













KEY EXTRACTS

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OF THE ECONOMIC,
SOCIAL AND
ENVIRONMENTAL
COUNCIL

Posted Workers

Jean Grosset, rapporteur

with the support of Bernard Cieutat

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KEY EXTRACTS OF THE OPINION

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POSTED WORKERS

presented on behalf of the section for
Labour and Employment

by
M. Jean Grosset, rapporteur
with the support of Mr Bernard Cieutat

On 21 April 2015, the Prime Minister asked the Economic, Social and Environmental Council to consider the issue of posted workers. The ESEC Bureau entrusted the Section for Labour and Employment with the task of preparing an opinion on the matter.
The Section appointed Mr Jean Grosset of the UNAF ('National Union of Family Associations') group as rapporteur, supported by associate qualified individual Mr Bernard Cieutat.

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Key extracts of the opinion

Introduction

The rules governing the posting of workers in the European Union enable a service provider, group or temporary employment agency established within one Member State to employ workers in another Member State whilst exonerating themselves from certain aspects of the employment law and social insurance schemes in place in the latter. As the sole guarantees with regard to protecting workers in light of the standards of the country in which they are posted, European legislation allows for a 'hard core' of rules to remain in place in the host country, notably with regard to the minimum wage applicable there.

The number of posted workers in Europe has notably increased over the past ten years or so and is no longer marginal in certain sectors, thus challenging the subsidiary nature of legislation that was originally something of an exception to the rule of private international law, according to which the employment contract must comply with the law in place in the country of employment. With this in mind, the decision to post workers is becoming increasingly like a workforce management standard and part of a social dumping process with every passing day.

This being the case, the French government has asked the Economic, Social and Environmental Council to give its opinion on the state of the national legislation regarding the posting of workers, particularly with regard to the monitoring methods that should be implemented, notably taking into account the systems adopted in other Member States and examining the role that social partners might play.

A year after the appointment of the new European Commission and the election of its president by the European Parliament, however, the issue raised is part of a new political reality, at a time when seven European Union Ministers of Work and Employment took a stance on 18 June 2015 to put the directive regarding the posting of workers back on the road to reform. The targeted re-examination of all aspects of the system introduced by the President of the European Commission following the commitments he made before the European Parliament must serve to fuel preliminary reflection on the issue.

In an original attempt at regulation, which could take the form of bilateral agreements between the two States[1], European law regarding the posting of workers has successfully achieved its objectives over the course of a period that would now seem to have passed. Indeed, efforts to promote the equalisation of progress in terms of living and working conditions to which the 1989 Community Charter of Fundamental Social Rights refers lost a great deal of momentum with the 2008 crisis, whilst at the same time, widespread competition regarding labour costs would appear to justify the choice to sub-contract to service providers and to post large numbers of workers. Whilst no clear cause and effect link

1 Such agreements already exist between France and China, for example. The referral letter relates only to the posting of workers in the European context, meaning that it covers postings within the European Union and the European Economic Area.

can be identified between these two situations, the problems they represent with regard to the job markets in certain sectors as a result of the unlawful use of posting law are now frequently reported.

Lengthy negotiations between the Member States and the law-making institutions of the European Union with a view to revising the 1996 directive on the posting of workers, however, ultimately only resulted in the adoption of a so-called 'implementing directive' text in 2014. Owing to persistent political disagreement, the objective of substantially reforming the rules outlined in the source directive had to be put on hold for a while.

Does the single market, which was intended to reconcile economic freedoms with social progress for European Union Member States, still have this role to play today? Whilst the European Union legislator encouraged the exercising of economic freedoms, the poor social results observed across the Union as a whole[2] make it perfectly logical to question the overall efficiency of this approach. In this respect, the ESEC considers the posting of workers to be representative of the need to renew the European project, which must itself revive its objective of harmonising standards of living and social security.

The posting of workers: an economic and social reality for europe that is rapidly developing within france

A regulated economic and social reality

The service provision and posting economy in the single market

The freedom of service provision has supported the opening up of Member State economies to intra-Community trade, with the proportion of intra-EU trade increasing from 12% to 22% of the area's GDP between 1992 and 2011. As far as the European Commission is concerned, the completion of the single market was responsible for increased growth and the creation of new jobs. With this in mind, the 20-year report on the single market produced by the European Commission in 2012 identified the removal of obstacles to trade in the services sector as one of its main achievements[3].

With regard to the completion of the single market, the European Commission is exercising extreme vigilance to ensure that competition policy, as a pillar of Community construction, *"guarantees that companies compete on a level playing field" and "promotes innovation and gives consumers a better choice of products and services, lower prices and higher quality."* [4]

2 *cf.* the 2014 report published by the European Union's Social Protection Committee. *2014 Social Protection Performance Monitor dashboard results*, published by the European Commission

3 European Commission, *20 years of the single European market - Together for new growth- Main achievements,* foreword by Michel Barnier, European Commissioner in charge of Internal Market and Services, p.7 (2012).

4 *Id.* p.15.

Within this competitive landscape, business strategies are making the search for less costly resources, alongside efforts to innovate with regard to both products and services, a central factor in the creation of value. The search for less costly solutions offered by service providers in what can sometimes be complex sub-contracting chains is a common consequence of this approach. The aim for companies is to secure their high-added-value core activities, even if this means outsourcing activities that are more exposed to competition at a lower cost. […]

Whilst such a strategy may appear to be in the best interests of the company in question, however, it is nevertheless questionable in terms of employment and particularly the working conditions of those employed by sub-contractors. In this respect, it is important to distinguish between two different types of cases, namely those in which the posted workforce substitutes the local workforce and those whereby the posted workforce merely supplements the human resources available to satisfy needs that the local job market cannot.

In the former case, the idea that competition from the service provider might have a virtuous effect on employment is based on an uncertain macro-economic hypothesis whereby jobs destroyed by the substitution of posted workforce will eventually result in the redeployment of the national workforce to perform other tasks. Such a scenario would be dependent upon the fulfilment of number of conditions that are not currently being met (such as workforce mobility, directing savings towards investment in production facilities, sufficient anticipated level of demand, etc.). Furthermore, the increased popularity of the choice to use posted workforce in certain sectors, combined with the significant reduction in the number of jobs available, would appear to discredit this hypothesis. Finally, whilst the practice of the lowest social contribution helps to free up more significant margins, it also affects employment, employees' social benefits and ultimately domestic demand.

In the latter case, the complementarity of the workforce can have a positive impact on activity and employment, provided that there is no longer any bottleneck presenting an obstacle to additional activity generated within the country. This being the case, freedom of service provision can result in an increase in economic activity without destabilising employment since the economic gain achieved by posting workers in the framework of such services does not, in principle, lead to any distortion of competition.

The gains associated with posting workers are, in principle, limited by the rules of minimum wage in force in the host country and by the employer covering the costs associated with the posting, although the reality of posting workers is now largely inconsistent.

In addition to the case of companies that post workers with specialist skills to support the installation of production facilities that will help create value on a continental scale or to increase the opportunities available, there is the case of ordering parties who take advantage of the services offered by service providers whose activity within the home country's domestic market is poor or even non-existent and whose posting practices and the specific conditions surrounding them present a problem. The expression 'exporting of unemployment' is often used to refer to the latter situation.

The posting of workers under the freedom of service provision system: the need for a legal framework

❒ Freedom of movement of workers and freedom of service provision

The posting of workers on the part of companies has always gone hand-in-hand with the development of international trade. This being the case, the European edifice has enabled companies to post a growing number of workers to support the growth of their increasingly international activities by encouraging the deployment of the freedom of service provision.

In legal terms, posting was initially governed by a Community regulation imposed in the social security sphere, independently of any rules of employment law. Prior to the adoption of Directive 96/71/EC, the only reference to posting in a Community legal text was that contained in Article 14 of the Council's Community regulation (EEC) No. 1408/71, dated 14 June 1971, regarding the application of social security schemes to salaried workers. This text outlined the social security rules applicable to workers who were either posted by a company or self-posted, in the case of individual contributors, from one Member State to another. This enabled the worker to remain subject to the insurance system in place in their home country for a once-renewable period of one year.

A body of rules regarding employment law was itself slower to emerge. Whilst the European Community had long been committed to the free movement of workers, only uses of private international law had long been applied. These were based on a principle and a few exceptions, this principle consisting of making workers subject to the law of the country in which they operated in the long-term, with the notable aim of avoiding any distortion of competition in the workplace. A number of exceptions, however, had to be considered, in the event of a conflict of laws, for the most uncertain of cases relating to those performing a number of roles in several Member States and for workers temporarily posted by a service provision company[5].

These uses were referred to in the private international law stipulations standardised in the Rome Convention of 19 June 1980 regarding the law applicable to contractual obligations (which was itself turned into a Community regulation known as the Rome I regulation). The rules outlined therein made it possible to take into account specific cases of individual employment contracts, for which *"the law chosen by the parties [...] may not [...] have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable [...]".* In the case of the individual employment contract, the law that shall apply in the absence of choice is the law of the country in which the employment contract would usually be executed. The imperative provisions of the law are those that cannot be derogated from by agreement between the parties because they are of a public nature in the country in which the contract is executed.

Even today, the application of the rules of employment law for highly mobile workers presents a problem. This is particularly true in the transport sector, which is governed by a specific Article of the Rome I Convention. Furthermore, since not all Member States have the same understanding of what aspects of employment law are governed by imperative

5 Even today there is no European text relating to the law governing posted workers that sets a limit on the duration of posting.

provisions, the text of the Rome I Convention continued to present a problem where posted workers were concerned.

In order to achieve the objective of protecting posted workers in the framework of service provision whilst at the same time maintaining freedom of service provision, a minimum common definition of the imperative rules applicable to the workers concerned had to be introduced. Without such a definition, the free movement of workers provided for in the founding treaties of the European Union, combined with the rules of private international law, would present a risk of major deregulation with regard to both national employment markets and the domestic market.

With this in mind, it is important to reposition the initial rulings of the Court of Justice of the European Community (CJEC) whilst reconciling the recognised capabilities of Member States with regard to employment law with the safeguarding of economic freedoms for businesses, particularly in the framework of the free provision of services.

The notion of posting therefore appeared in Community case law when the Court of Justice of the European Community was required to rule on service providers employing workers from one Member State and providing the service in question in another Member State[6]. It was then defined as the possibility of a service provider established in one Member State to move freely within another Member State, along with all members of its staff body, without the host State requiring any form of work permit.

The case law did not, however, make it possible to define the scope of service provision involving the use of posted workers. Furthermore, it was considered to be relatively vague, recognising that *"Community law [did] not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer [was] established; nor [did] Community law prohibit Member States from enforcing those rules by appropriate means".*

National legislation therefore anticipated the adoption of a directive that had been in the process of being prepared for a number of years in an attempt to compensate for this vagueness. The definition of posting under French law appeared with the five-year law of 20 December 1993, which introduced Article L. 341-5 to the French Labour Code[7]. This Article provided for workers posted temporarily in France to be subject to the fundamental aspects of internal social law, including the law regarding social security, regardless of the legislation applicable to the employment relationship. The French legislator therefore intended to make posted workers whose employment relationship was governed by the laws on another Member State subject to national law, including where social security was concerned.

❒ The posting of workers in the 1996 directive: a compromise between protecting national employment laws and the freedom of service provision

❒ An exception to the *lex loci laboris* that is now better regulated in legal terms

The 1996 directive forged a compromise between those Member States of the opinion that the law of the host country should apply to posted workers and those more in favour of freedom of service provision. The former obtained recognition for a hard core of rules applicable to employment contracts governed by the laws of the host country, which had not

6 CJEC, Rush Portuguesa, 1990, C-113/89.
7 Now Article L. 1261-1 *et seq*. of the French Labour Code.

previously been obtained anywhere within the European Economic Area, through the 1996 directive. The latter received confirmation of the exception to the *lex loci laboris* whereby the law governing the social protection of posted workers was that by which the company providing the service was governed. In accordance with the 1971 community regulation regarding the application of social security schemes to salaried workers, therefore, posted workers remained subject to the social security legislation in force in the country of the posting company.

The exception to the *lex loci laboris* was therefore better controlled in two respects. On the one hand, the jurisdiction of companies posting workers was clarified. On the other hand, a list of matters relating to employment law for which home States had to ensure that the rules applicable in their country were applied to posted workers, either by means of legislative, regulatory or administrative provisions or by means of collective agreements or arbitral awards that were universally applied, was specified.

The outlining of the jurisdiction of companies affected by this directive has been narrowed down to the following three types of company:

- those that post workers on their own behalf and under their own responsibility in the framework of a service provision contract that has been signed with a contracting party in the host country;
- groups of companies that might post an employee to another establishment or company within the group;
- temporary employment agencies and companies providing staff for another user company that is established or operates within a Member State, provided that there is a working relationship between these companies and the worker for the duration of the posting[8].

The scope of the companies concerned by the Community provisions relating to posting in the sense of the 1996 directive therefore excludes companies consisting of self-employed individuals, who cannot post themselves. Furthermore, it covers the case of posting companies whose service provision contract is likely to be limited to the provision of labour.

The definition of a posted worker has also been clarified as any worker who, for a limited period of time, performs their role within a Member State other than the State in which they normally work[9]. This definition highlights two important points, these being the fact that posting is a temporary phenomenon, despite the fact that no maximum duration is specified in the 1996 directive, and the fact that it differs from the notion of multi-activity in that the latter is of a permanent rather than temporary nature. Furthermore, the directive states that the notion of a worker on which its implementation is to be based is that that applies under the law of the Member State to which the worker is posted.

Finally, the 1996 directive helped to define the nature and indeed the scope of the applicable rules of employment law governed by the national legislations of the Member States to which workers are posted.

8 Article 1 of Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 regarding the posting of workers in the framework of service provision.

9 Article 2 of Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 regarding the posting of workers in the framework of service provision.

With regard to the nature of the applicable rules, only legislative, regulatory and administrative provisions stemming from collective agreements or arbitral awards that are universally applied to activities in the construction sector are affected.

The scope of the rules affected covers the following: "a) maximum work periods and minimum rest periods; b) minimum paid annual holidays; c) the minimum rates of pay, including overtime rates (...); d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; e) health, safety and hygiene at work; f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; g) equality of treatment between men and women and other provisions on non-discrimination[10]".

Critics of this system have pointed out that the protection afforded by the legislation of the host country does not cover employees posted to a country in which the collective negotiation system does not result in extensive agreements on sector-specific minimum wages and in which there is no legal minimum wage in place. It is also clear that the standard wage applicable to posted workers introduces a derogation to the principle of employment law whereby workers would receive 'equal pay for equal work', since, in the framework of the free provision of services, the organisational power of the entrepreneur can lead to workers with different qualifications paid at the minimum rate taking on similar tasks, where the professional classifications imposed by collective agreements distinguish between levels of pay in accordance with the level of qualification.

Nonetheless, in relation to the previous state of the law, this system has helped monitor the freedom of service provision by limiting the scope of exceptions introduced to the *lex loci laboris* principle.

... designed for the purposes of developing the free provision of services

The development of worker posting practices within this legal framework cannot be considered independently of the commitment on the part of Member States to promoting the freedom of service provision, as a founding principle of the treaties of the European Union (EU). It is for this reason that the European Commission and the Court of Justice, as guardian of and judge in the application of such treaties respectively, have systematically verified the compatibility of national regulations with the free provision of services guaranteed by Articles 56 and 57 of the Treaty on the Functioning of the European Union. In this respect, the Court of Justice ensures that this freedom is not jeopardised by any measure "*which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services*"[11].

Community law offers significant guarantees with regard to freedom of service provision, ensuring that the appeal of the services offered by providers from other Member States is not jeopardised by excessive national measures that might conflict with such companies. The CJEU assesses the compatibility of such measures with Community law by means of extensive examination, producing a report on their cost effectiveness where both employers and employees are concerned. Furthermore, it determines how useful they might be by comparing them with the regulations in place in the home country that apply

10 Article 3 of Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 regarding the posting of workers in the framework of service provision.

11 CJEC, 23 November 1999, C-369/96 and C-375/96, Arblade.

to the posted worker. This being the case, as far as the CJEU is concerned, the application of national regulations can be ruled out when posted workers benefit from primarily similar protection in the home country[12]. Moreover, a national measure that might result in an imbalance in the economic calculation of the respective costs and benefits to the employer and the employee as a result are also detrimental to the free provision of services[13].

The CJEU offers a restrictive interpretation of the scope of the applicable rules with regard to working and employment conditions outlined in the 1996 directive that host States may impose upon the employers of posted workers[14]. Whilst States may impose regulations that exceed this scope, the CJEC exercises strict control over their reasons for doing so, which must be based on a pressing need. It recognises, of course, that the protection of workers and unfair competition on the part of companies paying their workers at a lower rate than the minimum wage in force in the host State[15] may represent reasonable grounds to justify imposing restrictions on the freedom of service provision, but it does ensure that the regulations that it is required to assess are both justified and proportionate to the objective pursued[16].

A number of authors have made reference to *"the influence of economic freedoms on the protection of workers", and even a "European deconstruction"*[17]. The Rüffert ruling notably ruled that a law could not state that a non-extensive local collective convention (Land of Lower Saxony) should provide that, in the case of public procurement contracts only, service providers from other Member States must pay their posted employees at least the contractual minimum wage. The justification of such a measure, which involved reference to the protection of workers, was not upheld by the Court since such grounds of protection applied only to some of the workers in the construction sector. The particularly restrictive control method adopted by the judges resulted, both in this case and indeed in others (cf. Part II), in an interpretation whereby the development of the freedom of service provision prevailed over the objective pursued by the local legislator, namely to protect workers.

