Working Paper

Administrative requirements and control measures in the Posted Workers Enforcement Directive

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ABSTRACT

On 25 September 2019, the European Commission presented its report to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU (the 'Enforcement Directive') assessing, in particular, the appropriateness and adequacy of the application of national control measures introduced on the basis of its Article 9.

In its report, the European Commission summarises the three-years experience of Member States and relevant stakeholders with the effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers and technological developments.

The Enforcement Directive has been implemented in all Member States starting from 18 June 2016. According to the Enforcement Directive, all Member States are authorised to impose certain administrative requirements in order to ensure effective monitoring of compliance with the obligations set out in Article 3(1) of the Posted Workers Directive (96/71/EC), namely guaranteeing to posted workers the 'hard core' labour rights applicable in the host country based on law, regulation or administrative provision, and/or universally applicable collective agreements (provided these are more favourable than the rights enjoyed based on their home country employment regulation):

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual holidays;
(c) the minimum rates of pay, including overtime rates (but excluding supplementary occupational retirement pension schemes);
(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 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.

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To achieve its objective, the Enforcement Directive established a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of the Posting of Workers Directive, including measures to prevent and sanction any abuse and circumvention of the rules applicable to posted workers.

The Enforcement Directive itself enlists a range of administrative requirements the Member States can 'pick & chose' from, to guarantee the respect of the above 'core labour rights' during postings, namely:

a) to make a simple declaration to the responsible national competent authorities in order to allow factual controls at the workplace (the so-called 'Posted Worker Notification'; 'PWN');

b) to keep or make available and/or retain copies of the employment contract or an equivalent document relevant to the assignment, including payslips, time-sheets and proof of payment of wages during the posting, as well as after the period of posting at the request of the authorities;

c) to provide a translation of the retained assignment related employment documents;

d) to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices;

e) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.

Although the list of requirements included in the Enforcement Directive is indicative and non-exhaustive, allowing the Member States to choose the preferred control measures - or even introduce new ones as long as they are justified and proportionate - the European Commission's assessment indicates that most Member States impose most or all of the administrative requirements listed in Article 9(1).

While the PWN-related administrative requirements introduced by the Member States during the implementation of the Enforcement Directive are *de iure* in line with the scope of the regulation. In practice however, the introduction of measures based on the Article 9(1) of the Enforcement Directive has led to practical problems when posting workers, especially due to increased administrative burden.

The existence of the practical challenges related to compliance with PWN requirements was also acknowledged by the Court of Justice of the European Union (CJEU) which, in its most recent case law, namely cases *Čepelnik* (C-33/1) and *Maksimovic* (joined cases C-64/18, C-140/18, C-146/18 and C-148/18**)** has analysed the admissibility of certain national measures aiming at protecting posted workers and combating social security fraud. In both cases, the CJEU has identified that the national measures implemented under the Enforcement Directive are indeed able to create a barrier to the freedom to provide services.

KEYWORDS: *posted workers, EU internal market, freedom to provide services, Enforcement Directive 2014/67/EU, administrative requirements, control measures.*

Introduction

On 25 September 2019, the European Commission presented its report[2] to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU (the 'Enforcement Directive')[3] assessing, in particular, the appropriateness and adequacy of the application of national control measures introduced on the basis of its Article 9. The aim of the European Commission was to summarise the Member States' and relevant stakeholders' three-years experience with the system for administrative cooperation and exchange of information, implemented in the second half of 2016.[4]

Administrative requirements and national control measures, together with the enhanced role of the Member States in the framework of administrative cooperation, have been introduced by the Enforcement Directive in the attempt to provide means to efficiently monitor the volumes and nature of cross-border postings, and to foster cooperation between the competent authorities, while at the same time limiting Member States' possibilities to impose excessively onerous administrative requirements.[5] The European Commission has now assessed whether the means implemented by the Member States are adequate to identify genuine postings and provide appropriate data relating to the posting process, and whether more uniform, standardised process would be required to attain the objectives, together with the establishment of common principles or standards for inspections in the field of the posting of workers and technological developments. [6]

This article aims to provide an overview of the circumstances leading to the adoption of the Enforcement Directive, assess the administrative requirements introduced vis-à-vis of the economic actors active on the Single Market (without going into detail in relation to the administrative cooperation and access to information requirements lying primarily with the competent authorities of the Member States) and review some of the most recent case law of the Court of Justice of the European Union (CJEU) related to such control measures.

The legal evolution of the (Posted Workers) Enforcement Directive

The need to ensure the consistent enforcement of the Directive 96/71/EC (the 'Posted Workers Directive')[7] – laying down the 'hard core' labour law provisions that a host state must guarantee to workers posted to their territory within the framework of provision of services – resulted

[2] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation') [COM/2019/426 final].
[3] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance. OJ L 159, 28.5.2014, pp. 11–31.
[4] Articles 23-24 of the Enforcement Directive.
[5] Ahlberg et al. (2014), p. 201.
[6] Article 24 of the Enforcement Directive.
[7] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. OJ L 18, 21.1.1997, pp. 1–6.

from two main circumstances: the 'relaunch of the Single Market' and the improvement of the European Union's global competitiveness through the liberalisation of services on one hand, and the fear of increased mobility of 'cheap labour' from the newly accessed Central and Eastern European Member States on the other.

The European Commission introduced their proposal for a directive on the enforcement of the Posted Workers Directive in 2012[8], under the supervision of Commissioner László Andor[9], as part of the Commission's Employment Package (launched in April 2012)[10]. This proposal resulted from a number of discussion on European level following the evaluation by the Commission of the implementation and application of the Posted Workers Directive in 2003[11], as well as from the heated debates triggered by the judgments of the European Court of Justice.

Four decisions by the CJEU, the *Viking-Line, Laval, Rüffert* and *Commission v Luxembourg cases*[12] – often referred to as the 'Laval Quartet' – raised the question of the permissible level of interference into the employment conditions applicable during postings (i.e. whether the core terms and conditions of employment outlined under Article 3(1) of the Posted Workers Directive formed an exhaustive list guaranteeing a minimum threshold of protection), the interpretation of 'public policy provisions' in the context of postings, as well as the apparent supremacy of the freedom to provide services vis-à-vis collective actions and employees' social rights. According to Professor Mario Monti[13] the 'Laval Quartet' rulings "*revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level*".[14] He equally pointed out that "*the revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration*".

