



The Challenges of Defining Posted Workers

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1. Introduction

On 29 May 2018, the European Parliament approved the compromise text negotiated by the European Council on the revision of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the ‘Posting of Workers Directive’)¹. The main aim of the revision, as indicated in the reasoning provided by the Council, is “to facilitate the transnational provision of services whilst ensuring fair competition and respect for the rights of those workers who are employed in one member state and sent to work temporarily in another by their employer (posted workers)”².

The revision of the Posted Worker has been on the plate since 2016, when the European Commission proposed a revision of the rules on posting of workers within the EU to ensure ‘they remain fit for purpose’³. Despite the adoption and subsequent implementation of Directive 2014/67/EU concerning the enforcement of the 96/71/EC Directive (the ‘Enforcement Directive’), introducing a set of requirements to both companies posting their employees to another Member State with the intent to provide services for a temporary period (the ‘service providers’), some of the (historically affected) Member States⁴ highlighted that the current rules regulating the posting of workers do not take into consideration the new trends observed in the labour markets across the EU in the past decade, especially following the various enlargements of the European Union with new member states since the beginning of the 1980s, as well as the economic crisis affecting the Single Market. Following the amendments proposed by the European Commission, the new Posting of Workers Directive should

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¹ <http://www.europarl.europa.eu/news/en/press-room/20180524IPR04230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>

² <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/>

³ <http://ec.europa.eu/social/main.jsp?catId=471>

⁴ Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden have claimed support for a modernisation of the Posting of Workers Directive establishing the principle of ‘equal pay for equal work in the same place’.

be able to better fulfil the goal of ‘creating a social Europe that protects workers and stops companies from engaging in a race to the bottom’⁵.

Whilst it is reasonable to agree that the landscape of the EU Single Market, and with it the labour market, has changed significantly since the introduction of the first Directive in this field in 1996,⁶ the proposed amendment of the Posting of Workers Directive, barely two years after the adoption of the Enforcement Directive and before its actual implementation, has sparked a debate between the Member States, especially the traditional ‘high wage’ countries and the relatively new joiner ‘low wage’ countries, the latter considering the proposal as an intervention aiming at undermining their competitive advantage in providing services on the Single Market⁷.

As the new Posting of Workers Directive, together with the Enforcement Directive already in force, will establish significant obligations to all service providers active in cross-border businesses, the present article aims at identifying who is the circle of employees to whom the legal and administrative compliance requirements will be applicable.

2. Defining ‘posted workers’: a historical approach

Legal literature originates the regulation of posted workers from the ECJ’s judgment in case C-113/89 between *Rush Portuguesa Lda* and the *Office national d’ immigration* (National Immigration Office, France), published on 27 March 1990. In the case subject, Rush Portuguesa, a building and public work undertaking registered in Portugal, entered into a subcontract with a French company for works on several railway construction sites in France at a time when Portugal was a newly joined Member State, subject to certain transitional rules, partly affecting the free movement of workers as well.

In order to carry out the works, Rush Portuguesa brought its Portuguese workforce from Portugal: 46 of these workers were engaged in the application of concrete and reinforced concrete and 7 were site foremen; the remainder were a managing engineer, a team leader, a general site worker, a crane operator and a mason.⁸ The French immigration authorities, however, contended that the freedom

⁵ Quote from Agnes Jongerius (S&D, NL), co-rapporteur, from the European Parliament’s debate on the amendment of the posting of workers Directive of 29 May 2018.

⁶ Éva GELLÉRNÉ LUKÁCS: Free Movement of Persons – a Synthesis: 51–84. In: Réka SOMSSICH – Tamás SZABADOS (eds.): *Central and Eastern European Countries After and Before the Accession*. Volume I. Budapest, ELTE University, Faculty of Law, Department of Private International Law and European Economic Law, 2011.

⁷ Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania, by a joint letter, have argued that a review of the 1996 Directive is premature and should be postponed after the deadline for the transposition of the Enforcement Directive has elapsed and its effects carefully evaluated and assessed. These Member States have expressed the concern that the principle of equal pay for equal work in the same place may be incompatible with the single market, as pay rate differences constitute one legitimate element of competitive advantage for service providers. (Source: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [COM(2016) 128 final], p. 5)

⁸ Report for the hearing delivered in Case C-113/89, Judge-Rapporteur Thymen Koopmans.

to provide services did not extend to all the employees of the supplier of services and that freedom certainly did not extend to the jobs of the Portuguese workers that do not qualify for the posts defined by the annex to Regulation No 1612/68 of the Council⁹, requiring specialist qualifications and posts of a confidential nature in order to benefit from the freedom to provide services. As the Portuguese workers employed by Rush Portuguesa on-site did not fill in specialist jobs and did not call for special relations of trust between worker and company, the French immigration authorities considered that these individuals should have obtained a work permit prior to the posting, especially Portugal being subject to transitional rules, having accessed the European Communities only in 1986.

Rush Portuguesa rejected any definition based on the nature of the work performed by the employees of an undertaking providing services. As declared by Rush Portuguesa, the availability of such an undertaking's workforce as a whole determines its production capacity and therefore its capacity to provide the service in question. Any condition restricting the use of a company's workers consequently limits its freedom to provide services. Moreover, in the view of the Portuguese Government, the transitional provisions implemented against Portugal were accounted for by the concern to obviate any flood of labour towards certain Member States, which might upset the employment market in those States. The provision of services and the temporary access of workers for that purpose, however, cannot have that effect, and workers accompanying the provider of services return to their Member State of origin after the service has been provided. Accordingly, they do not come on to the employment market in the host Member State.¹⁰

The European Commission, involved in the case, shared Rush Portuguesa's view that the application of the French *Code du travail* (Labour Code) to its workforce made the provision of services difficult, referring to the provisions for the 1962 General Programme for the abolition of restrictions on freedom to provide services.¹¹ The second title of that programme referred to the abolition of restrictions on entry, exit and residence, which are liable to hinder the provision of services by the provider himself or by specialized workers or by staff possessing special skills or holding positions of responsibility accompanying the person providing the services or carrying out the services on his behalf.

On these grounds, the European Commission considered that the definitions of the terms 'specialist' and 'confidential nature of the post' defined the criteria which it proposes for reconciling the freedom to provide services with the transitional provisions of the Act of Accession of Portugal to the European Union. In the present case, the workers to be considered as 'specialist' and filling in posts of 'confidential nature' covered superintendents, team leaders and the operators of particularly complex machines; fulfilling the objective criterion of employees occupying confidential posts and having specialist qualifications, services can be freely provided.