❒ A compromise weakened by loopholes and fraud

According to the definition put forward by Gérard Cornu, *"evasion of the law consists of performing unlawful acts by lawful means and therefore, owing to this inefficiency, clashes with case law or even the law*[18]*"*. For the purposes of the present opinion, loopholes are essentially the same acts before they have been penalised by a judge or by the law.

Whilst the 1996 directive on which Member States and the European Parliament found it difficult to reach a compromise would, in principle, make it possible to reconcile fair competition with the protection of workers, the practices observed have led to doubts regarding its effectiveness[19]. A number of cases have shown that the 1996 directive has

12 CJEC, 2001, C-165-99, Mazzoleni.
13 CJEC, 2001, C-49/98, Finalarte.
14 CJEC, 18 December 2007, C-341-05, Laval und Partneri Ltd.
15 CJEC, 12 October 2004,C-60-03, Wolff and Müller.
16 *Cf.* aforementioned CJEC, Laval und Partneri Ltd
17 *Cf.* Müller, F. and Schmitt, M., 'Droit social communautaire', *Recueil Dalloz* (2008), p.3038. Antoine Lyon-Caen, 'Déconstruction européenne', *Revue de droit du travail*, p.273 (May 2008).
18 Cornu, G. *Vocabulaire juridique,* PUF, p.430
19 A critical report was requested by the European Commission itself in 2011. Van Hoek, A. and Houwerzijl, M., *Complementary study on the legal aspects* of the posting of *workers in the framework of the provision of services in the European Union To the European Commission Contract VC/2011/0096* (November 2011).

not entirely achieved the aim of regulating the posting of workers under the freedom of provision of services regime.

Indeed, other posting practices combined with the freedom of service provision do not fall within the framework of the directive on posted working, as is primarily the case with false self-employed workers. In accordance with freedom of service provision, it is still possible for companies to use the services of workers who are presented, where necessary, by companies that supply labour as being self-employed. The social security system that applies in such cases is that applicable to self-employed individuals and, moreover, that applicable in the home country. There are two forms of disloyalty at play in such situations in that, on the one hand, the employer exonerates themselves from the protection provided by the social security system for some employees in their home country, and on the other hand, they exonerate themselves from the regime that applies to posted workers in accordance with the 1996 directive in the host country. Whilst such practices might be criminalised as a form of illegal work, this does require an element of monitoring and investigation on the part of public prosecutors' offices.

This is also the case of the increasing frequency with which companies are hiring individuals that are holding multiple jobs, which can notably be observed in the official figures of the Centre of European and International Liaisons for Social Security[20]. In such a situation, the rules of private international law that enable the parties to the employment contract to agree on the law that shall apply can be cited by service providers to avoid the directive regarding the posting of workers. The distinction between the habitual nature of cases of multi-activity that involve the individual working across the territories of a number of Member States and the notion of temporary posting from one Member State to another for the purposes of providing a service is a fine one.

Finally, the many and varied irregularities regarding both Community social security regulations and the hard core of rules governing posted working as outlined in the 1996 directive are becoming increasingly frequently noted, including the absence of a declaration, or a declaration of posting that is unlawfully issued by the competent authorities in the home country, and the use of various loopholes to circumvent the hard core of rules of employment law in place in the host country. The infringements committed, along with the administrative shortfalls on the part of the issuing and supervisory authorities, are now widely talked about, so much so that the diagnosis of a lack of sufficient regulation has led to the Member States and the European Parliament adopting the new 2014 implementing directive without fundamentally challenging the 1996 compromise.

A rapidly developing and highly progressive reality following the expansion of the EU

The reality of posting has changed rather abruptly in terms of both scale and nature over recent years, with the very noticeable increase in the number of posted workers reflecting the expansion of the European Union and the effects of the 2008 crisis. This quantitative increase is coupled with a change in the nature of the posting phenomenon, as witnessed in both the geographical development of posting and the transformation of posting practices.

20 CLEISS, *Mobilité internationale, les données de la protection sociale*, statistical report on the 2013 financial year.

The posting of workers would now appear to constitute a movement similar to that of relocation, affecting precisely those roles that cannot be relocated.

The expansion of the European Union and the effects of the 2008 crisis

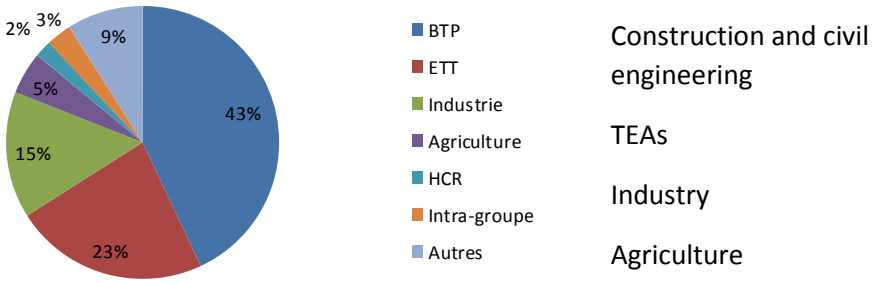
The development of posted working in France has become evident through the gathering, by the labour administration, of the prior declarations to which service provision companies from other Member States must agree[21]. According to the analysis of posting declarations from service provision companies in France in 2013 published by the General Directorate of Labour (DGT), the number of employees affected reached 212,641 (excluding cabotage) that year.

Whilst this figure must be put into perspective with the 25.8 million people in employment and the 2.8 million unemployed as understood in the sense of the ILO data in 2013, it is important to highlight the high concentrations of workers posted in certain labour-intensive sectors, including the construction and civil engineering sector (representing 43% of the declarations submitted in 2013), and temporary employment agencies (23% of declarations), which themselves post a large proportion of workers in the construction and civil engineering sector, meaning that the posting of labour workforce in the construction sector, which accounted for 1.7 million employees in 2013, can reach significant proportions[22]. Players in the transport, industrial (15%), agricultural (5%) and hospitality (2%) sectors are also affected. This sector-specific composition rather broadly reflects the socio-professional composition of the posted worker population, which includes an increasing proportion of labourers (86% in 2013 as opposed to 75% in 2006) and decreasing proportions of staff members, technicians and supervisors (5% in 2013 as opposed to 7% in 2007). The very low proportion of executives also proportionately reflects the very low numbers of declarations made with regard to posted workers involved in intra-group mobility initiatives (3%).

21 Article L. 1262-2-1 of the French Labour Code introduced by the law of 10 July 2014. The obligation to submit a prior declaration had already been provided for in the regulatory section of the same Code.

22 In 2011, the professional family of unskilled structural work labourers in the construction and civil engineering sector accounted for 600,000 individuals, according to the INSEE, meaning that that percentage of the workforce can be estimated at less than 15%, based on the assumption that the use of posted workforce in this sector relates more to relatively low-skilled workers. DARES Analyses, No. 079, (December 2013).

Graph 1: sector-specific distribution of prior posting request



The use of posted workers in France has increased significantly since the 2004 and 2007 expansions of the European Union to include the former Eastern bloc countries, with a significant increase in the use of posted workers from these countries observed until 2008. This growth reached significant plateaus in 2007, 2008 and 2009, but a notable increase in numbers from the new Member States was once again observed as of 2010.

The start of the recession in the eurozone countries as of the final quarter of 2008 also served to significantly boost the flows of posted workers arriving from Portugal, Spain and Italy as of 2010. According to the European statistics produced from data provided by the Member States to the European Commission[23], Portugal is now the leading supplier of posted workers to France, ahead of Poland, with the Portuguese social security system receiving declarations for 38,443 posted workers in 2013.

Generally speaking, an analysis of company declarations made to the French Labour Administration shows that postings, which have increased ten-fold in ten years, have ceased to be a marginal phenomenon and have now become significantly more common within certain sectors and certain professions.

23 The data from the French administration, which is extracted from prior declarations of posting and exclude cabotage, and that from the European Commission, which is based on the exploitation of declarations of posting made to national social protection systems, differ in this respect, although both sets of data indicate the same developmental trend. The data gathered by the European Commission in 2012 placed Poland ahead of Portugal.

The changing European geography of worker posting

❒ *A single legal framework and a progressive and contrasting situation across the Member States*

Whilst the legal framework governing the posting of workers is the same for all Member States that host posted workers, the latter do not enjoy the same positioning in the posted labour market, which has changed noticeably over recent years.

The first observation is that the total number of posted workers[24] officially tallied by the European Commission on the basis of declarations received in home countries was around 1 million workers in 2009 and 1.34 million in 2013.

The second observation is that the geography of worker posting has changed. Whilst the development of posted working associated with the cross-border movement of workers between neighbouring countries continues to dominate on a global scale, the cross-border posting of workers to Germany from its Eastern European neighbours has experienced the most significant increase. This progression is notably characterised by changes to the hierarchy of countries hosting the largest numbers of posted workers, with the Netherlands losing its leading position in the list in 2011 to Germany.

The third observation relates to the fact that whilst the two largest countries in the European Union, namely France and Germany, use high numbers of posted workers, Germany has made far greater use of this labour resource than France over the course of the past five years, using more than twice as much of this type of labour. Furthermore, the group of net contributors to the posted working phenomenon extended in 2013 to include Italy and Spain, showing that these countries have again become countries of emigration thanks to the posting of workers. Poland's net contribution to the volume of posted workers has stabilised following a period of significant growth in the 2000s.

The profile of posted workers also varies significantly depending on the home country. Whereas the majority of posted workers from Belgium, Germany, the Netherlands, Greece and Luxembourg in 2013 worked in the financial and services sectors (including transport), those posted from the new Member States and Portugal tended to work in the construction sector.

❒ *The geographic distribution of posting to and from France*

Posted workers arriving from bordering countries accounted for over a third of this category in 2004[25], as opposed to a quarter today. Workers posted to the countries on the European Union's external borders, on the other hand, accounted for 15% of this category in 2004 and over 56.4% in 2013. It is also striking to note that France posts a workforce of 12,688 employees to (and from) its own territory, primarily by means of temporary employment agencies, a phenomenon that had not been detected in 2004.

24 This figure takes into account only those workers posted in the framework of Article 12 of the Community social security regulation, i.e. salaried posted workers. Community social security regulations also provide for the self-posting of self-employed workers. European Commission, *Posting of workers in the European Union and EFTA countries: Report on A1 portable documents issued in 2010 and 2011*. *cf*. the 2014 report for the 2013 figures.

25 Ministry of Labour, Employment, Professional Training and Social Dialogue, DGT report, '*Analyse des déclarations de détachement des entreprises prestataires de services en France en 2013*', p.31 *et seq*., (November 2014).

Furthermore, although half of the declarations are made in eight cross-border departments, there is clear evidence of an increase in the geographic dispersion of posted workers, with a larger number of departments now finding themselves affected by significant volumes of declarations.

France is also a country that posts a lot of workers to other member countries, behind Poland and Germany. Whilst the number of workers posted from Germany is still on the increase, however, the number of posted workers sent from France to other Member States is decreasing. Furthermore, despite the lack of available statistics on the sectors to which France posts workers, it is likely that employees and self-employed workers posted from France work in more highly skilled professions than those posted to France from Portugal, Poland or Romania[26].

A transformation in posting practices characterised by more intense competition with regard to the cost of employment in labour-intensive industries that are difficult to relocate

All of this data confirms that the nature of the posting phenomenon is changing. The benefits that certain operators take from cross-border postings linked to the provision of services in a neighbouring country (exporting of products or services) do relatively little to explain the current growth in the number of posted workers. Whilst geographical proximity continues to play a role in explaining the reasons behind worker posting, other structural factors have emerged in sectors in which labour represents the most significant component of the cost price of a product or service marketed locally and the production of which cannot be relocated. These sectors include construction, hospitality and catering, transport, agriculture and, to a certain extent, food processing.

In those countries where there is no blanket minimum wage imposed either by law or by means of a collective agreement extension mechanism, competition regarding the cost of employment can result in the posted worker workforce representing a legal economic benefit in itself, thus legitimising an exemption to the principle of 'equal pay for equal work'.

26 The Belgian Limosa system has nevertheless highlighted the fact that this is not necessarily true in the case of workers posted from France to Belgium. The number of workers posted from France to Belgium in the construction sector accounted for 19.6% in 2007 as opposed to 34.9% in 2014. These figures are difficult to accurately interpret since this increase may be linked to the shortage of labour in construction professions, resulting in the use of cross-border labour from France. In any case, the introduction of the so-called 'Fillon reduction' exemptions from social charges has undoubtedly brought down the cost of using labour from France. Indeed, such exemptions had already been in place in Belgium for some time when the 'Fillion reductions' were adopted and are now less targeted towards lower salaries. *Cf.* minutes of the business support monitoring committee meeting organised by France Stratégie on 4 March 2015.
http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/comite_de_suivi_note_fs_comparaison_internationale_seance_040315_rev_vf_mise_en_ligne.pdf

Insufficient knowledge and statistical monitoring

Multiple statistical sources that fail to corroborate one another

Whilst European and national census systems can help in producing statistics on the progression in the number of posted workers, they only partially reflect the reality of the phenomenon.

This situation stems from the different functions of the information recorded. The European Commission reports on the only directly applied regulation relating to posting, namely the social security regulation. National recording systems have different administrative functions. In the social security sphere, for example, the purpose of a census is to verify that posted workers are making the necessary contribution to the social protection system in their home country, whilst in the field of employment law, the recording of prior declarations of posting is intended to fight illegal work and provide access for those responsible for monitoring posted workers.

❒ European Commission report on A1 declarations

The European Commission's report (which has been an official public report since 2011) is based on responses to a questionnaire put to the relevant authorities for the purposes of issuing A1 (formerly E101) social security forms[27]. In this respect, the European Commission and European agencies currently have no authority with regard to administering a statistical system covering all Member States, meaning that they have to rely on the declarations of posting countries regarding the number of A1 forms issued.

The A1 forms issued were not initially intended to be used for the purposes of monitoring the practical situations of posted workers with regard to the labour and employment laws of the host Member State. The issuing of the form serves only to certify that a worker has been posted or that an individual who is employed in more than one Member State has been posted with regard to the social security system, meaning that they pay their contributions in a Member State other than that in which they are working.

This being the case, a number of uncertainties remain in terms of what this declaration effectively means with regard to the specific posting operation to which it relates. More often than not, the relevant administrative body in the home country responsible for issuing the A1 form does not have the authority to monitor this posting operation. Neither does it have any objective interest in doing so when this would identify false postings, despite the principle of sincere cooperation between Member States. This would, of course, essentially deprive them of a financial resource[28]. In the case of genuine postings, which, conversely, result in the underpayment of posted workers, cooperation is useful in that it helps increase the resources available to the social security system in place in the home country, provided, of course, that the contributions that posted workers are required to pay are not fixed.

Furthermore, the authors of the report on the A1 forms issued in 2012 and 2013 state that insofar as A1 forms can be issued retrospectively and as several A1 forms can be issued

27 European Commission, *Posting of workers, Report on A1 portable documents issued in 2012 and 2013* (December 2014).

28 *Cf.* cases ruled upon by the CJEC, 24 June 1975, CPAM Sélestat v. Football Club d'Andlau, case 8/75, and more recently CJEC, 30 March 2000, Barry Banks, C-178-97.

to a given worker a number of consecutive times, the total number of forms does not accurately reflect the actual number of posted workers declared by a country.

It is concerning, however, to note the discrepancies in information drawn from the same sources. This is particularly true of declarations sent to the French social security liaison office, whereby the figures regarding A1 forms contained in the French database administered by the European and International Social Security Liaison Centre (CLEISS) differ from those stated by the European Commission. The CLEISS is currently working on explaining these discrepancies, but this might also mean that the figures exchanged between Member States in the framework of cooperation do not reflect those that they submit to the European Commission.

❒ National statistics regarding prior declarations of posting

Prior declarations of posting are submitted to administrative bodies with varying powers, depending on the Member State in question, in both material and procedural terms. Some administrative bodies are responsible for fighting both illegal work and social benefit fraud and have certain legal powers, whilst others are somewhat more specialist[29]. This being the case, national systems for listing prior declarations of posting are not all based on the same administrative systems, which explains the sometimes surprising discrepancies that exist between Member States.

Belgium, for example, registers far more prior declarations than France. In 2012, the Belgian administrative body received some 373,000 prior declarations, whereas only 125,000 A1 forms were issued for posted workers sent to Belgium. By comparison, the French administrative body responsible for employment registered only 169,613 posted workers (excluding the transport sector) (182,219 A1 forms declared to the European Commission).

Since the records of numbers kept do not strictly serve the same purpose owing to the fact that they cover neither exactly the same definitions[30] nor exactly the same periods, the discrepancies between the numbers of prior declarations of posting and the number of A1 forms issued can be explained.

Statistical monitoring that varies between one Member State and another in terms of its efficiency

The statistical monitoring of posted workers requires specific means, and electronic resources in particular. Indeed, not all Member States have, like Belgium, designed electronic systems for the quick and easy submission of prior declarations. Furthermore, companies posting employees must be familiar with the obligations regarding declaration that stem primarily from national laws, which, in practice, is not always the case.

In France, the recent provision of the Savary Law stating that contracting authorities and ordering parties should be required to check whether service providers have correctly completed their declarations should limit instances of failure to make prior declarations

29 The Limosa system that registers prior declarations of posting in Belgium is governed by the administrative body responsible for social security. In France, these declarations are registered by the administrative body responsible for employment.

30 With this in mind, the definition of posting used in the social security sphere incorporates the option of self-posting on the part of self-employed persons, whereas the provisions of the French Labour Code regarding prior declarations appear to apply only to declarations made by employers for posted employees.

in a number of cases[31]. The law of 6 August 2015 on economic growth, activity and equal opportunities introduces the obligation to make an electronic declaration online into the French system[32].

