted worker has ceased working in Finland. According to the Government Proposal, the information could be kept in file also in the state where the undertaking, which has posted workers to Finland, is established.[327]

Section 9 a of the Posted Workers Act contains penal provisions. In case an employer or their representative or a representative selected pursuant to Section 4 a, intentionally or through negligence violate the provisions on possession of information and reports or duty to report intended in Section 4 b, or neglect to give the information intended in Section 8 a to a staff representative, they shall be sentenced to a fine for the violation of the Posted Workers Act.
The party for whom the work is performed or their representative, who intentionally or through negligence neglect the duty of care provided in Section 4 a, shall also be convicted of a violation of the Posted Workers Act, the representative of the party having the work performed, however, only in consideration of the instructions and procedures issued at the workplace. The penalty for violations of the labour legislation is imposed in Chapter 47 of the Penal Code (Rikoslaki No 39/1889).

Provisions applicable to employers' liability to pay compensation in the Employment Contracts Act and in the Act on Equality between Women and Men apply to posted workers in so far as relevant substantive provisions of these Acts apply to posted workers.

[327] See Hallituksen esitys (Government Proposal) Eduskunnalle laiksi lähetetyistä työntekijöistä annetun lain muuttamisesta 142/2005.

According to the Ministry Department, the supervision is based on the idea that labour protection authorities guide employers and employees. Only in certain situations authorities can give a decision which binds the employer. This basic starting point of the supervision has turned out problematic in the case of postings, since the authorities cannot prevent the non-compliance with the legislation. Foreign undertakings often lack a real willingness to find out the content of Finnish legislation and to comply with Finnish legislation. When inspecting a workplace, the authorities have often difficulties with getting the documents they are entitled to see. Service providers might lack a representative or they have a representative but the necessary documents are not available. Sometimes documents are asked by the authorities with the help of cross-border co-operation between the authorities (see section 4.4).

Ireland

Under Irish employment law, employers are required to keep records indicating compliance with legislation on young workers, working time and the national minimum wage at the place where the employee works or, if the employee works at two or more places, the place from which the employee's activities are principally directed or controlled. This, of course, creates a difficulty for mobile workers like those in construction. Firms are not required to keep records and documentation on site (with limited exceptions; for example, relating to certain health and safety documentation).[328] As such, there is no specific requirement that an employer established outside of Ireland must keep records relating to posted workers on site in Ireland. There are no specific requirements on posting firms, for example, to keep at the Irish workplace work permits or contracts of employment from the home state, nor is there an obligation to have a designated representative in Ireland. This is a problem for the monitoring and enforcement agencies, particularly in ensuring that there is an employment relationship between the posted workers and the foreign service provider *before* the actual posting. It should be noted, however, that some instances of foreign service providers agreeing to bring records from their base to be inspected on site in Ireland at an agreed time and date were cited by NERA. [329]

Latvia

In Latvia, there is no requirement to keep documents in connection with posted workers at the place of work. However in practice it is necessary. This may be illustrated by the example of the problems encountered by a company[330] which posted several workers in Latvia during inspections of the State Labour Inspectorate: when the worker replied that he/she worked there, authorities required the company to show an employment contract proving the legality of employment. However, usually guest workers do not have their employment contract with them and the sending employer has not complied with the procedure of notification to the State Labour Inspectorate

[328] Note that the *Employment Law Compliance Bill 2008*, agreed by the social partners in the wake of the Irish Ferries/Gama controversies, specifies a comprehensive list of documents which must be kept by the employer in respect of the most recent three year employment period and must be retained by employers for a further two years after the employment relationship ends; these records must be made available to NERA inspectors at places the latter can specify. The Bill has not yet been passed into law.
[329] Note that, in the *Arblade* decision (Cases C-369/96 and 376/96 [1999] ECR I-8453), the ECJ ruled that the effective protection of workers in the construction industry may require that certain documents are kept on site in the territory of the host Member State. The informants were not aware of any progress in relation to the development of the 'organised system for cooperation and exchanges of information between Member States' mentioned by the ECJ, in Ireland.
[330] Based on an interview with an individual company.

under Article 14(4) of the Labour Law. And even if posted workers brought their employment agreement, it is in other language than Latvian. Hence, labour inspectors are not able to read them and sometimes require translation with approval of notary (which is costly).

Lithuania
A service provider established in another Member State is not required to designate one of his posted workers (or another representative) to represent him during the duration of the services carried out by his posted workers. The foreign shall keep documents relating to a posted worker within the time limits and in accordance with procedure laid down in the legislation of the appropriate state, however, not shorter than the duration of a worker's posting to the Republic of Lithuania.

Spain
Sometimes inspectors of other countries have raised the question with the Spanish inspection why Spain demands qualifying documents for workers (ex. card of formation, degree, etc). It is indicated that this exigency can be a problem to the free movement of services.
The same can happen in relation to the authorizations and requirements or conditions of operation of other organizations (companies of temporary work, services of prevention, etc).
The greater difficulty for the labour inspectorate is the documentation (receipts of wage, licenses and authorizations, etc), almost always in languages different from the Spanish. Also the lack of certainty on the authenticity of documents.
Sometimes, the fulfilment of certain rules (preventive organization, evaluation of risks concerning company, etc) cannot be verified in Spain, nor, although it could, could extend the Spanish legislation when being questions governed by the legislation of the origin country.

**Assessment**

As we have seen, with regard to additional requirements such as the need to appoint a representative or to keep employment documents available for the authorities, relatively few countries covered by this study impose these duties on foreign service providers. Only Austria and (partly) Lithuania impose such duties additional to their notification system. Finland imposes these duties without having a notification system. From the countries covered by the previous study, only Denmark applies no additional obligations to its notification system, whereas France, Germany and Luxembourg seem to have them all. France and Germany also require certain documents in their official languages. In the current study, an obligation to keep documents available in the language of the host state was found in Austria.
In contrast to the previous study, where some interviewees stressed (as in Luxembourg) that the requirements go too far, in the current study the emphasis was on the problem of really enforcing these requirements or on the difficulty to apply general host state law on these matters to service providers.

A lot of differences exist between the Member States concerning the severity and content of penalties and fines (see also section 4.4). In this respect it was (roughly) assessed in the previous study that Luxembourg seems to have the best balanced penal-

ties, as regards proportionality on the one hand and dissuasiveness on the other. No administrative fines are imposed there, but rather a lot of compliance orders.[331] A clear advantage of this mode of sanctioning is that it avoids a lack of result 'at the end of the day', as was noted in some other Member States (Belgium, France, Italy) which rely foremost on criminal penalties.[332] Disadvantage of the criminal mode of sanctioning is that, a statement of offence does not necessarily lead to prosecution since the prosecutor does not seem to give priority to offences related to the posting of workers. The findings in the current study do not change this assessment. In particular in Finland and also in Ireland, doubts were raised about the effectiveness of the current, more reactive than proactive mode of sanctioning through criminal law. Austria catches the eye with a multitude of requirements, often severely sanctioned, whereas in Slovenia compliance orders as in LU seem to be regularly used. Although problems were mentioned regarding the effectiveness of some of these measures and other measures were enacted too recently to be assessed, on the whole stakeholders seem quite content with the functioning of the Austrian enforcement measures. Interestingly, with regard to duties stemming from three different legal sources to keep employment documents available, the tax authorities (Finance Police, health insurance auditors) are designated to monitor all of them. In this regard, the Austrian approach may be a potential example (good practice) of clever enforcement, which merits further study.

***Recommendation 39 - unchanged***

**At national level**, exchange of best practices with regard to 'balanced'[333] additional duties on service providers is recommended. Preferably however, **at EU-level** uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Art. 2 and Art. 4 of Dir. 91/533). See in this regard also recommendations 36, 8 and 2 above.

## Self-regulatory duties on service providers

According to the previous study in some Member States (Denmark, Italy, the UK),[334] collective agreements also impose duties on foreign service providers, such as to provide pay receipts and employment contracts or documentation on the terms of employment upon request to the local branch of the trade union. In the present study, no such initiatives were reported. Hence, we stick to the following recommendation:

[331] See on this use of compliance orders in Luxembourg, Report March 2011, section 4.3, p. 113 (footnote 65). A recently adopted 'warning act' in Italy may, if applied in practice, have a similar effect. See also Report March 2011, section 4.4, p. 134.
[332] See Report March 2011, section 4.3, p. 115.
[333] Between excessively rigid (disproportionate) and overly loose (not dissuasive or deterrent) rules.
[334] See Report, March 2011, section 4.3, p. 124.

***Recommendation 40 - unchanged***

**At national level**, duties on service providers in (generally applicable) collective labour agreements may, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach of EU law, be welcomed and shared as good practice as a tool to enhance compliance with the PWD at the level of CLAs.[335]

[335] In that sense, the Dutch Foundation of Labour advised sectoral partners to adopt such measures (2007 handhavingskader grensoverschrijdende arbeid).

## *4.7 DUTIES ON SERVICE RECIPIENTS*

### Information requirements

In the previous study we saw that Belgium, Denmark (with regard to certain risk sectors), oblige recipients of the service to check whether foreign service providers, often in their role as foreign subcontractor(s) / temporary staffing agency, have complied with their notification duties. The recipient / user company has to report non-compliance to the competent national agency. If the service recipient reports the non-compliance, he is freed from liability but may otherwise be fined. In Austria, in case of temporary agency work the user undertaking has a joint responsibility. He is made subject to penalties if the remuneration documentation is not available. Moreover, as described above in section 4.6, the foreign employer is not obliged to appoint a representative in Austria. However, obligations are sometimes legally transferred to the person who exercises authority to issue instructions on behalf of the foreign employer to the posted foreign workers in Austria (a 'representative': for instance the person in charge of the party). In such a situation no formal appointment is necessary. In the case of temporary work the obligations will be passed to the Austrian user undertaking.

In Czech Republic and Slovakia, the service recipient (referred to as 'employer') is obliged to notify in writing all employees posted to him by filling out a specific form at the Labour Office, or, in Slovakia, to the Office of Labour, Social Affairs and Family in the district where the employee performs work. Posting - its beginning and end – is notified in writing, in duplicate on the information card,[336] delivered in person or by mail (Section 23(8) of Act No. 5/2004 Coll. on Employment Services). The obligation to inform must be fulfilled within 7 working days. For control purposes by the Office of Labour, Social Affairs and Family or by the Labour Inspectorate, the employer retains the information form certified by the Office of Labour, Social Affairs and Family. In case the obligation to inform is not fulfilled, it is considered as a violation of employment-law provisions (it may be fined by the Labour Inspectorate up to EUR 100,000). Quite recently, a similar notification duty for the service recipient was introduced in Bulgaria. Before posting a worker to Bulgaria, the local company who receives the posted workers must declare to the Employment Agency that the working conditions of the Ordinance on the terms and conditions for posting of workers have been complied with – maximum duration of working time, minimum wage, etc. (Art. 5 in conj. with Art. 3 OTCPWMS).

In Finland, the service recipient ('contractor') is also responsible for collecting information from the service provider ('contracting partner') e.g. on his reliability and has to keep these documents available to inspectors in case of checks (sanctioned with fines). Also in Hungary, certain information duties are imposed on the service recipient, when he is making use of TWAs. In Ireland, similar duties on user companies of TWAs exist, but these are limited to agencies established on Irish territory. Some du-

[336] The information card (No. 1) is available on the web site of the Ministry of Labour, Social Affairs and Family
http://www.employment.gov.sk/index.php?SMC=1&id=776.

ties of information on the recipient of the service are also established at CLA level, notably in the construction sector, stemming, for example, from the implementation of Directive 92/57/EEC on minimum safety on building sites.

In the other countries covered by this study, no mention was made of information requirements imposed on the service recipient.

## Liability (or 'functional equivalents') with regard to pay and pay-related contributions/tax

In nine Member States (Belgium, France, Germany, Greece, Italy, the Netherlands of our previous study, Austria, Finland and Spain in the current study) legal (sometimes combined with self-regulatory) more or less far-reaching mechanisms of liability exist, in particular joint and several liability schemes concerning the clients/main contractors/user companies. These arrangements aim to prevent the non-payment of wages (all but Belgium), social security contributions (all) and fiscal charges (Austria, limited to the TWA-sector, Belgium, Finland, France, the Netherlands, Spain and partly Germany). Several tools have been developed either to prevent the possibility for liability among the relevant parties or to sanction those parties that do not follow the rules. These preventive tools may be aimed at checking the general reliability of the subcontracting party and/or to guarantee the payment of wages, social security contributions and wage tax. Parties that do not abide by the rules on the liability arrangements in place may be sanctioned through a number of *repressive tools*, namely: back-payment obligations (Austria, Germany, France, Italy, Netherlands, Spain), fines (Austria, Belgium, Germany, France, Finland, Spain) and/or alternative or additional penalties (Austria, Germany, France, Finland, Italy, Spain). In other Member States (notably Greece, Hungary, Portugal, Sweden, Luxembourg, in a way also Cyprus, Ireland, the UK) alternative measures, mostly confined to the TWA sector and/or the construction sector, with similar aims are established.

For an extensive description of the liability systems in eight of the countries mentioned above (AT, BE, FI, FR, DE, IT, NL, ES), we refer to the study on 'Liability in subcontracting processes in the European construction sector' published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008. One of the findings of this study was that the liability rules in the Member States under study largely fail to have an effective impact on fraudulent situations and abuses of posted workers in cross-border situations of subcontracting and temporary agency work.

Below, we only give a brief account of the systems in place, in the Member States covered by this study.

Austria
The recipient of the service is not obliged to any special activities; in particular he/she does not have to check whether the posted worker actually receives the remuneration or vacation due him/her.
However, if the recipient of the service is a general contractor (principal), who contracts another party (sub-contractor) to perform a contracted task owed by him, pursuant to Sect. 7c Para. 3 of the AVRAG he becomes liable as a guarantor vis-à-vis the

employee of the subcontractor for the remuneration determined by law, regulation or collective agreement. This liability-arrangement is restricted to performances provided on construction sites involving building construction and civil engineering. Furthermore, it is limited to the direct contracting party of the subcontractor, in other words, to one level of subcontracting. Furthermore, the liability of Article 7c.3 AVRAG is restricted to the highest level in the subcontracting chain. The liability will only acquire a joint nature if the contracting party of the contractor has failed to meet its obligations after being formally pressed for payment by the worker by bringing legal proceedings against his/her employer within 6 months from the end of his service.
If the sub-contractor is a foreign employer not residing inside the EEA and if he is an entrepreneur, the recipient of the service guarantees the posted worker's remuneration demands as a joint debtor (Sect. 7a Para. 2 of the AVRAG).
The Chamber of Labour and the Austrian Trade Union Federation would be in a favour of extending this 'liability arrangement' across the EU, by including it in the PWD.

An accompanying measure to the new statutory criminal offence regarding the undermining of 'the basic wage' (applicable in all sectors), which was enacted as of 1st May 2011 (Sect. 7k of the AVRAG),[337] concerns the possibility to order the Austrian principal by decree or in the case of temporary work the user undertaking to deposit a portion of the remuneration due to the foreign service provider (employer). The amount of the surety shall be at least € 5,000. Preconditions to apply this measure are a justified suspicion of underpayment and a justified suspicion that criminal prosecution and punishment may be impossible or considerably impeded due to the 'personality' of the employer.
The Austrian principal will be discharged from the surety obligation if Austrian law is applicable to the contract between himself and the foreign employer (Sect. 7k Para. 3 of the AVRAG).[338] If the principal has already paid the foreign employer, the surety obligation is unauthorized.

Spain
The recipient of the service has a duty to undertake certain checks before contracting the service provider established in another Member State.[339] That is a general rule that applies in all sectors according to Article 42 of the Workers' Statute ("Article 42") which provides for joint liability of the principal contractor for wages and security contributions. Liability attaches where the subcontracted work is within the principal contractor's so-called own activity. The liability extends throughout the contract life, and ends a full year after the contract expires.
There are no specific fines for failure to comply with preventive measures for the recipient of the service. However, the consequence is that the service recipient will be responsible for the payment of the debts that exist with the Social Security or the Tax

[337] See also section 4.6.
[338] It is possible that foreign law will not accept this effect of discharging his dept and according to this a foreign court will sentence the Austrian principal to payment ignoring the surety obligation.
[339] In particular it is necessary to check that the service provider does not have any debt with the Social Security Authority or the Tax Authorities. Wages: no legal mechanism; it is common practice for the contractor to carry out regular compliance checks on subcontractors.

Authority.[340] So in case of a negligent service provider where the contract concerns the principal's 'own activity', he is liable to pay these debts and the outstanding wages. This means that if, after a formal request to their own employer, payment is not forthcoming, workers may take legal action jointly against their own employer and the corresponding contractor.

Law 32/2006, on subcontracting in the construction sector ("Law 32/2006"), applies, as the name implies, exclusively to the Spanish construction sector. Article 4(2) of Law 32/2006 refers to the obligation of principal contractors to ensure that workers are adequately trained in the prevention of occupational hazards, as well as the duty to have a preventative organization in place and to register with the Register of Accredited Companies. Noncompliance with these requirements results in joint liability between the malfeasant subcontractor and its principal contractor for wages and social security contributions. Interestingly, as a preventive measure, Article 5 of Law 32/2206 limits the number of vertical links in the subcontracting chain to three, absent a special showing that more subcontractors are objectively required to complete the work. This evidences Spain's efforts to simplify the contracting process by constricting the length of the vertical contracting chain.

Finland

The Act on the Contractor's Obligations and Liability when Work is Contracted Out (hereinafter Liability Act) applies to a contractor

- who in Finland uses temporary agency workers; or
- at whose premises or work site in Finland an employee is working, who is in the service of an employer having a subcontract with the contractor, and whose tasks relate to the tasks normally performed in the course of the contractor's operations or to transportation relating to the contractor's normal operations.

In building, and in repair, servicing and maintenance relating to building, the Act is applied

- to construction contractors using subcontractors;
- to all those contractors in the contractual chain contracting out part of the work at a shared workplace as referred to in the Act on Occupational Safety and Health Section 49.

The Act is applied if the duration of the work by temporary agency workers exceeds a total of 10 days, or the value of the subcontract agreement exceeds 7,500 Euros, excluding value added tax. This refers to the total value of the agreement, without separating the share of work performed.

According to the Liability Act, before an orderer concludes a contract, it is obliged to check whether the counterparty is entered in the Prepayment Register and the Employer Register, and is registered as VAT-liable in the Value Added Tax Register. Similarly, the orderer must ascertain whether the counterparty has paid its taxes and taken out pension insurances, as well as the type of collective agreement or principal terms of employment it applies to the work. The same information must also be obtained on foreign companies. Should an orderer neglect the obligation to check de-

[340] Unless he is exempted on the base of a certificate of good payment behaviour re the subcontractor issued by the social security authority . In that case, there is no responsibility for amounts owned up to the time in which the certificate is issued.

scribed above, it shall be obliged to pay a fee for negligence. The amount of the negligence fee is prescribed as no less than 1,600 Euros and no more than 16,000 Euros. The Regional State Administrative Agency under whose jurisdiction the Occupational Safety and Health Authority supervising the law falls, decides on the payment. Apart from this penal sanction, the Act does not include a real monetary liability of the principal contractor for the obligations of the subcontractors.

According to the responsible State Agency, the Liability Act functions quite well. Still, the representative of the Ministry Department would suggest different alternatives in order to improve the compliance with this Act. According to the interviewee, improvements to the current situation could be sought through developing responsibility in subcontracting chains. Also it is suggested that an identifier with a picture could be made generally obligatory.

Greece
Pursuant to Law 2956/2001, limited to the TWA-sector, the recipient of the service does not have any duty to undertake certain checks before contracting the temporary work agency established in another Member State. However, the temporary work agency and the user company are jointly liable regarding pay and social security contributions.

**Other related measures (including self-regulation)**

Hungary
In 2006 the Labour Code was amended with the aim of cracking down on undeclared work. In that context, the temporary work agency is required to provide a user company with proof of the agency worker's lawful employment – such as employment contracts (including agreed wages), the relevant enquiry to the social security system and registration of the agency.[341] If an agency fails to meet the legal criteria or there is no appropriate employment contract, it will be assumed that an employment relationship with the user enterprise is established from the date the agency worker starts work for the period specified in the contract between the agency and the user enterprise. This rule aims to make the user enterprise responsible for the lawful employment of agency workers.

Ireland
No specific legal obligations exist for service recipients, provided with posted workers by a service provider, to prevent non-payment of wages, social security or service charges. The only qualification to this applies to workers supplied by a temporary work agency; in this situation, labour legislation, in some cases, regards the end-user as the 'employer' (the party responsible for paying the worker's wages is generally deemed to be 'the employer').
Temporary work agencies established in Ireland are required to be licensed (the requirement does not apply to agencies established in other jurisdictions) but the end-user is under no obligation to check for compliance with this requirement and, in practice, such checks are rarely, if ever, undertaken. In fact, service recipients are under no

[341] The rules applicable to registration of the temporary work agency are contained in Government Decree No. 118/2001 (VI.30).

obligations to undertake investigations as to whether the service provider runs its business in conformity with labour law, social security or fiscal law in the sending state. The exception to this relates to public procurement contracts. Such contracts do contain compliance clauses but, according to the national informants, these are, in practice rarely checked or invoked (see Gama case).
No chain liability procedures exist in Ireland; obligations as regards wages, social insurance and pension contributions, sick pay and so on rest with the employer.
The principal exception relates to the Construction REA section 10 compliance. Under the Construction REA, contractors are required to engage only 'approved' subcontractors, who should be compliant with the REA and relevant tax, social welfare and health and safety legislation. However, according to the national informants, it seems only minimal checks (if any) are carried out by main contractors for compliance with this section. This appears to be the case also in relation to State contracts. Compliance with section 10 is frequently seen as a 'box-ticking' exercise.

Portugal
Contrary to many other systems in the Portuguese Law there used to be, as a rule, no joint liability of the employer (the temporary work agency) and the client/user. The law was however changed and now if a temporary work agency sends workers abroad it must provide an additional gage (caution) and there is a public fund that will pay the workers, through the Portuguese Embassy or consulate, the travel expenses with a right of reimbursement against the employer.
The law was changed in 2007 (Lei 19/2007) and the changes were kept by the Decreto-Lei 260/2009 (de 25 de Setembro) and by the labour code. If the temporary work agency does not pay the salary in time or the travel expenses it is possible for the worker (after a delay of 15 days) to request payment from the public fund that must pay with the amount of money that was paid as a caution by the employer. Afterwards, the temporary work agency will be summoned to refund the amount paid in order to keep the caution. However, the public fund only pays to the limit of the amount of the caution.
The recipients of a service by a temporary work agency must check if it is registered in the public databases of all the temporary work agencies authorised to operate in Portugal.

**Duties in collective agreements**

Although in Cyprus there is as yet no statutory framework in this regard,[342] certain sectoral collective labour agreements, specifically in the banks and the construction industry, do contain relevant provisions.

In the construction sector, one noteworthy aspect of the latest sectoral collective agreement that was in force from 1 January 2008 and expired on 31 December 2010, is the achievement of a special memorandum of understanding, which is considered to

[342] The Cypriot Labour Department is of the opinion that for the purposes of a more effective implementation of the posting legislation it would be useful to impose stricter penalties and measures on the using company as well, which would act preventively. In any case the penalties are also directly related to the size of the posting; for example the imposition of a small monetary penalty on a large company that posts a large number of workers is not as preventive as for a small employer who posts one or at most two workers.

be extremely important for the sector, which sets out for the first time, the framework for regulating contracting in the sector. In accordance with the provisions of the special memorandum of understanding – apart from the two sides' commitment to work together to make the terms of the collective agreement universally applicable to all workers in the construction industry – they have also agreed that outsourcing should take place within the framework of the collective agreement, as well as on the basis of labour legislation provisions. Specifically, the two sides agree that there must be a written delegation agreement between the contractor and subcontractor, which should include the following:

- a description of the services provided by the subcontractor;
- provision for mandatory observance by the subcontractor of the terms of the collective agreement for all staff, whether organised in trade unions or not;
- an obligation on the part of the subcontractor to implement the Health and Safety Scheme;
- an obligation on the part of the main contractor for any defaults or omissions by the subcontractor in relation to the staff it employs.

