

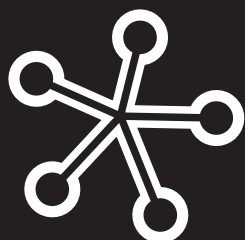


# AIAS

Amsterdam Institute for  
Advanced labour Studies

## Collective redress and workers' rights in the EU

*Jan Cremers and Martin Bulla*



Working Paper 118

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## Acknowledgements

This paper is the result of a four months period of desktop research in 2011. After the conclusion of a project on the practical functioning of the rules designed for posted workers as prescribed by the European Directive 96/71/EC several question marks related to the practical enforcement of workers' rights stayed upright for the research team. However, time and money was lacking to look for the answers. Around the time that Martin Bulla came to AIAS for a short stay the notion of collective redress had just passed on the agenda of the European legislator. Jan Cremers prepared some background documents for an EU consultation in this area. Without additional funding we combined the two things during Martin Bulla's stay at AIAS in an exploratory project. The authors want to thank the Amsterdam Institute for Advanced Labour Studies for this opportunity.

Sole responsibility for the content lies with the authors Jan Cremers and Martin Bulla.

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# Collective redress and workers' rights in the EU

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# Abstract

This Working Paper examines the issue of collective redress as a possible way to defend workers' rights in the EU. Since the implementation of the internal market and the development of the Community acquis trade unions and the workers they represent in Europe are confronted with the question how to defend workers' rights that can be derived from EU law, especially in a cross-border context. Although in theory it is often claimed that foreign workers have access to justice and can address to local courts like any other worker the practice is rather patchy.

In the first exploratory contribution Jan Cremers describes the latest developments in the European Union related to the cross-border enforcement of workers' rights. The notion of collective redress is introduced with a short explanation of the position of the trade unions. After an exploration of practical experiences the article ends with an overview of challenges and open questions that have led to further desktop research.

Martin Bulla investigated whether collective redress can provide a possible way of improvement of judicial enforcement of posted workers' rights vested in the Posting of Workers Directive (Directive 96/71/EC). The contribution starts with the most significant problems posted workers are facing, followed by an overview of basic types of collective redress procedures as well as differences in approaches to legal regulation in countries. EU initiatives dealing with the issue of collective redress mainly related to consumer law are examined and existing legal instruments are addressed with a view to a possible use for enhancement of posted workers' rights. Finally an overview of ways of applying redress procedures under the existing legislation is followed by proposals concerning a better functioning of collective redress in respect to posted workers.

## Samenvatting

Dit Working Paper behandelt de thematiek van de collectieve claim als een mogelijkheid om werknemersrechten in de EU te verdedigen. Sinds de invoering van de interne markt en de ontwikkeling van het gemeenschapsrecht worden de vakbonden en de werknemers die zij vertegenwoordigen in Europa geconfronteerd met de vraag hoe op te komen voor werknemersrechten die kunnen worden ontleend aan EU-wetgeving, met name in een grensoverschrijdende context. Hoewel buitenlandse werknemers in theorie toegang hebben tot justitie en zich kunnen wenden tot de lokale rechter, net als alle andere werknemers, is de praktijk weerbarstiger.

In de eerste bijdrage beschrijft Jan Cremers de recente stand van zaken in de EU met betrekking tot de grensoverschrijdende handhaving van werknemersrechten. De notie van collectieve schadeclaims wordt uiteengezet met een korte uitleg van de opstelling van de vakbeweging. Na een uiteenzetting van praktische ervaringen eindigt de bijdrage met een overzicht van de uitdagingen en open vragen op dit terrein.

Martin Bulla onderzocht of collectief verhaal kan bijdragen aan het juridisch handhaven van de rechten van gedetacheerde werknemers ontleend aan de Europese Detacheringsrichtlijn (Richtlijn 96/71/EC). Zijn bijdrage start met de belangrijkste problemen waar gedetacheerde werknemers tegen aan lopen, gevolgd door een overzicht van vormen van collectieve schadeprocedures en van verschillen in juridische benadering per land. EU-voorzieningen op het gebied van collectieve claims, met name op het gebied van gebruikersrecht, worden behandeld en bezien wordt in hoeverre dergelijke legale middelen ingezet kunnen worden voor de verbetering van de handhaving van het recht van gedetacheerde werknemers. Het eind bevat een overzicht van de toepassing van collectieve claims in het bestaande rechtstelsel, gevolgd door aanbevelingen voor het beter functioneren van collectieve claims voor gedetacheerde werknemers.



## Part A

# Is collective redress an instrument for workers? An introduction

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# 1. Preface

Since the implementation of the internal market project and the development of the Community acquis, as a cornerstone for the integration of the European Union, trade unions in Europe are confronted with the question how to strengthen workers' rights that can be derived from EU law, especially in a cross-border context. Although it is often claimed that foreign workers have access to justice and can seek redress through local courts in seeking respect for working conditions and legal provisions, the practice is less rosy. The overall picture in the Member States is rather patchy.

In this exploratory article the author describes the latest developments of cross-border enforcement of workers' rights in the European Union. The first paragraph is dedicated to the overall legal frame in the EU and the practical experiences in this field. In the following section the notion of collective redress is introduced with a short explanation of the contribution from the trade union side. After an exploration of trade unions' possibilities the article ends with a list of practical problems and open questions that require further investigation. At the same time this article is an upbeat for the second contribution in this AIAS Working Paper by Martin Bulla who has worked during a short stay at AIAS on the question how to deal with the enforcement of posted workers' rights via collective redress.



## 2. The legal EU frame

As a result of the introduction of the single market European citizens and employees are more and more confronted with aspects of life and work that are based on European rules and regulations. The topical question is how citizens and workers can ask for justice in deriving their rights from this legal and regulatory frame. The Treaties provide for legal and administrative cooperation and according to the Lisbon Treaty (article 82 TFEU) the European legislator (Council and Parliament) will adopt measures to lay down rules and procedures for ensuring mutual recognition on all forms of judgments and judicial decisions throughout the EU. In addition, throughout the last decade, the European legislator has enshrined the collective defence of workers interests in the EU Treaties. The strongest overall case in this area (next to the Convention on Human Rights recognised at EU level<sup>1</sup>) is a section in the Charter of Fundamental Rights of the European Union that deals with the right to effective remedy (title VI, article 47):

*Right to an effective remedy and to a fair trial*

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Another topical question is the role of the European social partners in cases where there is direct reference to parts of the EU legal system that originate from the results of the social dialogue. In the recent past there has been a call for a transnational labour dispute system since the introduction of the social dialogue procedures.<sup>2</sup>

All in all, the right to compensation, the right to access to justice and the right to effective remedy should no longer be a matter of theory. Legal provisions guaranteeing the practical enforcement of rights have to be a crucial element in policy making. The right to act collectively should be strengthened at EU level and the EU should play an important role in promoting effective enforcement of these rights. But recognition of workers' rights in cross-border situations is not self-evident and the problems that EU citizens encounter when they try to seek redress are manifold. In practice, workers are often unable to exercise

1 Article 6 of the European Convention on Human Rights: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

2 According to articles 154 and 155 of the Treaty on the Functioning of the European Union the EU can hand over to the European social partners the possibility to conclude contractual relations, including agreements, related to proposals in the social policy field. At the joint request of the partners these agreements can be transposed in EU legislation. This procedure can put the partners in a co-regulatory role.

these rights due to the inadequacy of existing means of redress in mass claim situations and to a lack of cross-border cooperation. On top of that the costs of legal proceedings are sometimes higher than the compensation they can receive.

The theme that we want to explore here, therefore, is whether a collective redress mechanism that allows citizens and workers to bring a case via their representative organisations before the court could be more effective.

### 3. The notion of collective redress back on the agenda

In 2011 the European Commission (DG Justice) opened a public consultation: *Towards a Coherent European Approach to Collective Redress*. The purpose was to identify common legal principles on collective redress and to examine how such common principles could fit into the EU legal system. The consultation explored which different forms of collective redress (injunctive and/or compensatory) could have an added value for improving the enforcement of EU legislation and for better protecting the rights of citizens and business.

