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MASTER THESIS

Posting of workers within the construction sector

A comparative study within Belgium and The Netherlands on the protection of posted workers

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List of Abbreviations

AVV	<i>Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten</i> (Act on the general applicability or inapplicability of collective agreements)
CEE	Central and Eastern Europe
CJEU	Court of Justice of the European Union
CLA	Collective Labour Agreement
ED	Enforcement Directive
ETUC	European Trade Union Confederation
LIMOSA	<i>Landenoverschrijdend Informatiesysteem ten behoeve van Migratie Onderzoek bij de Sociale Administratie</i> (Cross-border Information system for the benefit of Migration Examination at the Social Administration)
PWD	Posted Workers Directive
TFEU	Treaty on the Functioning of the European Union
Waadi	<i>Wet allocatie arbeid door intermediairs</i> (Placement of Personnel by Intermediaries Act)
WAGA	<i>Wet Arbeidsvoorwaarden bij Grensoverschrijdende Arbeid</i> (Terms of Employment of Posted Workers Act)
WAGWEU	<i>Wet Arbeidsvoorwaarden Gedetacheerde Werknemers in de Europese Unie</i> (Terms of Employment Posted Workers in the European Union Act)
WAS	<i>Wet Aanpak Schijnconstructies</i> (Tackling Artificial Arrangements Act)
Wml	<i>Wet minimumloon en minimumvakantiebijslag</i> (Statutory Minimum Wage and Minimum Holiday Pay Act)

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Abstract

Nowadays, the concept of posting of workers within the European Single Market is subject to a heated debate, between Western EU Member States who advocate the revision of the current EU rules, on the one hand, and Central and Eastern EU Member States who are strongly against a revision of the current rules on posting, on the other. This study found that within the current rules on posting, during the period of posting, foreign worker in the Belgian and Dutch construction sector are entitled to receive the same gross wage as local workers, as they are covered by the Belgian or Dutch general applicable collective agreements. Nevertheless, it was found that foreign service providers in the respective construction sectors are likely to have a competitive advantage, directly and indirectly, based on differences in the amount of social security contributions and personal income taxes. Therefore, at this moment, there is no full level playing field between local and foreign service providers in Belgium and the Netherlands. The proposed revision of the PWD is not going to improve this situation since both taxation and social security are excluded from its scope. In order to minimize social dumping under terms of posting, Member States should focus on adequate monitoring tools and effective enforcement mechanisms with respect to the labour conditions of posted workers. In order to reach this goal, the EU should focus on coordination and cooperation among Member States.

Chapter 1 - Introduction

1.1 Introduction

The Treaty on the Functioning of the European Union, and in particular, the free provision of services, recognises the right for companies, established in one Member State, to provide services in the territory of another Member State.¹ While exercising this economic right, businesses may send their workers from the domestic Member State (hereafter, Sending State) to another Member State (hereafter, Host State) in order to provide the services. This concept, also referred as posting of workers, is defined as “*the situation whereby an employer sends an employee to work in another country for a limited period of time, within the juridical sphere of labour law*”². Such a cross-border situation, raises the question about what labour legislation should be applicable to the working conditions of the posted employees during the period of posting. As starting point, posting derogates from the predominant *lex loci laboris* principle as workers being posted remain subject to the legislation of the Sending State while they perform work for a limited period of time in the territory of the Host State.³ However, at the same time, European harmonization in the field of labour law and social policy at the EU level is quite limited; every jurisdiction has its own system of labour legislation and industrial relations. As argued by Blanpain, those domestic systems of labour regulation are the outcomes of long and complex historical processes.⁴ Taking the cross-national differences regarding labour standards into account, from an economical point of view, a service provider that sends workers from a Member State with relatively low standards has a competitive advantage in a Member State with higher labour standards, as it results convenient in terms of labour cost.

This was the framework where the EU intervened with the adoption of the Posted Workers Directive 96/71/EC (hereinafter, PWD), in order to protect the position of workers in derogation from the free movement principle, and to establish a level playing field by creating a climate of fair competition between local and non-local service providers within the European Single Market.⁵ The PWD forces posting companies to comply with the ‘*hard core*’ of working conditions, including the minimum wage, as laid down within legislation and general applicable collective labour agreements (hereinafter, CLA) in the Host

¹ Consolidated Version of the Treaty on the Functioning of the European Union art. [56], 2008 O.J. C 115/47, [hereinafter TFEU].

² Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 527

³ Jan Cremers, ‘Labor Recruitment and Economic Freedoms in Europe’, in Marya Rozanova, (ed), *Labor Migration and Migrant Integration Policy in Germany and Russia*, Saint Petersburg State University, 2016, p. 48

⁴ Roger Blanpain, *European labour law*, Kluwer law international, 2008, p.797

⁵ PWD, Recital 5

State.⁶ However, previous studies indicate that, despite the PWD, the concept of posting has been (mis)used by companies as a way to recruit cheap labour.⁷

In 2014, the Enforcement Directive 2014/67/EU (hereinafter, ED) has been introduced in order to ensure that Member States implement the provisions of the PWD, with respect to the monitoring and enforcement of labour conditions of posted workers, in a more uniform manner.⁸ While most Member States transposed only recently the ED into their domestic legislation, in October 2017, the European Council reached an agreement on a fundamental revision of the PWD. One of the major proposed changes is the extension of protection of the posted workers. By applying the 'remuneration' rather than *the 'minimum rates of pay'* of the Host State in order to promote the principle that the same work in the same place shall be rewarded in the same manner.⁹ This proposal is particularly sensitive, as it touches upon controversial interests at stake between the Western EU Member States and the Central and Eastern EU Member States.¹⁰ From one stand point, Western Member States (where labour costs are relatively high) are in favour of an extension of the scope of the PWD by means of promoting equal pay for equal work. Unlike, Central and Eastern Member States (where labour costs are instead relatively low) have an interest in not expanding the applicability of the Host State's labour standard to posted workers, since it would imply a restriction to the freedom to provide services and thus, it would reduce the competitive position of service providers in Central and Eastern Europe (CEE).¹¹ It is within this broad context that the EU regulatory framework concerning the posting of workers is subject to a heated debate. Due to the complexity of the matter, and the conflicting interests at stake, the question is whether the current legislative framework on posting, is adequate enough to create a climate of fair competition between domestic and foreign service providers in the receiving Member States. As well as, if an approval of the revision of the PWD, as proposed by the Council, would improve the current situation by ensuring a level playing field between local and foreign service providers in terms of labour costs. In order to answer this question, this paper will examine the current situation in the construction sector of two Western Member States (Belgium and The Netherlands) by examining

⁶ PWD, art. 3

⁷ See for instance Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011; Lisa Berntsen, 'Precarious Posted Worlds: Posted Migrant Workers in the Dutch Construction and Meat Processing Industries', *International Journal of Comparative Labour Law and Industrial Relations*, no. 31 (4), 2015

⁸ Recital 7 of the ED

⁹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter, the proposal)

¹⁰ Rebecca Zahn, 'Revision of the posted workers directive: a Europeanisation perspective', *Cambridge Yearbook of European Legal Studies*, no. 19, p. 19

¹¹ Ten Member States from Central and Eastern Europe and Denmark made use of the Subsidiarity Control mechanism by triggering the yellow-card procedure, see <http://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/>

domestic law and practices with respect to the scope of protection of posted workers in terms of pay. Moreover, the monitoring processes and enforcement mechanisms of both Member States will be discussed regarding the imposition of domestic labour standards on foreign service providers under the scope of posting.

1.2 Problem statement

The following problem statement can be identified:

How are the working conditions of posted workers currently regulated and monitored within the EU and more particularly, within The Netherlands and Belgium, and to what extent might the proposed revision of the Posting of Workers Directive improve the current situation by ensuring a level playing field between local and foreign competitors in the construction sectors in those countries?

1.3 Methodology

The main aim of this thesis is to research the concept of posting from a multidisciplinary point of view. As a result, the study will rely on the analysis of both primary and secondary sources in the legal and economic literature. The scope of this study is limited to the matter of posting from low wage Member States to high wage Member States. As the difference in labour standards provokes that this form of posting results more sensitive for social dumping issues. Due to the scope and limitations of this thesis, the analysis will be limited to Belgium and the Netherlands from the perspective of Host States. In terms of fair competition, both countries experience similar problems due to the presence of posted workers from Member States where labour costs are lower.¹² Secondly, those countries have been chosen as their domestic legislation is written in Dutch which can be beneficial for an adequate comparison. For the completion of a legal comparison, this study will rely on the work of Zweigert and Kötz.¹³

The concept of level playing field is frequently used within the debate on the revision of the PWD. It indicates that both foreign and local competitors are subject to the same set of rules. Houwerzjl and Van Hoek identified three main areas in the PWD which are aimed at ensuring a level playing field between local and foreign competitors: rates of pay, health and safety and working time and holidays.¹⁴ While addressing the full scope of the PWD, this study mainly aims to examine whether a level playing field is ensured in terms of rates of pay. In order to achieve the latter, this paper will examine at a first stage, the

¹² Mijke Houwerzjl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.9

¹³ Konrad Zweigert and Hein Kötz, *Introduction to comparative law*, USA, Oxford University Press, 1992

¹⁴ Mijke Houwerzjl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *To the European Commission Contract*, no. 96, 2011, p.8

wage gap between local and foreign posted workers in the Belgian and Dutch construction sector and at a second stage, whether a revision of the PWD would improve the current situation.

1.4 Research questions and structure

In order to answer the central question appropriately, it will be divided into a number of sub-questions. The following research questions will be discussed, in order to define and limit the problem statement:

A. *How is the concept of posting regulated at the level of the EU and Cen who post workers to their territory?*

The current discussion about the revision of the PWD illustrates the conflicting stakes between the free provision of services on the one hand and the protection of workers' rights within a climate of fair competition on the other hand. The aim of chapter 2 is to set the matter of posting in the wider context of the EU by examining whether the Host State is allowed to condition the free provision of services by imposing domestic legislation on workers being posted to their territory. Subsequently, the current legal framework on posting will be analysed by taking the wider EU context into account.

B. *Why is the concept of posting wide-spread used within the construction sector and what forms of abusing practices can be identified within and outside the limits of the EU framework on posting?*

Chapter 3 will analyse why the concept of posting has gained so much popularity within the construction sector in comparison with other sectors. Moreover, abusing practices, both within and outside the limits of the EU framework, will be discussed.

C. *How is the current EU legal framework on posting implemented in Belgium and the Netherlands, and to what extent is a level playing field guaranteed between local and foreign service providers within the construction sector? As well as, to what extent would the implementation of the proposed revision of the PWD improve the current situation in the countries concerned?*

Although both the Netherlands and Belgium are confronted with a high inflow of posted workers from Member States with relative lower labour standards, both countries implemented the EU legislation in a different way. Chapter 4 will address those differences with respect to the scope of protection, monitoring, and enforcement of the labour conditions. Moreover, we will assess whether a level playing field is created in terms of pay in respective countries and whether a revision of the PWD would improve the current situation.

Chapter 2 – Posting within the European Single Market

2.1 Introduction

The aim of this chapter is to address the legal context of posting by assessing the free provision of services on the one hand, and grounds which allow Host States to conditionally restrict this economic right by imposing domestic labour standards, on the other one. Afterwards, the EU regulatory framework concerning the concept of posting will be examined extensively, in particular the PWD, the ED, and the proposed revision of the PWD.

2.2 Posting of workers within the EU

2.2.1 Data on posting

As explicitly laid down within the PWD, the free provision of services offers European service providers the possibility to ‘*post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed*’¹⁵. Over the period from 2010 to 2015, the amount of workers being subject to posting in the EU has increased from approximately 1.1 million to 1.5 million (see figure 1). Data over 2015 shows that the group of workers being posted constitutes a share of 0.65 percent of the total workforce¹⁶, which is per se a quite small amount. Nevertheless, the amount of posted workers is relatively high within certain sectors, as we will see in the chapter on posting within the construction sector. In absence of a harmonized registration system under the PWD, those numbers are based on the amount of official documentations (the so-called A1 forms) issued by Member States under article 12 Regulation (EC) No 883/2004.¹⁷ Several scholars expressed their concerns about the use of A1 forms as benchmark for the amount of workers being posted within the EU.¹⁸ For instance, the data might not be accurate enough since the experience shows that some workers are posted without such a form.¹⁹ Moreover, the data does not represent the unique amount of posted workers but the amount of postings, which may lead to double counting in case a worker has been posted more than once during a year.²⁰ Unfortunately, at this moment, we do not count with a more accurate EU registration system concerning the amounts of workers being posted.²¹ In the light of the recent debates with respect to the EU rules on

¹⁵ PWD, Recital 3

¹⁶ Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015', p.31

¹⁷ Posted workers have to declare by means of a form that they remain subject to the social security system of the Sending State during the period of posting

¹⁸ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 21; Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015', p.11

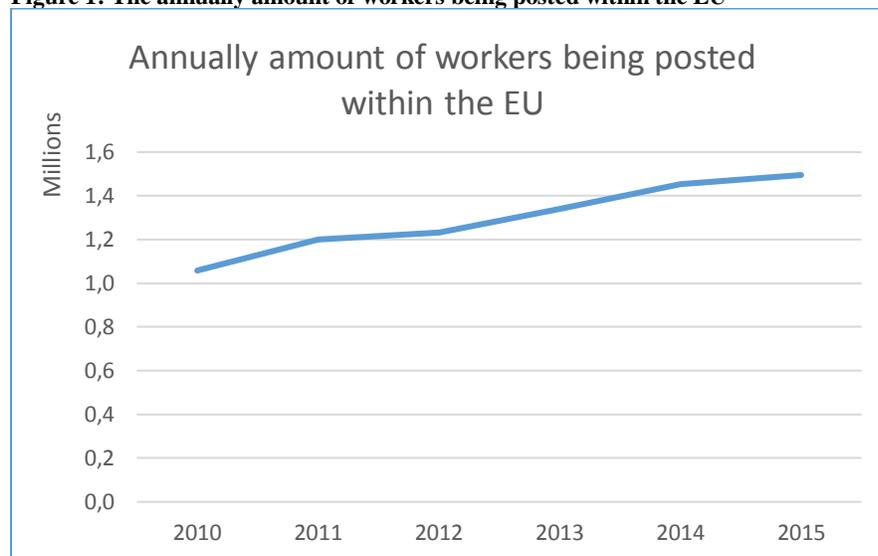
¹⁹ Ibid

²⁰ Mikkel Barlund and Matthias Busse, 'Labour Mobility in the EU Addressing challenges and ensuring ‘fair mobility’', 2016, p.5

²¹ Ibid

posting, one might argue that there is a strong need for a comprehensive registration system for posting at the level of the EU.