In fact, from the early 2000s one of the major topics ruling the European scene was the reform of the free provision of services: in 2002, the European Commission had identified extensive impediments to a free market in services, and proposed a revision of the regulation on free movement of services in attempt to 'remove obstacles to economic activity', 'solve cross-border problems' and to 'utilise economies of scale'[15]; in 2004, Commissioner Bolkestein

[8] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [COM(2012) 131 final].
[9] Commissioner for Employment, Social Affairs and Inclusion in the Barroso II administration of the European Commission (2010-2014).
[10] https://ec.europa.eu/social/main.jsp?langId=en&catId=1039
[11] Report from the Commission services on the implementation 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, 2003 (http://www.ec.europa.eu/social/postedworkers).
[12] Case C-438/05, *Viking Line* [2007], ECR I-10779; case C-341/05, *Laval un Partneri* [2007], ECR I-11767; case C-346/06, *Rüffert* [2008], ECR I-01989; case C-319/06, *Commission v Luxembourg* [2008], ECR I-04323.
[13] Report 'A new strategy for the single market' to the President of the Commission, 9 May 2010, p. 68.
[14] Excerpt of the report of Mario Monti on "A new Strategy for the Single Market", p. 1. (http://www.europarl.europa.eu/document/activities/cont/201005/20100527ATT75093/20100527ATT75093EN.pdf)
[15] Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services [COM(2002) 441].

tabled a first draft Services Directive supporting a shift of focus in the European economy from industry or agriculture to economies of services.

The proposed reform of the Services Directive[16] stirred up considerable concerns among the various stakeholders. On one hand, as the introduction of the 'Bolkestein draft' coincided with the enlargement of the European Community with 8 (later 8+2) new Member States, there was a clear difference in interest between the 'old' and 'new' Member States: while the priority of the EU15 was to protect established labour standards and their usual mode of regulation[17] (albeit taking advantage of the new possibility of establishing subsidiaries in newer Member States so as to take commercial advantage of lower operational costs) , the new EU8+2 Member States were eager to benefit from their new status within the EU and therefore favoured the remove the extensive obstacles to free movement of services, which would aid entrepreneurs established within their jurisdiction to compete effectively for service contracts in other Member States[18].

On the other hand, trade unions in particular expressed their concern with regard to its possible impact on national industrial relations regimes and its relations to the Posted Workers Directive[19]. In fact the 'Laval Quartet' judgments triggered intense debate among EU institutions, academics and social partners particularly in relation to the balance between the exercise by trade unions of the right to take collective action, including the right to strike, and the economic freedoms enshrined in the Treaty on the Functioning of the European Union, as well as the interpretation of the concept of public policy, the material scope of the terms and conditions of employment imposed by the Posted Workers Directive and the nature of mandatory rules, in particular the minimum wage[20].

The adoption of the Enforcement Directive was seen as one of the key instruments introduced as part of the process to liberalise the free movement of services within the European Union (previously European Economic Area and European Community), which 20 years after the creation of the Single Market and 15 years after the regulation of the core employment rights of employees posted to another Member States for temporary provision of services had yet to reach the full potential of the European market integration.

Enforcement of rights under the Posted Workers Directive

Posted workers are usually defined in line with the Posted Workers Directive as *"workers who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works*"[21]. Neither this definition, nor the Posted Workers Directive brings clarity to certain questions that would allow a clear interpretation of the notion, and therefore application of the Directives themselves, in the practice.[22] Additionally, the lack

[16] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. OJ 2006 L 376, p. 36.
[17] Barnard (2008), pp. 323–394.
[18] Evju/Novitz (2014), p. 67.
[19] Evju/Novitz (2014), p. 67.
[20] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [COM(2012) 131 final].
[21] Article 2 of the Posted Workers Directive.
[22] van Hoek/Houwerzijl (2012). See also: Fekete (2018), p. 27.

of appropriate measures available to capture the actual volumes of postings made it difficult to assess the actual number of workers active in this type of cross-border assignments, and consequently the impact of postings on the labour market of the Member States.[23]

While previous studies indicated that the number of postings barely accounts to 1% of the total number of employees in the EU[24], scholars[25] now suggest that even though the ideal typical single European labour market has been imagined as a product of the free movement of labour, i.e. permanent-type mobility, the cultural, economic, linguistic and social diversity of the European Union seems to drive very high and underestimated levels of free service mobility based on the free movement of services.[26] More recent studies argue that in fact whatever the precise figures, they are much higher than officially expected, even in countries where transitional agreements were put in place to mitigate the effects of the 2004 Enlargement.[27]

Because posted workers are not fully integrated into the labour market/industrial relations of the host state, they will not in practice be covered by the normal mechanisms for supervision and control of working conditions in the host state. Neither will they, in practice, be under close scrutiny by the control mechanisms in the state of establishment. In this way there is a risk of creating a free zone for irregular or undeclared work where the labour laws of neither the host state or the state of establishment are enforced. The absence of effective control mechanism for posted workers, it is argued, risks distorting competition between domestic and foreign service providers and employers[28], and therefore able to erect barriers to the transnational provision of services.

As the freedom to provide services constitutes one of the main motors of the Single Market, with the adoption of the Posted Workers Directive the question of how to protect the employment conditions for posted workers is no longer purely a matter of national social policy, but forms part of the *acquis communautaire social*.[29]The Posted Workers Directive, respecting the principle of subsidiarity, does not give the Member States any detailed instructions on how to ensure posted workers the rights conferred on them: Member States shall take appropriate measures in the event that a posting employer fails to comply with the Posted Workers Directive.