The European Commission has produced a working document emphasising that rights which cannot be enforced are worthless (European Commission, 2011). Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation. The Charter of Fundamental Rights of the European Union confirms the right to an effective remedy for everyone whose rights and freedoms guaranteed by EU law are violated. The EC refers to cross-border disputes in particular and to the fact that individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices. However, in this consultation the EU only referred to the rights of consumers and businesses not workers.

The trade union movement developed several arguments in reaction to this consultation process. They mainly focused on infringements of EU law in cross-border disputes. An answer to the collective redress consultation was a logical follow up to these demands (ETUC, 2011a). In May 2009 the European Trade Union Confederation (ETUC) had already formulated a position paper called *Towards a New Social Deal*. In that paper the ETUC called for a New Social Deal as a driver for social justice and more and better jobs. Key demands in the paper were the creation of a dispute settlement system and the creation of a specific chamber at the European Court of Justice, with the participation of the social partners, devoted to social and labour problems (ETUC, 2009). In the 2011-2014 Action Plan (adopted during the Athens congress) a clear demand with reference to redress was formulated (ETUC, 2011b):

338. The ETUC will step up the work inside the ETUC litigation network, taking the next step by deciding upon a litigation strategy for the European trade unions and by starting to actively bring suitable cases to court, via all possible channels, national, European, and international, in order to create a body of case law that is favourable to the interests of workers in the EU.

In a joint letter to the Commissioner for Justice, Fundamental Rights and Citizenship the ETUC, alongside a list of NGO's, stressed the urgent importance of providing European citizens with the missing tool for efficient redress in mass claim situations (ETUC, 2011c).



## 4. Experiences in the field – a preliminary view

Institutional enforcement and related sanctioning exist in some member states but legal facilities and court access vary significantly across the member states. The legal position of some of the institutional authorities involved in the world of work in member states (for instance tax authorities) is relatively strong. For other institutions i.e. the labour inspectorate, the outlook is more diverse as their judicial competence in cross border situations is weaker. A completely different situation applies for the individual worker that is confronted with cross border cases. The preconditions necessary for workers to be able to seek justice and to defend their rights that can be derived from EU law before court are often missing in cross-border disputes. This of course can have an important effect on the proper search for justice.

For individual workers the route through national tribunals and courts is an arduous one:

- courts are often unfamiliar with transnational issues,
- courts are not always committed to the results of collective bargaining,
- evidence obtained in one member state is not automatically recognised by courts in another,
- there is a lack of guidance on how to deal with cross-border issues and the ECJ cases have not contributed to more clarity or certainty,
- therefore, it is also difficult for individual workers to prove abuses,
- fines are rather symbolic and have no deterrent effect,
- employers can close down their operations and re-emerge under different names relatively quickly,
- it is difficult to master and monitor regulations that originate in another EU country

In a research project that was dedicated to the theory and practice of the Posted Workers Directive found that in situations where individual cases of, leading to breaches of EU law, was detected, offences often turned out to be of a larger scale. However, redress is the result of an uncertain path by the route of individual lawsuits that can take years in an unknown constituency and jurisdiction. Evidence obtained in one Member State is not automatically recognised by courts in another and administrative sanctions and sentences (for instance imposed by the labour inspectorate and the courts) are not recognised by or legally binding in other countries (as they would be if they were treated as criminal offences). Therefore, administrative sanctions in general do not stand up in an extra-territorial context and are, as a consequence, not observed. As a consequence, procedures are interrupted or terminated. The result is impunity and the in-

ability of the EU's legal system to guarantee effective sanction, remedy or redress. On top of that redress initiated by the competent national enforcement institutions is often dependent on the number of workers involved and/or the extreme nature of the exploitation or abuse (Cremers, 2011).

In recent years the role of trade unions and their representatives at the workplace has been crucial for the detection of irregularities in a cross-border context, especially in situations where unions have established good contacts with the workers concerned. The most significant groups involved in compliance and enforcement at the workplace are local trade union shop stewards and representatives. Their activities range from the translation of trade union information into several languages to cooperation with the labour inspectorate or networking with solicitors. The legislative instruments, which support and maintain the function for trade unions to monitor and check wages and employment conditions for domestic and foreign employers alike, have not kept pace with this important new role and have been partially weakened by EU law.

## 5. New challenges for the trade unions

The trade union movement in Europe is confronted with the situation that violations and breaches of workers' rights, even with severe consequences such as fatalities, are taken less seriously than cases where the economic freedoms are at stake. The workers' voice is often neither heard nor recognised. This will probably lead to the formulation of new union demands. The enforcement of workers' rights and effective sanctioning, in a transnational context, has to be guaranteed. The legal force of administrative fines has to be upgraded in order to be mutually respected and recognised in a transnational context. The cooperation between competent authorities in the checks on contract compliance and in the enforcement of EU rules has to be strengthened and mutual assistance between member states has to be made mandatory. In this respect, the long-standing union plea for a system of joint liability in the subcontracting chains with extra-territorial competencies will certainly stay on the agenda.

The ETUC claims in its submission paper to the Commission to protect all workers and to strive for a regulation ensuring respect of fundamental rights and for stricter sanctions in case of infringements of existing regulations (ETUC, 2011a). Trade unions should have access to justice at national level and be entitled to challenge administrative decisions. Cross-border mobility based on EU regulations has to be complemented by Europe-wide recognised legal national provisions to guarantee effective transnational sanction, remedy and redress in cases of violations of workers' rights. Therefore, several questions raised in the aforementioned consultation will stay relevant in the work towards an improvement of collective redress of workers' rights in the area of labour law. Trade unions must be entitled at national and at EU level to put an end to practices that infringe national and EU workers' rights. In the social field collective redress could contribute to a stronger enforcement of the rights enshrined in the Charter and in other parts of the *acquis*. Strengthening the position of trade unions in case of EU law related cross-border disputes is complementary to the role of collective negotiations, collective action and national juridical procedures. Recognition of the representative role of trade unions in this field could contribute to a more effective enforcement of rights that derive from EU law.

This might also clarify and solve the question whether an individual worker is eligible in a foreign constituency, a situation that is not settled in a uniform way all over Europe. The bundling of individual claims by trade unions can increase the efficiency of both judicial and out-of-court redress. Therefore, trade unions must be able to represent (if they wish to) in their countries victims of other member states, even when they

are domiciled in different member states. Apart from the judicial mechanism, the right to negotiate as an alternative dispute resolution (ADR) has to be recognised. In the legal provisions the imbalance of power has to be taken into account. Therefore, the 'loser pays' principle cannot be applied in the case of a violation of workers' rights. Procedures that serve as a barrier for workers to claim their rights must be prohibited.

## 6. Unsolved questions

It can be concluded that in the field of the economic freedoms, especially in the area of cross-border activities and the posting of workers, evidence is found that the access to redress is uncertain and arduous for individual workers. Breaches of fundamental social rights are often not covered by transnational judicial mechanisms and the recognition of collective actors is in no way guaranteed.

This leads to some important questions:

- Where is the legal standing vested for workers' rights in cross-border or transnational disputes and what about the recognition of the workers' voice?
- In a situation of multiple claims, bundling of individual claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity might increase the efficiency of both judicial and out-of-court redress. How to create effective remedy related to workers' rights?
- What role can trade unions representing workers' rights play in the context of litigation or multiple claims in a cross-border context?
- How to safeguard the representative role of trade unions and the capacity to represent victims of other member states (in court and out-of-court)?
- Is the effect of collective redress binding for all or can individuals' opt-in/opt-out?
- In the social field the classical sanction is of an administrative nature. This type of sanction is not EU proof. Cooperation between member states and/or their competent authorities is poor. Do we need a Regulation on Workers Protection Cooperation (comparable to the general framework for the cooperation of national enforcement authorities initiated for consumer protection)?

In Part 2 of this paper Martin Bulla assesses some of these items from the legal perspective.