Figure 1: The annually amount of workers being posted within the EU



Source: Administrative data PD A1 Questionnaire 2016 and previous years: in Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers- Report on A1 portable documents issued in 2015' [2016] European Union; made by author

2.2.2 Posting from a sending and a receiving perspective

Before analysing the EU legislation on posting, it is important to illustrate the different interests at stake between sending and receiving Member States. At this moment, the EU represents a territory of 28 Member States.²² Every Member State has its own industrial system characterized by a unique set of labour legislation and social policies. Those national social models are the outcome of historically and culturally rooted processes²³, and while they may share some common values, they have developed a wide variety of wage levels and working conditions. By taking this and the free movement of services into account, certain conflicts might occur in case that countries with high labour costs receive posted workers from countries with relative low labour costs (see also figure 2). In the lack of any legislation in force to solve those conflict-of-laws, this situation might result in a downward spiral of wage and labour cost competition which might have a negative impact on the labour conditions and wage-setting regimes of workers in the receiving countries, generally the “older” Member States.²⁴ At the same time, research indicates that the sending

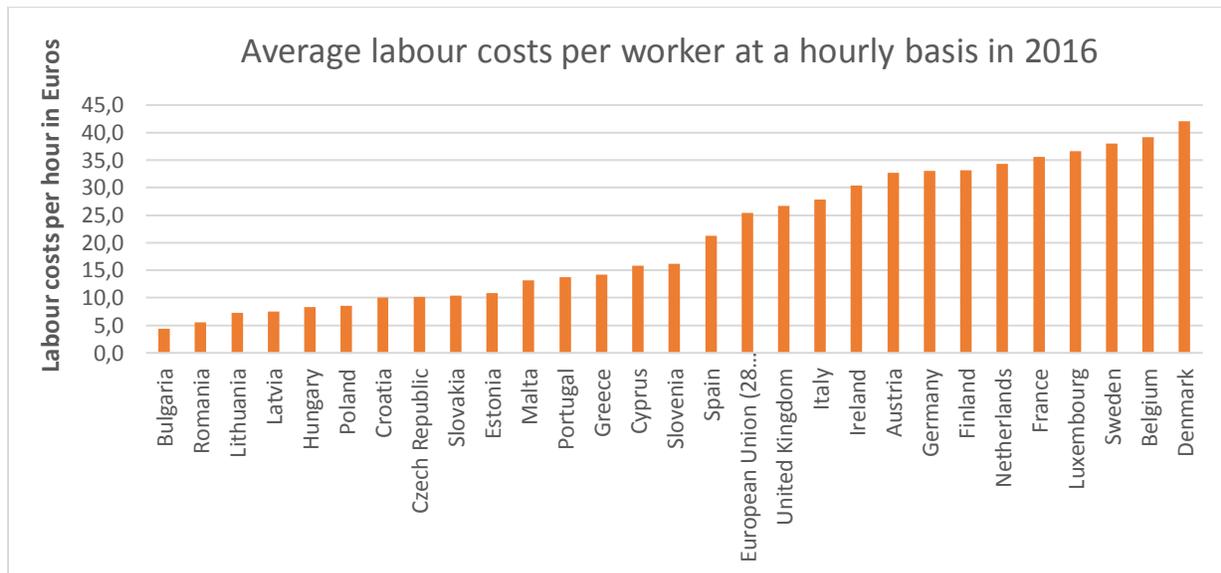
²² When the PWD was introduced, there were only 15 Member States. As argued in 2.2.2, with the enlargement of the EU, differences among systems of industrial relations have grown as well.

²³ Roger Blanpain, *European labour law*, Kluwer law international, 2008, p.208

²⁴ See Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004; Jan Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (CLR/International Books 2011); Nathan Lillie and Ines Wagner, 'Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building', in Jan Drahekoupil (ed), *The outsourcing challenge:*

countries (with lower labour costs) are likely to benefit from the outflow of labour in terms of a decrease of unemployment and an increase in wages.²⁵ This illustrates the complexity and the different interests at stake related to the practice of posting within the EU.

Figure 2: Average labour costs per worker at an hourly basis in 2016



Source: Eurostat Labour costs annual data - NACE Rev. 2 - EUR; made by author

2.3 The European Single Market

2.3.1 The mobility of labour within the EU

Article 1 of the Treaty on European Union (TEU) frames the development of the European Union within the *'process of creating an ever closer union among the peoples of Europe'*. One of the main pillars of a united Europe was the establishment of a European Single Market also referred as the Internal Market in terms of free movement of goods²⁶, persons²⁷, capital²⁸ and services²⁹. Those four freedoms, and especially the free movement of workers and services, affected the mobility of labour as well. The roots for the free movement of workers and citizens can be found in the 1957 Rome Treaty.³⁰ As a consequence, also in the middle of the 21st century, more than 500 million EU citizens have access to services, jobs, and

organizing workers across fragmented production networks, Etui, 2015; Rebecca Zahn, 'Revision of the posted workers directive: a Europeanisation perspective', *Cambridge Yearbook of European Legal Studies*, no. 19

²⁵ Anzelika Zaiceva, 'Post-enlargement emigration and new EU members' labor markets', *IZA World of Labor*, p. 1

²⁶ TFEU, art. 26 and 28-37

²⁷ TFEU, art. 45-48

²⁸ TFEU, art. 49-55

²⁹ TFEU, art. 56-62

³⁰ For a comprehensive overview Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.150

opportunities in 28 Member States. Moreover, labour markets became more interdependent as companies, under the free provision of services, became able to provide services in another Member State without any internal frontiers.³¹ The overarching objective of the Internal Market is laid down within article 26 TFEU:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

As both the free movement of workers and the free movement of services affected the mobility of labour within the EU, a distinction must be made between those two fundamental economic freedoms. First of all, it is important to note that the free movement of workers addresses the mobility of labour from a more personal perspective: as mentioned above, job seekers and workers of one Member State have freely access to the labour market of another Member State.³² On the other hand, free movement of services approaches the mobility of labour from a business perspective: service providers are free to deliver services in a State, other than their State of establishment, by posting employees for a temporary period of time. With the *Rush Portuguesa* case, the Court of Justice of the European Union (hereinafter, the CJEU) ruled explicitly that the main difference between the free movement of services and that of workers can be found in the fact that workers being posted under terms of the former do not have access to the labour market of that Host State.³³ One might argue, that the fact that posted workers do not gain access to the labour market of the Host State, must be understood in the light that posted workers remain subject to the legislation of the Sending State. In contrast, based on the predominant *lex loci laboris* principle, workers who move individually to the territory of another Member State to work or to seek work are covered by the legislation of that State.

2.3.2 The social dimension of the European Single Market

From the beginning, the economic integration of the European Single Market brought major challenges for the Community with respect to the social dimension of the Internal Market in terms of labour standards and social policies.³⁴ In the beginning stage, with the establishment of the European Economic Community (EEC) under the Rome Treaty, the concern on the social dimension of European integration was secondary to realization of the economic dimension.³⁵ This approach was in line with the Jean Monnet-method; integration in one field of policy would lead to integration in another one, as well referred as a spill-over

³¹ JørgenSteen Madsen and others, 'The Social Dimension: convergence or diversification of IR in the Single European Market?', *Industrial Relations Journal*, no.22(2), 1991, p. 85

³² Roger Blanpain, *European labour law*, Kluwer law international, 2008, p. 270

³³ Judgement of 27 March 1990, *Rush Portuguesa Lda v. Office National d'Immigration*, C-113/89, EU:C:1990:142, paragraph 15 and 16

³⁴ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.151

³⁵ Damian Chalmers and others, *European Union law*, Cambridge university press 3 edn, 2014, p. 669

effect.³⁶ Social policy, and in particular labour law, was seen as part of the national sovereignty of the Member States.³⁷ As a consequence, there was no need for the Community to play an active role in the social field, as the social policy competences were to remain, at least in the initial phase, within the discretion of Member States' legislators.

Cremers argues that in the period 1985-1994, under the presidency of Jacques Delors, the social dimension of the Internal Market became of greater importance in the process of creating an internal market without borders.³⁸ The newly introduced EU competences in social policy matters allowed the adoption of EU legislation on labour standards, including provisions on equal treatment, health and safety, working time, working conditions, European works councils, and on information and consultation.³⁹ However, even while there was an enlargement of EU competence in labour law and social policy, matters such as pay, collective bargaining and the right to strike remain part of the sovereignty of the Member States. Scholars argue that after the Eastern enlargement, disparities have grown with respect to the industrial systems of Member States.⁴⁰ Taking that into account, from that moment on, no new initiatives have been taken with respect to the harmonization of labour law and social policy. More concretely, the deregulation dogma seems to be the dominant approach nowadays.⁴¹ In brief, social integration with respect to social policies and labour standards remains limited within the EU. For the scope of this thesis, while assessing the level playing field between local and foreign competitors, it is important to underline that the wage-setting is within the competence of the Member States.

2.4 Free movement of services

2.4.1 Scope of application

The free provision of services is one of the cornerstones of the Internal Market. Its implications can be found in Article 56 TFEU:

³⁶ The so-called “neo-functional theory”; in Damian Chalmers and others, *European Union law*, Cambridge university press 3 edn, 2014, p. 669

³⁷ Catherine Barnard, *EU employment law*, Oxford University Press 4th edn, 2012, p. 7

³⁸ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.151

³⁹ TFEU, art. 153; For more information on social rights and principles in EU law see: European Commission (2016) Commission Staff Working Document on the EU social acquis [online] Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0050&from=EN>

⁴⁰ Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal*, no. 38(6), 2007, p. 525; Fritz Scharpf, 'The European social model', *JCMS: Journal of Common Market Studies*, no. 40 (4), 2002, p.3

⁴¹ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.151

[...] restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

In other words, EU-based service providers are free to move unrestricted to the territory of another Member State together with its staff, in order to fulfil the service in question. In its case law, the CJEU made clear that article 56 has to be interpreted in a broad way.⁴² A leading case is *Rush Portuguesa* concerning a Portuguese construction firm, which entered into a subcontract with a French company for a construction project in France. In order to provide this ‘service’, *Rush Portuguesa* sent Portuguese workers for a limited period of time to France’s territory. This resulted in a conflict with the French authorities, who required *Rush Portuguesa* to pay a special contribution and to arrange work permits for the workers being posted.⁴³ The CJEU ruled that the fundamental right to provide services might not be restricted by administrative barriers at the domestic level, such as the release of work permits for the workers in question, since the imposition of such conditions would have a discriminatory effect on the foreign service providers.⁴⁴ Indeed, in the *Vander Elst* case, the CJEU stated that also third-country nationals who are lawfully and habitually employed in one Member State by a service provider, and are posted from that Member State to another State for a certain period of time, do not need to have new work permit in that State.⁴⁵ The interpretation of the Court within those cases illustrates the broad interpretation of the fundamental freedom to provide services.

2.5 Restrictions to the free movement of services at the national level

The free provision of services imposes certain obligations to the Member States: any restriction at the national level has to be removed.⁴⁶ The lack of harmonization of labour law and social policies might result in conflicting situations, where national provisions in the field of labour law restrict, directly or indirectly, the free movement of services. This section attempts to illustrate those legitimate reasons that lawfully justify limitations to the free provision of services, as laid down in the TFEU and identified by the CJEU. This investigation is relevant as it will cast light on the conditions for the legitimacy of national restrictions to the posting of workers. Indeed, as we will see, national initiatives aimed at counteracting abuse of posting, risk to be considered violations of the freedom to provide services.

⁴² Judgement of 27 March 1990, *Rush Portuguesa Lda v. Office National d’Immigration*, C-113/89, EU:C:1990:142, Judgement of the Court of 9 August 1994 (hereinafter, *Rush*), *Raymond Vander Elst v. Office des Migrations Internationales*, C-43/93, EU:C:1994:310 (hereinafter, *Vander Elst*)

⁴³ *Rush*, paragraph 3

⁴⁴ *Rush*, paragraph 12

⁴⁵ *Vander Elst*, paragraph 20-22

⁴⁶ TFEU, Art. 56

2.5.1 Legislation

Within the TFEU, two legitimate reasons for a limitation to the free provision of services can be identified. First of all, according to article 62 TFEU, which refers to article 51 TFEU, shall the provisions on the free movement of services not apply to activities which are connected to the exercise of official authority. Secondly, in line with article 62 and 52 of the TFEU, Member States may treat foreign nationals, including foreign service providers, differently for reasons of public policy, public security, and public health.

