



European Labour Authority – The guardian of posting within the EU?

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1. Context of the European Labour Authority

Cross-border mobility is, without exaggeration, one of the most important issues in the EU. The terms ‘mobility’ or ‘free movement’ are used here to tackle Union citizens’ free movement while migration is used exclusively for third-country nationals to avoid misconceptions. Free movement is not only one of the four fundamental freedoms in the Internal Market, but a political symbol as an explicit element of union citizenship. Pursuant to Article 20 (2) a) of the TFEU “Citizens of the Union shall enjoy [...] the right to move and reside freely within the territory of the Member States”.

Free movement rights are appreciated a lot when public opinion is asked on the advantages brought by the EU. The Standard Eurobarometer of Autumn 2017¹ put a question whether EU citizens are for or against free movement.² Support for free movement reached an EU average of 82% (while 14% were against and 5% did not know). This is an outstanding result taking into account other results on important, modern issues like the digital single market within the EU, which reached 62% support and 20% were against (18% did not know).³ “More and more EU citizens have been living in another EU Member State since 2009 and the number of EU-28 movers further grew in 2016. In 2016, there were roughly 12 million EU and EFTA movers in total” – states the 2017 Intra-EU labour mobility report.⁴

Such a strong support for free movement means beyond doubt that the EU legislator feels politically empowered to deepen this segment of the Internal Market. The process is fairly rapid and covers

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¹ Standard Eurobarometer 88 – Public opinion in the European Union, December 2017. Page 87. (Eurobarometer is prepared and published twice a year (in Spring and in Autumn).

² Question QA16. Support/against/Do not know the statement: „The free movement of EU citizens who can live, work, study and do business anywhere in the EU”.

³ Ibid. page 86.

⁴ European Commission, 2017 annual report on intra-EU labour mobility, page 23.

several issues including e.g. employment rights, equal treatment rights as well as the establishment of tangible instruments like the European Health Insurance Card and lately the European Professional Card.⁵ The process is always two-fold, first the legal situation is clarified better by adopting new rules and concepts, which is followed in a second step by proper implementing rules, usually in the form of new or renewed EU institutions and/or on-line, electronic platforms being accessible to individuals, businesses, Member State authorities, civil organisations, EU institutions etc.

The idea of the European Labour Authority (hereinafter referred to as ELA) fits into this general mechanism. The EU has first suggested several new intervention areas and contributed to the creation of elaborated legal surroundings related to the European labour market. This extensive body of legislation could then be viewed as creating the need for new, more effective and more efficient implementation methods at EU level.

Accordingly, the first, legislative phase was characterised by intensive work intended to complete free movement rights based on the principles of fairness and proportionality. Most of the proposals have been tabled by the Commission between 2015 and the beginning of 2017. Important to note that several legislative proposals have already been adopted⁶ while regarding other proposals, like the one on Social Security Coordination⁷ considerable progress has been achieved, important chapters, namely the one on posting, have partially been agreed upon.⁸ Now, the European Commission is deliberating to propose the introduction of the European Social Security Number (a public consultation⁹ already took place between 30 November and 28 December 2017).

The Juncker Commission has put jobs, growth and fairness as priorities on its agenda for 2015-2019 and in this spirit the European Pillar of Social Rights (hereinafter referred to as Pillar) was adopted on 17 November 2017 in Gothenburg.¹⁰ The Pillar stands firm behind the proposal for the ELA. The Pillar is an interinstitutional joint proclamation of the institutions of the EU, namely the European Parliament, the Commission and the Council. This has been endorsed by the Council but not by individual Member States meaning that it is a political commitment taken at European level by the supranational bodies of the EU. The Pillar, on the one hand, is designed to ensure fair, cross-border

⁵ <http://www.europarl.europa.eu/resources/library/media/20180116RES91806/20180116RES91806.pdf> (Downloaded 26 April 2018)

⁶ Regulation (EU) 589/2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets and amending Regulation (EU) No 492/2011 and (EU) No 1296/2013. On 1 March 2018 common understanding has been endorsed by the European Parliament, the European Commission and the European Council representatives on COM(2016)128 final (doc. 7350/18). <http://ec.europa.eu/social/main.jsp?langId=hu&catId=89&newsId=9062&furtherNews=yes> (Downloaded 26 April 2018)

⁷ COM(2016)815 final.

⁸ https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CONSIL:ST_13645_2017_INIT&from=EN (Downloaded 28 April 2018)

⁹ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5862503_en

¹⁰ Member States have approved the text at Coreper level on 11 April by qualified majority voting. <http://www.consilium.europa.eu/en/press/press-releases/2018/04/11/posting-of-workers-council-confirms-the-compromise-text-agreed-with-the-european-parliament/>. The directive will be published in the Official Journal of the EU after the voting in the European Parliament and the formal approval of the Council (at ministerial level). See for more: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en (Downloaded 26 April 2018)

labour mobility within the EU which is derived from free movement of workers and cross-border activities. Additionally, on the other hand its objective is far more than that: it would like to serve as a basis for upward convergence towards better working conditions in each and every Member State.

In sum, on the one hand better functioning national labour markets and on the other managing fair labour mobility and social convergence in an increasingly European labour market were set as target objectives.

The second (institutional) phase has been launched in September 2017 by disclosing the idea of the ELA. It was first mentioned by the President of the European Commission in his 2017 State of the European Union address. President Juncker emphasised the following context:

“In a Union of equals, there can be no second class workers. Workers should earn the same pay for the same work in the same place. This is why the Commission proposed new rules on posting of workers. We should make sure that all EU rules on labour mobility are enforced in a fair, simple and effective way by a new European inspection and enforcement body. It is absurd to have a Banking Authority to police banking standards, but no common Labour Authority for ensuring fairness in our single market. We will create such an Authority.”¹¹

No more details were made public until November 2017, when a concise (5 pages long) inception impact assessment was published on the initiative.¹² The impact assessment was open to public consultation between 27 November 2017 and 7 January 2018.¹³ Based on the political target objectives and the conclusion drawn from the public consultation, on 13 March 2018 the proposal for a Regulation for establishing a European Labour Authority was launched by the Commission within the so-called ‘Social Fairness Package’.¹⁴ According to the proposal the Authority should be up and running in 2019 and reach its full operational capacity by 2023.

2. The devil lies in the details

The above-described context of the ELA would seem to suggest that both the renewed legal instruments and the forthcoming, supportive institutional steps are logical consequences of the generally endorsed motion, namely to deepen the Internal Market, to protect the rights of cross-border workers and to provide for clearer and fairer rules for workers and employers.