⁹ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (no longer in force).

¹⁰ Report for the hearing delivered in Case C-113/89 (I-1422).

¹¹ General Programme for the abolition of restrictions on freedom to provide services, OJ 2, 15. 01. 1962. p. 32–35.

The European Commission considered that, subject to a case-by-case appraisal of the facts by the national court, the criteria of workers with ‘specialist qualifications’ or holding posts of a ‘confidential nature’ must be clarified having regard to the nature and intrinsic characteristics of each type of service provided. However, the criteria must include in any event, for persons occupying posts of a confidential nature, the principal executives of the undertaking providing the service and, for specialized workers, persons with qualifications which are of a high level or are in short supply and relate to a task or trade that calls for special knowledge.¹²

The French national court hearing the case, asked the Court to clarify whether the freedom to provide services extended to the workforce of the service provider, and whether this freedom applied only to a restricted category of workers, or to the whole workforce of the undertaking, referring the following questions to the European Court of Justice for a preliminary ruling¹³:

“(1) Does the Community law taken as a whole, and in particular Article 5 and Articles 58 to 66 of the Treaty of Rome and Article 2 of the Act of Accession of Portugal to the European Community, authorize a founding Member State of the Community, such as France, to preclude a Portuguese company whose registered office is in Portugal from providing services in the building and public works sector on the territory of that Member State by going there with its own Portuguese work-force so that the work-force may carry out work there in its name and on its account in connection with those services, on the understanding that the Portuguese work-force is to return, and does in fact return, immediately to Portugal once its task has been carried out and the provision of the services has been completed?

(2) May the right of a Portuguese company to provide services throughout the Community be made subject by the founding Member States of the EEC to conditions, in particular relating to the engagement of labour in situ, the obtaining of work permits for its own Portuguese staff or the payment of fees to an official immigration body?

(3) May the work-force, which has been the subject of the disputed special contributions and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the Labour Inspector recording the breaches committed by Rush Portuguesa, be regarded as “specialized staff or employees occupying a post of a confidential nature” within the meaning of the provisions of the annex to Regulation No 1612/68 of the Council of 15 October 1968?”

In its judgment, the Court of Justice confirmed, that Articles 59 and 60 of the Treaty preclude a Member State from prohibiting a person providing services established in another Member State

¹² Report for the hearing delivered in Case C-113/89 (I-1423).

¹³ Judgment delivered in C-113/89, point 5.

from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.¹⁴ Nevertheless, Member States must in such a case be able to ascertain whether a foreign undertaking engaged in construction or public works is not availing itself of the freedom to provide services for another purpose, for example that of bringing his workers for the purposes of placing workers or making them available.¹⁵

The *Rush Portuguesa* case-law is considered as a landmark case, as it laid the foundations of the legislative grounds of the definition of ‘posted workers’. The Court of Justice concluded, that the workers of a certain undertaking providing services in another Member State would enjoy the freedom to provide services, and this freedom would extend to its own workforce, independently from the post filled by the workers and the nature of the activity performed by them, provided that the purpose of movement of workforce is to provide services, and not to facilitate the entry of the workers to the other Member States’ labour market.

Based on this case-law and the subsequent legislation, posted workers gained their right of free movement within the EU on the grounds of being linked to an undertaking enjoying the right to provide certain services in other Member States (and therefore under Article 56 of the Treaty on the Functioning of the European Union), as opposed to enjoying their right of free movement, settlement and employment across the EU citizenship on the grounds of their EU citizenship, under Article 45 of the Treaty on the Functioning of the European Union.¹⁶ Posted workers are therefore a distinct category, different from the ‘EU workers’, and enjoying limited rights and benefits as opposed to the workers who engage in cross-border employment activities in base of their rights conferred by EU citizenship.

3. Defining ‘posted workers’: a legislative approach

The period from the late 1950s to the early 1970s saw strong economic growth in most of the EU. However, intra-EU labour mobility remained quite low; labour demand was therefore largely met by immigration from outside the EU. The 1980s and early 1990s did see a renewed push for greater

¹⁴ Judgment delivered in case C-113/89, point 12.

¹⁵ Judgment delivered in case C-113/89, point 17.

¹⁶ Éva LUKÁCS – Tamás MOLNÁR: Citizenship within Directive 2004/38/EC – stability of residence for Union citizens and their family members In: Ulla NEERGAARD – Catherine JACQUESON – Nina HOLST-CHRISTENSEN (eds.): *Union Citizenship: Development Impact and Challenges*. Copenhagen, DJØF Publishing, 2014. 603–641.

market integration, launched under the umbrella of the ‘Single Market’, however, the focus was very much on product markets.¹⁷

In the 1980s, the European Communities witnessed the accession several new Member States with lower economic status (1981: Greece; 1986: Spain and Portugal), as well as the start of negotiation of future membership of applicant countries of Central and Eastern Europe in their preparations for joining the European Union (1989: launching the PHARE programme to assist Poland and Hungary), becoming confronted to the opening of the Communities’ labour market to lower paid workers. The case of *Rush Portuguesa* was one of the first cases recognising the existence of a conflict of interest between ‘high wage’ and ‘low wage’ Member States in the field of transnational provision of services and cross-border movement of workers. As a response to this new phenomenon, the European Communities adopted a new legislation, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services with the intent to promote “the transnational provision of services [...] in a climate of fair competition and measures guaranteeing respect for the rights of workers”.¹⁸

In its original definition, ‘posted worker’ means “a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works”¹⁹. Neither this definition, nor the Directive or its subsequent enforcement Directive brings clarity to certain questions, that would allow a clear interpretation of the notion, and therefore application of the Directives themselves, in the practice.

It is also important to mention that posted workers are only indirectly the subjects of Directive 96/71/EC. The Directive applies primarily to the undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to the territory of another Member State²⁰. Only secondarily, to clarify in which instances the undertakings need to comply with the obligations set by the Directive (and the subsequent enforcement Directive), the Directive elaborates on the definition of ‘posted worker’ and generally, of ‘worker’.