2.5.2 The role of the Court of Justice of the European Union

A. The non-discrimination versus the market access approach

Several cases were brought before the CJEU in relation to conflicts between the free movement principles and national social policies. Therefore, the rule of reasoning of the CJEU is important for identifying the restrictions to the free movement of services. With respect to this matter, Barnard has identified two contrary approaches of the Court over time, namely the *non-discrimination approach* and the *market access or restrictions approach*, on which the CJEU relies to assess whether a national measure that restricts the free provision of services is justified or not.⁴⁷

The *non-discrimination approach*, as applied by the CJEU, for instance, in the case *Commission v. France*⁴⁸, is characterized by an assessment of the impact of a Member State's social policy on the position of both national and migrant workers. In case of direct or indirect discrimination of the foreign worker, the restriction is not justified and the discriminatory element has to be removed since it infringes the working of the internal market.⁴⁹ At the other hand, in line with the *market access approach*, the CJEU focusses rather on the restriction itself, by examining whether the out-of-state actor is limited in exercising its economic rights.⁵⁰ The *market access approach* has been clearly demonstrated by the CJEU within the *Säger* judgement with respect to the free movement of services:⁵¹

'Article 59 (now Article 56 TFEU) of the Treaty requires not only the elimination of all discrimination against a person providing services on the grounds 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 Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'

⁴⁷ Catherine Barnard, *EU employment law*, Oxford University Press 4th edn, 2012, p. 200-202

⁴⁸ Judgement of the Court of 4 April 1974, *Commission v. France*, C-167/73, EU:C:1974:3, paragraph 45

⁴⁹ Catherine Barnard, *EU employment law*, Oxford University Press 4th edn, 2012, p. 201

⁵⁰ Ibid; Jukka Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, Oxford University Press on Demand, 2002, p.60

⁵¹ Judgement of the Court of 25 July 1991, *Säger*, C-76/90, EU:C:1991:331, paragraph 12

In other words, within this approach, the CJEU does not test whether there is a discriminatory effect but focusses rather on the isolated impact of the national rule on the out-of-state actor. The *market access approach* has been repeated by the CJEU in other cases regarding restrictions to the free movement of services and it is seen as the dominant position of the CJEU.⁵² As far as it is possible to discern, the *market access approach* can be seen as a threat to national systems of national labour law since it brings non-discriminatory measures within the scope of the Treaty.⁵³

B. The line of reasoning of the CJEU

The CJEU developed a justificatory test in order to examine whether a restriction to one or more economic freedoms, including the free movement of services, can be justified. As stated within the *Säger* case:⁵⁴

[...] the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.

In other words, a restriction to the free movement to provide services is compatible with Article 56 TFEU as long as it meets four requirements: the restriction has to *be justified by overriding reasons of public interest*, the restriction has to be *non-discriminatory* to nationals and non-nationals, the restriction has to be *objectively necessary*, and the restriction must not go beyond what is *necessary* in order to attain the objective. This line of reasoning has been then consistently repeated by the CJEU.⁵⁵

Summarizing, first of all, the CJEU assesses whether there is a restriction to the free movement to provide services. Secondly, the CJEU assesses whether the restriction is legitimate based on the four elements above mentioned.

C. The protection of workers

For the scope of this thesis, it is relevant to ascertain whether a national legislation establishing rules in favour of workers' interests can justify a restriction to the free movement of services, especially from the

⁵² Catherine Barnard, *EU employment law*, Oxford University Press 4th edn, 2012, p. 202

⁵³ *Ibid*

⁵⁴ Judgement of the Court of 25 July 1991, *Säger*, C-76/90, EU:C:1991:331, paragraph 15

⁵⁵ Judgement of the Court of 26 February 1991, *Commission v. France*, C-154/89, EU:C:1991:76; Judgement of the Court of 26 February 1991, *Commission v Italy*, C-180/89, EU:C:1991:78; Judgement of the Court of 26 February 1991, *Commission v Greece*, C-198/89, EU:C:1991:79

perspective of posting. In order to assess that, it is necessary to determine whether the connotation ‘protection of workers’ falls within the concept of ‘public interest’, and when the limitation to the freedom of providing services complies with the proportionality test. Given the market approach test, one might argue that the imposition of the labour conditions by the Host State is a restriction to the right to provide services of the foreign service provider, as it prescribes a burden for him. In that case, the next question would be whether this restriction can be justified by overriding reasons of interest.

The CJEU acknowledged that the ‘protection of workers’⁵⁶, and in particular ‘the social protection of workers in the construction sector’⁵⁷, is an overriding reason of public interest which justifies a restriction to the economic freedoms, including the free movement of services. However, in its rulings, it appeared that the ‘protection of workers’ as a legitimate reason for a restriction to the economic principles has to be interpreted carefully, as demonstrated by the CJEU in the Viking case and the Laval case. The Viking case concerned a dispute between a Finnish trade union and a Finnish company, the Viking line, which wanted to reflag its vessel to Estonia.⁵⁸ As a consequence, Viking would be able to hire Estonian crews, and more importantly, to apply Estonian working conditions, which were more advantageous (lower) than the Finnish ones. In order to protect the position of Finnish workers, both the Finnish Seamen’s Union and the International Transport Workers’ Federation took collective action against the Finnish company. In its judgement, the CJEU stated that the collective action pursued by the Finnish trade union, with the support of the international transport workers’ federation, was a restriction to the economic freedom of Viking (in this case, the free movement of establishment).⁵⁹ The second question was, in this case, whether the restriction to the free movement of establishment could be justified with the objective of protecting the workers. In its rulings, the CJEU differentiated between the strike of the Finnish trade union and the action of the international trade union. With respect to the former, the CJEU ruled that the strike could only be justified ‘*when the jobs or conditions at issue were jeopardized or under serious threat*’.⁶⁰ Moreover, the CJEU ruled that it is the task of the national Court to determine whether the Finnish trade union’s actions go beyond what is necessary to achieve the objective pursued.⁶¹ The actions of the international trade union were aimed at preventing ship-owners to register their vessels in a State other than that of which the

⁵⁶ Judgement of the Court of 23 November 1999, *Arblade*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 36; Judgement of the Court of 17 December 1981, *Webb*, C-279/80, EU:C:1981:314, paragraph 19; *Rush*, paragraph 18; Judgement of the Court of 11 December 2007, *Viking*, C-438/05, EU:C:2007:772, paragraph 77 (hereinafter, Viking); Judgement of the Court of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 103 (hereinafter, Laval); Judgement of the Court of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 74

⁵⁷ Judgement of the Court of 28 March 1996, *Guiot*, C-272/94, EU:C:1996:147, paragraph 16

⁵⁸ Viking, paragraph 21

⁵⁹ Viking, paragraph 4

⁶⁰ Viking, paragraph 81

⁶¹ Viking, paragraph 87

beneficial owners of those vessels are nationals.⁶² The CJEU ruled that the restrictions on freedom of establishment resulting from such action cannot be objectively justified.⁶³

The CJEU provided a similar line of reasoning in the Laval judgement. Within this case, a Latvian construction company posted Latvian workers to the territory of Sweden to renovate and extent school premises.⁶⁴ Beforehand, the Swedish building and public works trade union, wanted to reach an agreement with Laval on the applicability of the Swedish collective agreement for the building sector on the work provided by Laval.⁶⁵ In case, Laval would have signed this collective agreement, it would have been bound by all its terms including those on pecuniary obligations on the sector organization and the Swedish pension fund.⁶⁶ After negotiations, no agreement was reached and Laval started to work on the Swedish construction sites. The Swedish trade union, in turn, decided to start with collective action by means of a blockade of Laval's construction sides followed by sympathy actions of other trade unions by boycotting Laval.⁶⁷ Obviously, Laval's right to provide services has been restricted by the collective actions of the Swedish trade unions. The CJEU had to assess whether those collective actions were subject to the proportionality test or whether they could have been seen as absolute rights. The CJEU observed the former line of reasoning: while the CJEU acknowledged that the right to take collective action is recognized as a fundamental right within community law⁶⁸, it had to pass for the proportionality test⁶⁹. In this case, the CJEU ruled that *'the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest'*.⁷⁰ However, given the situation, the CJEU said that a blockade went too far.⁷¹ Both cases illustrate the fact, that the 'protection of workers' as a legitimate justification for a restriction to an economic freedom has to be interpreted cautiously. Both the Laval and Viking judgements have been heavily criticized for bringing collective action within the scope of the TFEU.⁷²

⁶² Viking, paragraph 88

⁶³ Ibid

⁶⁴ Laval, paragraph 27

⁶⁵ Laval, paragraph 29-33

⁶⁶ Laval, paragraph 32

⁶⁷ Laval, paragraph 34

⁶⁸ Laval, paragraph 93

⁶⁹ Laval, paragraph 96

⁷⁰ Laval, paragraph 103

⁷¹ Laval, paragraph 111

⁷² See Anne Davies, 'One step forward, two steps back? The Viking and Laval cases in the ECJ', *Industrial Law Journal*, no. 37(2), 2008, p.126-148; Alban Davesne, 'The Laval case and the future of labour relations in Sweden.', 2009

2.6 The legal framework on Posting at the EU level

The aim of this section is to explore the legal framework on posting at the EU level from three angles: social security law, tax law, and labour law.

2.6.1 Social security law

Already in 1971, before the adoption of the PWD, the concept of posting was introduced in Regulation 1408/71 (now Regulation 883/2004) on the coordination of social security in the case of free movement of persons.⁷³ Based on the principle of equal treatment, the starting point of the Coordination Regulation is the *lex loci laboris* principle: workers are subject to the social security system where the work is performed.⁷⁴ An exception is made for European workers being subject to posting⁷⁵ for a period of less than 24 months. Those workers remain subject to the social security system of the Sending State.⁷⁶ The employer who posts the workers to the territory of another Member State, has to carry out its activities normally in the Sending State. Article 14 (2) of the Implementation Regulation 987/2009 describes in more detail that the employer has to perform substantial activities, other than purely internal management activities, in the Member State in which it is established. As a consequence, the legislation of the Member State of establishment is not automatically applicable to the posted workers. Therefore, businesses cannot establish themselves in low tax jurisdictions, while performing substantial activities in the territory of another Member State by structurally ‘sending’ workers from the low social security cost jurisdiction to the high social security jurisdiction.

2.6.2 Tax law

With the establishment of the European Single Market, taxation has remained almost utterly within the sovereignty of the Member States⁷⁷, meaning that each country is entitled to determine the connecting factor arising tax liability within its jurisdiction. In this terms, in order to achieve a coordination of tax law regarding cross-border situations, it has been of utmost importance to rely on the agreement of bilateral tax treaties⁷⁸, which are meant to avoid double taxation and double non-taxation. Within the EU, most of those bilateral tax treaties are based on the OECD Model Tax Convention.⁷⁹ Similar to the *lex loci laboris*

⁷³ Regulation (EC) No 883/2004, preamble 1

⁷⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 11

⁷⁵ A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf.

⁷⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 12 (1)

⁷⁷ Only Value Added Tax is harmonized at the EU level. For more information see Laurence Gormley, *EU taxation Law*, Oxford University Press ed. 2, 2018

⁷⁸ Frederic de Wispelaere and Jozef Pacolet, ‘Posting of workers: the impact of social security coordination and income taxation law on welfare states.’, 2015, p. 4

⁷⁹ Ibid

principle, as starting point, with respect to cross-border situations, the wage is taxed in the Country where the employment is exercised. However, the wage remains subject to taxation in the Contracting State (the Sending State) under two conditions. When the employee is present in the Host State for no longer than 183 days in 12 months, and the employer has no physical presence⁸⁰ in the country where the employment is exercised.⁸¹ For instance, a worker being posted from Poland to the Netherlands, is subject to taxation in Poland with respect to his wage received during the period of posting under condition that he resides no longer than 183 days in the Netherlands and his employer has no physical presence in the Dutch territory. As argued by De Wispelaere and Pacolet it is quite remarkable that under tax law, posted workers remain subject to the Sending State for the first 183 days, while for social security law, the posted workers remain subject to the Sending State for a period of 24 months, while both taxes are considered as labour taxes.⁸²

2.6.3 Labour law before the enactment of the PWD

From the perspective of labour law, before the enactment of the PWD, there were no provisions at the EU level on the application of the labour provisions of the Host State in case of posting.⁸³ In practice, with respect to the posting of workers, several Member States deviated from the *lex loci laboris* principle: incoming posted workers remained subject to the labour legislation of the Sending State during the period of posting.⁸⁴ Already before the PWD, the CJEU ruled that Host States were able to apply their legislation or collective agreements relating to minimum wages, to workers being posted to their territory, no matter in which country the employer is established.⁸⁵ In the *Rush Portuguesa* case, the CJEU ruled that:⁸⁶

[...]Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.