The only dispositions containing enforcement-related content are Articles 5 and 6 of the Posted Workers Directive: these confirm the need of an active involvement from the Member States, in particular to ensure that adequate procedures are available to workers and/or their

[23] There is a substantial lack of data regarding the overall number and characteristics of posted workers throughout the EU. Prior to the implementation of the Posted Workers Enforcement Directive, national authorities had to rely on the A1 (formerly E101) attestations, attesting posted worker's membership of their social security system, in order to monitor the application of the requirements on posting of workers and in cross-border cooperation. Due to differences in the scope of posting between Directive 96/71/EC (Posted Workers Directive) and Regulation (EC) No 883/2004 (Regulation on the coordination of social security systems), however the number of A1 attestations issued or received provide only an indicative picture of the actual number of postings. See: De Wispelaere/Pacolet (2017).
[24] Voss et al. (2016), p. 12.
[25] See for instance Dølvik/Visser (2009) and Kaczmarczk/Okólski (2008).
[26] Mussche et al. (2016) p. 3.
[27] Dølvik/Visser (2009), p. 520.
[28] Ahlberg et al. (2014), p. 187.
[29] Ahlberg et al. (2014), p. 192.

representatives for the enforcement of obligations under this Directive, not only in the in the host state, but also in any other state where the worker may be entitled to institute proceedings against their employer.[30] The Posted Workers Directive also establishes a joint responsibility of the host state and the state of establishment through the obligation of cooperation on information in order to strengthen the monitoring and enforcement measures[31]: according to its Article 4, Member States have to designate liaison offices, which are to work as links between monitoring authorities in the Member States, but also to facilitate access to national work and employment conditions relevant for posting employers and posted workers.

Harmonisation of enforcement measures through case law

Although the Posted Workers Directive prescribes that the Member States shall take appropriate measures to guarantee that posted workers are ensured the employment conditions, these measures are not harmonised at European Union level. In its judgment in the *Santos Palhota* case[32] the CJEU has stressed that the Posted Workers Directive seeks to coordinate the substantive employment conditions of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored. The various control measures do not fall within the scope of the Posted Workers Directive and may be freely defined by the Member States, in compliance with the Treaty and the general principles of the European Union law.

Consequently, until the beginning of the new millennium, the harmonisation of the enforcement rules was mainly brought about by the CJEU, through its preliminary rulings.

In the *Rush Portuguesa* case[33] the CJEU famously ruled that the host state's power to monitor the application of its labour law is limited in the event of cross-border provision of services:

> "… such *checks must observe the limits imposed by Community law and in particular those stemming from the freedom to provide services which cannot be rendered illusory* and whose exercise may not be made subject to the discretion of the authorities".

Subsequently, in the CJEU also clarified that not only discriminatory measures could amount to unlawful restrictions to the free movement of services:

> "… the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the *abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the*

[30] The Rome Convention of 19 June 1980 on the law applicable to contractual obligations (OJ C 27, 26.1.1998, pp. 34–53) defines the rules of applicable law specific to individual employment contracts in order to provide employees with the protection afforded to them under the Convention; in the absence of choice of law, Article 6 of the Convention provides the possibility the employee to institute proceedings not only (a) in the country in which the employee habitually carries out his work in performance of the contract, but also (b) in the country in which the place of business through which he was engaged is situated, or (c) in the country to which the contract is more closely connected based on the circumstances as a whole.

[31] Ahlberg et al. (2014), pp. 192-193.

[32] Case C-515/08, *Santos Palhota* [2010], ECLI:EU:C:2010:589, paras. 26-27.

[33] Case C-113/89 *Rush Portuguesa* [1990], ECR I-01417, para. 17 (highlights by the author); see also Joined Cases 62/81 and 63/81 *Seco* [1982], ECR 00223.

> *activities of a provider of services established in another Member State* where he lawfully provides similar services". [34]

Only the national measures justified by overriding reasons of public interest and introducing restrictions of the free movement of services proportionate to these interests can be applied to foreign service providers:

> "… [t]he application of national rules to providers of services established in other Member States must be *appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary* in order to attain it".[35]

In parallel with the CJEU's own efforts to ensure a uniform application of the national control measures, the European Commission was also actively working on removing barriers to the transnational provision of services by initiating a series of infringement procedures against Member States to question a set of requirements for posting of workers, from restrictions affecting temporary agency work[36] to the specific requirements for posting non-EU national workers[37] and the lack of clarity of the provisions on what information must be provided to the authorities, and when this must be done[38].

From the perspective of market integration and particularly the free movement of services, national monitoring measures started being perceived as restrictions of economic freedoms. National monitoring measures could make it impossible for a foreign provider to operate in another Member State using its own employees. Such measures could also cause delays or administrative burdens for the service providers. Furthermore, it is sometimes argued that national control measures are not in practice aimed at protecting posted workers but rather at protecting national markets from foreign competition. In this way the national monitoring measures are obstacles to realising a fully integrated service market.[39]

Enforcement of posted workers' rights: in need of a reform

One of the first assessments of the implementation of the Posted Workers Directive examined in 2003 the legal context and the practical functioning of the Posted Workers Directive in the framework of the free provision of services. In 2003, Member States had hardly developed measures to ensure compliance with the posting rules. Liaison offices and national compliance authorities suffered from a lack of staff and competences were too dispersed to guarantee effective control.[40]

As a consequence of the debates around the liberalisation of services in the Single Market and the concerns of the social partners concerning the effect of this liberalisation on the rights of the employees involved in the cross-border provision of services, there was an increased need

[34] C-76/90 *Säger*, [1991], ECR I-04221, para. 12 (highlights by the author).
[35] Joined cases C-369/96 and C-376/96 *Arblade* [1999], ECR I-08453, para. 35 et seq. (highlights by the author).
[36] Case C-493/99 *Commission v Germany* [2001], ECR I-08163; Case C-279/00 *Commission v Italy* [2002], ECR I-01425; Case C-490/04 *Commission v Germany* [2007], ECR I-06095.
[37] Case C-445/03 *Commission v Luxembourg* [2004], ECR I-10191; Case C-168/04 *Commission v Austria* [2006], ECR I-09041; Case C-244/04 *Commission v Germany* [2006], ECR I-00885.
[38] Case C-319/06 *Commission v Luxembourg* [2008], ECR I-04323.
[39] Ahlberg et al. (2014), p. 187.
[40] Cremers (2018a), p. 2.

articulated by the stakeholders to introduce control measures in line with the objectives to mitigate the impact of the economic crisis that hit the European Union in 2007-2008.

Already in 2006 – on the same day as the European Commission presented its amended proposal for a Services Directive – it also published a guide for the member States with its own interpretations of what kind of national administrative requirements and control measures could be considered consistent with the Community law.[41] The purpose of the guide was to raise awareness of the Member States on the prevailing case law on administrative procedures[42], and consequently to 'steer' them towards an implementation that is aligned with the general objectives identified in the Services Directive, namely the sustainable development of the Single Market based on a highly competitive social market economy, the freedom to provide services and promotion of a level playing field, the improvement of living and working conditions, respect for the diversity of industrial relation systems in the Member States, and the promotion of dialogue between management and labour. On the other hand, the national control measures had to observe more specific (and related operational) objectives as well: (i) better protection of the rights of posted workers, (ii) facilitating the cross-border provision of services and improving the climate of fair competition, and (iii) improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers[43].