By centring the Directive around the notion of the posting undertakings, instead of the notion of posted workers, the EU legislators confirmed the principle determined by the *Rush Portuguesa* and subsequent case-law: posted workers are not EU citizens engaging in cross-border employment relationships, but integral parts of the services provided by certain economic operators across the EU, and therefore linked to the nature and duration of the provision of services. The Directive and the enforcement Directive, although they set as an objective to guarantee respect for an appropriate

¹⁷ Jonathan PORTES: Labour mobility in the European Union. *Palgrave Dictionary of Economics*, June 15, 2015.

¹⁸ Preamble (5) of 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, OJ L 18, 21. 01. 1997. p. 1–6.

¹⁹ Article 2 of Directive 96/71/EC.

²⁰ Article 1 (1) of Directive 96/71/EC.

level of protection of the rights of posted workers for the transnational provision of services²¹, in their present state are not so much about setting the rights and obligations of posted workers when performing work in a Member State other than their usual residence, but rather about determining the rights and obligations applicable to undertakings providing transnational services through their usual workforce, under one of the following stances²²:

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

For this reason, the definition of ‘posted worker’, and ‘worker’ in general, is left broad by the Directive, and subject to case-by-case interpretation. Nevertheless, to understand who is entitled to (indirectly) benefit of the protection and benefits under the Directive, it is worth dismantling the definition of ‘posted worker’ into the following parts: a) who can be considered a posted worker; and b) what can be considered as transnational provision of services.

3.1. Defining posted workers through the concept of ‘worker’

The Posting of Workers Directive does not provide a clear definition of ‘posted worker’ or ‘worker’, but only refers back to the national legislation to provide interpretation. In its Article 2, ‘posted worker’ is defined “a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works”²³, while the definition of a ‘worker’ is “that which applies in the law of the Member State to whose territory the worker is posted”²⁴.

²¹ Article 1 (1) of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28. 05. 2014. p. 11–31

²² Article 1 (3) of Directive 96/71/EC.

²³ Article 2 (1) of Directive 96/71/EC.

²⁴ Article 2 (2) of Directive 96/71/EC.

The lack of clear definition of ‘worker’ is not a peculiarity of the Directives 96/71/EC and 2014/67/EU: as pointed out by Paanetoja in her work, the term is not defined in Article 45 TFEU, nor are any definitions to be found in the treaties preceding it.²⁵ Moreover, this term is used alternately with the term ‘employee’ in the most recent pieces of EU legislation.²⁶

The term ‘worker’ has been subject of interpretation by the Court of Justice of the European Union (CJEU) on several occasions²⁷, and defined primarily in base of the criteria qualifying ‘work’ activity. In the landmark case *Lawrie-Blum (66/85)*, the CJEU has held that “[s]ince freedom of movement for workers constitutes one of the fundamental principles of the Community, the term ‘worker’ in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of that fundamental freedom, the Community concept of a ‘worker’ must be interpreted broadly.²⁸ That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration²⁹.”

The main criteria, therefore, to be qualified as ‘worker’ seem to be:

- i) to hold a subordinate relationship to the employer;
- ii) to be subject of the right of the employer to exercise the power of direction and control;
- iii) to perform certain activities/services for the benefit of the employer;
- iv) to receive remuneration from the employer for the activities/services provided on the employer’s benefit.

As regards labour law, the European Union’s role is restricted to complementing policy initiatives taken by individual EU countries by setting minimum standards. In accordance with the Treaty, particularly Article 153, the European Union can adopt Directives, that set minimum requirements for working and employment conditions, as well as informing and consulting workers, while the Member States remain in charge of incorporating and implementing these Directives into their own national law.

As indicated by the European Commission’s Green Paper on the modernisation of labour law, outside of the specific context of freedom of movement of workers, most EU labour law legislation leaves the definition of ‘worker’ to the Member States, with each Member State having national

²⁵ Jaana PAANETOJA: The broadening definition of ‘worker’ in the European Union. In: Izabela FLORCZAK – Zbigniew GÓRAL (eds.): *Developments in Labour Law from a Comparative Perspective*. Łódź, Łódź University Press, 2015. 26.

²⁶ PAANETOJA (2015) op. cit. 28.

²⁷ See amongst others: judgments *Kempf (C-139/85)*, *Megner and Scheffel (C-444/93)*, *Franca Ninni-Orasche (C-413/01)* and *Genc (C-14/09)*.

²⁸ Judgment in case 66/85, p. 16.

²⁹ Judgment in case 66/85, p. 17.

traditions that are very different when it comes to the formulation and implementation of labour law and policy.³⁰

According to the Commission's Green Paper, difficulties associated with the different definitions of worker have emerged particularly in connection with the implementation of Directives on posting of workers and transfers of undertakings. Directives 96/71/EC and 2014/67/EU in fact, contrary to most EU labour law legislation, require to qualify posted workers as 'workers' in base of the criteria provided in the law of the Member State to whose territory the worker is posted³¹ (i.e. of the host country), instead of assessing their position in base of the sending country's legislation. The Directives, therefore, require that all undertakings posting their workers temporarily to another Member State know and comply with not only with their own labour law requirements, but with those of the host country as well, which creates a significant burden to the economic operators desiring to benefit of the freedom of provision of services.

Another characteristic of 'posted workers', as opposed to the 'workers' defined in Article 48 of the TFEU, is that they are can qualify as such only if they are linked to undertakings providing cross-border services under one of the following scenarios:

- a) under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State (*secondments to external clients*); or
- b) to an establishment or to an undertaking owned by the group in the territory of a Member State (*intra-corporate transfers*); or
- c) under a contract concluded between a temporary employment undertaking or placement agency and a user undertaking established or operating in the territory of a Member State (*hiring-out of labour*).

In all above instances, to qualify as 'posted worker' and to benefit of the minimum protection afforded to him/her by the mandatory rules of the law of the Member State within whose territory the worker is temporarily posted, the worker needs to:

- i) maintain an employment relationship with the undertaking / temporary employment undertaking or placement agency during the period of posting;
- ii) being posted to the territory of a Member State on the employing undertaking's account and under their direction, in the framework of the transnational provision of services;
- iii) for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works;
- iv) qualify as 'worker' in the host Member State where the posting is directed.

³⁰ European Commission Green Paper: Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final, p. 5.

³¹ Article 2 of Directive 96/71/EC.