The French administration maintained declaration rate brackets of between 20% and 25% in 2006, 25% and 33% in 2007 and 33% and 50% for 2008 and 2009. It no longer believes that corrective measures are necessary, given the stabilisation of the declaration system put in place[33]. As a result, foreign company inspection initiatives regularly reveal that service providers have not submitted their posted worker declarations.

Since 2010, around a thousand checks on foreign companies have been reported every year in the framework of a survey on declarations of international service provision aimed at verifying the terms under which worker postings are dealt with. Nevertheless, the difficulties associated with such checks actually reveal that, in 2013, over half of the departments in mainland France failed to complete the section of the survey corresponding to companies that had not submitted any prior declarations. The labour administration has referred to the possibility of either a lack of monitoring in these departments or difficulty in providing the information requested in the survey. Since 2012, the national action plan for fighting illegal work has made it possible to produce an inventory of the increasing number of checks carried out in priority sectors, which increased by 25% in 2012 (1,154) and 2013 (1,442).

Whilst the French administration does undertake important checks on a sample comprising both companies that do declare and some that do not, it has not yet put in place any form of electronic online declaration system, as has Belgium. A national project regarding a file for posted workers declared by companies is currently under way and will undoubtedly make it possible to more efficiently cross-reference with declarations regarding A1 forms.

With regard to recording data regarding A1 forms, the European Commission has also observed that certain Member States are not in a position to provide the new data they are requested to provide. This can include data such as the number of workers actually posted, in relation to the number of forms issued, and the average durations of postings. Such difficulties clearly show that the issuing of the A1 form is not in itself linked to any procedures for monitoring worker postings from the home country.

As the statistical data currently stands, it would appear that not all of the Member States (primarily those countries making a net contribution to the European posted workforce) that send posted workers to other countries are in a position to report on either the number of posted workers sent from their country or the average duration of posting, even though, in principle, Community law limits the maximum duration of posting to 24 months.

31 Art. L. 1262-4-1 of the French Labour Code.
32 Employers have been given the option of using this service by the Ministry of Labour since June 2014.
33 General Directorate of Labour (DGT), *Analyse des déclarations de détachement des entreprises prestataires de services en France en 2013* (December 2014).

Social dumping and intra-European unfair competition: the concerning deviations in the posting of workers

In 2006, the ESEC[34] defined social dumping as *"a practice consisting of contravening, circumventing or restricting legal social rights and taking advantage of these discrepancies in a way that might be assimilated with unfair competition". The opinion added that, "as far as States are concerned, social dumping consists of tolerating or even supporting and encouraging unfair practices in the social sphere. Where companies are concerned, the phenomenon is also characterised by the search for and use of discrepancies".*

At the Community and European Economic Area (EEA) levels, where the regulations governing the posting of workers are determined and applied, this issue is still very current. EU Member States share both responsibility for and the consequences of a system that, if it is not controlled, is liable to result in social dumping. It is important to distinguish between breaches of employment law, the victims of which are primarily employees, and evasion of the law on the part of certain operators with the aim of escaping the social security systems in place in host countries by resorting to false postings.

Taking advantage of differences in the cost of employment

The cost of employment includes wages, social contributions and various other additional benefits. The legal uncertainty surrounding the definition of a minimum wage, which features among the hard core of rules in place in the host country that apply to posted workers, as well as the significant discrepancies that exist between the social charges payable in home countries, give operators significant room for legal optimisation. For lack of sufficient provisions for ensuring the clarity and effectiveness of the rules regarding the minimum wage, the European Commission has gradually come to recognise a form of social dumping[35].

❒ *The legal use of posted working: a minor economic advantage, in principle*

According to CLEISS figures, the average rate of employer contributions for a non-executive employee in 2011 stood at 38.90% in France, 24.6% in Spain, 18.81% in Poland, 12.31% in Luxembourg, 8.5% in Ireland and 6.3% in Cyprus. This being the case, labour-intensive industries clearly benefit from using posted labour. In the construction sector, where labour can account for up to 50% of the costs incurred, a price difference of nearly 16% can be mechanically explained by a difference of 32% between French and Cypriot social costs. This benefit is, however, partially counter-balanced by the rules governing the minimum gross wage in place in the host country and the employer's responsibility for covering the costs associated with posting (food, accommodation, transport, etc.).

Furthermore, in order to assess the economic benefits of using posted labour, it is important to compare the cost thereof, including any social contributions payable in the

34 Opinion adopted by the ESEC on 25 October 2006 on *Enjeux sociaux et concurrence internationale : du dumping social au mieux-disant social* ('Social issues and international competition: from social dumping to the lowest social bidder'), presented by Didier Marteau on behalf of the Section for Employment.

35 The press release issued by the European Commission announcing the adoption of the implementing directive explicitly referred to a situation of social dumping.

home country, with the effective cost of the labour where resident workers are concerned. In France, exemptions from charges, tax credits for competitiveness and employment, and the measures designed to reduce the cost of employment adopted following the Responsibility and Solidarity Pact are deducted from the minimum wage in force based on this calculation.

In a typical case produced by the DARES[36] and based on the assumption that the law is upheld, for example, employing a posted worker earning 300 euros in their home country would be comparable in terms of cost to that of a worker employed under national conditions. This typical case is based on hypothetical posting and subsistence allowances (to cover accommodation, travel, food, etc. expenses), with daily allowances of 40 and 20 euros respectively. Furthermore, it takes into account an employer contribution rate that is 10 points below the level of French social security contributions. Finally, the comparison is made with the case of an employee earning a gross salary of 1,500 euros in France and benefiting from all of the social contribution exemptions in force. According to the DARES simulation, the option of using a service provider based in this country would be more costly than using local labour.

This case has been outlined by the DARES in a questionnaire sent to French economic appointments at the various embassies. The responses to the questionnaire highlight the fact that there does not appear to be any form of framework regarding the allowances paid to posted workers available[37]. Indeed, few countries have implemented any form of legal system regarding posting and subsistence allowances, meaning that the case in question is largely theoretical.

❒ *Significantly lower actual rates of pay*

In practice, the rules that apply are easy to circumvent.

It is frequently noted that the actual number of hours worked causes a drop in the hourly rate of pay, or that employers ask posted workers to work longer hours in exchange for covering the cost of their accommodation.

Furthermore, whilst the rules of pay that apply to posted workers relate to a minimum wage, few employees in the sector are accepting this rate in certain industries. A small business in the construction sector that employs workers that have sometimes been with the company for a number of years may adopt a labourer pay scale divided between hierarchical coefficients ranging from 150 to 270, whereas within a team of posted workers the entry-level wage would automatically apply[38].

Finally, another of the legal difficulties encountered relates to the definition of the minimum wage applicable, whether such a concept does not exist as defined in the directive regarding the posting of workers or its content is not clearly defined and accessible to posting companies. It is important, of course, to remember that, unlike France, not all Member States have extensive minimum wage systems in place. In Germany, for example, where not all sectors are covered by widespread collective agreements, there was no minimum guarantee covering posted workers' pay prior to the recent introduction of a legal minimum wage.

36 Note dated 22 June 2015 from the DARES ('Directorate for Research, Studies and Statistics') to the Delegation for European and International Affairs of the Ministry of Social Affairs.

37 *Cf*. Appendix.

38 Rapporteur interview with Thierry Grimaldi, President of the CAPEB Haute-Loire, 21 May 2015. He cited the case of an ordinary business with two employees on 230, one on 130, one on 170 and one on 200.

Furthermore, the definition of what the minimum wage contains depends, to a relative extent, on the Member States themselves since the CJEC ensures that the measures taken by each State with a view to establishing an appropriate rate will not have the effect of hindering the free provision of services[39]. This definition is not a standard one since it will depend on the legislation in force in each host State. Furthermore, allowances specific to the posting, with the exception of accommodation, food and travel, may be considered to be part of the minimum wage, without the rules by which they are determined being clearly outlined in the directive[40]. Finally, in principle, contributions paid in the home country go towards the minimum wage, but the variety of different social security systems that exist and of the social risks that they cover once again requires a distinction to be made between these elements of the gross wage.

A number of case law rulings by the Court of Justice relate to the rules governing the determination of the minimum wage. Art. 3 c) of the directive, which provides that posted employees should be paid at the minimum rate of pay in force in the host country, for example, offers only very limited protection against social dumping, owing to the poor legibility of the system and the variety of the situations encountered across the different Member States, which maintain jurisdiction with regard to social security and determining wage levels. Such differences do, however, offer certain opportunities for optimising costs. The legal appraisal commissioned by the European Commission in 2011 highlighted the vagueness of certain rules and called for the 1996 directive to be modified to clarify them.

This pathway to substantial reform was ultimately not pursued, in a context in which Community case law requires that Member States ensure the legibility and accessibility of national legislation regarding the minimum wage in order for it to be enforceable against economic operators. This case law, which ensures that the provisions of the Treaty are useful and aim to encourage the development of the single market, could compromise the effects of the most protective of the provisions contained in the directive on posted workers at any time.

Simulations designed to compare the salaries of workers living in France with those of posted workers show that the minimum wage does indeed serve as a protective mechanism, at the same time as social charge exemption mechanisms limit, in principle, the economic benefits of using posted workers on low wages. In France, social charge exemptions up to 1.6 times the minimum wage therefore serve to reduce the apparent difference between the cost of employing posted and non-posted workers, although this observation highlights the fact that competition with regard to the levels of contributions payable in the framework of individual social insurance systems is now placing Europe's social regimes under significant pressure.

In legal terms, the 1996 directive and the Court of Justice case law have nevertheless helped to exclude travel, accommodation and food expenses, overtime pay, contributions to supplementary pension schemes, amounts paid in reimbursement of costs actually incurred as a result of the posting and any fixed sums not calculated on an hourly basis from

39 CJEC, 14 April 2005, case C-341/02, Commission v/Germany.

40 Article 3 (7) of the 1996 directive provides that "*allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.*"

the minimum wage[41]. As a result, in order for the law to be enforced, breaches and evasion of the law must be effectively dealt with.

Salaries and working conditions that are still downgraded as a result of failures on the part of the employer to fulfil their contractual obligations and breaches of the employment law in place in the host country

The posting of workers can give rise to various breaches of the laws in place in the host country. Those committing such breaches do so with the aim of achieving lower labour costs than those guaranteed by legal and contractual minimums whilst relying on the posted workers concerned, who nevertheless benefit more from such situations than they would in their home countries, to remain silent. Condemned by professional and trade union organisations operating within the most heavily affected sectors, such practices put foreign employers, and therefore their national ordering parties, in breach of the main provisions of the French Labour Code regarding the minimum wage and working hours and conditions.

The 1996 directive uses both the terms "minimum hourly rate" and "minimum wage", clearly referring to the obligation to pay a legal or contractual minimum hourly rate, although the most common type of fraud reported involves the production of a payslip stating the monthly legal minimum for a number of hours recorded in a double-entry system that exceeds the legal number of hours worked. This being the case, the actual hourly rate is significantly lower than the hourly rate corresponding to the applicable minimum wage.

Cases of construction sites employing posted workers on Saturdays and Sundays in addition to the other days of the week are often cited in this respect. Professional organisations in the construction sector insist that the payslip stating the apparent minimum hourly wage should be systematically compared against a breakdown of the hours actually worked.

Another of the practices frequently observed by players in the sector involves having posted workers pay the accommodation and even travel-related costs incurred as a result of their posting, either by means of a deduction from the salary they receive in their home country or by having them agree to work beyond their legal working hours[42]. Such breaches can be detected only through the effective monitoring of working hours since the payslip can still state that the employee is paid at the legal minimum wage.

The following violations of the working and living conditions of posted workers, which enable employers to reduce their labour costs, are frequently cited:

- very low-cost housing in highly unsatisfactory conditions that might even, in some cases, be deemed unfit for habitation;
- the hiring of individuals who have used their freedom of movement to travel to a host State, at their own expense with no reimbursement of travel expenses, as posted workers.

41 CJEC, 7 November 2013, case C-522/12, Tevfik Izsbir v/ DB Services GmbH. In this case, the Court ruled that whilst it was important to include lump sum payments "as consideration for the usual work of the workers concerned", it was also important, on the other hand, to exclude the employer's contribution to forming capital that "is distinguishable from the salary itself".

42 This practice is known as 'exchanging hours'. Aforementioned rapporteur interview with Thierry Grimaldi.

Finally, all of the provisions of the French Labour Code regarding the substantive rules contained in the 1996 directive can be circumvented by employers who escape inspection by the labour inspectorate. The obligation to submit a prior declaration is also designed to prevent the circumvention of the common law provisions in place in the country in which the posted worker is operating. Failure to declare a posting is punishable by an administrative fine of a maximum of €2,000 per employee (€4,000 in the event of a repeat offence within one year).

It has to be possible to identify and to sanction such breaches of legal or contractual obligations, which can sometimes be difficult to prove. Whilst the French Labour Code does provide for various criminal sanctions, including where the minimum wage is concerned, there is, however, a prerequisite to the labour inspectorate submitting an official report. Indeed, the identification of offences and the gathering of sufficient basic information by inspection agents to characterise an offence are prerequisites to further action being taken. In the case of posted work, such tasks can prove taxing owing to contractual documents being drafted in a foreign language and not systematically translated, even if the regulations provide for this, and the checks that must be performed in order to ensure, for example, that the gross wage paid to the employee does in fact correspond to the minimum wage payable in France.

Furthermore, in some cases, the elements deemed to constitute a breach or an offence do not reflect the reality of situations that are more grey areas than outright prohibited. The criminal provisions regarding undignified working and housing conditions, for example, are aimed more at particularly serious offences, meaning that judges may be reluctant to apply them in the cases of poorly housed posted workers.

False postings: circumventing the social security system in place in the host country through illegal working

False posting practices designed to circumvent the social security system in place in the host country mask the situations of foreign workers who should be bound by the same national social contribution obligations as other workers, in accordance with the *lex loci laboris* principle. Organisations that put in place sophisticated schemes for the purposes of justifying the fact that the migrant workers concerned are not bound by the social legislation in place in the country in which they are working have found themselves under particular scrutiny.

The freedom to establish a service provision company, governed by the 'Services' directive of 12 December 2006, enables companies to establish a presence within an EU Member State. It does not, however, make them exempt from the common rule whereby employees recruited by the establishment in question and in a permanent and stable position of employment within the establishment are subject to the employment laws and social security regime in place in the country in which their particular establishment is based and not that in which the parent company is based[43]. There is, however, great temptation for such companies to combine the provisions of the Services directive and the directive on

43 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, sometimes referred to as the 'Bolkestein Directive', did not go as far as the text of the European Commission's initial draft, whereby employees were to be subject to the country of origin principle.

posted workers to pass workers who should be subject to national legislation off as posted workers.

Most such practices nevertheless fall within the scope of measures to fight illegal work, which is criminally prosecuted and sanctioned in France. Indeed, in specifying that illegal work more specifically covers three types of offence, the French Labour Code helps to detect those companies adopting false posting practices, notably targeting undeclared work, bargaining and the unlawful leasing of labour for the purposes of making a profit. Attempts could be made to produce a typology of these different types of fraud in accordance with the type of organisation set up to practice them[44].

The Savary report identified at least three different types of organisations enabling companies to sidestep the social legislation in force in the host country but liable to fall within the definition of the crime of undeclared work, including 'shell' and 'letterbox' entities and companies posting false self-employed individuals.

'Shell' entities, for example, are created by companies claiming to provide services from a home country in order to post workers there whilst taking advantage of the social charge obligations in force in the home country, in accordance with the terms of intra-group posting. In reality, the workers recruited have worked very little for this company in the home country and generally work in France on a permanent basis for a period not exceeding two years, after which time the social security regulations require either a dispensation to be granted or the posting to be ended. The recruitment of such workers is therefore intended solely for the purposes of side-stepping social legislation in the country in which the entity in question usually operates on a stable and continuous basis[45]. In the event that it is possible to establish the permanent activity of the 'shell', the existence of an establishment with an activity other than international service provision within the country is brought to light and dealt with within the scope of undeclared work.

Symmetrically, so-called 'letterbox' entities are created by a company from Member State A in another Member State B with lower social contribution rates, without them actually operating there and merely to justify the posting of workers recruited in country B. In such cases, there is no more evidence of the provision of a service than there is with 'shell' entities. The same reasoning could be used here as in the previous case thanks to the collaboration on the part of the home country in establishing that no activity other than the practice of recruitment has been observed in the home country. In accordance with Article L. 1262-3 of the French Labour Code, by fraudulently using the provisions regarding the posting of workers the employer is intentionally avoiding their obligations to submit the relevant declarations to the appropriate social security bodies, which also constitutes a form of undeclared work.

Likewise, of course, the posting of false self-employed individuals may fall within the scope of the offence of undeclared work in accordance with Article L. 8221-6 II of the French Labour Code. This occurs when a company that was employing an individual requests that the latter set themselves up on a self-employed basis so that it may hire them as an ordering party or in the framework of a recruitment initiative on the part of a labour supply company that will then assign the recruited self-employed individual to a third-party company. There

44 *Report produced on behalf of the Commission on Social Affairs on the bills designed to increase responsibility on the part of project owners and ordering parties in the framework of sub-contracting and to fight social dumping and unfair competition,* by MEP Gilles Savary.

