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Dipartimento di Giurisprudenza
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Sede di Rovigo

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A CURA DI

SILVIA BORELLI - ANDREA GUAZZAROTTI

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INDICE

FRANCESCO COSTAMAGNA*

REGULATORY COMPETITION IN THE SOCIAL DOMAIN AND THE REVISION OF THE POSTED WORKERS DIRECTIVE

1. *Introduction*

Regulatory competition in the social domain has been regarded as a threat for the legitimacy and the acceptability of the European integration process since its early days. For instance, one of the conditions for the gradual realization of the free circulation of workers was, in the words of the Spaak Report of 1956, the granting to the Commission of the power to «decide on the necessary protection measures in order to avoid an inflow of labor which would be dangerous for the standard of living or employment of workers in certain specified industries»[1]. In that context, differences in the employment protection between Member States was considered as a factor that could distort competition within

* University of Turin and Collegio Carlo Alberto. I would like to thank Silvia Borelli, Andrea Guazzarotti, Floris De Witte, Augustín Menéndez Menéndez and Alexander Somek for their insightful comments on an earlier version of the paper. The chapter has been written in the context of the REScEU project (Reconciling Economic and Social Europe, *www.resceu.eu*), funded by the European Research Council (grant no. 340534).

[1] Information Service High Authority of the European Community for Coal and Steel, *The Brussels Report on the General Common Market*, 1956, 19.

the internal market. At that time, the introduction of the principle of non discrimination with regard to pay and working conditions was mainly conceived as an antidote against this risk. As emphasised by the Court in a judgment of 1973, the principle «has the effect of not only allowing in each State equal access to employment to the nationals of other Member States, but also, in accordance with the aim of Article 177 of the Treaty, […] guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited»[2]. The same logic also informed the explicit commitment to equal pay between men and women included in the Treaty of Rome[3] to allay the concerns of certain Member States – France, in particular –, fearing that their ambitious legislation protecting gender equality might disadvantage their undertakings *vis-à-vis* their competitors[4].

The visibility of the problem increased in the second half of the 1980s and in the 1990s, when EU institutions mobilized to complete the internal market[5]. The removal of the barriers to the free circulation of capitals, goods and services increased undertakings' freedom in choosing where to locate their activity. Moreover, the principles of mutual recognition and market access, two central tenets of the Court of Justice's case law on the internal market, limited Member States' capacity to impose their own standards. Therefore, the differences in the levels of social protection became one of the main factors determining Member States' relative competitiveness in a race that no longer concerned only undertakings, but also regulatory systems[6]. The existence of these differences was

[2] ECJ, 4 April 1974, C-167/73, *Commission v. France*, para. 45.

[3] Article 119 Treaty on the European Economic Community (now Article 157 TFEU).

[4] C. Barnard, *EU Employment Law*, Oxford, 2013, 36. See also ECJ, 8 April 1976, 43/75, *Defrenne II*, paras. 9-10.

[5] In 1985 the Commission adopted a White Paper (European Commission, *Completing the Internal Market. White Paper from the Commission to the European Council*, 14 June 1985, COM(85) 310 final) that gave a strong push toward the completion of the internal market. See C.D. Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, in *Michigan Journal of International Law*, 11, 1990, 1103. The author pointedly observed that «[t]he '1992 Project' has radically changed the European Community. It has given the 'common market' new impetus and has lifted the Community out of the deep crisis in which it was bogged down in the first half of the 1980's».

[6] F. De Witte, *The Architecture of EU's Social Market Economy*, in P. Koutrakos, J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham-Northampton, 2016, 124.

a corollary of the choice to leave social policy in the realm of Member States' exclusive competences[7]. In that regard, early hopes about the possibility that the creation of a common market could automatically foster convergence toward higher social standards proved to be over optimistic.

The debate reignited after the 2004 eastward enlargement of the European Union and a number of judicial decisions where the EU Court of Justice (CJEU) adopted a "total market thinking" approach[8]. "Losing" States reacted by claiming that the promotion of free movement at the expenses of their capacity of exercise regulatory functions in the social sphere could contribute to a dangerous "race-to-the-bottom" with regard to workers' rights and spur on heinous forms of regulatory competition. Conversely, "winner" States hailed the attempt by the CJEU to rein in protectionist regulatory policies that undercut their competitive advantage, by limiting their capacity to fully exploit their lower labour costs.

What is still unclear is how far national authorities can go in confronting regulatory competition in the social domain: whether they have to accept it as an inevitable consequence of the internal market or whether they can consider it as an abuse and, thus, take action against it. The chapter addresses this question by dealing with the case of posted workers, which is now the most controversial aspect of the debate on this form of regulatory competition, despite it being just one of the possible ways in which undertakings established in countries with lower labour costs can exploit their competitive advantage. More in detail, the chapter focuses on the debate concerning regulatory competition in the light of the revision of the Posted Workers Directive ('PWD'). To this end, the analysis proceeds as follows. First, it looks at the relationship between regulatory competition and posting of workers, by reviewing the original content of the PWD and by critically analysing the case-law of the Court. The second part of the analysis focuses on the revised PWD by taking into consideration the Commission's Proposal, Member States' positions and role of the European Parliament in the quest for a better balance between the "economic" and the "social" in this context.

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[7] C. Barnard, *Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution*, in M. Dougan, S. Currie (eds), *Fifty Years of the European Treaties. Looking Back and Thinking Forward*, Oxford and Portland, 2009, 314-315. See generally S. Giubboni, *Social Rights and Market Freedoms*, Cambridge, 2006.

[8] E. Christodoulidis, *The European Court of Justice and "Total Market Thinking"*, in *German Law Journal*, 10, 2013, 2005-2020. See also C. Joerges, F. Rödl, *Informal Politics, Formalized Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in* Viking *and* Laval, in *European Law Journal*, 15, 2009, 1-19.

2. *Regulatory competition in the social domain and the Posted Workers Directive*

2.1. *Regulatory competition and posting of workers in a nutshell*

Posting is a peculiar form of cross-border labour mobility that is currently perceived as one of the main vehicles for labour cost competition in the EU. Some commentators challenge this perception, pointing to the limited practical impact of this form of labour mobility if viewed from a more general perspective[9]. In particular, they point to the fact that data, although couched in considerable uncertainty, seem to show that posting is actually quite limited from a quantitative point of view, affecting just 1% of the total number of employees in the EU. Furthermore, labour cost differentials, although certainly very important, are not the only driver in this context[10]. More than 35% of all postings takes place in high-value chains and concerns a highly-skilled workforce. In these cases, labour standards' differentials are not an issue and certainly not the reason why undertakings post their workers in another member State[11].