At first glance, one might interpret this statement of the Court as a stance in favour of the autonomy of the national systems of labour law over EU law, due to the fact that it enables Member States to apply their national provisions in the field of labour law to foreign service providers as well. In a similar vein, within

⁸⁰ The company is no resident and has no permanent establishment in the Host State

⁸¹ OECD Model Tax Convention on Income and on Capital, art. 15 (2)

⁸² Frederic de Wispelaere and Jozef Pacolet, 'Posting of workers: the impact of social security coordination and income taxation law on welfare states.', 2015, p. 4

⁸³ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.152

⁸⁴ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.150

⁸⁵ Judgement of the Court of 3 February 1982, *Seco and Desquenne & Giral*, C-272/94, EU:C:1982:34, paragraph 14; Judgement of the Court of 24 January 2002, *Portugaia Construções Lda*, C-164/99, EU:C:2002:40, paragraph 21

⁸⁶ *Rush*, paragraph 18

the *Arblade* case, the CJEU ruled that the Host State may impose the obligation for foreign service providers to comply with the minimum wage as fixed by the collective agreement which applies in the Host State under condition that the provisions are sufficiently precise and accessible.⁸⁷ It is in this context, that the Posting of Workers Directive (PWD) intervened by reconciling the free movement of services with the need to establish a climate of fair competition and respect for the rights of the workers, thus formalizing the CJEU ruling.⁸⁸ At the same time, we will see that, with the enactment of the PWD, Member States were limited in extending their legislation and collective agreements to service providers, established in other Member States.

2.7 The Posting of Workers Directive

2.7.1 Main aims of the Posting of Workers Directive

The roots of EU legislation reconciling the free movement of services with the protection of posted workers can be traced back to a debate in the 1980s concerning public procurement principles within the European context.⁸⁹ During that period of time, under pressure of trade unions, there was a wide-spread support for the creation of a social clause within the public procurement rules in order to ensure that both migrant and local workers were treated and remunerated in line with the legislation and collective agreements of the country where the work was performed.⁹⁰ As part of the implementation of the Community Charter of Fundamental rights of Workers, the European Commission came up with a proposal in 1991 on the posting of workers. Despite the wide-spread support for EU legislation in the field of posting, it took five years before the PWD got approved by the European Council and Parliament.⁹¹

The legal foundation of the PWD can be found within article 53 (1) and 62 TFEU on the free movement of services, and not on the Treaty Title on EU social policies. As described in the recital, the PWD has the aim to promote the *'transnational provision of services'* in a *'climate of fair competition'* by guaranteeing *'respect for the rights of workers'*. In order to reach those objectives, a (partial) level playing field is created under the terms of the PWD,⁹² and this has been attained by establishing a derogation to the free movement of services. More precisely, with the introduction of the PWD, service providers who post workers to

⁸⁷ Judgement of the Court of 23 November 1999, *Arblade*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 41-47

⁸⁸ PWD, recital 5

⁸⁹ Jan Cremers, 'The posting directive: Origins and assessment', *Transfer: European Review of Labour and Research*, no. 1(2), 1995, p. 309-314

⁹⁰ Hellsten, J. (2005), *On the Social Dimension in Posting of Workers* (Helsinki, Hanken School of Economics).

⁹¹ Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal*, no. 38(6), 2007, p. 526

⁹² Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.12

perform temporary work in the territory of a Member State have the obligation to observe the nucleus of mandatory rules for minimum protection that apply in the Host Member State.⁹³

2.7.2 The concept of posting within the PWD

Article 2 PWD defines the concept of posted worker:⁹⁴ ‘a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’. Consequently, self-employed persons are not covered by the PWD since they are not covered by the concept of worker. For the definition of worker, with respect to the PWD, the legislation of the Host State is applicable.⁹⁵ Contrarily, to Regulation 883/2004, on the coordination of social security, wherein is determined that the rules of the Sending Member State applies in order to determine whether a person is self-employed or employed.⁹⁶ This might result in conflicting situations in which a person is qualified as posted worker under the PWD and as a self-employed person under Regulation 883/2004.⁹⁷ Another difference with Regulation 883/2004 is the fact that the PWD refers to a ‘limited period of time’ while Regulation 883/2004 refers to a maximum period of 24 months.

Within the scope of the PWD, three different forms of posting are explicitly identified: subcontracting, intra-group posting and posting through temporary agency work.⁹⁸ Posting through temporary agencies is seen as the most problematic form of posting. For instance, situations are known where temporary agencies are established in certain countries with low labour costs in order to circumvent the application of labour standards which apply in Member States with high labour standards where the workers are sent to perform their work.⁹⁹ Finally, it is important to note that with respect to the determination of the Sending State, it is important that the company has substantial activities in that state.¹⁰⁰

2.7.3 Minimum protection of the posted worker

As discussed above, before the implementation of the PWD, Member States already had the possibility to apply their legislation and collective agreements to the workers being posted to their territory, as established by the CJEU in the *Rush Portuguesa* line of cases. In order to ensure a more uniform approach, the PWD

⁹³ PWD, recital 13

⁹⁴ PWD, art. 2 (1)

⁹⁵ PWD, art. 2 (2)

⁹⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 1 (b)

⁹⁷ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 20

⁹⁸ PWD, art. 1 (3)

⁹⁹ Ines Wagner, ‘EU posted work and transnational action in the German meat industry’, *Transfer: European Review of Labour and Research*, no. 21(2), 2015, p. 205

¹⁰⁰ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p.15

compelled Member States to establish a protection for workers while being posted, coinciding with the ‘hard core’ terms and conditions of employment of the host state (and regardless irrelevant of the law which is applicable to the employment relationship¹⁰¹ of the posted workers in question).¹⁰²

The choice of limiting the applicability of the Host State labour rules to a “core” allow to draw a connection with the rules on international private law, the Rome I Regulation, which determine the law applicable to contractual obligations (1980).¹⁰³ According to Rome I, the employer and the employee have the freedom to choose the applicable law to the contract of employment.¹⁰⁴ However, this choice may not have the result of depriving the employee of the protection afforded to him by the applicable law in the absence of choice.¹⁰⁵ Moreover, as stated in article 9 of the Rome I legislation, overriding reasons of public interest may require the application of another system of law.¹⁰⁶ With respect to posting, article 9 of Rome I justifies the application of the hard core protection of employment conditions in the Member State within whose territory the worker is temporarily posted to the posted worker, during the period of posting regardless of the applicable law of the employment relationship.¹⁰⁷

Thus, the PWD applies the *lex loci laboris* principle to the position of the posted worker to a certain extent, namely with reference to the ‘hard core’ of terms and conditions of employment as listed in article 3 (1):

- (a) *maximum work periods and minimum rest periods;*
- (b) *minimum paid annual holidays;*
- (c) *the minimum rates of pay, including overtime rates; this point does not apply to 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 terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;*

¹⁰¹ The Rome Convention on the law applicable to contractual obligations (1980) determines the law applicable to an individual contract of employment

¹⁰² Laval, paragraph 73

¹⁰³ Regulation (EC) No 593/2008 of the European Parliament and of the council [2008] OJ 2 177/6-16 [hereinafter Rome I]

¹⁰⁴ Rome I, art. 3

¹⁰⁵ Rome I, art. 4 and 8 (2), (3)

¹⁰⁶ Rome I, art. 9

¹⁰⁷ Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations - A Legal Study of the EU's Influence on the Dutch, German, and Swedish Enforcement Systems*, Deventer, Kluwer, 2015, p. 207; Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', To the European Commission Contract, no. 96, 2011, p.17

(g) *equality of treatment between men and women and other provisions on non-discrimination.*

Those matters are to be covered by the Host State rules, when laid down by law, regulation or administrative provision, and/or collective agreements which have been declared universally applicable within the Host State.¹⁰⁸

The PWD includes the so-called most favourable principle: it states that the rules of the PWD shall not prevent the application of working terms and conditions which are more favourable for the posted worker.¹⁰⁹ In other words, in case the ‘hard core’ labour conditions of the Host State are less favourable to the worker than the working conditions being laid down within the Sending State, the more favourable conditions of the Sending State prevail. As a result, in order to determine which provisions are more favourable to the posted worker, one has to make a comparison between the Sending State and the Host State on grounds of labour provisions, as listed above under article 3 (1) PWD. Taking the heterogeneity of the Member States’ systems of labour law into account, Cremers and Donders argue that making a comparison between States for each provision might be difficult and time consuming, especially when the worker is posted for a relatively short period of time.¹¹⁰

2.7.4 The minimum rates of pay

Article 3 (1) PWD states that the concept of ‘minimum rates of pay’ is defined by the national law and/or practices as laid down within the legal framework of the Host State. With respect to the determination of the pay of the posted worker during the period of posting, the role of general applicable collective agreements is in particular important, since they entail most of the times a higher (minimum) wage than the statutory minimum wage (for an overview of the statutory minimum wages, see figure 3).

Within literature, the minimum rates of pay, besides safety and health standards, are seen as one of the ‘hard core’ provisions, with the greatest impact on the position of the worker being posted.¹¹¹ In order to assess whether the PWD provides a level playing field, it is important to examine what is considered as part of the minimum rates of pay. Despite its importance, ‘*it is legally unclear as to which components of the wage paid should be regarded as constituent elements of the minimum rate of pay in the host country*’¹¹². This is

¹⁰⁸ PWD, art. 3 (8)

¹⁰⁹ PWD, recital 17; PWD, art. 3

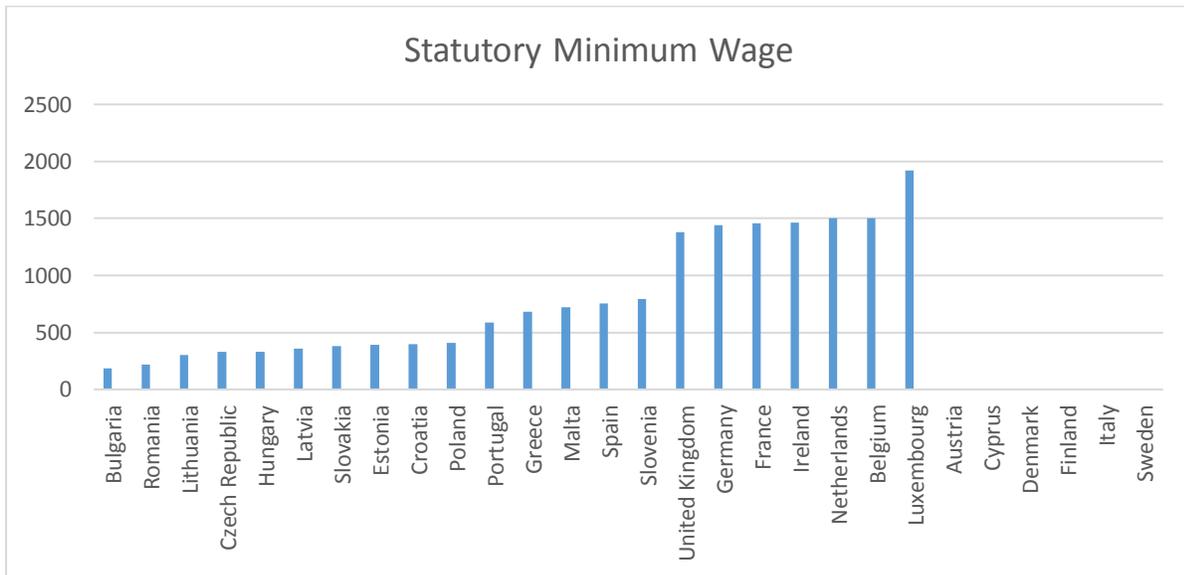
¹¹⁰ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p.22

¹¹¹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', To the European Commission Contract, no. 96, 2011, p.8

¹¹² Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.32

quite worrying since both the employer, the foreign service provider, and the posted worker should be acquainted with the minimum rates of pay that applies within the Host State. The foreign service provider needs to know it in order to determine the right wage, as the same manner, that the posted worker should be aware about her or his entitlements during the posting. The main aim of this section is to identify the composition of the minimum rate of pay, while relying on the PWD and relevant case law as far as it is reasonably viable.

Figure 3: The monthly statutory minimum wage in the European Member States in 2015



Source: Eurostat tps00155 (Austria, Cyprus, Denmark, Finland, Italy and Sweden do not have a statutory minimum wage)

The ambiguity about the concept of the ‘minimum rates of pay’ poses a two folded problem.¹¹³ From the perspective of the Host State, it is important to determine the constituent elements of the minimum rates of pay.¹¹⁴ Secondly, from the perspective of the foreign service provider, it is important to examine which components of the sum actually paid to the posted worker can be taken into account for the calculation of the minimum rates of pay of the Host Member State.¹¹⁵

First of all, from the perspective of the Host State, it is significant to determine which components are considered as part of the ‘*minimum rates of pay*’. In principle, this is within the competence of Member States themselves;¹¹⁶ however, the Directive and case law give some guidelines on specific elements. The PWD indicates that overtime rates are included in the concept of ‘minimum rates of pay’, while

¹¹³ European commission, 'Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors', *Contract No VC*, no. 36, 2015, p. 36

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ PWD, art. 3 (1)

contributions to supplementary occupational retirement pension schemes are excluded.¹¹⁷ The CJEU provided more details in the case between *Sähköalojen ammattiliitto ry*, a Finnish trade union in the electricity sector, and *Elektrobudowa Spółka Akcyjna (ESA)*, a Polish company that posted 186 workers to Finland.¹¹⁸ Primarily, Polish posted workers were as well covered by the job ladder or wage scale¹¹⁹ as laid down at the Finnish collective agreement.¹²⁰ Secondly, the applicable Finnish collective agreement entailed the provision of a daily allowance for (local) workers being posted within the territory of Finland¹²¹. The CJEU ruled that a *'daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned'*¹²². Thirdly, the CJEU ruled that also the posted workers were entitled to receive a compensation for daily travelling time as long as they meet the requirements as laid down within the collective agreement in question. Last but not least, the CJEU ruled that posted workers were entitled to receive a holiday pay that corresponds with the minimum wage of the Host State.¹²³ In brief, the 'minimum rates of pay' includes besides the gross wage the following components: overtime rate, daily allowance, compensation for daily travelling time, and minimum paid annual holidays.