¹¹ http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm (Downloaded 2 April 2018)

¹² Ref. Ares(2017)5822262 – 28/11/2017. <http://ec.europa.eu/info/law/better-regulation/initiatives/Ares-2017-5822262> (Downloaded 2 April 2018)

¹³ <http://ec.europa.eu/info/law/better-regulation/initiatives/Ares-2017-5822262> (Downloaded 2 April 2018)

¹⁴ COM(2018) 131 final.

However, if one digs deeper and the dust is settled, this idyllic picture gets a little blurred. Notions like 'social dumping' and 'welfare magnet'¹⁵ come up which embody a common fear that workers moving from one country to another could result in deterioration of the social conditions in the host country. Usually two reasons are cited. First, their movement entails increased competition with undertakings of countries with lower wages or standards. As second, these workers adapt better and accept – on the top of lower wages – also lower conditions of work safety, jobs that do not match their qualification (they are over-qualified), lesser rights to social protection and interest representation, worse accommodation in the host state. These two factors can, both theoretically and practically entail loss of jobs of own nationals in the host country and/or limited access to public benefits (in terms of school places, rentals, health care services), all creating tensions.

How big a challenge mobility can cause is pictured clearly by the Brexit referendum.¹⁶ British voters voted against EU membership especially because of fears related to (internal) free movement and (external) migration, to loss of jobs and shrinking of life niveau they enjoy now. Clearly, Brexit was unprecedented, but not tensions on mobility: issues relating to mobility encompassed a certain growing duality in recent years, approximately since 2013.

On the one hand the preamble of Regulation 492/2011/EU were constantly cited and claimed for regarding economically mobile persons, namely: "Mobility of labour within the Union must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States".¹⁷ This side of the coin shows itself in the polls, namely that EU citizens praise free movement, praise the opportunity to live, study, work in an open area without frontiers.

However, some expressed worries regarding negative effects of cheap labour and unfair trade practices alongside with tensions created by the necessities of economically non-active free movers. Britain was especially hit by the latter: the volume of incoming persons in Britain reached a really high peak, in 15 years the population has grown by 10% from 60 million to 66 million. Out of the 17 million EU citizens living or working in other Member States almost 10% targeted the UK in the last ten years.¹⁸ In other EU countries the proportions are much smaller (except Germany), but Brexit has put the whole issue into a different light. The first European Council conclusion (hereinafter referred to as EUCO) after the referendum emphasised that "We are starting today a political reflection to give

¹⁵ Laura GYENEY: The limits of Member State Solidarity: The legal Analysis of the Dano and Alimanovic cases. In Marcel SZABÓ – Petra Lea LÁNCOS – Réka VARGA (ed.): *Hungarian Yearbook of International and European Law 2016*. Hague, 2017. 431–447.

¹⁶ Éva GELLÉRNÉ LUKÁCS: Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons. *ELTE Law Journal*, 2016/1. 141–162. (<http://eltelawjournal.hu/brexit-point-departure-future-field-free-movement-persons/>)

¹⁷ Preamble 4 of Regulation (EU) 492/2011 on the free movement of workers within the EU.

¹⁸ European Commission, 2017 annual report on intra-EU labour mobility, page 12.: "The UK hosts the largest number of EU-28 movers who arrived during the past ten years (1.8 million recent movers)"

an impulse to further reforms”.¹⁹ Furthermore, the Dutch foreign minister added that “What we have to do is not continue with business as usual but rather look at the real concerns of citizens, such as jobs, security and migration.”²⁰

The Brexit referendum seemed to back-up the vague intuition that if the number of free movers exceeds a given level, tensions cannot be absorbed by the host country’s citizens related to all spheres of life (political, economic and social). The realization of this idea forecasted new measures aimed at inherently striking a new type of balance on the labour markets of the Member States.

2.1. Posting: the social side of mobility in the European labour market?

Let us get further insights through the example of posting of workers in the framework of the provision of services.²¹ Posting in my view is the “veterinarian’s horse” of mobility, which Hungarian term means that all the possible (rather negative) symptoms of mobility can be presented by it.²² The story begins in 2014, when the EU has adopted Directive 2014/67/EU (hereinafter referred to as enforcement directive) on the enforcement of the original posting of workers directive (Directive 96/71/EC).²³

This new enforcement directive has not yet even been implemented, when the European Commission has published the proposal for the revision of the original posting of workers directive on 8 March 2016.²⁴ The Commission stated that “The aim of this proposal is to facilitate the provision of services across borders within a climate of fair competition and respect for the rights of posted workers, who are employed in one Member State and sent to work temporarily in another by their employer. More specifically, the initiative aims at ensuring fair wage conditions and a level playing field between posting and local companies in the host country”.²⁵ Fair wage conditions mean equal pay for equal work at the same place.

Within the 8 weeks (quite short) deadline, national parliaments of 11 Member States (in all 14 chambers)²⁶ submitted a reasoned opinion asserting that the proposal infringed the principles of subsidiarity and proportionality. The threshold of at least one third of the votes was reached, consequently the so-called ‘yellow card’ procedure was triggered for the third time in the history

¹⁹ 26 June 2016 European Council (EUCO) Conclusions.

²⁰ <https://www.consilium.europa.eu/en/meetings/gac/2016/06/24/> Downloaded 29 April 2018. Bert Koenders, the Netherlands Minister for Foreign Affairs and President of the Council made the statement.

²¹ KÁRTYÁS, Gábor: *Munkaerőkölcsonzés Magyarországon és az Európai Unióban. (Placement services in Hungary and in the EU)* Budapest, 2011. https://www.ajk.elte.hu/file/AJKDI_KartyasGabor_dis.pdf

²² <https://forum.wordreference.com/threads/veterinarians-horse.1844889/> The origin is a figure in vet’s schoolbooks illustrating a horse with symptoms of all the illnesses a horse can have.

²³ 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.

²⁴ COM(2016)128 final.