In order for someone to be considered a subcontractor, they must be a registered employer hiring paid staff, be covered by employer's liability insurance, have met all obligations regarding the Social Insurance Fund and observe the terms of the sectoral collective agreement. Such conditions are similarly applicable to contractors, the only difference being that the number of permanent staff in the case of contractors will depend on the size class of the delegated project.

## Duties on recipients of services – a way forward to solving problems at national and/or EU level?

### Assessment

Given the problem observed in several Member States of unreliable service providers and/or service providers that do not register, it is understandable that the service recipient is made co-responsible to a certain extent. Thus, to enhance the effectiveness of notification schemes and/or to ensure compliance with the PWD, most notably the payment of the applicable wages to posted workers, these initiatives may be welcomed. (Self-evidently) the content of the measures must not be disproportionate[343] or in breach of EU-law, and shared as good practice, namely as a tool to enhance compliance with the PWD, including the CLAs level. See in this regard the judgment of the ECJ in the case Wolff & Müller.[344] Here, the Court stated (at para 37) that, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined.

[343] In this respect, an exemption or 'light' procedure may be considered for service recipients who are natural persons and where the employment is for their private purposes.
[344] Case C-60/03 Wolff & Müller [2004] ECR I-9553.

***Recommendation 41 - no substantive changes, Member States information added***

The feasibility of adopting minimum standards **at EU-level** with regard to duties (including joint and several liability) on service recipients in the context of the PWD merits further study, taking into account the (in)effectiveness of these tools,[345] now that 19 of the 27 Member States have enacted some kind of duties on the service recipient.

[345] See the study on 'Liability in subcontracting processes in the European construction sector' published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008.

## *4.8 TOOLS / REMEDIES AVAILABLE TO POSTED WORKERS*

### Locus standi

Regarding the legal remedies for posted workers and/or their representatives to enforce the rights conveyed by the PWD, Article 6 of the PWD stipulates that in order to enforce his rights to the terms and conditions of employment guaranteed in Article 3 of the PWD, the posted worker must have the opportunity to institute judicial proceedings in the host Member State, without prejudice, where applicable, to the right, under existing international conventions/regulations on jurisdiction, to institute proceedings in another State, such as the one where he habitually fulfils his employment contract. Hence, all Member States have had to ensure that workers posted to their country, covered by the Directive, can bring judicial proceedings for enforcement in the territory where they have been posted. In our first study we found that, with the exception of the UK, Article 6 of the PWD is explicitly implemented in all (predominantly host) Member States covered by that study.

With regard to the fifteen Member States covered by the present study, it was reported that Austria,[346] Bulgaria, Cyprus, Finland, Latvia, Malta[347] and Spain have explicitly implemented Article 6 of the PWD.
The other eight Member States seem to have implemented Article 6 in an indirect manner, or, in two Member States, perhaps not at all. In Ireland, the same situation exists as was reported for the UK in the first study; the posting situations covered and the rights derived from the PWD have not been clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was therefore not properly implemented. Nevertheless, posted workers can seek the same remedies for any infringements of their rights in the same manner as any other workers; there are no limits regarding the competences of the courts or tribunals in dealing with posted workers. Also in Greece, Hungary,[348] Lithuania, Portugal and Slovenia, it seems to be the case that posted employees can initiate court proceedings before the courts on their territories without any constraints. Apparently, they have the same judicial remedies at their disposal as settled employees. In Czech Republic and Slovakia the situation is not fully clear: According to the Civil Procedural Codes in both countries as a general rule the courts have jurisdiction if the defendant is domiciled in their territories[349] and

[346] No special legal venue has been established for posted workers originating from non-EEA-membership countries.
[347] In Malta, Article 47 of the EIRA does provide that proceedings for an offence under the Act or under the Regulations issued by authority of the Act may be commenced for a period of up to one year from the commission of the offence.
[348] According to section 61 of the Law-Decree 13 of 1979 on International Private Law Hungarian courts shall have jurisdiction in employment-related lawsuits filed by employees against employers if the place of regular employment is in Hungary or was last in Hungary; and/or the place where work was actually performed is in Hungary, provided that the place of regular work neither is nor was in the same country.
[349] For CZ as an additional criterium was mentioned that 'In the Czech Republic there is an undertaking or branch of such employer (defendant)'. According to the national expert, The Czech Republic did not implement Article 6 PWD into special provisions, because the applicable general provisions provide enough guarantee for the employee, that he will be able to sue in front of Czech courts. For SK, it is submitted that in accordance with Section 37 and the Act no. 97/1963 in matters relating to the em-

with respect to disputes referring to the right of property, if the defendant has a property in their territories. Next to this, the other determining criteria set down in the Brussels I Regulation, the place of habitual work performance and the place where the business which engaged the employee is (or was) situated do neither provide for an option to sue in their country as a host state. The rapporteur from Slovakia noticed, that, based on this rule, an employee posted from another EU member state to perform work in the territory of the Slovak republic may file a claim in a Slovakian court against his/her "user" employer (the service recipient) established in Slovakia. However, it is not clear, whether Slovakian courts would consider the user employer as a legitimate defendant in a dispute regarding the posting of an employee.

## Support by social partners and/or other stakeholders

In Ireland, workers may refer claims to the Labour Court, through their trade union. In this case, the Court issues a non-binding Recommendation (although the parties can agree in advance of the decision to be bound by the Recommendation). However, only contractual claims may be pursued in the civil courts. Breaches of employment legislation are generally pursued through the State's employment tribunal system. Claims are generally referred by the worker (or, at the worker's request, a trade union) in the first instance to a Rights Commissioner. Hearings before a Rights Commissioner usually take place in private and are relatively informal (written submissions are not mandatory, for example). A right of appeal exists to the Labour Court. Legally binding orders of the Rights Commissioners or the Court are enforceable through the civil courts.
A breach of a worker's entitlements under the REA can be pursued not only by the worker in civil proceedings through the employment tribunals but also by NERA, on behalf of a worker. Trade unions can also apply to the Court in respect of alleged breaches of REAs and the Court may direct the employer to do various things (including the payment of any sum due to a worker for remuneration in accordance with the agreement). However, enforcing such orders against employers established abroad is logistically difficult. For trade unions, too, it is difficult to justify devoting resources to pursuing a claim on behalf of a worker in the jurisdiction for only a short period of time. Although unions (and employer bodies) can enforce rights collectively, they are increasingly unable to do so without State assistance, given the decline in trade union density and the fragmentation of employer representative bodies.

Apart from partial rights in Ireland for trade unions to refer cases to tribunals on behalf of the individual worker (but only with his/her consent), as described above, no other Member States covered by this study have independent locus standi for representative trade unions, as is the case in Belgium, France and the Netherlands (see p. 138 of our previous study). According to the Ministry of Labour in Finland, introducing independent locus standi for trade unions would be a good idea to improve the current situation where individual posted workers do not seem to make use of their rights.

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ployment contracts the authority of the Slovak jurisdiction is given if the plaintiff is an employee who is resident in the Slovak Republic.

Worth mentioning however, are some additional supportive tools and/or institutions, mentioned in the reports on AT, IE and to some extent also LV and SK, which may be of help for (a collective of) posted workers.

In Austria, the BUAK monitors and enforces holiday-pay of (posted) workers in the construction sector. Moreover, in some cases the 'Arbeiterkammer' may provide posted workers with legal advice and protection.

As an institution under public law, the Construction Workers' Annual Leave- and Severance Payment Fund ("Bauarbeiter-Urlaubs- und Abfertigungskasse" – BUAK) is tasked with the administration of holiday- and severance pay of workers in the construction sector. Employers in the construction sector must report the posting of workers to BUAK. BUAK employees are authorized to enter employers' construction sites as well as common areas, to obtain information from persons present and determine their identity. BUAK has 12 inspectors for construction sites and approx. 25 auditors for domestic employers at its disposal.

Membership of AK, which offers its members as personal services legal advice and protection is laid down in law (Sect. 10 of the Labour Chamber Act of 1992 ["*Arbeiterkammergesetz*" – AKG], Federal Law Gazette No. 626/1991 in the version Federal Law Gazette I No. 147/2009). Workers who have concluded their employment contract abroad or work occasionally abroad belong to the AK according to Sect. 10 Para. 4 of the AKG if the focus of their working relationship is domestic and the employer is liable to the Austrian social security system. Workers who are posted to Austria for short or medium-term periods are not members of the AK. According to Sect. 10 of the AKG transborder voluntary membership is not possible. However, in serious cases of wage and social dumping foreign workers can also be granted protection for political reasons. Usually cooperation with foreign authorities is maintained by the ÖGB or the AK representation in Brussels.

Foreign workers posted to Austria are usually not members of the ÖGB but receive information free of charge. Protection is granted if the worker is a trade union member in the country of origin.

Ireland

The Labour Relations Commission (LRC) is the State's third-party mediation and conciliation service and has a key role in dispute resolution involving large number of workers (like the Gama and Irish Ferries disputes). The LRC also houses the Rights Commissioners service, which investigates disputes, grievances and claims that individuals or small groups of workers refer under a range of employment rights legislation (including complaints relating to pay, terms of employment and dismissal). The Labour Court is not a court of law, but operates primarily as an industrial relations tribunal hearing both sides in a case and then issuing a non-binding recommendation, setting out its opinion on the dispute and the terms on which it should be settled. Disputes that cannot be dealt with by the LRC are generally referred on to the Court. The Court, however, has acquired many extra functions in recent years as a result of specific roles being assigned to it under various pieces of employment legislation, under which it can make legally binding determinations.

In Latvia, an employee may be represented by a trade union or in discrimination cases by the Ombudsman. Still, trade unions lack resources for representation of each worker before the national court.

Only in Slovakia, it seems to be the case that if wage conditions have not been properly observed, the labour inspectorate may oblige the employer to back-payments of the outstanding amount to the (posted) employees. With regard to trade union assistance, it most be noted that union density is low in Slovakia. If in some companies there operate trade unions, it works normally like this: in the case when the employee's rights are threatened or undeclared, and this employee is a member of a trade union, she/he has the option to request the assistance of the trade union body. In most cases the trade union advises in the area of the employment contractual matters, or it tries to resolve the issue directly with the employer if it is a serious problem, or it is an issue regarding a large number of employees. Some trade unions, especially those affiliated to trade federations also have their lawyers who provide legal advice to employees. Unlike in the past, the lawyers of the trade unions do not represent the employees in legal proceedings. Hence, trade unions provide mainly a consultancy service. The Works Council members usually provide also only consultancy service to employees or in case the problem is very serious, they discuss it directly with the employer.

## Access to legal aid for posted workers

Posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in Austria, Bulgaria, Czech Republic, Greece, Finland,[350] Hungary, Lithuania, Portugal, Slovenia, Slovakia and Spain, as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU. However, in Greece and Portugal legal aid is not very well developed. In the Portuguese situation, only indigents are exempted from judicial costs and only in cases related to occupational accidents the public attorney system will provide the equivalent of a lawyer to the worker.[351]
In accordance with the general principles operating in Cyprus, Latvia and Malta, no legal aid would be available for posted workers there.[352] In Ireland, (posted) workers taking claims before the employment tribunals have no access to legal aid; the applicable law does not allow for the granting of legal aid before an employment tribunal. Legal aid may be available for contractual claims pursued in the civil courts if the applicant satisfies the financial eligibility criteria laid down (e.g. the applicant must have an annual disposable income of less than €18,000).

[350] In the Finnish system, workers can turn to a lawyer or if they have small income, a municipal counsel. If the workers are members of a trade union, they often get assistance from a lawyer in the union or financial support in the court proceedings.
[351] In other cases the State has a protocol with the body that represents the private attorneys, "Ordem dos Advogados", to designate a private lawyer to a person who cannot afford it. The system is expensive to the State but, according to the national expert, the truth remains that if you want a good lawyer in Portugal you must pay for her/him yourself and they are not cheap.
[352] In the first study, only for the UK and Romania the non-existence of access to legal aid was reported.

Although these findings are in line with EU law (notably the legal aid directive) it is recommended, for instance by an EU Communication, to provide access to legal aid for (posted) workers in countries where this is currently not available (*recommendation 43*).

## Complaint mechanisms

### Posted workers

None of the countries examined in the present study nor in the previous one, have specific complaint mechanisms in place for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the regular methods of complaint in the host country, if any,[353] such as contacting the trade unions or the labour inspection services with their complaints. However, it was reported that in practice most posted workers do not complain about non-compliance and abusive situations, in some instances because they are afraid to do so, or because it could cause them to lose their job. As another factor for non-complaining the difficulty for posted workers to understand and get access to general complaint mechanisms under host state legislation was mentioned in most national reports.[354]

However, in Cyprus, in the case of the Labour Inspection Department, complaints may be made using any means (e.g. telephone, post, fax, e-mail, appointment, etc.) either anonymously or not, on an individual level or through a representative, and the proportion of complaints investigated is 100%. In many cases, the labour inspections are the result of a request from the workers' trade union organisations, and a small number take place following a relevant request from another department of the Ministry of Labour and Social Insurance. The Department of Labour Relations reports that in most of the cases, the controls are the result of complaints from the workers themselves, which are made by telephone and in direct connection with an inspector. For the purpose of facilitating the complaints procedure for cases of undeclared or illegal employment, and ensuring the anonymity of complainants, since 2009 there has been a helpline 7777 that operates on weekdays from 07:30am to 14:30pm. Nevertheless, as regards its effectiveness, this initiative is evaluated as particularly poor, because in the majority of cases the complaints are not valid.

A positive note regarding the attitude of authorities towards posted workers was made in the Slovenian report. Here, the interviews with representatives of the authorities led to the general impression that competent authorities intensively strive to offer an adequate and comprehensive help to posted workers and are trying to solve their problems promptly. The reason for this compassionate attitude is that they are aware of the situation of posted workers who are mostly workers in the construction sector which in Slovenia is suffering from crisis. Hence with aid of the Inspectorates, also social problems of such workers are solved or prevented. A lot of posted workers come from

[353] No official complaint mechanisms (also for the local labour force) exist in Cyprus and Malta.
[354] In CZ and BG they were considered accessible, but nevertheless they were not often used.

ex-Yugoslavia countries, who were dismissed by their Slovenian employer.[355] These workers usually worked in the Republic of Slovenia in order to help their families back home. Being jobless in Slovenia is, hence, for them, as well as for the Republic of Slovenia, a rather substantive social issue. Therefore they usually like to accept posting as a proper solution for their situation

**Service providers**

Although this section is primarily devoted to remedies for posted workers, it is interesting to note that a special complaint mechanism does exist with regard to obstacles concerning the free provision of services in the EU. As a result of the Single Market Action Plan of 1997, foreign service providers can contact the national points of contact of the Internal Market Problem Solving Network (SOLVIT) with complaints about the authorities' application and enforcement of the rules on posting of workers.

As concluded in the previous study,[356] it seems that this complaint mechanism has worked satisfactorily in particular in Poland, but in the majority of Member States covered by our first study it was found that the mechanism is not very well known and may be underused. Apart from that, it proved very difficult in several Member States to get access to information about the nature of complaints from the SOLVIT agencies.

In the current study, this finding was by and large confirmed. Although service providers who have complaints or problems with the authorities can ask for help through SOLVIT, this avenue is not particularly well known (for instance in Ireland a number of the social partners representatives had never heard of SOLVIT) or publicised.[357] It seems, in practice, service providers tend to contact employer organisations (IE), or (less frequently), labour inspectorates (IE[358], BG). On the other hand, in some countries the SOLVIT office confirmed that there were cases of posted workers registered, but they could not provide specific details, referring to the fact that this information is included in a Database owned by the European Commission (ES, SR).

From the SOLVIT contact point in Latvia, one currently pending case on posting of workers issues was reported, concerning a restriction for natural persons to receive construction services in Sweden. Latvian companies most frequently seem to complain to SOLVIT centre on too slow repayment of VAT tax. Nevertheless, according to the interviewee of SOLVIT, Latvian employers have experienced the following problems in other EU member states:

- national implementing measures are unclear, practical application is inconsistent; in particular it concerns the status and functioning of temporary employment agencies;
- ineffective access to applicable employment rules of the host member state (in particular, if regulated by collective agreement, no explicit information is pro-

[355] This particular remark only concerns the role of Slovenia as a host country of this group of TCN posted workers
[356] See Report March 2011, section 4.5, p. 151-153.
[357] However in Latvia, Latvian companies do not use their possibilities to lodge complaint to Latvian SOLVIT centre frequently although SOLVIT centre carries out information campaigns frequently.
[358] In Ireland: The National Employment Rights Authority (NERA).

vided on whether they are declared universally applicable), even administrative authorities are not able to answer such questions (regarding Spain)
- de facto activities of trade unions (especially in Scandinavia) may lead to closure of service market in particular member states because of the demand to comply with all national law (collective agreements) which goes beyond the scope of the PWD minimum requirements (like in Laval case);
- unclear tax rules, in particular, in which country the posted worker must pay income tax – in sending or hosting state.

Also in Slovenia, employers turned mostly to SOLVIT in other situations than posting of workers. The only case relating to posting of workers issues, concerns the posting of third country nationals:
a residence permit for posted workers with the Croatian and Serbian nationality (which were regularly employed by Slovenian employer and had permanent residence in the Republic of Slovenia) was refused in the Netherlands, where the Slovenian employer performed services (vessels repairs).

The SOLVIT Centre in Hungary registered 75 inquiries in 2010. The experiences gained since 2006 indicate that the majority of the cases are complaints related to social services. The next large categories include the recognition of vocational qualifications and cases of EU citizens and their third-country family members related to entry, stay and permanent residence. Compared to those, there were few, or even a negligible number of cases related to the freedom of services.
Nevertheless, one of the successfully resolved cases published on the SOLVIT website relates to posting of workers: A Hungarian company intended to perform construction work in the Netherlands. However, pursuant to the Dutch legal regulations the employees of the company needed a work permit in order to work in the Netherlands. Pursuant to the Treaty of Accession the freedom of services applies between Hungary and the Netherlands, and therefore the Netherlands would not have had the right to set this requirement. The permit procedure lasted for five weeks, which caused a delay in the commencement of the work at the time agreed in the agreement. It was revealed that the Dutch authorities continued to apply the rules of individual work permits to the case. As a result of the intervention of the Dutch SOLVIT Centre, the Dutch Government approved a new legal regulation, according to which registration was introduced for employment related to the supply of services. Therefore there is no longer any need for individual permits in relation to such type of employment.

Furthermore, the interviewee of SOLVIT explained that to date almost all posting cases stem from the fact that Hungarian employees tried to use this type of employment to take a job in Member States still applying limitations on the access to their labour market. The last case was related to the hiring-out-of-workers type of posting, in relation to which the decision of the European Court of Justice in cases C-307/09 and C-309/09 created a new situation by permitting Member States applying a transitional period to extend their limitations also to the case of transitional hiring-out of workers, which falls within the scope of the PWD (Art. 1(3)(c)). Naturally, once the transitional regime is lifted, it is unlikely that such problems will occur again.

## Non- use of jurisdiction clause in the host state by posted workers

Hardly any court cases related to posting of workers were reported.[359] This seems to confirm the finding in the first study that the right to take legal action has at present hardly been or has even never been used by posted workers nor by their representatives. The – alleged - causes mentioned by stakeholders in the present study for this non-use may be distinguished in four groups.

**Firstly**, *neutral reasons* such as, in Cyprus, Greece, Malta and Portugal, the insignificance of the phenomenon of posting. In Latvia,[360] representatives of the trade union and the state labour inspectorate are convinced that the too demanding legal obligations (financial burdens, in particular the obligation to provide a daily subsistence allowance) are the main cause for the few posted workers from their country (and thus no posted workers initiating court cases): If possible, Latvian employers send their employees for service provision in other EU Member States under other legal 'avenues' (free movement of workers or as self-employed).
The lack of publicly accessible and/or reliable data on the number of claims pursued by posted workers through the courts or tribunals may also be an explanation. This was mentioned in Austria, Hungary, Ireland and Latvia. In the Irish report it is observed that claims by non-national workers are 'lumped together' which makes it impossible to distinguish whether the claim is by a posted worker or simply a migrant worker exercising free movement rights under Article 45TFEU. Also Austrian and Hungarian court statistics do not necessarily indicate whether or not the case relates to a worker posted abroad in the framework of the provision of services (if e.g., the case relates to wages, it will be included in the respective part of these statistics.).

**Secondly**, rather obvious and well-known '*worker-related*' reasons were mentioned in Austria, such as *language problems*,[361] *unfamiliarity* with the legal system and the system of industrial relations in the host country, and the fact that in the case of unpaid wages, the amount of money due is usually not worth the cost and effort of commencing a legal action. As reported from Slovenia, the ignorance and lack of legal awareness of employees is used by posting employers who do not ensure the working conditions according to the hard core of the host country, which leads to underpayment, identified as the most pressing problem in Austria. The lack of 'empowerment' of posted workers is augmented in situations where other actors, such as trade unions, employers and even administrative institutions also display a lack of appropriate knowledge of the workers' rights under the PWD.

[359] Only in Latvia, a very recent case of 5 July 2011, in Lithuania a case of September 2009, in Slovenia a case of October 2008. In this case the worker denied to go to Serbia (hence not a Member State) for a more business trips, claiming that these trips are actually a temporary work abroad, not provided in his employment contract. See for an overview and more details, Annexes.
[360] This is especially true for the highly qualified workforce, such as IT professionals or construction engineers. Their salary in Latvia in most of the cases already complies with the minimum salary level in other EU Member States. They know foreign languages and thus have full access to the information on their rights and know how to enforce them. They base their 'posting' in other EU member states on mutual agreements with their employer. Due to too many requirements and formalities in sending and host state they freely choose to be posted under another title than 'posted worker'.
[361] As reported from Lithuania, many workers still lack knowledge of any language of 'Old' Europe. They are used to communicate in Russian as a second language. In this respect the practice of some trade unions stands out: they have at least one representative from Eastern Europe being able to communicate in Russian, for example, Norwegian trade unions.

**Thirdly**, a very important *socio-economic factor*, recognized by interviewees in sending and host countries alike, is the *salary gap* between Eastern and Western Europe. In particular workers in low-skilled jobs seem to be very willing to work abroad even without demanding what they are entitled to according to the minimum requirements under PWD. It may even be the case, according to the Irish report, that 'bargains of convenience' exist between posted workers and employers, whereby the workers are willing to accept inferior pay and conditions to those under the legislation/collective agreements of the host country (either because these are still far in excess of rates in the country of origin, or 'willing' only in the sense they are afraid to confront the employer or approach a trade union). This is the flip side of the positive comment of Bulgarian actors on the possibility of cross-border posting in the EU: 'Posting is one of the possibilities for labour migration in search of better living and work conditions. It helps to study the foreign experiences as well as the culture and style life in the host countries. Sometimes it is one of the ways to combat unemployment in the sending states.' Posted workers stemming from states with low wages do not compare their situation with their colleagues in the host state, but judge whether it is better than that of their colleagues in the sending state.

However, as was noted in the Austrian report, under-remuneration of posted workers – in Austria - is also widespread because it did not carry a risk for the employer, at least until 1 May 2011: If the worker asserted his claim, all the employer was obliged to pay was the amount due to the worker in the first place. In case the worker took his claim to court, the labour- and social courts did try to reach a settlement that in most cases got the employer off the hook. Particularly with the addition of the purely civil legal remedies, the new statutory offence as in Sect. 7i Para. 3 AVRAG is in the eyes of all stakeholders a vital contribution for the posted worker's protection. This brings us to the fourth identified cause for the non-use of rights by posted workers.