At the presentation of his political priorities before the European Parliament on 15 September 2009, President Barroso recognised the need to address concerns and issues raised by several stakeholders and announced a legislative initiative to resolve the problems of implementation and interpretation of the Posted Workers Directive[44]. The Impact Assessment compiled by the European Commission between 2009-2012 as a result of President Barroso's commitment identified four group of problems to be addressed by the future regulation[45]:

1. Problems related to the implementation, monitoring and enforcement of the applicable working conditions, including the protection of posted workers' rights;
2. Problems related to the abuse of the posted workers status in order to evade or circumvent legislation;
3. Problems related to the controversial or unclear interpretation of the terms and conditions of employment of the Posted Workers Directive;
4. Tensions between the freedom to provide services/establishment and national industrial relation systems.

[41] Guidance on the posting of workers in the framework of the provision of services [COM(2006) 159 final].
[42] Amongst others, the European Commission refers in its guide to the *Arblade* case (joined cases C-369/96 and C-376/96) to argue the requirement to elect a representative domiciled in the host country, and to cases C-445/03 *Commission v Luxembourg*, C-244/04 *Commission v Germany* in relation to the requirements of a simple prior declaration.
[43] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [COM(2012) 131 final].
[44] http://europa.eu/rapid/press-release_SPEECH-09-391_en.htm
[45] Impact assessment – Revision of the legislative framework of the posting of workers in the context of provision of services, SWD(2012) 63 final.

The draft Enforcement Directive, proposed by the European Commission in 2012, was based in essence on a package of regulatory measures to deal with the implementation, monitoring and enforcement of the minimum working conditions ('problem 1') and with the abuse of posted worker status in order to evade or circumvent legislation ('problem 2'), combined with nonregulatory measures to deal with controversial or unclear interpretation of the terms and conditions of employment required by the Posted Workers Directive ('problem 3'), to address the specific objectives ('better protection of the rights of posted workers', 'improving the climate of fair competition' and 'facilitating the cross-border provision of services') and the most coherent with regard to the general objectives (enhancing competitiveness of the European Single Market).

The draft Enforcement Directive proposal was well received by the European Economic and Social Committee (EESC)[46], which welcomed the intention of the European Commission to enforce the existing Posted Workers Directive, focusing on better implementation and effective administrative cooperation among Member States, to guarantee protection for posted workers while respecting the Member States' different labour market models. Nevertheless, in the EESC's view the European Commission should put more emphasis on the social aspects and ensured greater respect for the autonomy of the social partners and the role played by them in various labour market models[47].

The European Committee of the Regions (CoR) also welcomed the European Commission's initiative to harmonise the enforcement of the implementation of the Posted Workers Directive and addresses the fundamental issues that have arisen from the judgments of the CJEU, however regretted that the draft proposal does not review or rework the Posted Workers Directive and is thus not able to deal with all of the substantive issues[48].

Objectives of the Enforcement Directive

Circumvention of the posting rules goes from non-compliance with the labour law or social security regulations, which is left undetected due to limited or vague requirements of cooperation and information exchange for national authorities, all the way to the setting up of "letterbox companies" in a Member State with low-wage levels in order to have work carried out in a high-wage Member State by workers posted from the first Member State.[49] The objective of the Enforcement Directive is to ensure compliance with Posted Workers Directive by introducing a set of requirements towards both Member States and undertakings to guarantee the protection of employees' rights and reduce social dumping.

Addressing the European Parliament, President Barroso envisaged the creation of a Regulation, as it "*has the advantage of giving much more legal certainty than the revision of the Directive itself, which would still leave too much room for diverging transposition, and take longer to*

[46] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services', CESE/2012/1387.
[47] Opinion of the EESC, CESE/2012/1387
[48] Opinion of the Committee of the Regions on 'The posting of workers in the framework of the provision of services', CDR/2012/1185.
[49] Van Nuffel/Afanasjeva (2018), p. 1413.

produce real effects on the ground"[50]. In fact, based on the differences and disparities in the way the Posted Workers Directive is implemented, applied and enforced in the different Member States are detrimental to the proper functioning of the Directive, thus making it very difficult, if not impossible, to create the required level playing field for service providers and ensure that workers posted for the provision of services enjoy the same level of protection guaranteed by the Posted Workers Directive throughout the EU.[51] The 'Monti II Regulation'[52], which sought to address the issue of industrial action presented by the *Laval* and *Viking* cases and reconcile these with EU free movement law however failed to do this and has been withdrawn by the European Commission following the use of the new 'yellow card procedure' employed by national parliaments through the CoR under the subsidiarity provisions on the Treaty.[53]

In order to improve the application and enforcement of the Posted Workers Directive in practice, the European Commission proposed more uniform rules – in the form of a new Directive – for administrative cooperation, mutual assistance, national control measures and inspections reflect the heterogeneous nature of inspection and control systems across Member States, while also endeavouring to avoid unnecessary or excessive administrative burden for service providers. At the same time, moreover, respect for the diversity of the different social models and industrial relations systems in the Member States is guaranteed.[54]

The Enforcement Directive only provides guidance to the Member States on how to determine the genuine link of employment between the sending company and the employer and to prevent abuse and circumvention. The real addressees of the Enforcement Directive are the competent national authorities, as well as the service providers and receiving undertakings, who are subject of administrative requirements and control measures introduced by the Enforcement Directive.

Administrative requirements and control measures in the Enforcement Directive

The Enforcement Directive uses access to information and administrative assistance rules to provide for the 'enforcement' of those legal principles enshrined in both the old and new Posted Workers Directives. Access to information for cross-border firms is to be made available through the Internal Market Information system (IMI) and places new demands on member states to ensure that requisite information is forthcoming. Crucially, the responsibility is placed upon member states to ensure that Article 3(8) of the Posted Workers Directive[55] is drafted properly in national law.[56]

[50] http://europa.eu/rapid/press-release_SPEECH-09-391_en.htm
[51] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [COM/2012/0131 final], p. 12.
[52] 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 (Proposal withdrawn) [COM (2012) 130].
[53] Pintz (2015), p. 93.
[54] COM/2012/0131 final, p. 12.
[55] Definition of 'Collective agreements or arbitration awards which have been declared universally applicable'.
[56] Morton (2013), p. 9.