The crucial issue raised in this initial exploration is how to elaborate tailor-made provisions in the field of workers' rights in cross-border disputes notably in those cases where rights can be derived from EU law. If for instance competent authorities in countries where cross-border work is pursued want to enforce workers' rights these countries are often dependent on the cooperation of the home country. A reply to requests for information can take some time and the employer and the workers have often disappeared. Thus, systematic and effective supervision in the host country becomes an illusion. The EC has produced a

procedure to streamline the request for information. However, this procedure has a non-binding character; the competent authority (in the host country) ‘*would be grateful*’ if the competent authority in the home country could provide the information concerning the worker. A refusal or simply negligence is not sanctioned. Therefore, a general framework for the cooperation of national enforcement in the field of workers’ rights (equivalent to the existing framework for consumer rights) with a mandatory character combined with a strengthening of the collective instruments for the defence of workers’ rights should improve this situation.

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## **Part B**

# **Enforcement of posted workers' rights via collec- tive redress**

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***Guest at AIAS September-December 2011***

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# Abstract

This paper aims at examining the issue of collective redress as a possible way to improve judicial enforcement of posted workers' rights vested in the Posting of Workers Directive (Directive 96/71/EC). The reader is introduced to the matter of troublesome enforcement of posted workers' rights and the most significant problems posted workers are facing in this respect. The second section provides a short analysis of the concept of collective redress. Basic types of collective redress procedures are addressed alongside differences in approaches to legal regulation in various countries. Subsequently the paper surveys the most important EU initiatives dealing with the issue of collective redress from the perspective of consumer law. In the third section existing legal instruments, designed for different purposes, are addressed with a view to a possible use for enhancement of posted workers' rights. The final section gives an overview of ways to apply collective redress procedures under the existing legislation, followed by a series of proposals concerning the enhancement of collective redress in respect to posted workers.

**Keywords:**

Collective redress, posting of workers, class actions, enforcement of workers' rights, judicial enforcement



## 7. Troublesome enforcement of the Posting of Workers Directive

Enforcement has been a serious issue ever since the Posting of Workers Directive<sup>3</sup> (hereinafter referred to as PWD) has been adopted. It is not only the result of insufficient legal regulation on both European and national level but also due to the very specific character of the posting of workers as such. The weak position of posted workers is determined not only by their precarious legal status but also practical reasons. From the legal point of view the posting of workers represents a triangular relationship between the posted worker, the sending employer and the user undertaking. Whilst there is a clear employment relationship between the sending employer and the posted worker, which in fact should be preserved in the course of the whole duration of the posting, there is no direct legal relationship between the posted worker and the user undertaking. There is no contract between these two entities nor is there any provision of the PWD which would define this relationship. Legal theory considers the relationship between the posted worker and the user undertaking as a *sui generis* employment relationship. This gives rise to many practical legal issues, which will be discussed later. Finally, as regards the relation between the user undertaking and the sending employer, this is based on a commercial contract regulating various aspects of the posting.

From a practical perspective posted workers are on the territory of a foreign state and do not orient themselves in the same way as at home. Moreover, in many cases, especially as regards manual labourers, they do not speak the language of the host member state. This makes their position very precarious in terms of seeking justice. Another serious issue which impedes posted workers' access to justice is the fact they are usually completely dependent on their user undertaking in the host country. The user undertaking often provides (or ensures) accommodation, pays (ideally) wage and not exceptionally even retains workers' travel documents.

For this reason workers are apparently not willing to anger their user undertaking by raising their voice or even seeking legal action for the protection of their rights since it could endanger their very existence in the host country. This is even worse in cases of workers coming from outside the EU, whose very presence in the host country depends on the duration of the employment provided by the user undertaking (work permits, visas). The very nature of posting presumes a limited, temporary duration of this particular triangular legal relationship. Thus if enforcement has to be effective it needs to provide an instant solution. This

3 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

means that a standard judicial proceeding is out of consideration in most cases, since it is a lengthy, complex and even costly process with uncertain outcome. The financial question represents an additional obstacle. In the case of judicial proceedings it is not only lawyers' fee what the claimant has to bear but also the court fee, which is usually set as a percentage from the whole sued claim.

Leaving aside questions like jurisdiction in transnational cases, which will be addressed in the third section, it appears that judicial remedy under current legal regulation, is not a viable way of seeking remedy for posted workers. Therefore we should focus our attention on administrative enforcement of the PWD which is most frequently applied in practice. Speaking about administrative enforcement, we can differ between two tracks: (i) ex officio supervision of administrative authorities on compliance with the PWD in cases of posting workers and (ii) dealing with complaints submitted by aggrieved posted workers.

Supervision of administrative authorities on their own initiative depends to a large extent on relevant information about the numbers and allocation of posted workers on their territory. An important barrier for effective supervision is the lack of efficient and transparent mechanism for registration of workers posted to pursue working tasks on the territory of the host member state. If competent authorities are not aware of the presence of posted workers in the host state they are obviously not in a position to pursue their tasks and monitor compliance with respective legislation. Since the PWD does not provide for a unified mechanism for registration of posted workers, it is up to individual Member States how or even whether they will address this issue. In practice there is a broad range of sophisticated registration schemes to standard registration to no registration at all. Several Member States do employ some type of registration schemes. Many countries, however, gather information about posted workers only indirectly via procedures used primarily for other purposes like E-101 social security forms or registration for tax purposes. Several Member States only monitor posting of third country nationals. Other Member States have developed various forms of registration, notification or pre-declaration schemes (Van Hoek & Houwerzijl, 2011). These mechanisms have to be set very carefully since both the European Commission and the European Court of Justice are more focused on removing any administrative obligations imposed on cross border service providers than on securing effective enforcement of posted workers' rights (Cremers, 2011).<sup>4</sup>

As regards solving administrative complaints submitted by posted workers, to a large extent the same problems appear as with judicial remedy. Injured workers hesitate to seek justice, as they fear for their job and income and also due to lack of legal awareness. Moreover, Member States have not developed specific complaints resolving procedures for posted workers, so they have to rely on general mechanisms, which are

4 Compare also the judgments in joint cases C-369/96 and C-376/96 *Arblade* e.a. (para 33-39).

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in most cases too complex to understand and inaccessible for posted workers (Van Hoek & Houwerzijl, 2011).

In addition, effectiveness of administrative enforcement depends on which suitable tools these authorities have at their disposal, in particular with respect to the transnational character of the posting of workers. The specific triangular character of posting preserves the original employment relation between posted workers and their sending employer. The implication is that the user is in a commercial relationship with the sending employer and therefore in a *sui generis* relation with the posted worker. The administrative authorities of the host country are reliant on cooperation with liaison offices in sending Member States. Despite article 4 of the PWD that provides for administrative cooperation between respective national authorities, this cooperation is still too bureaucratic and longstanding, in some cases even non-existent, and therefore ineffective. On top of that, besides cooperation between administrative bodies which is a rather procedural issue, there is a lack of sufficient substantive sanctions and other measures that could be effectively used to pursue article 5 of the PWD to ensure compliance with the posting rules.

Taking into consideration all the above problems of enforcement, there are several ways to improve the current situation. One very important measure, which could be very helpful, is collective redress as a way of united and cooperative action of aggrieved workers in order to enforce their rights. In the next section the notion of collective redress will be introduced as well as several legal measures developed and used for the purpose of better protection and implementation of consumers' rights. These provisions can be seen as an interesting framework for future drafts in respect to posted workers' rights. The third section will address collective redress from the perspective of private international law and presents concrete proposals with regard to a better execution of posted workers' rights.





## 8. Collective redress in general – what is it?

### 8.1. The concept of collective redress

Collective redress may be defined as a means of seeking remedy for a breach of law in cases where a higher amount of claimants are affected by a single unlawful act of the defendant. The European Commission defines collective redress as a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices (European Commission, 2011). Finally, for comparison, Zheng Tang sees collective redress as a cost-sharing and procedure-consolidating mechanism by which claims of a group of claimants with similar factual and legal issues are congregated together in one action (Zheng Tang, 2011). In these kinds of cases the amount of damage caused to single individual may be relatively small; this would act as a deterrent from seeking remedy individually.<sup>5</sup>

There are also other aspects to be seen in cases that hinder the injured party from filling a suit or seeking remedy in a different way. We are speaking especially about high litigation costs, complexity of the proceedings combined with the lack of legal awareness and the lengthy of the proceedings. An important role is played by the fact that many potential claimants are afraid of stepping out of the row and bringing an action. The fear of possible negative impact on them in the future stops them from defending their rights. This may be a case of employees, either posted abroad or working in their home country, who are afraid of losing their job if they speak out for their rights. The point of collective redress is to provide procedural tools that would on the one hand encourage injured individuals to stand up for their rights by diminishing the deterrents from seeking remedy and on the other hand, to ensure that courts will be able to manage mass actions effectively and in a reasonable time.