45 Case law of 11 March 2014 Vueling, EasyJet, Supreme Court, Criminal Division 11-88420 and 12-81461.

are two types of entity responsible for this type of fraud, these being the companies that actually employ so-called 'self-employed' individuals and those that supply labour and pay the posted worker a wage, more often than not deducting a weekly fixed sum from the wage paid. The reclassification of the contract between the posted worker and the ordering party that has signed a contract with the intermediary may come into play by verifying the existence of a hierarchical link between the ordering party and the false self-employed individual and can be determined by the criminal judge or the civil judge.

One final practice commonly adopted in an attempt to circumvent the regulations in force relates to companies whose service provision is limited to reducing labour but who avoid having to comply with the regulations regarding temporary working, which impose the same conditions of pay as those that apply to the permanent employee that the temporary employee is covering. This practice, which amounts to bargaining and the unlawful leasing of labour, is also, in principle, prohibited in the framework of fighting illegal work.

All of these prohibitions are covered by a robust array of penal sanctions outlined by the French Labour Code[46], recently extended by the law of 10 July 2014. The latter has exacerbated the potential sanctions incurred for the organisation of undeclared work by an organised group and introduced the option for the judge to order that the sanctions issued be published and publicised.

The difficulties associated with implementing the law governing the posting of workers

Insufficient standardisation of the definitions of posting within community labour and social security law

The definitions of posting in Directive 96/71 and social security regulation 883/2004: major differences

Directive 96/71 incorporates employment law guarantees for posted workers, whereas Regulation 883/2004 features provisions that apply with regard to social security. Article 12 of this so-called 'basic' regulation binds the posted worker to the insurance system in place in their home country for a maximum period of 24 months. The relevant authorities of the Member State posting the employee attest to the posted worker's membership of their social security system by issuing the individual with a document that is enforceable against the administrative authorities in the host country (Article 19 of Regulation EC 987/2009 outlining the terms governing the application of the basic regulation). In practical terms, only the issuing of this document, commonly known as the 'A1 form' (formerly E101), by the relevant authority in the worker's home country can substantiate this attestation. Major differences in the definition of posting do, however, exist between these regulations and the

46 Art. L. 8224-1 *et seq*. of the French Labour Code.

directive, leaving those countries that post workers a significant margin of discretion with regard to the terms governing the issuing of this attestation.

Box 4: posting from the perspective of social security law

Article 12 of Regulation (EC) 883/2004
Special rules

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 24 months and that he/she is not sent to replace another person.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months.

Article 19 of Regulation (EC) 987/2009
Provision of information to persons concerned and employers

1. The competent institution of the Member State whose legislation becomes applicable pursuant to Title II of the basic Regulation shall inform the person concerned and, where appropriate, his employer(s) of the obligations laid down in that legislation. It shall provide them with the necessary assistance to complete the formalities required by that legislation.

2. At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.

❒ The lack of standardisation regarding the posting operations covered

❐ Membership of a social security system and posting in employment law: contradictory conditions

The social security regulation, which was not intended to cover the working relationship between an employer and their employee, refrains from defining the operation whereby an employer posts an employee. It is broader in scope than the directive since it covers both employees and self-employed individuals (Art. 12 of the regulation) and those holding multiple jobs (Art. 13). The 1996 directive, for its part, refers only to the case of posted workers but does identify different employer situations, including those of service providers, companies and entities operating as part of a group and temporary employment undertakings. The posting operation can be characterised according to whether you take the employee's perspective or that of the employer. As far as the employee is concerned, they will, in principle, be required to habitually work in the home country. The employer, meanwhile, will be required to undertake a substantial part of their activity in the home country. However, the two texts offer differing perceptions of the link that exists between the employee and the employer prior to the posting operation.

- With regard to the habitual nature of the employee's activity

Whilst the social security regulation refers to a one-month period of affiliation to the social security system in place in the home country, it does not specify that this affiliation must be pursuant to the social security contributions associated with an employment contract.

Article 2 of the 1996 directive, conversely, clearly specifies that a posted worker is a worker who performs their role in a Member State other than the State in which they habitually work and for a limited period of time. The preamble to the 1996 directive clearly refers to the Rome I Regulation that helps to specify that habitual work is understood as work undertaken in the framework of the employment contract implemented by the employer posting the employee.

This being the case, the regulation outlines the conditions of affiliation to a social security system whilst the directive sets out, in principle, a posting condition, making reference to the undertaking of habitual work on the part of the posted employee in the framework of the employment contract in the home country but without specifying the duration of execution of said contract as a condition of the posting.

- With regard to the primary nature of the employer's activity in the home country

Neither do the regulation and the directive outline in exactly the same terms the conditions regarding the employee's affiliation and posting with regard to the employer. In terms of affiliation to the social security system in place in the home country, the criteria are outlined in an interpretation circular, which states that the employer's activity in the home country must be of a substantial nature and that the worker's affiliation must date back at least one month[47].

The directive, however, stipulates no conditions regarding the duration of the contract that the employer has signed with the employee as a condition of the posting, although it does refer to the habitual execution of the employment contract in the home country and is indeed based on the assumption that the posting company is established in the home country.

- The case of those holding multiple jobs

Article 13 of Regulation 883/2004 looks at the situation of workers holding multiple jobs, that is working in several Member States on a regular basis. The basic rule outlined in this article is that a worker holding multiple jobs may remain affiliated to the social security system in place in the country in which he lives provided that he undertakes a "substantial part of his activities" there. The key point with regard to workers holding multiple jobs lies in this notion of a "substantial part of his activities", which is defined in the practical guide on legislation that applies to workers in the European Union as accounting for at least 25% of the individual's working hours and/or pay[48].

An employee covered by the social regime that applies to those holding multiple jobs can therefore remain affiliated to the social security system in place in the country in which they live for an unlimited period of time, provided that they undertake at least a quarter of their activity there. In the event that they should fail to reach this threshold, they must

47 Practical guide on legislation that applies to workers in the EU, the EEA and Switzerland by the European Commission, November 2012. This guide serves as an interpretation circular with regard to the directive and the regulations on the posting of workers.

48 *Ibid* p.29.

be affiliated to the social security system in place either in the Member State in which the employer's head office or primary place of business is located or in the Member State in which they live in the case of those with multiple employers based in different Member States.

Using this notion of a "substantial part of his activities" (approximately 25% of the worker's wage), a company, where it is the sole employer, may entirely legally choose the less costly social security option.

Employees holding multiple jobs must split their activity (in varying proportions) between at least two States. They may, however, undertake their activity, including their primary activity (up to 75%), in a Member State other than that in which they habitually reside without any time limitation since the rule regarding the maximum period of 24 months applies only in the framework of Article 12.

It is often difficult to make the distinction between employees holding multiple jobs, as covered by Article 13, from posted employees, in the sense of Article 12. Some holding multiple jobs may fall within the scope of the 1996 directive on posting and be considered as posted workers in accordance with employment law when they are providing a service on behalf of a foreign company. There remains one outstanding issue with regard to the coordination of these provisions with those of Directive 96/71/EC on posting.

The temporary nature of the individual's activity in the country to which they are posted, which, in accordance with Article 12, justifies their continued affiliation to the social security system in place in their home country, does not apply in the event that the individual holds multiple jobs. The employee may undertake a very substantial part of their activity, on behalf of any employer, in another Member State and on a regular basis. An Estonian construction company may, for example, undertake the majority of its activity in Finland, and on a regular basis, with the same employees living in Estonia and covered by the Estonian social security system, provided that they are also employed on Estonian construction sites for what corresponds, in theory, to 25% of their activity.

Service providers operating in another Member State can sometimes play on the rules of Articles 12 and 13, making it all the more difficult for the relevant authorities to verify the temporary nature of the posting. Once it has been proven that an employee's situation puts them within the scope of Article 13, how is it possible to verify that they spend at least a quarter of their working hours in the home country? It is then a matter of the desire, and moreover the ability, of the State from which the worker has been posted to verify such information.

❒ The inconsistent definition of the temporary nature of the posting

Article 12 of Regulation (EC) 883/2004 on the coordination of social security systems exceptionally (by exemption of the *lex loci laboris* principle) provides that posted workers shall continue to be subject to the social security system in place in the State from which they are being posted and not that of the State in which they provide the service for a maximum of 24 months.

The directive on posted workers does not specify a maximum period for the posting, reflecting the ambiguity of the wording of Article 56 of the treaty, which offers a definition of cross-border service provision. It also fails to comment on the conditions regarding its potential renewal.

The directive offers only a vague definition of posted workers who carry out their work "for a limited period" outside of the State in which they "normally" work. Such vagueness facilitates the abuse of the system, whereby, in the worst-case scenario, the company providing the service can be merely a shell, with no undertaking in the country in which it claims to be based and with which employees will have no previous professional connection. The lack of specification in the directive regarding a maximum time frame for the posting makes it particularly difficult for the labour inspection services to verify its temporary nature.

Furthermore, whilst monitoring the application of the regulation requires close cooperation between the relevant administrations in the countries concerned, the directive fails to outline any sanctioned obligations in this respect. However, the relevant administrations in the home country often neither want to nor sometimes have the means to verify the conditions surrounding the posting, whilst those in the host country often lack some of the information required to efficiently monitor postings, if only for the purposes of identifying posted employees.

❒ Rules of cooperation and coordination that pursue different goals in both texts

The directive calls for cooperation between labour administrations, notably by means of liaison offices set up in each Member State, stating that "*such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities*". Whilst the cooperation of labour administrations is required with regard to issues associated with fighting illegal work, however, where social security issues are concerned the regulation provides only for cooperation regarding information.

The 2014 report to the French High Council on the Financing of Social Welfare observed that whilst, "*with regard to employment law, the directive puts together a combination of laws in force in the destination country, to form the 'hard core', and the law as applicable to the contract (generally that of the home country), for the remainder, the coordination regulation still provides for the application of the system in place in the home country. The posted worker therefore remains liable to contribute to their own social security system and able to benefit from the services it provides. The social security authority in the home country issues an 'A1 form' attesting to the posted employee's affiliation to the system, notably aimed at the authorities in the destination country.*[49] "

This "statement of the legislation applicable to the holder" is designed more to protect the rights of the bearer than to make it easier to monitor their situation, which could result in the circumstances surrounding their posting being called into question. The application of a rule that the legislation of a single Member State shall apply can, in principle, be seen as an indication of legal and physical security for the posted worker.

From a single market perspective, the aim of the regulation was to establish a common method for determining the social security legislation applicable to all workers covered by the free movement system whilst observing the characteristics specific to national social security legislation (Recital 4 of the regulation). In this respect, the regulation incorporates only a coordination system (as opposed to an administrative cooperation system) and fails to impose any obligations on the part of the home State other than that of informing the

49 French High Council on the Financing of Social Welfare, '*Point d'étape sur les évolutions du financement de la protection sociale*' (March 2014).

host State of the A1 forms issued. As a result, it strictly governs the possibilities for another Member State to contest the applicable legislation as originally determined by the first Member State.

The coordinating regulation thus provides that any changes to the posted worker's circumstances with regard to the social security provisions require the agreement of the authority issuing the A1 form confirming that the employee remains subject to the legislation of the State from which they have been posted. Any verification or correction of the information stated on the form must be requested from the home State from which the employee has been posted. This system is based on the principle of sincere cooperation between the administrations in the respective Member States with regard to sharing information but does not imply any compulsory advanced administrative cooperation with regard to monitoring.

The A1 form is not, however, as the law currently stands, a condition of the validity of the posting but rather simply prove that the individual is covered by a national social security system.

Generally speaking, the posting system, as outlined in the directive and the regulation, offers very real guarantees with regard to certain posting circumstances, and those regarding employees of major multinational groups, workers normally employed in countries with strong social welfare systems, and those posted on a temporary basis to work within another of the companies in the group located in another Member State, in particular. It does not, however, provide any real protection for posted workers in more precarious situations who are posted from countries in which the social security systems are far more fragile. Furthermore, the significant differences that exist between the two texts create a number of loopholes that operators can exploit at the expense of the employees concerned and that make it even more difficult to monitor the competent administrations.

Specific rules with regard to temporary employment and road transportation

❒ Temporary employment and posting: a problematic comparison

The circumstances surrounding the posting of temporary workers are outlined in Directive 96/71/EC: "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"[50].

The activities of temporary employment agencies in France are very closely governed. The prohibition of bargaining, the unlawful leasing of labour for the purposes of making a profit, and the offence of undeclared work, as suppressed by French employment law, does not exist in European Union law, despite the adoption of a sector-specific directive on temporary working in 2008[51].

50 Directive 96/71/EC, Article 1, paragraph 3, c).

51 The main objective of Directive 2008/104/EC is to promote equal opportunities for posted workers and other employees of companies that use posted labour in all Member States.

Directive 96/71/EC, however, provides for posting in the framework of temporary employment under the same conditions and with the same protection as with posting linked to service provision.

The majority of French legal provisions regarding temporary employment, which amount to a very high standard within Europe, therefore apply to posted temporary workers with regard to both the reason for and duration of the assignment and the specific aspects of the associated pay (and the payment of a termination allowance in particular). This being the case, the posting of temporary employees is, in principle, all things being equal, more costly than the posting of workers in the framework of providing a service.

Moreover, the obligation for a temporary employment agency to provide evidence of a financial guarantee that would cover the wages and social contributions of temporary workers in the event that the company should default is one by which foreign agencies are also bound[52].

Whilst the legal conditions governing the posting of temporary workers might appear somewhat unappealing in France, they are also largely circumvented owing to the fact that ordering parties have certain needs with regard to both labour and the provision of services in itself.

The vast majority of companies specialising in providing labour from other European Union countries are believed to be operating illegally, according to Prism'emploi, a professional federation operating in the sector. The online canvassing of French companies in the construction and agricultural sectors with regard to the provision of foreign labour is, of course, based on labour costs that are far lower than the minimums that should, in principle, apply.

One highly controversial practice, and one that very often amounts to fraud, is that of posting French or Belgian workers to their own countries by means of agencies based in Luxembourg, where social charges are lower[53].

The majority of fraud, however, stems from vagueness on the part of companies involved in leasing labour under the guise of service provision. By disguising a simple case of provision of labour as a provision of services in a given professional sphere they can avoid the additional costs associated with the French regulations governing temporary employment.

The administrative bodies of the States in which the service is being provided, of course, have the possibility of verifying that the rules governing entry to the national labour market and national social legislation are adhered to. The CJEU therefore recognises that a Member State can verify that a company established in another Member State and posting workers is not using the principle of the free provision of service for any purpose other than to provide the service in question, such as bringing in its own personnel for placement purposes or for the provision of workers, for example[54].

52 Rapporteur interview with François Roux, Managing Director of Prism'emploi (a recruitment and temporary employment professional federation), 21 May 2015.

53 The posting of French employees to France from Luxembourg is something of an exceptional situation in that, despite significantly lower contribution levels, the social security system in place in Luxembourg offers more generous welfare cover, particularly with regard to retirement and family allowances.

54 CJEU, 21 September 2006, Commission/Austria, C-168/04, pt. 56, cited by Nicolas Moizard of the University of Strasbourg's social law laboratory.

French legislation suppressing illegal work enables the judge to characterise a service provision contract as an unlawful lease of labour based on factual information[55].

The Court of Justice is, however, highly vigilant when it comes to the proportionate nature of the measures taken by States and does not hesitate to condemn the latter in the event that it believes their checks to present a hindrance to the freedom of service provision. In 2011, for example, it ruled that, in subjecting temporary employment agencies providing their services within the Brussels capital region to the obligation to have the sole purpose of providing labour and requiring them to have a specific legal status, Belgium had violated Article 56 of the TFEU regarding the free provision of services[56].

In its Vicoplus ruling dated a few months earlier, however, the Court of Justice recognised that States had a right to exercise extensive control in cases where the posting was intended for the purposes of providing labour. The case concerned fines imposed on the company Vicoplus for having posted Polish workers to the Netherlands, for a temporary period following the accession of Poland, without having obtained work permits. The Court, in its ruling, distinguished the provision of labour from the temporary posting of workers who are sent to another Member State for the purposes of undertaking work there in the framework of a service provision agreement. In the latter case, the posting of workers is an accessory to the provision of the service on the part of the employer.

In this case, the Court validated the notion that posting with the sole aim of providing labour is likely to have an impact on the labour market in the Member State in which the beneficiary of the service is located and that a Member State should be able to verify that the provision of a service is not, in actual fact, aimed simply at providing labour that is not covered by the principle of the free movement of workers.

According to Fabienne Muller's interpretation, the CJEU, in the framework of the Vicoplus ruling, successfully adopted an approach that separated the different types of posting for the purposes of looking at their respective consequences in terms of the leeway granted to Member States. It therefore partially agrees with the French understanding and could approve national measures that might prove detrimental to the free provision of services if it were to be proven that the movement of labour for the sole purpose of provision disrupted the labour market in the host State[57].

❒ The international road transportation of goods: Community regulations faced with extreme mobility

Employment law as applicable to the road transport market is subject to significant uncertainty and differences in interpretation.

Transport law permits hauliers to use their vehicles to transport goods internationally, perform cabotage operations, transport goods across borders and undertake combined transport operations. The extreme levels of mobility involved in such activities within a

55 In a ruling dated 9 November 2010, the Supreme Court branded a service provision contract between a Luxembourg-based company and a series of companies established in France an unlawful leasing of labour, highlighting the complete integration of the employees provided within the teams belonging to the beneficiary company and the absence of any technical expertise specific to the sub-contractor. Supreme Court, Crim Ch., 9 November 2010, appeal n°09-88759.