However, this picture is too static and unable to grasp with the complexity of the phenomenon at stake. First, over the last few years posting of workers has increased quite markedly, becoming the fastest growing form of cross-border labour mobility in the EU. According to the Commission, from 2010 to 2014 the average annual rate of increase has been 9.6%[12]. The crisis has certainly contributed much to the trend, exacerbating wage differentials between Member States and turning countries that used to be net receivers of posted workers into net senders.

Second, data need to be disaggregated to have a better understanding of the situation, since the impact of posting varies considerably across sectors. Construction is the most important target sector, due to

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[9] F. De Wispelaere, J. Pacolet, *An Ad Hoc Statistical Analysis on Short Term Mobility - Economic Value of Posting of Workers. The Impact of Intra-EU-Cross-Border Services, with Special Attention to the Construction Sector* (Research Commissioned by the DG EMPL), Leuven, 2016, 17.

[10] See generally, E. Voss, M. Faioli, J.-P. Lhernould, F. Iudicone, *Posting of Workers Directive - Current Situation and Challenges*, Study for the EMPL Committee, 2016, 14-20.

[11] With specific regard to the Belgian situation, see N. Mussche, V. Corluy, I. Marx, *How Posting Shapes a Hybrid Single European Labour Market*, in *European Journal of Industrial Relations*, 2017, 7-8.

[12] European Commission, *Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Impact Assessment*, 8.3.2016, SWD(2016) 52 final, 67.

its labour-intensive and price-sensitive nature and due to the fact that delocalization is not an option in this context[13]. In some countries, such as Sweden, Finland and Austria, construction posted workers represent over half of the total number of the workers received in a single year[14]. Furthermore, the European Builders Confederation estimated that between 2011 and 2014 around 15,000 construction workers in Belgium (8% of the total) lost their job due to «unfair competition showed by a constant increase of posted workers»[15].

Lastly, the effects of posting have symbolic and political implications that go well beyond their economic relevance. Indeed, EU law forces the receiving State to tolerate the presence on its own territory of workers that carry out their activity without respecting all the terms and conditions applied to national workers. In some cases, the differences between local workers and posted ones are quite substantial and, thus, highly problematic from a political point of view. This is the case of wage differences that, in some countries and in some sectors, can be around 50%[16]. Moreover, the EU regulatory framework left much room for abusive practices by undertakings wishing to evade employment or social security legislation. This is especially true in the case of posting through temporary employment agencies: there are reports of agencies that have been set up in locations that are convenient in terms of social security costs with the sole purpose of sourcing workers in more expensive countries[17].

2.2. *The Posted Workers Directive: the attempt to insulate national labour regimes from the market*

Posted workers are workers that, in the context of the trans-border provision of services, temporarily carry out their activity in the territory of a Member State different from the one in which they normally work. Unlike other forms of intra-EU labour mobility, posting is covered by the provisions on the free movement of services and not by those on the free

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[13] R. Zahn, *Revision of the Posted Workers' Directive: Equality at Last?*, in *Cambridge Yearbook of European Legal Studies*, 19, 2017, 198.

[14] European Commission, *Impact Assessment*, cit., 55-66.

[15] European Builders Confederation, *Posting of workers: European Small Construction Entrepreneurs Welcome Revision*, 8 March 2016 available at *http://www.ebc-construction.eu/fileadmin/Pubblications/Press_releases/2016/2016_03_08_EBC_on_EC_PWD_revision_EN.pdf*.

[16] Voss *et al.*, cit., 37.

[17] Zahn, cit., 197.

movement of workers[18]. This means that posted workers do not benefit from the full application of the principle of non-discrimination with regard to pay and working conditions. Indeed, the imposition of equality of treatment with national workers is a restriction to the free movement of services, making less attractive their provision by undertakings established in another Member States[19]. The Court made clear that this does not prohibit Member States from «extending their legislation, or collective labour agreements […] to any person who is employed, even temporarily, within their territory»[20]. Nonetheless, they can do so only in so far as they meet overriding requirements in the public interest and they do not go beyond what it is necessary to achieve such objective. Therefore, with regard to posted workers non-discrimination and the application of labour law in accordance with the territoriality principle are treated as exceptions and not the rule.

What the Court failed to do is identifying which rules receiving Member States could impose upon posting undertakings. EU institutions sought to fill the gap with the enactment of the PWD[21], which was adopted after a lengthy and heated debate between Member States more likely to export labour and those more likely to be on the receiving end[22]. The PWD reflected, thus, the compromise between these two groups of States, trying to find a point of equilibrium between competing interests: on the one side, the promotion of the free circulation of services and, on the other, the preservation of receiving States' capacity to impose their own labour standards. The latter has been mostly considered being coterminous with the protection of posted workers' rights, assuming that safeguarding national regulatory systems' integrity would invariably go in their favour. However, as pointedly observed by Davies, the interests of these workers are more ambiguous, since «they stand to benefit from the host State's higher standards, but only if their employers continue to ob-

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[18] E. Verschueren, *The European Internal Market and the Competition Between Workers*, in *European Labour Law Journal*, 6, 2015, 136.

[19] Extensively, on the interpretation of the notion of 'restriction' by the Court see S. Deakin, *Regulatory Competition in Europe After* Laval, Centre for Business Research, University of Cambridge, Working Paper No. 364, 2008, 2-6.

[20] ECJ, 27 March 1990, C-113/89, *Rush Portuguesa*, para. 18.

[21] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 *concerning the posting of workers in the framework of the provision of services*, OJ L 18 of 21.1.1997, 1-6.

[22] J. Drucker, I. Dupre, *The Posting of Workers Directive and Employment Regulation in the European Construction Industry*, in *European Journal of Industrial Relations*, 4, 1998, 311-312.

tain the contracts which make the secondments necessary»[23]. The preservation of receiving States' regulatory autonomy pursues objectives that go beyond posted workers' rights, such as, as duly recognized in the Preamble of the Directive, contributing to a «climate of fair competition».

The drafters of the PWD struck a balance that was quite favourable to receiving Member States. It is quite telling in that regard that two of the then most likely exporters of posted of workers, the UK and Portugal, respectively ended up voting against the Directive and abstaining from the vote. Despite encased in an internal market shell, the PWD had a strong social content, aiming at insulating national labour regimes from the pressure generated by the process of economic integration[24].