There are various terms used in connection to mass litigation such as collective action, group action, representative action, class action. There is no universal and generally accepted categorisation of these terms. According to Cafaggi and Micklitz it is, however, possible to generalize that *collective action* is used as the overreaching category in contrast to *individual action* (Cafaggi & Micklitz, 2008).

5 According to the EC Green paper on consumer collective redress half of the European consumers will not go to court for less than 200 €. One out of five European consumers will not go to court for less than 1000 €. Cited in COM (2008) 794, Brussels, November 2008, p. 4.

At this point it must be stressed that there is quite a substantial difference between the American and the European approach to collective redress. To a large extent this divergence may be attributed to the general contrast between common law and civil law. In American terms, the equivalent to collective action would be aggregate litigation. In the United States there is a long and well-developed tradition of collective redress. In contrast, in European countries this issue is still developing in a rather experimental stage (Zheng Tang, 2011). For this reason European debates about collective redress began with an assessment of positive and negative aspects of the American approach. Several original European models of collective litigation became more or less modified variations of the US regulation. To date only fourteen European Union Member States have adopted any form of collective redress mechanism. But even in these countries legal instruments are not very widely used.<sup>6</sup>

The best known type of American aggregate litigation is class action. US class action enables an individual to bring an action on behalf of a class of claimants, against the same defendant. All the putative claimants are deemed to be represented by the person who brought the action, unless they opt-out. Three pivotal features may define the legal concept of the US class action: opt-out, jury trial and contingency fee (Cafaggi & Micklitz, 2008). These remarks can help us to understand the main characteristics of the European debate about the most suitable model of collective redress. Instead of the jury trial which is not an issue in procedural regulations of civil law countries, there is a debate on the role of the judge in these kinds of proceedings. There are different types of mass procedures, with the role of the judge varying from pure approval of an agreement reached by litigants, to proceedings with very strong position of the judge, who has to decide at the beginning whether a particular case is admissible. The vigorous role of the judge is preserved during the whole proceedings, including the stage of seeking and examining the evidence and awarding compensation. Another line of the discussion wriggles around the issue of legal standing. It involves consideration, whether each individual who suffered any kind of damage by the misconduct of the defendant shall be allowed to bring an action on behalf of the whole class or whether this right shall be reserved only to professional lawyers, public authorities, or private associations. Again, various approaches may be seen in different countries.

At the centre of the debate, however, is the dichotomy between the opt-in and opt-out approach. The opt-in system means that each individual, who might be affected by the infringement in question, has to give his or her explicit consent to take part in the process and be included in the class of claimants. On the

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<sup>6</sup> Other resources report only 13 EU member states having adopted any kind of collective redress mechanism, however, on July 19 2010 a Polish Act on Class Action came into force.

contrary, under an opt-out system all the subjects putatively aggrieved by the particular misconduct of the defendant are automatically deemed to be parties of the case unless they expressly make known their will not to take part on the case and to be excluded from the class of claimants. Considering the basic principles of continental civil legal systems it is not a surprise that most countries tend to favour the opt-in approach.<sup>7</sup> There are also several EU Member States, which have adopted opt-out models, at least in respect to some specific procedures designed for particular legal branches.<sup>8</sup> In some of these states, however, the opt-out model is only used as an additional option in respect to specific areas, next to a general opt-in approach.

Finally, the financial question is at stake in the course of European debates concerning the design of collective redress mechanism, especially the issue of covering expenses related to bringing an action and the distribution of the possible compensation awarded by the judgement. As regards costs of the proceedings, most European countries apply the 'loser pays' principle, which means that the losing party is obliged to reimburse to the claimant(s) all expenses arising from the proceedings. This method obviously acts as a deterrent from seeking judicial protection. Conversely, in United States there is a widespread tradition of so-called contingency fees. This concept basically means that the fee for legal services is only payable if a favourable result was achieved. This fee is usually calculated as a percentage of the compensation awarded by the court. In order to eliminate barriers to judicial remedy, there are debates about how to adapt the American contingency fees system to European conditions or otherwise facilitate access to justice by reducing the risk of paying excessive litigation costs if losing the case.

The European economic and social committee (hereafter EESC) asserts that a European collective actions mechanism has to be self-financing and that the introduction of US-style contingency fees is not possible. Instead, it suggests creating a 'support fund for collective action'. A crucial source of financing for this fund would be sums of 'unlawful profits' of convicted businesses, fixed by the judge that could be used provided that they are not claimed by identified subjects, who were directly injured (EESC, 2008, § 7.6.1 - 7.6.3). Similar adjustment was designed by a British Legal services commission in a form of 'supplementary legal aid scheme', which would be fed by a share from damages awarded in successful cases (Fairgrieve & Howells, 2009).

7 One of the constitutional cornerstones of most civil law countries is the freedom to take legal proceedings. It is understood as the right of each individual person who may be involved in the case to be heard by the court and to take part on the litigation. This principle is expressed also in multiple international human rights documents, such as the European Convention on human rights. Therefore it is hardly viable in civil law to impose a judgement on a person who did not give consent to take part in the particular process.

8 The opt-out method is encompassed in its purest form probably in the Dutch Collective Settlement of Mass Claims Act. Opt-out solutions have also been introduced in Norway, United Kingdom and in Germany as regards cases related to unfair commercial practices.

Finally, it is worth mentioning specific practices developed in Austria. In this country the collective redress procedure for infringement of consumer's rights is funded by a so-called 'process insurer'. This is an insurance company which takes over the risk of the case but claims a 30% share of the final award. As it is a de facto form of US contingency fee each consumer who agrees to be represented in the proceedings by a consumer organisation has to give an explicit and written consent to this form of funding (Cafaggi & Wicklitz, 2008).

## 8.2. Collective redress mechanisms used in European countries

In the European legal environment we can distinguish between various different models of collective actions. As already mentioned, there is no universally accepted categorisation; however, the best-known European examples of collective redress mechanisms include *group action*, *representative action*, *public interest actions* and *model or test cases*.

Group action has the closest relation to standard judicial proceedings. In case of group action individual actions are simply united into a common procedure and each class member is a party to the litigation. This approach is used in the United Kingdom and based on the Group Litigation Order (hereinafter GLO) which has been introduced into British Civil Procedure Rules.

Representative action is a type of litigation where one individual, private organisation or public authority brings an action on behalf of a multitude of individuals, who are not parties to the joint litigation. Austria is said to be the state where this type of procedure was invented (Cafaggi & Micklitz, 2008). The representative action system relies especially on consumers associations that are entitled to litigate on behalf of the whole class of damaged consumers, while each individual consumer has to transfer his right to claim the compensation to this association.<sup>9</sup> Cafaggi and Micklitz attribute the success of this system to the way it is funded – the concept of process insurer, as already mentioned.

A similar system exists in the Netherlands, though in a more general form. Under Dutch law individual claimants may establish an association in order to protect and better enforce their rights and justified interests. Based on objects of this association or foundation, as defined in articles of their statutes, this entity is entitled to bring an action in its own name on behalf of all associated members. However, it is not allowed to claim financial damages this way. Instead, the purpose of this action is to reach a declaratory judgement, proclaiming that the defendant has acted wrongfully against members of the association. This system is based on the opt-in model, since the judgement is only binding for the association, which has brought the action in its own name and for a settlement an active expression of the will of each member of the association is needed (Tzankova, 2010).