**Fourthly,** also persistent *system-related* causes were observed in many Member States, such as *non-existent or inadequate access* for posted workers to multi-lingual and transparent *information* on their basic rights through internet and/other sources (e.g. AT, CY, PT).

*Costly and lengthy judicial procedures* may also inhibit posted workers from pursuing claims in court; in Latvia the Trade Union of Construction Workers complained that a case was brought before the court in August 2010 by a posted employee from Latvia on non-payment of minimum salary in a host Member State by his Latvian employer. The first sitting of the court of first instance was held almost a year later, on 5 July 2011. Also in Ireland, where there is in fact a rather low threshold to lodge a claim, things do not run smoothly: employment tribunals (the Rights Commissioners, the Labour Court, the Equality Tribunal and the EAT) operate on a relatively informal basis (as compared with the regular court system) and workers can be assisted by colleagues, trade union officials or lawyers (as they choose). The tribunals also have a wide jurisdiction in terms of ordering redress; most typically, where a worker's rights have been infringed, the tribunals may order that the employer comply with the relevant legislation (or other binding provision) and/or award compensation to the worker. Nevertheless, in practice, given the time it takes to pursue a case, relatively few posted workers are going to be in the jurisdiction long enough for a compliance order to be of much value. It is more likely a posted worker would seek a compensation order. However, enforcing such orders against employers established abroad is

logistically difficult. For trade unions, too, it is difficult to justify devoting resources to pursuing a claim on behalf of a worker in the jurisdiction for only a short period of time. Hence, in individual cases, without the high number of workers involved and extreme nature of exploitation as in the Gama dispute (which was solved through collective action and intervention of the State's dispute resolution bodies), the route through the employment tribunals and regular courts for posted workers is an arduous one (even where an individual has the aid of NERA or a trade union). At present, according to the national informants in Ireland, there are delays of approximately two years in getting a case heard at the EAT, approximately one year at the Rights Commissioners and approximately six months at the Labour Court.

The possibility of judicial protection is relatively negatively perceived in Portugal (cumbersome and expensive judicial system) and Slovakia (lengthy judicial proceedings in many cases and diverging judgments in similar cases. The loss of confidence in the judicial system is marked also by some corruption scandals. Another reason for low number of court cases is a financial one - the need for payment of costs and attorneys' fees).
In Slovenia, strict procedural rules make it more difficult for posted workers to pursue a legal claim; although the Employment Relationship Act uses the term "right", the worker shall actually make a written request to the employer before a claim is admissible in court. Hence, the request is a procedural precondition. Should the employer not fulfil his obligations within eight working days upon the receipt of the worker's written request, the worker may request judicial protection before the competent labour court. The time limit to file such legal claim at the court is limited to 30 days after the expiry of the eight days period for the employer. Although these kinds of time limitations are common in the Republic of Slovenia, they may nevertheless hamper access to court for posted workers, especially when they have left the country again. This can be overcome by acting through an agent or legal representative, but this is costly (and thus often not worth the effort).

## Posted workers' rights denied under legislation or court attitude in the sending state

In several sending states mention was made of rules or court attitudes which may hamper the rights of workers posted from these states. Especially the so-called 'business-trip' legislation in several sending member states was sometimes interpreted as if host state rules do not apply during relatively short periods of posting. For instance in Slovenia, where it was stated that there is a distinction between business trips based on travel order by the employer and posting of workers. Whereas by posting the worker will be protected by the Slovenian law plus host State core protection, this would not be so in the case of business trips. By the latter the provisions on posting of workers are not relevant, as the work is not continuous (as held by the Supreme Court) and commonly lasts only up to a week. A worker on a business trip would not be protected by host state core protection; solely Slovenian employment law would be relevant in assessing his rights and duties. See in this respect also section 3.2 under the heading 'the regulation of posting from the state of implementation'), where it was found that Bulgaria made use of the Art. 3(3) PWD in its capacity as a sending state, and recommendation 14. It is important to stress here again that the PWD leaves it to

the host state to decide whether its rules should be applied during short term postings up to one month.

Another example, also referred to under the heading 'recognition of foreign judgments' in section 4.4 (see p. 219), concerns the unclarity in Slovakian law regarding the recognition of a foreign judgment, since, according to Section. 64 of the Act No. 97/1963 Coll. a foreign judgment shall not be recognized or enforced if the foreign court would not be competent to rule in the case, should the jurisdiction be considered under Slovak regulations. In fact, the National Labour Inspectorate, which acts as a liaison office in terms of posting of employees asserts that only the Slovak court has jurisdiction on claims involving posting of employees *from* Slovakia to the territory of another member state, since the employment relation between the employee and the sending employer remains maintained in the full scale and the Slovak employer is responsible for all the working conditions and conditions of employment to be met during the term of posting.[362]

An illustration of what may be called an unfriendly court attitude is the situation regarding workers posted by temporary work agencies established in Portugal. Such a posted worker should be strongly advised to pursue his claim in the host state, simply because the Portuguese Law seldom recognizes any liability of the client or user of the temporary work.[363] If the TWA-employer, that in Portugal may be a physical person, goes bankrupt or simply flees, it is almost useless in Portugal to sue the client. Although many of the cases of posting decided by the EU Court of Justice refer to Portuguese enterprises and workers (to begin with Rush Portuguesa), those that had the most serious impact in the Portuguese public opinion and in the media occurred a decade ago and were related to Portuguese TWA's that sent Portuguese agency workers to Germany and the Netherlands and then left them stranded with no salary and no means to return back home.[364]

## Assessment and recommendations

The findings in the country reports reveal the following main causes of non-use of the jurisdiction clause by posted workers:[365]

- Problems with the language, non-awareness of prevailing terms and conditions, non-transparent or inaccessible legislative information, expensive and lengthy judicial redress procedures, (depending on the system in the host state) poor or no access to legal aid, and problems in cross-border judicial proceedings.

[362] The assessment of the National Labour Inspectorate is disputed by the national expert, see p. 219. However, if the National Labour Inspectorate is correct, this situation seems to make judgments such as in the Polish 'Galmet'case possible. See Report March 2011, Annex and section 3.5 and 4.5, p. 142 and further.

[363] See in this regard Case C-60/03 Wolff & Müller [2004] ECR I-9553, which involved a Portuguese worker who lodged a claim for outstanding wages against the German main contractor.

[364] As stated before, many Portuguese temporary work enterprises are not companies or legal persons, but physical persons and frequently they collect the price of the contract from the client and simply vanish, without having paid the salary (or a substantial part of it) of their workers.

[365] In this respect, the study 'Information provided on the posting of workers, by F. Muller and others, Université de Strasbourg, September 2010 (EC commissioned study: VP/2009/001/0160), also contains interesting information.

- The salary gap between Eastern and Western European workers as the main socio-economic cause. In this respect, the existence of possible 'bargains of convenience' between posted workers and employers was observed, whereby the workers are willing to accept inferior pay and conditions to those under the legislation/collective agreements of the host country (either because these are still far in excess of rates in the country of origin, or 'willing' only in the sense they are afraid to confront the employer or approach a trade union).

These problems resemble largely the obstacles we found in the previous study and confirm our conclusion that the jurisdiction clause in the PWD on its own is not enough to provide an effective remedy. To the extent that procedural (system-related) problems are detected, efforts should certainly be made to remove them. However, the main point to underscore in this context is (again) the indispensable role of other actors, such as state authorities and trade unions to help enforcing the posted workers' rights under the PWD.

Hence, we reiterate our recommendations 42, 43, 44 and 45 (see below). Compared to the previous study, the findings on the implementation of Art. 6 PWD in the current study were more worrying than in the previous report. Of the 15 countries covered, eight Member States seem to have implemented Article 6 in an implicit manner, or, in two Member States, perhaps not at all. Hence, it merits further study to ensure that in each Member States the jurisdiction clause is properly implemented (this extra recommendation is included in rec. 42). Last, but not least, the current study also showed that posted worker's rights can be denied under the legislation or court interpretation/attitude of the sending country. Thus, we call for action at EU-level against such law and/or practice in a new recommendation 46.

***Recommendation 42 - substantively amended, see first sentence***

**At EU level**, it merits further study to make sure that in each Member States the jurisdiction clause is properly implemented.[366] Moreover, an amendment to Article 6 PWD is recommended, so as to make the option to give social partners locus standi an obligation. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state.
In this context the independent right to bring cases before the court and its quite effective use by the German holiday fund ULAK also merits attention. If not already provided for by **national** legislation, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for such purposes as recovering outstanding wages).

[366] In case of implicit implementation, such a right is not very accessible for posted workers. As suggested in the Irish report, the establishment of a specific, stream-lined recovery process for posted workers pursuing civil claims in the host state, would be a major step forward.

***Recommendation 43 - no substantive changes; supplemented with Member States information***

Posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in 22 Member States, as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU (except for Denmark). However, in accordance with the general principles operating in CY, MT, LT, RU, the UK and partly IE, in employment cases, no legal aid would be available for workers posted there. In PT and EL legal aid is not well developed.
Although these findings are in line with EU law (notably the legal aid directive), an EU Communication might recommend the provision or enhancement of access to legal aid for posted workers in countries where this is currently not available or not well developed.

***Recommendation 44 - one concrete proposal added in last sentence***

We believe it is important to emphasize the long-term need to structurally promote and (financially and institutionally) support trade union (and/or social partner) 'awareness and empowerment' initiatives with regard to posted workers both **at national** and **at EU-level**. For instance, by funding dedicated 'posted workers officers' amongst the social partners, as was suggested in the Irish report.

***Recommendation 45 – adapted with regard to EU-level***

The lack of designated complaint mechanisms **at national level** should be remedied. Member States should exchange good practices in this regard, such as the anonymised complaint procedure existing in Germany, to make it easier for posted workers to lodge a complaint. **At EU-level**, too, it would be necessary to facilitate access to existing complaint mechanisms such as the Internal Market Problem Solving Network (SOLVIT).

***Recommendation 46 - ** NEW ****

Legislation in the sending state stipulating that host state rules do not apply during relatively short periods of posting or not recognizing host state judgments granting these rights to posted workers run counter to Brussels I, Rome I and the PWD. To prevent undermining of posted workers' rights in the sending state, the **EC** should act upon that, ultimately with an infraction procedure.

# CHAPTER 5. SUMMARIZING CONCLUSIONS

## *5.1 BACKGROUND, AIM AND OUTLINE OF THE STUDY*

The position of workers who are posted to another Member State in the framework of the provision of services has been a European concern for a considerable period of time. The Posting of Workers Directive (hereafter referred to as PWD), adopted on 16 December 1996 is one of the tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (former Article 49 TEC) with the need to ensure a climate of fair competition and respect for the rights of workers (preamble paragraph 5). The European Commission has regularly monitored the implementation and enforcement of this Directive to assess whether the aims of the PWD were being met. A comprehensive monitoring exercise launched in 2006 by the European Commission led to the assessment that the Directive's main shortcoming, if not all of them, could be traced to a range of issues relating to its implementation, application and enforcement in practice.

In July 2009 the European Commission launched a pilot project 'working and living conditions of posted workers'. As part of this project, two research projects were commissioned, which were launched in December 2009/January 2010. One concerned the economic and social effects associated with the phenomenon of posting of workers in the European Union (VT/2009/62). The other (VT/2009/63) concerned the legal aspects of the posting of workers in the context of the provision of services in the European Union. This last mentioned project led to the study "The legal aspects of the posting of workers in the framework of the provision of services in the European Union", by Ms Aukje van Hoek and Ms Mijke Houwerzijl, March 2011. It is based on twelve national studies which examined the questions and difficulties that arise in the practical application of the posting of workers legislation, as well as its enforcement in practice.

The current study is meant to supplement this first study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union with information on the implementation, application and enforcement of the Posting of Workers Directive in the fifteen Member States not covered by the first study. The set-up of the present study is based on that particular purpose.
The comparative study starts with a succinct overview of both the labour law and the private international law context of the PWD (chapter 2). Chapter 3 deals with the implementation and application of the directive and discusses in detail its personal and substantive scope. Chapter 4 deals with monitoring and enforcement. In each chapter we compare the results from the current study with those from the previous study and formulate (and where necessary reformulate) our conclusions and recommendations. An overview of results and conclusions is offered in this chapter 5; an overview of all recommendations is presented separately.

## *5.2. LEGAL CONTEXT OF THE PWD: PRIVATE INTERNATIONAL LAW AND NATIONAL LABOUR*

### Private international law – problems inherent to the unclear interaction of Rome I and PWD

The present preamble to the PWD makes reference to the Rome Convention, but the exact relationship between both legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention and its replacement, the Rome I Regulation. This can be explained in part by the fact that the ECJ did rarely (and until recently could not) judge conflict of law issues. Accordingly, the Member States have developed or maintained different interpretations both of the interaction between Article 8 and Article 9 of the Rome I Regulation and of the interaction between the Rome I Regulation and the PWD. This was evident in the first study and is confirmed by the current study. Among the traditions identified in the study are the common law tradition which makes a clear distinction between common law protection and statutory protection; the *ordre public* tradition in which extensive use is made of the possibility to apply the mandatory provisions of the forum for public policy reasons; the tradition of NL, DE and AT in which a strict distinction is made between protective rules and general interest rules, and the position of the MEE-countries in which the impact the previous system of old private international law can still be felt. The position of the Scandinavian countries is determined largely by their system of collective labour law.[367]

The PWD is based on the EU competences as regards the internal market and in particular the free provision of services. This freedom attaches primarily to the service provider (and/or recipient). When the service provider needs to send employees to another Member State to be able to provide the service, the labour law of the host state may cause an impediment to this activity by creating additional burdens and costs for the service provider who is already covered by the law of another country. This obstacle can be justified by the need to protect both the labour law system of the host state against wage-based competition (social dumping) and the posted workers themselves. However, the PWD limits the possibility of the Member States (and indirectly also the unions) to avail themselves of this justification to the hard core provisions of the PWD and public policy provisions. This restriction is based on the assumption that the posted workers are already adequately protected by the law of the country in which they normally work. Often, the country in which the employee normally works, will coincide with the country of establishment of the employer (the service provider). However, it is important to note that the assumption that the posted worker is covered by the labour law protection of the country of establishment of the service provider is not necessarily true for two reasons:

1) The law applying to the individual contract of employment is determined by private international law (PIL), in particular Article 8 of the Rome I Regulation. This provision primarily refers to the place of *work*: the law of the country where or from which

[367] This distinction is made with the sole purpose of creating a better understanding as to the different perception of the PWD in the Member States.

the work is habitually performed will apply to the contract of workers – posted or not. The actually place of performance of the work is the relevant factor here, not the contractual arrangements or the seat of the employer. When workers are posted abroad, and the work is actually performed in the host state, the law of the country in which the employer is established may nevertheless be applicable to their contracts when:

- the posted workers habitually work in (or from)[368] the country in which their employer is established and are only temporarily posted to the host country;
- it is impossible to identify a country in which or from which the workers habitually work, making the employer's place of business the most relevant connection;
- the country of establishment of the employer is for other reasons the most closely connected to the contract. These other reasons could involve the domicile of the worker, the place of recruitment, special travel arrangements and allowances to compensate the worker for working abroad etc.

Both the first and the last steps of this choice of law rule will only refer to the country of establishment of the employer if there is a genuine connection of both the worker and the contract of employment with that country. The rule of the closest connection also lays weight on the fact that in the case of expatriation on behalf of the employer, the employer bears the costs of labour mobility. If these requirements are not met, there is little or no justification for giving priority to the law of the country of establishment of the employer over the law of the place where the work is actually performed. Policy makers should bear this in mind if they consider clarifying the concept of 'posting' under the PWD. It should also be clear that the limitations which the PWD – in the interpretation of the ECJ – imposes on the application of the law of the host state do not apply when host state law is applicable to the contract by virtue of Article 8 Rome I.

2) Labour protection is often organized through statutes having an independent scope of application in international cases. This statement is especially relevant for common law jurisdiction such as the UK in the previous study and IE in the current study. But also in other states specific protection can be limited in scope to work performed within the territory. We identified several provisions containing such spatial limitation, for example in the law of LV as regards the protection of specific groups under Article 3(1)(f), in EL as regards working time provisions and in BG and HU as regards specific aspects of health and safety regulation (Article 3(1)(e)).[369] In the previous study health and safety was already identified as being territorially restricted in for example Germany and the Netherlands. An important conclusion to be drawn from this, is that the implementation of the PWD in the law of the Member States has harmonized the application of overriding mandatory provisions of the host state, but has not done the same as regards the application of the mandatory protection of the law of the sending state. In particular, under the current interpretation of the interaction between the PWD and the Rome I Regulation, there is no guarantee that a worker will always be protected by at least one system of law – be it that of the host state, the country of habitual place of work or the country of establishment of the employer. The problem that the statutory protection of the sending state may not – or only to a limited extent – apply to work performed outside the territory, is not a problem caused

[368] When the worker habitually works in more than one Member State, but has his center of activities in one of them, the law of the latter State applies. The term 'working from' does not refer to the country of origin of the employer. See for more details Section 2.2.
[369] See Sections 3.5 and 3.6 respectively.

by the PWD.[370] However, the PWD does enhance the risk of creating legal lacunae by limiting the competence of the host state to offer (alternative) protection. The danger of lacunae is most urgent when the worker does not have a relevant connection with the country of establishment of the service provider. This again underlines the importance of ensuring a real link to the sending state in all cases of posting under the PWD.

Hence, we recommend a clarification of the relationship between the Rome I Regulation and the PWD and an interpretation of the concept of posting in the PWD in the light of the Rome I Regulation (*recommendation 1*). Moreover, attention is drawn to the responsibility of the sending state in offering adequate protection to posted workers (*recommendation 2*).

## The PWD and the different systems of standard setting in labour law – problems caused by Article 3(8) and the ECJ case law

### Collective labour agreements and the PWD

Under Article 3(1), host states shall ensure posted workers the terms and conditions of employment covering the matters mentioned there which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8 insofar as they concern the activities referred to in the Annex.

Paragraph 8 specifically allows the Member States to refer to non-extended collective agreements, under the conditions mentioned therein. This provision was included in the Directive inter alia to allay Denmark's fears that the directive would not be able to accommodate their autonomous system of standard setting.[371]

Article 3(8) stipulates:
'Collective agreements or arbitration awards which have been declared universally applicable` means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

[370] Currently there is no ECJ case law on the question whether such territorial restrictions would be compatible with Article 8 of the Rome I Regulation. See on the scope of protection of UK statutes Supreme Court UK – pending case no UKSC 2010/0154, Ravat v. Halliburton and House of Lords Lawson v. Serco [2006] UKHL 3
http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060126/serco-1.htm.
[371] Compare Kerstin Ahlberg, The Age of innocence – and beyond, Formula Working paper no. 21, 2010 p. 6.

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

Since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection, might be seen as being in conflict with the Directive in combination with the Treaty provisions on free movement of services. This is caused in part by the wording of Article 3(8) and partly by the interpretation of the Directive and Treaty by the ECJ. The result is that the Directive seems to be more apt at accommodating the systems in which collective agreements are comparable to delegated legislation, such as the French /Belgium/Luxembourg/German/Dutch systems of generally applicable CLAs than at accommodating autonomous systems such as the UK/SW/DK.[372]

However, in the current study no major problems are reported which are directly linked to this legistic bias of the PWD. On the contrary, LV reports on the problems experienced by undertakings in that country when posting workers to the Scandinavian countries which are linked to the Scandinavian system of standard-setting.

The absence of reported problems can be explained by a variety of reasons, all linked to the specific situation in states covered by this study. An important factor is high prevalence of procedures for extension of collective agreements in combination with the low relevance of sector agreements in many of the countries studied.[373] In AT, CY and IE collective agreements at sectoral level are the main source of rights and obligations of workers and employers. In contrast, collective agreements only seem to play a minor role in countries such as HU and LV. On the whole, and due to historic reasons, the MEE countries report a lower impact of collective agreements than the old Member States.

In all of the MEE countries covered by this study a system of extensions is provide for by the national legislation. The same is true for PT and EL. AT also has a system for extension, but this is hardly ever used. In this case, the main reason is that due to a

[372] See also Swiatkowski, Polish response to the European development, Formula Working paper no 18, 2010, p. 34 and 42.

[373] Other explanations include the predominance of the sending state perspective amongst the Member States covered and the relatively low awareness as to posting in some MS.

system of compulsory membership of all undertakings in the central employers' organisation that is party to almost all sector agreements, collective agreements tend to have general applicability anyhow.

Of the systems from the common law and Scandinavian traditions, only CY is purely voluntaristic. Collective agreements are not legally binding and there is no system for making collective agreements generally applicable. The other systems within these families (MT, IE, FI) all have a system of extension of collective agreements (FI, IE) and/or a system of setting minimum wages through bipartite or tripartite bodies (MT, IE).[374]

Yet, some potential areas of conflict can be identified in the current set of data which correspond to a large extent with the problem points identified in the previous study. When the requirements of Article 3(8) in combination with the case law of the ECJ are compared to practice in the Member States, certain discrepancies are revealed.

- The provision seems to permit recourse to non-extended collective agreements only in case a Member State does not have a system for declaring collective agreements to be generally binding. If a system exists but is not (often) used in practice, recourse to agreements entered into by the most representative organizations and/or agreements that are generally applied might be problematic. In the previous study we noticed this requirement to be problematic for Germany and possible Italy. No similar problems were identified in the current study, though AT has two systems that both lead to 'collective agreements or arbitration awards which have been declared universally applicable' in the meaning of Article 3(8).
- The collective agreements entered into by the most representative organizations must have national coverage, excluding the referral to generally applied regional and/or local agreements. However, CLAs with a more limited, local reach may be used when these are generally applicable. Depending on the exact interpretation of these terms, this restriction was deemed to affect inter alia the systems in Germany and Denmark. Due to an absence of non-national CLAs, this problem seems to be irrelevant in the Member States covered by this study.
- The ECJ lays great weight on transparency, which entails that the employer should be able to discover in advance what his obligations are with respect to collective agreements (probably even before tendering for the contract). In the previous study we remarked that this requirement rules out bargaining at company level, as is/was usual with regard to wages in Denmark and Sweden. This particular problem, linked to the layered system of collective negotiations in those countries, is not reported in the current study. However, transparency was mentioned by the Latvian expert as a potential problem with the LV system of extension. Here the problem mainly pertains to the accessibility of the relevant agreements.
- The ECJ seems to demand that the Member States explicitly base themselves on Article 3(8). In this study, Cyprus and Finland have made use of the possibility opened up by Article 3(8). However, it is unclear whether they actually fulfil the requirements of the ECJ.But also the FI method of referring to 'usual and reasonable wages' in case there is no extended collective agreement is questionable in this respect.

[374] The situation in IE as regards the system of collective negotiations is problematic, but this seems to be linked to economic reasons and constitutional objections, rather than to problems caused by EU law.

- The application of a non-extended collective agreement is subject to the requirement of equal treatment. In the previous study this requirement was deemed problematic as to the implementation of the PWD in Italy.

Thus we can uphold the conclusion drawn in the previous study that several countries experience difficulties in their attempts to reconcile the PWD and internal market case law with their system of establishing labour standards. The "erga omnes" approach as well as the conditions laid down in Article 3(8) have given rise to difficulties not only in Sweden and Denmark, with their tradition of autonomous standard setting, but also in Germany and Italy and even the UK (in sectors such as the construction industry where relatively strong trade unions still exist). In the current study we identified potential problems as regards the implementation and application of Article 3(8) of the PWD in particular in Cyprus and Finland.