As for the shell, the act was adopted on the basis of Articles 57 and 66 EEC, i.e. provisions that guarantees the free provision of services. Furthermore, several paragraphs of its Preamble reiterated the need of removing the obstacles to the free circulation of services, while paying far less attention to the advancement of conflicting social objectives.

Conversely, the substantive content of the PWD was very much attentive to the preservation of receiving States' regulatory autonomy, even at the expense of the free movement of services. First, Article 3(1) set a list of seven basic labour standards that Member States must ensure apply to posted workers. The items of the list are: working hours, holidays, supply of workers by agencies, health and safety, protection of pregnant workers, children and young people, equality between men and women and – the most relevant one – minimum rates of pay. The PWD did not aim to harmonize national labour legislations, leaving the task of defining the content of these standards to national authorities and social partners. The PWD only set some limits with regard to the instruments that Member States can use to define the standards. Article 3(1) established that these terms and conditions had to be laid down either by «law, regulation or administrative provision» or by «collective agreements or arbitration awards which have been declared universally applicable». According to Article 3(8), the latter, at least with regard to the construction sector, were «collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned». The formula would seemingly allow Member States to «substitute for the test of obligation the test of applicability in

[23] P. Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems?*, in *Common Market Law Review*, 34, 1997, 574.

[24] De Witte, *cit.*, 127-128.

fact or even that of the representative status of the parties which negotiated the agreement»[25].

Secondly and, to some extent, more importantly, the EU legislator conceived the PWD as setting just a minimum floor, allowing Member States to go beyond it. On the one hand, Article 3(7) stipulated that PWD's provisions «shall not prevent application of terms and conditions of employment which are more favourable to workers». On the other hand, Article 3(10) enabled the receiving State to apply to posted workers rules governing matters that were not included in the list of Article 3(1), provided that these rules are «public policy provisions» and they do not discriminate against service providers coming from other Member States.

2.3. *Posting of workers in the case-law of the Court: upsetting the balance*

The balance struck by the legislator was seen as a threat to the freedom to provide services. The Court, in a series of judgments often dubbed as the "Laval quartet"[26], sought to respond to these concerns, by re-orienting the normative framework on posting toward the pursuit of market-related objectives. Structurally, the shift transformed what had been conceived as a tool aimed at curbing regulatory competition in the social domain into a tool fostering it. To put it differently, it converted the PWD from «an ornament of the social policy of the Community»[27] into an instrument constraining national authorities' autonomy in the exercise of their social competences.

Operationally, the transformation of the PWD materialized in two main steps. The first was the reversal of the idea that the PWD only codified a minimum level of protection of posted workers' rights, leaving intact the possibility for receiving States to go beyond it. In *Laval*, the Court adopted a *contra legem* interpretation of Article 3(7), by stating that it «cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory

[25] Davies, cit., 580.

[26] A. Koukiadaki, *The Far-Reaching Implications of the Laval Quartet: The Case of the UK Living Wage*, in *Industrial Law Journal*, 43, 2015, 91-121. These cases prompted an intense debate that has been reviewed by C. Barnard, *The Calm After the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in* Viking *and* Laval, in A. Bogg, C. Costello, A.C.L. Davies (eds), *Research Handbook on EU Labour Law*, Cheltenham-Northampton, 2016, 337-362.

[27] Davies, *cit.*, 602.

rules for minimum protection»[28]. Likewise, in *Commission v. Luxembourg* the Court adopted a narrow interpretation of the public policy clause contained in Article 3(10), limiting the possibility to invoke it in order to go beyond the list of minimum standards set by the PWD only when tere is a serious threat to a fundamental interest of society[29].

The second step concerned the instruments that Member States can use to impose their own labour standards upon posting undertakings. In particular, the Court adopted a restrictive interpretation of the notion of universally applicable collective agreements, ruling out the possibility to extend to posted workers terms and conditions contained in agreements that are generally binding agreements only *de facto*. The Court adopted this stance in a string of judgments concerning the interplay between posting and public procurement. These cases touched upon a very sensitive issue, such as the possibility for Member States to use public procurement as a tool to advance non-economic objectives[30]. This possibility is expressly provided for by EU public procurement law. Both Article 26 of Directive 2004/18/EC[31] and, albeit in a slightly different way, Article 70 of Directive 2014/24/EU[32] allow national institutions to lay down special conditions governing the performance of the contract that concern social and employment-related considerations. In this context, the application of the requirements set forth in the PWD, read jointly with Treaty provisions of the free provision of services, act as a constraint on Member States' autonomy.

The first of this line of judgments was *Rüffert*, a case concerning the compatibility with EU law of the law of Lower Saxony on the award of public contracts (*Landesvergabegesetz*), which provided that contracts for building services could be awarded only to tenderers that undertake to pay their employees at least the remuneration prescribed by the 'Build-

[28] ECJ, 18 December 2007, C-341/05 *Laval*, para. 80.

[29] ECJ, 19 June 2008, C-319/06, *Commission v. Luxembourg*, paras. 23-71.

[30] See R. Caranta, *The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works*, in *Common Market Law Review*, 2015, 394-409; S. Montaldo, *La dimensione sociale degli appalti pubblici nel diritto dell'Unione europea*, in *Politiche sociali*, 2015, 347-360; S. Arrowsmith, P. Kunzlik, *Public Procurement and Horizontal Policies in EC Law: General Principles* in S. Arrowsmith, P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions*, Cambridge, 2009, 12-15.

[31] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, OJ L 134 of 30.4.2004, 114-240.

[32] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*, OJ L 94 of 28.3.2014, 65-242.

ings and public works' collective agreement. The Court answered in the negative, holding that minimum wages are not enforceable in the context of trans-border provision of services when laid down through collective agreements that, despite having *de facto* a general scope of application, have not been declared universally applicable[33]. The restrictive reading of this clause rested on a one-sided conception of the objective of the PWD, which, according to the Court, is primarily meant to «bring about the freedom to provide services» and not also to ensure «a climate of fair competition and […] respect for the rights of workers». By making form prevail over substance, the Court allowed – or even forced – national political authorities to intrude into spaces that had been left to the autonomy of social partners. Despite this was enough to settle the case, the Court went further[34], finding that the law at stake contrasted with Article 56 TFUE, read in the light of the PWD. Imposing a minimum wage requirement only to those performing a public contract, in the eyes of the Court amounts to an unjustifiable restriction to the free circulation of services, due to its selective character[35]. The reference to this form of discrimination finds no basis in EU law and severely limits Member States' capacity to act as socially-responsible buyers, by making sure that public moneys are spent on contractors that abide by standards higher than those prevailing in private sector transactions or, at least, in a way that does not foster regulatory competition within their territory[36].