The measures introduced by the Enforcement Directive to obtain its objective – guaranteeing the protection of employees' rights and reducing social dumping – are spread throughout the whole Enforcement Directive, and can be divided into three major sections, depending on the subject required to complete the actions prescribed:

a) *Competent national authorities* (labour inspectorates and courts) – Measures mostly related to access to information, cross-border cooperation and inspection/enforcement.

b) *Economic operators* (service providers and receiving undertakings) – Measures mostly related to compliance with *stricto sensu* administrative requirements and control measures.

c) *Social partners* – Measures mostly related to cooperation and advisory role.

The below list exemplifies some of the requirements introduced for each category of addressee.

Addressee	**Control Measure**
National authorities (labour inspectorates and courts/tribunals)	a. Identification of a genuine posting and prevention of abuse and circumvention (*Article 4*). b. Operation of single official websites to ensure clear, transparent, comprehensive and easy access to information (*Article 5*). c. Ensuring a close cooperation and mutual assistance between Member States, especially to facilitate checks, inspections and investigations of any non-compliance or abuse of applicable rules on the posting of workers (*Articles 6-8*). d. Carrying out appropriate and effective checks and monitoring mechanisms in order to control and monitor compliance with the provisions and rules laid down in Directive (*Article 10*). e. Ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings (*Article 11*). f. Enforce the measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer (*Article 12*). g. Facilitate the cross-border enforcement of financial administrative penalties and/or fines imposed on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State (*Articles 13-19*).
Economic actors (service providers and receiving undertakings)	1.1 Comply with the administrative requirements and control measures imposed by the Member States (*Article 9*). 1.2 Comply with the measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer (*Article 12*).
Social partners	a. Cooperate with the Member States to facilitate the access to information on applicable collective agreements (*Article 5*).

	b. Engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings (*Article 11*). c. Advise Member States on additional measures to ensure subcontracting liability (*Article 12*).

Source: Author's own assessment

One of the main objectives of the Enforcement Directive is to improve the identification and monitoring of postings and to introduce at Union level more uniform elements, facilitating a common interpretation, in order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU[57] and/or of the application of the Posted Workers Directive[58]. Therefore, the constituent factual elements characterising the temporary nature inherent to the notion of posting, and the condition that the employer is genuinely established in the Member State from which the posting takes place, need to be examined by the competent authority of the host Member State and, where necessary, in close cooperation with the Member State of establishment.[59]

Article 9(1) of the Enforcement Directive enlists the administrative measures Member States may impose. This list of measures is indicative and non-exhaustive; the wording of the introductory sentence ('*Member States may in particular impose*') suggests the indicative nature of these instruments. Nevertheless, all measures introduced by the Member States should be justified and proportionate[60] so as not to create administrative burdens or to limit the potential that undertakings, in particular small and medium-sized enterprises (SMEs), have to create new jobs, while protecting posted workers.[61] The procedures and formalities relating to the posting of workers should not in any case create a restriction to the freedom to provide services in the EU internal market.

The administrative and control measures suggested by the Enforcement Directive [62] focus on the requirements that would all have been banned under the Bolkestein proposal of the Services Directive[63]:

1. the requirement to make a declaration to the host state's authorities,
2. the requirement to have a representative in the host country, and
3. the requirement to hold and keep employment documents.

The below chapters provide an overview of the regulation of each administrative requirement and control measure adopted as part of the final Enforcement Directive, also reflecting to the relevant case law that the Directive was meant to codify. Although certain authors (Ahlberg,

[57] Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, pp. 47–390.
[58] Recital 7 of the Enforcement Directive.
[59] Recital 8 of the Enforcement Directive.
[60] Article 9(2) of the Enforcement Directive.
[61] Recital 4 of the Enforcement Directive.
[62] Article 9(1) of the Enforcement Directive.
[63] Ahlberg et al. (2014), p. 199.

Johansson, Malmberg) consider the joint and several liability in subcontracting as part of these measures, I will proceed with the review of the *stricto sensu* administrative requirements only (that is the requirements attached to the more procedural notification obligation established by the Directive), and leave the analysis of this provision to the studies of substantive labour law[64].

1.1 A simple declaration

First, the host Member State may create an obligation for a service provider established in another Member State "*to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State, containing the relevant information necessary in order to allow factual controls at the workplace"* (Article 9(1) point (a)). This is in line with the CJEU case law[65], which has clarified that the host state may require a declaration prior to the posting as long as it is not combined with any kind of prior registration procedure or prior control.[66] In fact the CJEU previously ruled that since a prior declaration enables compliance with the social welfare and wages legislation of the host Member State to be monitored during the posting, it constitutes a more proportionate means of attaining that objective than such authorisation or a prior check.[67] On the other hand, if the declaration in question assumes the nature of an administrative authorisation procedure, that goes beyond what is necessary in order to ensure that posted workers are protected.[68]

The Enforcement Directive also provides guidance on the content of the permissible simple declaration. Although the European Commission's proposal contained an exhaustive enumeration[69], the adopted Enforcement Directive follows a more permissive approach, and provides an open list of examples that the Member States may include into their national declaration forms:

(i) the identity of the service provider;
(ii)the anticipated number of clearly identifiable posted workers;
(iii)the contact persons (referred to under Article 9, points (e) and (f));
(iv)the anticipated duration, envisaged beginning and end date of the posting;
(v)the address(es) of the workplace; and
(vi)the nature of the services justifying the posting.[70]

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[64] The Enforcement Directive itself regulates subcontracting liability in a separate section: *Chapter V – Enforcement* (as opposed to *Chapter IV – Monitoring Compliance*, where the other administrative requirements are enlisted).
[65] See Case C-515/08 *Santos Palhota*, para. 51 and case-law cited (Case C-445/03 *Commission v Luxembourg*, para. 31; Case C-244/04 *Commission v Germany*, para. 45, and Case C-168/04 *Commission v Austria*, para. 52).
[66] Ahlberg, Johansson, Malmberg, p. 209.
[67] Case C-515/08 *Santos Palhota*, para. 53.
[68] Case C-515/08 *Santos Palhota*, para. 52.
[69] According the original text of the draft provision, "*the declaration may only cover the identity of the service provider, the presence of one or more clearly identifiable posted workers, their anticipated number, the anticipated duration and location of their presence, and the services justifying the posting*". See COM(2012) 131 final, p. 33 (highlights by the author).
[70] Article 9(1) point (a) of the Enforcement Directive.