56 CJEU, 30 June 2011, C-397-10 Commission/Belgium.

57 Muller, F., 'Détachement, mise à disposition, déplacement de travailleurs, prêt de main-d'oeuvre : *what else*?' in *Les nouveaux défis du contrat de travail,* Report on the symposium of the Labour Institute in Bordeaux, 18 March 2011.

commercially united European area makes it particularly difficult to identify the social rules that must apply to the drivers concerned, as demonstrated by the current situation in the European road transport market. Sub-contracting practices have significantly increased in a highly competitive environment, with the majority of international haulage companies based in Western European countries having created subsidiaries in Central and Eastern European countries where social and fiscal costs are significantly lower.

In actual fact, a large proportion of international and cross-border transport activities, and even cabotage operations performed using vehicles registered in Eastern Europe, are performed by drivers who are subject to the pay and employment conditions in force in these countries.

In France, meanwhile, although such activities are targeted for posting fraud in the 2013-2015 national plan for fighting illegal work in the same way as the construction sector, a very small number of violations of this type are reported in the road transportation sector, leading the bodies representing employers in the sector to believe that posting is not the problem where the road transport sector is concerned[58].

Posting and cabotage: coordination difficulties

The term 'road cabotage' refers to the ability of a European haulier not based in the country in question to transport goods by road between two points within a State other than that in which it is based. Cabotage operations are intended to optimise returns with the aim of avoiding cases of vehicles deadheading following an international transport operation. Cabotage is, in fact, a form of domestic transport but is considered an extension of international transport.

This option was introduced following a 1993 regulation and was fully liberalised in 1998. Despite its theoretically temporary nature, cabotage became more widespread over the course of the 1990s without any real limitation on the duration of such operations and in accordance with the social conditions in place in the employer's home country. In 2005, French hauliers challenged the Commission on the reasons for failing to apply the directive on posting to the road transport sector.

There followed several years of work and discussion that resulted in the adoption of Regulation 1072/2009/EC, which limited cabotage activities to a period of seven days following the unloading of the internationally transported goods and to three transport operations. The recitals of the Regulation state that the provisions of the directive on the posting of working should apply also to cabotage[59], yet at the same time it is recognised that the rule regarding the seven-day maximum period means that cabotage is covered by the exception outlined in Paragraph 2 of Article 3 of Directive 71/96/EC. The provisions regarding the minimum wage and the minimum duration of paid annual leave in accordance with the conditions that apply in the State in which the service is being provided would not need to be applied.

Cabotage is therefore exempt from the most protective provisions of the directive, provided that it lasts only a very short period of time. It does, however, fall within the legal

58 Hearing before the ESEC Section for Labour and Employment of Florence Berthelot, Deputy Managing Director of Legal and Social Affairs at the French National Federation of Road Transport (FNTR), 13 May 2015.

59 Recital 17 of Regulation (EC) 1072/2009/EC: "*The provisions 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 apply to transport undertakings performing a cabotage operation.*"

scope of posting. The French authorities should not renounce all requirements for prior declarations to be made in the transport sector.

The fact remains that the 1996 directive should apply to transport operations taking the form of a provision of services but not covered by the definition of cabotage in the sense of the 2009 regulation. This may concern cross-border transportation between two countries undertaken by a company established in a third country, in which case foreign companies providing road transport services must submit a separate prior declaration of posting for all operations leaving France and lasting eight days or more to the labour inspectorate of the country from which the initial operation departs[60].

The European Transport Workers' Federation (ETF) is in favour of the full and entire application of European law

The 'road' division of the ETF has expressed its well-argued support for the notion that the directive on the posting of workers should clearly apply to those working in the road transport sector and that its scope does not, *a priori*, exclude any form of transport agreement. The criteria governing the application of the directive do not, therefore, limit its scope to drivers performing cabotage operations only[61].

According to this organisation, intra-group postings, the provision of drivers to haulage companies for the undertaking of temporary operations and the execution of trans-national service provision agreements (the provision of transport services on behalf of a third party involving at least two co-contracting parties established in different States) constitute situations that fall within the scope of the posting of workers.

In all cases in which the driver is not governed by the provisions of the posting directive, the ETF calls for the implementation of Regulation 593/2008/EC on the law applicable to contractual obligations, also known as Rome I, Article 8, paragraph 2 of which states that *"to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. "*

It should be noted that the application of the provisions of the Rome I Regulation regarding location concerns all aspects of the employment contract, including social contributions, meaning, for example, that a driver from Eastern Europe who operates out of France on a regular basis on behalf of a haulage company that is itself established in Eastern Europe would have a French employment contract and that the social contributions pertaining to their pay would be paid in France.

The 'road' division of the ETF has made the application of the Rome I Regulation a greater priority than even those of the directive on posting insofar as the provisions regarding the employment contract outlined in this regulation span a large number of international transport situations that currently often result in abusive social practices[62].

60 MEP Gilles Savary, *Report produced on behalf of the Commission on Social Affairs on the bills designed to increase responsibility on the part of project owners and ordering parties in the framework of sub-contracting and to fight social dumping and unfair competition,* National Assembly, 11 February 2014.

61 This approach is actively supported by the French trade unions operating in the sector, as highlighted by the hearing before the ESEC Section for Labour and Employment of Thierry Cordier, Secretary General of the CFDT Transport union, and André Milan, Secretary General of the FGTE-CFDT, 20 May 2015.

62 Rapporteur interview with Roberto Parillo, President of the road transport division of the ETF, Brussels, 11 June 2015, and the ETF explanatory note on *the application of national minimum wage to the road transport sector: a measure imposed by the EU legislation*, Brussels (2 March 2015).

There would appear to be little grounds on which to dispute the notion that all of the protective provisions alluded to by transport unions are, in legal terms, applicable to the road transport sector and that they serve to help limit social dumping. The issue is rather knowing why there are now so few of them and why they are so poorly applied.

The French Federation of Road Hauliers (FFTR) has highlighted a series of practical obstacles and is relying on a stance taken by the European Commission back in 2006, whereby the international road transport sector is not, in principle, excluded from the scope of detachment although it is practically impossible to impose the directive within this sector.

The debate is nevertheless far from over, and certain Member States are now expressing their desire to apply the texts to their full extent. Germany has recently introduced a minimum wage that applies not only to cabotage but also to international transport and transit and can now rely on its very well organised customs services, which serve as both tax and employment inspectorates, to ensure that it is upheld.

Since it introduced its computerised 'Limosa' system on which companies must register, Belgium has required a prior declaration of posting for employees from transport companies undertaking cabotage operations.

In France, meanwhile, the law on growth and activity, which had recently been adopted by the parliament at the time of writing, plans to bring road, rail and river transport operations into line with the common law on posting (subject to the forthcoming implementing decrees). It outlines, within the French Transport Code, the specific conditions whereby transport companies are discharged from their obligation to submit a declaration of posting and outlines the conditions governing the connection between their representative in France and the relevant supervisory bodies. Furthermore, it gives structure to the responsibility shared by co-contracting parties within the transport sector by assimilating the recipient of the transport agreement with the ordering party[63].

European social dialogue is another significant factor in this rather flourishing context and one that has been gaining ground for a number of years through the involvement of employer and trade union representatives from both Eastern and Western Europe. In December 2012, European professional employers' organisations and trade unions signed a joint declaration opposing the complete liberalisation of the road transport sector having deemed the level of social harmonisation that existed between the Member States to be insufficient. This sector-specific social dialogue continues with the aim of negotiating a European agreement regarding a social code for the road transport sector and, eventually, transposing this agreement into a transport regulation.

Certain national employer federations, such as the French FNTR federation, are campaigning for a global and integrated European system that would apply to mobile workers[64].

63 Article 96b of the law on economic growth, activity and equal opportunities.

64 Hearing by the ESEC Section for Labour and Employment of Florence Berthelot, Deputy Managing Director of Legal and Social Affairs at the French National Federation of Road Transport (FNTR), 13 May 2015.

The consequences of the dichotomy between employment and social security legislation

The application of the legislation in force in the home country with regard to those rules of the directive that fall within the 'hard core' and the principle of affiliation to a single social security system partially dealt with a concern regarding the protection of posted workers. The various forms of posting and the operations that employers might undertake in their attempts to circumvent the law in the home country make for a context that is conducive to fraud in posting situations.

Furthermore, the temporary nature of the posting phenomenon is dealt with in a very ambiguous manner in the European Union's body of legislation. With regard to Directive 96/71/EC, the "limited period" during which the posted worker undertakes their work within another Member State is not specified whereas a maximum duration of 24 months is specified in the social security coordination regulation in the case of workers covered by Article 12 thereof. This also reflects the difficulty associated with coordinating multi-activity and posting within the coordination regulation.

This ambiguity regarding the duration of posting might be attributed to the principle of prohibiting restrictions on the free provision of services within the EU as outlined in Article 56 of the Treaty on the Functioning of the European Union. This tension between the temporary nature that is logically associated with the cross-border nature of service provision and the intention on the part of the European legislator not to restrict this freedom is apparent in Directive 2006/123/EC regarding services in the European market. The 'Services' directive deals with both the freedom of service provision and the freedom of establishment. The latter cannot, in fact, be distinguished from the free provision of services under any circumstances since an individual or a company seeks to establish a presence in another Member State for the purposes of providing services there.

As a result, whilst the activity must, by definition, be limited in terms of duration in order to maintain its foreign nature, services provided outside of the country in which the company's head office is located may, nevertheless, be of a shorter or longer-term nature. There is nothing against a service provision activity becoming so extensive that it needs to establish a presence in the country in which it takes place. In such circumstances, it is easy to see why the time frame for posting, as an accessory to the provision of services, remains so poorly defined within European law[65].

Neither is there anything against a very short-term service provision, such as certain transport operations, for example, being repeated many times. In this respect, the only rule that applies with regard to determining an employee's affiliation to a social security system is the 24-month rule, although the application thereof in certain sectors may conflict with the original purpose of the directive on posted workers.

65 Europedia.moussis - Free provision of services in the EU. http//:www.europedia.moussis.eu

Box 5: Three consequences of the lack of harmonisation between European social security and employment laws

Case 1

The case of an employed HGV driver from country A, posted on an almost permanent basis to country B for the purposes of providing a transport service between this country and the neighbouring countries or performing cabotage operations.

If the same employed HGV driver makes return journeys between country B and the neighbouring countries can this still be considered habitual activity in the home country? The answer to this question is negative from an employment law perspective insofar as the services that the driver normally provides do not involve them departing from their home country.

The most common case, however, is one whereby employed drivers providing international transport services from another Member State are employed in accordance with the conditions in force in their home country. Such cases involve a clear violation of the Rome I Regulation, provided, of course, that the necessary checks are performed.

Furthermore, the 24-month time frame allows for posting practices that represent clear cases of fraudulent circumvention of the law, particularly where cabotage operations are concerned.

A case of fraudulent circumvention of the law then tends to develop whereby multi-establishment transport companies switch employment contracts from the law of country B (for example France) to country A (for example Croatia) in order to employ these employees as workers posted to the country in which their initial employment contract was signed for the purposes of performing cabotage operations. In such cases, the worker posting regime can be applied. Employees originally subject to French employment law can therefore be employed by a Croatian establishment as posted workers for a period of 24 months for the purposes of performing cabotage operations between Marseille and Besançon.

Case 2

The case of an employee posted in the framework of an intra-group mobility initiative from an establishment in country A to an establishment in country B. The duration of the posting, with regard to the social security system in place in the home country, is 23 months and 29 days.

If there are no checks in place to ascertain that this posting is not related to international service provision, it is highly possible for this employee to avoid the *lex loci laboris* principle to which they should be subject. In order to achieve this the inspection services must ascertain that the existence of an establishment exceeds the framework of international service provision. Registration on a list of national activities to which all companies, including national ones, are subject, in order to be able to perform such activities on a regular basis may be presumptive of such a situation. Nevertheless, not all activities are subject to such rules.

Case 3

The case of the false self-employed worker. In the absence of any controls sanctioning the existence of a hierarchical link, the social security regulation can guarantee that the directive is circumvented.

The self-posting system enables self-employed hauliers to post themselves from country A to country B for a period of up to 24 months, pass their activities off as an international provision of services of a temporary nature that they wish to provide in country B to the neighbouring countries when they are, in actual fact, employed on behalf of a third party, the latter being the actual service provider.

The difficulties of monitoring the application of the regulation

Sub-contracting and posting

With regard to the provision of cross-border services, it is not uncommon for sub-contractors to be used solely for the purposes of legally reducing labour costs by taking advantage of the difference in pay levels and social charges between local employees and posted employees, often on a fraudulent basis, by avoiding the obligations imposed by the State to which the employee has been posted where working and employment conditions are concerned.

Such infringements of the imperative rules regarding the minimum levels of protection outlined in the 1996 directive often go hand in hand with a violation of the provisions that define posting. The link between the sub-contractor and the ordering party may be such that the sub-contractor will not undertake any truly substantial activity in the country of establishment and that it will sometimes not serve any purpose other than to provide labour, meaning that the criterion regarding the length of the employment relationship in the country from which the worker is posted is questionable.

This type of situation is observed in the construction, agricultural and road transport sectors. [...]

Complex sub-contracting chains involving both local and foreign companies in the construction sector can cloud contractual relations to the point of making it very difficult to identify the legal employer of posted employees in cases where the latter are not in possession of an A1 form.

The law on economic growth, activity and equal opportunities endeavours to provide a substantial response by modifying Article L. 1262-3 of the French Labour Code with a view to making those companies whose activities in the State in which they are established fall exclusively within the scope of internal and administrative management (so-called 'letterbox' companies) exempt from the provisions relating to posting. It is important to discourage companies from establishing subsidiaries in countries with low labour costs with the primary, if not sole aim of recruiting workers there.

The emerging coordination of national administrations responsible for monitoring such situations

❒ Low-impact cooperative instruments for administrative control in the field

The implementation of Directive 96/71/ EC is based on the principle of sincere cooperation between States, but the directive provides only for mutual information obligations between "public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment" to help achieve this. The rule of subsidiarity, which maintains jurisdiction for monitoring such matters where Member States are concerned, has to limit, as European law currently stands, more advanced coordination that exceeds the exchange of information, with the exception of those that can be established in a bilateral framework.

Furthermore, such exchanges of information are administratively compartmentalised where they concern only those bodies deemed "competent" in the framework of the directive, namely those defined as such by State legislation. Whilst the directive provides for liaison offices to provide a link between labour administrations, and whilst Member States have generally identified such offices, which endeavour to exchange the information required whilst maintaining good relations, the positioning of and tools available to the administrative bodies appointed to perform such functions vary significantly from one country to another. Few Member States have established liaison offices that are competent in matters of both social security and employment, as have Belgium and Spain. France itself has two liaison offices, one that is competent in matters of social security and the other in matters of employment.

In practical terms, a labour inspector must contact the liaison office in their country so that the latter can submit a request for information to the liaison office in the posted worker's home country. This request may relate to the nature of the posting company, or whether or not the latter undertakes a substantial part of its activity in the home country, but one of the most important facts that must be established is whether or not a corresponding A1 form has been issued. If the labour administration in the home country has access to the competent services with regard to social security it may, of course, exert a degree of control. If this is not the case, there is nothing forcing it to do so as the law currently stands.

In 2007 the European Commission recognised that the shortcomings in administrative cooperation between the States, as well as the flaws observed in terms of access to information on companies and posted workers themselves, were comprising the correct application of the directive[66].

In a recommendation dated 31 March 2008 it suggested that Member States introduce an electronic information exchange system based on the Internal Market Information (IMI) system. It believed the use of an appropriate electronic information system that worked well and was designed to facilitate mutual support and the exchange of information between Member States to be a very effective means of overcoming many of the difficulties observed with regard to applying the relevant provisions. The regulation of 25 October 2012 regarding administrative cooperation by means of the Internal Market Information system placed the 1996 directive on the posting of workers among the European Union acts of which this system was intended to facilitate the implementation. It is important, however, to note that the scope of this regulation still fails to cover the necessary coordination with regard to social security for the purposes of effectively fighting worker posting fraud.

The Commission offered States support and assistance in the implementation of such projects and even went as far as agreeing to set up a high-level committee that would notably be responsible for facilitating the exchange of information between Member States and/or social partners, promoting the exchange of experience and good practices and monitoring improvements in administrative cooperation practices[67].

66 European Commission, Communication of 13 June 2007 on the posting of workers in the framework of the provision of services – maximising its benefits and potential while guaranteeing the protection of workers.

67 The Commission's Recommendation 2008/C85/01, dated 31 March 2008, regarding improving administrative cooperation with regard to the posting of workers in the framework of service provision.

❒ Untraceable cross-referencing between A1 forms and prior declarations of posting[68]

In actual fact, the absence of any system forcing the home State from which a worker is posted to quickly relay information and differences in administrative practices and means between countries have largely stood in the way of advanced administrative cooperation. One of the legal reasons for such obstacles relates to the design of the coordination mechanism in place with regard to social security. The social security regulation provides for a coordination mechanism designed solely for the purposes of implementing the regulation itself and not applying the 1996 directive. Based on the premise that Member States maintain sole jurisdiction in attesting to an employee's affiliation to the social security system in place in their home country, there are no provisions allowing them to cross-reference the issuing of A1 forms with prior declarations of posting in the host State.

The Electronic Exchange of Social Security Information (EESSI) system proposal passed in 2009, of course, is part of an information exchange approach[69] and must make it possible to replace paper forms with an electronic system for the exchange of data between national social security regimes. The implementation of this system, however, is proving to be a lengthy process and one that does not provide for any other form of administrative cooperation.

The absence of administrative cooperation is perfectly characterised in the provisions governing the A1 form, and those regarding the conditions under which it must be presented in particular[70]. In principle, it is these very forms that enable the social monitoring services in the Member State in which the service is provided to verify the actual origin of the posting and the correct application of the provisions of the social security coordination regulation.