²⁵ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2488&furtherNews=yes> (Downloaded 2 April 2018)

²⁶ Bulgaria, Czech Republic, Denmark, Estonia, Croatia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia.

of the EU, which obliged the European Commission to reconsider the proposal and decide whether to withdraw, maintain or amend it. On 20 June 2016, the European Commission concluded that the proposal did not constitute a breach of the subsidiarity principle and decided to fully maintain it.²⁷

Already the yellow card procedure could have raised flags, but thinking surely started when 7 EU Member States out of 28 – namely Hungary, Lithuania, Latvia and Poland that voted against it, while the UK, Ireland and Croatia that abstained – did not support the compromise text, when ministers in the Council agreed upon the common position on 23 October 2017, in order to enable the Presidency to start trilogue procedure with the European Parliament.²⁸ These countries objected the proposal arguing that ‘renewed was not equal to improved’.²⁹ Also their views were supported by important EU level social partners, like BusinessEurope and CEEMET.³⁰

Quite the contrary, Marianne Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour Mobility called the common understanding that was reached in the trilogue procedure on 1 March 2018 a ‘landmark agreement’: “At the heart of our proposal is the principle of equal pay for equal work at the same place. We have now confirmed this principle in legislation. This directly responds to the concerns of many citizens that outdated legislation leads to unfair competition in the Internal Market”.³¹ This mirrors the views of the 21 Member States that supported the text, first and foremost France, Germany, Belgium, Austria, Luxembourg and the Netherlands being traditional target countries for mobility.

How could these two different comprehensions both be understood and brought into one platform at the same time? First, posting is of moderate importance: in 2015, there were around 1,9 million postings in the EU comprising 0.65% of the labour force in the EU28.³² But if posted workers are counted on the basis of full-time equivalent (usually posted workers are employed for short periods meaning that 2-3 workers would amount to 1 full-time worker) their share can be much less, 0,2-0,3% only (there is no reliable data on this, however).³³ According to the impact assessment, in turn, only 1/3 of postings goes from low-wage country to high-wage country.

Secondly, of the three channels where competition can be distorted on the Internal Market (imports of goods from low-wage countries, imports of services involving posted workers, offshoring of production to low-wage countries) posting of workers is the least considerable option for competition

²⁷ COM(2016) 505 final.

²⁸ <https://euobserver.com/social/141166>

²⁹ <https://euobserver.com/social/139599>

³⁰ <https://www.besnesseurope.eu/publications/posting-workers-bad-deal-will-harm-functioning-single-market-services> (Downloaded 2 April 2018)

³¹ https://ec.europa.eu/commission/commissioners/2014-2019/thyssen/announcements/statement-commissioner-thyssen-revision-posting-workers-directive-following-7th-trilogue-council_en 1 March 2018 (Downloaded 22 April 2018)

³² Uuriintuya BATSAIKHAN: EU posted workers: separating fact and fiction. <http://bruegel.org/2017/08/eu-posted-workers-separating-fact-and-fiction/> (Downloaded, 28 April 2018)

³³ Zsolt DARVAS: Could revising the posted workers directive improve social conditions? http://bruegel.org/wp-content/uploads/2017/08/Darvas_2017-01-31_EP_Posting_workers-1.pdf, 8. (Downloaded 28 April 2018)

between low-wage and high-wage countries as compared to the huge impact of imports or off-shoring.³⁴ Real distortions are caused by importing goods from outside the EU, which has a huge hidden percentage of cheap labour (from Asia, Africa etc.).³⁵ Posting within the EU is not an issue of real scale now, neither in terms of the number of workers, nor in terms of general EU economic trends. Obviously, posting characteristics at present shall be treated as a point of departure and its present regulation addresses the future.

2.1.1. Supporters of extending the principle of equal pay for equal work at the same place

Countries and other stakeholders supporting the principle are inclined that the number of posted workers does not grow on their territories and this tool will be capable of attaining that objective. In their views, if the introduction of the equal pay for equal work principle will result in stagnation or decline of posting, then posted workers who remain needed under these new coordinates will become regulars (typical or long-term workers as an opposite to peculiar, in this case posted workers).

This approach primarily focuses on the host labour market and targets protecting national workers from loss of their jobs. Secondly, they want to guarantee that posted workers (who are per definition vulnerable) meet all the requirements of the host country even though they carry out a certain service in a definite period of time, therefore they cannot integrate to the society of the host Member State. This is a basic feature of posting which also distinguishes this legal institution from the free movement of workers where the principle of equal treatment, including equal pay applies in accordance with Article 45(2) TFEU. This is not 'better' protection, it is the same protection corresponding to the rules of the host states entirely. The express inclusion of temporary work agencies and workers hired by them into the personal scope of posting serves this purpose, too.³⁶

This group primarily protects workers in the host states (receiving states). They have real objection only against unlawfully posted workers. They do not have deep knowledge on posted workers' general circumstances, rather pick disputable examples,³⁷ even if, most probably the majority of posted workers are employed lawfully. They do not think that losing posted workers would have any or considerable effect on the companies on their territories hence the business shall run with regular workers if posted workers are not available. There is a probability of course that sending undertakings will abandon their cross-border business but they shall be replaced by undertakings in the host country. Parallel

³⁴ Ibid. 4–6.

³⁵ Ibid. 5.

³⁶ Article 1 (3) d): “[...] the worker shall be considered to be posted to that Member State by the temporary employment undertaking or placement agency with which the worker has been in an employment relationship. The temporary employment undertaking or placement agency shall be considered to be the undertaking.”

³⁷ Jan Cremers suggests that posting has a ‘business model’ which is based on ‘artificial agreements’ and refers to posting undertakings as “liable for bogus activities [that] can bypass proper control and enforcement”. (Jan CREMERS: *Towards a European Labour Authority, Mandate, Main Tasks and Open Questions*. [Politik für Europa #2017 plus] Friedrich Ebert Stiftung, 2018. 8.)

they require the posting undertakings not to deprive posted workers from equal rights and protection in their states, as the impact assessment presumed: “Equal rules on remuneration will contribute to increase the wages earned by posted workers”.³⁸ These states are supported by trade unions,³⁹ that fight for better protection of workers in their country of employment – a natural demand of trade unions.

2.1.2. Supporters of the status quo

Countries and other stakeholders supporting the status quo see the case completely differently. They assert that existing difference between the wage levels in the different Member States cannot be considered as unfair competition. It is a fact that due to the different levels of economic development, some Member States have certain wage advantage, just like enterprises of other (Western) Member States have enormous advantage in terms of access to capital. The single market means increased competition, which was welcomed and promoted even by the EU institutions so far. In this aspect it is worth recalling that one of the conditions for the accession to the EU is that a candidate country should be able to cope with the competition and the market forces at play in the Internal Market.

Moreover, the EU has no competence to regulate wages in such a comprehensive manner, this falls within national competence. If a posted worker has contracted an employment contract under a certain national law, wage shall be calculated accordingly. Article 153(5) of the TFEU clearly states that the EU does not have any jurisdiction over wage setting: “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” Even trade unions consider carefully an EU-wide minimum wage.⁴⁰

Additionally, the issue receives much more attention than it would deserve taking into account the whole of the EU commercial businesses: it is not proportionate to apply such an extensive body of law to this small group of people. They assert furthermore, that no experiences were to be drawn from the real effect and application of the Enforcement Directive, which should have been awaited, especially its effects in general on the provision of services, on the other fundamental freedom of the Internal Market.