A similar model was introduced in Poland. Pursuant to the so-called Class Action Act at least 10 individuals, having claims of the same kind and based on the same or common factual grounds, may join to bring an action together. The action is brought by a representative in his/her own name, but he/she acts on behalf of all group members. A representative may act an individual member of the group, or some public

<sup>9</sup> Besides Austria, this is very much the case also in the Netherlands and Italy.

authority. However, such a representative has to be approved by all group members. This procedure is based on an opt-in principle, since only those who expressly joined the group are considered group members and the final judgements is only binding for group members. What is interesting is that claims seeking financial compensation may only be sought this way if sums sued by individual group members are unified. If this is not viable to achieve, the claim may be limited only to a court decision establishing the liability of the defendant. Thereafter monetary compensations may be sued individually.

The class action procedure, however, may only be used in the fields exactly defined in the Class Action Act, such as consumers' protection, product liability and tort. This, unfortunately, does not include labour disputes. The Polish model also addresses the issue of funding. It introduces a substantial novelty into Polish law in a modified form of contingency fee, enabling in class action cases a contractual agreement setting the fee for legal representation as a percentage of the amount awarded by the court, but not more than 20%.<sup>10</sup>

The EESC mentions 'public interest actions' as a separate category. Since the point of this type of action is to give to consumer organisation the power to decide whether or not to bring an action before a court in case where the general public interest of consumers is damaged, it may be understood as a subtype of representative action (EESC, 2008).

Finally, the use of test cases (or model cases) is a very interesting solution, based on the presumption, that one test case may create a legal basis and pattern for other similar cases against the same defendant and deriving from the same infringement. This approach has mostly been used, if not even invented, in Austria and Germany.

Although categorisation in theory might impress, the practice is much more colourful and diverse and we can encounter also different hybrid and original models. In European terms this is undoubtedly the case of the Dutch system under the Collective settlement of mass claims act (hereinafter WCAM), which is based on the US class settlement model and keeps exceptionally many features of this template, but still in a form adapted to the European civil law environment. WCAM establishes a legal framework for concluding collective settlement agreements for mass claims. After such an agreement has been signed, it has to be submitted for a court approval. After this judicial approval is granted, all the putative class members become parties to this settlement agreement, unless they use the opt-out option. The WCAM is mostly used in areas of product liability, insurance, securities and financial services (Tzankova, 2010). This approach was lately incorporated, inspired by the Dutch model, into an amendment to the German Act on model procedures for mass claims in the capital market (Kapitalanleger-Musterverfahrensgesetz). Unlike the Dutch

10 Polish Law Review, No 1/2010, accessible: <http://www.millercanfield.pl/pub/06bed347a84615bc47701835916328ad.pdf>

law, however, the judicially approved settlement agreement will only oblige those who have already filed an individual lawsuit, not all the putative claimants.

### 8.3. Initiatives at European Union level addressing collective redress issues

The idea of collective redress has attracted attention of the EU institutions and various EU institutions have addressed this issue in various policy documents. Probably the first relevant reference to the collective redress may be found in *Consumer Policy Strategy 2007 – 2013*, where the Commission suggests that it will consider action on collective redress mechanism for consumers in respect to infringements of consumer protection rules and breaches of EU antitrust laws (European Commission, 2007). Following this announcement, the European Commission has organised several more or less formal conferences and discussion events regarding collective redress procedures.

The most important document, which served also as a base for other dossiers, was the European Commission's *Green paper on consumer collective redress*. In this Green paper, the European Commission expressed its dissatisfaction with the current state, since large numbers of consumers affected by a single breach of the law were not allowed to obtain redress and compensation in a sufficient way (European Commission, 2008). The Commission suggested 4 possible policy options. The first relies on national legislation and already existing EU legislation but does not take into account any further action on EU level. The second option is based on enhanced cooperation between Member States and requires them to allow individuals from other Member States access to their collective redress mechanisms. The third option is a mixture of different steps. It involves improvement and extension of both existing national and EU tools, especially the small claims procedure and a Consumer protection cooperation Regulation. Member States should also improve their alternative dispute resolution (ADR) schemes in order to facilitate collective redress. The final option counts on adoption of a collective redress judicial mechanism on EU level.

After a political row over the shape of future European collective redress mechanisms three EU commissioners issued a Joint Information Note on the 5 October 2010 (European Commission, 2010) which expressed core principles, defining a framework for further developments:

- Any EU initiative on compensatory collective redress should ensure that any right of injured parties to compensation can be effectively and efficiently obtained.
- Parties should have the possibility to resort to a collective consensual resolution of their dispute, either by settling among themselves or using an Alternative Dispute Resolution mechanism.
- The rules on European civil and procedural law should work efficiently for collective actions and judgments should be enforceable throughout the EU.
- Adequate means of financing should be available to allow citizens and businesses to have access to justice.
- Any European approach to collective redress would have to avoid from the outset the risk of abusive litigation. They firmly oppose introducing ‘class actions’ along the US model into the EU legal order (Hodges, 2010).

## **8.4. Important legal instruments for enforcement of consumer’s rights that may serve as inspiration**

### **a. Regulation on consumer protection cooperation**

The aim of this regulation is to establish enhanced cooperation between national authorities in individual Member States and to improve enforcement of consumer’s rights (European Parliament, 2004). This regulation requires each member state to appoint one liaison office responsible for implementation of the regulation which has to be equipped with sufficient investigation and enforcement powers. Appointed national authorities may exercise these powers either directly under their own judicial authorities or by application to courts. Investigation powers shall include access to relevant documentation and the authority to require the provision of any relevant information by any person and also the power to carry out on-site inspections.

Among the enforcements competences shall be also the power to request cessation of the intra-Community infringements and where appropriate, to publish the resulting undertaking and resulting decisions. A very interesting power, which the regulation demands for national liaison offices, is the power to require the loosing defendant to make payments into the public purse or to a beneficiary in the event of failure to comply with the decision. The designated national bodies (liaison offices) are required to provide each other mutual assistance in the course of solving individual cases. The European Commission makes public a list



of these national liaison offices in the Official Journal of the European Union. The regulation also provides for coordination of market surveillance and enforcement activities and exchange of information.

## **b. The Injunctions Directive**

The Injunctions directive introduces a set of measures, designed to facilitate judicial or administrative enforcement of collective interests of consumers protected by EU law, in cases where consumers are affected by infringements originated in another EU member state (European Parliament, 2009). A key point of this directive is that so-called 'qualified entities' having a legitimate interest in protecting consumers' rights, established in any EU member state can get access to national administrative or judicial mechanisms for seeking injunctions for infringement of the collective interests of consumers in any other EU member state, where the infringement has occurred or originated.<sup>11</sup> Qualified entities may be either public authorities or private, usually non-profit associations and organisations.<sup>12</sup>

The directive relates to actions for injunctions seeking an order requiring the cessation or prohibition of any infringement or publication of the decision or a corrective statement in order to eliminate further effects of the infringement.<sup>13</sup> Like the regulation on consumer protection cooperation, the injunctions directive refers to a specific tool in the form of order against the losing party to pay an amount into the public purse or to a beneficiary in case of failure to comply with the decision within the defined time limit. Only 'qualified entities', as mentioned above, have the right to initiate an administrative or judicial procedure seeking injunction under this directive.

## **c. Alternative dispute resolution procedures**

The European Commission also strongly supports enhanced using of various alternative dispute resolution mechanisms (ADR) as a tool of collective redress of consumers' rights.<sup>14</sup> So far, not all EU Member

11 Article 3 of the Injunctions directive defines a qualified entity as any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 of the Injunctions directive are complied with, in particular: independent public bodies, specifically responsible for protecting consumers' interests and /or organisations whose purpose is to protect consumers' interests in accordance with the criteria laid down by the national law.

12 The European Commission publishes a list of these qualified entities in the Official Journal. For example, for the Netherlands is listed only the Consumentenbond, in Germany the Verbraucherzentrale Bundesverband, the Deutscher Verbraucherschutzverein, Foodwatch and many others, in UK mostly public authorities, e.g. Civil Aviation Authority, Office of Fair Trading, The Office of Rail Regulation, or The Financial Services Authority.