Additionally, the Enforcement Directive lists qualitative criteria characterising the existence of a genuine link between the employer and the Member State of establishment, which can also be used to determine whether a person falls within the applicable definition of a posted worker. Namely, Article 4 of the Enforcement Directive provides a number of criteria the competent authorities may review to identify genuine postings and to prevent abuses and circumventions of the rules on postings of workers, especially the use of so-called ‘letter-box companies’ disguising effective employment relationships as postings. These ‘clues’ include in particular³²:

- a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;
- b) the place where posted workers are recruited and from which they are posted;
- c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;
- e) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

The Enforcement Directive reinforces the definition of ‘worker’ by stating that Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties³³.

3.2. Defining posted workers based on the activity performed

As defined by the Posting of Workers Directive, posted workers are workers who, for a *limited period*, carry out their work in the territory of a Member State other than the State in which they normally work.

As defined in the previous chapter, to fall under the scope of the Posting of Workers Directive and of the Enforcement Directive, the workers posted to another Member State should be linked to their employer, defined as ‘service provider’ by the Directives, through a subordinate employment

³² Article 4 para 2 of Directive 2014/67/EU.

³³ Article 4 (5) of Directive 2014/67/EU.

relationship. Neither the Posting of Workers Directive, nor the Enforcement Directive provides a true definition of the ‘service provider’: the Posting of Workers Directive only determines in its Article 1 that ‘undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3 [i.e. within the framework of intra-corporate transfer, secondment to client premises or hiring out of personnel through temporary-work agency], to the territory of a Member State’, while remaining silent on the essence of both notions of the ‘service provider’ or the more generic ‘undertaking’. The Enforcement Directive goes one step forward and require the competent authorities of the Member States to ascertain whether ‘an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities’³⁴, again without defining who shall be considered as ‘undertaking’ within a posting relationship.

As neither of the secondary legislation applicable to posting of workers provide a clear definition of who are the undertakings, who should conform with the labour and administrative requirements established by the Directives, and what are the activities performed on a transnational level and on a temporary basis that would qualify a posting of workers as such, we need to look for a more generic approach through other legislations.

The term ‘undertaking’ is not defined in the Treaty, but has been widely interpreted by the European Court. In the *Höfner and Elser v. Macrotron* case³⁵ the ECJ held that ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed’. In the case in question, explicitly inquiring whether the provision of business executives by personnel consultants constitute a service, the ECJ upheld that employment procurement is indeed an economic activity.

The critical question is, therefore, what constitutes an ‘economic activity’, and how this term relates to the more generic category of ‘services’?

The definition of ‘economic activity’ was examined by the ECJ in a series of cases, establishing that the characteristic features of an ‘economic activity’ is (1) the offering of goods or services on the market³⁶, (2) where the activity could at least in principle be carried on by a private undertaking in order to make profits.³⁷ Some of the decisions of the ECJ upheld that there exists an extra element that for an economic activity to be found there must also (3) be a bearing of the economic and financial risk.³⁸ However, it is argued that risk does not form a general requirement in the definition of undertakings,

³⁴ Article 4 (2) of Directive 2014/67/EU.

³⁵ *Höfner and Elser v Macrotron GmbH* (1991) C-41/90, para. 21.

³⁶ ECJ Case C-205/03 *FENIN v. Commission* (11/07/2006) ECR I-6295, para. 25.

³⁷ ECJ Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, (21/09/1999) ECR I-57, para. 79.

³⁸ C-180/98 *Pavlov* [2000] ECR I-06451, paragraph 76.; Case C-309/99 *Wouters* (2002) ECR I-1577.

but simply a factor in the assessment of identifying an economic unit, while the independent economic role on the market appears to be a requirement for defining undertakings³⁹.

The definition of services in EU law is regulated under Title IV ('Free movement of persons, services and capital'), Chapter 3 ('Services') of the Treaty on the Functioning of the European Union⁴⁰, as well as the Services Directive⁴¹. Article 57 TFEU (ex. Article 50 TEC), defines 'services' as follows:

"Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions."

Based on the definition provided by the TFEU, therefore, the definition of 'services' includes all activities that are remunerated, but do not fall under the scope of the regulation of free movement of goods, capital, or people. There is no constant definition of 'services', and a case by case analysis is required to determine whether certain activities would fall under this category.

Initially, the Posting of Workers Directive seems to have meant to be applicable only in certain sectors: as indicated by the Cockfield White Paper of 1985, the provision of transnational services within the European Communities before the creation of the Single Market (and the adoption of the Posting of Workers Directive) was mainly concentrated in the traditional services such as transport, banking and insurance, and opening up to new service areas such as information marketing and audiovisual services⁴².

Accepting that the Posting of Workers Directive itself was originated by the Court's decision in the *Rush Portuguesa* case (C-113/89), it is understandable that the Directive refers to the construction sector and to the initial assembly and/or first installation of goods, while allowing Member States to provide certain exemptions in case of services of short duration or otherwise considered as 'non-significant'.⁴³ The Annex of the Directive explicitly lists the activities falling under the scope of Article

³⁹ Bendik T. ECKBO: Concept of Undertakings. (Thesis) King's College, University of London, 2012. (<https://munin.uit.no/bitstream/handle/10037/7146/thesis.pdf?sequence=1>) (last accessed: 04 July 2018)

⁴⁰ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012. p. 47–390.

⁴¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27. 12. 2006. p. 36–68.

⁴² Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Parliament COM (85) 310 final, June 1985, p. 27, point 100.

⁴³ Article 3, (2)-(5) of Directive 96/71/EC.

3 (1), second indent⁴⁴. Based on recent official statistics⁴⁵, while the number of postings across the EU in the construction sector continues to constitute a significant share of the workers providing cross-border services (45% of total postings), a significant rise is witnessed in the services sector, including the transfer of personnel in the business world (secondments in the field of finance and insurance; real estate; professional, technical and scientific activities; administrative and support service activities representing 9.6% of total postings).

The current Posting of Workers Directive explicitly excludes merchant navy undertakings as regards seagoing personnel⁴⁶ given the specific nature of the itinerant work done by this group of workers and the practical difficulties associated with monitoring them.⁴⁷ Similar challenge is faced in relation to road transport personnel. The impact assessment supporting the legislative proposal aiming at laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector concludes that “the posting provisions and administrative requirements do not suit the highly mobile nature of the work of drivers in international road transport. This causes disproportionate regulatory burdens for operators and creates unjustified barriers to provision of cross-border services”⁴⁸.