This camp primarily wants to protect the jobs of posted workers which parallel means safeguarding also the business opportunities connected thereto. Opposite to the approach of the other group which

³⁸ Impact assessment (SWD(2016) 53 final) p. 3.

³⁹ See the opinion of ETUC (downloaded 2 April 2018): https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc_revision_of_the_posting_of_workers_directive.pdf

⁴⁰ <https://www.uni-flensburg.de/fileadmin/content/seminare/soziologie/dokumente/culture-practice-and-europeanization/vol.3-issue-1/seeliger.pdf>; Martin SEELIGER: Why do (some) European trade unions reject minimum wage regulation. *Culture, Practice & Europeanization*, Vol. 3, No. 1, 2018. 37–46.

inclines to handle this issue as more of a ‘protection of the labour market’ issue, not so strongly and evidently connected to business perspectives, this group is forced to have a double focus.

Obviously there is a strong connection between the undertaking having the assignment in another EU Member State and the posted worker whose work effectuates the completion of this assignment. The prerequisite of the assignment is a good proposal and available workforce to accomplish the assignment, but interdependence is necessarily there: the posted worker loses his/her employment opportunity if the undertaking loses its business opportunity. The stricter the rules on posting are, the more difficult it becomes for undertakings to get assignments in other Member States. Short term or long term, but more rules will increase costs and undertakings will lose drive to go international. Instead of having equal pay in the host Member State, workers might not even get to any other Member States as posted workers. Loss of jobs for posted workers or non-establishment of posted worker posts could be the consequences of the process. Even the difference between free movement of workers and the free provision of services can vanish. Consequently, these stakeholders focus on the loss of jobs and job opportunities.⁴¹ This approach was supported by employers’ organisations and interest representations, especially by BusinessEurope.⁴²

2.1.3. Can convergence and balance be found on the Internal Market?

Data from 2016 and 2017 shows already a solid decline in the number of posted workers, even without the introduction of the equal pay for equal work principle.⁴³ Data of forthcoming years will only shed light on the real impacts. We cannot even predict educated guesses. The impact assessment attached to the original Commission proposal neither did mention this possibility, nor did it mention any forecasts regarding numbers.⁴⁴ From the impact assessment it would seem that there will be no individuals affected with job losses, the new rules only “[...] can reduce the competitiveness of companies located in Member States with lower wage conditions” due to increased labour costs.⁴⁵

It is certainly true that a gap can be perceived between the approaches of countries from which posted workers are sent (‘sending countries’) and countries which host posted workers (‘receiving countries’). It is difficult to answer the question whether it is possible at all to create convergence between the two approaches? At first glance, no convergence seems to evolve between the two above-mentioned standpoints.

⁴¹ See the position of the Hungarian government, <https://eu-brusszel.mfa.gov.hu/eng/news/the-hungarian-government-does-not-accept-disfavouring-hungarian-citizens-working-in-another-member-state> (downloaded 2 April 2018)

⁴² <https://www.buinesseuropa.eu/publications/posting-workers-bad-deal-will-harm-functioning-single-market-services> (Downloaded 2 April 2018)

⁴³ <http://bruegel.org/2017/08/eu-posted-workers-separating-fact-and-fiction/>; BATSAIKHAN op. cit.

⁴⁴ SWD(2016) 53 final, Summary (Commission Staff Working Document, Executive Summary of the Impact Assessment).

⁴⁵ Ibid.

There are, however aspects deserving attention that can influence the future models on the Internal Market, the smooth operation of which is clearly a common denominator:

1. The limitation of posting would increase the shortage and demand for skilled and highly professional workers in EU countries. Expertise of workers who enjoyed the advantages of posting but do not want to be regulars will not be realised in host states.
2. The loss of jobs of posted workers would not terminate the unmet demand for cheap labour. It is feared that the new situation would contribute to a driving force for undeclared work rather than a transformation of posted workers into regular workers.
3. The intervention into the market is seen artificial by several stakeholders and it could reduce business opportunities resulting in distorted competition and in increase of prices horizontally within the Internal Market.
4. Labour market forces would prevail, employers (not the workers) will decide on new viable employment and business options. Market always tends to find equilibrium, other cost-effective methods can be invented. An open eye shall be kept probably on intensification of off-shoring practices, parallel employments. Not to be neglected that most employer organisations, both at EU and national level were explicitly against this new rule, during the entire more than 2 year-long legislative process.

These factors remained largely outside the horizon when the dossier was negotiated. All in all, it remains to be seen, how this new rule would avoid to materialise these concerns and instead would rather contribute to jobs preservation or jobs growth, the very primary target objectives of the EU (Europe 2020 Strategy) and even in a post-Brexit era. Cooperation between national authorities to tackle evolving tensions shall be intensified and the dialogue at European level shall be used to neutralise the fractions.

3. Proposal on the ELA

3.1. ELA as an independent, new Authority

How the ELA can be faceted in this setting?

A notable starting point could be the Declaration of the Commission on 23 October 2017, which was made public right after the common position on the revised posting directive has been adopted in the Council. The Commission stated that “[...] Indeed, because of its transnational nature, the posting of workers poses particular challenges for the entities responsible for supervising the application of

working conditions. Greater and easier cooperation between the competent authorities of the home and host Member States appears therefore necessary. The Commission considers that the establishment of a ‘European Labour Authority for ensuring fairness in our single market’ will significantly contribute to effectively addressing these challenges.” Obviously, a strong connection was envisioned between posting and the concept of the ELA already months before the adoption of the concrete text. It is recalled that the idea of the ELA was first mentioned in September 2017, a couple of days before reaching this common position on the revision of the posting of workers directive.

The Commission’s declaration was followed by publishing the inception impact assessment document, which formed the contextual basis of the public consultation.⁴⁶ Among the enumeration of the addressed challenges, general problems are mentioned first: fragmented institutional set-up at EU level when dealing with the complexity of cross-border situations; insufficient access to and sharing of information at EU level; weak or absent tools for dispute settlement and for joined cross-border investigate activities and, most importantly insufficient/inadequate capacity of competent national authorities to solve these challenges, which is a justification that the problems require action at EU level.⁴⁷

A remarkable point expressly addresses the areas concerned, including posting: “Problem the initiative aims to tackle [... is] absence of a risk assessment capacity to address multi-faceted/ cross-border phenomena like new risks arising from blurred boundaries between the posting and free movement of workers, social security coordination (including possible tax fraud), undeclared work, and in certain cases work-related crime”.⁴⁸ Clearly, as it is stated in the document: “The ELA aims at contributing to the overall objective of ensuring that EU rules on labour mobility are enforced in a fair, simple and effective way and supporting labour mobility in the single market.”⁴⁹ The document refers to fair, simple and effective enforcement as an aim of the ELA, however, it is not clear from the text whether the ELA or national authorities would be entrusted with the task of concrete enforcement.