13 For the purpose of the Injunctions Directive, infringement means any act contrary to the Directives listed in Annex I of the Injunctions Directive which harms the collective interests of consumers included in these directives (Article 1, 2 of the Injunctions Directive).

14 In this respect, the European Commission issued two important recommendations: Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (OJ L 115, 17.04.1998) and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR (OJ L 109, 19.04.2001).

States have such mechanisms available in respect to consumer disputes, not to mention the frequency of their use (European Commission, 2008). As an interesting example the European Commission refers to the system of *complaint boards* in Sweden and Finland. These boards are authorized to deal with collective claims brought to them by a consumer ombudsman, consumer organizations or wage-earners' organisations. The final output of this mechanism is a non-binding decision, which recommends the way in which the dispute may be resolved (European Commission, 2009).

## 9. Collective redress of posted workers' claims – analysis of the legal environment

### 9.1. *De lege lata* analysis – current state

Jurisdiction in cases involving a cross-border element is governed by Regulation No. 44/2001 (European Council, 2001; hereafter referred to as 'Brussels I Regulation'). This regulation contains special provisions for disputes of distinct character. Besides the general rule, vested in article 2, special jurisdiction rules are provided for matters related to a contract (article 5.1), matters related to maintenance (article 5.2), tort, delict or quasi delict (article 5.3). Moreover, there are special sections regulating jurisdiction in specific contractual matters like insurance (section 3), consumer contracts (section 4) or contracts of employment (section 5).

#### a. The problem of classification of the claim and identifying the defendant

As a general rule, a defendant may be sued in the courts of the member state where he/she is domiciled (article 2). As regards claims of posted workers, there is a question, whether article 5.1 (matters related to contracts) or section 5 (individual contracts of employment) shall apply. Pursuant to article 5.1 in matters related to a contract, a defendant domiciled in a member state shall be sued in the courts of the place of performance of the obligation in question. The aim of section 5, regulating the jurisdiction in matters related to individual contracts of employment is to offer special protective rules, providing to the worker as the weaker party more favourable jurisdiction rules (according to recital 13 of the Brussels 1 Regulation). Therefore article 19 enables the employee to sue the employer either in a member state of his domicile, or in the courts for the place where the employee habitually carries out his work (or where he last did so) or in the courts for the place where the business which engaged the employee is (or was) situated.<sup>15</sup> Besides, section 5 (article 20) bans the employer from suing an employee in a member state other than that of his/her domicile.

Article 18 explicitly stipulates that in matters relating to individual contracts of employment, jurisdiction shall be determined by Section 5. There are only two exceptional cases, in which other provisions may be applied. First a situation where the defendant is not domiciled in a member state (article 4) and secondly dis-

<sup>15</sup> This provision only may apply if the employee does not or did not habitually carry out his work in any single country.

putes arising out of the operations of a branch, agency or other establishment of the employer (article 5.5). The provisions of section 5 may be deviated from also by an agreement on jurisdiction, concluded between parties to the contract after the dispute has arisen, provided that such an agreement allows the employee to bring actions in courts other than those indicated in the regulation.

Section 5 of the Brussels I regulation unfortunately does not provide for any definition as regards its scope. Due to the very specific triangular character of posting of workers it is in question whether this relationship may be considered as a matter related to an individual employment contract in the sense of section 5 or whether it shall be governed by article 5.1, regulating jurisdiction in matters relating to contracts. It is without a doubt that section 5 (articles 18-21) represents a *lex specialis* in relation to article 5.1. This means that section 5 shall only apply in cases meeting special conditions, defining the scope of this section. Otherwise *lex generalis* - article 5.1 would have to be applied. To classify correctly a collective claim of posted workers within the meaning of Brussels I regulation, we need to examine the character of the posting of workers.

Usually a posted worker is in no direct contractual relationship with the user undertaking. The posting is governed principally by two contracts: (i) a contract between the sending employer and the user undertaking and (ii) amendment to the contract of employment between the sending employer and the posted worker. Also the PWD itself while laying down the obligation to guarantee certain terms and conditions of employment to posted workers in article 3.1 mentions the ‘undertakings referred to in Article 1 (1)’, which means the posting employer.<sup>16</sup> Thus the relationship between a posted worker and the user undertaking is very specific and usually regarded as a labour relationship *sui generis*. For this reason there is very little space for posted workers to sue their user undertaking. The employment relationship between the posted worker and the sending employer, on the other side, is maintained during the whole period of posting. To conclude, an action for non-compliance of terms and conditions of employment guaranteed by the PWD should be primarily directed against the posting employer, not the user undertaking.

Should the defendant be the posting employer, no problem arises in respect to the classification of the claim, as there is no doubt that it would be a matter relating to the individual contract of employment. In case the claim was directed against the user undertaking, which is not a viable idea according to the author of this paper, protective jurisdiction, provided for in section 5 of the Brussels I regulation would hardly be applicable and the claim shall be regarded as a matter relating to a contract, as defined in article 5.1. Clear

16 Article 3 (1) of the PWD: ‘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.’ Article 1 (1) of the PWD: ‘This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.’

classification of a claim directed against the posting employer however, applies unambiguously only in respect to individual claims. As regards collective redress the classification issue is more complex. First we have to distinguish between different types of collective actions. In respect to group actions or test cases the contractual base of the collective action would persist, since in this kind of procedures all the particular claimants are individually in a position of a litigating party and the collective aspect only lies in the fact that individual actions are procedurally brought and heard together.<sup>17</sup>

A different situation however occurs in relation to representative actions. In this case the action is brought to the court by a representative, who itself acts as a litigating party on behalf of individual claimants. The representative either may or may not be a party to the contract of employment. Under certain conditions, if the representative is a public authority, a question will arise whether this action would even fit in the scope of the Brussels I Regulation. Tang suggests two possible approaches to this problem: (i) *the subject matter approach*, which emphasizes the character of the subject matter of the case itself. This would mean that only the relation between the defendant (employer) and individual posted workers would be considered. Secondly, the (ii) *procedural qualification approach* takes into consideration the relation between litigating parties. In this case a contractual relationship between the defendant and the representative itself would be required. Should the representative be a public authority, which apparently did not enter into a contract of employment with the employer, a contractual or even quasi contractual character of this case would be hard to recognise (Zheng Tang, 2011). But if the representative would be one of the individual claimants (posted workers) it is beyond controversy that there is a contractual relationship between the actual litigation parties.

## b. Representation by the trade unions

From our perspective it is important to assess a situation in which the class of posted workers would be represented by a trade union. Let's now put aside the question whether trade unions are allowed to represent posted workers in judicial proceedings, since this would depend on national legislation of the member state competent to hear that case (*lex fori*). Trade unions are not a public authority and they obviously cannot be considered as a party to the contract of employment. In this respect we are speaking about representative action. Therefore an issue of qualification of such a dispute would arise. May an action brought by a trade union on behalf of posted workers against the posting employer be regarded as a matter relating to an individual contract of employment within the scope of section 5 of the Brussels I Regulation? Since section 5 does not provide any definition on 'matters relating to individual contracts of employment', we have to

<sup>17</sup> Compared with the analysis dealing with consumer collective redress: Zheng Tang, S. Consumer collective redress in European private international law. *Journal of Private International Law*, Vol. 7 No. 1, 2011, p. 108.

look at the preamble to the Brussels I Regulation, which explains why the European legislator has introduced special jurisdiction rules for certain types of claims. According to recital 13 of the preamble *In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.* It is clear from this recital that the aim of the special jurisdiction rules for insurance, consumer contracts and individual contracts of employment is to protect the weaker party. Speaking about the ‘weakness’ or ‘strength’ of contractual parties, we can make a distinction between the procedural aspect; litigation power and the substantive aspect; the bargaining power. Although collective redress procedures may significantly improve the litigation power of posted workers, since joining individual claims, often of negligible value, may result in a considerably high claim, it does not affect in any way the bargaining power of respective parties.