Moreover, it shall be borne in mind, that not every form of pay is considered as part of the minimum wage, as laid down in article 3 (7): *'allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging'*. For instance, costs for accommodation cannot be deducted from the minimum wage of the posted worker. All in all, despite case law and provisions in the Directive, the composition of the minimum rates of pay remains subject to ambiguity, as clearly stressed out by the European Commission: *'the lack of a clear standard generates uncertainty about rules and practical difficulties for the bodies responsible for the enforcement of the rules in the host Member State; for the service provider when determining the wage due to a posted worker; and for the awareness of posted workers themselves about their entitlements'*¹²⁴.

¹¹⁷ PWD, art. 3 (1) (c)

¹¹⁸ Judgement of the Court of 12 February 2015, *Sähköalojen ammattiliitto ry*, C-396/13, EU:C:2015:86

¹¹⁹ Categorization of employees into pay groups based on job, skills, education etc.

¹²⁰ Judgement of the Court of 12 February 2015, *Sähköalojen ammattiliitto ry*, C-396/13, EU:C:2015:86, paragraph 27-45

¹²¹ *Ibid*, para. 46

¹²² *Ibid*, para. 52

¹²³ *Ibid*, paras 64-70

¹²⁴ EU Commission, Impact Assessment: Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2016 p. 11

2.7.5 Article 3 (8) PWD: absence of a system for declaring collective agreements

Some Member States such as the UK, Sweden and Denmark do not have a system for declaring collective agreements generally binding¹²⁵. Especially for those States, Article 3 (8) extends the scope of the PWD by stating that in the absence of a system for declaring collective agreements binding, Member States, might base themselves on two other categories of collective agreements:¹²⁶

Collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and labour organizations at national level and which are applied throughout national territory.

By means of those options, also the Member States in question are able to apply the ‘hard core’ labour condition, as laid down within collective agreements, to the workers being posted to their territory.¹²⁷ However, a narrow interpretation of article 3 (8) by the CJEU became clear within the *Rüffert* case¹²⁸. The *Rüffert* case addressed the situation of a Germany company, Objekt und Bauregie, which won a tender for a large construction project in Germany.¹²⁹ The contract between the German State of Lower Saxony and the company contained a declaration that the subcontractor had to comply with a local collective agreement.¹³⁰ In particular, the contract stated that employees working at the construction site should receive at least the minimum wage as laid down within the local collective agreement.¹³¹ Objekt und Bauregie used a Polish subcontractor which posted Polish workers to the German construction site. Those workers did not receive the minimum wage as laid down within the local collective agreement.¹³² Since Objekt und Bauregie did not comply with the contract, the contract was annulled by the German State of Lower Saxony and charges were pressed against the German Company.¹³³ However, the CJEU stated that the local collective agreement was not generally applicable, and thus not covered by article 3 (1) (C) PWD.¹³⁴ Furthermore, the German State could not appeal on Article 3 (8) since this provision may be used only by States which do not have a system for declaring collective agreements.¹³⁵ All in all, the annulment

¹²⁵ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 22

¹²⁶ PWD, art. 3 (8)

¹²⁷ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 22

¹²⁸ Judgement of the Court of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189

¹²⁹ *Ibid*, paragraph 2

¹³⁰ *Ibid*, paragraph 5

¹³¹ *Ibid*, paragraph 6

¹³² *Ibid*, paragraph 11

¹³³ *Ibid*, paragraph 11

¹³⁴ *Ibid*, paragraph 28

¹³⁵ *Ibid*, paragraph 31

of the contract and the charges were seen as an infringement of article 56 TFEU (the freedom to provide services). This case stressed the idea that the PWD does not only provide a minimum protection to the posted workers but functions as well as a ceiling. This aspect will be discussed below.

2.7.6 Protection of posted workers beyond the provisions of the PWD

In line with article 3 (10) (first indent) PWD, Member States may extend the protection of posted workers beyond the nucleus of terms and conditions of employment, under the condition that such higher protection is rooted in public policy provisions. The case *Commission v Luxembourg*¹³⁶ addressed the implementation of article 3 (1) and 3 (10) of the PWD in Luxembourg. The situation was as follows: while invoking article 3 (10), Luxembourg declared that all national labour law provisions apply to foreign service providers, also in case of posting to the territory of the country.¹³⁷ The CJEU instead argued that a protection beyond the provisions laid down within the PWD restricts the free provision of services which must be interpreted strictly (see the test in section 2.5.2).¹³⁸ Subsequently, the CJEU ruled that this restriction could not be justified by overriding reasons of public interest.¹³⁹

In another case (the above mentioned *Laval case*), the CJEU stated that industrial action in favour of the application of domestic labour provisions ‘beside’ and ‘above’ the ‘hard core’ protection to posted workers is a restriction to the free movement of services and could not be justified, unless in presence of overriding reasons of public interest, and of compliance with the proportionality test.¹⁴⁰

Both cases illustrate the rigid interpretation of the PWD by the CJEU: the PWD provides not only a minimum protection to Posted workers but it is interpreted to function as a ceiling of rights as well. According to the reasoning of the Court, the application of the host State’s labour law provisions beyond the list of nucleus terms and conditions of employment is an unlawful restriction to the free movement of services.

This is quite contradictory to the preamble of the Directive:

‘Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State;

¹³⁶ Judgement of the Court of 19 June 2008, *Commission v. Luxembourg*, C-319/06, EU:C:2008:350

¹³⁷ Article 1 of the Law of 20 December 2002

¹³⁸ Judgement of the Court of 19 June 2008, *Commission v. Luxembourg*, C-319/06, EU:C:2008:350, paragraph 30

¹³⁹ Judgement of the Court of 19 June 2008, *Commission v. Luxembourg*, C-319/06, EU:C:2008:350, paragraph 44

¹⁴⁰ *Laval*, paragraph 111

whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means'.¹⁴¹

Moreover, and as previously mentioned, the main objective of the Directive was, according to the recitals and its provision, to establish a climate of fair competition under *terms of equal treatment*. However, it is the question whether an interpretation of the directive as limited to setting no more than a minimum level protection can be seen as an effective tool to establish a climate of fair competition, or if it instead leaves space to social dumping practices, detrimental for domestic service providers.

2.8 The Enforcement Directive

2.8.1 Introduction

The previous section on the PWD has focused mainly on the scope of the posted workers' protection, since such issue is narrowly related to the creation of a level playing field between service providers within the European Single Market. From a more practical point of view, the PWD contains also provisions on the monitoring of transnational activities under posting¹⁴². In 2003, a publication of the Commission concluded that Member States had difficulties with implementing the PWD in practice.¹⁴³ For this reason, and to ensure that Member States implement, apply and enforce the PWD in a more uniform manner, the Enforcement Directive 2014/67/EU (hereinafter, ED) concerning the posting of workers was introduced. As stated within the preamble of the ED, '*adequate and effective implementation and enforcement are key elements in protection of the rights of posted workers and in ensuring a level-playing field for the service providers*'¹⁴⁴. Due to the scope of this paper, we will focus on the provisions which are closely connected to the enforcement and monitoring of the pay of the posted worker in compliance with the Host State's legislation and practices.

2.8.2 Content

As starting point, the competent authority of the Host State assesses whether the (foreign) service provider complies with the labour terms and conditions of the posted worker.¹⁴⁵ The ED provides that the State of establishment of the service provider shall as well continue monitoring the working conditions of the posted worker in accordance with its national legislation and practices during the period of posting abroad.¹⁴⁶

¹⁴¹ PWD, recital 12

¹⁴² For instance, Member States are supposed to establish a liaison office in order to provide information on the applicable collective agreements and legislation

¹⁴³ The European Commission, 2003 in Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal*, no. 38(6), 2007, p. 529

¹⁴⁴ ED, recital 16

¹⁴⁵ ED, art. 7 (1)

¹⁴⁶ ED, art. 7 (2)

Moreover, the State of establishment shall assist the Host State in monitoring the posting by means of administrative cooperation.¹⁴⁷ Those provisions are made in order to improve the coordination between Member States on the matter of posted workers.

For the monitoring procedure itself, the ED extends the administrative requirements and the control measures. Most importantly, service providers are obliged to inform the responsible authority in the Host State about the posting of workers – including the identities of the posted workers and the anticipated duration of the posting.¹⁴⁸ Moreover, the following documents have to be accessible at the workplace during the period of posting: the contract of employment, time-sheets indicating the amount of hours worked by the posted employee, proof of payment of wages or copies.¹⁴⁹ Article 10 allows competent authorities of Member States to make a risk assessment in order to identify sectors with relatively high share of vulnerable posted workers, which require more random checks or inspections than other sectors.¹⁵⁰ Finally, the ED provides for the transnational recognition of sanctions.¹⁵¹ Consequently, a fine for a Dutch company for non-compliance with the PWD by the German Labour Inspectorate can be collected by the Dutch competent authority.

2.8.3 Subcontracting liability

With respect to the construction sector¹⁵², the ED obliges Member States to introduce a subcontracting liability in order to tackle underpayment.¹⁵³ The subcontracting liability means that, in addition to or in place of the employer, the direct contractor of the employer also referred as the user undertaking can be held liable for the outstanding wage as provided under the PWD. Self-explanatory, this liability is limited to the rights acquired by the worker under the contractual relationship between the employer and the user undertaking¹⁵⁴. For instance, a Polish worker posted by a Polish company to the Netherlands can hold *both* the Polish employer and the Dutch user undertaking liable for the payment of the Dutch minimum rates of pay (see figure 4). As argued by the European Parliament, the introduction of subcontracting liability has a

¹⁴⁷ ED, art. 6 (1)

¹⁴⁸ ED, art. 9 (1) (a)

¹⁴⁹ ED, art. 9 (1) (a)

¹⁵⁰ ED, art. 10 (1)

¹⁵¹ ED, art. 15 (1)

¹⁵² As only construction sector is included in the Annex to the PWD. For more see European Parliament, Liability in Subcontracting Chains: National Rules and the Need for a European Framework, study for the JURI committee, 2017, p. 47

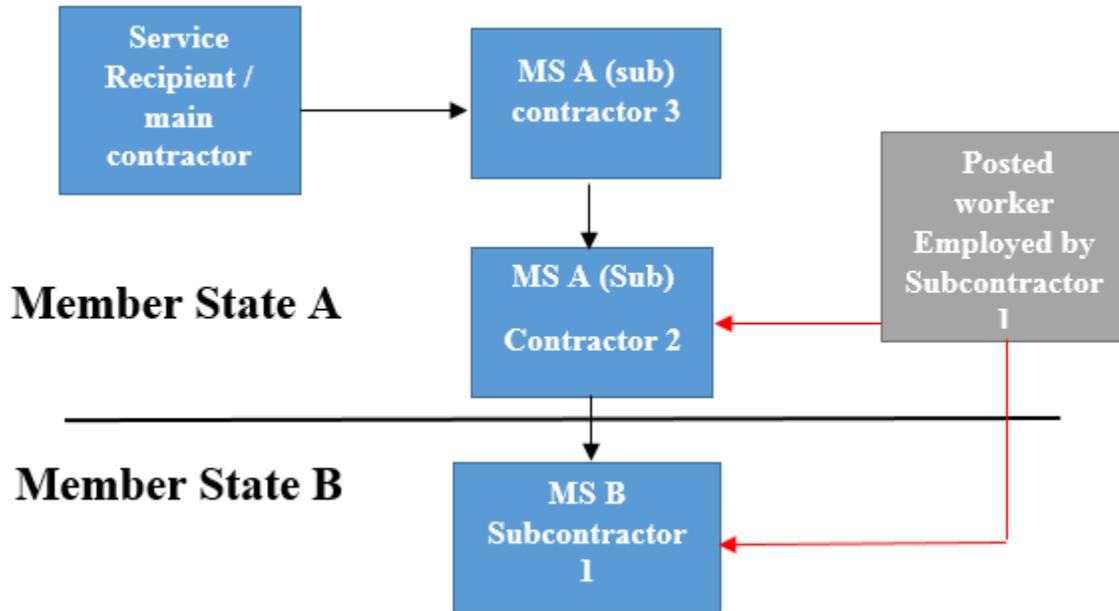
COM (2012), p. 22;

¹⁵³ Article 12 (1) ED

¹⁵⁴ Article 12 (3) ED

preventive effect since companies have the incentive to make sure that they do business with trustful subcontractors¹⁵⁵.

Figure 4: The Subcontracting liability as described in Art. 12 of the Enforcement Directive



Source: made by author

However, user undertakings can be exempted from this liability in case they undertook due diligence¹⁵⁶ as defined by national law¹⁵⁷. The subcontracting liability as framed in the ED is criticised for the fact that the liability scheme is limited only to one layer of subcontracting and to the construction sector¹⁵⁸. Based on article 12 (4) ED, Member States have the possibility to extent the scope and range of subcontracting liability.