The document suggests the establishment of the ELA being an appropriate response to challenges and three possible policy options regarding the role of the ELA are presented:

Option 1 – a support role under which ELA would provide analytical and technical support to existing structures and tools;

Option 2 – an operational role under which ELA would promote common technical standards, increase cooperation between national authorities by taking over some technical tasks from the existing structures and further enriching them to address identified gaps and create synergies;
and

⁴⁶ Ref. Ares (2017)5822262 – 28/11/2017.

⁴⁷ Ibid. p. 1–2.

⁴⁸ Ref. Ares (2017)5822262 – 28/11/2017. p. 2.

⁴⁹ Ibid. p. 2.

Option 3 – a mandatory role under which ELA would set standards and requirements and could take binding decisions in case of disputes between Member States and instruct inspections.⁵⁰

During the public consultation⁵¹, which lasted between 27 November 2017 and 7 January 2018, questions were asked about efficacy of the present network and directions for its improvement. In essence 390 replies were collected.⁵² 70% of respondents supported that cross-border information flows could be improved alongside with enhanced cooperation between national authorities. In turn, they agreed that a new authority could mean a real addition to overcome insufficient access to information and insufficient cooperation. However, as it is summarised in the ELA proposal: “Targeted consultations yielded varied results”.⁵³ This meant particularly that – parallel to supporting information-exchange and cooperation – concerns were raised by EU bodies and a number of commissions working on issues relevant for the ELA that the ELA shall not complicate or duplicate existing administrative structures and shall respect Treaty-based national competences.⁵⁴

Concerns were taken into account and the ELA was designed in the softer form, to have at the moment an operational role and not a regulatory (supervisory) role.⁵⁵ The ELA is intended to be established by a regulation that can be changed in a proper legislative process any time later on by qualified majority.

3.2. ELA and posting

What can be said about posting-related objectives? The issue is two-fold hence posting is based on a labour law pillar and a social security pillar which are regulated by distinct bodies of law with distinct institutional set-ups.

3.2.1. Labour law aspects – inspections

The ELA will remain the one and only consultative body in the field of posting when the proposal is adopted. According to the proposal, the Authority will replace the Committee of Experts on Posting

⁵⁰ Ibid. p. 3.

⁵¹ <http://ec.europa.eu/social/main.jsp?catId=333&langId=en&consultId=30&visib=0&furtherConsult=yes> (Downloaded 2 April 2018)

⁵² 8809 answers were received but 8420 were identical (as a result of a campaign of the European Trade Union Confederation).

⁵³ ELA proposal, p. 7.

⁵⁴ ELA proposal, p. 7. The Administrative Commission for the Coordination of Social Security Systems, the European Platform to enhance cooperation in tackling undeclared work, the Committee of Experts on Posting of Workers, the Technical Committee on the Free Movement of Workers, the European Network of Public Employment Services were consulted.

⁵⁵ Ibid. p. 8.

of Workers and the European Platform on tackling undeclared work.⁵⁶ These bodies are primarily responsible for consultation on posting, they channel Member States' and other stakeholders' view with policy making perspectives. The ELA will pool technical and operational tasks of these bodies into a permanent structure and tries to enhance its efficacy. There is no further guidance how the replacement will look like in practice, but if the ELA substitutes the Commission as Secretariat, for example, it is hoped that the policy making perspectives can even be better coordinated and the overlaps minimised.

An interesting aspect is the role of the ELA in the field of inspections. It is to be recalled that the provisions of the Posting Enforcement Directive 2014/67/EU are very extensive but they did not go as far as to tackle upon joint investigations or the possibility of sending inspectors to the territory of another Member State or to address this issue without the consent of the other Member State. At present, this approach seems to be confirmed in the proposal because the ELA has not been empowered to decide on joint inspections of the respective bodies of the Member States. It can only mediate and help the setting up of agreements for this purpose.⁵⁷ Article 9 clearly states that "The organisation of a concerted or joint inspection shall be subject to the prior agreement of all participating Member States via their National Liaison Officers".⁵⁸ No inspections can be carried out in the territory of the Member State that does not wish to take part in the concerted or joint inspection.

Presently the ELA's role would probably remain rather supportive in this area, however, there is a sentence worth recalling (Article 9 (1) last sentence): "The Authority may also suggest to the authorities of the Member States concerned that they perform a concerted or joint inspections". BusinessEurope refers expressly to this sentence by stating that "We [...] do not support the proposed Authority's role in suggesting a concerted or joint inspection of its own initiative to the authorities of the Member States concerned".⁵⁹ Clearly, inspection falls within national competence and from a mere legal point of view the term 'suggestion' cannot be properly positioned. In what procedure would the ELA decide on putting a suggestion, what information will it require to back-up this suggestion, is a Member State expected to take the suggestion on board and deal with it, what are the consequences if there is no reaction or the suggestion is not accepted? Furthermore, taking into account the length of this part, the question arises: why to adopt so many provisions on this issue if the *status quo* (no EU intervention) is designed to be maintained?

⁵⁶ P. 9. of the proposal COM(2018) 131 final, Article 50 of the legislative proposal repealing Commission Decision 2009/17/EC setting up the Committee of Experts on Posting of Workerson and Decision 2016/344/EU on establishing a European Platform to enhance cooperation in tackling undeclared work. ELA will also replace the Technical Committee on the Free Movement of Workers.

⁵⁷ Articles 9–10 of the ELA proposal.

⁵⁸ Article 9 (3) first sentence.

⁵⁹ https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2018-05-07_european_labour_authority.pdf page 5. point 25. (Downloaded 10 May 2018)

According to the proposal, inspections cover all the areas under the scope of the Authority's competences, including social security issues.⁶⁰ It shall be recalled that the General Partial Agreement on the revision of the Regulation 987/2009/EC (social security coordination) contains a new definition of fraud: "fraud: means any intentional act or intentional omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the law of the Member State(s) concerned, the basic Regulation, or this Regulation".⁶¹ The formation of a cross-border fraud definition gives the opportunity for national administrations to combat fraud more effectively. The new definition is a further basis for co-operation too, in a field which still falls within national competence.