1.2 Social documents

In its judgment in the case concerning *Arblade*[71], the CJEU pointed out that the effective protection of workers, particularly as regards health and safety matters and working hours, could require that certain documents be kept in an accessible and clearly identified place in the territory of the host Member State, so that they were available to the authorities of that State responsible for carrying out checks, "*particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of [the Posted Workers] Directive*".

Consequently, Member States may require that foreign service providers hold certain "social" (i.e. labour law related) documents available in an accessible and clearly identified place during the period of posting, as well as after the period of posting, at the request of the authorities of the host Member State. The list of social documents that service providers must retain for the purpose of postings are specified in Article 9(1) point (b) of the Enforcement Directive: employment contract or an equivalent document[72], payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages. In the *Finalarte*[73] cases, the CJEU accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that State, to the extent that this difference in treatment could be attributed to objective differences between those businesses and businesses established in the host Member State.[74]

In the *Arblade* judgment, the CJEU ruled that the obligation to have available and keep certain documents at the domicile of a natural person resident in the host Member State, who would hold them as the employer's appointed agent or proxy, even after the employer has stopped employing workers in that State, could only be admissible if the national authorities were not able to effectively perform their control duties effectively in the absence of such an obligation[75]. The European Commission's conclusion[76] – in line with the referred case law – is that the host Member State must be able to demand, in accordance with the principle of proportionality, that documents be kept in the workplace which are, by their nature, created there, such as time sheets or documents on conditions of health and safety in the workplace.

The Enforcement Directive also establishes an obligation to provide a translation of the social documents into (one of) the official language(s) of the host Member State, or into (an)other

[71] Joined cases C-369/96 and C-376/96 *Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-8453, para. 61.
[72] Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship confirms in its preamble 13, as well as Articles 3-4 that the following documents may be accepted as equivalent to the employment contract: written contract, a letter of appointment or one or more other documents or, if they are lacking, a written statement signed by the employer, provided that they include at least the following additional information: (a) the duration of the employment abroad; (b) the currency to be used for the payment of remuneration; (c) where appropriate, the benefits in cash or kind attendant on the employment abroad; (d) where appropriate, the conditions governing the employee's repatriation.
[73] Joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98 and 71/98 *Finalarte Sociedade de Construção Civil Lda v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others* [2001] ECR I-7831, paras. 69-74.
[74] COM(2006) 159 final, p. 7.
[75] Joined cases C-369/96 and C-376/96 *Arblade*, para. 76.
[76] COM(2006) 159 final, p. 7.

language(s) accepted by the host Member State[77]. The final provision allows more room for manoeuvre at national level to determine whether all or only part of the documents retained need to be translated. The European Commission's original proposal[78], in fact, followed the direction provided by the CJEU in case *Commission v Germany* (C-490/04)[79], justifying the translation of the documents referred only if these documents are not excessively long and standardised forms are generally used for such documents.

The introduction of the administrative requirement of document retention was most probably considered as a temporary measure by the EU legislator. In fact, the creation of the Internal Market Information System ('IMI')[80] to facilitate administrative cooperation between competent authorities of the Member States and between competent authorities of the Member States and the Commission made it credible that the IMI will render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there[81]. Though this system is an important step toward mutual assistance, the information it contains is not yet comprehensive enough to fulfil all enforcement needs[82], and the national registration schemes for posted workers introduced in most EU/EEA-countries since the transposition of the Enforcement Directive into national law do not provide comparable data given the differences in the administrative requirements implemented[83].

1.3 Contact person

This measure considered crucial for the Nordic countries, where employment relations are mostly regulated though collective agreements and negotiations with the trade unions, was included into the Enforcement Directive based on the Commission's proposal[84].

The European Commission's original proposal followed the CJEU's case law[85] in which the Court decided that Member States may not impose an obligation to designate a representative or ad hoc agent established, domiciled or residing in the host Member State, and therefore only required to designate a contact person to negotiate, if necessary, on behalf of the employer with the relevant social partners in the Member State to which the posting takes place, in accordance with national legislation and practice, during the period in which the services are provided.

The adopted Enforcement Directive however introduced two separate requirements related to the designation of contact persons in the host state, presumably to facilitate the efficient

[77] Article 9(1) point (d) of the Enforcement Directive.
[78] COM(2012) 131 final, Article 9(1) point (c) of the Enforcement Directive.
[79] Acknowledging that on-site supervision would be extremely difficult, even impossible, in practice, if those documents could be presented in the language of the Member State where the undertaking is established (paragraph 71). However, the Court equally indicated that of particular importance for its conclusion in this respect was the fact that the translation requirement concerned only four documents that were not excessively long and for which standard forms were generally used (paragraph 76).
[80] Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation'). OJ L 316, 14.11.2012, pp. 1–11.
[81] See Joined cases C-369/96 and C-376/96 *Arblade*, para. 79; Case C-319/06 *Commission v Luxembourg*, para. 91.
[82] Čaněk et al. (2018), p. 15.; Civinskas et al. (2017), p. 142.
[83] Alsos/Ødegård (2018), p. 11-12.
[84] COM(2012) 131 final, Article 9(1) point (d) of the Enforcement Directive.
[85] Case C-478/01 *Commission v Luxembourg* [2003], ECR I-02351, para. 19.

execution of inspections: the host Member State may require the foreign service provider on one hand, to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be (Article 9(1) point (e)), and on the other hand, to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which the services are provided (Article 9(1) point (f)).

The Enforcement Directive provides no further instructions regarding the role and liability of such contact persons, nor was this requirement subject to the interpretation of the CJEU. In the case related to the obligation to designate a representative domiciled in the host state in order to keep and maintain social documents, the CJEU argued that the role of contact person could be fulfilled by one of the posted workers[86]; while the 'administrative representation' (i.e. liaising with the labour authorities to provide information and requested social documents) may be indeed fulfilled by the posted workers themselves, the question remains whether they would have the appropriate knowledge and skills to negotiate with the trade unions and conclude collective agreements on behalf of their employer[87].