The impact of the ECJ cases can be mitigated by measures at the national level with regard to the problems identified above (*see recommendation 3*). However, national action can not eliminate all the reported problems and uncertainties. Accordingly there is a wide array of literature and policy documents in which proposals are made to alter the text of Article 3(8) PWD. All together these documents reveal a clear lack of consensus among the Member States as well as among the different stakeholders as regards both the identification of the problems to be addressed and their preferred remedy.[375]

**Other mechanisms for standard setting**

The overview of standard setting mechanism reveals other problems as to the compatibility of those mechanisms with EU law. This is due to the Laval and Rüffert judgments in which the ECJ extended the effect of the PWD beyond the methods of standard setting covered by Article 3(8). These judgments call into question the legitimacy of several practices which exist in the Member States. In the previous report we reported on the use of the Swedish codetermination act to induce respect for CLAs in case of subcontracting. Also collective agreements are used to regulate the working conditions in the subcontracting chain. Likewise, collective agreements may regulate outsourcing and the hiring in of temporary agency workers by the companies bound by the CLA. In the previous report this method was found to be of importance in the UK and Italy. In the current study it is reported as being used in FI[376] and CY. IE, FI and MT specifically mentioned the relevance of fair competition in public procurement and the efforts made to include an effective check on employment and labour conditions in the procurement procedure.

The ECJ has consistently held - in the context of the interpretation of Article 3(7) PWD - that employers may voluntarily agree to provide their workers with better pro-

[375] See in this respect also the Report on joint work of the European Social Partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases. http://www.etuc.org/IMG/pdf_Joint_report_ECJ_rulings_FINAL_logos_19.03.10.pdf (2010-05-15).

[376] See the wet lease case of the Finnish Labour Court 2009, described above: Työtuomioistuin TT:2009-90 (Ään.). The court considered a duty to apply the (entire) collective agreement in violation of EU-law when imposed on foreign subcontractors.

tection than that offered by the PWD.[377] In case of subcontracting and outsourcing, the basic commitment to abide by the collective agreement is entered into by the main contractor (or service recipient/contracting party). This commitment may be assessed as voluntary. It is currently unclear, however, how the ECJ would evaluate the position of the subcontractors/service providers who are confronted by a contractual demand to abide by the collective agreement entered into by their contract partner. This uncertainty also affects the position of the unions as regards their right to strike in support of such demands.

The case law of the ECJ in the Laval quartet has created legal uncertainty with regard to both the position of the unions/the right to take industrial action and the conformity with EU-law of social clauses in (public and private) procurement. In the previous report we recommended that this uncertainty be remedied by action at EU level. We repeat this recommendation here (*Recommendation 4 and 5*).

**The EU and the position of the unions**

Regarding the position of the unions and the right to take collective action, in some national reports submitted under the previous study it was observed that the threat of an action for damages by employers which could ultimately even bankrupt trade unions, makes unions more cautious in exercising their right to strike in situations with a cross-border element.[378] This consequence of the Viking and Laval judgments has been criticized by the ILO Committee of Experts on the Application of Conventions and Recommendations.[379] Currently, the Member States have widely divergent rules on liability of unions and damages awarded in collective action cases. However, the rules on liability for breach of EU law are not entirely at the discretion of the Member States. In the light of this we recommend that a solution to the problems which are caused by the level of damages should be found at EU level, too.

As far as the right to strike itself is concerned, it remains to be seen if and how the line of reasoning in Viking and Laval fits with recent case law of the European Court of Human Rights on the freedom of association laid down in Article 11 of the European Convention on Human Rights.[380] Finally, it is not clear how the Viking and La-

[377] Rüffert para 34 reads: "Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a *commitment made to their own posted staff (emphasis added)*, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81).

[378] As reported in the UK in relation to the so-called BALPA-case (see T. Novitz, Formula paper September 2010), and in Sweden in relation to the final judgment in the Laval case of the Swedish Labour Court on 2 December 2009. See http://www.eurofound.europa.eu/eiro/2010/01/articles/se1001019i.htm .The main issue was under which conditions a trade union shall be liable for damages.

[379] See Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), ilolex nr 062010GBR087.

[380] Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008, Enerji Yapi-Yol Sen v Turkey, Application No 68959/01, 21 April 2009 and Danilenkov and others v Russia, Application No 67336/01, 30 June 2009. An interference with the freedom of association according to Article 11

val judgments must be read in the light of the recent ratification of the Lisbon Treaty which confers a binding power on the Charter of Fundamental Rights. This reinforces the status of social fundamental rights in the EU, including the "right to collective bargaining and action" (Article 28). The fundamental rights status of the right to collective bargaining and collective action is also reflected by the fact that several Member States have indicated that their collective labour law provisions are part of public policy in the meaning of Article 3(10).[381]

In short, the case law of the ECJ in the 'Laval Quartet' raises questions with regard to the commitment to fundamental rights undertaken by the EU itself and its Member States. However, it should not be left to future litigation to resolve these queries, as unions can simply not afford to 'get it wrong' and thereby risk the payment of damages.

When dealing with this issue, it should be kept in mind that the position of the unions and the safeguarding of the right to strike may also play a role in the interpretation of Article 3(7) especially as regards the possibility for posted workers to negotiate with their employer on their employment conditions during the posting. Moreover, Article 5 orders the Member States to 'ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.' Action taken by the unions could be one of those procedures. We advise to clarify the distinction between the different types of union activity in a legislative instrument (*recommendation 4).*

**The EU and social clauses**

Regarding the issue of social clauses in procurement contracts, a similar mix of problems arises. In its Rüffert judgment the ECJ did not discuss the specific public procurement aspects of the case, such as the impact of the Public Procurement Directive 2004/18, in particular Article 27, and ILO Convention No. 94 (C94).[382] Thus, the relation between these instruments and the PWD (and Article 56 TFEU) is obscure and merits further investigation and clarification.[383] This is all the more true as several

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ECHR may be justified if 'prescribed by law', pursued by one or more legitimate aims and if 'necessary in a democratic society' for the achievement of those aims. As Malmberg notices: "…the justification according to Article 11 asks whether the interference with the trade union rights could be justified. In Laval and Viking the question is put the other way around:could the restriction of the economic freedoms be justified? See J. Malmberg, The impact of the ECJ Judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action, Study requested by the European Parliament's Committee on Employment and Social Affairs, IP/A/EMPL/ST/2009-11 MAY 2010, PE 440.275, p. 11.

[381] See section 3.6 'Extension of the protection under 3(10) – public policy'

[382] The fact that Germany has not ratified C94 may be the reason why neither the Advocate General in his Opinion nor the ECJ discussed the Convention. It must be noted that the referring national judge also didn't include public procurement law in his preliminary questions.

[383] Compare Niklas Bruun, Scope of Action from a Scandinavian (Nordic) Angle, presentation given at "The Impact of Case-Law of the European Court of Justice upon the Labour Law of the Member States - Scope of Action from a Scandinavian (Nordic) Angle" Symposium organized by the German Federal Ministry of Labour and Social Affairs, Berlin 26.6.2008 http://www.bmas.de/portal/26966/property=pdf/2008__07__16__symposium__eugh__bruun.pdf

Member States ratified C94 before their accession to the E(E)C.[384] According to Article 351 TFEU (ex 307 EC); public international law obligations undertaken by a Member State before acceding to the EU shall not be affected by the EU Treaties. However, to the extent that such agreements are not compatible with the Treaties, the Member State concerned shall take all appropriate steps to eliminate the incompatibilities established. This may result in the obligation of the Member States to denounce those treaty obligations, as has been done in the case of ILO Conventions prohibiting night work for women. According to the ECJ in Commission v Austria this obligation to denounce a Convention only exists if the incompatibility between the Convention and EU law has been sufficiently clearly established.[385] At the moment, it is not established that Convention No. 94 is incompatible with EU law and therefore must be denounced by the Member States that have ratified it.[386]

The issue of social clauses, again, has an overlap with Article 3(7) PWD. State authorities involved in public procurement do not act in their capacity as legislators, but rather as contractual counterparts. Social clauses are an integral part of 'corporate' social responsibility. In this regard, the Rüffert case does not only call into question the ability of state authorities to adhere to social standards in their contracting practice, but may also affect the possibility of private parties (including social partners) to do so. Such practices of corporate social responsibility occur in different varieties in the Member States. This aspect, in our opinion, also merits a rethinking (and a clarification) of the application of the PWD to social clauses (*recommendation 5*).

[384] Ratified *before joining the E(E)C* by Belgium (1952), Denmark (1955), Finland (1951), France (1951), Italy (1952), Netherlands (1952), Spain (1971), Austria (1951) and the United Kingdom (1950). The UK denounced ILO Convention No. 94 in 1982. Among the new Member States, Bulgaria (1955) and Cyprus (1960) have ratified the Convention. Also Norway, Member State of the EEA agreement, has ratified the Convention.

[385] ECJ 30.3.2004, Case C-203/03 Commission v. Austria [2005] ECR, I-935, para.62.

[386] .See on social clauses in public procurement also the reasoned opinion of the EFTA Surveyance Authority against Norway 29 June 2011, http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/1480. The next possibility of denunciation is 20 September 2012. If this deadline passes without denunciations then the Member States remain bound to ILO Convention No. 94 until 20 September 2023. See in more detail: Niklas Bruun, Antoine Jacobs, and Marlene Schmidt, ILO Convention No. 94 in the aftermath of the Rüffert case. Transfer: European Review of Labour and Research November 2010 16: 473-488

## 5.3. DETAILED REVIEW OF THE PWD'S IMPLEMENTATION AND APPLICATION

### The concept of posting

The Directive aims to coordinate the laws of the Member States by laying down clearly defined rules for minimum protection of the host state which are to be observed by employers who temporarily post workers to perform services on their territory. For this type of services the PWD - as interpreted in the light of the ECJ case law – creates a legal framework in which the labour protection of the host country is deemed to apply, but only to a limited extent. Hence, according to the authors of this study, the category of posted workers form a middle ground between mobile workers who are temporarily present in the territory of another Member State but are not covered by its laws[387] and mobile workers who are deemed to have become part of the labour force of the host state and hence are covered by its laws in their entirety.

The Directive contains criteria for distinguishing postings from other types of labour mobility. These relate to the establishment of the employer, the performance of a cross-border service, the context in which the posting takes place and the temporary character of the posting as such. These criteria cause problems of both interpretation and delineation. In order to avoid such problems several Member States have chosen not to include the personal scope criteria used in the PWD in their implementing statutes, but to apply instead the relevant[388] standards of labour law and labour protection to anyone working within the territory (or similar criteria). In the previous study we found this to be true in B, NL and the UK; in the current study, IE provides an example of this policy. A clear disadvantage of the latter method of implementation is that it may lead to over-application of the implementation measure. It might be applied in cases in which application of host state law is ineffective and/or disproportionate but also in cases in which full (rather than limited) application of host state law would be warranted. A proper implementation of the scope of application of the PWD into national law may prevent this – see *recommendation 6*.

From the material gathered in the previous report – inter alia in the analysis of cases that have attracted media attention[389] – we concluded that a clear and enforceable definitions of posting and posted worker may also help to avoid 'creative use' of the freedoms in which the provision of services is used to avoid (full) application of the host state's law. Controversial cases include the setting up of letter box companies which then hire workers specifically to 'post' them to other Member States and incidences of consecutive 'postings' of a single worker to a single Member State by different 'employers' in different Member States.

[387] E.g. a worker employed in a Member State attending a seminar or training in another Member State.
[388] The PWD contains a list of standards which are relevant in this respect, but some Member States extend the protection beyond the fields of protection enumerated in the directive. For example, IE applies all of its statutory protection to posted workers.
[389] See previous study, section 3.5 and the current study, section 3.4 and Annex.

The use of letter box companies is a more general problem as regards the freedom to provide services (see e.g. in art 4(5) of the Services directive 2006/123/EC) and can be countered by clear requirements as to the activities in the home state as well as the temporary character of the service provision. However, most of the states covered by the current study have not included such requirements in their national law. In the previous study only a few (most notable LU and FR) had done so. A similar lack of practical implementation can be found as to the definition of posted worker in Article 2 PWD. Consecutive and rotational posting of workers can – to some extent – be prevented by stricter checks on the absence or presence of a country in which the work is normally performed (as required under Article 2 PWD). However, of the 27 Member States covered by the two studies, not one had any specific rules on the interpretation and application of this criterion.[390] To the contrary, some states, such as MT only require the workers to normally work *outside the host* state, without requiring any relevant link of the worker to the state in which the employer is established. As is demonstrated inter alia in section 3.3, checks do exist as to the status of the posted worker on the labour market of the sending state and/or the length of previous employment, but those are invariably linked to migration law and only apply to third country national and/or third county postings. Finally, as to the temporary nature of the posting, hardly any specifications were found in the Member States covered by the current study either. In SK informal reference was made to the 1 to 2 year limit in social security. In AT and PT it was left to the courts to decide on the basis of the concept used in the Rome I Regulation.

To fight abuse of the free provision of services, we recommend further implementation of the requirements with regard to both the establishment of the posting employer in the sending state and the link of the employment contract to the sending state. We are fully aware that the Member States are not entirely free to implement the requirements in their national laws. The concepts used are based on European law and should be interpreted autonomously. Moreover, extra requirements put in place by national authorities invariably will cause obstacles to the free provision of services which must be justified under the EU rules. Hence, it would be preferable if working definitions of the main concepts used in the Directive could be developed at EU level. A set of recommendations are formulated to accomplish this: see *recommendation 7, 8 and 9*. In absence of and awaiting EU action, the national enforcement authorities should reach agreement as to the criteria used to determine the status of the posted worker under the Directive: *recommendation 10*.

**Specific problems with regard the definition of posting**

*A transnational provision of services*: The PWD must be situated in the context of the free provision of services as protected by Article 56 TFEU. However, not all national implementation measures restrict their application to cases in which a cross-border service is provided by the employer to a service recipient in another Member State. A case in point, which raises discussion in several Member States, is the trainee who is sent abroad as part of his or her training program. Other situations in which the service provision might not be present include intra-company transfers and postings

[390] France has a provision which excludes employees hired in France from the scope of application of their implementing rules. L 1262/3, see Section 3.2, p. 32 and p. 46 of the first report.

without underlying service contract. The latter group was not identified as such in the current study, but did feature in the first study in which mention was made (inter alia by the FR legislator) of film crews which might work in the host state without performing services for third parties.

*Three party arrangements*: With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and a recipient of the service in the host state.[391] A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider.[392]

It is advisable to clarify and if necessary amend the requirements of a service provision and a service contract between the employer and the recipient of the service in order to fit the purpose of the Directive. In the absence of a solution at EU level, a further clarification by the Member States would be welcomed. See *recommendations 11 and 12*.

**Problems with regard to specific sectors: transport**

Several member states (HU, SK, CZ) have a tradition of treating transport workers as a separate category for private international law purposes. The contract of transport workers was traditionally submitted to the law of the place of establishment of the employer (road) and/or the country of registration of the means of transportation (ship/air). Hence the place of work was not a relevant factor for determining the applicable law. Though these rules are currently superseded by the Rome I Regulation and the interpretation thereof by the ECJ in the Koelzsch case (C-29/10), this tradition may still affect the application of the PWD-protection in those states. Moreover, for lack of a habitual place of work, the mobility of transport workers may not qualify as posting under domestic law and/or the implementation measure. This is the case – to some extent at least – in AT, HU, SI and PT.

The national reports contain very little information as to the practical application of the PWD to transport – an absence of practical cases is seen as the main explanation for this. Only the AT expert confirms the finding in the previous report that the PWD will most likely be applied to cabotage activities, but not to transit and first deliveries. The latter activities are not deemed to fulfil the requirement under the AVRAG (the national implementation of the PWD) that the posted worker should perform 'continued employment activities' in AT.

These findings underscore the relevance of a separate implementation of the PWD for transport workers, as was recommended in the first study. Though the Directive does apply to transport workers (with the exception of seagoing personnel of the merchant navy), the system of the Directive is ill fitted to deal with workers who do not work *in* a specific country but rather *from* a specific country. It seems advisable to formulate a

[391] Explicitly required in Art 1(3)a, and implicit as regards Art 1(3)c postings.
[392] The Swedish expert discussed the position of the driver in international transport performing a cabotage activity in a situation where a forwarding agent has entered into the contract of cabotage. The German expert mentioned the situation of double posting in which is worker is posted domestically to a user company which then posts the worker to another Member State.

sub-rule for applying the PWD to transport workers. In absence of and awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application and enforcement of the PWD to this sector. See *recommendation 13*.

## The regulation of posting from the state of implementation.

The PWD primarily addresses the Member States in their role as host state. Several member states have, however, included provisions on posting from their territory in their implementing laws. Such is still the case in BG, HU, LV, LT, PT, SK and ES – and was until recently the case in CZ.[393] AT (amongst others) has not done so. The AT report explicitly states that application of the standards of the host state must be achieved through Article 9 of the Rome I Regulation. Under paragraph 3 of this Article "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." There is little case law on the interpretation of this provision and none coming from the EC J.[394] Hence we do not know whether disrespect for the rules on minimum protection which apply to posted workers, would 'render the performance of the contract unlawful' in the meaning of this provision.[395] Moreover, under Article 9 Rome I Regulation the courts of the Member State are allowed, and not obliged, to give effect to the rules of the host state. When the duty to apply host state law to posted workers is not implemented in the law of the sending state, such a duty could only arise from the Directive itself.[396]

Hence, the implementation in the law of the sending state and/or at EU level of a duty to respect the host state core protection standards may further the effective enforcement of the rights conveyed by the Directive – *see recommendation 14 new*). However, care should be taken as to the exact formulation of the implementing provision. As demonstrated by the overview two risks attach to such clauses:

1) The provision might cause confusion as to the applicability of the law of the sending state as law applicable to the contract of employment. This risk was commented upon in the SK report. When implementing the PWD for postings from their territory, the Member States should respect the 'more favourable right' provision of Article 3(7) first indent.
2) The provision might contradict the relevant rules in the host state. An example of this can be found in BG law, which grants protection under host state law for postings lasting longer than 30 days. This short term exemption is deemed to be an implemen-

[393] Laws of other states, e.g. SI contain substantive protection of posted worker posted from their territory/under their laws, but no rules based on the private international law effect of the PWD.
[394] The text differs from the corresponding text in Article 7 of the Rome Convention.
[395] In some countries not all elements of protection of the PWD were considered to be overriding mandatory provisions in the meaning of the Rome Convention/Rome I Regulation. This complication will not be dealt with here, but poses another argument for specific implementation of a duty to respect host state law directed at the courts of the sending states.
[396] And the duty of conform interpretation this imposes.

tation of Article 3(3) PWD. However, Article 3(3) is directed at the host states: these may introduce a short term exemption in their law, but may also (and often do) refrain from doing so. The sending state should respect the position of the host state on this issue and not overrule the provisions of the latter. In the example of posting from BG, the relevant host state law may not contain a 30 days exemption and claim application from the first day of posting. The CZ expert reported exactly this complication as the reason for abrogation of a similar provision in CZ law. However, rather than not providing for protection to workers posted from their territory, states can avoid any conflicts by simply recognizing the protection offered by the host state, without imposing unilateral requirements.

## Transitional regime and third country postings

Several 'old' Member States (EU15) applied or still apply a transitional regime in regard to the free movement of workers from eight of the ten new Member States in 2004 (EU8) and of the two other new Member States (Romania and Bulgaria, EU2) which acceded in 2007. Only Germany and Austria also negotiated the possibility of imposing restrictions to the free movement of services insofar as these involved cross-border posting of workers. A study of the transitional regime was included in the first study for several reasons:

- The actions taken by the Member States during this period may provide information as to the areas which are deemed problematic in respect of labour mobility within Europe.
- In countries that allow the free provision of services (Article 56 TFEU) but not the free movement of workers (Article 45 TFEU), the transitional regime sheds light on where the Member States draw the line between the two freedoms, and thus on the distinction between a 'posted worker' and a migrant EU worker, using Article 45 TFEU.

In the current study, which complements the previous one, the questions on the transitional regime were maintained. However, as the first study mainly covered host states and the current study predominantly sending states, the information retrieved is quite different. In several host states the lifting of the transitional measures was heavily debated and made dependent on the introduction of specific measures to counter the effect of migration and posting of workers. This effect was not found in sending states. However, also sending states have measures as regards third country postings. These regimes will also – to some extent - provide information on the topics mentioned above. Hence, we discussed both in chapter 3.4 of the study.

The transitional regime permitted Member States to treat workers from the designated new states as third-country nationals. This basically means that those workers needed (and in some instances still need) permits before being permitted to enter the labour market of the host state. The permit requirement in turn made it possible for the host state to impose further requirements, for example with regard to housing and/or employment conditions, in conformity with their migration law regimes governing foreign labour from outside the EU. These requirements address concerns which also arise in regard to mobility outside the transitional period.

In Belgium and the Netherlands the transitional period offered political and legal opportunities to address the problems associated with posting of workers and/or migration more systematically. In the current set of countries the transitional period has not led to such debates and law reforms. The Irish report rather refers to two specific cases as the major incentives for law reform.[397]

In countries which imposed a transitional period for free movement of workers from the new Member States, it was often suggested that this would create an incentive for workers to 'switch' to other channels for labour migration to the old Member States, such as through the free movement of services (as a posted worker or as 'posted' self-employed or through the freedom of establishment (as self-employed). To different degrees, the national reports do indeed mention suspected or demonstrated shifts in migration modalities from regular labour migration to undeclared work, true or bogus self-employment and posting of workers.[398]

In the previous study, a particularly problematic point concerned the status of workers from the EU8 /EU2 countries who are posted to EU15 Member States by TWAs. This controversy was meanwhile decided upon by the ECJ in its judgment of 10 February 2011.[399] The special status of posting through TWAs is mirrored in the rules on third country posting and immigration of IE and SI. In IE third country TWA workers are not granted work permits. In SI posting through third country TWA's is only possible using the extended procedure for migrant workers.

In the previous report we reported on the fact that several countries have adopted a sectoral approach to the transitional regime, only imposing it in specific sectors (e.g. the restrictions on posting of workers in Germany) or lifting parts of it in some sectors while retaining it in others (Belgium/France/Italy/the Netherlands). Due to fact that the current study covers mainly sending states, often themselves subject to the transitional regime, the national reports do not provide much information in this respect. Of the host states covered by the study, only AT imposed sectoral restrictions on the free provision of services against the EU-8 and EU-2.

In Austria, also the immigration rules for third country employment have a sectoral element: the lighter procedure for third country postings (as opposed to migration) does not apply to postings in the construction sector. Such specific procedures for third country postings exist not only in AT, but also in BG, CY, EL, HU, SK, SI, ES. These special regimes differ widely in scope, from very restricted in HU to quite extensive in SI. Several of the requirements for applying a special procedure for third country postings also figure in the debate on posting within the EU/EEA. We mention here the possibility to impose a time limit to posting, the requirement that the posting should be for a specific task, the distinction between provision of services and intra-company transfers, the problematic position of provision of manpower and the payment of the costs of expatriation. The experience with these requirements in third country posting might be used as information and inspiration in the discussion on EU/EEA posting.

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[397] See section 3.4.

[398] In the previous report such shifts were reported from Romania, the Netherlands, Denmark, Italy, France. In the current study, BG, HU and IE address this issue.

[399] C-307-309/09, Vicoplus, not yet reported.

## Overview of contentious cases

In their reports the national experts have given an overview of contentious cases, both in court and in the media. There were three main aims to this exercise:

- To identify trends as to the countries and sectors in which problems are reported.
- To identify whether the contentious cases concern aspects of posting or rather other forms of labour mobility.
- To identify general trends as to the application and enforcement of the PWD.