Fight against fraud is of outstanding importance, hence it reveals false actions starting in the sending countries and effectuated in other countries by undertakings established in the former. It must, however, be clear that several undertakings that are established in sending countries are not established by the nationals of the sending countries. *Jan Cremers* brings striking examples for this purpose, namely that certain enterprises from Western countries establish secondary legal establishments (or even letter box companies) in countries with lower wages (like Hungary) and they try to circumvent the posting rules.⁶² Consequently, sending countries – when arguing against overburdening undertakings – speak not for its own nationals' businesses but for businesses established within their territories by any union citizen (or company). This clarification is sometimes overlooked in societal talks.

According to BusinessEurope in general "Our doubts on the need to create a new EU authority remain".⁶³ It strongly opposes joint inspections and suggests further clarifications to serve that aim.⁶⁴ It questions the scope of the Authority to intervene in certain matters having a very limited cross-border dimension, like violations of working conditions, health and safety rules etc. in the Member States.⁶⁵ On the other hand, there are views that "[...] the European Labour Authority should have a broad mandate to detect and investigate, with the competence to take all necessary enforcement measures to bring about the cessation or prohibition of abuses".⁶⁶ It remains to be seen whether the Authority would be confined to intra-EU dimensions or it would rather grow into a body with more broadly defined competences, competences to intervene into national policy making and enforcement mechanisms.

⁶⁰ Article 9 (1).

⁶¹ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13645_2017_INIT&from=EN (Article 1 (2) ea) point) (Downloaded 2 May 2018)

⁶² Jan CREMERS: Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping. *ETUI Policy Brief*, 5/2014. 3–4.

⁶³ https://www.buinessurope.eu/sites/buseur/files/media/position_papers/social/2018-05-07_european_labour_authority.pdf (Downloaded 10 May 2018)

⁶⁴ *Ibid.* 5., points 25–28.

⁶⁵ *Ibid.* 3., point 14.

⁶⁶ CREMERS (2014) op. cit. 13.

3.2.2. Social security coordination – replacing the Conciliation Board

The other side of posting, the aspect of social security coordination bears some interesting features. Already the inception impact assessment mentioned, that “There are no fora for dispute settlement beyond social security coordination; and even when they exist there might be in-built limitations to their effectiveness.”⁶⁷ The important reference is made to an existing dispute settlement system in the field of social security coordination – which has certain limitations –, the body referred to here is the Conciliation Board. According to the proposal the ELA replaces the Technical Commission, the Audit Board, and the Conciliation Board of the Administrative Commission for the Coordination of Social Security Systems.⁶⁸ Already the Administrative Commission has launched a discussion on how to strengthen the dialogue and conciliation procedure with a view to making it more effective.⁶⁹ This task would be taken over by the ELA.⁷⁰

By taking over the Conciliation Board, its mediative role and non-binding character is emphasised. Building on the experiences the ELA would reveal possible infringements, examine them, mediate between Member States and then report the result and its implementation by the Parties to the Commission. The Commission is subsequently free to decide, whether to initiate an infringement procedure against a Member State or not. BusinessEurope, however, is firm on stating, that “Dispute resolution must be removed from the scope of the Authority”⁷¹, because the present setting is appropriate.

It shall be stated, that the role of the Conciliation Board is crucial in adding to clarity of the rules in the field of social security coordination. At present, national authorities issuing the documents are sometimes hesitant to check A1 forms upon request of other national authorities, but on the other hand, national courts in host states sometimes withdraw A1 forms, in spite of the fact, that this is not allowed lawfully under the current framework, except in case of evidenced fraud, based on the case-law of the ECJ.⁷² For these reasons, enhancing uniform interpretation of EU law in this field is a necessity, it is important to enhance co-operation of national authorities and, at the same time, to properly draw the boundaries of competences of host states authorities and courts. Case law and awaited decisions in cases of the ECJ (like *Alpenrind*⁷³) are of fundamental importance here.

⁶⁷ Inception impact assessment, p. 3.

⁶⁸ Proposal COM(2018)131 final p. 9. Legislative proposal: Articles 46–47.

⁶⁹ The proposal refers to EP Question E-009697-16 on the application of the dialogue and conciliation procedure established by Decision of the Administrative Commission for the Coordination of Social Security Systems No A1.

⁷⁰ Article 17(2) in accordance with Article 13 provides the frames for rendering conciliation tasks.

⁷¹ https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2018-05-07_european_labour_authority.pdf, p. 4. point 19. (Downloaded 10 May 2018)

⁷² C-365/15 (COM vs Belgium), C-620/15 (A-Rosa), C- 474/16 (Belu), Altun states that fraud can result in a setting aside of the A1 form by a national court but several guarantees must be met.

⁷³ *Alpenrind and Others*, Case C-527/16.

A distinct issue is whether the Conciliation Board should in the first wave be removed from the ambit of the Administrative Commission, which bears the utmost expertise on social security coordination. First, the number of cases before the Conciliation Board is rather limited, yearly 2-3 cases, meaning that Member State authorities are able to solve their disputes even without this dispute-settlement mechanism very effectively. Secondly, there are no EU competences to compel a Member State to obey the decision of the Conciliation Board. Member States will comply only if they respect the expertise of the Board. If the Board is made independent from the experts, the gentlemen's agreement to voluntarily obey might be broken. This very special area of dispute settlement might be left for further consideration, based on more information.

4. Questions and concerns

4.1. Revised posting rules

The expression 'increasingly European labour market' was used in the context of posting together with fair and well-functioning labour markets. In terms of posting the increased regulatory framework is surely a reality coupled with increased application of national labour laws in cross-border situations. It is to be mentioned that 'administrative simplicity' is only referred to once in a very limited context. The impact assessment notes that alleviating administrative burdens of SMSs is only taken into account regarding risks originating from judicial litigation.⁷⁴

It is not clear, however, what will be the impacts of the new posting rules, most prominently the principle of equal pay for equal work at the same place in general on the day by day operation of undertakings. Labour costs increase, difficulties in calculation of wages in other Member States when employees pursue temporary cross-border activities, increased data reporting obligations can cause increase in administrative burden. SMEs have less flexibility and resources to lift the strict and heavy requirements. It is to be recalled that one of the objectives of the EU is to alleviate administrative burdens of enterprises (SMEs especially) in general, in order to boost competitiveness.

