

Insecurities and vulnerabilities of migrant and posted workers: the need for information provision

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INTRODUCTION

Posted worker is an employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis. The long-standing directive *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 is currently being amended* (PWD). The EU employment ministers struck a compromise on 23 October 2017 to reform it. The new deal, based on a 2016 European Commission proposal,¹ aims to modify current rules and allow people who work temporarily in another member state to earn as much as workers in the country where they are posted. The deal reaffirms the principle of "the same pay for the same work in the same place", as stated in the Commission's proposal. Ministers agreed to set the duration of posting to 12 months, with a possible six-month extension, in specific cases and when notified to authorities. Member states will now enter discussions with the European Parliament to agree on a final version of the Directive's revision. One of the main difficulties in the upcoming discussion could be the parliament's proposal to extend the legal basis of the Directive - to make it relevant to the social legislation and not only to the freedom of services laws (EU observer,2017). In discussing the future of the proposed PWD revisions, Bernaciak (2016) claims it is mainly a political issue and process, as the proposal actually envisages putting in place a new rule regarding permissible and legal company behaviour. Issues such as non-payment of workers, 'letterbox' companies and practices of fraud by some temporary work agencies will still not be solved by the principle of equal pay for equal work (Bernaciak 2016). In this political process, Bernaciak emphasises the role of national and European employer associations, which could play a key role in the creation of a more predictable and transparent market environment.

It is really important to emphasise that the ongoing tensions between liberalisation of the service sector on the one hand and preserving national labour and social standards remain strong at the level of the EU, and have come to reveal deep political-economic tensions, mainly between new and old Member States (Vah Jevšnik and Cukut Krilić 2016). While it is undoubtedly clear that the EU project actually gave preference to economic over social liberties and rights, it is also a fact that the violations in the area of posted work actually undermine the system of industrial relations also in the countries where the posted workers

¹ As early as March 2016, the Commission introduced the so-called 'targeted revision' of the original PWD. The main proposed modifications are to set the maximum duration of posting to 24 months, extend the coverage of universally applicable collective agreements to posted workers, and allow for additional conditions to be set for subcontracting companies. The most important change was that posted workers would not be guaranteed only the host-country minimum wage, but would receive remuneration equal to that of domestic workers, including bonuses, holiday and seniority payments (Bernaciak 2016; Proposal for a directive..., 2016). It was believed that the introduction of the equal wage principle would prevent the exploitation of posted workers and ensure they are treated with dignity, as the notion of fairness in the context of wage differences between posted and domestic workers was at the forefront of discussions on this issue (Bernaciak 2016).

perform their work. Posted work is clearly a way for companies to get round existing regulations and national systems of industrial relations (Lillie 2012). While research has addressed the effects of posting regulations on the protection of labour rights for migrants, few studies focus on how such cross-border employment structures generate specific dimensions of precariousness and how these impact the lives of posted workers (Berntsen 2015). We can agree with the argument of Berntsen (2015) that posting is part of an assortment of often vaguely defined cross-border employment relations, resulting in precarious and often substandard conditions of workers, but few studies actually focus on how such cross-border employment structures generate specific dimensions of precariousness and how these impact the lives of posted workers. Although their recruitment and entry is regulated, specific vulnerabilities of cross-border employment within the EU market must also be exposed (Berntsen 2015). The alleged temporary nature of posting further complicates the relations between the existing working communities of the receiving states and the inclusion of posted workers into the system of industrial relations in that state (Rocca 2012).

POSTED WORK - OSH - RELATED VULNERABILITIES AND RISKS

At first glance, it may seem that posted workers do not share the particularities of migrant workers as they come to another country to provide services and secondly, their posting is of temporary nature. So posted workers are generally regarded as mobile subjects, not migrants. However, many of today's mobile subjects travel and work without any safety-nets (Amid and Rapport in Rogelja and Toplak, 2017), while the positive discourses on mobility (of the highly-skilled, of lifestyle migrants, for example) tend to underscore the vulnerability of contemporary forms of mobility. As Rogelja and Toplak (2017) state: 'Multiple legal possibilities and obstacles have created a specific mobile-immobile context in which not everyone has equal access to (in)mobility and rights. Posted workers are thus usually highly mobile but without proper rights'. In this respect, we would argue that they share many vulnerabilities that have been extensively documented also among migrant workers.

And secondly, and this is another issue that is often overlooked both in policy and research, many of the workers that are posted to EU member states from other member states are actually migrants from non-EU third countries who are in this sense experiencing double vulnerabilities – as migrants to EU countries and as posted workers to yet another EU country. During a recent conversation with the representative of the Employment Service in one of the former Yugoslav countries that is among the major countries of origin of workers posted to the EU, it became clear that she was dealing with posted workers on a regular basis. Nevertheless, she was completely unaware of the meaning of the legal/administrative category of posting, as, in her words, these people are perceived simply as migrants who are coming to Slovenia and are then sent to another EU member state by an employment agency to perform work.