Quite remarkably, the Court adopted the same restrictive approach also in situations where the PWD was not even applicable. This is the case of *Bundesdruckerei*, a judgment concerning, once again, the inclusion of a minimum wage clause in a call for tender issued by the City of Dortmund for the digitalisation of documents and the conversion of data for the urban planning service of the city[37]. One of the participants purported to have the service performed in Poland by a subcontractor established in that country and, thus, challenged the compatibility of the clause with EU law. The Court started by excluding the applicability of the PWD, by pointedly observing that Polish workers were going to per-

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[33] ECJ, 3 April 2008, C-346/06, *Rüffert*, para. 27. For a comment of the judgment see S. Borrelli, *Social Clauses in Public Contracts, the Posted Workers Directive and Article 49 EC: the Rüffert Case*, in *Transfer: European Review of Labour and Research*, 2, 2008, 358-362.

[34] C. Kilpatrick, *Internal Market Architecture and the Accommodation of Labour Rights: As Good as It Gets?*, EUI Working Paper LAW 2011/04, 14.

[35] *Rüffert*, cit., paras. 36-40.

[36] Verschueren, cit., 149.

[37] ECJ, 7 November 2011, C-549/13 *Bundesdruckerei*.

form the service from their home country without being posted in the German territory[38]. This notwithstanding, the argumentative path followed by the Court coincides with the *Rüffert*'s one. In particular, the judgment confirmed that imposing a minimum wage on contractors and subcontractors established in another Member State represent a restriction under Article 56 TFUE[39]. Furthermore, it reiterated the argument elaborated in *Rüffert* according to which this restriction cannot be considered as a measure necessary to advance the position of workers and to avoid social dumping, as the requirement only apply in the context of public contracts and not to the benefit of employees working in the private sector[40]. Lastly, the Court added that the measure is disproportionate in so far as it seeks to extend a level of retribution that may be reasonable in Germany to a country where minimum wage rates and the cost of living are sensibly lower. This attempt, observed the Court, «prevents subcontractors established in the Member State from deriving a competitive advantage from the differences between respective rates of pay»[41]. The latest remark, even though referred to *Bundesdruckerei*'s specific factual situation, suggests that wage competition went from being an unintended consequence of the internal market that States have the right to limit and resist to a built-in feature that States have to tolerate.

3. *Curbing Regulatory Competition in the Social Domain by Amending the PWD?*

3.1. *The genesis of a controversial act*

The pro-market approach adopted by the Court, the growing relevance of the phenomenon, the increase of proven cases of malpractice and abuses, coupled with a mounting hostility against free movement of workers more in general contributed to increase the demands of revision of the posting of workers' regulatory framework.

In 2012, the Commission issued a proposal for a Directive focusing on the enforcement of the PWD. The Enforcement Directive[42], adopted

[38] *Ibid.*, para. 27.
[39] *Ibid.*, para. 30.
[40] *Ibid.*, para. 32.
[41] Para. 34.
[42] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administra-*

in 2014, aims at establishing a common framework of competent authorities and liaison offices so to ensure a more uniform implementation of the PWD and reduce the space for abusive practices[43]. More in detail, it sets out the procedure and substantive elements to be taken into account in order to identify "genuine posting"[44], it requires Member States to make sure that terms and conditions of employment applicable to posted workers are clearly available[45] and it enhances the cooperation between national authorities with regard to the application and enforcement PWD[46]. Furthermore, it identifies which information receiving Member States can request from service providers to ensure effective monitoring of compliance with the PWD[47]. Lastly, it introduces subcontracting liability, by allowing Member States to ensure «that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker»[48].

Despite touching upon several controversial issues, the Enforcement Directive does not – and was not intended to – directly confront the key question lying at the core of the whole debate, i.e. the balance between the "economic" and the "social" within the posting of workers' regulatory framework. In June 2015, a group of "higher wage" countries wrote a letter to Commissioner Thyssen calling for a review of the PWD «in a context of preventing social dumping and abuse of the free movement of services» and striving to rebalance the conflicting interests at stake[49]. Few months later, "lower wages" countries reacted by rejecting the claim that there was an urgent need to revise the PWD, especially in a moment in which it was unclear what would be the effect of the Enforcement Directive. Moreover, these countries also warned against the negative implications that a revision of the PWD could have on the functioning of the internal market[50].

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tive cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159 of 28.5.2014, 11-31.

[43] Article 3.

[44] Article 4.

[45] Article 5.

[46] Articles 6-8.

[47] Articles 9-10.

[48] Article 12.

[49] Available at *https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2015/06/19/brief-aan-eurocommissaris-thyssen-over-de-detacheringsrichtlijn/letter-like-minded-ministers-posting-of-workers-def.pdf*.

[50] Available at *http://arbetsratt.juridicum.su.se/euarb/15-03/nio_medlemsstater_utstationeriongsdirektivet_augusti_2015.pdf*.

In March 2016 the Commission adopted a Proposal for a revision – and not just a "targeted review" as originally envisaged – of the PWD[51]. According to the Commission, the PWD was out of touch with the current economic reality and, in particular, with the growth in wage differentials that further incentivizes the use of posting as an instrument for unfair competition. Therefore, it was necessary to revise the rules on the terms and conditions applicable to posted workers and, in particular, to make sure that the same work at the same place is remunerated in the same manner[52]. At least at first sight, the Proposal was very much responsive to the concerns expressed by high-wage countries, seeking to reduce the possibility to use labour costs' differentials as competitive factors in the context of posting. The Proposal caused much controversy, revealing the depth of the fault between high-wage and low-wage countries. This is very much evident if one considers the reaction of national parliaments participating to the legislative process. Whereas the French Parliament lamented the fact that the Proposal was not bold enough in promoting the principle of equal pay for posted workers, ten national parliaments[53] of Central and Eastern European States[54] issued reasoned opinions in the context of subsidiarity control mechanism under Protocol No. 2, triggering a yellow card against the Commission[55]. These opinions were quite comprehensive, touching upon issues that go beyond just the violation of the principle of subsidiarity. In particular, almost all these parliaments expressed concerns as to the negative effects that the Revised PWD could have on the competitiveness of lower-wage countries and, thus, on their undertakings' ability to have access to lucrative mar-

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[51] European Commission, *No Time for Business as Usual. Commission Work Programme 2016*, 26 November 2015, COM(205) 610 final, 8.