The revised posting of workers directive can also be regarded as adopted, the final assent will be given to it the latest in June 2018 with 99% probability under the Bulgarian Presidency. It will deliver further new challenges for posting undertakings in terms of wage calculations. Even if there are several aspects worth considering when regulating wage issues EU-wide, the implementation of the equal pay for equal work principle became a political determination. It should be noted, that it is still

⁷⁴ Impact assessment (SWD(2016) 53 final) p. 3.: „SMEs will benefit from improved legal clarity and decreasing administrative burden originating from risks of judicial litigation”. See in this context also Tamás GYULAVÁRI – Gábor KÁRTYÁS: Effective international enforcement of employee rights? Challenging Hungarian ‘unorthodox’ laws. <http://journals.sagepub.com/doi/full/10.1177/2031952518763826> (Downloaded 20 March 2018)

determination delicate issue at the level of enterprises: as a general practice enterprises established in Member States with higher average wages do not apply the principle in the case of the workers working in their subsidiaries established in Member States with lower average wages.

Clearly, as the situation stands now, the political dimension outweighs other concerns and arguments, most importantly that the intervention to the Internal Market could close windows of opportunities in Member States with lower average wages, making upward convergence difficult for them. By endorsing these new rules European stakeholders (and Members States) implicitly accepted that the number of postings would stagnate or even decline, while there is a hope that host labour markets' will be better protected from unfair trade practices. However, there can be dangers in availing of unfair trade in this context. As *Darvas* observes „If a “same pay at the same place” regulation is introduced, the logical next step would be to introduce tariffs on goods imported from EU countries with lower wages and to set barriers to offshoring production to low-wage EU countries”.⁷⁵ It can only be strongly hoped, that this vision remains an eventual logical option and does not become a targeted and implemented policy objective.

4.2. *The role of ELA*

The contours of the ELA were probably originally drawn up as an independent regulatory authority, a kind of guardian of labour mobility, with a focus on posting. President Juncker has mentioned it in context of the European Bank Authority, which have really extensive competences as a “ [...] new European inspection and enforcement body”.⁷⁶ Even suggestions from the academic side aimed at installing the ELA with strong competences: “[...] it would be appropriate to provide the European Labour Authority with the possibility of appealing directly to the Court of Justice of the European Union for a decision, if the Authority is unable to reconcile the viewpoints or find a solution”.⁷⁷ After such a political determination, it is fairly sure, that the ELA will be established.

However, albeit it was suggested to be established as a distinct authority, the circumstances seem not being capable of supporting the strong version (option 3). According to the proposal its objectives are to support labour mobility. Noteworthy is that regarding posting, its functions seem to bear the opportunity of exploring more than that: new methods and new pathways. By taking over the management of the Expert Committee on Posting and the European Platform on undeclared work its policy making profile will be dominant. By taking over the Conciliation Board for meditation

⁷⁵ DARVAS op. cit. 9.

⁷⁶ http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm (Downloaded 2 April 2018)

⁷⁷ CREMERS (2018) op. cit. 12.

purposes and channel its experiences into the legal control mechanisms, it will dispose over the seeds of a new enforcement mechanisms.

All these could bring new dimensions into the horizontal European labour market situation and could impact uniform interpretation in a much stronger manner than now. This development is traced by reference to the possibility of upgrading the Authority, which is expressly included in the proposal: “The proposal includes an evaluation clause to assess the mandate and tasks of the Authority every 5 years, providing for the possibility to progressively extend the scope of its activities and to scale-up the Authority”.⁷⁸

At present, the Treaty does not grant competence to dispose over enforcement competences. A research, however, suggested that even the Treaty should be amended in order to equip the ELA with the necessary competences: “In the short term, the ELA will not have binding powers vis-à-vis the Member States—for there is quite simply no legal basis for this—but it should not be excluded that in the medium or long term and in specific situations, the ELA may be endowed with a mandatory role”.⁷⁹

Talking about information exchange and support of actors horizontally, the ELA, indeed could play a very important role. It might add to spreading knowledge between countries, undertakings and people with very different political, economic and social background and/or economic performance. An article, for example states with regard to an alleged circumvention of posting: “The company’s own financial statements recorded that the haulage contractor was paying these drivers approximately €2.36 per hour, making this practice tantamount to slave labour”.⁸⁰ The author quasi equates this hourly rate to employing slaves.

In fact, there are countries within the EU where the officially set gross minimum wage per hour, calculated on the basis of economic performance and other circumstances, does not exceed 3 euros and the employees are not slaves but workers with labour and social rights. Certainly, these workers would like to earn more. Disparities are there and upward convergence is set as a target, the attainment of which needs hard work, patience, more cooperation and more information about each other on each side.

4.3. International road transport and the applicability of posting rules

There is currently an important exception to the revised posting rules in the road transport sector having regard to its highly mobile nature. The issue is sensitive for the half of the Member States, including Spain, Portugal, Ireland and the Central-Eastern European states, which employ many long

⁷⁸ Ibid. 10.

⁷⁹ Sofia FERNANDEZ: What is our ambition for the European Labour Authority. <http://institutdelors.eu/publications/quelle-ambition-pour-lautorite-europeenne-du-travail/?lang=en>, 15. (Downloaded 17 May 2018)

⁸⁰ CREMERS (2014) op. cit. 4.

haul lorry drivers in the EU. As a compromise, the posting of workers directive shall apply to the road transport sector later, when a legislative act amending Directive 2006/22/EC⁸¹ will be applicable as *lex specialis* and which will lay down specific rules for drivers in the road transport sector.⁸² The trilogue confirmed the Council ministers' agreement on 23 October 2017 to adopt a *lex specialis* for transport workers.⁸³ This can only be a matter of short time to decide on the status of intra-EU drivers. The only question remains, how exactly it is going to happen. The ELA proposal shows the aptitude of the issue: "There are also over 2 million workers in the road transport sector who cross intra-EU borders on a daily basis to transport goods or passengers".⁸⁴ Approximately amounting to the aggregated number of posted workers in all other sectors.

The Commission's first Road Mobility Package⁸⁵ was launched in May 2017. It proposed that Member States shall apply the posting rules for international drivers who work more than three days per month in a Member State. Applying the posting rules would mean that the drivers shall get the same pay as drivers get in that Member States being part of the international transport route. Consequently the equal pay for equal work principle would be applicable for the international transport operations, too. Practically, if an international driver crosses 4-5 countries while transporting goods from different destinations in these countries, and the number of days exceeds the set maximum (3 days according to the Commission's proposal) the undertaking that employs the driver shall calculate wages in accordance with the rules of the countries of destination. The driver's salary could then consist of 4-5 different wage-parts corresponding the exact wage levels in the countries of destination calculated for the length of time the driver spends in that country. The payment of social contributions would be calculated on the whole amount of wage in one country (usually in the country of residence).⁸⁶

The mutual declaration between transport and logistics associations, bus and coach associations, chambers of commerce and employers' confederations from lots of EU countries⁸⁷ – representing both Eastern and Western Member States – strongly advocates against the application of the Posting of Workers Directive (96/71/EC) to the road transport operations in the EU.⁸⁸ The declaration states that "[...] applying the Posting of Workers Directive to all international transports where hypermobile

⁸¹ Directive 2006/22/EC of the European Parliament and of the Council on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC (Text with EEA relevance).