Host states were specifically asked for cases on workers posted to their country, sending states were asked to focus on problems reported in the context of posting from their country.

Annex I contains a full list of cases reported in the media, with references. Annex II contains a list of court cases related to the posting of workers.

In the first report we concluded that presence of cases both in the media and in courts seemed to depend on the position of the Member State as regards posting of workers. Predominantly sending states with low average wage levels encounter other problems than predominantly receiving states with high wage levels. This finding is confirmed in the current report. A geographical element is added, however: Greece, Malta, Cyprus and Ireland do not have other EU countries at their direct borders, which gives them a more isolated position as to posting. Little to no cases and low interest in the general public were also reported from BG, CZ, EL, MT, PT, SK, SI and ES.

However it is interesting to note that also some of the predominantly sending states are reporting problems in their role as receiving states. Cases were reported from LT as regards posting from Sweden and Latvia, from Greece in relation to CY, CY to EL and HU to EL. Partly due to these incidents, the awareness of the countries studied with regard to the problem of posting seems to be rising. The fact remains, however, that in several countries the issue of cross-border posting is low on the agenda.

In the previous report three sectors stand out as far as the incidence of cases is concerned: TWA's, construction and transport by road.[400] The findings in the current study are less conclusive. The small number of cases identified in the national reports might play a role in this. The constant factor is the construction sector, which figures in the national reports of AT. HU, IE, LT and LV. Other sectors are mentioned only on an incidental basis.

It is worth mentioning that subcontracting is reported as problematic in several reports (AT, FI). IE specifically refers to the fact that compliance with labour standards is problematic with regard to public service contracts.

The overview of cases confirms the finding in the previous report that in practice posting is not distinguished sharply from other types of mobility. Problems may relate to irregular work, fake self-employment and underpayment rather than specifically to

[400] Other sectors mentioned in the first study were agriculture health services, shrimp peeling and cleaning as well as meat cutting and other food processing industries.

postings.[401] For those cases that are related to posting, the specific type of posting (under a service contract, intercompany transfer or the provision of manpower) can't always be identified. Among those that do specify the type, the posting under a service contract is predominant,[402] but in both the CY and the IE reports the posting cases reported were related to inter-company transfers rather than the provision of services under a cross border service contract. Provision of manpower rarely figured as such.[403] The only FI case reported regarded a wet lease contract in civil aviation which was considered by the unions to be a type of subcontracting.

The overview of cases in this study also confirms the findings in the previous study as to the problems encountered in effective enforcement. The workers themselves may lack the incentive to enforce when their wages are below the minimum of the host state, but acceptable according to the standards of the sending state.[404] But they may also face practical difficulties when trying to enforce their rights. Involvement of the unions is important, both from the point of enforcement and from the point of public awareness.[405] Public enforcement, however, plays a large role in the identification of the problems related to posting in the current study. Cases are triggered by tax law (LT), social security (HU) or special funds with independent enforcement authority (BUAK in AT). The role of the public authorities is not always perceived as positive, though: they are also identified as causing problems for the posting employers.[406]

## Issues related to the substantive scope of the PWD

The Directive contains a list of areas of protection establishing the 'hard nucleus' of protection for which Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment laid down in their laws and generally binding collective agreements. Under the current interpretation of the Directive by the ECJ the host state may only impose protection in other areas if the state can justify that on the grounds of public policy. The exhaustive character which is thus afforded to the Directive focuses attention on the limits of the concepts used therein. In this part of the study we focus on the interpretation of these concepts besides identifying the problems arising in the application of the specific types of protection.

## Wages and working time

The rules on wages are identified by most experts as of paramount importance, besides safety and health and, to a lesser degree, working time and holidays. They can be regarded as the 'hard nucleus of the hard nucleus' of protection. In other words, the hardest core within the hard core of rights. However, the interpretation of the concept itself is uncertain and its application in practice is fraught with difficulties.

[401] AT, FI, IE, LT, HU.
[402] Mentioned in the reports on AT, LT, HU, LV, SI
[403] Only in LT/PT.
[404] Reported by AT/IE/LV.
[405] CY, IE.
[406] E.g. the Soko Bunda case in HU, see also SI.

The Directive delegates the definition of the concept minimum rates of pay to the Member States. Moreover, the Directive specifically allows the Member States to use universally applicable collective agreements as a means to establish minimum protection in the areas covered by the PWD. However, the PWD does not provide a clear answer to the question of whether the host state can only impose a single minimum wage (flat rate) or rather a set of rules determining the minimum rate of pay in the individual case (wage structure / job ladder).These two pay levels may differ considerably. Hence, if the PWD is to create a level playing field, the application of the entire wage structure is of paramount importance. It should be absolutely clear that such is allowed under the PWD: See *recommendation 15*.

Apart from this discussion of the concept of 'minimum', it should be noted that the concept of 'rates of pay' is also far from clear. Which labour condition should or should not be taken into consideration when determining the minimum rates of pay? Moreover, there is much confusion about the standards to be used for comparing the wages actually paid to the minimum prescribed by the host state. A related (but not identical) problem of comparison is raised by the possibility that the worker may rely on better protection offered by the law of the sending state as provided for by Article 3(7). Whereas the Member States could be more specific in identifying the different elements of 'pay' under Article 3(1)(c) (*recommendation 17 new*), guidance at EU level is needed with regard to the method of comparison between the minimum rates of pay of the host state and the level of pay actually received and/or the protection of the host states as compared with the protection of the sending state (*recommendation 18*).

Problems identified in the two reports concern inter alia:

- Contributions to funds;
- The possibility to combine levels of protection, in particular with regard to overtime rates;
- Comparability and exchangeability of special benefits;
- Special payments related to the posting and the distinction between pay and reimbursements of costs; this issue was particularly pertinent in the current study as several of the member states involved have a statutory duty to pay expenses and per diem allowances in the case of business trips.[407]
- Complications caused by taxes and premiums (the gross/net problem);
- Withholding of costs from the wages due to the worker

A separate problem with regard as regards pay levels concerns the relation between the wages paid and the number of hours worked. This problem is partly caused by the rules on minimum wages in the Member States themselves. If minimum rates are fixed by the hour, the number of hours worked directly impacts on the wages paid at the end of the day, week or month. On the other hand, monthly wage rates may result in very different effective hourly wage costs, depending on the number of hours worked. Hence, Member States are encouraged to introduce an hourly minimum wage when this is not already in their legislation (*recommendation 16*).[408]

[407] See the special paragraph on per diems in section 3.5.
[408] See also section 3.5 working time and holidays.

However, with regard to effective hourly wage costs, the larger problem seems to be the (national) supervision and enforcement of working time provisions. This also holds with regard to the right to paid holidays. Although officially part of the hard nucleus, this right is barely relevant in practice. Only when the right to paid holidays is effectuated through a special holiday fund do the right itself and its enforcement take on practical relevance.

## Health and Safety

The European health and safety regime is based on Framework Directive 89/391/EEC[409] and consists of several ingredients amongst which safety requirements with regard to the workplace, to equipment and to personal protection but also rules with regard to risk assessment and prevention policies. In this study we focused on questions which specifically relate to the application of these rules to cross-border postings. These pertained to:

- The scope of application of the H&S regulations both as regards the host states and the sending states.
- The complex structure of H&S regulation, which may lead to a varied interpretation of the reach of Article 3(1)(e) of the directive.
- Specific national requirements which may lead to problems of mutual recognition, in particular training requirements and health checks.

In the questionnaire the host states focused on the application of H&S provisions to workers posted to their country, whereas the sending states mainly discussed the extraterritorial effect (or not) of their own regulations. The host states all apply their H&S provisions *to* postings to their country. But most of the sending states covered by this study likewise apply their laws to posting *from* their country. This leads to an unexpected degree of overlap in protection. However, there is not much information on how this extraterritorial application of the health and safety regulations is implemented in practice.

Since this study mainly covers sending states, it provides little information as to the exact application of H&S provisions in case of posting *to* the MS. However, the information given supports the conclusions of the earlier report. Hence we repeat the recommendation as to the clarification of the notion of safety and health and the relationship with other systems of protection (e.g. social security) in *recommendation 19*.

Problems might arise in particular as regards

- The application of organizational requirements in case of posting (HU, BG).
- Sick pay (AT, MT), liability for accidents at work and occupational diseases (PT) and compulsory insurances (SK, PT, AT) might cause problems, not in the least because of the overlap of these issues with social security.
- In contrast to the previous study no problems were reported which relate to the different systems of health checks and training requirements. Hence we simply repeat the recommendation of the previous study that where applicable and as much

[409] This framework directive further provides the base for directives on working time, special protection for young workers and female workers who are pregnant or have recently given birth.

as possible mutual recognition should be granted to training and health checks performed in the home state of the workers (*recommendation 19*).

Special mention should be made of the fact that liability for accidents at work is classified as tortious in PT, leading to the application of the Rome II regulation on non-contractual liability instead of the Rome I regulation on contractual obligations.

## Protection of specific groups

The special protection given in the Member States to pregnant women or recent mothers, children and young people is largely based on EU Directives.[410] The directive on pregnant women and recent mothers contains several types of protection to be offered to this specific category of workers, including and in particular the right to maternity leave. The protection of minors and young adults relates inter alia to the minimum age for gainful employment, special rules on working time and rules on safety and health. The study largely confirms the findings in the previous study that neither protection of minors nor protection of pregnant women and recent mothers constitute elements of major relevance as regards the protection of posted workers. However, the potential for problems is quite large, especially as regards protection of pregnancy and parenthood (less as regards minors).

With regard to minors the only interesting point raised in the reports was related to the question of the minimum age for gainful employment: is this to be considered as part as the protection offered under Article 3(1)(f) or rather an extension of protection under Article 3(10)?

As to protection of motherhood and family, there is a striking difference in the length of the leave granted to pregnant women. AT has a 16 weeks period in which the pregnant woman is not even allowed to work. CY has an 18 weeks period. IE has 26 weeks of paid leave plus 16 of unpaid leave. SK offers 34-43 weeks of leave depending on the circumstances. As regards to payment during leave both the level of payment and the source thereof are country specific. The payment is part of social security in AT, BG and IE whereas it is paid (in part) by the employer in MT. In IE, additional payments by the employer are usual, but these are not based on any statutory requirement. Accordingly, the right to leave under the law of the host state might not be supported by a claim to payment under the applicable labour law or social security regulation.

It is interesting to note that in some countries the rules on unfair dismissal (IE) and/or on equal protection/non-discrimination (ES) are included in the protection of this specific group of workers, whereas dismissal law is not in itself part of the hard core of protection applicable to posted workers.[411] Interesting is also the position of PT where

[410] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) – OJ L 348, 28 November 1992, pp. 1-8; and Directive 94/33/EC of 22 June 1994 on the protection of young people at work – OJ L 216, 20 August 1994, pp. 12-20).

[411] This problem was also reported by the Dutch and Luxembourg experts to the previous report.

protection of parenthood and family life is considered to be a constitutional value. This protection is not restricted to mothers but extends to fathers too.[412]

Although there is no great sense of urgency in regard to this subject, nevertheless three recommendations may be considered, if only in the slipstream of legislative activity on other elements of the PWD. Firstly a clarification of the content and scope of the protection under Article 3(1)(f) would be welcome. Depending on this, a clearer demarcation between the PWD and the Regulation 883/04 on coordination of social security with regard to payment during maternity leave would be welcome. Finally, and again depending on the outcome of the previous two points, it may be important to establish a method of comparison with regard to the protection offered in the field of maternity leave and parental leave, in particular how a longer leave against a lower remuneration/benefit should be compared to a shorter period of leave against a higher remuneration/benefit (*recommendation 20*).

## Protection against discrimination

The protection against discrimination does not seem to play a major role in the protection of posted workers. The relevant national laws and regulations are largely based on the relevant EU directives on discrimination at work. For a more theoretical point of view it is interesting to note (once again) the multitude of sources of protection in labour law. Protection against discrimination protection may be achieved through both the labour code (limited to workers) and special non-discrimination statutes.[413] In some cases, even the criminal code may come into play. Each of these has a different scope of application in international cases. Accordingly, the interest of non-discrimination may have different sources of protection. On the other hand, non-discrimination plays a more general role in workers' protection (inter alia in the areas of pay and safety and health) in Cyprus, Ireland and Spain. There a single legal instrument/concept is used to protect a variety of interests.

## Provision of manpower

The rules on temporary work agencies do play a role in practice, especially insofar as Member States subject this economic activity to restrictions and/or special authorization. Though application of these restrictions to cross-border posting is in accordance with Article 3(1)(d) PWD), the restrictions themselves will have to be evaluated in the light of Article 4 of the TWA Directive. The PWD also allows the protection offered to posted TWA workers to be extended to the level of protection offered to local TWA workers (in accordance with Article 3(9) PWD). This provision interacts with Article 5 of the TWA Directive. The EC is advised to monitor the implementation of

[412] Pregnant women are granted 30 days of leave before confinement whereas leave after childbirth can be taken by either the mother or the father.
[413] BG Protection against discrimination act; CZ Antidiscriminatory Act No. 198/2009 Coll.; LV Ombudsman Law; SK Antidiscrimination Act; effective from 1.7.2004. Compare the protection of safety and health: this is often based on a general rule in the labour code in combination with specific provision in H&S regulation.

the latter Directive with special regard to the position of posted workers (*recommendation 21*).[414]

## Extension of the protection under 3(10) – public policy

The concept of public policy has become highly controversial after the judgment in case C-316/09 (Commission v. Luxembourg). Several Member States were confronted with an interpretation of the concept of 'public policy' in the PWD which seems to differ rather drastically from the notion of public policy/ordre public in their labour law and private international law systems. It is important to note, though, that the relevance of Article 3(10)(first indent) is directly related to the interpretation of the heads of protection under Article 3(1). Several 'extentions' of the protection could be interpreted as coming within the scope of a head of protection specifically mentioned in Article 3(1) of the Directive and vice versa. This was noticed in the previous study with regard to inter alia France and Sweden. Examples of this are also found in the current study. For example: the minimum age for employment could be seen as part of the protection of minors. However, it is notified by Spain as being an extension under Article 3(10). The application of the rules on per diems and reimbursement of costs to postings to Lithuania might be part of the regulation on minimum rates of pay, but could also be considered to go beyond the hard core. Hence, we recommend as a first step in the discussion on the public policy clause in the PWD, the clarification on the scope of application of the heads of protection in Article 3(1) (*recommendation 22*).

The current study also confirms that finding in the previous study that not all Member states report the application of their 'public policy' laws to the European Commission. This lack of precise information on the content of national rules which are given a public policy status makes it hard to evaluate the necessity to change (the current interpretation of) Article 3(10). Hence, the second step in the evaluation of Article 3(10) consists of a (more precise) inventory of provisions which are applied to posted workers but can not be subsumed under one of the other heads of protection. These rules can only be applied when they are attributed a public policy status. Member States could aid this inventory by more specifically referring to the provisions of the PWD in their implementation (*recommendation 23*).

Finally, a lot is still unclear about the exact interpretation of the public policy provision in the PWD. Generally, collective rights, especially the right to collective negotiation and collective action, are deemed by the Member States to fall within the concept of public policy. This is supported by ECJ. However, the public policy concept has only been clearly delimitated in the context of migration law. The PWD operates in the context of private international law, in which the concepts of 'ordre public'/public policy may take on a different meaning.[415] There is currently a lack of clarity as to the exact relation between overriding mandatory provisions (lois d'ordre public) and public policy in private international law on the one hand, and the concepts of imperative requirements of the public interest and public policy in the framework of

[414] Section 3.6 provision of manpower.
[415] See inter alia H. Verschueren & M.S. Houwerzijl, Toepasselijk arbeidsrecht over de grenzen heen, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009.

the internal market on the other.[416] The inventory of national rules applied under Article 3(10) could provide a point of entry for the Commission to seek further clarification of the concept of public policy from the ECJ (*recommendation 24*).

[416] See inter alia Com(2003)458 p. 13 for an indication of the confusion caused by the overlapping notions. For an assessments of the impact of PIL on the current interpretation of Article 3(10) see inter alia C. Barnard The UK and Posted Worker, ILJ Vol 38, 2009, p.130; and A.A.H. van Hoek, Openbare orde, dwingende reden van algemeen belang en bijzonder dwingend recht, De overeenkomsten en verschillen tussen internationaal privaatrecht en interne marktrecht, in: H. Verschueren & M.S. Houwerzijl, Toepasselijk arbeidsrecht over de grenzen heen, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009, p. 55-90.

## 5.4. ACTORS INVOLVED AND THEIR COMPETENCES TO ENFORCE RIGHTS CONVEYES BY THE PWD

In Chapter 4 of this study topics were examined in relation to monitoring and enforcement of the PWD. In contrast to the provisions in the PWD with regard to the personal and substantive scope of the Directive, the PWD contains neither guidance nor minimum requirements regarding the level/nature of monitoring and enforcement (Art. 5). Moreover, only very few requirements are stipulated regarding the provision and exchange of information (Art. 4) and legal remedies for posted workers and/or their representatives (Art. 6). Thus, at present, the monitoring and enforcement of the PWD will in principle be largely (if not entirely) based on the level provided in the national system. In our first study, major difficulties and obstacles were identified in this respect. The twelve national reports summarized and analyzed in that study clearly revealed and exposed the weaknesses in the national systems of labour law and their enforcement in the host states with regard to vulnerable groups on the labour market, such as (certain groups of) posted workers. Compliance can and should therefore be strengthened by the implementation and application of several monitoring and enforcement 'tools', as listed below. But at what level should this be done?

In general, compliance with EU law is based on a decentralized system of enforcement, which means that EU law is predominantly applied by the national authorities and adjudicated by the national courts according to the national (procedural) rules. However, this does not (necessarily) mean that the responsibility of the Member States to guarantee compliance to EU law should stop when the limits of their own system are reached. In fact, as may be gathered from the case law of the ECJ, the Member States have a responsibility to guarantee the 'effet utile' of EU law. This is based on the so-called principle of effectiveness grounded in Article 4(3) sentences 2 and 3 of the TEU (old Art. 10 EC). In line with this principle, Member States need to implement, apply and enforce effective, proportionate and dissuasive sanctions to guarantee compliance with EU-rules, such as the PWD. Therefore, the current situation where the weaknesses in the national systems of enforcement are also weaknesses of EU law on the posting of workers, does not have to be accepted as a 'fait accompli' but, as far as feasible, may and should be reversed.
In this regard, some help at European level would appear indispensable. Preferably, national tools and rules on enforcement should be embedded in a European framework of legislation and cooperation between the main actors involved, in order to achieve an effective level of compliance with the PWD on the one hand and to prevent unfair competition and legal confusion hampering the cross-border provision of services on the other. In this context, we advised to strengthen compliance by the implementation and application of several monitoring and enforcement 'tools'.[417]

By and large, the conclusions and recommendations in our previous study also hold for the fifteen countries covered by our present study. Below we summarize the findings, organised as follows. Firstly, we introduce the different actors involved, making a distinction in host state authorities monitoring compliance with the rights guaranteed by the Directive (see section 4.2), and host state authorities monitoring the presence of posted workers within the territory (see section 4.3). Another part of the comparative

[417] For more details see Report March 2011, Chapter 5.5, p. 185 - 191 and 5.6, p. 192 – 201.

analysis (see section 4.4), concerns the inspection and enforcement activities of the monitoring host state actors in practice. This deals with the frequency of workplace control, the way labour inspectorates and other inspectorates assess self-employed persons rendering services in the receiving Member State, and how they verify whether an undertaking is properly established in the country of origin. The extent to which cross-border cooperation occurs and the recognition of foreign penalties/judgments is also examined. Next, we turn to the host state monitoring authorities' responsibility for providing information to the general public (see section 4.5). Duties such as notification and information requirements imposed on service providers by authorities in the host state (see section 4.6) and statutory duties and/or self-regulatory tools imposed on recipients (clients/main contractors/user companies) of the service are subsequently presented (see section 4.7). This concerns information requirements and also (chain) liability schemes, in order to prevent the non-payment of wages, social security contributions and fiscal charges by employers of the posted worker. Finally, the legal remedies available to posted workers and their representatives are also examined, as well as any other means of support for posted workers (see section 4.8).

## Actors involved

### Monitoring the terms and working conditions (i.e. the rights) of posted workers[418]

In almost all the Member States examined in the current study and the previous one, national host state authorities explicitly fulfil a monitoring and inspecting role in respect of posted workers. In most countries the social partners are also involved. They may play multiple roles, such as acting as advisers, representatives and providers of legal aid to individual members (see further below). With regard to monitoring and compliance tasks, on average host state social partners play a rather modest role alongside the local or national authorities. However, in the Nordic systems the role of social partners in monitoring and enforcement activities is more prominent, whereas in some of the new Member States their role is purely marginal, if any.

Regarding the host state public authorities involved, a situation where no (UK) or multiple actors are responsible (in the previous study this concerned BE, DE, IT, in the current study AT and CY), may be assessed as problematic from a viewpoint of transparency and accessibility of a system. For Cyprus this point of view was confirmed, however, no such critic was heard from stakeholders in Austria. In this country a positive consensus on the structure of the system of enforcement was observed. In both studies, the national reports displayed a great variety regarding the extent to which host state public authorities are involved in monitoring/enforcement of labour law. The vulnerability of systems that place excessive reliance on private law enforcement must be emphasized again here (CY, SE, DK, IE, NL, UK in general, and DE specifically with regard to health & safety law). This may lead to (abusive) situations of non-compliance where unreliable service providers are involved.
However, this variety reflects the choice in the PWD to leave monitoring and enforcement of the rights conveyed in the Directive fully to the national level (see Arti-

[418] See for more details section 4.2.

cle 5 PWD), without any detailed requirements or guidelines (of minimum harmonization) as to the appointment of certain responsible actors and their tasks. In that sense, the problem is caused not by one factor alone, but instead by the 'silence' at EU level combined with the application/enforcement of the PWD at national level. Nevertheless, the fact that the Directive is not more explicit or even silent, does not imply that host Member States should not respect prevailing EU law as interpreted by the Court while applying national monitoring and enforcement instruments/systems. In this regard, it was recommended to create greater transparency in the monitoring systems of the host countries with multiple authorities involved by appointing one authority as the first contact point. In addition, the implementation of more public enforcement measures is advocated in respect of host countries where the national system insufficiently ensures the adequate enforcement of posted workers' rights. Insofar as both problems would endanger the 'effet utile' of the PWD, such measures may be stipulated at EU level (*recommendations 25 and 26*).

**Focus of the monitoring and enforcement activities**

Another problem concerns the mode of operation of the host state monitoring authorities. For instance, it was found in the previous study that in Germany, customs authorities specifically control compliance with and enforcement of (part of the applicable) regulations on the posting of workers. At regional level there are 40 main customs offices (*Hauptzollämter*) which are competent to do so. In contrast, in all the other host countries covered by both studies, perhaps with the exception of the recently established Competence Centre for the Control of Wage- and Social Dumping"(Competence Centre LSDB) in Austria, it seems that the inspectorates focus first and foremost on monitoring compliance with national labour law in general. Hence, no enforcement capacity is specifically allocated to monitor compliance with the rights conveyed in the PWD. As a result, host state inspecting bodies act within their ordinary prerogatives, which means in practice that they essentially interpret existing national labour law following both "local practices" and domestic policy guidelines, with or without a limited awareness of the *presence* and specific legal situation of posted workers. We believe that a more targeted focus on this group would be helpful in the monitoring and enforcement policy of national host state authorities. This can be achieved by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations (*recommendation 28*).