[52] *Commissioner Thyssen presents Commission's Social Package: First outline of the European Pillar of Social Rights and reform of the Posting of Workers Directive*, 8 March 2016. Available at *http://europa.eu/rapid/press-release_SPEECH-16-682_en.htm*.

[53] More precisely, also the Danish Parliament issued a reasoned opinion, but it raised arguments not in line with those of the other parliaments, In particular, it focused on the perceived intrusion of the Proposed Directive into domains that should be Member States' exclusive preserve.

[54] Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia. Specifically on the Latvian position, see Z. Rasnača, *Identifying the (dis)placement of 'new' Member State Social Interests in the Posting of Workers: the Case of Latvia*, in *European Constitutional Law Review*, 14, 2018, 131-153.

[55] See specifically D. Jancic, *EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, 2017, 299-312.

kets. Unlike in the case of the Monti II Regulation[56], the Commission offered an unwavering response, deciding to maintain the Proposal without even amending it[57]. Few days later, in his State of the Union, President Juncker reiterated that «workers should get the same pay for the same work in the same place. This is a question of social justice. And this is why the Commission stands behind our proposal on the Posting of Workers Directive. The internal market is not a place where Eastern European workers can be exploited or subjected to lower social standards. Europe is not the Wild West, but a social market economy»[58].

Despite the Commission's dedication, the proposed reforms sparked much controversy among Member States, as well as within the European Parliament. It was only after 23 months of negotiations, in February 2018, that negotiators on behalf of the European Parliament, the Council and the Commission reached a common understanding on a possible agreement. The final text was then approved by the European Parliament on 29 May 2018 and by the Council on 21 June 2018[59].

3.2. *Still an exclusively internal market act? The legal basis of the Revised PWD*

A first tricky issue with regard to the attempt of imbuing with greater social sensitivity the posted workers' regulatory framework was the identification of the legal basis of the Revised PWD. The Commission chose the safest route, basing its proposal on Articles 53 and 62 TFEU, which correspond to the original Articles 57 and 66 TEEC.

Conversely, the European Parliament proposed to add also Article

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[56] European Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, 21.3.2012, COM(2012) 130 final. The Commission decided to withdraw the proposal after 19 parliamentary chambers expressed their discontent with it. See F. Fabbrini, K. Granat, *"Yellow Card but no Foul": The Role of National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 50, 2013, 115-143.

[57] European Commission, *Communication on the Proposal for a Directive Amending the Posting of Workers Directive, with Regard to the Principle of Subsidiarity, in Accordance with Protocol No. 2*, 20 July 2016, COM(2016) 505 final.

[58] European Commission, *State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends*, 14 September 2016.

[59] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 *amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, OJ L 173 of 9.7.2018, 16-24.

153(1), (a) and (b), TFEU in conjunction with Article 153(2) TFEU[60]. According to the proponents, these provisions allow the Parliament and the Council to adopt directives aiming at improving the working environment and conditions and, therefore, they would represent a possible foundation for the adoption of the act at stake. In their view, adding this legal basis would contribute to uphold the credibility of the commitment toward rebalancing the protection of workers' rights and the free movement of services in the context of posting. Indeed, as repeatedly stressed by the CJEU, the choice to adopt a dual legal basis can be justified if «the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other»[61]. Conversely, the choice to have just one legal basis is correct when the act pursues different objectives, but one of them is the predominant one. Therefore, the Parliament's proposal to enlarge the legal basis of the act seemed perfectly congruent with the idea that the Revised PWD should not just be an internal market act with a strong social content, but a legal instrument that pursues the two set of objectives on an entirely equal footing[62].

The European Parliament's proposal has been rejected and the Revised PWD is exclusively based on Articles 53(1) and 62 TFEU. The choice reaffirms the predominantly internal market character of the act, relegating the safeguard of competing objectives to a second-tier status. This may offer to the CJEU a strong interpretative tool to defend its stubborn pro-market stance when it comes to apply the provision of the Revised PWD. Moreover, Article 153 TFEU could have formed a basis for those parts of the Revised PWD that seek to "encourage cooperation between Member States" in the attempt to reduce the space for circumventions, fraud and abuses. In particular, Article 4(2) of the Revised PWD requires Member States to «make provision for cooperation between the public authorities […] responsible for monitoring the terms and conditions of employment», empowering the Commission to «take

[60] European Parliament, *Report on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services*, 19 October 2017, A8-0319/2017, amendment 1.

[61] ECJ, 10 January 2006, C-178/03, *European Commission v. European Parliament and Council*, para. 43.

[62] European Parliament, *Opinion of the Committee on Legal Affairs on the Legal Basis*, 15 June 2017.

appropriate measures» when the sending State fails to provide timely information to the receiving State.

3.3. *Equal pay for equal work: objective or chimera?*

The main objective of the revision of the PWD was curbing the use of posting as a vehicle that undertaking can use to exploit the wage differences existing between Member States. In this regard, one of the most debated aspects of the revision is the shift from "minimum rates of pay" to "remuneration" in Article 3(1)(c) PWD. This change should contribute to create a level playing field, reducing the pay gap between posted workers and local ones[63]. Admittedly, the notion of "remuneration" is broader that just "minimum rates of pay" and should allow receiving States to require posting undertakings to pay their workers not just the minimum but a salary comprising a richer set of elements. This is the case, for instance, of seniority allowances, allowances for dirty work or 13th or 14th month bonuses[64]. The shift builds on the *Sähköalojen ammattiliitto* judgment, where the CJEU had already adopted a broader interpretation of the notion of minimum wage, so to include a daily allowance and the compensation for daily travelling time[65]. Quite interestingly, the judgment put much emphasis on the need to avoid that the calculation of the minimum wage could become a matter of choice for an «employer who post employees with the sole aim of offering lower labour costs than those of local workers»[66].