A segment of vulnerabilities of posted workers will be presented through the contribution of the OSH (occupational health and safety) approach to assess the vulnerabilities of posted workers. We would argue, in line with the observations of Sonila Danaj, that the major contribution in analysing OSH and migrant workers made by Sargeant and Tucker (2009 in Danaj 2017), who propose a layered framework to assess the occupational safety and health vulnerabilities of migrant workers, could also be largely applied also to posted workers. They define migrant workers as workers without permanent status in the receiving countries, which is applicable to a variety of immigrants, such as recent, temporary, and seasonal and also posted migrant workers.

In the first layer of vulnerability are the migration factors, such as the conditions of the recruitment and the migration status of the worker. If the conditions of recruitment of a

worker are solid, i.e., regular contracts according to local national laws and/or collective agreements are in place, migrant workers enjoy higher levels of protection. Similarly, if the migrants have a regular residence and/or work permit, as opposed to any form of irregular stay, they will be better protected. However, if employment is precarious, informal or semi-informal, migrant workers will be more vulnerable to occupational and safety risks. In combination, the more insecure the migration status and the more precarious the employment, the more exposed they are to OSH related risks. The irregular migrants functioning in the informal economy are naturally the most vulnerable of all. The characteristics of the migrants themselves, namely the socio-economic conditions in their home country, education and skills levels, and language skills present the second layer of vulnerability. Poor socio-economic conditions at home make migrant and also posted workers more willing to consent to poor working conditions as a means to remain in the receiving country and make earnings for themselves and their families back home. Within migrant characteristics, language skills, which would facilitate their ability to follow OSH procedure or guidelines, read the signs and other OSH instructions, attend trainings and etc. can be included as well. Lack of knowledge of the local language along with lack of access to OSH related material in the native language; make migrant workers more vulnerable to these risks. The importance of language skills as a means to both receive as well as convey information is an issue for posted workers as well. In the transnational workplaces, these differences in OSH cultures might become more visible and make some workers more vulnerable to OSH risks compared to others (in Danaj, 2017). In the third layer of vulnerability, Sargeant and Tucker have put the receiving country conditions, specifically the characteristics of employment and sector, access to collective representation, access to regulatory protection, and particular problems of social exclusion/social isolation. Some sectors and workplaces are more hazardous than others; therefore, if migrant workers are concentrated in these kinds of jobs, their OSH vulnerabilities are higher. Likewise, the type of employment also affects their level of vulnerability, as informal and precarious workers being the most vulnerable of all. Access to collective representation is also fundamental considering that most worker organizations have taken over the monitoring OSH practices in the workplace, as well as they question whether, in the case of injury, they would have representation available to defend their rights. Furthermore, it is not enough for a regulatory protection system to be in place, migrant workers have to have access to it in order not to be exposed to OSH risks. And finally, social exclusion and isolation might augment stress and other mental conditions while making protection and services inaccessible or, at least, less accessible, compared to their fellow workers. Under these circumstances, migrant workers would become even more vulnerable.

Serious infringements in matters of OSH go hand in hand with factors such as undeclared work, underpayment, excessive working time, lack of rest periods, and non-compliance with regulations concerning social security and health insurance. Work-related accidents and ill health can therefore also be attributed to stress-related conditions which may occur as a result of irregularities in the posting procedure, fatigue due to long working hours, the failure to provide OSH training, failure to provide translations of health and safety rules and lack of necessary working equipment. This leads to a higher rate of work-related accidents, especially in high-risk, hazardous sectors, and can have short-term and long-term effects (i.e., burnout, development of chronic conditions and a variety of disabilities) on the health of posted workers. Since posted workers predominantly provide services in hazardous sectors such as agriculture, construction and mining, and/or are exposed to hazardous agents such as chemical substances or radiation, they are particularly vulnerable to accidents and occupational diseases (Vah Jevšnik and Cukut Krilić, 2016).

It should be noted that due to the significant wage disparities in the EU Member

States, workers from lower-income countries tend to intentionally ignore or downplay irregularities concerning their legal status and are reluctant to report OSH-related violations for fear of losing their jobs. They are often willing to work long hours and in substandard working conditions, in some cases at the expense of experiencing work-related stress and injuries, developing acute and chronic illnesses and temporary or life-long disabilities. No-questions-asked dependence on the employer, especially in cases of fictitious postings or undeclared work, generates precariousness that involves “instability, lack of protection, insecurity and social or economic vulnerability” (Rodgers 1989).

This demonstrates precisely what the Brexit debate has thrown into sharp relief: the true cost of market integration in the absence of social protection: insecurity and marginalisation for growing numbers of European citizens (Social Europe, Websource).