**Monitoring the presence of posted workers[419]**

Monitoring the presence of posted workers entails a more 'migrant law'-style of supervision (namely regarding access to the territory of a state). In this context, specific monitoring and enforcement tools targeted at the posting of workers do exist in several host Member States. The existence in all Member States included in this study of requirements to notify to the relevant national social security authorities (in their role as a sending state) the posting of workers for social security purposes (E-101 forms, based on Reg. 1408/71; now A1-forms based on Reg. 883/2004)) or to register for tax purposes was mentioned. In section 4.3 we make mention of some peculiarities re-

[419] See for more details section 4.3.

garding such notification duties from a sending state perspective. However, for the rest of this study we restrict ourselves only to such (equivalent) requirements in the host state related to the posting of workers within the meaning of the PWD (i.e., on monitoring the presence of posted workers for the purpose of checking the respect of the relevant, applicable labour law provisions).[420] In this respect we found in the previous study that no host state authority monitors the presence of posted workers in general in SW, IT, NL and UK. In the current study, this is the case in FI, HU and IE (see also section 4.5). In these countries, no host state government agency is notified of posted workers nor does any agency gather information relating to the number of workers posted to their territories in the meaning of the PWD. However, AT, IE, IT, NL and UK do run permit or visa requirement schemes for (some) posted workers who are third country nationals (so for migration law and/or transitional regime purposes). As already stated above in the section on 'transitional regimes', such schemes may cause problems of compatibility with EU law (be disproportionate).[421]

In this context, the question whether a requirement on service providers to simply notify the presence of posted workers in the host state may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study (*recommendation 27*). In total eighteen Member States do run general notification or 'pre-declaration' schemes for posted workers, regardless of their nationality and their specific posting situation (BE, DK, FR, DE, LU, RO in the previous study, AT, BG, CY, CZ, EL, ES, LV, LT, MT, PT, SI and SK in the current study).

## Inspection, enforcement and cooperation[422]

### Competences, sanctions, nature of inspections

As concluded in the previous study in all hosting Member States, with the notable exception of the UK, there seems to be a policy trend towards greater emphasis on stringent enforcement. This trend was also noticed in several hosting states in the current study (AT, IE, SI). At the same time, the traditions in the Member States are very different regarding the competences of the authorities involved, their inspection activities, the nature of their controls and sanctions, as was confirmed again in the current study. Interesting – but beyond the scope of this research study – would be a much more detailed comparison of the different national authorities and their competences, including their use in practice, in order to shed more light on the effectiveness of the different enforcement systems in situ.

[420] The definition of 'posted worker' for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines). See Chapter 4, p 93 – 156.
[421] See p. 289-290. See in particular the VanderElst (C-43/93), Commission-Luxembourg (C-445/03), Commission v Austria (C-168/04) and Commission v Germany cases (C-244/04) and the Vicoplus cases (C-307-309/09).
[422] See for more details section 4.4.

### Domestic and cross-border cooperation

Despite considerable progress, the internal cooperation between national authorities (including social partners) responsible for monitoring the position under labour law, social security law and tax law of posted workers and their employers, still displays serious shortcomings, as was shown in both studies conducted. While in some Member States there is still no or only limited systematic cooperation, in others there is a clear gap between cooperation on paper and cooperation in practice. The same holds for cross-border cooperation of the national authorities involved in PWD-related monitoring/enforcement issues. The difficulties in cross-border cooperation are increased by the wide variety of functions performed by the competent authorities in the different countries (what the Labour Inspectorate does in one country falls under the competence of Tax authorities, or the Ministry of Finance in another). Hence, further implementation/application of the ongoing initiatives at EU and national level is necessary with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates (*recommendation 29*).

### Inspection activities, frequency of controls

With regard to the specific inspection activities of the host state authorities involved (based on risk assessment, on own initiative or on request) and the frequency of their controls, a great variety exists, as illustrated by the country findings in both studies. However, a common problem in several countries seems to be a shortage of staff involved in monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings could be ameliorated by national efforts (by recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) and/or at EU level by stipulating appropriate minimum standards in a legal instrument. The advantage of an EU-level measure would be that it may reduce, as far as possible, the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD (*recommendation 30*).

## Involvement of social partners – problems caused at national level

Apart from the Nordic countries Denmark and Sweden, it was found in the previous report that social partners in the host state are involved in monitoring / enforcing the rights of posted workers and their presence only to a very minor extent. In all countries covered by that study it was observed that they lack sufficient (financial) sources and access to data necessary for the adequate performance of their tasks. Since most host state authorities do not feel (especially) responsible for monitoring compliance with labour law at CLA level, nor do they cooperate very smoothly with social partners, this situation leads to a clear absence of monitoring and enforcement of rights at CLA level. This finding was largely confirmed in the country studies for the present report. Hence, we reaffirm our conclusion that more financial as well as institutional support of social partners is needed at national level. Besides this, it would be helpful to stipulate minimum standards, preferably at EU level, for adequate monitoring/enforcement of rights at the CLA level, as well as guidelines for cooperation be-

tween the authorities and social partners (*recommendation 31*). On a positive note, some best practice examples of cross-border cooperation between trade unions were observed, between Latvian and Norwegian, Austrian and Hungarian, Austrian and Slovakian, and Spanish and Portuguese unions, most of them funded by the EU.

## Other issues

### Posted worker or (posted) self-employed?

A specific problem related to monitoring the terms and working conditions of posted workers is the difficulty which is sometimes experienced by host state authorities of distinguishing between a (posted) worker and a self-employed person (service provider). This may be problematic even in purely national situations, but in cross-border situations the problems are even worse, since different legal regimes may apply to those categories. With regard to the applicable social security system, the Member State in whose territory the person concerned is normally (self-)employed is responsible for (issuing the E 101 certificate) determining the nature of the work in question. Consequently, in so far as an E 101 certificate establishes a presumption that the self-employed person concerned is properly affiliated to the social security system of the sending State, it is binding on the competent institution of the host state.[423] In the context of the PWD it works the other way around: Article 2(2) PWD stipulates that the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host state.[424] For labour law purposes a comprehensive judgmental view on an individual basis is necessary in each country.

In the previous report it was observed that the burden of proof is sometimes very hard. Hence, for labour law purposes, Dutch law provides a rebuttable legal presumption of an employment relationship. It was assessed that this good practice may inspire other Member States to implement similar provisions, however with the caveat that a similar (albeit more stringent) legal presumption in French law was considered to constitute a disproportionate restriction of the free movement of services incompatible with EU law. Nevertheless, it was concluded that even if this judgment would make Member States hesitant to adopt a legal presumption of an employment relationship in certain situations of posting, the European legislator could still consider this option. This again highlights the problems Member States experience in effectively monitoring the proper application of the Directive without violating EU law.

In most countries covered by the current study it seems that the qualification of the workers' status is not perceived as a particular pressing problem (although in LV the difficulty to proof that someone is a bogus self-employed was noted). In fact, a disinterest in this problem was noticed in CY. In SK, labour inspectors do not seem to investigate the status of a worker in the case of posting, since they are not allowed to contest it before the court. In some country reports, the A1/E 101 form is mentioned

[423] Case C-202/97 (Fitzwilliam Executive Search), para 53, Case C-178/97 (Banks), para 40.
[424] As a general rule, Member States need to exercise their competences to interpret, apply and enforce Article 2.2 PWD in conformity with (Art. 56 of) the TFEU.

as one of the indications of the worker's status for labour law purposes, whilst in SI and perhaps also in IE it seems to be in use as *the* indicator.

### Recognition and execution of foreign judgments

In both studies, country reports confirmed that foreign judgments relating to infringements concerning the protection of workers can in principle be recognized according to Regulation 44/2001/EC on recognition and enforcement of judgments in civil and commercial matters, and sometimes this is (also) laid down in national Codes of Private International Law. However, on the base of Slovakian law it is not clear whether a foreign judgment would be recognized in this respect, since according to Section. 64 of the Act No. 97/1963 Coll. a foreign judgment shall not be recognized or enforced if the foreign court would not be competent to rule in the case, should the jurisdiction be considered under Slovak regulations. The National Labour Inspectorate, which acts as a liaison office in terms of posting of employees asserts that only the Slovak court has jurisdiction on claims involving posting of employees *from* Slovakia to the territory of another member state, since the employment relation between the employee and the sending employer remains maintained in the full scale and the Slovak employer is responsible for all the working conditions and conditions of employment to be met during the term of posting.

With regard to the usefulness of the existence of Council framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, as in the previous study, the responses from the national stakeholders in the current study varied from an acknowledgement of its existence to non-awareness or non-applicability because their system does not use these penalties in the context of posted workers. Hence, despite EU measures governing the recognition and execution of foreign judgments and decisions, enforcement of rights conveyed by the PWD still seems to stop at the national borders.

As was concluded in the previous study, for the part that the non-recognition and execution of foreign judgments and decisions is due to legal lacunae, additional measures should be taken at national and at EU level to enhance the cross-border recognition and execution of penalties used in the context of the PWD (*recommendation 32*). The agreement concerning mutual administrative and legal assistance in administrative matters between Germany and Austria of 31 May 1988 was mentioned as a best practice. This does make cross-border enforcement of administrative sanctions possible. Interestingly, the problem to execute across borders was the reason behind the introduction of a new responsibility of service recipients in Austria. In Slovenia, the Labour Inspectorates avoids the problem by making full use of their competence of immediate prohibition of working processes or a demand for immediate use of appropriate working equipment.

## *5.5 ACCESS TO INFORMATION,[425] DUTIES ON SERVICE PROVIDERS AND RECIPIENTS,[426] AND REMEDIES[427] AVAILABLE TO POSTED WORKERS*

### Dissemination of information – problem caused by national practice

#### Access to information in the host country

According to Article 4(3) of the Directive, host state monitoring authorities have responsibilities to provide information to the general public on posted workers' rights laid down in law and (generally binding) CLAs. From the previous study we know that in practice, the dissemination of information by the responsible authorities focuses on the statutory rights only and is mainly provided through websites. The social partners – in practice mostly the trade unions – are also involved. They offer information about the applicable CLA provisions. However, pursuant to the text of Article 3(1) PWD, the Member States would be responsible, and therefore they only delegate part of the tasks to social partners, without any supervision. In practice this division of responsibilities leads to a situation of too little information about the entitlements of posted workers at CLA level. In the current study, this finding was confirmed.

Both studies together show that in eighteen of the twenty countries examined from a host state perspective (except CY, IT), websites are the most prominent means for the dissemination of information, followed by information on paper. Moreover, in the previous study, single points of contact (linked to the implementation of the Services Directive (Dir. 2006/123) and special information campaigns were often mentioned. In the current study, only in Ireland such initiatives (the NERA road shows) were mentioned.

In the previous study it was established that especially in regard to information in a plurality of languages and the accessibility of the information, the situation has visibly improved in comparison to four years ago, when the European Commission in its Communication 159 (2006) concluded that there was a major scope for improvement. The current study displays a less optimistic picture in that regard. Hence, the conclusion that further efforts to enhance accessibility in different languages, sufficiently precise and up-to-date information remain necessary, particular in IT and CY, but also at EU level (EU fiches), was reinforced (see *recommendation 33*).

In both studies, the recent initiative of the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC) was referred to as a good practice. They launched together an internet portal with information on the working conditions applicable to posted workers in the construction industry. Also worth mentioning (again) is the reference in the Estonian and Malte-

[425] See section 4.5.
[426] See section 4.6 and 4.7.
[427] See section 4.8.

sean reports to the website and offices of EURES as a source for informing posted workers on applicable protection in the country of destination. In the Spanish report, mention was made of a special EURES cross-border services centre, which is to be established in every border region where a sufficient number (not defined in any legislation) of posted workers exists. In the case of Spain, there is one related to postings between Galicia and Northern Portugal.

A point of attention concerns the amount of information available: too many sources of information may also endanger transparency. In this regards it is recommended that authorities designate one website/webgate as the central entry point for the provision of information, at both European and national level (*recommendation 34*). In the current study, this was explicitly recommended by stakeholders (e.g. Latvia).

It should also be noted that posted workers, in particular in the lower segments of the labour market, may not have internet access. This makes adequate information on paper and special information and awareness-raising campaigns focused on posted workers indispensable, which several Member States mentioned in the previous study have put into practice. However, such special grass-roots projects are costly and time consuming. To promote and sustain such initiatives, financial support and facilitation at EU and national level is an absolute prerequisite (*recommendation 35*).

**Access to information in the sending state**

Currently, not much is done at national level to make information on terms and working conditions in host states available in the workers' country of origin before they are posted.

In this respect, in the previous study attention was drawn to recent initiatives of host states to target information at workers and firms in the sending countries (through their embassies, for example). In the national reports for the current study, such an upcoming initiative was mentioned regarding Cyprus. According to information from the Department, cooperation with the countries from which the greatest number of posted workers comes is under way, specifically Bulgaria, Greece and Romania, for the purpose of better monitoring the situation and resolving any problems; however, there is no clear framework regarding the form and manner of such a collaboration. In the view of the Ministry, posted workers should know their rights before coming to Cyprus. In this context the Ministry is thinking about conducting a campaign modelled on the "Know before You Go" campaign begun in 2006 by the Irish National Training and Employment Authority in (FAS).

Such initiatives deserve following, since awareness raising should start as early as possible in order to enable the worker to make an informed decision on the posting. To further this goal, the authorities in sending countries should also be addressed. Pursuant to Article 4 of Directive 91/533, employers have a duty (in addition to the obligation stemming from Article 2 to notify an employee in writing of the essential aspects of the contract or employment relationship including level of remuneration – basic amount and other components, paid leave, length of the working week, applicable CLA) to inform a worker who will be posted longer than one month before his departure about at least: (a) the duration of the employment abroad; (b) the currency

to be used for the payment of remuneration; (c) where appropriate, the benefits in cash or kind attendant on the employment abroad; and (d) where appropriate, the conditions governing the employee's repatriation.

In the countries covered by both studies this obligation seems only to be subject to the supervision of the Labour Inspectorate in its role as a sending state in Estonia. Here, failure by an employer to submit information is punishable by a fine. This good practice deserves to be followed by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting. At EU level, amending Directive 91/533 is highly recommended, in order to establish an effective and dissuasive sanction in case of non-compliance with the obligations laid down in Article 2 and 4 of this Directive and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533 also to the competent national authorities in the host and/or sending state.[428] In case authorities in the latter state would be made primarily responsible, the cooperation with the competent authorities in the host state should be clearly established (*recommendation 36*).

## Duties on service providers – problems caused at national and EU level

### Notification requirements

According to case law based on Art. 49 EC / Art. 56 TFEU, national authorities *in their role as host state agencies* may impose certain information duties on service providers and others, such as the service recipient. First of all, we examined statutory and self-regulatory duties on service providers. However, we refrained from describing possible requirements to submit information on the posting of workers in the host country only for social security and tax purposes,[429] as well as for the single purpose of monitoring posted workers with a third country nationality (as in NL, AT partly, and fully in IE, IT, UK).[430]

In six Member States covered by the previous study (BE, DK, FR, DE, LU, RO[431]) notification requirements in the context of the PWD are imposed on foreign service providers in order to enable the responsible government agencies to fulfil their monitoring and enforcement tasks as a host state. The current study includes ten Member States (AT, BG, CY, EL, LV, LT, MT, PT, SI, ES) where foreign service providers

[428] An obligation to submit conformal certificates to the directive 91/533 EC, or the written working contracts (copies are sufficient) of the posted workers currently exists in Luxembourg and Germany (as host states). See Chapter 4.3, p. 112.
[429] The definition of 'posted worker' for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines.
[430] Information requirements with the single purpose of monitoring posted workers with a third country nationality presence of posted workers are part of national migration law rather than of national labour law and therefore not relevant for the monitoring and enforcement of the PWD as such.
[431] According to the Eurofound study on posting of workers in the EU, October 2010, p. 10-13.

posting workers to their territories have to inform a designated authority (see section 4.3) in advance. All in all, *sixteen* of the 27 EU Member States do run more or less advance notification schemes for service providers in order to enable the responsible government agencies to fulfil their monitoring and enforcement tasks in their role as a host state. Remarkably though, in practice *five* of these countries are predominantly sending states (BG, LV, LT, PT, RO). *Five* other states with notification duties, report that posting (from and) to their territories is a relatively insignificant phenomenon (CY, EL, ES, MT, SI). So, paradoxically, only *six* of the sixteen states with a notification scheme are in practice major host countries (AT, BE, DK, FR, DE, LU), which presumably should have the biggest interest in a notification system.

In the *eleven* Member States without notification requirements on the service provider, *two* (CZ and SR) impose such requirements on the service recipient (see below). Instead of imposing duties vis-à-vis state bodies, *two* other Member States, Finland and in case of TWA's also Hungary, do impose duties on the foreign service provider regarding their contractual counterpart in the host country (the 'contractor'/user company). This leaves us with a clear minority of only *seven* Member States, including (paradoxically again) five major host states in practice, where no information duties (connected to the PWD) are imposed on the service provider (EE, IE, IT, NL, PL, UK, SE).[432] In the current study, Ireland serves as the only country without any specific statutory duties for service providers and recipients related to posting in the context of the PWD. There is no prior authorisation, nor advance declaration procedure specifically related to posting of workers. However, apart from social security and/or tax related obligations, all employers are required to notify the Health and Safety Authority (HSA) if initiating work on a new building site. According to the national informants, the DJEI, in reality, gets very few notifications from posting firms (it was suggested that there had been fewer than 6 in the past 3 years).

It was concluded in the previous study that notification schemes in itself appear to be a good practice in the sense that the introduction of some kind of simple declaration system may be assessed as almost a conditio sine qua non for most monitoring and enforcement efforts (as explained in Chapter 4.2). At the same time, it was admitted that notification is by no means an infallible instrument; first of all notification requirements may cause problems of compatibility with EU law (i.e. be disproportionate); secondly many national stakeholders point to the problem that a lot of service providers 'forget' to notify. Nevertheless, they all seem to agree on the advantages of this instrument with regard to facilitating enforcement and also for policy purposes. Indeed, effective policy making is impossible when no reliable data exist about size and character of the phenomenon of posting in the framework of the PWD. The advantages seem to outweigh the disadvantages, especially when a user-friendly and easy accessible system is implemented, as in Belgium. The notification systems as applied to posting of workers in Belgium and Denmark may be labelled good practice with regard to the exemptions they contain for insignificant and specific postings as

[432] Notwithstanding the fact that NL and IT do impose more or less sophisticated liability schemes on service recipients (see below section 4.7) and SE, UK and even IE seem to have at least some kind of functional equivalent (at least a form of social clause). Hence, at the end of the day, only EE and PL seem to be fully 'dutyfree' in this respect.

well as, in Belgium, exemptions from more far-reaching information requirements.[433] Such tools may act as an incentive for service providers to notify. The requirement in Germany and Luxembourg to submit the documents service providers have to provide to their employees pursuant to Directive 91/533 and, in Luxembourg, the possibility for 'repeat players' to submit only a 'light declaration' may also be shared as good practice, subject to further assessment in the light of the case law of the ECJ.
In the current study, no new information of any relevance could be added to this assessment on the effectiveness of notification schemes in practice. This may be explained by the fact that only *one* of the ten countries with a notification scheme in the current study, does often use it in practice, being a major host state (AT). The others are in practice either predominantly sending states (BG, LV, LT, PT) or report that posting (from and) to their territories is a relatively insignificant phenomenon (CY, EL, ES, MT, SI).

In conclusion, the development at EU level of uniform documents related to certain information requirements may be feasible (or insisting on multipurpose use of the documents required in Art. 2 and Art. 4 of Dir. 91/533). Besides this, the differences between Member States with and without notification systems and also the different content of notification requirements in force may create confusion and uncertainty. Whether it would therefore be recommendable to coordinate a notification system at EU level by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. Inspiration may be drawn from Directive 2009/52 and from the old proposals to adopt a residence Directive for posted workers (*recommendations 37 and 38*).[434]

**Additional administrative requirements**

There are also differing situations in the host Member States with regard to other and/or additional requirements, such as the need to request prior authorization or to keep employment documents available for the authorities, or to appoint a representative, which may in certain cases be in breach of EU law.[435]

In our previous study, other or additional requirements were identified in BE, DE, FR, LU.[436] In the current study such measures were identified in AT, FI and for a part in LT. Related measures were found in Cyprus, where the law does not impose additional requirements on service providers as such, but nevertheless the Inspectorate tries to collect information. Also in the Irish and Latvian reports it is shown how inspectorates struggle with the difficulty to apply general duties on the keeping of employment documents for employers established on their territories to foreign service providers.

[433] Please note that this qualification of the Belgium system as a best practice is restricted to the notification with respect to posting of workers. See pending ECJ case 577/10 as regards the compatibility with Article 56 TFEU of the same registration/notification as applied to self-employed.
[434] See COM (1999) 3 and COM (2000) 271.
[435] See in this respect the guidance of the European Commission on the case law of the ECJ with respect to control measures concerning the posting of workers in COM (2006) 159.
[436] See Report March 2011, section 4.3, p. 121-123.

In this regard host Member States should exchange best practices with regard to 'balanced'[437] additional duties on service providers. At EU-level uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Art. 2 and Art. 4 of Dir. 91/533) (*recommendation 39*).

### Self-regulatory duties on service providers

According to the previous study in some host Member States (Denmark, Italy, the UK),[438] collective agreements also impose duties on foreign service providers, such as to provide pay receipts and employment contracts or documentation on the terms of employment upon request to the local branch of the trade union. In the present study, no such initiatives were reported. Hence, we stick to the recommendation that such initiatives may, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach with EU law (i.e. not too rigid and not too loose), be welcomed and exchanged as good practice, namely as a tool to enhance compliance with the PWD at the CLA level (*recommendation 40*).

### Complaint mechanisms for service providers

Foreign service providers may contact the national contact points of the Internal Market Problem Solving Network (SOLVIT) with complaints about the application and enforcement of the rules on posting of workers by the authorities. It seems that this complaint mechanism has worked satisfactorily, especially in Poland, but in the majority of Member States covered by both studies, it was found that the mechanism is not very well known and may be underused. Apart from that, it proved very difficult in several Member States to get access to information about the nature of complaints from the SOLVIT agencies.

## Duties on recipients of services – a way forward to solving problems at national and/or EU level?

### Information requirements

In the previous study we saw that Belgium and Denmark (with regard to certain risk sectors), oblige recipients of the service to check whether foreign service providers, often in their role as foreign subcontractor(s) / temporary staffing agency, have complied with their notification duties. The recipient / user company has to report non-compliance to the competent national host state agency. If the service recipient reports the non-compliance, he is freed from liability but may otherwise be fined. In Austria, in case of temporary agency work the user undertaking has a joint responsibility. He is made subject to penalties if the remuneration documentation is not available. Now that the foreign employer is not obliged to appoint a representative in Austria, obliga-

[437] Between excessively rigid (disproportionate) and overly loose (not dissuasive or deterrent) rules.
[438] See Report, March 2011, section 4.3, p. 124.

tions are sometimes legally transferred to the person who exercises authority to issue instructions on behalf of the foreign employer to the posted foreign workers in Austria (a 'representative': for instance the person in charge of the party). In such a situation no formal appointment is necessary. In the case of temporary work the obligations will be passed to the Austrian user undertaking.

In Czech Republic and Slovakia, the service recipient (referred to as 'employer') is obliged to notify in writing all employees posted to him by filling out a specific form at the Labour Office, or, in Slovakia, to the Office of Labour, Social Affairs and Family in the district where the employee performs work. Quite recently, a similar notification duty for the service recipient was introduced in Bulgaria. Before posting a worker to Bulgaria, the local company who receives the posted workers must declare to the Employment Agency that the working conditions of the Ordinance on the terms and conditions for posting of workers have been complied with – maximum duration of working time, minimum wage, etc.