The shift toward the notion of "remuneration" is complemented by two other elements of novelty that are worth to be considered. First, the revised version of Article 3 PWD makes clear that the notion of remuneration is to be defined by «national law and/or practice of the Member State to whose territory the worker is posted», in accordance with the settled case-law of the CJEU. Quite remarkably, the Commission's Proposal omitted any such reference. Moreover, the final version of the Revised PWD amended Recital 12 of the Commission's Proposal. This recital acknowledged that «[i]t is within Member States' competence to set rules on remuneration in accordance with their laws and practice», but it added that these rules «must be justified by the need to protect

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[63] European Commission, *Impact Assessment*, cit., 13.

[64] *Ibid.*, 24.

[65] ECJ, 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry contro Elektrobudowa Spolka Akcyjna*, paras. 46-57.

[66] *Ibid.*, para. 41.

posted workers and must not disproportionately restrict the cross-border provision of services». The reference to the proportionality test could enable the Court to meddle with the decisions adopted at national level with regard to the calculation of the remuneration, potentially forcing national authorities to justify their choices in this regard. As advocated by the European Parliament, the EU legislators deleted the second sentence, making clear instead that «[t]he setting of wages is a matter for the Member State and the social partners alone. Particular care should be taken not to undermine national systems of wage setting and the freedom of the parties involved»[67]. The only limits to national authorities' autonomy are procedural, concerning the legal instruments to be used and the need to make their choices transparent, by publishing the relevant information on a single official national website. Article 3(1), last paragraph, establishes that the failure to publish on the website the terms and conditions of employment is to be «taken into account […] in determining penalties in the event of infringements […], to the extent necessary to endure the proportionality thereof».

Second – and, to some extent, more importantly – the Revised PWD expands the set of legal instruments that Member States can resort to in order to identify the constituent elements of the remuneration to be paid to posted workers. As seen above, this a highly controversial issue, due to the restrictive approach adopted by the CJEU in the *Rüffert* line of judgments. In response to that, the new Article 3(8) of the Revised PWD allows national authorities to require posting undertakings to respect the terms and conditions of employment, including remuneration, established in collective agreements that have not been declared universally applicable, even in the presence of a system to do so. In particular, these requirements can be laid down in agreements that are «generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned» and/or that «have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory»[68]. Moreover, unlike in the previous version of the PWD, the requirement to apply collectively agreed standards would no longer operate only in the construction industry, but in all sectors.

At least on paper, the reform, which has been vigorously pursued by the European Parliament[69] with a strong backing by trade unions, is a

[67] Recital 17.
[68] Davies, cit., 580.
[69] European Parliament, *Report*, cit., amendment 33.

step toward the realization of the promise of equal pay for equal work[70], potentially reducing the gap between local workers and posted ones. However, the real impact of the reform needs to be evaluated in the light of the subsequent subparagraphs of the provision at stake. The first of these subparagraphs subordinates the applicability of these collectively agreed standards to the condition that such application does not go beyond ensuring equality of treatment between national and posting undertakings «which are in a similar position». This is to avoid that the imposition of terms and conditions contained in agreements not officially declared as having universal application can produce inequality, by forcing posting undertakings to abide by requirements that are not binding on national enterprises. For greater certainty, the next subparagraph defines the notion of «equality of treatment», stating that it is deemed to exist when national undertakings are subject, «in the place in question or in the sector concerned», to the same obligations as the posting undertaking and such obligations are to be fulfilled «to the same effects». The impact of these provisions on the presumption of universality established in the first part of paragraph 8 will depend on how some of its key terms will be interpreted by national authorities and, ultimately, by the CJEU. For instance, it is unclear whether to be considered in a similar position as a national operator, the posting undertaking will have to demonstrate the existence of an actual competitive relationship between the two or whether a less demanding standard will prevail. The wording used in the definition of equality of treatment seems to suggest that the latter option is the most likely one.

3.4. *Beyond just equal pay: social contributions and the temporariness of posting*

The public debate on the social implications of posting and the reform of the PWD focused almost exclusively on the need to reduce the pay differences between local workers and posted ones. Yet, there are other cost differentials that are equally, or even more, impactful in this regard. According to recent studies, savings from differences in social security levies can be as high as 30% in certain situations[71]. Under the cur-

[70] Zahn, cit., 199-200.

[71] Voss *et al.*, cit., 38. See also F. De Wispelaere, J. Pacolet, *Posting of Workers: Impact of Social Security Coordination and Income Taxation Law on Welfare States*, KU Leuven Working Paper, November 2015.

[72] ECJ, 3 February 1982, 62-63/81, *SECO*, para. 7.

rent rules, posting undertakings are free to exploit these differences, since they pay social charges in accordance with the home country principle. Indeed, as duly spelled out in the *Seco* judgment of 1982, the application of the host country principle to «employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment» would constitute a form of covert discrimination, forcing those undertakings to bear a burden that is heavier than that of local competitors[72]. Moreover, Article 12 Regulation 883/2004 makes clear that the posted worker continues to be subject to the social legislation of the sending Member State. The revision of the PWD left this arrangement untouched.

The Revised PWD deals with other connected issues, by better clarifying the definition of certain conditions and, in some cases, trying to align it with the rules on social security coordination.

A key issue in this regard is the temporariness of posting. The whole regulatory framework and, more in detail, the application of the home country principle with regard to the payment of social contributions presuppose that posting is a temporary phenomenon. However, in its original version the PWD did not define the duration of posting. The Commission's Proposal sought to fill the gap, by establishing a 24 months time-limit. When the duration exceeds this limit, «the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out»[73]. According to the Rome I Regulation[74], this means that the workers shall be covered by the rules of protection imposed by the receiving State, unless another choice of law has been made by the parties. The Commission's Impact Assessment clarified that this proposal aims at aligning the PWD with Regulation No. 883/2004 and, thus, «eliminating a source of inconsistency in the EU regulatory framework»[75]. According to Article 12 Regulation No. 883/2004, a worker posted in the territory of another Member State ceases to be subjected to the social security legislation of his/her home country when the activity exceeds 24 months. The Commission's Proposal even sought to anticipate the moment in which equal treatment

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[73] EUROPEAN COMMISSION, *Proposal*, cit., article 1(1).

[74] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 *on the law applicable to contractual obligations (Rome I)*, OJ L 177, 4.7.2008, 109-119.

[75] EUROPEAN COMMISSION, *Impact Assessment*, cit., 25.

started to apply: if it is clear that posting will last more than 2 years since the beginning of the activity, the receiving Member State can impose its own labour legislation since day one.