The retroactive effect of the A1 form

It is important, however, to remember that the form is not legally bound as a condition of posting. Failure to present the A1 form at the request of an inspection officer does not, therefore, necessarily mean that the posting is unlawful.

CJEU case law has recognised the retroactive nature of the A1 form (formerly the E101), stating in the Bary Banks SA versus *Théâtre Royal de la Monnaie* ruling of 30 March 2000 that the coordination regulation did not impose a time frame for the issuing of the attestation. The Court believed that it was certainly easier for the certificate to be issued from the beginning of the period in question but that there was nothing against the E101 certificate coming into force retroactively and being issued over the course of or even at the end of the period in question.

The form cannot therefore be requested prior to the posting and can be produced at a later date to be presented to an administrative body or court to attest to the individual's affiliation to the social security system by which the form has been issued, thus introducing the possibility for a social security system to settle a contentious situation in retrospect. Furthermore, this delayed issuing of the A1 form might serve as something of a smokescreen regarding the actual date on which the posting began.

68 *Cf.* supra. The legal basis of the A1 form can be found in Article 19 of the aforementioned Regulation (EC) 986/2009.

69 Efforts to introduce the EESSI system have been under way since 2010 in accordance with Regulation EC 883/2004 modified by Regulations EC 987/2009 and 988/2009.

70 For a recent appraisal of such issues see Jorens, Y. and Lhernould, J.-P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, European Commision, May 2014.

It is also problematic in the event of an occupational accident; indeed, in accordance with employment law, such accidents must be acknowledged and compensated for as soon as they occur, and the care administered in the host country should result in the issuing of a claim for presentation in the home country. It would appear, however, that occupational accidents involving posted workers are virtually never declared as such either to the social security authorities or within healthcare establishments.

The 'evidentiary weight' of the A1 form

Secondly, the European Court of Justice insisted upon the 'evidentiary weight' of the E101 form (now the A1 form) in the early 2000s, when it had long promoted the merely declaratory value of the form. It clearly expressed its stance on the matter in the Fitzwilliam Executive Search ruling of 10 February 2000, first highlighting that the purpose of the E101 form was to facilitate the free movement of workers and the free provision of services. It maintained that, in accordance with the principle of sincere cooperation referred to in Article 4 of the Treaty on European Union, the competent institution was to undertake a proper appraisal of the facts for the purposes of applying the rules regarding the determination of the legislation applicable with regard to social security and ensure the accuracy of the information provided on E101 forms but that, in accordance with this very principle, institutions in the host State should consider the forms to have been lawfully produced and that they were bound by the latter in that they introduced a presumption regarding the regularity of a worker's affiliation to a social security system.

The Herbosch Kiere ruling of 26 January 2006 outlined the consequences of this principle of the 'evidentiary weight' of the A1 form with regard to the courts in the host State verifying the actual circumstances of the posting. Insofar as a national court does not have the ability to challenge the information provided on a form issued by another Member State, it cannot be held responsible for verifying the existence of an organic link between the posting company and the posted worker.

In this case, Belgian construction company Herbosch Kiere, which was responsible for managing two sites in Belgium, had signed two sub-contracting agreements with Irish company ICDS Constructors. An inspection of the relevant social laws on the part of the Belgian ministry found that Herbosch Kiere was the actual employer and that, this being the case, the corresponding social contributions were to be paid into the Belgian social security system. Following the preliminary referral of the matter by the Brussels Labour Court to the CJEU, the latter ruled that the evidentiary weight of the A1 form was at odds with a national court challenging the relationship between a worker and the company posting the worker.

The same case law could be applied to self-employed workers who are also in possession of an A1 form.

This being the case, the judge and, further upstream, the monitoring authority find themselves stripped of the possibility of reclassifying the relationship between workers in possession of the A1 form and the companies concerned.

The only feasible way of settling this type of dispute is to cooperate by means of the procedure put in place by the Administrative Commission for the Coordination of Social Security systems. In the event of any doubt regarding the validity of a form, the requesting institution must contact the issuing institution and ask that it withdraw or invalidate the form. In the event of a deadlock, the Commission shall intervene in a mediatory capacity.

In the event of persistent failure to reach an agreement, a Member State may instigate proceedings for failure to fulfil an obligation before the CJEU, which will examine the validity of the form in question[71]. This particularly long 'administrative-judicial' route would appear relatively poorly suited to the transience of the circumstances surrounding posted work.

In two rulings dated 11 March 2014, however, the French Supreme Court took a different approach when it condemned Vueling Airlines and EasyJet for their involvement in undeclared work[72]. It intentionally ignored the A1 forms in favour of the application of national legislation by adopting the criminal perspective of undeclared work, with the criminal judge exercising their full powers to establish the existence of an undeclared working relationship.

This ruling is now highly controversial. Some believe that the criminal classification of the acts of which both companies stand accused helps to rule out the principle of the evidentiary weight of the forms, with States maintaining full sovereignty with regard to identifying illegal working practices[73]. Others, on the contrary, claim that the national court has put itself in a difficult position by knowingly ignoring European Union law[74].

It is important, however, to underline that French law is very clear on the substantive issue of coordinating the freedom of service provision and the freedom of establishment. Article L. 1262-3 of the French Labour Code provides that a company "usually operating" in a country "on a stable and continuous basis" cannot invoke the provisions applicable to the posting of workers.

In conclusion, the shortcomings in cooperation between the various administrations with jurisdiction in matters relating to the posting of workers have eventually led to European Law leaving the home State solely responsible for the largest part of monitoring the practical provisions by which posted work is intended to be governed, thus compromising its efficacy. Awareness of this situation is gradually increasing,

resulting in the adoption of the 2014 implementing directive, Article 6 of which explicitly outlines a series of general mutual support principles aimed at helping to determine the true nature of the posting and prevent any abuse and circumvention of the regulations in force. Furthermore, a proposal for a decision of the European Parliament and the Council, establishing a European platform with the aim of strengthening cooperation aimed at preventing and discouraging undeclared work, is in the process of being examined[75]. This project explicitly states that it seeks to coordinate cross-border operational initiatives. The draft decision therefore formulates a series of objectives for the platform to seek to achieve, which include the following: to "*contribute to better enforcement of EU and national law, to the reduction of undeclared work and the emergence of formal jobs, hence avoiding the deterioration of quality of work, and to promote integration in the labour market and social inclusion*", notably by "*improving Member States' different enforcement authorities' technical capacity to tackle cross-border aspects of undeclared work*". This draft text, which reflects a

71 Nicolas Chavrier, '*Affaire EasyJet et Vueling Airlines. Une atteinte grave à la primauté du droit de l Union européenne*', *Semaine Sociale Lamy*, n°1641, 1 September 2014.
72 Supreme Court, Criminal Division, n°11-88.420 and 12-81.461
73 Hearing before the ESEC Section for Labour and Employment of Fabienne Muller, Head of the Masters 2 course in domestic, European and international law at the Strasbourg Faculty of Law, 29 April 2015.
74 Chavrier, N., *op. cit.*
75 Proposal for a decision of the European Parliament and of the Council of 9 April 2014, COM(2014) 221 final.

European Parliament resolution dated 14 January 2014[76], is of the utmost interest with regard to improving the efficiency of national labour inspectorates in the current European framework.

The effectiveness of the law in question: CJEU case law

The implementation of the law relies upon the competent administrations applying it, the relevant economic players themselves incorporating the contractual and legal aspects of employment and social security law, and the legal rulings returned in the event of a dispute. In this case, national courts, European Union common law judges and, in the event of a preliminary request or proceedings relating to failure to fulfil an obligation, the courts of the Court of Justice of the European Union are supposed to ensure the effectiveness of this law.

According to one widely accepted perspective, the case law of the Court of Justice of the European Union has tended to limit the scope of the laws applicable to posted workers in favour of the freedom of service provision. *"Beyond the difficulties inherent to the nature of posting and the lack of will on the part of European partners with regard to cooperation, it is important to underline that many of the monitoring measures put in place by Member States have collided with the relatively liberal case law of the Court of Justice of the European Union which strictly governs the monitoring options available to Member States with regard to ensuring the free provision of services within the EU".*[77]

Another trend that appears to be discreetly yet consistently emerging in the field of Community case law is that of recognising the monitoring means decreed by Member States to ensure the effective protection of workers' rights, provided, however, that these means are proportionate to the objective pursued and that they do not hinder the freedom of movement any more than is necessary[78].

Whilst the 1996 directive granted Member States limited room for manoeuvre with regard to applying the employment legislation of the host country to posted workers and undertaking extensive checks, therefore, it is with regard to the checks performed that the CJEU has proven to be more understanding where States are concerned.

❒ Case law that prioritises the free provision of services over the protection of workers and the fight against social dumping

In the name of the freedom of service provision, the CJEU has focused on stringently verifying the need for and the proportionality of national rules in light of the objectives pursued, in this case the protection of workers and the fight against social dumping.

The Court of Justice has based its reasoning in a number of rulings on a comparison between the national legislation designed to protect workers in the State in which the posting takes place and similar provisions of the law of the State in which the employer is based. The CJEC's Mazzoleni ruling of 15 March 2001, regarding the minimal wage provided for in the host State, states that the objective of protecting workers is achieved if the workers

76 European Parliament resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe.

77 Hearing before the ESEC Section for Labour and Employment of MEP Gilles Savary, rapporteur of the parliamentary bill *designed to increase responsibility on the part of project owners and ordering parties in the framework of sub-contracting and to fight social dumping and unfair competition,* 22 April 2015.

78 Hearing before the ESEC Section for Labour and Employment of Sophie Robin-Olivier, Professor of Law at Paris 1 Panthéon Sorbonne University, 22 April 2015.

concerned *"enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment".* It is important to draw a comparison that takes into account the various elements that help determine the employee's net income level (excluding charges and taxes). If this equivalence is found to exist, there is no cause for dismissing the application of the law in force in the employer's home country or country of establishment in favour of the law in force in the country of posting. Since the law in force in the country of posting may result in an awkward situation and administrative and financial charges for which the employer is liable, it is important that the employee significantly benefit from this in order for its application to be enforced[79].

As far as inspection services and courts are concerned, determining the equivalence of one system to another is a very complex matter, even in the event of optimal cooperation between the authorities in both Member States[80].

The 2007 Viking and Laval rulings, in which the CJEU enforced the primacy of the freedom of service provision with regard to Finnish and Swedish trade union organisations, are in keeping with the Mazzoleni ruling.

In the case of Laval, collective action on the part of Swedish trade unions was instigated with a view to enabling employees posted from Latvia to Sweden for the purposes of building a school to enjoy the benefits of the collective agreement in place in the Swedish construction sector. This action aimed to force the employer of the posted workers in question, namely Laval, to negotiate the terms of its membership to the collective agreement. Laval refused to negotiate and demanded that the application of the provisions in place in the home country with regard to remuneration and working and employment conditions be maintained in the absence of any general rules that would apply in Sweden.

The case was eventually referred to the CJEC, which ruled that the collective actions undertaken by the Swedish trade unions, and the blockading of a construction site in particular, were unfounded in that they were "not proportionate" and contravened the principle of the free provision of services. Furthermore, the Court put forward the argument that since the Member State did not have any general system in place for declaring collective agreements, the company was not obliged to apply a minimum wage or any collective agreements.

In order to comply with the CJEU's ruling, the Swedish government had new legislation on posted workers adopted on 15 April 2010, whereby trade unions are no longer permitted to undertake collective action to force a foreign company to adhere to the collective agreements in place in the sector, provided that the foreign company can provide evidence that it meets the minimum conditions required by the 1996 directive.

The Laval case law disrupted the Swedish professional relations system in two respects and its impact in the Nordic countries, which favour collective agreements over the law as a means of social regulation, was considerable. Not only do service provision companies established abroad fall outside of the scope of the Swedish collective negotiation system whereas they were previously included therein, but the law adopted in the wake of the

79 Lamy Social, 2015 Edition on the posting of workers in the framework of a service provision relationship. Evolution of Community law, 500-63.

80 Aforementioned hearing of Sophie Robin-Olivier.

Laval ruling undermines the monitoring mechanisms that were in place within the Swedish labour market and were based on the involvement of trade union organisations.

The Dirk Rüffert v. Land Niedersachsen ruling of 3 April 2008 concerns Germany and public procurement contracts. The law of the *Land* of Lower Saxony states that such contracts can only be awarded to companies that agree to pay their employees at least the rate provided for in the applicable collective agreement. In this particular case, workers employed by a Polish sub-contractor had received less than 50% of the minimum wage provided for in the regional collective agreement in place in the construction sector - an amount that corresponded to the minimum wage provided for by German law regarding the posting of workers. The contracting company was therefore condemned by a local court.

The CJEU dismissed the collective agreement on the grounds that it was not of general application. It also believed that the protection invoked for employees and applicable only to those involved in public procurement contracts did not represent an absolute need that could justify limiting the freedom of service provision. This being the case, the provision of the law of the *Land* of Lower Saxony that imposed this monetary clause where public procurement contracts were concerned was deemed not to comply with European law.

❒ Case law that is mindful of effective ways of ensuring that workers' rights are upheld has gradually emerged

Case law regarding monitoring means

The CJEU's mindfulness of effective ways of ensuring that workers' rights were upheld focused on the ability of the States concerned to impose certain obligations upon service provision companies for the purposes of monitoring posting operations, as well as, more recently, on trade unions' right to effective appeal before the courts.

The CJEU approved the obligation imposed by Member States to ensure that certain social documents were made available at the site, or at least in an accessible and clearly identified place within the host Member State to enable the relevant authorities of said State to perform the necessary checks[81]. It also recognised the obligation to have certain documents translated, including the employment contract, payslips and documents testifying to the hours worked and the payment of wages that were not excessively long and that were generally produced using standard formulas[82]. Finally, the obligation to keep a copy of documents equivalent to the "individual account" and the "payslip" stating the hours worked either in the workplace or at the registered address of the employer's agent or official representative within the Member State was also not deemed to oppose the freedom of service provision[83].

Likewise, the CJEU did not consider those systems whereby service provision companies were required to report the posting of workers to local authorities beforehand to be in conflict with the freedom of service provision. In any case, the terminology of the Court quite clearly shows that such "reports", which States were to submit in the form of preliminary "declarations", should not be assimilated to posting permits[84].

81 CJEC, Arblade, 1999, C-369/96.
82 2007, Commission v/ Germany, C-490/04.
83 CJEC, Dos Santos Palhota, 2010, C-515/08.
84 In the CJEC judgement on the Commission v/Luxembourg, 2004, C-445/03, the CJEC had specifically agreed to the obligation "*to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provisions of services justifying the deployment*".

Finally, the CJEU recognises that posting companies are forced to provide more information than companies established in the host State, but only to the extent that this difference in treatment can be justified by the objective differences that exist between these companies and those established in the host State.

The right to effective appeal on the part of trade unions for the purposes of protecting workers' rights: recent readjustments

The very recent Amattiliitto ruling appeared to introduce an additional approach to increasing the effectiveness of the rights of posted workers by admitting the appeal on the part of the Finnish Electrical Workers' Union on the basis of the directive on posted working, interpreted in accordance with Article 47 of the Charter of Fundamental Rights on the right to effective legal appeal[85].

In this ruling, the CJEU hinted at a readjustment between the freedom of service provision, on the one hand, and the protection of workers' rights and the conditions of fair competition, on the other. A Polish company had signed employment contracts with around a hundred employees that it had posted to Finland for the purposes of working on the electrification of a nuclear power plant construction site. The workers, believing that they had not been paid in accordance with the collective agreement of general application within the sector, conceded their claims for earnings to the Finnish Electrical Workers' Union, which then took on responsibility for recovering the wages owing to the workers by introducing an appeal before the Finnish judge.

The Polish company contested the authority of the Finnish union to represent Polish workers on the grounds that the concession of claims for earnings was prohibited by Polish law. It maintained that only the "basic" minimum wage had to be taken into account, to the exclusion of any other allowances, and that since the collective agreement fixed a wage based either on duration or on performance, it was at liberty to choose the most advantageous option.

The CJEU confirmed the validity of the concession of the claims for earnings on the grounds that any issues relating to the minimum wage to be paid fall within the scope of the law in place in the host country, in this case, Finnish law.

It ruled that preventing the electrical workers' union from taking the posted workers' case to court would constitute a breach of Directive 96/71/EC and the Charter of Workers' Fundamental Rights.

It stated that the host country determined the method by which the minimum wage was calculated and the chosen criteria, either by means of legislation or by means of a collective agreement of general application, including a minimum hourly or per-job wage, provided that the rules in force in the host country were binding and transparent. In any case, the employer in the home country is not permitted to offer a lower salary than that paid to local workers.

By the same reasoning, the host country clearly and transparently determines the rules governing the classification of workers into pay groups based on various criteria such as qualification, training, experience, role, etc. These criteria replace the criteria used in the home country, except in the event that the latter are more favourable to the worker in accordance with Article 3 §7 of the 1996 directive.

85 CJEU, 12 February 2015, Ammattiliitto, 2015, C-396/13.

It is significant that this ruling, which represented a case law U-turn, was returned following the directive on posting[86]. Unlike the Laval and Rüffert cases, however, representatives of the country of posting rely on an agreement of general application that outlines a series of clear and accessible rules for those employing posted workers. The nature of national employment law standards and the method by which they are produced are also decisive factors where the European judge is concerned. […]

Managing posting in Member States: a contrasting situation

The transposition of the European directives on posting and the practices adopted by administrations that apply both transposition laws and the social security coordination regulation vary greatly. […]

❒ In countries that use more posted labour than they send to other Member States

The provisions regarding prior declarations and notifications of posting

The prior declaration mechanisms accepted by the Court of Justice of the European Union have not been generalised in those countries that are net users of posted labour.