In Finland, the service recipient ('contractor') is also responsible for collecting information from the service provider ('contracting partner') e.g. on his reliability and has to keep these documents available to inspectors in case of checks (sanctioned with fines). Also in Hungary, certain information duties are imposed on the service recipient, when he is making use of TWAs. In Ireland, similar duties on user companies of TWAs exist, but these are limited to agencies established on Irish territory. Some duties of information on the recipient of the service are also established at CLA level, notably in the construction sector, stemming, for example, from the implementation of Directive 92/57/EEC on minimum safety on building sites. In the other countries covered by this study, no mention was made of information requirements imposed on the service recipient.

Given the problem of non-notifying service providers witnessed in several host Member States, it is understandable that the service recipient is made co-responsible to a certain extent. Thus, to enhance the effectiveness of notification schemes, these initiatives may be welcomed and exchanged as good practice, namely as a tool to enhance compliance with the PWD, including the CLA level. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined (*recommendation 41*).

**Liability (or 'functional equivalents') with regard to pay and pay-related contributions/tax**

In nine Member States (Belgium, France, Germany, Greece, Italy, the Netherlands of our previous study, Austria, Finland and Spain in the current study) legal (sometimes combined with self-regulatory) more or less far-reaching mechanisms of liability/responsibility (FI) exist. Apart from FI, these are in particular joint and several liability schemes concerning the clients/main contractors/user companies. The arrangements aim to prevent the non-payment of wages (all but Belgium), social security contributions (all) and fiscal charges (Austria, limited to the TWA-sector, Belgium, Finland, France, the Netherlands, Spain and partly Germany). Several tools have been developed either to prevent the possibility for liability/responsibility among

the relevant parties or to sanction those parties that do not follow the rules. These preventive tools may be aimed at checking the general reliability of the subcontracting party and/or to guarantee the payment of wages, social security contributions and wage tax. Parties that do not abide by the rules on the liability arrangements in place may be sanctioned through a number of *repressive* tools, namely: back-payment obligations (Austria, Germany, France, Italy, Netherlands, Spain), fines (Austria, Belgium, Germany, France, Finland, Spain) and/or alternative or additional penalties (Austria, Germany, France, Finland, Italy, Spain). In other Member States (notably Greece, Hungary, Portugal, Sweden, Luxembourg, in a way also Cyprus, Ireland, the UK) alternative measures, mostly confined to the TWA sector and/or the construction sector, with similar aims are established.
For an extensive description of the liability/responsibility systems in eight of the countries mentioned above (AT, BE, FI, FR, DE, IT, NL, ES), we refer to the study on 'Liability in subcontracting processes in the European construction sector' published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008. One of the findings of this study was that the liability rules in the Member States under study largely fail to have an effective impact on fraudulent situations and abuses of posted workers in cross-border situations of subcontracting and temporary agency work.

To enhance compliance with the PWD, most notably the payment of the applicable wages to posted workers, initiatives to make service recipient co-responsible may be welcomed. (Self-evidently) the content of the measures must not be disproportionate[439] or in breach of EU-law, and must be shared as good practice, namely as a tool to enhance compliance with the PWD, including the CLAs level. See in this regard the judgment of the ECJ in the case Wolff & Müller.[440] Here, the Court stated (at para 37) that, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined (*recommendation 41*).

## Supportive tools/remedies available for posted worker – main problem inherent to socio-economic position of 'average' posted worker

### Jurisdiction clause

Regarding the legal remedies for posted workers and/or their representatives to enforce the rights conveyed by the PWD, Article 6 of the PWD stipulates that in order to enforce his rights to the terms and conditions of employment guaranteed in Article 3 of the PWD, the posted worker must have the opportunity to institute judicial pro-

[439] In this respect, an exemption or 'light' procedure may be considered for service recipients who are natural persons and where the employment is for their private purposes.
[440] Case C-60/03 Wolff & Müller [2004] ECR I-9553.

ceedings in the host Member State, without prejudice, where applicable, to the right, under existing international conventions/regulations on jurisdiction, to institute proceedings in another State, such as the one where he habitually fulfils his employment contract. Hence, all Member States have had to ensure that workers posted to their country, covered by the Directive, can bring judicial proceedings for enforcement in the territory where they have been posted. In our first study we found that, with the exception of the UK, Article 6 of the PWD is explicitly implemented in all (predominantly host) Member States covered by that study.

With regard to the fifteen Member States covered by the present study, it was reported that Austria,[441] Bulgaria, Cyprus, Finland, Latvia, Malta[442] and Spain have explicitly implemented Article 6 of the PWD.

The other eight Member States seem to have implemented Article 6 in an indirect manner, or, in two Member States, perhaps not at all. In Ireland, the same situation exists as was reported for the UK in the first study; the posting situations covered and the rights derived from the PWD have not been clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was therefore not properly implemented. Nevertheless, posted workers can seek the same remedies for any infringements of their rights in the same manner as any other workers; there are no limits regarding the competences of the courts or tribunals in dealing with posted workers. Also in Greece, Hungary, Lithuania, Portugal and Slovenia, it seems to be the case that posted employees can initiate court proceedings before the courts on their territories without any constraints. Apparently, they have the same judicial remedies at their disposal as settled employees. In Czech Republic and Slovakia the situation is not fully clear: According to the Civil Procedural Codes in both countries as a general rule the courts have jurisdiction if the defendant is domiciled in their territories[443] and with respect to disputes referring to the right of property, if the defendant has a property in their territories. Next to this, the other determining criteria set down in the Brussels I Regulation, the place of habitual work performance and the place where the business which engaged the employee is (or was) situated do neither provide for an option to sue in their country as a host state. The rapporteur from Slovakia noticed, that, based on this rule, an employee posted from another EU member state to perform work in the territory of the Slovak republic may file a claim in a Slovakian court against his/her "user" employer (the service recipient) established in Slovakia. However, it is not clear, whether Slovakian courts would consider the user employer as a legitimate defendant in a dispute regarding the posting of an employee.

[441] No special legal venue has been established for posted workers originating from non-EEA-membership countries.
[442] In Malta, Article 47 of the EIRA does provide that proceedings for an offence under the Act or under the Regulations issued by authority of the Act may be commenced for a period of up to one year from the commission of the offence.
[443] For CZ as an additional criterium was mentioned that 'In the Czech Republic there is an undertaking or branch of such employer (defendant)'. According to the national expert, the Czech Republic did not implement Article 6 PWD into special provisions, because the applicable general provisions provide enough guarantee for the employee, that he will be able to sue in front of Czech courts.

**Support by social partners and/or other stakeholders**

Apart from partial rights in Ireland for trade unions to bring cases to court independent of the individual worker, no other Member States covered by this study have independent locus standi for representative trade unions, as is the case in Belgium, France and the Netherlands (see p. 138, section 4.5 of our previous study).
Since trade unions (and employers' associations) in the host state may have an independent interest in enforcing host law labour standards on foreign service providers, this is good practice which deserves following by other Member States.
In Ireland, workers may refer claims to the Labour Court, through their trade union. However, only contractual claims may be pursued in the civil courts. Breaches of employment legislation are generally pursued through the State's employment tribunal system. A breach of a worker's entitlements under the REA can be pursued not only by the worker in civil proceedings through the employment tribunals but also by NERA, on behalf of a worker. Trade unions can also apply to the Court in respect of alleged breaches of REAs and the Court may direct the employer to do various things (including the payment of any sum due to a worker for remuneration in accordance with the agreement). However, enforcing such orders against employers established abroad is logistically difficult. Although unions (and employer bodies) can enforce rights collectively, they are increasingly unable to do so without State assistance, given the decline in trade union density and the fragmentation of employer representative bodies.

Also worth mentioning are some additional supportive tools and/or institutions strengthening the chance that posted workers get what they are entitled to. In Austria, the BUAK, in the construction industry, monitors and enforces holiday-pay of (posted) workers. Moreover, in some cases the 'Arbeiterkammer' may provide posted workers with legal advice and protection. Workers who are posted to Austria for short or medium-term periods are not members of the AK. According to Sect. 10 of the AKG transborder voluntary membership is not possible. However, in serious cases of wage and social dumping foreign workers can also be granted protection for political reasons. Usually cooperation with foreign authorities is maintained by the ÖGB or the AK representation in Brussels. In Ireland again, the Labour Relations Commission (LRC) is the State's third-party mediation and conciliation service and has a key role in dispute resolution involving large number of workers (like the Gama and Irish Ferries disputes). It seems comparable to the ACAS in the UK, which played a reconciling role in the Linsey Oil Refinery case. In Latvia, an employee may be represented by a trade union or in discrimination cases by the Ombudsman. Still, trade unions lack resources for representation of each worker before the national court. Finally, only in Slovakia it seems to be the case that if wage conditions have not been properly observed, the labour inspectorate may oblige the employer to back-payments of the outstanding amount to the (posted) employees.

All in all, compared to the previous study the findings on the implementation of Art. 6 PWD in the current study were more worrying than in the previous report. Of the 15 countries covered, eight Member States seem to have implemented Article 6 in an implicit manner, or, in two Member States, perhaps not at all. Hence, it merits further study to ensure that in each Member States the jurisdiction clause is properly implemented (this extra recommendation is included in recommendation 42). Moreover, we

reaffirm our recommendation in the previous study at EU level, to make the option to give social partners locus standi in Article 6 PWD an obligation. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state. In this context the independent right to bring cases before the court and its rather effective and frequent use in practice by the German holiday fund ULAK also merits attention. If not already provided for, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for purposes such as recovering outstanding wages) (*recommendation 42*).

**Access to legal aid for posted workers**

In the previous study it was found that posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in Belgium, France, Germany, the Netherlands, Luxembourg and Sweden, as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU (except for Denmark). However, in accordance with the general principles operating in the UK in employment cases, no legal aid would be available for workers posted there. Nor do workers posted to Romania have access to legal aid, with the exception of such legal aid as can be provided from the trade union.

In the countries covered by the current study, posted workers have equal access to the legal aid mechanisms provided by law in Austria, Bulgaria, Czech Republic, Greece, Finland, Hungary, Lithuania, Portugal, Slovenia, Slovakia and Spain, as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU. However, in Greece and Portugal legal aid is not very well developed. In the Portuguese situation, only indigents are exempted from judicial costs and only in cases related to occupational accidents the public attorney system will provide the equivalent of a lawyer to the worker. In accordance with the general principles operating in Cyprus, Latvia and Malta, no legal aid would be available for posted workers there. In Ireland, (posted) workers taking claims before the employment tribunals have no access to legal aid; the applicable law does not allow for the granting of legal aid before an employment tribunal. Legal aid may be available for contractual claims pursued in the civil courts if the applicant satisfies the financial eligibility criteria laid down (e.g. the applicant must have an annual disposable income of less than €18,000).

Although these findings are in line with EU law (notably the legal aid directive) it may be recommended, for instance by an EU Communication, to provide access to legal aid for (posted) workers in countries where this is currently not available (*recommendation 43*).

**Complaint mechanisms**

None of the countries examined have specific complaint mechanisms for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the same methods of complaint as any other worker in these countries, such as contacting the trade unions or the labour inspection services with their complaints. However, in practice most posted workers do not complain about non-

compliance and abusive situations, in some instances because they are afraid to do so, or because it could cause them to lose their job. As another factor for non-complaining the difficulty for posted workers to understand and get access to general complaint mechanisms under host state legislation was mentioned. Nevertheless, there are some positive examples to note, such as in Slovenia with regard to help provided to workers posted from former Yugoslavia and in the UK and Ireland the roles of ACAS and LRC in *collective* disputes). Hence, in practice most posted workers do not complain about non-compliance and abusive situations, in some instances because they are afraid to do so, or because it could cause them to lose their job. It is advised that the lack of designated complaint mechanisms at national level should be remedied. At EU level, we recommend to facilitate access to already existing complaint mechanisms, for instance by increasing the level of awareness amongst posted workers (*recommendation 45*).

**Non-use of jurisdiction clause by posted workers**

Hardly any court cases related to posting of workers were reported.[444] This seems to confirm the finding in the first study that the right to take legal action has at present hardly been or has even never been used by posted workers nor by their representatives.

The – alleged - causes mentioned by stakeholders in the present study for this non-use may be distinguished in four groups.

**Firstly**, *neutral reasons* such as, in Cyprus, Greece, Malta and Portugal, the insignificance of the phenomenon of posting. In Latvia,[445] representatives of the trade union and the state labour inspectorate are convinced that the too demanding legal obligations (financial burdens, in particular the obligation to provide a daily subsistence allowance) are the main cause for the few posted workers from their country (and thus no posted workers initiating court cases). The lack of publicly accessible and/or reliable data on the number of claims pursued by posted workers through the courts or tribunals may also be an explanation. This was mentioned in Austria, Hungary, Ireland and Latvia.

**Secondly**, rather obvious and well-known '*worker-related*' reasons were mentioned in Austria, such as *language problems*,[446] *unfamiliarity* with the legal system and the

[444] Only in Latvia, a very recent case of 5 July 2011, in Lithuania a case of September 2009, in Slovenia a case of October 2008. In this case the worker denied to go to Serbia (hence not a Member State) for a more business trips, claiming that these trips are actually a temporary work abroad, not provided in his employment contract. See for an overview and more details, Annexes.

[445] This is especially true for the highly qualified workforce, such as IT professionals or construction engineers. Their salary in Latvia in most of the cases already complies with the minimum salary level in other EU Member States. They know foreign languages and thus have full access to the information on their rights and know how to enforce them. They base their 'posting' in other EU member states on mutual agreements with their employer. Due to too many requirements and formalities in sending and host state they freely choose to be posted under another title than 'posted worker'.

[446] As reported from Lithuania, many workers still lack knowledge of any language of 'Old' Europe. They are used to communicate in Russian as a second language. In this respect the practice of some trade unions stands out: they have at least one representative from Eastern Europe being able to communicate in Russian, for example, Norwegian trade unions.

system of industrial relations in the host country, and the fact that in the case of unpaid wages, the amount of money due is usually not worth the cost and effort of commencing a legal action. As reported from Slovenia, the ignorance and lack of legal awareness of employees is used by posting employers who do not ensure the working conditions according to the hard core of the host country, which leads to underpayment, identified as the most pressing problem in Austria. The lack of 'empowerment' of posted workers is augmented in situations where other actors, such as trade unions, employers and even administrative institutions also display a lack of appropriate knowledge of the workers' rights under the PWD.

**Thirdly**, a very important *socio-economic factor*, recognized by interviewees in sending and host countries alike, is the *salary gap* between Eastern and Western Europe. In particular workers in low-skilled jobs seem to be very willing to work abroad even without demanding what they are entitled to according to the minimum requirements under PWD. It may even be the case, according to the Irish report, that 'bargains of convenience' exist between posted workers and employers, whereby the workers are willing to accept inferior pay and conditions to those under the legislation/collective agreements of the host country (either because these are still far in excess of rates in the country of origin, or 'willing' only in the sense they are afraid to confront the employer or approach a trade union). This is the flip side of the positive comment of Bulgarian actors on the possibility of cross-border posting in the EU: 'Posting is one of the possibilities for labour migration in search of better living and work conditions. It helps to study the foreign experiences as well as the culture and style life in the host countries. Sometimes it is one of the ways to combat unemployment in the sending states.' Posted workers stemming from states with low wages do not compare their situation with their colleagues in the host state, but judge whether it is better than that of their colleagues in the sending state.

**Fourthly**, also persistent *system-related* causes were observed in many Member States, such as *non-existent or inadequate access* for posted workers to multi-lingual and transparent *information* on their basic rights through internet and/other sources (e.g. AT, CY, PT). *Costly and lengthy judicial procedures* may also inhibit posted workers from pursuing claims in court, such as in LV, IE, PT, SK, SI.

Together with the convincing (though anecdotal) evidence of (abusive) cases of non-compliance as reported in the national reports in the current and the previous study (see sections 3.5 and Annexes), this must be interpreted as a clear signal that the jurisdiction clause in the PWD alone is not sufficient to provide an effective remedy. To the extent that procedural problems are detected (in some national reports), efforts should certainly be made to remove them. However, the main point to underscore in this context is the indispensable role of trade unions which, as set out above and in the first study (sections 3.2 and 4.5), together with other actors at grassroots level, try to reach posted workers, raise their level of awareness as to their rights, and 'empower' them.[447] Noteworthy are several accounts of both wildcat strikes and organized strikes on behalf of posted workers. At the same time it was found that efforts to unionize posted workers are not very successful, mainly for non-legal reasons (disinterest / fear / distrust of unions due to bad experience / image in country of origin, costs of membership). However, there are also signs of success in the growing awareness of mainly

[447] Inadequate as this may be, and also fuelled by the interests of domestic workers.

Polish posted workers, which indicates that trade union efforts should be sustained and not abandoned for a lack of financial resources (which was also reported several times). ). Therefore, we believe it is important to emphasize the long-term need to structurally promote and support trade union (and/or social partner) initiatives in this regard (*recommendation 44*).

**Posted workers' rights denied under legislation or court attitude in the sending state**

In several sending states mention was made of rules or court attitudes which may hamper the rights of workers posted from these states. Especially the so-called 'business-trip' legislation in several sending member states was sometimes interpreted as if host state rules do not apply during relatively short periods of posting (SI, BG, see also above under section 3.2). Another example, also cited under the heading 'recognition of foreign judgments' in section 4.4, concerns the unclarity in Slovakian law regarding the recognition of a foreign judgment. An illustration of what may be called an unfriendly court attitude is the situation regarding workers posted by temporary work agencies established in Portugal. Such a posted worker should be strongly advised to pursue his claim in the host state, simply because the Portuguese Law seldom recognizes any liability of the client or user of the temporary work.[448] Hence, the current study shows that posted worker's rights are sometimes denied under the legislation or court interpretation/attitude of the sending country. Legislation in the sending state stipulating that host state rules do not apply during relatively short periods of posting or not recognizing host state judgments granting these rights to posted workers run counter to Brussels I, Rome I and the PWD. The EC should act upon that, ultimately with an infraction procedure (*recommendation 46*).

[448] See in this regard Case C-60/03 Wolff & Müller [2004] ECR I-9553, which involved a Portuguese worker who lodged a claim for outstanding wages against the German main contractor.

## 5.6. FINAL REMARKS

In this summarising chapter of our comparative study, based on fifteen national reports set against the conclusions and recommendations in the previous study, we have been able to incorporate most of the analysis of the causes of the problems, as well as our main recommendations, including the classification of best practices. Nevertheless, this is only a brief outline of our extensive complementary research into the existing problems in the implementation, application and enforcement of the Directive (see Chapters 2, 3 and 4).

By and large, the current study confirms the analysis and recommendations made in the previous study. Almost all recommendations were unchanged as regards their content,[449] with only four of them slightly adapted or amended (recommendations 2, 4, 42, 45).[450] Three new recommendations were added (14, 17 and 46)[451] as a result of new findings in the current study.

In general, many of our (confirmed) recommendations in both studies boil down to clarification and a more precise application of the concepts and standards in the PWD to enhance the Directive's practical impact. Ideally, the clarification must occur mainly at EU level, with the more precise and accurate application at national level. In particular, where problems of application and enforcement of the PWD are concerned, we also advocate the development of new legal or policy instruments. A lot can be done at national level, but with an eye to the principle of effectiveness grounded in the TEU, (additional) legal action at European level would seem to be indispensable.

[449] Recommendations 8 – 13, 15, 18, 20, 21 were renumbered.
[450] See p. 28, 47, 272, 273.
[451] See p. 81, 134, 273.

# ANNEX I

## *List of recommendations*

***Recommendation 1 – unchanged*** *(p. 28 final study)*

**At EU level>** The present preamble to the PWD makes reference to the Rome Convention, but the exact relationship between the legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention/Rome I Regulation, also because the ECJ did for a long time not judge PIL issues. Thus, to further a correct application of the law on posted workers, we would favour a clarification, stating that the concept of posting and the concept of posted worker in the PWD has to be interpreted in the light of the provisions of the Rome I Regulation.

In particular, it is important to ensure that the concept of posting is based on a genuine connection between the 'sending state' and the employment contract of the posted worker. The PWD basically contains this requirement in its definition of posted worker in Article 2(1) ('posted worker` means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in *which he normally works*). However, this provision currently lacks adequate practical enforcement and implementation. In this context we advise to make this provision operational while drawing inspiration from Article 12(1) Regulation 883/04 and, most notably, Article 14 Regulation 987/2009.

Moreover, we favour the introduction of a requirement that the employer has to bear the costs of the posting in order that the PWD be applicable (see art. 3(7) second indent).

See also recommendations 8-10 (formerly recommendation 11-13) below.

***Recommendation 2 - adapted, action at EU-level added*** *(p. 28 final study)*

**At national level>** In national law, special attention must be paid to the position of posted workers from a sending state perspective. In this regard, we consider it necessary to make sure that workers who are posted from that state will still be protected under its labour laws, in order to avoid lacunae in the legal protection of posted workers. This recommendation seems to be especially pertinent for the common law countries where statutory protection largely depends on the place of work, but it also applies to specific legislation in the other Member States.

Action **at EU-level** would be helpful to impose a clear duty on the sending state to take responsibilities not only as regards the formal applicability of its norms to posted workers, but also as regards the monitoring of application and – if necessary – enforcement of those norms that continue to apply during the posting abroad.

See in this regard also recommendations 8, 36 and 39 below.

***Recommendation 3 – no substantive changes*** *(p. 47 final study)*

**At national level>** The impact of the 'Laval quartet' can to some extent be mitigated by measures of national law, which would include:

- Explicit reference by the Member States to the autonomous method as a means of setting minimum standards.
- Identification of the relevant CLAs and the relevant norms within those CLAs.
- Transparency of norms contained in CLAs.
- Measures to ensure non-discrimination.

***Recommendation 4 – second paragraph slightly adapted*** *(p. 47 final study)*

**At EU level>** To eliminate legal uncertainty about the meaning of the fundamental right to collective action within the context of the fundamental economic freedoms of the single market, a new legislative initiative is necessary. We recommend that the EU uses the adoption of a new legislative initiative to improve the implementation, application and enforcement of the directive to clarify the distinction between collective action meant to impose host state standards in the meaning of Article 3(8) on the one hand and collective action by posted workers in order to reach agreement on better working conditions as covered by Article 3(7) or enforce rights granted under Article 5 on the other hand. In doing so, the instrument should confirm the right of posted workers to initiate or take part in industrial actions in the host country.

Another aspect which merits attention is the effect of damages on the effective enjoyment of the right to strike. As the right to damages for breach of EU law - though based on national law – is subject to EU requirements, attempts to mitigate this threat should be made at EU level.
It may also be worthwhile to consider the suggestion in the 'Monti report' to introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services does not affect the right to take collective action.

***Recommendation 5 – unchanged*** *(p. 48 final study)*

**At EU level>** To take away legal uncertainty with regard to the scope for Member States to include social clauses in public procurement contracts, this issue should be clarified not only in the light of the Rüffert judgment, but also taking into account the Public Procurement Directives which explicitly leave the Member States free to decide on how to integrate social policy requirements into public procurement procedures and ILO Convention No. 94.

Moreover, it should be clearly established to what extent the obstacle which social clauses may cause to the freedom of services may be justified by imperative requirements of the public interests, taking into account that Convention No. 94 promotes the observance of the universally applicable Fundamental Rights and Principles at Work, which are guaranteed by Article 21 and 28 of the EU Charter of Fundamental Rights.

***Recommendation 6 - adapted only with regard to the states covered by this study*** *(p. 75 final study)*

In general, we advise as action **at national level >** that Member States should bring their implementing law and the application and enforcement thereof into line with the more precise concept of posting in the PWD. Of the countries covered by the current study this recommendation seems to be particularly relevant for IE and SI.