The proposed time-limit gave rise to an heated debate among Member States: some of them – France, in particular – together with other stakeholders[76] voiced their dissatisfaction for a limit that they considered far too lenient, forcefully asking to cut it at least by half. The Commission's Proposal itself admitted that long-term posting is a marginal occurrence and that, in this context, posting exceeding 24 months is extremely rare. In fact, the average duration is less than 4 months[77]. The final version of the Revised PWD incorporates the 12-months limit[78]. When posting exceed this threshold, the receiving State is entitled to require the concerned undertaking to guarantee workers all the terms and conditions – and not just those listed in Article 3(1) – laid down in its own laws, regulations, administrative provisions and collective agreements that are universally applicable *de iure* or *de facto*[79].

The choice of a shorter time-limit perpetuates the misalignment between the PWD and the rules on social security coordination. However, the main problem does not lie with the overall harmony of the legal system, but with the enforcement of these rules. One of the most controversial issues is the risk that undertakings can try to evade the time-limit, by replacing the posted worker just before its expiry. To avoid this risk, the Revised PWD establishes that, in case of replacement of a posted worker by another worker performing «the same task at the same place» the duration of posting is to be calculated by cumulating the individual periods. For greater certainty, the provision adds that the sameness of task and place has to be determined by looking at the nature of the service provided, the work performed and the address of the workplace[80].

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[76] Voss *et al.*, cit., 49.

[77] *Ibid.*, 39.

[78] The limit can be extended to 18 months by the receiving State, upon request by the service provider.

[79] The provision excludes the applicability of the rules on «procedures, formalities and conditions of the conclusion and termination of the employment contract» and «supplementary occupational retirement schemes».

[80] Art. 12 Regulation (EC) No. 883/2004 excludes from the possibility of being subject to the social legislation of his/her home Country those posted workers that are sent in another Member States «to replace another person». The provision aims to avoid the risk that undertakings could circumvent the 24-months limit by simply replacing the concerned worker. In *Alpenrind*, the Court made clear that the exclusion operates also in those cases when the same worker is posted by two different employers (see ECJ, C-527/15, 6 September 2018, *Alpenrind*, para. 99).

3.5. *Preventing, monitoring and punishing abusive practices*

Loopholes and ambiguities characterizing the posting regulatory framework resulted in abusive practices, enabling posting undertakings to circumvent some of the rules set therein. The use of sub-contracting and agency employment, often coupled with an abusive recourse to bogus self-employment arrangements, stand out in this regard.

The Commission's Impact Assessment duly emphasised the situation of particular vulnerability which posted workers in the context of sub-contracting chains could find themselves trapped in[81]. A substantial body of empirical research shows that subcontracting, often with the involvement of employment agencies, is indeed a vehicle for abusive practices in many sectors. These agencies are often letter-box companies established in countries with low labour costs not carrying out any substantial economic activity therein, but having the sole aim of posting workers abroad so to minimise their outlays. There are several examples of this practice in the transport sector: for instance, in 2011 some Belgian and Dutch undertakings were offered the possibility to transfer their workforce to companies established in Cyprus and Liechtenstein through which they could hire back their staff[82]. Likewise, a study for the European Commission reported the case of a Belgian food processing company that dismissed its Belgian employees before signing a contract with a Dutch employment agency that posted to the undertaking many German-Polish workers. Polish workers were paid 10 euros/hour less that the Belgian counterparts[83]. In Italy, temporary agencies established in Romania have been recently quite active in advertising their offer of cheap labour to be recruited through the so-called "Romanian contracts". Leaflets were quite outspoken in offering savings of up to 40% of labour costs and the absence of labour and social contributions to be paid to the Italian social security system[84].

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[81] EUROPEAN COMMISSION, *Impact Assessment*, cit., 14-15. See generally Y. JORENS, S. PETERS, M. HOUWEZIJL, *Study on the Protection of Workers' Rights in Subcontracting Processes in the European Union. Final Report*, Study for the European Commission, June 2012.

[82] See J. CREMERS, *Letter-Box Companies and Abuse of the Posting Rules: How the Primacy of Economic Freedoms and Weak Enforcement Give Rise to Social Dumping*, ETUI Policy Brief 4/2014, 3-4.

[83] A. VAN HOEK, M. HOUWEZIJL, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, Study for the European Commission, March 2011, 58.

[84] S. ARCHAIN, *The Transnational Supply of Workforce within the European Union. Issues of Equal Treatment for Migrant Workers*, in *L'Altro Diritto*, 2017.

Reducing these forms of abuse was the main objective of the Enforcement Directive, adopted in 2014. Also the Revised PWD touches upon these issues, dealing, in particular, with posting by temporary work agencies and the exercise of monitoring, control and enforcement duties thereon.

As for the first aspect, Article 3(1b) Revised PWD obliges Member States to make sure that workers posted by temporary agencies are treated equally as national workers, in accordance with Article 5 Directive 2008/104/EC[85]. This provision requires user undertakings to guarantee to temporary agency workers the basic working and employment conditions applied to their own workers. Under the Article 3(9) of the original PWD this was just an option for Member States, leaving open the possibility that workers could be treated differently according whether the employment agency is established in the same State as the user company or not. The revision represents, thus, yet another welcome attempt to bring the PWD in line with other pieces of legislation, addressing a further element of ambiguity and uncertainty. However, the practical impact of the proposed change can be more limited than expected. As duly observed in the Impact Assessment, most of the Member States having a relevant share of workers posted through temporary agencies have already opted to make equal treatment between national agency workers and cross-border ones an obligation and not just a faculty[86].

Article 5 Revised PWD deals with the monitoring, control and enforcement of the obligations imposed by this Directive and the Enforcement Directive. The provision reiterates that the duty to ensure the respect of such obligations falls upon both the sending and the receiving States. Moreover, Member States must lay down penalties to be applied in case of non-compliance and these penalties have to be «effective, proportionate and effective».

Some interpretative problems may arise with regard to the last paragraph of Article 5. The provision deals with those cases where national authorities ascertain that an undertaking «is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive», after having carried out an assessment on the basis of Article 4 Enforcement Directive. The latter sets forth a series of

[85] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 *on temporary agency work*, OJ L 327 of 5.12.2008, 9-14.