The report commissioned by the European Commission in 2011 for the purposes of assessing the implementation of the legislation on posted working recommended that covering the expenses and allowances associated with posting become an effective condition in order to ensure that the legislation on posted working be applied to such situations[87]. In the event of failure to establish such a situation, all of the laws in place in the host country may be enforced, but no such proposal, which would result in significant changes being made to the directive, has been adopted.

A more recent report shows the significant variations that exist between the practices associated with the issuing of the A1 form from one country to another, concluding that the principle of sincere cooperation is vital to the functioning of the social security system coordination regulation. Beyond this principle, it notes that good cooperation is dependent upon the exchange of information, but that the coordination regulation made virtually no reference to the methods to be used for issuing and withdrawing these forms. This being the case, the information base available within the various national schemes in place is far from consistent. The inconsistency between the various attestation systems can thwart the principle of sincere cooperation[88].

This situation, which is inadequate in many respects with regard to protecting workers' rights in both the host State and the home country, has caused concern among a number of trade union organisations, which have alerted the public authorities to some of the practices employers are adopting. Bulgarian trade unions, for example, have highlighted that the directive has been incorrectly transposed in their country, enabling those employing posted workers to state a place of work that is located in a foreign country in the employment contract whilst avoiding having to pay accommodation, meal or travel expenses.

86 Hélène Weydert, 'Travailleurs détachés dans l'Union : quel salaire pour le plombier ou l'électricien polonais ?', Legitech, 18 March 2015 http///www.legitech.lu/fr/news-and-blog
87 Van Hoek, A. and Houwezijl, M., *op. cit.*
88 *Cf.* Jorens, Y. and L'Hernould, J.-P., report to the European Commission, 2014, *op. cit.*

The situation with regard to monitoring posting conditions from the host country

Within the framework of the free provision of services, the basic social security coordination regulation does not consider the issuing of an A1 form to be a prerequisite to posting. It might, therefore, appear paradoxical to ask that the administrative bodies responsible for issuing A1 forms monitor the actual circumstances surrounding the posting of the worker in question.

Nevertheless, Recital 12 of the 2014 implementing directive states that "*the lack of the certificate concerning the applicable social security legislation referred to in Regulation (EC) No 883/2004 of the European Parliament and of the Council 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*". Given that the task of classifying the posting situation in the host country falls within the jurisdiction of this country in accordance with Article 2 of the 1996 directive, establishing whether or not this certificate exists requires the conditions surrounding the posting to be examined.

In some cases, however, the administrative bodies responsible for issuing A1 forms accept sworn declarations from the employers concerned, notably for the purposes of attesting to any potential periods during which the individuals concerned may or may not have been in possession of forms E101 and E102 or A1 portable documents. Clearly, then, not all of the competent administrations keep a record of A1 forms issued in the past for the purposes of performing the necessary checks themselves.

Some Member States are now becoming aware of the need for more stringent monitoring, particularly with regard to the bases for calculating income tax and social security contributions. The application of the 1996 directive on the posting of workers therefore resulted in an extensive tax dispute between the national tax administration agency and Romanian temporary employment agencies, some of which had been under-declaring the number of hours worked and paying the majority of their wages in the form of allowances, which, in principle, do not count towards the basis on which taxes and contributions are calculated[89].

The trend for increased administrative cooperation and the interest on the part of posting countries in greater control over the bases on which their contributions to public finance are deducted should help improve a situation in which too few resources are allocated to preventing clearly unlawful posting practices in the home countries concerned.

89 *Cf.* Appendix.

Efforts to facilitate monitoring and the 2014 implementing directive

National initiatives: Limosa declarations in Belgium and the FKS inspection administration in Germany

❒ Limosa: a simple yet comprehensive centralised online recording system that is particularly useful in detecting risks

The Belgian National Social Security Organisation (ONSS) has designed and developed internally a service aimed at employers and ordering parties for the purposes of making the formalities regarding the prior declaration of posted workers more straightforward and efficient. The service was launched in April 2007 as a result of an accumulation of competence in the field of gathering electronic data.

Limosa is a prior declaration website aimed at employers and ordering parties alike and designed, as its name suggests, to be consistent with the existing online declaration system for all resident workers (Dimona), with the exception of the self-employed, who are subject to a separate system. The site also serves an informative purpose where national and foreign employers are concerned in that it provides rapid access to the standards that apply and the potential sanctions that might be imposed in the event of failure to declare (primarily administrative penalties). It is therefore translated and can quickly provide information designed to warn potential non-declarers of the risks to which they expose themselves.

The system is intended to serve as a particular deterrent by encouraging ordering parties to ensure that sub-contracted service providers submit the relevant declarations without, however, denying them access to the market.

The experiences taken from the system have left the responsible parties somewhat unconvinced. Despite being particularly efficient in terms of its ability to detect risk, the system raises the issue of the reaction times of the relevant monitoring services, which are generally limited, and their ability to impose sanctions, which also conflicts with the criminal justice tools designed to fight illegal work. Belgium has more systematically focused on administrative sanctions, of which it now has quite an array at its disposal.

From the Community judge's perspective, the Limosa system has not been invalidated in terms of either its principles or its functioning. The CJEU nevertheless considered the obligation for self-employed individuals to register online to be disproportionate[90].

❒ The German administration responsible for monitoring posted workers: constantly increasing specific resources

Germany has adopted an alternative model that places the emphasis on the resources devoted to monitoring, choosing, since 2004, to leave initiatives designed to fight clandestine work in the hands of the customs services. The jurisdictions of the tax inspection services and the Federal Employment Agency have therefore been combined into a single body responsible for monitoring declarations submitted by employers posting workers to other locations.

90 CJEU, 3 December 2014, Thermotech NV, C-315/13.

The resources devoted to this task have been entrusted to a special division of the customs body known as the *Finanzkontrolle Schwarzarbeit (*FKS) and have been significantly increased. […]

The 2014 implementing directive and the risks associated with its transposition

In light of the problems highlighted by the implementation of the 1996 directive, and mainly the vagueness of the corresponding texts leaving room for abuse that cannot be legally condemned and the obstacles to monitoring initiatives on the part of the State in which the service is being provided, European social partners in the construction sector were very quick to put pressure on the Commission to obtain a substantive assessment of the directive. The directive itself provided for a re-examination by the Commission on 16 December 2001 at the latest "*with a view to proposing the necessary amendments [...] where appropriate*". In actual fact, in an initial report produced in 2003, the Commission highlighted a number of difficulties in implementing the directive in several Member States but did not follow up on this observation[91].

The increasing variation in the levels of economic and social development observed within the European Union following the 2004 expansion and the feelings aroused by the Viking-line and Laval rulings that deprived trade union organisations of a significant degree of their ability to take collective action in the context of cross-border service provision have led the European Trade Union Confederation to request that the directive be revised. There followed much lively debate between the European institutions and social partners concerned.

With this in mind, the Commission reacted by presenting a proposal for an implementing directive in 2012 that *ipso facto* ruled out the most radical option, namely that of rewriting the 1996 directive.

The European Economic and Social Committee published an opinion on this proposal in September 2012, in which it declared its support for the principle of joint and several liability on the part of co-contracting parties that should be implemented in all Member States, a precise definition of "required diligence" that would likely exonerate the co-contracting party of this responsibility, and the possibility of trade union organisations in the host country instigating administrative and legal procedures on behalf of posted workers[92].

An initial meeting of the European Ministers of Employment in October 2013 highlighted the opposition between the Western continental European countries, who supported increased control, and the group comprising the United Kingdom and the Eastern European countries, which were against tighter regulation. A compromise was finally reached by qualified majority thanks to the rallying of Poland.

In accordance with the compromise that was reached, the option of revising the 1996 directive was definitively ruled out in favour of the production of an implementing directive

91 Cremers, J. and Donders, P., *The free movement of workers in the European Union,* European Institute for Construction Labour Research, Brussels, p.4-6, (2005).

92 Janson, T., (rapporteur), *Le détachement de travailleur*. Opinion of the European Economic and Social Committee dated 19 September 2012 AC SOC/460.
Rapporteur interview with Georges Dassis, President of the Workers' Group of the European Economic and Social Committee, and Denis Meynent (CGT), Xavier Verboven (FGTB), Francisco Soriano and Susana Florio of the Workers' Group, 11 June 2015.

validated by the Parliament in April 2014. This text resulted in progress being made in five areas, each with notable shortfalls:

- the text provides a non-exhaustive list of the criteria that can be used to verify that a company is actually operating in the State in which it is established. The overall assessment must be based on a series of concordant factors. It is important that States be given the means to fight 'letterbox' companies that are fictitiously established in the country from which the worker is being posted;
- the same series of concordant factors, based on indicative criteria, is used to assess the temporary nature of the posting;
- the implementing directive imposes maximum time frames for responding to requests for information on the part of another Member State but only in the case of 'reasonable' requests, without further precision;
- Article 9 of the directive outlines a list of "administrative requirements and control measures" that are theoretically compatible with European legislation. This provision aims to secure monitoring efforts on the part of the host States concerned with regard to the CJEU, which has thus far imposed a restrictive view of the legal capacity of the States concerned to manage posted work. This list is not, however, restrictive, to the extent that each State can add to it provided that it demonstrate that new measures are "justified and proportionate" and that it inform the Commission of its decision;
- joint and several liability on the part of the ordering party is introduced in Article 12 of the directive in the event of failure to pay the net minimum wage or in the event of any social contributions being unduly withheld, for the purposes of monitoring sub-contracting operations. In any case, the States concerned are only required to apply this provision to senior sub-contractors and only in the construction sector. They do, however, have the option of extending these measures to other sectors and reinforcing them provided that they are "non-discriminatory and proportionate" and that the Commission is informed of the decision. With regard to joint and several liability, therefore, the European legislator has developed a system that is tailored to reflect the desire on the part of each Member State to apply greater or lesser pressure to sub-contracting chains.

These latter two points have been fiercely debated within the Council of Ministers and have met with disagreement from the European Parliament, which hoped to take the matter further. With regard to Article 9, the Parliament called for an exhaustive list of compulsory control measures that would be supplemented by a non-exhaustive list of optional measures. Where Article 12 was concerned, meanwhile, it expressed a desire to extend joint and several liability to all sub-contractors and all rights to which posted employees are entitled[93].

It is important to note that in either case, the option available to States of taking appropriate measures that exceed the basic rule outlined in the directive is not without a certain element of risk in that it *ipso facto* places them under the control of the Commission and the CJEU, which will verify that the measures taken are indeed "non-discriminatory and proportionate". A single rule that reflected a high level of requirement, as the European Parliament so wished, would have offered the advantages of greater clarity and greater legal security where States were concerned.

93 Freyssinet, J., The European Directive on Posted Workers. Note Lasaire n°42 (May 2014).

The transposition of the 15 May 2014 directive in France

The 'Savary' Law of 11 July 2014, decree n° 2015-364 dated 30 March 2015 and the 'Macron' bill on economic growth, activity and equal opportunities dated 19 February 2015 provide additional legal means of fighting fraud associated with the posting of workers through four series of measures:

- tightening the formalities associated with posting;
- increasing liability on the part of ordering parties with regard to their co-contracting parties and sub-contractors;
- creating a new administrative sanction specific to posting situations;
- expanding alternatives to trade unions to defending posted workers and victims of undeclared work.

The 'Savary' law was drawn up under a completely unique set of circumstances. The law itself, which was adopted on 10 July 2014, must be regarded as the transposition of the European directive of 15 May 2014 into national law. It does, however, stem from a national initiative that pre-dates the European text. The bill of 8 January 2014 anticipated the adoption of the directive. French parliamentarians needed to deal with the social and economic emergency represented by the mass development of posting fraud in the construction and civil engineering, transport, agricultural and catering and hospitality sectors[94].

In the framework of their undertakings, however, MEPs nevertheless made their positions known regarding the proposal for an implementing directive presented on 21 March 2012. The information report by MEPs Gilles Savary, Chantal Guittet and Michel Piron presented on 29 May 2013 before the European Affairs Committee highlighted the need to tighten the provisions proposed by the Committee regarding national control measures and the joint and several liability of the ordering party. These recommendations were supported by the National Assembly in a European resolution adopted on 11 July 2013. Thanks to their early initiative, French parliamentarians succeeded in indirectly influencing the definitive drafting of the implementing directive.

The profound reasoning behind the bill related to the increasing and systematic use of posting as a social optimisation tool:

"What led me to submit a bill was observing that we were in the process of moving away from a form of worker posting that involved supporting material exchanges between Member States, which had long been the case, and towards a form of posting that was becoming a systematic part of social optimisation strategies through the use of false posted workers."[95]

The philosophy behind the law passed on 10 July 2014 is rather a simple one, namely that, since it is impossible to undertake exhaustive checks given the finite resources available to inspection services and the difficulty they have in comprehending the very complex arrangements in which labour service providers and user companies engage, the sanctions imposed must be quick and exemplary. It must also be possible to apply them to companies established in France and involved in fraudulent activity by invoking their liability as the ordering party.

94 Bill designed to increase liability on the part of project owners and ordering parties in the framework of sub-contracting and to fight social dumping and unfair competition, French National Assembly, n°1686, 8 January 2014.

95 Aforementioned hearing of MEP Gilles Savary.

The new French law spans all sectors of activity whereas the implementing directive specifically targeted the construction and civil engineering sectors.

- ❒ Tighter formalities associated with posting *[…]*
- ❒ Increased liability on the part of ordering parties and project owners *[...]*
- ❒ A new administrative sanction: suspension of service provision *[…]*
- ❒ Civil court action on the part of trade unions to defend the rights of posted employees *[…]*

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* *

Major trends in European law, which relate to both the circumstances surrounding its formulation and the political power struggles that frame its interpretation, have impeded the application of provisions designed to ensure equal treatment for workers to the point of making the practice of posting, in the context of economic imbalance that is currently affecting the European Union, appear to be a vehicle for the lowest social contribution rates and unfair competition.

The issue of worker posting is dealt with separately under European regulations according to whether it is being examined from an employment law perspective or from a social security law perspective. This division between sources of law, with the directive on posted workers on the one hand and the social security coordination regulation on the other, has led to the weakening of the rules governing the posting of workers (temporary nature, connection with the posting company, the latter having to undertake a substantial part of its activity in the home country, etc.). It therefore becomes very difficult to verify the limited duration of the posting, the length of time for which the employee has habitually worked in the home country and the company's actual connection with the country from which the individual is being posted, and even to enforce such factors against the posting company in question. with regard to the transport sector, the very boundaries of the regulation to be implemented continue to fuel debate, thus placing both companies and employees in something of a legal no man's land.

Furthermore, an imbalance between the economic and social objectives of the treaty that has been accepted by the Council and the Commission since the 2000s has created a series of major obstacles to the application of the protective rules specific to posting in host States. In this respect, it is important to note that the Commission and the Court of Justice have relied on a literal interpretation of the TFEU, Article 56 of which gives the Union institutions full jurisdiction over the defence of the freedom to provide services, whereas they have only at best the power to impose minimum requirements with regard to the matters relating to employment law outlined in Articles 151 and 153 of said treaty. It is still important that they not hinder the effective application of these minimum requirements where the latter are clearly incorporated in European law, as is the case in the framework of posting with Directive 96/71.

Until very recently, the application of provisions that were favourable to workers and necessary for the purposes of avoiding social dumping between Member States was perceived by the European authorities as going against economic freedoms and the realisation of the single market and often assimilated with the expression of protectionist tendencies on the part of the States concerned. Until the early 1990s, however, the perception of complementarity between the aim of raising social standards within the European Union and increased economic integration had prevailed. As of 2007, the CJEU started to challenge the conventional practices adopted by certain countries and the role that trade union organisations could play in implementing the protective provisions outlined in the directive in a number of its rulings, owing to the local nature of the rules thus imposed upon foreign service providers.

There is, however, very recent evidence of a readjustment as a result of a combination of renewed European legislation, national measures regarding tighter controls on monitoring posted work, various initiatives on the part of social partners and a significant change of direction in the case law. With regard to the legislative component, the implementing directive of 15 May 2014 recognises and indeed outlines the conditions surrounding the verification in host countries of the temporary nature of the posting and the actual operation of the posting company in the State in which it claims to be established. It also introduces the possibility of invoking the liability of the ordering party with regard to wages and working conditions and paves the way for advancing the status of the A1 certificate on the basis that the absence of such a certificate might make it easier to challenge the circumstances surrounding the posting.

Prior to or in anticipation of the adoption of this directive, certain Member States increased the legal tools and administrative resources available to them with the aim of improving both awareness and the monitoring of worker posting practices. It should be noted that some of the provisions of the directive on the awarding of public procurement contracts, adopted on 26 February 2014, reflect this same trend towards the regulation of posting[96].

Recent changes may, however, appear relatively precarious. The impact of the Amattiliitto and Vicoplus rulings is as yet difficult to ascertain. The monitoring powers of the host States concerned following the adoption of the implementing directive have not been fully clarified and it is important to note how the Court of Justice will receive national transposition measures. Finally, the effectiveness of social law as applicable to posting is based solely on the monitoring and control capacities of the host States concerned, with the Commission remaining firmly in control of the leeway available to the latter in this respect. At the same time, there is still a long way to go before the objectives pertaining to administrative cooperation between Member States are achieved.