Social dumping that is among the most contested issues in the posting process is therefore not to be viewed as solely a company and/or state strategy/practice, but the role of workers in furthering social dumping, although controversial and indirect, is also to be taken into account (Berntsen and Lillie 2014; Bernaciak 2014). States provide ‘windows of opportunity’ in social dumping practices by easing regulatory constraints and introducing market mechanisms to areas previously protected from market pressures (Bernaciak 2014: 25). In this vein, Berntsen and Lillie (2014) argue that firms react to government incentives when they engage in social dumping practices. They also extend this notion to temporary work agencies that they view as a part of the spectrum of an inevitable presence in the regulatory environment that permits and promotes their activities. However, in the absence of systematic micro-level evidence it is difficult if not impossible to draw a clear line between worker exploitation and practices that are not in line with the existing norms but are nonetheless viewed as ‘permissible’ by the workers. For example, in the case of concession bargaining, they seek to obtain a competitive advantage and certain level of job security by compromising on wages and working conditions (Bernaciak 2014: 25). To further support this argument, the studies of this phenomenon findings of a study that examined the working and living conditions of posted workers in five selected countries (Belgium, France, Germany, Sweden and the UK) clearly demonstrate that the workers were aware that they were cheaper than the domestic labour force, but this was to some degree acceptable to them as long as the wages remained significantly above their country of origin levels. For most of the interviewed workers, posting was a part of a project to improve their lives (Clark 2012). In a similar vein, it holds true that the workers’ role in terms of monitoring and enforcing labour conditions is generally relatively passive, which can again be interpreted as the logical outcome of the temporary and insecure nature of their employment (Berntsen and Lillie, 2015).

Trade unions also significantly affect the shaping of trade unions’ strategies towards posted workers and influence the challenges faced when organising posted workers (Danaj and Sippola 2015). There is also still a significant research gap in this area (for notable exceptions see for example Berntsen and Lillie 2015; Danaj and Sippola 2015). The hyper-mobility of most posted workers and their usually relatively short-term employment situation pose an additional challenge to the work of trade unions, and national union support for a more transnational approach in this area is also needed (Danaj and Sippola 2015; Berntsen and Lillie 2016).

To overcome the existing gaps in policy and research, two projects have been implemented by the Slovenian Migration Institute at the Research Centre of the Slovenian Academy of Sciences and Arts (ZRC SAZU) Slovenia. The first project is entitled Posting of Workers: Sharing Experiences, Promoting Best Practices and Improving Access to Information (EaSI,

PROGRESS/ 2014 - 2016) and was aimed at increasing the accessibility, transparency and coherence of information on posting of workers for the officials of competent public authorities, employers and posted workers in Slovenia and the title of the second project is Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors (EaSI, PROGRESS/2017-2018). Within this project, among other activities, a transnational e-Observatory on OSH in the context of posting will be set up.

LACK OF ACCESS TO INFORMATION

Posted workers appear to have little awareness of their rights, mostly because of the lack of union representation and their isolation in receiving countries (Wagner and Lillie, 2014) and also due to the lack of information. Various international documents or organization have recently recognised the need for effective information infrastructure for migrants in the last few years (here we can mention the IOM report on improving access to labour market information or European Agenda on Migration). In the project DRIM, DRIM - Danube Region Information Platform for Economic Integration of Migrants, financed by the Interreg Danube Transnational Programme, ZRC SAZU, together with partners from 8 other countries, is approaching this goal through a set of activities that build on transnational cooperation and mutual learning and perhaps most importantly, create a common, transnational rather than national, information tool for migrants and mobile individuals. We are collecting information on services in the areas of employment, entrepreneurship, education, taxes, social benefits, health, housing, childcare, transport and other areas of migrants' everyday life. In its final form, Danube Compass information platform should deliver information in eight countries and in each country in five languages – local language, English language plus three languages that will be selected according to specific country needs. With Danube Compass built and running, the project will begin to carry out training courses among public institutions, especially national and local authorities that work with migrants on a daily basis aiming at disseminating Danube Compass as wide as possible as well as learning from public institutions on specific barriers to a greater access to information. In the last phase of the project, the Consortium will organize national and transnational workshops with decision makers in the region and prepare country specific recommendations which will serve as the basis for the preparation of the Strategy promoting the access to information as the key integration measure.

The transnational character of our activities and especially of our main output the Danube Compass information platform poses great challenges in front of us. How to make a platform unified but still open to various special provisions and service offered only in a particular country? How are different categories of moving individuals – migrant, immigrant, posted worker, refugee, highly mobile experts – understood not only in different countries but also in different institutions? What do these categories mean for the access to services that information platform details? These are all challenges ahead of us but we believe that access to information leads to empowerment of migrants and mobile individuals, while barriers can lead to dissolution and apathy (Bofulin, 2017).

CONCLUSIONS

To sum up, the new body of literature on (OSH related) vulnerabilities of posted workers needs to be multi-sectoral, multi-level, multidisciplinary, and should include inputs from all relevant stakeholders in order to provide quality evidence base to inform policy debates in the EU and it should also recognise the heterogeneity of posted workers and their diverse

work/life experiences. It should focus not only on work-equipment related and work practice-related risks, but also psychological risks, such as stress, anxiety and isolation and address work accidents and hazards that can lead to poor health and those that hinder wellbeing in general (for example, exploring work-life balance of workers who are regularly posted abroad which remains an almost completely unexplored issue). Finally, effective preventive measures need to be outlined, brought to attention and utilized in practice (Vah Jevšnik 2017).

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