Another category of workers excluded from the scope of the Posting of Workers Directive, although without expressed reference, is the group of business travellers. Business visitors are not defined by EU law, hence the challenge in drawing a clear distinction between genuine business visitors and posted workers. Typically, business visitors include professionals travelling to another Member State for a short period of time (usually from few days to few weeks) to perform non-gainful activity, either on their own account, or upon instruction of their employers e.g. with the scope of visiting subsidiaries or client premises, attending seminars, training or meetings, occasionally with the intent to negotiate contracts with partners and clients.

The Schengen Borders Code⁴⁹, although does not provide any clear definition of business visitors themselves, enlists under its Annex I the documentary evidence required from the third-country

⁴⁴ Annex of Directive 96/71/EC: “The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: 1. excavation; 2. earthmoving; 3. actual building work; 4. assembly and dismantling of prefabricated elements; 5. fitting out or installation; 6. alterations; 7. renovation; 8. repairs; 9. dismantling; 10. demolition; 11. maintenance; 12. upkeep, painting and cleaning work; 13. improvements”.

⁴⁵ Eckhard VOSS – Michele FAIOLI – Jean-Philippe LHERNOULD – Feliciano IUDICONE: *Posting of Workers Directive – current situation and challenges*. Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, IP/A/EMPL/2016-07, June 2016 (http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU%282016%29579001_EN.pdf) (last accessed: 04 July 2018)

⁴⁶ Article 1 (2) of Directive 96/71/EC.

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Reassessing the regulatory social framework for more and better seafaring jobs in the EU (first phase consultation of the social partners at Community level provided for in Article 138(2) of the Treaty), COM/2007/0591 final.

⁴⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector [COM(2017) 278 final]; Brussels, 31. 05. 2017.

⁴⁹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

national in order to verify the fulfilment of the condition to justify the purpose of the intended stay, namely:

- i) an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work;
- ii) other documents which show the existence of trade relations or relations for work purposes;
- iii) entry tickets for fairs and congresses if attending one.⁵⁰

As typically business visitors are considered not to perform any substantial work activity, they are usually exempt from obtaining work permits for the host country, and are only subject to obtaining a residence title (e.g. visa) allowing them to enter the host country and to reside there for the duration of their visit. On the other hand, many business visits disguise work activities, when the professionals are actually posted to another Member State to perform an activity on behalf and under the instructions of their employer, in exchange of remuneration. It is up to the discretion of the competent authorities adjudicating the respective residence titles to decide whether the applicant falls within the category of business or not.

Currently, there is no legislation or literature clearly outlining whether the Posting of Workers Directive and the Enforcement Directive should be applicable to business visitors as well, especially for the case of EU nationals, who enjoy the right of free movement within the Schengen Area and are not subject to the control of consulates or other border controls. On the other hand, some of the Member States do follow a restrictive approach when determining the concept of ‘work activity’, and would require the submission of a declaration to the competent authorities in base of Article 9 of the Enforcement Directive if, within the framework of a labour inspection, they would ascertain that based on the activities performed, the business visitors would qualify as posted workers as well⁵¹.

In line with the amendments proposed by the European Commission the revised rules on posting of workers approved by the European Parliament at the end of May 2018 would extend also to the road transport sector, according to the Commission’s Road Transport Strategy for Europe, once it enters into force (the Strategy is currently under discussion in the Council and the Parliament). Depending on the development of this ‘lex specialis’, there will be an assessment to see whether further measures are required⁵².

The Enforcement Directive does not provide any limitation on the services to which the Directive should be applicable. In fact, it only insists that the undertaking providing the services should ‘an undertaking genuinely performs substantial activities’ and that ‘the posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works’. To assess

⁵⁰ Highlights by the Author.

⁵¹ Based on the inquiry lead by the Author with national authorities.

⁵² European Commission: Towards fair labour mobility: revision of the EU Posting of Workers rules.

whether the requirement of ‘temporality’ is fulfilled, all factual elements characterising such work and the situation of the worker shall be examined⁵³. Such elements may include in particular:

- a) the work is carried out for a limited period of time in another Member State;
- b) the date on which the posting starts;
- c) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;
- d) the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
- e) the nature of activities;
- f) travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- g) any previous periods during which the post was filled by the same or by another (posted) worker.

As with the definition of ‘service provider’ and ‘undertaking’, neither the Posting of Workers Directive, nor the Enforcement Directive defines the content of the services to be performed by the posted worker. Generally, if the requirements to qualify an activity as ‘economic activity’ are satisfied, it is irrelevant that the body is not in fact profit making or that it is not set up for an economic purpose. Also, the legal personality of the entity is irrelevant, therefore natural persons, legal persons, State and public bodies (even if they supply public services or if the entity is subject to a public service obligation) are potentially caught under the definition of ‘undertaking’ from EU law perspective.

Overall, when defining the personal scope of the Posting of Workers Directive in base of the activities performed by workers posted to another Member States to provide transnational services, a trend of broadening of the circle of workers considered as posted workers can be perceived. The new rules adopted by the European Parliament expand the scope of the Directive beyond the traditional sectors (construction, manufacturing, agriculture) with the intent to promote the ‘equal pay for equal work’ principle within all sectors impacted by transnational provision of services. While recognising that cross-border mobility of workers has significantly expanded in the past decade, with the localisation of operations and workers to Member States providing the most beneficial (and cost-effective) environment, the proposed amendments of the Posting of Workers Directive, once approved by the European Council, would extend to sectors that were traditionally considered as creating disproportionate regulatory burdens and unjustified barriers to provision of cross-border services, like the road transport sector.

⁵³ Directive 2014/67/EU.

Once the new regulation will become effective, and all employers posting their workers to another Member State will need to fulfil the employment law, tax and social security requirements in both the home and host country, while observing the additional notification and document retention obligations arising from the Enforcement Directive.

4. Defining ‘posted workers’: a comparative approach

One of the main criticism against the current rules on posting of workers refer to the discrepancies between the definition of the posted workers provided by the main applicable Directives (the Posting of Workers Directive and the Enforcement Directive) as well as the definitions provided by other applicable secondary legislation, creating uncertainties regarding the personal scope of these Directives, and consequently legal loopholes in the enforcement of the provisions.