⁸² Szabolcs TAKÁCS: Hungarian Secretary of State emphasised the need to find different rules for international road transport workers during the press conference after the 23 October 2017 Council meeting: <http://www.kormany.hu/hu/miniszterelnokseg/europai-unios-ugyekert-felelos-allamtitkar/hirek/kompromisszumra-jutottak-az-unios-szakminiszterek-a-kikuldetesi-iranyelv-modositasarol> (Downloaded 2 May 2018)

⁸³ <https://euobserver.com/social/141166>

⁸⁴ COM(2018)131 final, p. 1.

⁸⁵ See for more https://ec.europa.eu/transport/modes/road_en

⁸⁶ GELLÉRNÉ LUKÁCS, Éva: Biztosítás külföldi munkavégzés esetén. (Insurance in case of working cross-border), *HR & Munkajog*, 2015/10. 34–39., particularly 37–39.

⁸⁷ Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, United Kingdom.

⁸⁸ http://www.mkfe.hu/images/cikkek/dok/MUTUAL_DECLARATION_of_road_transport_associations_and_chambers_from_18_EU_Member_States.pdf (Downloaded 2 May 2018)

workers cross borders every day goes against the rationale of the Directive itself, as the intention has been to apply the posting rules to employees that carry out work for months or years in the territory of one Member State other than the state in which the driver normally works. The posting rules are thus inapplicable to drivers who work on a daily or even hourly basis in different Member States”. Moreover, “applying the Posting of Workers Directive will not be enforceable due to the large and complex administrative challenges it causes. The Directive will entail applying numerous national legislations to a month’s salary – control authorities and companies will likely have to deal with up to 20 different national legislations depending on the countries they operate in every single month with up to 50 different minimum wages per legislation, depending on the seniority of the driver, on the truck, on the goods being transported etc.”.⁸⁹

The work on this dossier is ongoing, the meeting of the Permanent Representatives Committee in Brussels had the road package provisions on its agenda on the 2nd of May 2018.⁹⁰ No firm and final terms have yet been negotiated, but there are different points of views on the table. Countries in which drivers of international road transport workers are active (receiving states) would like to have strict rules and include these persons into posting expressly. In an implied way they already treat them as posted workers by requiring them to receive and evidence equal pay for equal work and to provide for A1 certificates which is a direct evidence of a person being a posted person.⁹¹ There are even fines imposed on drivers in intra-EU road transport if they do not comply with these (at present only nationally set) requirements.⁹² On the other hand, the undertakings themselves and their interest representatives assert the non-compliance of these requirements with not only present EU law but with notions of freedom to provide services within the Internal Market.⁹³ They deny international drivers’ posted worker status.

The application of the very complex rules of posting on international long haul drivers could result in damaging the sector in general. If an undertaking established in one Member State can’t comply with the above-mentioned requirements, there is probability that another undertaking from another Member State can’t take comply with them either because of the overburdening nature of requirements. The nature and logic of the transport sector is fundamentally different from the logic of general posting. Here, there will be no take-overs of posted workers as regular workers in the host states, simply because the nature of the work is inherently different, it is inherently cross-border. Goods and passengers shall be transported cross-border on a daily basis. There will be no simple take-over of the

⁸⁹ Ibid. p. 1.

⁹⁰ <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkl49p4k6gyk?ctx=vh7ej5swwyte&tab=1> (Downloaded 10 May 2018)

⁹¹ A1 certificate demonstrates that a person falls within the ambit of the social security rules of the sending Member State in terms of Article 11 of Regulation 883/2004/EC on social security coordination.

⁹² http://www.mkfe.hu/images/cikkek/dok/MUTUAL_DECLARATION_of_road_transport_associations_and_chambers_from_18_EU_Member_States.pdf; Hungarian drivers’ interest representatives object practices of host states: <https://www.feol.hu/gazdasag/europai-unio-kozuti-fuvarozok-birsag-1825457/> (Downloaded 12 May 2018)

⁹³ Ibid. Undertakings made investments and now they face increased administrative burden and changed circumstances.

business opportunities either by new operators, because each and every undertaking will be subjected to the same difficult-to-meet rules. The transport market will be exposed to uncertainty. The fate of 2 million international drivers is at stake, their situation is still a pending issue. Being careful could not harm and the voice of the transport sector could be more carefully listened to.

5. Conclusions

Commissioner Marianne Thyssen has already announced the success in the field of posting on 1 March 2018, when the common understanding on the principle of equal pay for equal work at the same place has been endorsed in the trilogue process. The pressure to enhance social fairness in the European labour market seems to have weakened considerably. Maybe it would be worth considering, whether further pushing this idea would contribute to fairness or rather to fragmentation of the Internal Market by provisions that are rather difficult to follow and comply with for all players.

In the field of international road transport a mutual declaration was supported by 18 Member States' professional organisations including Belgium, the Netherlands and Denmark (countries with high activity in posting) by which professional organisations draw the attention of policy makers to the inapplicability of the posting rules to international road transport. The nature and logic of the transport sector is fundamentally different from the logic of general posting. Here, there will be no take-overs of posted workers as regular workers and no take-over of business opportunities by new operators either because of the difficult-to-meet rules. The warning aspects listed regarding the general revised posting rules could be reconsidered in order to avoid unwanted consequences in the international road transport sector like off-shoring these undertakings by their owners and management.

Finally, statistics show that return mobility in the EU-28 decreased by 3% in 2015, compared to 2014, however, in several EU-13 countries⁹⁴ nationals formed the largest group of incoming movers meaning that inflows to these countries are still largely return mobility.⁹⁵ Return mobility is based on several reasons, one is the increasing shortage of labour in the present, traditional sending countries, but another might be the deteriorating conditions of their employment.⁹⁶ Fears seem arise that decreasing posting on one hand and increasing return mobility on the other do not bestow the glory of labour mobility. And yet truck drivers' fate is now on the waiting list.

⁹⁴ RO, LT, HU, HR, EE, LV.

⁹⁵ 2017 Intra-EU labour mobility report, p. 47.

⁹⁶ *Munkaerőpiaci Tükör*, <http://real.mtak.hu/37228/1/egyben.pdf> (Downloaded 20 April 2018)