[86] European Commission, *Impact Assessment*, cit., Annex VI.

elements that competent national authorities have to take into account in order to identify genuine posting and avoid abuse and circumvention. These elements are instrumental to determine whether the posting undertaking carries out a substantial economic activity in the State of establishment and whether the worker is actually posted to carry out a temporary activity. Article 5 Revised PWD provides that the Member State that has established that the posting undertaking is behaving improperly or fraudulently is to ensure that «the worker benefits from relevant law and practice». In the case in which the Member State carrying out the assessment under Article 4 Enforcement Directive is the receiving one, the provision can be read as empowering the competent authorities to require the posting undertaking to comply with all the rules of the national labour system. If this reading is correct, the provision at hand would enable the authorities of the receiving State to act unilaterally in cases of abusive recourse to posting. This would break with the approach followed in drafting other rules governing posting. For instance, the Implementing Regulation on the coordination of social security systems[87] provides that the receiving State cannot but accept the documents, such as A1 or E101 certificates, issued by the competent authorities of the sending State. It is only for the latter authorities to withdraw or declare invalid such documents if necessary. If doubts arise on the validity or accuracy of the documents, the receiving State must ask sending State's competent institution to reconsider the grounds for issuing the certificate. Should the two institutions disagree on the matter, the case has to be brought to the Administrative Commission, which «shall endeavour to reconcile the points of view». In any case, the Regulation does not entrust the authorities of the receiving State with the power to unilaterally disregard a certificate, even if substantial evidence demonstrates its fraudulent origins.

The prohibition of unilateral rejection of the certificates issued by the sending State has been partially relaxed by the CJEU in the *Altun* judgment. Here, the CJEU found that the principle of sincere cooperation imposes upon the issuing State the duty to carry out a diligent investigation on the validity of the certificate when so requested by the authorities of another Member State. Otherwise «a national court may, in the context of proceedings brought against persons suspected of having

[87] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 *laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems*, OJ L 284 of 30.10.2009, 1-42.

used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud»[88]. Few months later the CJEU reiterated that the possibility for receiving State's courts to disregard A1 documents is an exceptional occurrence. Indeed, national courts can so decide only in cases of fraud and abuse of rights and it is not enough that the Administrative Commission, seized with the matter, has already held that that certificate was incorrectly issued and should be withdrawn[89].

Lamentably, the final version of the Revised Directive dropped the proposal of the Commission to include a provision enabling Member States to ban from subcontracting chains posting undertakings that failed to guarantee «certain terms and conditions of employment covering remuneration»[90]. The condition built upon the *RegioPost* ruling, where the Court made clear that national authorities can include a minimum wage clause in a public contract and they can make the clause compulsory also for subcontractors[91]. The Revised PWD relegates the question of subcontracting chains in one of its final articles, establishing that this issue will be one of those that the Commission has to take into consideration in its report on the implementation of the Directive, to be submitted five years after its entry into force. Undoubtedly, this represents a major step back in the process toward ensuring a level playing field and a higher level of protection to posted workers, especially in the light of the conspicuous body of evidence showing the inability of the current legal framework to properly deal with the abusive recourse to sub-contracting in the context of posting.

4. *Conclusion*

The cleavage between high-wage and low-wage Member States is one of the most profound fault lines running through the European integration process[92]. "Losing" States claim that the promotion of free move-

[88] ECJ, 6 February 2018, C-359/16, *Altun*, paras 39-61.

[89] *Alpenrind*, cit., paras. 46-47 and 64.

[90] European Commission, *Proposal*, cit., article 1(2)(b).

[91] ECJ, 17 November 2015, C-115/14, *RegioPost*. See F. Costamagna, *Minimum Wage in EU Law Between Public Procurement and Posted Workers: Anything New Under the Sun After the* RegioPost *Case?*, in *European Law Review*, 1, 2017, 101-111.

[92] M. Ferrera, *Solidarity in Europe After the Crisis*, in *Constellations*, 21, 2014, 222-238.

ment at the expenses of their capacity of exercising regulatory functions in the social sphere can contribute to a dangerous race-to-the-bottom with regard to workers' rights and spur on heinous forms of regulatory competition between Member States. However, as in many other cases, unfairness is in the eyes of the beholder. As observed by Barnard, «what is social dumping for the losers (richer Northern European states) is economic opportunity for the winners (poorer Eastern European states) who take advantage of their lower labour costs to gain a foothold on these new markets»[93]. Yet, it can be hardly denied that fostering unbridled intra-EU regulatory competition might be a dangerous path, contributing to erode inter-individual and inter-State solidarity within the EU. Moreover, as admitted by the Commission in its Green Paper on Social Policy of 1993, «"negative" competitiveness between Member States would lead to social dumping, to the undermining of the consensus making process […] and to danger for the acceptability of the Union»[94].

This explain why the revision of the PWD attracted considerable attention, despite posting is not the sole – and, possibly, not even the most impactful – vehicle for regulatory competition. The Proposal tabled by the Commission in March 2016 stirred much controversy and a highly polarized debate. 11 national parliaments issued reasoned opinions declaring themselves against the proposal of the European Commission and more than 500 amendments has been discussed in front of the European Parliament. It then took more than 23 months of negotiations to reach an understanding on a possible agreement.

The revision of the PWD was an exercise of reactive law-making. On the one hand, it sought to react to a mutated economic landscape, which incentivizes the recourse to posting as a way to hire cheap labour, circumventing the limits posed by national labour laws. According to the proponents, the revision was all the more urgent in the light of the inability of the current legal framework to respond to the new challenges. On the other hand, the revision aimed at rebalancing the relationship between the promotion of free movement of services and the safeguard of social objectives in the context of posting, reacting to the one-sided approach adopted by the Court.

The Revised PWD is more favourable to the position of receiving Member States and it offers greater protection to posted workers' rights

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[93] BARNARD, *Fifty Years*, cit., 311.

[94] EUROPEAN COMMISSION, *Green Paper on Social Policy. Options for the Union*, 17 November 1993, COM(1993) 551 final, 46.

than the original version of the PWD and also of the Commission's Proposal. The act makes some steps in the right direction, seeking to reduce the pay gap between local workers and posted ones and narrowing down the space for abusive practices. However, it is far from certain whether such revision will prove enough to avoid, or at least significantly reduce, the recourse to posting as a tool for unfair regulatory competition. This will largely depends on how some of the key elements of novelty of the Revised PWD will be interpreted by the CJEU and implemented by national authorities. Moreover, the final deal includes some compromises, such as, for instance, the exclusion from the scope of application of the Revised PWD of the international road haulage industry and, even more problematically, of a stricter regulation of the use of subcontracting chains.