Additionally, the European Parliament⁵⁴ has identified a growing tension between the EU’s objectives in the field of economic policy, the freedom of transnational service provision and the social rights of workers, given that the basic provision of the Posting of Workers Directive reflects the situation of 1996, but since then a number of EU legal instruments and principles have been adopted, namely:

- i) there is a mismatch between the definition and the temporary character of posting between the Posting of Workers Directive and the regulation (EC) No 883/2004 on the coordination of social security systems;
- ii) while temporary agency workers do fall under the personal scope of the Posting of Workers Directive as defined in Article 1 (3) point c), with the adoption of the EU Directive on Agency Work (2008/104/EC), temporary agency workers are required to be granted the same working and employment conditions of workers as comparable workers of the user undertaking, in the Posting of Workers Directive the same principle is not mandatory⁵⁵;
- iii) finally, following the adoption and implementation of the Lisbon Treaty in 2009, a shift in the objectives defined in relation to the posting of workers is perceivable in the case-law of the European Court of Justice and the activity of the European Commission, moving from the utmost protection of the freedom to provide services to the safeguard of social and labour rights and the promotion of equal treatment.

The present Chapter briefly reviews below the inconsistencies between the Posting of Worker Directive and the Social Security Regulation as well as the Directive on Agency Work, identifying the

⁵⁴ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 34.

⁵⁵ EU Commission 2016 Impact Assessment, op. cit. 15.

main flaws of the current rules, and the areas of improvement proposed by the European Commission in the new rules on posting of workers.

4.1. Difference between ‘posted worker’ under Posting of Workers Directive and Social Security Regulation

The applicability of social security systems cannot be detached from the regulation of posting of workers, as this latter constitutes derogation from the *lex loci laboris* rule - the principle that any worker who works in a given Member State is subject to the whole body of the legislation of that State to ensure equal treatment and non-discrimination - as posted workers remain attached to the social security system in their home country.⁵⁶

The treatment of posted workers as a specific case in EU level coordination of social security rights was justified by the Commission as being necessary in order to avoid intensive and difficult implementation measures. Full application of the host country principle would have meant that workers, who may have been posted for very short periods of time and/or to many different Member States, would need to adhere to the social security systems of all countries.

Consequently, Regulation 883/2004 on the coordination of social security systems⁵⁷ provides a clear definition on ‘posted workers’ as follows, as a first example of workers subject to Special Rules⁵⁸:

“1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.”

Regulation 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (the Implementation Regulation) further details the scope of persons falling under the category outlined in Article 12(1) above: in the Implementation Regulation’s reading, the ‘posted workers’ subject to social security regulations ‘shall include a person who is recruited with a view to being posted to another Member State, provided that, immediately before the start of his employment, the person concerned is already subject to the legislation of the Member State in which his employer is established’⁵⁹.

⁵⁶ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 25–26.

⁵⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) (OJ L 166, 30. 04. 2004. p. 1–123.)

⁵⁸ Article 12 of Regulation 883/2004.

⁵⁹ Article 14 (1) of Regulation 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

Both definitions provided in Article 2 of the Posting of Workers Directive and in the above Article 12 (1) of the Social Security Regulation indicate that the definition of a posted worker is based on three important conditions:

- a) workers are posted by companies that normally carry out their activity in the home Member State;
- b) to perform paid work on behalf of their employer;
- c) for a limited duration of time.

Nevertheless, when comparing the definitions provided in the Posting of Workers Directive, the Enforcement Directive and the Social Security Regulation, we notice that the inconsistencies appear mainly in two fields: (i) the lack of standardisation regarding the posting operations covered and (ii) the inconsistent definition of the temporary nature of posting.

First of all, the Social Security Regulation is broader in scope than the Posting of Workers Directive, since it covers both employees and self-employed individuals (Article 12 of the regulation) and those holding multiple jobs (Article 13). On the other hand, the Social Security Regulation does not intend to define the working relationship between an employer and their employees, but only refers to a minimum one-month period of affiliation to the social security system in place in the home country, although without specifying that this affiliation must be pursuant to the social security contributions associated with an employment contract⁶⁰.

Additionally, there seem to be a difference in interpretation of the employer in the posting of workers and social security settings. The Social Security Regulation and its Implementing Regulation refer to a narrower group, the ‘employer’, while the Posting of Workers Directive and the Enforcement Directive refer to a broader category, those of ‘service providers’ and ‘undertakings’. Nevertheless, the core of the definition of the employer/service provider remains the same in both fields: in parallel to Article 4 (2) of the Enforcement Directive, according to the Implementation Regulation, the employer referenced in Article 12 (1) of the Social Security Regulation ‘shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out’⁶¹.

When it comes to the temporary nature of the postings covered, both the Posting of Workers Directive and the Social Security Regulation confirms that the operation should be of temporary nature. In contrast with the Posting of Workers Directive, which does not specify a maximum period

⁶⁰ Jean GROSSET – Bernard CIEUTAT: *Key Extract of the Opinion of the Economic, Social and Environmental Council on Posted Workers*, September 2015. (https://www.eesc.europa.eu/ceslink/resources/docs/411150024_000915_postedworkers.pdf) (last accessed: 04 July 2018) 28

⁶¹ Article 14 (2) of Regulation 987/2009.

for the posting, and also fails to comment on the conditions regarding its potential renewal, the Social Security Regulation clearly outlines that the duration of posting shall not exceed 24 months.⁶²

As confirmed by recent reports⁶³, the definitions relating to posting from social security coordination perspective are more concrete than those in the Posting of Workers Directive. The inconsistencies in the definition of ‘posted workers’ in the Posting of Workers Directive, the Enforcement Directive and the Social Security Cooperation Regulation defined above create a challenging environment for the national authorities that are in charge of issuing the so-called A1 (formerly E101) attestations, attesting posted worker’s membership of their social security system⁶⁴, but also to the relevant administrations involved in the monitoring of the application of the regulations on posting of workers and in cross-border cooperation.

In order to align the definition of posted workers in employment law and social security, the Commission’s Proposal of the amendment of the Posting of Workers Directive⁶⁵, approved by the European Parliament on 29 May 2018, introduced some changes to the current definition of posted workers. The Commission’s original Proposal would have limited the postings to 24 months as a general rule, in compliance with social security regulations, while providing the opportunities to extend the length of postings beyond this date, under the condition that following this duration ‘the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out’⁶⁶, i.e. the posted worker would be subject of the mandatory set of terms and conditions applicable to workers in the host country in the field of employment and social security. The length of general posting proposed by the Commission was nevertheless decreased to 12 months by the Council, with the opportunity of extension up to 18 months on the basis of a motivated notification by the service provider⁶⁷.