Literature makes a difference between joint and chain liability.¹⁵⁹ Joint liability is limited to the employer and the user undertaking of the employer for the outstanding payments.¹⁶⁰ The subcontracting liability as described within the ED is an example of joint liability as clearly demonstrated by figure 4: the liability scheme is limited to one layer. By contrast, chain liability covers the whole chain rather than the contractor

¹⁵⁵ See the European Parliament resolution of 26 March 2009 on the social responsibility of subcontracting undertakings in production chains

¹⁵⁶ Reasonable steps taken to avoid committing a tort or offence

¹⁵⁷ Article 12 (5) PWD

¹⁵⁸ Jan Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, no.22(2), 2016, p.160

¹⁵⁹ Mijke Houwerzijl and Saskia Peters, 'Liability in subcontracting processes in the European construction sector', 2008, p.2

¹⁶⁰ *Ibid*

of the employer only (the user undertaking).¹⁶¹ For instance, in case of chain liability, the Polish worker may address all parties in the chain for her or his pay. Chain liability is perceived as more efficient in counteracting abusive practices.

2.8.4 Assessment of the ED

Synthesizing the main points, it might be reasonably assumed that the ED offers the Member States a wide range of instruments with the aim to improve the monitoring process of posting and therefore to address practices that do not comply with the rules established in the PWD. Moreover, the ED promotes cooperation between Member States concerning prevention, detection, and enforcement of abusing practices of posting. Those measures might be helpful in the fight against social dumping due to posting. At the same time, it raises the question whether Member States have enough capacity to monitor the process of posting extensively. As van Drongelen and van Rijs argue, the success of the ED depends primarily on the way how the Member States transpose it into their domestic legal framework.¹⁶² For now, it is too early to evaluate the impact of the ED on the position of the posted worker since it was transposed into domestic legislation of the Member States only in 2016¹⁶³. Nonetheless, at this stage, it is reasonable to assume that there is much to be improved as regards the enforcement and monitoring of posted workers.

2.9 Revision of the PWD

Recently, the European Commission, under the impulse of President Juncker, proposed a revision of the PWD with the aim to make a step forward towards the creation of a level playing field with respect to the rights of the posted worker.¹⁶⁴ In its proposal, the Commission emphasises that the revision of the PWD has to be seen as complementary to the ED.¹⁶⁵ The proposal of the PWD is quite revolutionary since it deviates from the principle of minimum protection, which is currently established in the PWD and case law, by replacing the reference to ‘*minimum rates of pay*’ by a reference to ‘*remuneration*’.¹⁶⁶ The proposal resulted in a clash between high-wage EU countries¹⁶⁷ and low-wage EU countries¹⁶⁸. On the one hand, high-wage EU countries are in favour of a widening of the scope and amendments of the PWD by applying the same local rules for remuneration to the posted workers rather than the ‘*minimum rates of pay*’, in order to

¹⁶¹ Ibid

¹⁶² Harry van Drongelen and Andre van Rijs, ‘De Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie, de detachings-en handhavingsrichtlijn samengebracht’, *PS documenta*, no. 2016 (15), 2016, p. 1105

¹⁶³ The ED had to be transposed into national laws before 18 June 2016

¹⁶⁴ COM (2016) 128

¹⁶⁵ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 COM(2016) 55 final, p. 3

¹⁶⁶ Ibid, p. 8

¹⁶⁷ Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden

¹⁶⁸ Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania

minimize the downward pressure on national social policies and to ban abusive practices of posting at the costs of the social position of the posted worker.¹⁶⁹ On the other hand, low-wage EU countries expressed their concern¹⁷⁰ that the principle of *'the same pay for the same work at the same place'* as part of the proposal is incompatible with the principles of the European single market since it will affect the competitive position of local service providers. Regarding social dumping, some scholars are concerned about the fact that the extension of protection of a posted worker, might result in a shift to the posting of (bogus) self-employed persons since they are not covered by the protection of the PWD¹⁷¹ (see also section 3.3.3.).

On the 24th of October 2017, after an extensive political debate, the representatives of the Member States seated in the European Council reached an agreement on the revision of the PWD.¹⁷² The proposal is based on the following objective: *'Safeguard the freedom to provide services on a fair basis in both the short and the long term, notably by preventing abuse of the rights guaranteed by the Treaties'*¹⁷³. In this perspective, *the total gross amounts of remuneration should be compared, rather than individual elements of remuneration.*¹⁷⁴ The amount of the total remuneration shall be determined by national law and/or practice of the State where the worker is posted and should comprise *'all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application [...]*¹⁷⁵. With respect to the concept of remuneration, a reflection of the case law on the *Sähköalojen ammattiliitto ry* is clearly visible in the amendments to the PWD.¹⁷⁶ This can be confirmed by the proposal itself which states that *'the concept of 'remuneration' should include, but should not be limited to, all the elements of minimum rates*

¹⁶⁹ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.63

¹⁷⁰ Ten Member States from Central and Eastern Europe and Denmark made use of the Subsidiarity Control mechanism by triggering the yellow-card procedure, see <http://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/>

¹⁷¹ European Commission, Impact assessment, Proposal for amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 2016, p. 43

¹⁷² For the press release see the European Council, Posting of workers: Council reaches agreement. [online] Available at <http://www.consilium.europa.eu/en/press/press-releases/2017/10/23/epsco-posting-of-workers/>

¹⁷³ European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, p. 5

¹⁷⁴ Ibid, p. 7

¹⁷⁵ Proposed amendment of Article 3 of the PWD as laid down in: European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

¹⁷⁶ Rebecca Zahn, 'Revision of the posted workers directive: a Europeanisation perspective', *Cambridge Yearbook of European Legal Studies*, no. 19, p. 17

*of pay developed by the Court of Justice of the European Union*¹⁷⁷. Therefore, one might argue that within the proposed PWD the ‘minimum rate of pay’ does not act anymore as a ceiling of rights (see also section 2.7.6). However, as argued by the European Trade Union Confederation (ETUC), the revision of the PWD does not address the problem that some countries, including Germany and Italy, use a limit number of generally applicable collective agreements at the sectoral level.¹⁷⁸ Moreover, collective agreements at the company level are still not covered by the revised PWD.¹⁷⁹ By taking this into account, one might question whether the nature of the revision is substantial or rather symbolic, as posted workers are not entitled to receive the same remuneration as local workers covered by a local company-level agreement.

Another meaningful proposed change deals with the maximum period of posting, turning it into a limited period of 12 months.¹⁸⁰ This period can be extended with 6 months on the basis of a motivated notification of the service provider in question.¹⁸¹ Furthermore, in order to avoid abuse, in case a posted worker is replaced by a new posted worker for the same tasks at the same place, the cumulative period of the posting will be taken into account with respect to the length of the posting. Finally, special rules will be developed for the transportation industry and for temporary work agencies, although for the scope of this thesis we will not address them.

2.10 Conclusion

The aim of this chapter was to provide an answer to the following research question:

- A. *How is the concept of posting regulated at the level of the EU and to what extent are Host States able to restrict the free provision of services by imposing domestic labour standards on non-local service providers who post workers to their territory?*

As starting point, based on the *lex loci laboris* principle, from the perspective of labour law, social security law, and tax law, posted workers remain subject to the legislation of the Sending State. At the same time, there is no interdependency between those three areas of law which might result in conflicting situations as rules differ from each other.

¹⁷⁷ European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, recital 12a

¹⁷⁸ European Trade Union Confederation, Posted workers revision – equal pay for some [online] Available at <https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some#.WodSloPwbRZc>

¹⁷⁹ Ibid

¹⁸⁰ European Council, Proposal to amend Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, recital 8

¹⁸¹ Ibid

From the perspective of labour law, working conditions and remuneration primarily fall within the sovereignty of Member States. The imposition of domestic labour standards on foreign service providers touches upon a sensitive area as it restricts (indirectly) the free provision of services. After analysing the EU Treaty and CJEU case law, it can be stated that the free movement of services has a fundamental role within the EU, and can be restricted by domestic legislation only in exceptional situations.¹⁸² The CJEU ruled that the protection of workers' can be seen as a legitimate reason for a restriction to the economic principles. However, this has to be interpreted carefully, and has to be justified by overriding reasons of public interest, as demonstrated by the CJEU in the Viking case¹⁸³ and the Laval case.¹⁸⁴

As confirmed in the *Rush Portuguesa* case, and then formalized by the introduction of the PWD, Host Member States are able to impose (higher) labour conditions to posted workers. In the PWD, the EU legislator has limited the scope of such protection to the nucleus of labour conditions¹⁸⁵ of the Host State. From a pay perspective, this meant that the Host State's minimum rates of pay, as laid down in legislation and/or general applicable collective agreement, apply to posted workers as well. At the same time, the composition of the 'minimum rates of pay' is subject to ambiguity.

Criticism argue that the PWD does not only provide a minimum protection to the posted workers but operates as a ceiling as well as demonstrated by the Luxembourg case. Recently, the European Council reached an agreement on the revision of the PWD. Most importantly, the revised Directive enlarges the material scope of protection of the PWD from a *minimum* rates of pay to the *same* remuneration in accordance with the Host State's legislation and practices. This means that Host States are able to restrict the free provision of services by applying all the elements on remuneration to the workers being posted to their territory. However, the scope of the proposed PWD remains limited to general applicable CLAs at the sectoral level, which makes it challenging for Host States to create a climate of absolute fair competition.

¹⁸² The restriction has to *be justified by overriding reasons of public interest*, the restriction has to be *non-discriminatory* to nationals and non-nationals, the restriction has to be *objectively necessary*, and the restriction must not go beyond what *necessary* in order to attain the objective.

¹⁸³ Judgement of the Court of 11 December 2007, *Viking*, C-438/05, EU:C:2007:772

¹⁸⁴ Judgement of the Court of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809

¹⁸⁵ In domestic legislation and/or in general applicable collective agreements

Chapter 3 – Posting practices within the construction sector

3.1 Introduction

Based on the overall number of A1 forms¹⁸⁶, the amount of posted workers is estimated to be 1.49 million persons over 2015¹⁸⁷, which is per se a quite small amount. Nevertheless, the numbers of posted workers are relatively high within certain sectors (see figure 5). Especially the construction sector is subject to a significantly high share of workers being posted within the territory of the EU: as illustrated in figure 5, 41.6 percent of the total amount of A1 forms issued in 2015 by the public authorities of the Member States concerned workers in the construction sector. In other words, for every ten workers being posted within the EU, there are at least four of them working in the construction sector. Undoubtedly, this represents an impressive in- and outflow of construction workers between Member States under terms of posting.

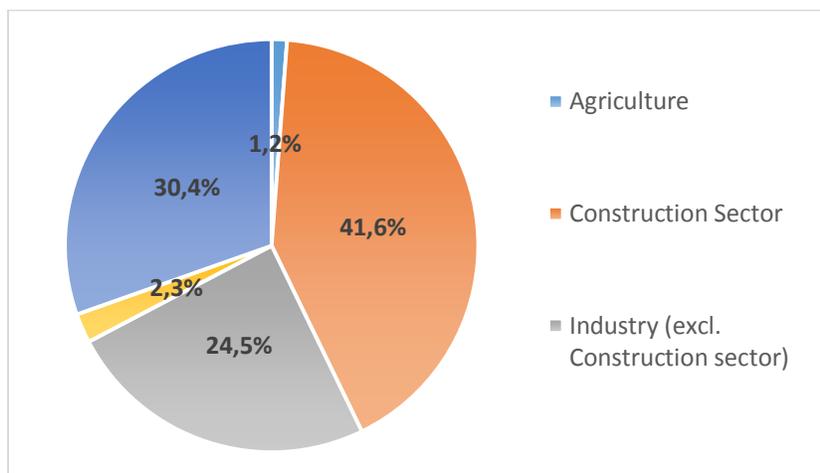
Thus, it is worth considering why the concept of posting gained so much popularity within the construction sector in comparison with other sectors. As encountered within literature, international undertakings seek to save labour costs by recruiting construction workers from cheap regulatory regimes to high-wage Member States¹⁸⁸. This might result in labour cost competition and to a race-to-the-bottom or social dumping. This chapter attempts to identify those abusing practices of posting within the construction sector.

¹⁸⁶ See section 2.2.1 for a critical view on the numbers of A1 forms as benchmark for the amount of posted workers

¹⁸⁷ Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015', p.8

¹⁸⁸ See for instance Mijke Houwerzijl, Regime shopping across (blurring) boundaries, *Regulating transnational labour in Europe: the quandaries of multilevel governance*, 2014, p. 95-130; Nathan Lillie, Bringing the offshore ashore: transnational production, industrial relations and the reconfiguration of sovereignty transnational production, *International Studies Quarterly*, no. 54 (3), 2010

Figure 5: Total Amount of A1 Forms received within the territory of the EU for workers being posted over 2015



Source: Administrative data PD A1 Questionnaire 2016 and previous years: in Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015' [2016] European Union; made by author

3.2 The role of posting within the construction sector

3.2.1 Facts and Figures

In the context of temporally cross-border movement of workers within the EU, a recent study identified an astonishing flow of postings from 'EU-13' or 'new' Member States¹⁸⁹ to the 'EU-15' or old Member States¹⁹⁰ and a flow of postings across EU-15 Member States.¹⁹¹

The construction industry results in a crucial sector for posting issues. Therefore, we have analysed the amount of A1 forms issued by Member States¹⁹² from both, a sending and a receiving perspective (see table 1). Also here, a clear distinction is visible with the EU-15 Member States as Host States on the one hand and the EU-13 Member States as Sending States on the other hand which might indicate a flow of postings in the construction sector from the EU-13 Member States to the EU-15 Member States. In addition, the ratio between received workers and sent workers can be used in order to determine whether a Member State is a receiving or a Sending Member State. Member States with a rate above 1 may in general be perceived as a Receiving State, while the Member States with a rate below 1 can be seen as Sending state. Equally at this point, a clear distinction can be noticed regarding the role of the EU-13 Member States with low ratios

¹⁸⁹ Croatia, Romania, Bulgaria, Poland, Czech Republic, Latvia, Lithuania, Slovenia, Estonia, Slovakia, Hungary, Cyprus and Malta

¹⁹⁰ Belgium, Greece, Luxembourg, Denmark, Spain, Netherlands, Germany, France, Portugal, Ireland, Italy, United Kingdom, Austria, Finland and Sweden

¹⁹¹ Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015', p.10

¹⁹² Data retrieved from Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015'

such as Poland and Portugal, as Sending States, and the role of EU-15 Member States with high ratios such as Belgium and the Netherlands as Host States.