The collective redress itself though has purely a procedural character and is aimed at improving workers’ position within the course of the enforcement of their rights. On that account, collective redress would not change the nature of employment relations which is typically imbalanced, in favour of the employer. Not to mention the fact, that the posted workers’ position is even weaker compared to ‘standard’ employees working in their home country, for many reasons already outlined in chapter 1 above. Therefore, in accordance with recital 13 of the preamble to the Brussels I regulation, worker’s claims should always be subject to special protective jurisdiction rules, regardless the procedural form they choose to make use of in order to enforce their rights. To sum up, even if classes of posted workers pursuing their claim via collective redress were represented by a trade union, protective jurisdiction rules aimed at protecting employees as the weaker party still should apply.

### c. Where to sue

Under current legislation posted workers facing non-compliance of terms and conditions of employment guaranteed by both EU and national legislation within the course of their posting may only sue their original employer, who posted them abroad. Article 19 of the Brussels I regulation provides for three different ways as regards how to determine the competent court. In case of posted workers, however, all these rules will most probably lead to the same result. The first rule (article 19.1) refers to the member state where the employer is domiciled. Under this provision it is quite simple to identify the competent court. The second rule (article 19.2a) points out at the place where the employee habitually carries out his work (or where he last did so). Although the Brussels I regulation does not define the concept of ‘habitual place of work’, the Court of Justice of the European Union explains, that it is a place where or from which the

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employee principally discharges his obligations towards the employer.<sup>18</sup> So habitual place of work will be a place embedded in the employment agreement or a place where (or from where) the employee as a matter of fact (regardless wording of the employment agreement) physically and truly performs his obligations to the employer, resulting from the employment agreement.

As regards the posting of workers, the very nature of this legal relation clearly proves that it may not affect the determination of the 'habitual place of work' within the meaning of the Brussels I Regulation, since the posting has an exclusively temporary character. Even though there is no uniform limit regarding the length of duration of the posting, the very logic of this legal institute gives voice to the fact, that it is only temporary modification of a permanent regime of the employment relation. While the Brussels I Regulation does not provide for a definition of the 'habitual place of work' concept, the same concept of 'habitual place of work' is used also by the Rome I Regulation (European parliament, 2008). In this instrument we can find more detailed explanation, clearly saying in article 8 (2) that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.

Finally, the last jurisdiction rule contained in (article 19.2b of) the Brussels I regulation refers to the courts for the place where the business, which engaged the employee, is (or was) situated. This rule however may only be used provided that the employee does not or did not habitually carry out his work in any single country. As regards posting of workers, again, this jurisdiction rule will lead us to the country where the worker signed his employment agreement and the amendment regulating the posting and from where he was posted to perform temporarily working tasks at the workplace of the user undertaking abroad.

To conclude, current legal regulation does not provide space for lodging suits against the user undertaking or even against the posting employer in the host country, where the employee temporarily works. In most cases the only viable solution for posted workers is to sue the posting employer in the country of origin. This is obviously a very inadequate solution, which hampers posted workers' access to justice during the period of posting, when they are mostly vulnerable and their position is ever weaker than normally. In the last chapter, thus, we would like to point out on a possible ways of improvement the enforcement of posted worker's rights.

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18 Judgement of the ECJ of 13 July 1993 *Mulox IBC Ltd v. Hendrick Geels* (C-125/92).

## 9.2. *De lege ferenda* proposals – legislative initiatives at EU level that shall be adopted

As already mentioned above, there are several serious problems in the current legislation that endanger and impede the enforcement of posted workers' rights. From the systematic point of view we can divide these issues into two categories: (a) questions concerning substantive legal matters and (b) problems connected with the legal procedure of enforcement.

### a. Issues relating to substantive law

One of the most significant issues with regard to the posting of workers is the complex triangular internal structure of the legal concept of posting of workers and the unclear and complicated relationship between the posted worker and the user undertaking. This has a vast impact on procedural aspects, since identification of the subject holding the passive legitimation in the case (who shall be sued) is dependent on the substantive legal regulation. As already pointed out above, under current legal regulation, posted workers essentially cannot sue their user undertaking, since there is a lack of comprehensible legal link between these subjects, with clearly defined mutual obligations. Thus, it is desirable to redefine the whole relational triangle of posting of workers and to define mutual rights and obligations of all subjects composing this triangle in a comprehensive and coherent way.

Special attention shall be paid to the issue of liability. It must be clearly established which subject (user undertaking/posting employer) is responsible for observance and violation of any particular right of the posted worker. In this respect, introduction of a joint and several responsibility of both user undertaking and posting employer is strongly recommended by most scholars and practitioners. The exact scope of this responsibility, however, is open for discussion. Some authors prefer to limit the joint and several responsibility only on financial obligations, or only on some financial or fiscal aspects. We, however, would prefer establishment of this type of common responsibility in respect to the whole extent of the hard nucleus of terms and conditions of employment, as defined in the PWD. This solution would provide much stronger protection for posted workers, which is the principal aim of the whole directive.

### b. Procedural issues

Should the new and clear definition of mutual rights and obligations within the triangular relationship of posting of workers be established together with joint and or several liabilities of both the user undertaking and the posting employer, it would unambiguously represent a major improvement from both the



substantial and the procedural point of view. As regards the procedural angle, this solution would make it possible for the posted workers to sue also their user undertaking or ideally both employers at once, based on their joint and several liabilities. However, an issue concerning a classification of such a case would arise. Should the defendant be only the user undertaking, most probably this kind of cases would not be eligible to be classified as a matter relating to the individual contract of employment within the meaning of section 5 of the Brussels I Regulation. This would, however, to a large extent be dependent on the exact wording and construction of the new definition of the posting triangle. A different situation occurs if the posted worker chooses to sue both the user undertaking and the posting employer, which is obviously a strongly recommended solution. In such a case, protective jurisdiction of the section 5 would be established.

On the other hand, it is not necessary in this case to make these kinds of procedures subject to the special protective jurisdiction. Even if classified as a matter relating to a contract within the meaning of article 5.1 of the Brussels I Regulation, it would provide sufficient solutions for posted workers. The jurisdiction rule under this provision says that the court competent to hear the case is that of the place of performance of the obligation. Since within the period of posting a posted worker carries out his obligations towards the user employee in the host member state, this would lead to the establishment of competence of the host member state's court. As a matter of fact, if the action was directed only against the user undertaking, only the relation between the user undertaking and the posted worker should be taken into consideration while solving the classification issue.

Ideally a new provision could be introduced into the Brussels I Regulation, providing for a special jurisdiction rule for matters relating to posting of workers. This special rule should lead to the courts for the place where the posted worker habitually carries out his obligations *during the period of posting*, i.e. courts of the host member state. This, however, is not necessary and as outlined above, this issue may be solved also under current legislation.

### **c. Need for an effective enforcement**

Making the user undertaking responsible for observing the terms and conditions of employment in relation to posted workers and making courts of the host member state competent to hear this kind of cases would without any doubts bring substantial improvement for the enforcement of posted workers' rights. This would, however, not solve all the problems observed. The need for an instant and rapidly enforceable solution will persist, as well as a need for special instruments, addressing the problems of costs of the proceedings and reluctance of posted workers to stand up for their rights. The problem of the length of

standard judicial proceedings could be solved by the introduction of a special accelerated judicial procedure, aimed particularly on protection of posted workers' rights. This could be based on a mechanism established by the injunctions directive, which was described above.

The second problem mentioned high litigation costs and reserved behaviour of posted workers as regards using judicial redress may be worked out by enabling a collective redress of posted workers' claims and simultaneously providing trade unions with the right to represent posted workers in such cases. Most suitable way how to achieve this would be probably throughout a new provision, incorporated into PWD, which would unequivocally provide for an option to merge posted workers' claims and to bring such a class action to the court by respective trade union, which would act as a legal representative of aggrieved posted workers in the host member state.

## 10. Conclusions

Despite the fact that the poor enforcement of posted workers' rights is a well-known reality this problem still has not been addressed sufficiently. To some extent it is due to the very complex character of the issue, which involves many different areas, not only the concept of posting of workers itself and the specific and precarious position of posted workers, but also to legal procedures of judicial and administrative enforcement. The matter is made even trickier by reason of the transnational nature of the posting of workers.