4.2. Temporary agency workers as posted workers

With the economic crisis started in 2007, service providers across the EU had to look for alternative options to cut their costs and improve their efficiency, often by reaching to atypical forms of

⁶² It is important to note that Member States may by common agreement provide for exceptions and extend the length of posting for longer periods, up to five years (according to Article 16 of Regulation 883/2004).

⁶³ Kristina MASLAUSKAITE: *Posted Workers in the EU: state of play and regulatory evolution*. Jacques Delors Institute, 2014. (<http://www.institutdelors.eu/wp-content/uploads/2018/01/postedworkers-maslauskaite-ne-jdi-mar14.pdf?pdf=ok>) (last accessed: 04 July 2018)

⁶⁴ GROSSET–CIEUTAT (2015) op. cit. 27

⁶⁵ Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

⁶⁶ Proposed new Article 2a of Directive 96/71/EC.

⁶⁷ General Approach of the Council, 24 October 2017, 2016/0070 (COD); the Council’s approach has been negotiated with the European Parliament and approved on 11 April 2018, the final adoption of the Directive’s amendment will however come at a later stage, once it has been voted in the Parliament.

employment of personnel and deployment across borders. Such forms of employment are particularly appealing when the service providers intend to accomplish specific transnational projects within a specific period of time by ‘leasing’ temporary agents from placement agencies or contracting self-employed personnel to achieve certain results.

The Posting of Workers Directive explicitly indicates in Article 1, that the scope of the Directive shall include all service providers who, “being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State”. Consequently, all temporary employment and placement agencies leasing their employees to service providers to perform temporarily activities in another Member State, should observe not only the employment law in force in the Member State where they are usually based, but also the minimum labour conditions applicable in the destination country, based on the requirements set by Article 3 of the Posting of Workers Directive, and ensure the respect of the notification and related administrative duties prescribed by the Enforcement Directive.

Temporary-work agencies are defined by Directive 2008/104/EC on temporary agency work⁶⁸ as “any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction”⁶⁹. In case this assignment would involve a transnational aspect by instructing the worker to perform their activity in a Member State other than their usual location, the temporary-work agencies will need to apply the legislation relevant to posted workers as well, ensuring the same level of protection in the field of employment conditions and health and safety.

According to recent research conducted by the European Parliament to assess the current situation and challenges related to the Posting of Workers Directive⁷⁰, in 2014, the posting of workers through temporary work agencies accounted for approximately 5% of total postings (based on available data from A1 documents). The European Parliament identified significant cross-country differences in the posting of agency workers, resulting also from differences in the regulations (e.g. ban of agency work in the construction sector in Germany). According to the A1 data analysed, the Member States making bigger use of posted agency workers are the Netherlands, Belgium, France and Portugal (more than 10% of total postings) while from the sending perspective, the Netherlands (35%) and Belgium (25.7%) are posting the most workers through temporary-work agencies.

A study carried out in 2015 by the European Commission in conjunction with the Fondazione Giacomo Brodolini⁷¹ concluded, that for temporary-work agencies, there are no official registrations as

⁶⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 05. 12. 2008, p. 9–14.

⁶⁹ Article 3 point b) of Directive 2008/104/EC.

⁷⁰ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 20.

⁷¹ FONDAZIONE GIACOMO BRODOLINI (FGB): *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 97/71/EC in a selected number of Member States and sectors*. 2016. (ec.europa.eu/social/)

to who the final users of the posted workers from temporary work agencies are. The construction sector is mentioned as a typical final user, often in the context of subcontracting chains, in the Netherlands, Belgium, Denmark, France and Sweden, while posted temporary agency workers play an important and increasing role in the transport sector. Finally, the agricultural sector is also a common employer of workers posted by temporary work agencies. As to posting into higher-wage professions, it is reported that Sweden makes good use of doctors and nurses posted by foreign temporary work agencies, while Germany makes use of Nordic agencies to secure sufficient workers for the offshore wind sector.

Although the option to provide services through temporary-work agencies was opened with the intent to improve the living and working conditions of workers in the European labour market by promoting flexibility combined with employment security and reducing labour market segmentation⁷², it became apparent that some agencies would operate as ‘letter-box companies’ with the intent to minimise their costs related to social security by ‘regime shopping’, i.e. sourcing their workers from locations which are convenient in terms of social security to countries with more restrictive regulations, or performing only limited administrative operations in the less restrictive countries but effectively employing their employees in another Member States on a permanent basis.

Fraudulent work agencies also seem to be particularly involved in abusive practices of utilising bogus self-employment in order to avoid the protections granted by the Posting of Workers Directive to posted workers⁷³. In practice, it is often challenging to distinguish genuine posted employees from foreign workers (who are permanent or resident workers in the host Member State), as it is often difficult to determine, whether a worker ‘carries out his [her] work in the territory of a Member State other than the State in which he [she] normally works’ for ‘a limited period’; or if ‘the posted worker returns to – or is expected to resume working – in the Member State from which he or she is posted, after completion of the work or the provision of services for which he or she was posted’⁷⁴. According to the Enforcement Directive, ‘[t]he lack of the [A1] certificate concerning the applicable social security legislation may be an indication that the situation should not be characterised as one of temporarily posting to a Member State other than the one in which the worker concerned habitually works in the framework of the provision of services’⁷⁵.

In order to align the rules applicable to postings as well as to temporary agency work, the proposal of the new Posting of Workers Directive refers to Directive 2008/104/EC on temporary agency work, to ensure that the basic working and employment conditions applying to temporary agency workers

[BlobServlet?docId=14965&langId=en](#)) 51. (last accessed: 12 May 2018)

⁷² Preamble 8 of Directive 2008/104/EC.

⁷³ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 30.

⁷⁴ Eurofound Report (2016).

⁷⁵ Preamble 12 of the Enforcement Directive.

posted to another Member State should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job⁷⁶.

4.3. Contractors as posted workers

Question arises whether contractors, i.e. workers performing services on behalf of the service provider based on a services agreement instead of an employment agreement, would qualify as ‘posted workers’, and hence fall under the scope of the Posting of Workers Directive and the Enforcement Directive.