Table 1: Data on the A1 forms issued by the Member States from both a sending and a receiving perspective 2015 in the construction sector

Member State	Construction workers received in MS	Construction workers sent from MS	Ratio: received workers/sent workers
Germany	163.278	NA	NA
Belgium	53.700	13.188	4,07
France	44.137	5.244	8,42
Austria	37.848	13.680	2,77
Netherlands	16.034	2.978	5,38
Sweden	14.177	NA	NA
Spain	9.092	NA	NA
Italy	7.409	NA	NA
Finland	7.082	470	15,07
United Kingdom	6.188	NA	NA
Luxembourg	5.912	21.413	0,28
Czech Republic	3.519	5.177	0,68
Croatia	2.257	15.372	0,15
Denmark	2.166	NA	NA
Slovenia	1.937	63.460	0,03
Poland	1.434	125.493	0,01
Slovak Republic	1.364	36.303	0,04
Romania	843	19.069	0,04
Lithuania	810	9.311	0,09
Hungary	734	24.826	0,03
Estonia	590	3.054	0,19
Latvia	457	809	0,56
Bulgaria	423	NA	NA
Ireland	289	NA	NA
Greece	249	NA	NA
Portugal	110	34.743	0,00
Malta	31	0	NA
Cyprus	28	30	0,93

Source: Administrative data PD A1 Questionnaire 2016 and previous years: in Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers- Report on A1 portable documents issued in 2015' [2016] European Union; made by author

3.2.2. The labour costs driven model and the construction sector

As mentioned above, temporary labour migration under terms of posting plays an important role within the construction sector in the EU. What are the reasons of the wide-spread application of posting within this particular sector? The literature distinguishes two main models of posting: the skills driven model and the labour costs driven model.¹⁹³ The skills driven model addresses the temporary movement of workers driven by skills shortages elsewhere and takes place in high value chains.¹⁹⁴ While, the labour costs driven model, hold up that posting of workers is triggered by labour cost differentials between Member States in low value chains, including the construction sector.¹⁹⁵ The latter is the situation which is reflected in the large flows of construction workers from EU-13 Member States, with relative low labour costs, to EU-15 Member States, with relative high labour costs.¹⁹⁶

The construction sector is unique in its kind by means of its relative high labour intensity; as Cremers argues, ‘about 50% of the turnover is achieved through the labour of workers’¹⁹⁷. Jobs within the construction sector are characterised by unskilled and physical demanding work which make them unattractive for domestic workers which might result in labour shortages.¹⁹⁸ Moreover, the temporary character of (large) construction projects requires a large workforce for a limited period of time; after completing the work at one production site, construction workers move on to another site located elsewhere to provide work.¹⁹⁹ Therefore, construction firms are less bound to a fixed location of production. In this way, notably in Western Europe, the structure of the construction industry is quite complex being composed by large construction companies as main contractors and small and medium-sized construction companies, including self-employed, as subcontractors.²⁰⁰ Recent research indicates that the majority of EU mobile workers

¹⁹³ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.9

¹⁹⁴ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p.17

¹⁹⁵ Ibid

¹⁹⁶ EU Commission 2016 Impact assessment, p. 33; Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 525

¹⁹⁷ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 8

¹⁹⁸ The European Commission, 2003; Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 525; Graham Ive and Stephen Gruneberg, *The economics of the modern construction firm*, Springer, p. 2000

¹⁹⁹ Ivana Fellini, Anna Ferro and Giovanna Fullin, ‘Recruitment processes and labour mobility: the construction industry in Europe’, *Work, employment and society*, no. 21(2), p. 279; Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 9

²⁰⁰ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 9; Nathan Lillie, ‘Subcontracting, posted migrants and labour market segmentation in Finland’, *British Journal of Industrial Relations*, no. 50(1), 2012, p. 148-167; Gerhard Bosch and Klaus Zühlke-Robinet, ‘he labor market in the German construction industry ’ in Gerard Bosch (dir.), *Building chaos: an international comparison of deregulation in the construction industry*, London Routledge, p. 48-73

within the construction sector are employed by subcontractors.²⁰¹ The use of subcontracting is seen as a way to spread the economic risk across several actors. Nonetheless, it has certain drawbacks such as a strong labour cost competition between all sorts of subcontractors, including transnational employment agencies and construction businesses, which results in a widespread use of posting: subcontractors recruit workers from lower-wage Member States to construction projects within high-wage States in order to save labour costs.

3.3 Social dumping within the construction under the scope of posting

3.3.1 Introduction

As discussed before, the specific characteristics of the construction sector, with in particular the intense competition on labour costs between subcontractors, makes the sector more sensitive to social dumping and unfair competition. Some enterprises are willing to surpass the boundaries of the EU and national legislation in order to make advantage of the concept of posting. Situations are known, where service providers gain a competitive advantage by establishing artificial company structures such as letter-box firms and bogus self-employment in order to circumvent the EU legislation and the relatively higher minimum rates of pay²⁰². Within literature, those abusive practices are known as social dumping: *‘the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage’*²⁰³.

It is noteworthy to remember that in the past few years, several media reported about the controversial working methods of Atlanco Rimec, one of the leading European recruitment firms in Europe.²⁰⁴ Atlanco, established in Ireland, managed to be a successful bidder during tendering procedures for large construction projects spread across West-Europe.²⁰⁵ For instance, in 2007, Atlanco posted 300 workers from Poland to the construction site of the nuclear power plant Olkiluoto 3 in Finland. So far, Atlanco did not breach EU law as it exercised its right to provide services within the Internal market. However, a closer look shows that those Polish workers were employed under a Cypriot subsidiary firm of Atlanco Rimec, even if Polish workers did not have any connection with Cyprus. Because of this mechanism, Atlanco was able to avoid

²⁰¹ Erka Caro and others, ‘Posted migration and segregation in the European construction sector’, *Journal of Ethnic and Migration Studies*, no. 41 (10), 2015, p.1600-1620

²⁰² Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 526

²⁰³ Magdalena Bernaciak, Social dumping and the EU integration process, 2014, p. 5

²⁰⁴ De Volkskrant, ‘Buitenlandse bouwvakkers hebben recht op nabetalings’, 22 July 2015, available at: [<http://www.volkskrant.nl/economie/buitenlandse-bouwvakkers-hebben-recht-op-nabetaling~a4106099/>](http://www.volkskrant.nl/economie/buitenlandse-bouwvakkers-hebben-recht-op-nabetaling~a4106099/); Les Echos, ‘Ouvriers détachés de Flamanville : amende confirmée pour Bouygues en appel’, 20 March 2017, available at: [<https://www.lesechos.fr/20/03/2017/lesechos.fr/0211894944818_ouvriers-detaches-de-flamanville---amende-confirmee-pour-bouygues-en-appel.htm>](https://www.lesechos.fr/20/03/2017/lesechos.fr/0211894944818_ouvriers-detaches-de-flamanville---amende-confirmee-pour-bouygues-en-appel.htm)

the relatively higher labour costs on social security and pension rights which apply in Poland in comparison with Cyprus.²⁰⁶ As a consequence, the Polish workers had to rely on the Cypriot social insurance system in cases of sickness or disability with disastrous consequences.

Companies like Atlanco attempt to enhance their competitive position at the expense of labour rights by means of posting. Its practices, also referred as social dumping through the establishment of letterbox companies, are not unique within the construction sector. Therefore, “local” companies (those established in countries with relatively high labour standards, in this example Finland) have difficulties with competing against this kind of service providers. This section attempts to identify several forms of abuse of posting practices within the construction sector. A distinction will be made between forms of abuse within and outside the scope of the EU framework on posting, in paragraphs 3.3.2 and 3.3.3 respectively.

3.3.2 Unfair competition within the limits of the EU framework on posting

The European Commission stated in a recent report that ‘*posting workers allow companies to exploit their competitive advantage across borders*’²⁰⁷. However, as scholars argue, the legal framework on posting has been abused as a manner to recruit ‘cheap’ labour within the EU.²⁰⁸ The exploitation of differences between national and sectoral labour market regulations, within the limits of the EU framework on posting, have been referred as ‘strategic posting’²⁰⁹ or ‘regime shopping’²¹⁰. Despite the application of the nucleus of terms and conditions as laid down within the PWD, a foreign services provider can have an (indirect) competitive advantage against the local service provider based on three main elements: taxation, social security, and the gross wage itself.²¹¹

As described before, based on most bilateral tax treaties, the competence to levy personal income tax stays with the sending country for the first 183 days of posting and only then moves to the receiving country (see section 2.6.2). Every jurisdiction has its own tax system and therefore, different personal income tax rates.

²⁰⁶ Nathan Lillie and Markku Sippola, ‘National unions and transnational workers: the case of Olkiluoto 3, Finland’ *Work, employment and society*, no. 25(2), p. 303

²⁰⁷ European Commission, *Employment and Social Developments in Europe 2014*, 2014, p. 148

²⁰⁸ See for instance: Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007; Jens Arnholtz and Nana Wesley Hansen, ‘Labour market specific institutions and the working conditions of labour migrants: The case of Polish migrant labour in the Danish labour market.’, *Economic and Industrial Democracy*, no. 34(3), 2013, p. 401-422; Torben Krings, ‘A race to the bottom? Trade unions, EU enlargement and the free movement of labour’, *European Journal of Industrial Relations*, no. 15(1), 2009, p 49-69

²⁰⁹ Magdalena Bernaciak, *Market expansion and social dumping in Europe*, Routledge, 2015,

²¹⁰ Eckhard Voss and others, ‘Posting of Workers Directive: Current Situation and Challenges’, 2016, p.30

²¹¹ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 38

As a consequence, workers might pay more personal income tax in one State than in another. De Wispelaere and Pacolet state that the differences of personal income tax rates between the sending and the receiving Member States, constitute a financial incentive for posted workers as they retain a larger part of their gross wage than the local workers.²¹² Indirectly, this might affect the position of the foreign service providers as well.

Moreover, the matter of corporate income tax is within the sovereignty of the Member States. As a consequence, also the corporate income tax rates vary from State to State which might result in a competitive advantage for service providers who are established in low tax jurisdictions. However, as those taxes are not directly linked to labour but to profit, we will keep this element outside in the assessment of the level playing field in Belgium and the Netherlands.

As for social security, posted workers remain subject to the social security system of the Sending State.²¹³ The different rates of social security contributions from the perspective of the employer may imply that posted workers are less costly than local workers in case they are posted from jurisdictions with lower social security costs.²¹⁴

Construction firms which are established in low wage Member States might save costs on the pay of the posted construction workers when applying the minimum wage of the Host State rather than the same wage. Especially in absence of a general applicable collective agreements for the construction sector in the Host State, the wage gap between a local and a posted worker can rise to a high amount as the statutory wage is significant lower than the average wage within the construction sector. Taken the current minimum-protection approach of the PWD and the different wage levels of Member States into account, the current situation is likely to result in a downward labour market pressure within the construction sector due to posting, with related risks of social dumping.²¹⁵ This effect has been reinforced by the last two enlargements of the EU, since they brought even greater differences in the field of wages and employment (also in consideration in the differences in the industrial relations systems) between Western Member States on the

²¹² Frederic de Wispelaere and Jozef Pacolet, 'Posting of workers: the impact of social security coordination and income taxation law on welfare states.', 2015, p. 6

²¹³ Regulation (EC) No 883/2004 of the European Parliament and of the Council, art. 12 (1)

²¹⁴ Mijke Houwerzijl, Regime shopping across (blurring) boundaries, *Regulating transnational labour in Europe: the quandaries of multilevel governance*, 2014, p. 5

²¹⁵ Magdalena Bernaciak, Social dumping and the EU integration process, 2014, p. 22

one hand, and Eastern Member States on the other hand.²¹⁶ In chapter 4, we will examine this wage gap with respect to the construction sectors in Belgium and the Netherlands.

3.3.3 Abusive practices of posting within the construction sector outside the limits of EU framework on posting

Illegal practices of posting vary from non-compliance with the general applicable CLA's or legislation in the Host State, to forms of fake posting such as the use of letter box firms in Member States with poor social legislation in order to save labour costs on the posting. Since it is impossible to detect all methods of abuse related to posting, this section aims at illustrating certain methods of fraud, circumvention, and abuse which are closely related to the concept social dumping within the construction sector: undercutting and circumvention of minimum rates of pay, fake posting by means of rotational and permanent posting, bogus self-employment, and the use of letterbox firms.