The European Parliament eventually adopted the implementing directive on 16 April 2014 having failed to obtain a more concrete text from the Council, after a series of amendments designed to reinforce the relevant obligations and controls had been

96 Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Reminder of the authority on the part of the States concerned to ensure that the relevant legal and contractual provisions relating to social and environmental matters are applied (Article 36, §2), the system for the verification of abnormally low tenders by the contracting authority (Article 84), the right to information on sub-contracting (Article 88) and the possibility of forced compliance with a social or environmental standard (Article 61).

postponed as a result of the compromise reached between the States. Aware of the fact that the adoption of this text had not succeeded in appeasing the concerns expressed in economic and social circles within certain Member States, Jean-Claude Juncker, the first President of the Commission elected by the Parliament, agreed to strictly enforce the directive and, eventually, to undertake a targeted review of its provisions[97].

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* *

Proposals

Opportunities for reforming the posting of workers at European level

Reforming the law on the posting of workers by means of a readjustment in favour of fundamental social rights

The Economic, Social and Environmental Council recommends that Directive 96/71/EC on the posting of workers and social security coordination regulations be revised to ensure that the rule on equal treatment for posted workers and other workers within the European Union be upheld with regard to pay in accordance with the 'equal pay for equal work in the same workplace' principle. It asks that the future directive take full account of the objective of social harmonisation in the progress assigned to the European Union by the TFEU. This principle should form the legal basis of the directive on the posting of workers along with Article 57, which defines the provision of services.w

The directive should explicitly state that, in order to invoke the latter, service providers must have covered the costs (travel, accommodation and meals) associated with the posting of workers.

The ESEC would ask that the European legislator consider the compatibility of the provisions regarding workplace accident compensation (in accordance with the stipulations of the social security system in place in the home State) with ILO Convention n°19 regarding "Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents".

97 *"At the same time, I will ensure that the Posting of Workers Directive is strictly implemented, and I will initiate a targeted review of this Directive to ensure that social dumping has no place in the European Union. In our Union, the same work at the same place should be remunerated in the same manner."* Jean-Claude Juncker, Opening Statement in the European Parliament Plenary Session, 15 July 2014.

The ESEC would recommend that the French government take action to ensure that 'joint and several liability' be extended to all sectors of activity in the framework of a revision of European law on posted workers.

Consolidating the legal rules governing the posting of workers

❒ *Negotiating the revision of the social security regulation to more effectively guarantee the procedures for issuing the form and making this a condition of posting*

The ESEC would call upon the French government to take the necessary measures to review social security regulations to ensure that the A1 form is systematically produced prior to the start of the posting operation in order to create the best possible conditions for the posting of workers within the EU. Those employing posted workers and individuals holding multiple jobs, as well as self-employed workers choosing to self-post, would then be obliged to immediately present the form at the request of the authorities responsible for social control in the host country in question. Failure to present the form would, at the initiative of the social security body or bodies in the country in which the service is being provided, result in the instigation of proceedings to recover the corresponding social contributions.

Furthermore, in order to guarantee effective administrative cooperation between Member States, the State from which the worker is being posted would have to be held responsible for the accuracy of the information provided on the form, notably with regard to the identification and physical address of the company behind the posting.

Member States would be obliged to ensure the reliability of the information provided, with failure to do so potentially resulting in the Commission instigating proceedings for failure to fulfil an obligation in accordance with Articles 258 and 259 of the Treaty on the Functioning of the European Union.

❒ *Encouraging negotiation within sectoral European social dialogue committees to contractually establish a sector-specific duration for posting*

Given the known difficulties associated with establishing a single maximum duration for the posting of workers, the ESEC would suggest that such a duration be determined for each sector of activity in the framework of European social dialogue. It believes that this objective could be achieved through negotiation within European Union sectoral dialogue committees.

❒ *Better managing the posting of a worker in the country in which they reside*

The ESEC would ask that the French government take the necessary steps to ensure that more restrictive conditions that can be enforced against employers looking to post a worker to a country in which they habitually reside be incorporated into both the directive and the social security coordination regulation.

It should be clearly stipulated that a company can only post an employee to another country if the worker concerned resides in the country in which said company is established, unless they can prove that this is a cross-border employee.

With regard to the abuse and circumvention of the law in the specific situation of temporary employment agencies, the tightening of controls and suppression of fraud must continue, with the emphasis very much on verifying that temping agencies posting employees undertake a substantial part of their activity in the country in which they are established.

❒ *Clarifying the definition of a company undertaking a 'substantial part' of its activity in the country in which it is established*

The ESEC is in favour of clarifying the notion of a company's substantial activity in both the source directive and the social security system coordination regulation. It believes that in order for a company's activity in the country from which the worker is posted to be considered substantial it is vital that all of the following conditions be met:

1) the company's headquarters and administrative head office must be located in the home State;

2) the company must have executed more contracts in the home State than in the State in which the worker is to be employed;

3) the company must have generated over 25% of its overall turnover in the home State.

❒ *Establishing a minimum period of affiliation on the part of the employee concerned to a social security system in the home country in the framework of the employment contract*

The ESEC would recommend that employees have to be affiliated to the social security system in their home country for at least three months before an A1 form can be issued.

The ESEC would like to see checks put in place to ensure that the posted worker habitually works in the home country before an A1 form can be issued. At least one month's affiliation to the social security system in the framework of paid employment could be accepted as proof that this is the case.

The hiring of job-seekers with a view to posting should be justified, before the body responsible for issuing the A1 form, in respect of the workforce and order book of the posting company.

The ESEC believes that a significant increase in the one-month affiliation period stipulated in the European Commission's interpretation circular should be negotiated the next time the social security system coordination regulation is revised.

Increasing the affiliation period from one month to three months could be negotiated the next time the social security coordination regulation is revised.

❒ *Strengthening administrative cooperation between Member States to improve the detection of fraud associated with the posting of workers and illegal work*

The ESEC would recommend strengthening administrative cooperation between European Union Member States to fight fraud associated with the posting of workers and illegal work. It believes that this will require the decision to be made to establish a European platform for fighting illegal work that incorporates all of the information systems required to detect fraud. In this respect, the exploitation of national databases that are shared at national level and contain data relating to both prior declarations of posting and the A1 certificates issued by social security bodies is a prerequisite to administrative cooperation.

The ESEC would recommend that the French government consider ways of promoting increased cooperation between willing Member States with a view to developing administrative cooperation that will make it possible to share data and target coordinated and efficient monitoring initiatives.

The ESEC would also recommend that the French government provide the necessary instructions to ensure that the competent administrations engage in bilateral cooperation with those in other Member States that are the most committed to establishing an information system with a view to improving the detection of fraud associated with the posting of workers.

❒ *Introducing a European strategy for the adoption of a European posted worker's card*

The ESEC would ask that professional sectors obtain suitable monitoring instruments for establishing a framework of fair and undistorted competition. It would, however, highlight the potential risk of such efforts being dispersed at both European and national levels if a global strategy is not implemented across the EU and the EEA.

With this in mind, it would recommend that the French government speak out within European institutions in favour of the adoption of a European posted workers' card that would make it possible to identify the individuals concerned within a European database and more efficiently verify the conditions surrounding their posting, as well as their working conditions, with a view to serving the interests of the economic players concerned without hindering the freedom of service provision.

With regard to the road transport sector, it is important to examine the feasibility of combining this card with the geolocation system with the notable aim of ascertaining assignment periods.

❒ *Defending an approach that supports the principles of sincere cooperation between Member States, fair competition and the effectiveness of the laws applicable to posted workers before the CJEU*

The ESEC would recommend that the French government work in conjunction with t he relevant parties to prepare systematic responses to the Community judge with regard to cases pertaining to the posting of workers in order to ensure that the principles of sincere cooperation, fair competition and worker protection are more systematically taken into account by the CJEU, including where cases relating to other States are con cerned.

Initiatives to be implemented at national level

Increasing the accountability of and the information provided to project owners, ordering parties and service providers

❒ Reinforcing provisions that help to rule out abnormally low tenders

The ESEC would recommend that the public authorities reform the regulations regarding abnormally low tenders in the Public Procurement Code to effectively enforce the obligation to reject such tenders in accordance with the provisions of the directive on the awarding of public procurement contracts of 26 February 2014.

It believes that it should be compulsory to mention the use of posted workers in responses to calls for tenders and that the labour cost factor, including where sub-contractors are concerned, should be systematically taken into account in order to assess the conditions under which the tenderer plans to execute the contract.

The ESEC would recommend that a pre-contractual summary course of action be made available to professional organisations representing employers in order to prevent abnormally low tenders.

❒ *Ensuring access to information on the part of companies*

The ESEC would recommend that all necessary measures be taken to make information regarding the rights and obligations of service providers and ordering parties, particularly with regard to obligations relating to declarations and legal and contractual minimum wages, accessible.

The ESEC would recommend the creation of an informative website aimed at posting companies and ordering parties that could be administered by a special body with national jurisdiction that is also responsible for recording declarations of posting (cf. proposal below). Until such a service is established, a dedicated working should be put together at central government level.

Better protecting the living and working conditions of posted workers

❒ Asking that the competent administrations ensure the effective monitoring of the working and accommodation conditions of posted workers

The ESEC would recommend that coordinated action be taken by the various State departments to ask that posted workers report back on their working hours and their accommodation conditions.

In order to achieve this, inspection missions undertaken by labour inspectors accompanied by interpreters and the relevant police services, under the authority of the prefect and the Regional Department for Business, Competition, Consumption, Labour and Employment (DIRECCTE), must become more systematic. Furthermore, it is important to incorporate a provision into the French Labour Code that provides access for the interpreters accompanying labour inspectors to the premises under inspection.

❒ *Sanctioning ordering parties that fail to comply with the obligations by which they are bound in the event of a workplace accident involving a posted worker*

The ESEC would recommend incorporating a provision into the French Labour Code that sanctions ordering parties that fail to fulfil their obligation to declare a workplace accident, as outlined in Article R.1262-2, by means of an administrative fine.

❒ *Asking that healthcare and social security systems systematically include in their information base the reason(s) for their having to intervene in the case of patients involved in a workplace accident*

The ESEC would ask that national health and social security information systems help to distinguish between care administered to posted workers who are victims of workplace accidents and other forms of care.

The ESEC would reiterate that the provisions of the directive on the posting of workers state that it should be possible for the cost of such care to be covered by the insurance provided by the social system in place in the home country. Under-declaration of such care in the framework of workplace accidents and the consequences thereof may lead to insufficient consideration being given to the rights of posted employees in their home country.

More effectively fighting the circumvention of regulations and evasion of the law

❒ Creating a special body with national jurisdiction in registering posted workers using the Limosa model

The ESEC would recommend the creation of a special body with national jurisdiction and responsible for gathering and centralising prior declarations from companies regarding the posting of workers and the necessary information for employers and ordering parties. Introduced in the form of a website, on which companies, service providers and ordering parties, regardless of their position within the sub-contracting chain, would complete an online declaration form, this body could gather declarations of postings and provide declaring parties with any information they may require.

Furthermore, the ESEC would recommend that the national committee on fighting illegal work establish a specialist body responsible for fighting fraud associated with the international provision of services with a view to capitalising upon risk analyses produced by the body with national jurisdiction.

❒ *Increasing the means of action and coordination available to the administrations responsible for monitoring posting situations*

The ESEC would recommend increasing the workforces employed by regional illegal labour support and control units (URACTIs) to at least 200 agents, without reducing the inspection workforces assigned to other tasks. Furthermore, one labour inspector per territorial monitoring unit should be able to undertake ongoing training programmes dealing with international service provision.

It believes that the coordination of the various competent monitoring bodies should be better managed at regional level, with the involvement of General Prosecutors of Courts of Appeal.

❒ *Reinforcing the implementation of criminal policy with regard to false postings*

The ESEC would support the reinforcement of criminal policy against the employment of posted workers working illegally and

calls for a criminal circular examining the following:

- situations of fraud evasion regarding posted work;

- the respective roles of the General Prosecutor of the Court of Appeal and the Public Prosecutor with regard to regional administrations in coordinating criminal policy for fighting illegal work under the guise of the posting of workers.

It would suggest that the regulatory authority take the necessary measures to ensure that the Public Prosecutor's Departments of specialist inter-regional courts are able to coordinate regional anti-fraud committees where the most complex of cases are concerned and that they have assistants specialising in illegal work.

Reinforcing the role of and the means available to social partners for the purposes of promoting information and better protecting posted workers

❒ Incorporating the rule applicable to posted workers into collective agreements

By drawing conclusions from the 'equal pay for equal work' principle in collective agreements

The ESEC believes that a revision of the directive on the posting of workers with regard to the 'equal pay for equal work' principle should provide for posted workers to be paid a gross wage calculated under conditions that are just as favourable as those that apply to national workers where collective agreements are concerned. The qualification level and professional experience of the individuals concerned will be taken into account. Any subsistence allowances or other allowances intended to compensate for the worker being away from home for the duration of the assignment will not be taken into account when calculating the gross wage payable. Signatory social partners will be able to enforce the 'equal pay for equal work' principle within the scope of the collective agreement by relying on efforts on the part of the monitoring body and before the courts, where necessary.

Failing this, by stipulating specific minimum wages in collective agreements

In any case, were the legal framework governing the posting of workers to remain unchanged and were it still necessary to stay within the application "of a hard core of basic imperative rules", the legislator should include the definition of the various components of the contractual minimum wage among the topics for compulsory negotiation. It would also be necessary to ensure that such contractual minimums, which must be extensive and accessible in order to make service providers more aware of them, could be enforced.

❒ *Supporting and promoting regulatory initiatives on the part of social partners*

By means of a special clause in public procurement contracts

The ESEC believes that particular attention should be paid within the framework of public procurement to positive initiatives on the part of professional organisations and trade union organisations to promote good posting practices among their principals and defend the rights of posted workers in their place of work. It would recommend that a social clause be introduced into calls for tenders relating to public procurement contracts that requires contracting parties on the one hand to act in accordance with the provisions of sectoral agreements designed to fight illegal working and on the other hand to support efforts on the part of trade union organisations to inform posted workers employed at construction sites of their rights.

By introducing trade union executives responsible for informing and defending the rights of posted workers

The ESEC would recommend introducing trade union executives devoted to informing and defending the rights of posted workers at major sites involving ordering parties and sub-contractors. These executives would comprise employees appointed by representative trade union organisations within the company of the main ordering party. It would be down to the legislator to outline the principle of the trade union executive, ensure the legal accessibility thereof to posted workers and arrange for the information gathered by the executive regarding the working and employment conditions of posted workers to be passed on to the SRBs of the ordering parties concerned. The terms governing the functioning of and the means available to the trade union executive would be outlined by means of a company-level agreement.

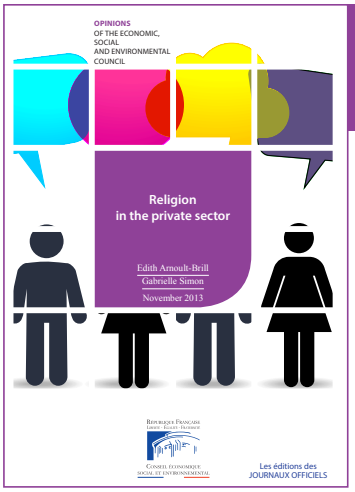
Following consultation with the social partners concerned, the threshold for creating the trade union executive would be set by means of a decree.

Furthermore, the ESEC would recommend that inter-professional negotiations be opened up with a view to introducing a territorial, inter-professional or sector-specific system designed to inform posted workers and migrant workers of their social rights and provide them with legal advice close to their place of work, taking into account the systems that exist for VSEs. This initiative could be based on the experiences of the Faire Mobilität ('Fair Mobility') programme launched in 2011 at the initiative of the Confederation of German Trade Unions (DGB). Reflecting the approach adopted by Germany, this new system could be co-funded by the European Union via the ESF, the Ministry of Labour and social partners.

By means of the provision of comprehensive information for social partners regarding the use of posted workers in companies and territories

The ESEC would recommend that the social and economic database (BDES), which aims to provide staff representatives with information regarding the company's social and economic orientations, incorporate data relating to the use of posted workers in the sub-contracting chain.

The ESEC would recommend providing Regional Employment, Training and Vocational Guidance Committees (CREFOP) with regionalised data gathered by means of the online posting declaration system so that said committees may analyse the use of posted labour by sector and by trade.



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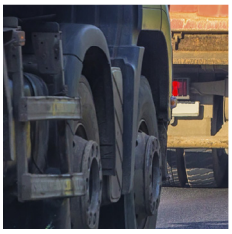
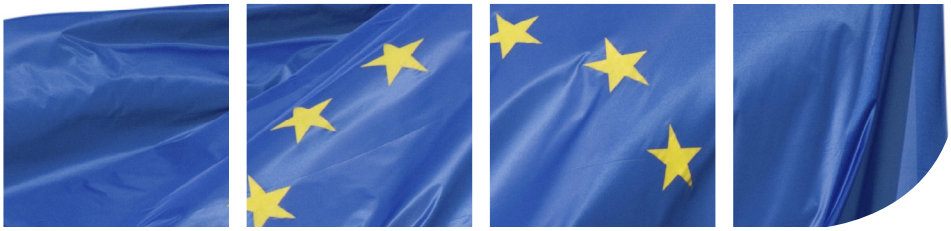



The rules governing the posting of workers in the European Union enable a service provider, group or temporary employment agency established within one Member State to employ workers in another Member State whilst exonerating themselves from certain aspects of the employment law and social insurance schemes in place in the latter.

Does the single market, which was intended to reconcile economic freedoms with social progress for European Union Member States, still have this role to play today?

The ESEC considers the posting of workers to be representative of the need to renew the European project, which must itself revive its objective of harmonising standards of living and social security



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