***Recommendation 7 (formerly rec 7 (second part) – unchanged*** *(p. 77 final study)*

**At EU level or at national level >**
To prevent employers from circumventing and abusing the rules it is necessary to establish a clear definition of "undertakings established in a Member State" (see e.g. in art 4(5) of the Services directive 2006/123/EC). Only genuinely "established" companies may benefit from the freedom to provide services and hence from the PWD.
In the absence of an EU solution, Member States could clarify this issue in their national systems, although this carries the risk of substituting a European concept for a national one.

***Recommendation 8 ( formerly rec 11) – unchanged*** *(p. 77/78 final study)*

**At EU-level >** To enhance possibilities to combat abusive situations, the definition of temporary posting in Article 2 PWD should be amended or clarified.

- Whether a rebuttable legal presumption of 'structural' employment in the host state should be introduced in case the length of employment in the host state exceeds a certain period of time (which may be partly left to the sectoral social partners to fill in, as for example in Article 5(3) Directive 2008/104 on TWA), merits further study. In any event, care should be taken to comply with the Treaty requirements under the free movement of services
- Another option would be to indicate which minimum links to the country where the posted worker normally works should exist in order for that mobility to qualify as posting under the PWD. This merits further study as well, in particular with regard to the care that should be taken to comply with the Treaty requirements under the free movement of services.
- The sending state should have a clear responsibility in preventing abusive situations (compare Article 30 (1)(2) Dir 2006/123/EC)

See also recommendations 2 and 7 above and recommendations 36 and 39 below.

***Recommendation 9 ( formerly rec 12) – no substantive changes, last sentence added regarding Member States***
*(p. 78 final study)*

**At EU level >** To stress the distinction between 'passive mobility' of a worker posted in the framework of service provision of his employer and 'active mobility' of a worker, entering the labour market of another member state to take advantage of job opportunities, we advise to amend the text of Article 3(7) second sentence of the

PWD by making the reimbursement of expenditure for travel, board and appropriate lodging/accommodation an obligation on the service provider.

The experience of several Member States with such obligation should be taken into account when formulating the obligation.

***Recommendation 10 (formerly rec 13) – unchanged*** *(p. 78 final study)*

**At national level>** In the absence of or while awaiting EU action, a clear understanding should be reached between enforcement authorities as to the necessary link of worker, undertaking and/or contract to the sending country. The posting declaration (A1 form) under the social security regulation may be a starting point for this discussion (see in particular Article 12 Regulation 883/04 and Article 14 Regulation 987/2009). Another indication of the fact that posting is temporary and undertaken on the employer's account, would be the fact that the employer reimburses costs of travel, lodging and subsistence.

See also recommendations 1 and 9 above.

***Recommendation 11 (formerly rec 7 first part) – unchanged*** *(p. 79 final study)*

**At EU level or at national level >** With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and the recipient of the service in the host state. A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider.
In our opinion the existence of an intermediary between the employer and the recipient of the services should not prevent application of the Directive in cases which otherwise fit the objectives of the Directive. Hence, we recommend clarifying this, in line with the purpose of the PWD.

***Recommendation 12 (formerly 7 third part) – unchanged*** *(p. 79 final study)*

**At EU or national level >** The requirement of a cross-border service provision needs clarification. A trainee is present in the territory of the host state for professional reasons, and may be benefiting from the freedom to receive services, rather than providing such. Hence, the (non-) application of the PWD to trainees and other workers receiving services abroad should be clearly established as well as the extent to which the PWD applies to intra-company transfers and postings.

In the absence of an EU solution, Member States could clarify these issues in their national systems, although this carries the risk of substituting a European concept for a national one.

***Recommendation 13 (formerly rec. 9 and 10)*** *(p. 80 final study)*

**At EU level or national level>**
There is reason to formulate a sub-rule for applying the PWD to transport workers. This should be the subject of further research and should be formulated in cooperation with the relevant stakeholders and experts in the field of transport regulation.
In the absence of and while awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application of the PWD to this sector.

***Recommendation 14 ** NEW** (p. 81/82 final study)*

**At national level >** Member states that have not yet done so, should consider introducing a specific clause in their law, recognizing the application of core standards of the host state during postings taking place from their territory and/or under their law.
Member states that already have such clause in their national law, should if necessary correct such clauses to ensure the full respect for (the nucleus of) host state law as well as full respect for the protection offered by the law applying to the contract of employment, under application of Article 3(7) PWD (see in this regard also recommendation 2 above).

It may also be helpful to stipulate at **EU-level** the full respect by the sending state for the core standards of the host state during postings from its territory**.**

***Recommendation 15 (formerly rec 14) – unchanged*** *(p. 117 final study)*

**At EU level >** It should be made clear that minimum rates of pay can be set at different levels (alternatively or simultaneously) and that each may constitute a binding minimum for the purpose of the Directive.

***Recommendation 16 – unchanged*** *(p. 119 final study)*

**At national level>** An hourly minimum wage rate is more effective in offering protection to posted workers than a daily, weekly or monthly rate. Member States that currently do not have minimum hourly rates are advised to introduce these in their national laws.

***Recommendation 17 ** NEW** (p. 133 final study)*

**At national level >** The member states should clarify – in as far as they have not already done this – which provisions in the national laws or collective agreements are applied to workers posted to their territory as an implementation of Article 3(1)(c).

***Recommendation 18 (formerly rec 15) – unchanged*** *(p. 134 final study)*

**At EU-level >** A European framework should be developed to enable Member States to articulate their standards and allow service providers easily to check the conformity

of their 'own' employment conditions with the local rates of pay in the host state. From a practical point of view it may be a defensible tactic to allow a comprehensive comparison first and only perform an item-by-item comparison when the comprehensive comparison shows considerable discrepancies in protection. Such a practice, however, would need European backing to ensure conformity with the Directive.

***Recommendation 19 (formerly 17 and 18) – no substantive changes*** *(p. 140 final study)*

**At EU level>** A clarification of the notion of safety and health in Article 3(1)(e) may remedy the confusion caused by the fact that the notion may cover different elements such as on-site protective measures, health checks, as well as liability for industrial accidents. The relationship with other systems of protection should be clarified.

**At national level >** Member States should as far as possible apply the rules of mutual recognition to each other's system of training and health care. This requires cooperation and exchange of information between the authorities involved.

***Recommendation 20 (formerly rec 19, 20 and 21) – no substantive changes*** *(p. 145/146 final study)*

**At EU level >** With respect to the protection under the heading of Article 3(1)(f), a clarification of the contents of the special protection offered in this provision would be welcome.
As far as is relevant in light of the first recommendation, a clearer demarcation between the PWD with regard to payment during maternity leave (see Article 11(2) of Dir. 92/85/EEC) and the Regulation 883/04 on coordination of social security (regarding maternity benefits) would be welcome.
Depending on the outcome of the previous two points, it may be important to establish a method of comparison with regard to the protection offered in the field of maternity leave and parental leave, in particular how a longer leave against a lower remuneration/benefit should be compared to a shorter period of leave against a higher remuneration/benefit.

***Recommendation 21 (formerly rec 8) – unchanged*** *(p. 157 final study)*

The regulation of TWA activity is within the competence of the Member States – which must of course operate within the confines of the EU Treaties. **At the European level >** the consequences of the implementation of the TWA Directive should be monitored. The relationship between the PWD and the TWA directives should be made clear, especially in regard to the question of whether Member States that apply a full equality principle (which goes beyond the minimum required by the TWA directive) can or (with regard to the ruling in Vicoplus) even should also impose this full equality principle on foreign service providers.

***Recommendation 22 – unchanged*** *(p. 161 final study)*

**At EU-level>** Clarifying the scope of application of the headings of protection mentioned in Article 3(1) will help clarifying the remaining scope of application of the public policy provision in Article 3(10) (first indent).

***Recommendations 23- unchanged*** *(p. 161 final study)*

**At national level>** Member States could help to clarify the scope of application of the headings of protection mentioned in Article 3(1) and the scope of application of the public policy provision in Article 3(10) (first indent) by more explicitly referring to the relevant provisions in their implementation. Besides this, a more detailed identification of applicable provisions will help illustrate the breadth of the concepts used in the Directive.

***Recommendations 24 – unchanged*** *(p. 161 final study)*

**At EU-level>** The concept of public policy is used both in the context of the free movement of services and in the context of private international law. It is currently unclear whether the concept of public policy used in the case law on free movement of services is also valid in the context of the Rome I Regulation and if not, what impact the PIL concept may have on the interpretation of the PWD. Thus, further specification of the concept of public policy, taking into account the PIL context of the PWD, seems necessary.

***Recommendation 25 – no substantive changes*** *(p. 170 final study)*

**At national level >** Create more transparency in the monitoring systems of host countries with multiple monitoring authorities, by appointing one authority as the first contact point/first responsible actor in respect of monitoring the rights conveyed by the PWD and/or the presence of posted workers. Implement – if politically feasible – more public enforcement in case the national host state system prevents the adequate enforcement of rights for posted workers which may endanger the 'effet utile' of the PWD.

***Recommendation 26 – no substantive changes*** *(p. 171 final study)*

**At EU-level >** Stipulate in a recommendation or in a legal instrument that one government agency at national host state level should be the first contact point/first responsible actor on posting of workers issues. Furthermore (if it is assessed that effective measures cannot be sufficiently achieved at national level), it could be stipulated in a legal instrument that sanctions based on private law alone are not likely to be sufficient to deter certain unscrupulous employers. Thus, compliance can and should be strengthened by the application of administrative or, in some situations, even criminal penalties.

***Recommendation 27 – no substantive changes*** *(p. 179 final study)*

**At national level >** A closer focus is needed in the host state national authorities' monitoring and enforcement policy. This can be achieved by issuing inspection guidelines specifically targeted at posting of workers situation. In this respect, the question whether a requirement on service providers and/or recipients to simply notify the presence of posted workers to authorities in the host state may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study. It may help the national actors to detect posting of workers situations and it gives insight into the size and occurrence of this phenomenon at sectoral level.

***Recommendation 28 – no substantive changes*** *(p. 171 final study)*

**At EU-level >** Since the enforcement bodies in the host Member States do not specifically focus on the specific legal position of posted workers on their territories and thus tend to overlook them, a more targeted focus on this group can also be furthered by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations at EU level. Possible sources of inspiration: Osha (European Agency for Safety and Health at Work); SLIC; Europol; Administrative Commission in the context of social security coordination.

***Recommendation 29 – unchanged*** *(p. 198/199 final study)*

Further implementation/application of initiatives **at EU and national level** already taken with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates is indispensable. It depends on the situation in each Member State what concretely should be done from an operational point of view. To keep authorities continuously focused on the need for a smooth and effective cooperation, we advise to evaluate and monitor the situation on paper and in practice regularly (for instance once or twice a year).

***Recommendation 30 – no substantive changes*** *(p. 206 final study)*

Several countries reported a shortage of staff involved in host state monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings should be dispelled by **national** efforts (recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) **and/or at EU level** by stipulating minimum standards in this respect in a legal instrument (Directive 2009/52 may serve as a source of inspiration in this respect). The additional advantage of a measure at EU level would be that it may reduce as far as possible the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD.

***Recommendation 31 - no substantive changes*** *(p. 213 final study)*

More (e.g. financial as well as institutional) support of social partners **at national level** together with more supervision / stipulation of minimum standards **at EU-level**

for adequate monitoring / enforcement of rights at the CLA-level in the host state, is necessary as well as guidelines for cooperation between the authorities and social partners.

***Recommendation 32 - no substantive changes*** *(p. 222 final study)*

For the part that the non-recognition and execution of foreign judgments and decisions is due to legal lacunae, additional measures should be taken **at national** and also **at EU level** to enhance the cross-border recognition and execution of penalties in the context of the PWD.

***Recommendation 33 - unchanged*** *(p. 231 final study)*

**At national level >** Continue the efforts to improve access to and content of the information on host country labour law standards, especially respecting entitlements in CLAs. **At EU level**, these efforts can and should be facilitated as far as possible (best practice of social partners at EU level: EFBWW/FIEC joint initiative), by practical measures and/or legislative amendments, stipulating more detailed minimum standards than in the current Art. 4(3) of the PWD.

***Recommendation 34 – no substantive changes*** *(p. 231 final study)*

In almost all host countries websites are the most prominent means for the dissemination of information. If too little (clear) information was available through internet before 2006, now it sometimes seems to be the opposite: too many sources of information may also endanger transparency. In this respect it is recommended that host state authorities designate one website/webgate as the central entry point for the provision of information on posting of workers in the context of the PWD, at **both European and national level** (inspiration may be drawn from the setting up of 'Points of Single Contact' (PSCs) in the context of Directive 2006/123 (Services Directive).

***Recommendation 35 – unchanged*** *(p. 231 final study)*

It should be noted that posted workers, in particular those in the lower segments of the labour pool, may not have internet access. In this respect adequate information on paper and special information and awareness-raising campaigns focused on posted workers will remain indispensable, which several host Member States mentioned in the previous study have put into practice. However, such special grass-roots projects are costly and time consuming. To promote and sustain such initiatives, financial support and facilitation **at EU and national level** is an absolute prerequisite.

***Recommendation 36 - no substantive changes*** *(p. 235 final study)*

**National level >** In the countries covered by the current study and the previous one the obligation to provide written information on certain issues as defined in Art. 4 Dir. 91/533, seems only to be subject to supervision by the Labour Inspection in its role as a sending state in Estonia. Here, failure by an employer to submit information is

punishable by a fine. This good practice deserves following by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting.

**At EU level**, amending Directive 91/533 is highly recommended, in order to establish effective and dissuasive sanctions in case of non-compliance with the obligations laid down in Articles 2 and 4 of this Directive and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533, also to the competent national authorities in the host and/or sending state.
In case authorities in the latter state would be made primarily responsible, the cooperation with the competent authorities in the host state should be clearly established.

See in this regard also recommendations 2 and 8 above and recommendation 39 below.

***Recommendation 37 - no substantive changes*** *(p. 244 final study)*

**National level >** The initiatives to enact a notification system for service providers in a majority of Member States (in their capacity as host state) merit further study.

***Recommendation 38 – no substantive changes*** *(p. 244 final study)*

From an EU perspective, notably with regard to further cross-border service provision, the differences between Member States with and without notification systems may create confusion and uncertainty, as also may the different content of notification requirements in force. Whether it would therefore be recommendable to coordinate a notification system **at EU-level**, by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. In this respect, inspiration may be drawn from Directive 2009/52 and from the old proposals (see COM (1999) 3 and COM (2000) 271) to adopt a residence Directive for posted workers (note that both are/were only meant for workers with a third country nationality, which may put the protection of intra-EU posted workers at a disadvantage).

***Recommendation 39 – unchanged*** *(p. 251 final study)*

**At national level**, exchange of best practices with regard to 'balanced' additional duties on service providers is recommended. Preferably however, **at EU-level** uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Art. 2 and Art. 4 of Dir. 91/533). See in this regard also recommendations 36, 8 and 2 above.

***Recommendation 40 – unchanged*** *(p. 252 final study)*

**At national level**, duties on service providers in (generally applicable) collective labour agreements may, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach of EU law, be welcomed and shared as good practice as a tool to enhance compliance with the PWD at the level of CLAs.

***Recommendation 41 - no substantive changes, Member States information added*** *(p. 260 final study)*

The feasibility of adopting minimum standards **at EU-level** with regard to duties (including joint and several liability) on service recipients in the context of the PWD merits further study, taking into account the (in)effectiveness of these tools, now that 19 of the 27 Member States have enacted some kind of duties on the service recipient.

***Recommendation 42 - substantively amended, see first sentence*** *(p. 272 final study)*

**At EU level**, it merits further study to make sure that in each Member States the jurisdiction clause is properly implemented. Moreover, an amendment to Article 6 PWD is recommended, so as to make the option to give social partners locus standi an obligation. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state.
In this context the independent right to bring cases before the court and its quite effective use by the German holiday fund ULAK also merits attention. If not already provided for by **national** legislation, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for such purposes as recovering outstanding wages).

***Recommendation 43 - no substantive changes; supplemented with Member States information***
*(p. 273 final study)*

Posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in 22 Member States, as long as they are EU nationals or regularly residing or domiciled in another Member State of the EU (except for Denmark). However, in accordance with the general principles operating in CY, MT, LT, RU, the UK and partly IE, in employment cases, no legal aid would be available for workers posted there. In PT and EL legal aid is not well developed.
Although these findings are in line with EU law (notably the legal aid directive), an EU Communication might recommend the provision or enhancement of access to legal aid for posted workers in countries where this is currently not available or not well developed.

***Recommendation 44 - one concrete proposal added in last sentence*** *(p. 273 final study)*

We believe it is important to emphasize the long-term need to structurally promote and (financially and institutionally) support trade union (and/or social partner) 'awareness and empowerment' initiatives with regard to posted workers both **at national** and **at EU-level**. For instance, by funding dedicated 'posted workers officers' amongst the social partners, as was suggested in the Irish report.

***Recommendation 45 – adapted with regard to EU-level*** *(p. 273 final study)*

The lack of designated complaint mechanisms **at national level** should be remedied. Member States should exchange good practices in this regard, such as the anonymised complaint procedure existing in Germany, to make it easier for posted workers to lodge a complaint. **At EU-level**, too, it would be necessary to facilitate access to existing complaint mechanisms such as the Internal Market Problem Solving Network (SOLVIT).

***Recommendation 46 - ** NEW **** *(p. 273 final study)*

Legislation in the sending state stipulating that host state rules do not apply during relatively short periods of posting or not recognizing host state judgments granting these rights to posted workers run counter to Brussels I, Rome I and the PWD. To prevent undermining of posted workers rights in the sending state, the **EC** should act upon that, ultimately with an infraction procedure.

# ANNEX II

## *List of media cases*

**Austria**

- South Korea and Indonesia workers case – victims of wage and social dumping, parliamentary enquiry < Enquiry 3263/J, 22nd Legislative Period http://www.parlament.gv.at/PAKT/VHG/XXII/J/J_03263/fname_045886.pdf>

- Fake self-employment case- 136 out of 1.136 fake self-employed

**Bulgaria**

No cases reported

**Cyprus**

- Banking sector case - posting from Greece to Cyprus, trade union must approve the posting as part of the binding sectoral collective labour agreement

**Czech Republic**

No cases reported

**Finland**

No cases reported

**Greece**

No cases reported

**Hungary**

- SoKo Pannonia, SoKo Bunda case - Hungary companies active in Germany, non-fulfilment of formal requirements
- The Dublin Spencer Dock case - investigation into the salaries of Hungarian workers posted in Ireland by Irish trade union, underpayment
- Hungarian airport security employees case – regular employees on strike, Greek workers employed to ensure the operation of the airport

**Ireland**

- Gama case - Turkish workers posted, underpayment

**Latvia**

No cases reported

**Lithuania**

- The metal sector (Belgium) and construction sector (Norway) case - working condition, no breaches established by Lithuanian authorities
- Illegal work cases - Rumanian and Chinese construction workers transferred to work on a chicken farm

**Malta**

No cases reported

**Slovakia**
No cases reported

**Slovenia**
No cases reported

# ANNEX III

## *List of court cases*

**Austria**

- Supreme Court, 28 November 2005, 9 ObA 150/05g- duration of posting, posting from Croatia to Austria for more than ten years

**Bulgaria**

- District Administrative Court in Targoviste 3rd div, case N 8 of 2008 – social security, refusal A1 form
- District Administrative Court in Targoviste 3rd div, case N 127 of 2008 – social security, refusal A1 form
- District Administrative Court in Targoviste 3rd div, case N 85 of 2008 – social security, refusal A1 form
- District Administrative Court in Targoviste 3rd div, case N 125 of 2008 – social security, refusal A1 form
- District Administrative Court Silistra, case N 81 of 2009 – social security, refusal A1 form, lack of direct relation between the sending employer and the employee
- District Administrative Court Silistra, case N 3816 of 2008 – social security, refusal A1 form, lack of direct relation between the sending employer and the employee
- District Administrative Court Silistra, case N 9809 of 2009 – social security, refusal A1 form, lack of direct relation between the sending employer and the employee
- District Administrative Court Silistra, case N 6935 of 2008 – social security, refusal A1 form, lack of direct relation between the sending employer and the employee
- District Administrative court Sofia, case N 80 of 2008 – social security, refusal A1 form, lack of direct relation between the sending employer and the employee
- District Administrative Court Silistra, case N 59 of 2008 – social security, refusal A1 form, lack of activities of the sending employer in Bulgaria
- District Administrative Court Silistra, case N 104 of 2008 – social security, refusal A1 form, lack of activities of the sending employer in Bulgaria
- District Administrative Court Sofia, 18 June 2009, case N 2133 of 2009 – social security, refusal A1 form, lack of activities of the posted worker in the posting enterprise in Bulgaria

**Cyprus**

- Supreme Court in civil appeal 24 Febuary 1998, No. 9302, Thaleia A. Theologou and Others vs. Ktimatiki Nemesis - posting from Greece to Cyprus, trade union must approve the posting as part of the binding sectoral collective labour agreement

**Czech Republic**

No cases reported

**Finland**

- The Finnish Labour Court (Työtuomioistuin) 2009, Työtuomioistuin TT:2009-90 (Ään.) - Finnish and Spanish aircraft companies, application of a Finnisch collective agreement

**Greece**
No cases reported

**Hungary**
- ECJ 16 June 2010, C-298/09, Rani, reference for a preliminary ruling, termination posting contract, domestic registered seat in line with EU law
- Court of second instance, April 2011, not published - employees strike Hungarian airport, Greek workers employed to ensure the operation of the airport

**Ireland**
- High Court 25 February 2011, not yet reported, Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS - Turkish workers posted, underpayment
- John Grace Fried Chicken Ltd & Ors v Catering JLC & Ors [2011] IEHC 277 – catering sector, binding employment regulation orders unconstitutional
- High Court 2007, 3 IR 472, Gama Construction & Gama Endustri v Minister for Enterprise, Trade and Employment - Turkish workers posted, underpayment Supreme Court 2010, 2 IR 85, Gama Construction & Gama Endustri v Minister for Enterprise, Trade and Employment - Turkish workers posted, underpayment
- Labour Court Recommendation, LCR 18214/2005, Gama Endustri v SIPTU - Turkish workers posted, underpayment
- Labour Court Recommendation, LCR 18389/2005, Irish Ferries v SIPTU - Irish Ferries re-flag ships to Cyprus, voluntary redundancy, replaces by Latvia workers, underpayment
- Labour Court Recommendation, LCR 18390/2005, Irish Ferries v SUI - Irish Ferries re-flag ships to Cyprus, voluntary redundancy, replaces by Latvia workers, underpayment
- Labour Court Recommendation, LCR 19847/2010, Construction Industry Federation v Irish Congress of Trade Unions – Irish legislation apply to all employees working in Ireland irrespective of nationality or status
- Employment Appeals Tribunal, UD2366/2009, Taylor v David Lloyd - secondment or posting of an UK worker in Ireland, applicability of the directive.
- National Employment Rights Authority v. RAC Constactors, criminal case, unpublished, see i.a. 'Construction Firm Fined for Falsifying Work Records' Irish Times, 7 February 2011. Subcontracting, Portuguese firm, construction project on behalf of local authority in Ireland, falsification of work records, underpayment.

**Latvia**
No cases reported

**Lithuania**
- Resolution of Tax Dispute Commission of 2 October 2009, case no. S-299(7-251/2009) - tax liability of Swedish company for provided works in Lithuania Judgment of 22 September 2009, Case No. 3K-449/2009 - difference between business trip and posting within the meaning of LGPW

**Malta**
No cases reported

**Slovakia**
- Meat industry case, not published – posting from Slovakia to Belgium, failure to meet wage conditions under Belgian collective agreement

**Slovenia**
- Supreme Court of the Republic of Slovenia, 7 October 2008, judgment VIII Ips 215/2007 - Slovenian worker, access denied to Serbia for business trips, business trips regarded as temporary work abroad