Challenges with the application of the Enforcement Directive

The list of control measures introduced into the Enforcement Directive was meant to codify the CJEU's case law, where the Court has tried whether different monitoring measures restrict the free movement of services in a way that cannot be justified.[88] No requirement was introduced by the European Union's side that each element above is to be satisfied in every posting case.[89] In fact, as the procedures and formalities relating to the posting of workers should not in any case put an unnecessary administrative burden on the service providers, the procedures and formalities should be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible[90].

The main concern of the European Commission when presenting its proposal[91] for the Enforcement Directive was to create an improved and clearer regulatory environment that can benefit the application of the regulation by small and medium-size enterprises (SMEs) and especially micro-businesses: during its impact assessment[92], the European Commission found SMEs are in particular are especially affected by administrative requirements that create excessively onerous obligations for foreign undertakings, however, as the exclusion of these smaller economic actors from the scope of the regulation would undermine the fight against letter box companies and it would create considerable new loopholes, the Commission

[86] Case C-319/06 *Commission v Luxembourg*, para. 91.
[87] Ahlberg et al. (2014), p. 212.
[88] Ahlberg et al. (2014), p. 208.
[89] Recital 5 of the Enforcement Directive.
[90] Article 9(4) of the Enforcement Directive.
[91] COM(2012) 131 final, pp. 10-11.
[92] Commission Staff Working Document – Impact Assessment: Revision of the legislative framework on the posting of workers in the context of provision of services [SWD/2012/0063 final].

endeavoured to introduce a carefully balanced scheme that can contribute to fairer competition and a more level playing field across the board.

Although the final text of the Enforcement Directive is less restrictive than the European Commission had proposed, it still requires a significant effort from the Member States to review and align the administrative and control measures already in place in their national law, to cooperate amongst themselves and to communicate any new control measures to the European Commission, which shall evaluate their compliance with EU law (Article 9 (5)). Some authors argue[93] that the heavy onus the European Commission has placed on national level enforcement points to the European Commission's endeavour to alleviate the responsibility of the CJEU following the 'uproar' surrounding the *Laval Quartet* judgments, indicating that the Member States need to do better to mitigate against the effects of the CJEU's oversight and better enforce the spirit of the Posted Workers Directive.

The change of approach of the European Commission between the introduction of its proposal and the adoption of the final text of the Enforcement Directive – in many instances allowing more flexibility in establishing the used administrative requirements and control measures at national level, instead of providing closed lists and exhaustive examples – induced the Member States to adjust the requirements outlined in Article 9(1) of the Enforcement Directive to their existing national notification processes, creating a large variety of administrative measures across the European Union.

When looking at the national monitoring measures introduced to guarantee the application of the Posted Workers Directive, which have been under scrutiny of the CJEU, the majority of these measures were found to aim primarily at protecting the national labour markets from wage competition instead of ensuring the 'hard core' employment rights guaranteed by the Posted Workers Directive. As a recent example, in the *Čepelnik* case[94], CJEU determined that the Austrian national measures requiring a recipient of services provided by workers posted by an undertaking established in another Member State to provide security and suspend payments to that undertaking restrict the free provision of services within the EU internal market and therefore are incompatible with the EU law. In the *Maksimovic* case[95], the CJEU questioned the proportionality of the PWN-related sanctions scheme as a whole, given that the Austrian system imposes a fine for each violation, without applying a maximum limit on the total amount of fines that can incur, also taking into account the rigorous compliance system with inspections frequently carried out by the Austrian financial police.

Although the implementation of the Enforcement Directive across all Member States resulted in the establishment of mandatory registration systems for foreign service providers/posted workers, these are not consistent, nor are they comparable across sectors and countries.[96] To this date the overall perception of the Enforcement Directive is that in its current form it is not able to fulfil its objective to ensure compliance with Posted Workers Directive, whilst not

[93] Morton (2013), p. 9.
[94], Case C-33/17*Čepelnik* [2018], EU:C:2018:896.
[95] Joined cases C-64/18, C-140/18, C-146/18 and C-148/18, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei* [2019], ECLI:EU:C:2019:723.
[96] Alsos/Ødegård (2018), p. 2.

putting an unnecessary administrative burden on the service providers[97], and there is a need to improve the reliability and compatibility of administrative data collection across the EU and increase the amount of information collected.

While the European Commission's primary ambition with the introduction of the Enforcement Directive was to remove any obstacle to the freedom to provide cross-border services by enforcing deregulation at national level, Member States have moved in the opposite direction and introduced new requirements in order to monitor and enforce the proper application of the Posted Workers Directive[98]. The national variations in administrative requirements and control measures applicable to posting result in cross-borders problems and administrative burdens that are in fact perceived as restriction of the freedom to provide services[99].

The future of compliance monitoring – Setting up the ELA

Despite the implementation of the Enforcement Directive, the action of the national authorities is insufficient to enforce compliance with European mobility rules: this is partly due to the authorities' lack of resources in many countries, but also to the difficulties they have in cooperating with one another. The EU has a necessary role to play in overcoming these difficulties.[100]

To facilitate the task of national authorities, the European Commission has created tools and networks for information sharing and cooperation; nevertheless, these networks are fragmented and should be better coordinated. Currently, there is a stratification of separate networks in the areas of posting, undeclared work and social security coordination: each addresses one or more specific areas under its responsibility, although the issues would often benefit from a more integrated approach.[101]

As early as 2013, Michel Barnier, then the Commissioner in charge of the internal market, stressed the need to establish a (European) control agency to coordinate and strengthen the mandate of labour inspectors.[102] The European Commission's proposal for a regulation establishing an European Labour Authority ('ELA') followed a few years later, in 2017. [103]

The aim of the ELA is to gather a series of similar EU bodies within a unified institutional setting in order to enhance coordination in relation to labour mobility. The seven EU bodies (including the Committee of Experts on Posting of Workers) variously concerned with European labour mobility are to be gathered under one roof, to streamline work in this area, gathering resources and fostering synergies across different aspects of labour mobility.[104]

[97] Recital 5 of the Enforcement Directive.
[98] Ahlberg et al. (2014), p. 213.
[99] Čaněk et al. (2018), p. 19.
[100] Fernandes (2017), p. 3.
[101] Fernandes (2017), p. 5.
[102] Jarry/Yves: "Barnier propose une agence européenne d'inspection du travail", Reuters, 3 December 2013.
[103] Inception Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority ('ELA Impact Assessment'), Ares(2017)5822262.
[104] Ludden/Jeyarajah (2018), p. 3.