Collective redress if designed and applied in proper form may lead to a significant improvement of posted workers' legal position and enforcement of their rights. It addresses several of the most significant problems which arise in this respect such as the hesitance of posted workers when it comes to standing up for their rights, lack of knowledge about the host country's legislation and high litigation costs. The most appropriate form, according to the author of this paper, would be representative action, with explicit authorisation for trade unions to act as a representative of posted workers.

As already mentioned the most pivotal problems occurring in relation to bringing posted workers' rights to bear, may be divided into two crucial categories. The first category concerns the very structure and nature of the concept of posted workers. It is too complicated with unclear and insufficiently defined internal relations and responsibilities within the triangle of posting. In particular the vague division of duties between the sending employer and the user undertaking makes it very difficult to call for the accountability of any of these subjects. Solving this first cluster of problems seems to be rather easy. It requires opening the Posting of Workers Directive and redefining the internal structure of the triangle of posting. In order to improve enforceability, it would be very desirable to introduce joint and several liability of both the sending employer and the user undertaking for observing terms and conditions of employment guaranteed to posted workers.

The second cluster of problems is related to the legal procedure of enforcement. These procedures are usually very longstanding, costly and complex. This acts as a substantial barrier to effective enforcement of justice for posted workers. The generally weaker position of employees in an employment relation as compared to employers is even more precarious when the employee is posted abroad within the scope of the PWD. Given the fact that the legal relation of posting has a temporary character, a need for a fast procedure with instant and directly enforceable decision in cases involving failure to meet guaranteed terms and conditions of employment for posted workers is even stronger. It is not viable for posted worker to wait long months for an outcome of a remedial procedure, since at the time of achieving the final decision the

posting may be already long time over.

The way to tackle this second group of problems is tougher. The simplest solution would be the introduction of strict periods for courts issuing a decision in cases involving posting of workers. A reasonable period would be of up to 30 calendar days. More complex, but a far more effective solution, would require the development of proper procedures, specifically designed for cases dealing with posting of workers. This new accelerated model of legal enforcement may be based, as already mentioned, on a template instituted by the Injunctions Directive (European Parliament, 2009). To conclude under current legislation the judicial enforcement of provisions vested in the PWD is ineffective and nonviable. It is due time to refine the judicial enforcement and make respective legal instruments more operative since both the Posting of Workers Directive and Brussels I Regulation which are part of the relevant judicial frame in this respect are about to be revised.

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February 2003 - Cees Nierop
- 01-05 Employer's and employees' preferences for working time reduction and working time differentiation – A study of the 36 hours working week in the Dutch banking industry  
2001 - Kea Tijdens
- 01-04 Pattern persistence in European trade union density  
October 2001 - Danielle Checchi & Jelle Visser
- 01-03 Negotiated flexibility in working time and labour market transitions – The case of the Netherlands  
2001 - Jelle Visser
- 01-02 Substitution or segregation: Explaining the gender composition in Dutch manufacturing industry 1899 – 1998  
June 2001 - Maarten van Klaveren & Kea Tijdens
- 00-01 The first part-time economy in the world. Does it work?  
2000 - Jelle Visser



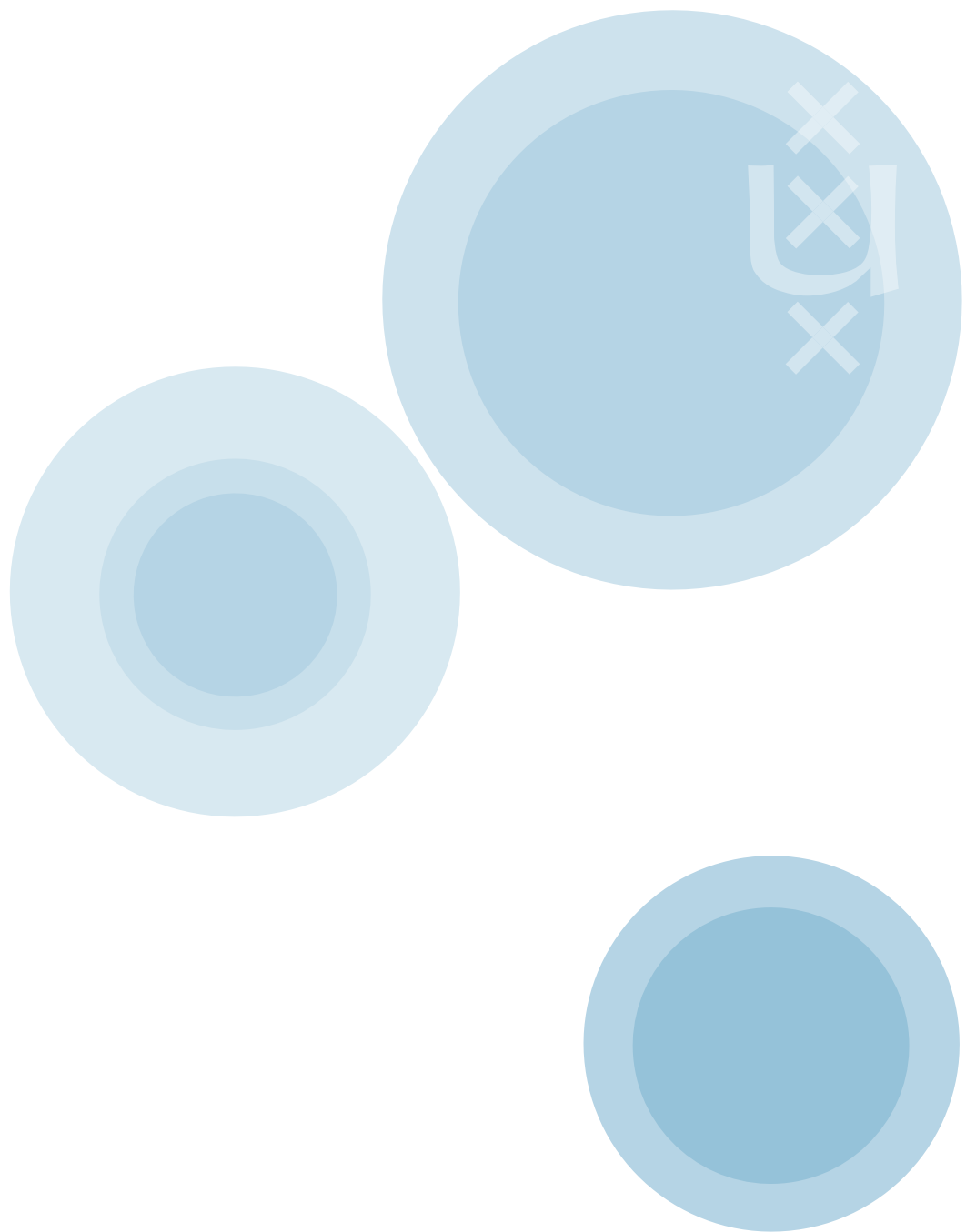
# Information about AIAS

AIAS is a young interdisciplinary institute, established in 1998, aiming to become the leading expert centre in the Netherlands for research on industrial relations, organisation of work, wage formation and labour market inequalities. As a network organisation, AIAS brings together high-level expertise at the University of Amsterdam from five disciplines:

- Law
- Economics
- Sociology
- Psychology
- Health and safety studies

AIAS provides both teaching and research. On the teaching side it offers a Masters in Comparative Labour and Organisation Studies and one in Human Resource Management. In addition, it organizes special courses in co-operation with other organisations such as the Netherlands Centre for Social Innovation (NCSI), the Netherlands Institute for Small and Medium-sized Companies (MKB-Nederland), the National Centre for Industrial Relations 'De Burcht', the National Institute for Co-determination (GBIO), and the Netherlands Institute of International Relations 'Clingendael'. AIAS has an extensive research program (2004-2008) on Institutions, Inequalities and Internationalisation, building on the research performed by its member scholars. Current research themes effectively include:

- Wage formation, social policy and industrial relations
- The cycles of policy learning and mimicking in labour market reforms in Europe
- The distribution of responsibility between the state and the market in social security
- The wage-indicator and world-wide comparison of employment conditions
- The projects of the LoWER network



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