Although it is not debated, that in many occasions the use of contractors, i.e. self-employed entrepreneurs or other companies holding the necessary workforce to complete a certain activity or to provide a certain service is genuine, it has also been established that in the current precarious economic situation, many temporary work agencies or other posting companies place workers “who voluntarily or forcedly assume the statute of a self-employed, while in reality, there is a link of subordination” given that many regulations relating to working time, taxes and wages are laxer for self-employed workers⁷⁷.

In all EU Member States and Norway, the distinction between employment and self-employment continues to be based on the basic character of ‘subordination’. In general terms, it is true to say, that subordinate employees work under the direction of the employer for remuneration, usually established based on the time an employee spends performing his or her activities and – in most countries – paid on a weekly or monthly basis. However, the legal definition of ‘subordination’ varies quite substantially across countries. According to a recent Eurofund report on fraudulent contracting of work in the EU⁷⁸, the uncertainty and technical difficulty that people face when qualifying an employment relationship in terms of ‘subordinate employment’ or ‘self-employment’ means that employers tend largely to use the latter. The bogus use of self-employment appears to be significant in competitive markets with narrow profit margins, such as the construction, cleaning, tourism and catering sectors.

As the Eurofound report reminds, the national reports highlight, qualifying a relationship as self-employment implies the non-application of employment protection legislation, working time, health and safety at work, paid leave and holidays, the minimum wage and pension and insurance contributions, which are reserved for subordinate employees.

While contractors and self-employed entrepreneurs do fall under the scope of the Social Security Regulation, strictly following the above analysis of the definition of ‘worker’, they do not pertain under the labour law compliance and administrative requirements arising from the Directives, given that

⁷⁶ New preamble 15 of the proposal for Posting of Workers Directive [COM(2016) 128 final].

⁷⁷ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 40.

⁷⁸ Eurofound Report (2016) op. cit. 14.

their relationship would not qualify as a subordinate employment situation. Nevertheless, especially in a situation where a service provider is deploying a contractor (employed by another undertaking but linked to the service provider by a services agreement) to another Member State to perform gainful activities based on their direct instructions and under their direct supervision, to their own benefit, it may be challenging to determine which of the undertakings (the service provider or the actual employer of the contractor) will be the party responsible for ensure compliance with the Directives.

In order to ensure fair treatment of workers posted to other Member States through subcontracting chains, the Enforcement Directive has added a layer of protection, allowing the Member States to introduce measures to ensure compliance with the applicable rules in subcontracting chains, and also to establish the liability of subcontractors. One of the main challenges defined in relation to the Posting of Workers Directive in fact is that its enforcement is made difficult because national regulators have few means to pursue international posting companies, whereas their contractors are not liable for any infringements regarding the posted work.⁷⁹ According to the Enforcement Directive, Member States may introduce on a voluntary basis, after consulting the relevant social partners, a mechanism of direct subcontracting liability, in addition to or in place of the liability of the employer, in respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners.⁸⁰

The notification and monitoring of posting introduced by the Enforcement Directive also aim at assisting competent authorities in identifying workers falsely declared as self-employed: by observing the administrative requirements and control measures set out in Article 9, and by completing the subsequent inspections as prescribed by Article 10, the Enforcement Directive sets the objective to enhance legal certainty and provide a useful tool contributing to combating bogus self-employment effectively and ensuring that posted workers are not falsely declared as self-employed, thus helping prevent, avoid and combat circumvention of the applicable rules.

As defined in its Article 12 of the Enforcement Directive on subcontracting liability, Member States may take additional measures – on a non-discriminatory and proportionate basis – in order to ensure that in subcontracting chains the contractor of which the employer (service provider) is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding remuneration. This principle has been transposed also to the Proposal of the new Posting of Workers Directive, which would add a new paragraph dealing with situations of subcontracting chains, giving the faculty to Member State to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements.

⁷⁹ VOSS–FAIOLI–LHERNOULD–IUDICONE (2016) op. cit. 36.

⁸⁰ Preamble 12 and Article 12 on Subcontracting liability of Directive 2014/67/EU.

5. Conclusions

Defining posted workers is seemingly an easy task when reviewing the relevant EU legislation, the Posting of Workers Directive and the Enforcement Directive. However, interpreting the definition of posted workers in its every element, and applying this definition in practice raises several challenges to both legal practitioners and stakeholders of the corporate world.

The parties involved in the posting of workers within the framework of the provision of services are, at first glance, easy to determine: the worker itself, the worker's employer (who is in fact the service provider), and the recipient of the services in the host Member State. The actual definition of who is in fact pertaining to each group of participants, given the specific terminology used in the EU legislation, as well as the inconsistencies in interpretation of this terminology by the Member States, requires an in-depth analysis of the EU legislation applicable.

The concept of 'posted workers', just like the concept of 'worker' itself, is not defined neither by the EU treaties nor by secondary legislation regulating employment-related matters. Consequently, to understand the who are the 'posted workers' falling under the personal scope of the Posting of Workers and Enforcement Directives, we need to review on one hand the historical socio-political circumstances that ultimately lead to the regulation of transnational postings, on the other hand the definitions provided by the applicable EU legislation and the jurisprudence of the Court of Justice of the European Union.

In view of the probable adoption of a new Posting of Workers Directive at the end of June 2018, this article attempted to identify and differentiate the group of people to which the rules related to transnational postings and the administrative obligations set by the enforcement Directive will be applicable. While the regulation of posted worker was created in an environment where the cross-border movement of workers was limited and mostly assumed the movement of EU nationals between Member States, today, we need to take into consideration the degree of globalisation, and the trend of multinational undertakings employing, hence the request from some of the Member States to expand the personal scope of the Directive, and to align the rules applicable to postings with other relevant legislation.

A modernised legislative framework for posting of workers sets as an objective to contribute to creating transparent and fair conditions for the implementation of the Investment Plan for Europe, and to provide an additional boost to cross-border service provision and thereby lead to increased demand for skilled labour to be fulfilled. Only time will be able to judge if a more detailed and comprehensive regulation of postings within the European Union will indeed facilitate the free movement of services, or create a distorted environment where administrative burdens and increased employment-related costs will limit transnational business activities, which for so long stood at the heart of the European Union.