The objective of the ELA is to contribute to ensuring fair labour mobility in the internal market fits in a more operational implementation of the *acquis communautaire*. It can also be seen as an indispensable complement at EU-level of national measures that were formulated: based on the current observations, national competent enforcement and compliance authorities are unable to meet their liabilities as soon as transnational elements enter. Moreover, their cooperation is hampered by fragmented national mandates and dispersed competences and related legal and operational difficulties to trace circumvention in cross-border situations. Cooperation across the territorial borders and across the disciplines is of utmost importance.[105]

Based on the European Commission's proposal, the ELA would play a key role in providing a systematic support to national administrations, mobile citizens and businesses on cross-border employment matters, including posting of workers. As a matter of fact, a strong connection was visioned between posting and the concept of the ELA already months before the adoption of the concrete text: the idea of the ELA was first mentioned in September 2017, a couple of days before reaching this common position on the revision of the Posted Workers Directive.[106]

Although a stronger coordination European labour mobility was welcomed by most of the stakeholders[107], the creation of an independent (European) authority/agency to replace the existing EU labour mobility bodies is disputed.[108] BusinessEurope, for instance, expressed their doubt that "the setting up of a European Labour Authority is an efficient and cost effective way of achieving this. Streamlining existing structures was possible without creating a new agency".[109] Despite these concerns, BusinessEurope agrees that removing barriers for labour mobility in Europe is key to ensure that enforcement measures do not place excessive administrative burdens on mobile enterprises or workers or end up discouraging labour mobility[110]. Consequently, they support the provision of reliable, easily accessible, up to date information to avoid duplication and reducing bureaucracy and administrative burdens for companies[111], as well as the objectives of digitalising existing procedures, making information more accessible for companies, especially SMEs, and workers, and facilitating information sharing / improving coordination between national authorities.[112]

When the proposal is adopted the ELA will fulfil the role of sole consultative body in the field of posting, replacing the Committee of Experts on Posting of Workers and the European Platform on tackling undeclared work, pooling technical and operational tasks of these bodies into a permanent structure and tries to enhance its efficacy.[113] There is no further guidance how the replacement will look like in practice, but if the ELA substitutes the European Commission

[105] Cremers (2018b), p. 4.
[106] Gellérné (2018), p. 11.
[107] According to the European Commission, 64% Europeans supported more European level decision-making dealing with social security issues in 2016, an increase by 14 percentage points compared to 2014 (ELA Impact Assessment, p. 2.).
[108] See the result of the stakeholder consultation accompanying the ELA Proposal [SWD(2018) 80 final].
[109] BusinessEurope Position Paper ('BusinessEurope') p. 1. <https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2018-05-07_european_labour_authority.pdf>
[110] BusinessEurope p. 2.
[111] BusinessEurope p. 1.
[112] BusinessEurope p. 3.
[113] Recital 31 of the ELA Regulation Proposal [COM(2018) 131 final].

as Secretariat, for example, it is hoped that the policy making perspectives can even be better coordinated and the overlaps minimised.[114]

The ELA will certainly play some role in the enforcement of the dispositions of the Posted Workers and Enforcement Directives in cross-border settings, however it is yet to be confirmed whether its activity will be confined to a supporting role only vis-à-vis the competent national authorities, or it will be endowed with a more operational (and possibly, mandatory) role[115]. In its recent report, for example, the European Commission suggested that the current administrative burdens weighting on the service providers could be solved by the introduction of a single EU-wide declaration system of a common template for websites, which could be coordinated by the Expert Committee on Posting of Workers or by the ELA itself, once it becomes fully operational by 2024.

Whatever the final decision of the European Parliament and Council will be, the ELA will be in a good position to oversee (directly or indirectly) national policies and enforcement mechanisms, and therefore foster a more uniform application of administrative requirements and control measures in line with the Enforcement Directive.

Conclusions

The posting of workers is a complicated phenomenon where service providers and posted workers fall under several jurisdictions. It is regulated by European Union legislation and case law; most prominently, the Enforcement Directive and the Posting of Workers Directive. However, EU rules serve as a basis for coordinating and resolving conflicts between national systems, rather than as a direct basis for labour market regulation.[116]

As an attempt to ensure the correct application of the 'hard core' employment rights guaranteed under the Posted Worker Directive, as well as to monitor and pursue any circumvention of these rights, the Enforcement Directive introduced a series of administrative requirements and control measures with the aim to provide the competent labour authorities (primarily in the host Member State) with the appropriate means to assess the volumes of postings into their countries, and to facilitate the enforcement of the posted worker, and in parallel to it, social security provisions.

Although the Enforcement Directive has been implemented by most of the Member States by the deadline of 18 June 2016, most of the Member States opted to adjust their existing administrative requirements and control measures to the new provisions, therefore originating 28 different schemes[117]. This high number of variations in processes creates unnecessary administrative burden on the service providers active in multiple Member States. From the authorities' perspective, inspectors often work with little and sometimes incorrect information about posted workers and their employers.[118] In addition, as a consequence of the diversity of

[114] Gellérné (2018), p. 13.
[115] Fernandes (2017), p. 8.
[116] Čaněk et al. (2018), p. 17.
[117] 32 schemes, if counting the EEA countries (Iceland, Liechtenstein and Norway) and Switzerland as well, to which countries the Posted Workers and Enforcement Directives apply as well.
[118] Čaněk et al. (2018), p. 4.

national labour laws, labour inspection bureaucracies in different countries often operate along different priorities and goals.[119]

Considering the complex and interrelated challenges that cross-border posting brings to national authorities, the most effective way to tackle them would be a comprehensive transnational approach.[120] The idea of the ELA seems to be a step in the right direction: being a supranational institution, it would be able to fill in an 'umbrella' role to ensure a more harmonised regulation and enforcement of the administrative requirements and control measures applicable to postings. The details of the ELA's responsibilities however are yet to be defined – future developments will shed (again) some light on the direction the EU institutions are planning to take in order to fulfil the promise to create a "highly competitive social market economy".

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[119] Čaněk–Kall– Lillie– Wallace– Haidinger, p. 13.
[120] Čaněk–Kall– Lillie– Wallace– Haidinger, p. 3.

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