A. Undercutting and circumvention of minimum rates of pay

As illustrated before, the composition of the minimum rates of pay, as part of the nucleus terms and conditions is a quite complex concept. Considering the abovementioned and the problematic implementation of the PWD by the Member States, situations of underpayment of construction workers while being posted (both intentionally and unintentionally by their employer) are not uncommon. For the scope of this thesis, we will focus on the group of employers that intentionally abuse of the blurred definition and enforcement of the Directive in order to pay their posted employee a salary which is lower than the one effectively due.

First of all, some undertakings try to circumvent the applicable minimum rates of pay of the Host State, as laid down by the PWD, by not paying the posted worker the right amount of hours, including hours of overtime, against the rate they are entitled to.²¹⁷ However, the matter of working time and overtime is a particular problem of the construction sector and it is not restricted to the concept of posting. Secondly, some firms may undercut the minimum rates of pay by paying the posted worker 'on paper' the minimum wage which applies in the Host State, but charging them, extensively with costs on lodging, work clothing or even working materials while those components are explicitly excluded from the scope of the minimum rates of pay under the PWD.²¹⁸ For instance, Atlanco Rimec posted construction workers from Portugal to the Netherlands in order to work on the Avenue 2 project. While being posted, the Portuguese workers had

²¹⁶ Guglielmo Meardi and others, 'Constructing uncertainty: Unions and migrant labour in construction in Spain and the UK', *Journal of Industrial Relations*, no. 54(1), 2012, p. 9

²¹⁷ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 39

²¹⁸ Ibid

to pay a fee of 1000 euro a month to an affiliated firm of Atlanco for (poor) housing. Similar wage structures are used by malicious employers as a way to save on labour costs where the posted worker is entitled to.

B. Fake posting by means of rotational and permanent posting

Some undertakings abuse the rules on posting by repeatedly replacing posted workers with new posted workers for the same job. As a consequence, local jobs are permanently performed by (cheaper) posted workers which is also referred as '*permanent posting*'.²¹⁹ It is important to stress that, the revised PWD entails provisions on this matter.²²⁰

Similarly, the concept of Posting has been applied unlawfully in cases of '*rotational posting*': (construction) workers are recruited to be repeatedly posted to the territories of other Member States without performing any work in the territory of the Sending State²²¹. In a recent report of the European Commission, abusive practices are mentioned to originate from the incorrect use of A1-Certificates by firms that aim at 'faking' that the posted worker has been performed work in the Sending State²²². For instance, in the case described above, the Polish employees of Atlanco Rimec were insured under the Cyprian system. As a consequence, a Cyprian A1 Certificate was issued where it was stated that the employee was already covered by social security insurance in Cyprus, as Sending State. However, this is departing from reality.

C. Letterbox firms

In this day and age, the use of letter box firms is one of the most common forms of exploitation of the grey areas of EU legislation on posting of workers, which leads to a significant abuse of workers' rights. A letter box firm is a firm which is registered in a country while it has no or very little economic activity in that country.²²³ From the perspective of posting, letter box firms can be used as a way to avoid the applicability of regimes which are associated with relatively high wages, social security contributions, and taxes.

The use of letterbox firms harms the social protection of posted workers from two perspectives. First of all, the labour costs saved by employers because of 'establishing' themselves strategically in a regime with

²¹⁹ Eckhard Voss and others, 'Posting of Workers Directive: Current Situation and Challenges', 2016, p. 28

²²⁰ Under the proposed rules, in case a posted worker is replaced by a new posted worker for the same tasks at the same place, the cumulative period of the posting will be taken into account with respect to the length of the posting

²²¹ European Parliament, Liability in Subcontracting Chains: National Rules and the Need for a European Framework, study for the JURI committee, 2017, p. 39

²²² European Commission, Impact assessment – revision of the legislative framework on the posting of workers in the context of provision of services, SWD, 2012, p.35 and 36

²²³ Karsten Sørensen, 'The fight against letterbox companies in the internal market.', 2004, p.1

beneficial rates are at the expense of the social position of the posted workers²²⁴ since the workers are poorly insured. Secondly, workers being posted through letter box firms are at a greater risk of falling victim to non-payment since letterbox companies are “empty businesses” in the sense that they do not possess funds on paper. In the worst scenario, the letterbox company could disappear when the posted workers start claiming their wages. The construction sector is especially vulnerable to abusive practices by means of letterbox firms since pyramids of subcontracting are common within this sector.²²⁵

D. Bogus Self-employed

Another problematic aspect of posting in the construction sector is the use of abusive reliance on self-employed workers. Self-employed workers are excluded from the scope of the PWD and thus, they are not covered by the protection of the Directive. In this manner, foreign subcontractors can save on labour costs by (often unlawfully) relying on a workforce “hired” through a contract of services rather than with a contract of employment.²²⁶ In 2008, the European Economic and Social Committee expressed its concerns about the use of the so called *bogus ‘self-employed workers’*: *‘posted workers are sometimes encouraged to declare themselves to be self-employed when they are in fact entirely dependent on one single contractor’*²²⁷.

As Houwerzijl argues, a ‘posted’ worker which is covered by the status of self-employed worker will lose all labour law and (most) social security protection.²²⁸ At the end, the ‘employer’ or the single contractor will benefit from this situation in terms of lower costs by abusing the workers’ rights. Self-employed workers are overrepresented in the construction sector: about one fourth of the total workforce in the sector is working under the self-employed status.²²⁹ Research identifies a grey zone of (foreign) economically dependent self-employed workers working in the construction sector in Western Member States such as Austria and Germany.²³⁰ As mentioned before, it belongs to the competence of the State where the work is performed, to assess whether a worker is falsely declared as self-employed.

²²⁴ European Parliament, *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, study for the JURI committee, 2017, p. 69

²²⁵ Jan Cremers and Jörn Janssen, *Shifting Employment: undeclared labour in construction*, CLR/International Books, 2007, p.19

²²⁶ Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 530

²²⁷ Opinion of the European Economic and Social Committee on the Posting of workers in the framework of the provision of services — Maximising its benefits and potential while guaranteeing the protection of workers (5.1)

²²⁸ Mijke Houwerzijl, *Regime shopping across (blurring) boundaries, Regulating transnational labour in Europe: the quandaries of multilevel governance*, 2014, p. 5

²²⁹ Jan Cremers and Jörn Janssen, *Shifting Employment: undeclared labour in construction*, CLR/International Books, 2007

²³⁰ Jan Cremers, ‘Free movement of services and equal treatment of workers: The case of construction’, *Transfer: European Review of Labour and Research*, no. 12(2), 2006, p. 177

3.4 Conclusion

The central research question of this chapter was the following:

Why is the concept of posting wide-spread used within the construction sector and what forms of abusing practices can be identified within and outside the limits of the EU framework on posting?

With respect to the construction sector, this study found a clear trend of workers being posted from the relative new Member States to the old Member States, including Belgium and the Netherlands. Literature indicates that posting within the construction sector is driven by labour costs. This makes the sector sensitive to labour cost competition between local and foreign competitors. In this field, a distinction has to be made between unfair competition within the limits on the EU framework on posting and abusive practices of posting outside the limits of the EU framework on Posting. As found by this thesis, even within the limits of PWD, foreign service providers can achieve a competitive advantage in terms of pay based on taxation, social security, and the applicable gross wage. This will be further investigated for Belgium and the Netherlands in Chapter 4. Furthermore, illegal abusive practices have been identified, including undercutting and circumvention of minimum rates of pay, rotational and permanent posting, application of letterbox forms, and the use of bogus self-employed. While it is important to take all of those abusive practices into account, this thesis will focus on the pay of the posted workers themselves in order to assess whether a level playing field between local and foreign competitors is created in terms of rates of pay.

Chapter 4 – Comparison between Belgium and the Netherlands

4.1 Introduction

As described in chapter 2 with respect to the PWD, it appears that the scope of protection vis-à-vis the composition of the minimum rates of pay is subject to ambiguity. The aim of this chapter is to assess how the EU legal framework on posting has been implemented in Belgium and the Netherlands, and to what extent a level playing field is created between local and foreign service providers in the construction sector. The composition of the minimum rates of pay for posted workers within the respective construction sectors will be examined in order to determine whether there is a wage gap between local and posted workers, and (eventually) where such a gap originates from.

Moreover, as laid down in chapter 2, there are some doubts regarding the effectiveness of the monitoring and the enforcement of posting at the level of the Host State. Given the abusive practices of posting, one might argue that legal protection of posted workers without strong monitoring and enforcement at the level of the Host State could be seen as an empty shell. In 2016, both Belgium and the Netherlands implemented the ED. Due to the scope and limitations of this thesis, it is impossible to evaluate all the aspects of the process of monitoring and enforcement in Belgium and the Netherlands. Therefore, the comparison will be limited to the following aspects: the role of the Labour Inspectorate, the registration system, and subcontracting liability.

At the end, a conclusion will be drawn taking into consideration how both legal systems attempt to minimize the forms of social dumping within the construction sector and whether the proposed revision of the PWD would improve their current situation.

4.2 Posting within respective construction sectors

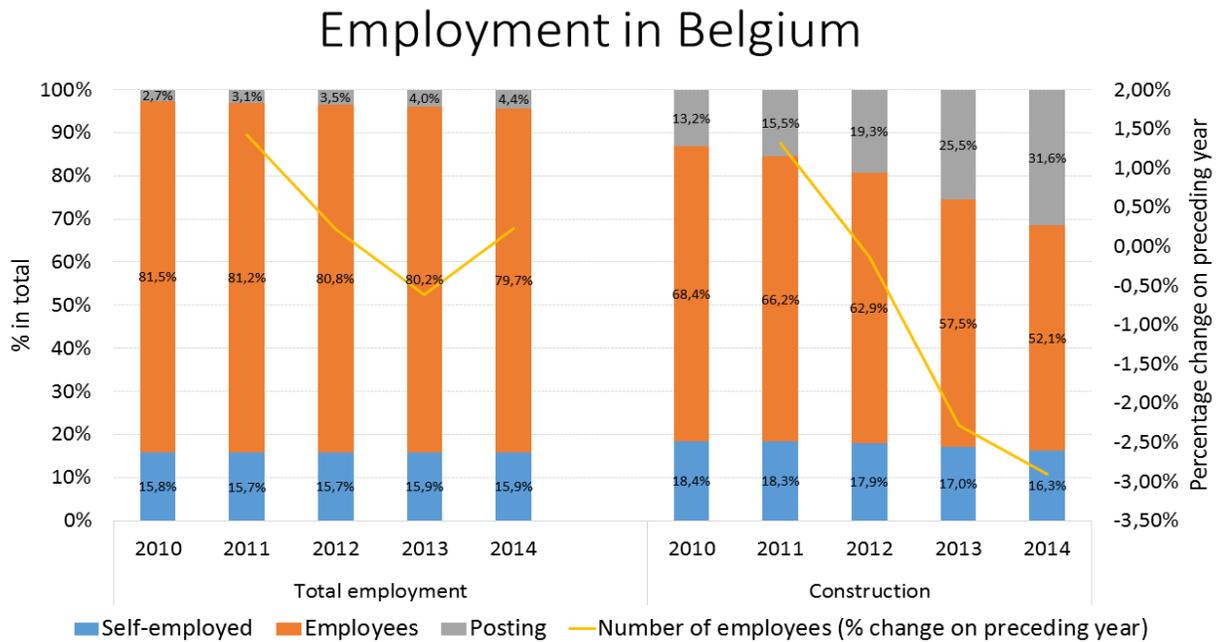
Belgium

The Belgian construction sector is characterized by a relatively high share of posted workers. Recent research indicates, based on the LIMOSA registration system, that 31.6 percentage of the people working within the Belgian construction sector are classified as posted workers.²³¹ As figure 6 illustrates, the increase of posted workers in the Belgian construction sector over time has been associated with a decrease of domestic employees working in the construction sector. It would be short-sighted to conclude that the decrease in domestic workers can be exclusively allocated to the increase in posted workers since also other

²³¹ Frederic de Wispelaere and Jozef Pacolet, 'An ad hoc statistical analysis on short term mobility–Economic value of posting of workers. The impact of intra-EU cross-border services, with special attention to the construction sector.' p. 21

factors have to be taken into account, such as the economic conjuncture. Nevertheless, the significant high share of posted workers had a great impact on the Belgian construction sector, leading to a situation where Belgian service providers have to compete with service providers who are established in low-wage Member States such as Poland. Considering this phenomena, the Belgian construction sector is vulnerable to social dumping and fraud by foreign service providers, such as non-compliance with the Belgian minimum wages.²³²

Figure 6: Belgium, trends in employment, self-employment and posted workers, all economy and construction sector, 2010-2014



Source: Calculations based on LIMOSA and NBB data, copied from Frederic de Wispelaere and Jozef Pacolet, 'An ad hoc statistical analysis on short term mobility–Economic value of posting of workers. The impact of intra-EU cross-border services, with special attention to the construction sector', 2016, P. 21

The Netherlands

For the most current data on posting in the Netherlands, we have to rely on the amount of A1 forms issued. In 2015, the share of posted workers is estimated to be 6.6 percent of the total amount of workers within the construction sector.²³³ Despite the relatively lower share of posted workers, also the Dutch construction sector has been confronted with forms of unfair competition.

²³² See also Frederic de Wispelaere and Jozef Pacolet, 'Tackling social dumping and fraud in the Belgian construction sector', 2016

²³³ Jozef Pacolet and Frederic De Wispelaere, 'Posting of workers-Report on A1 portable documents issued in 2015', p.31

As we will discuss later, the Dutch system is characterized by the absence of an effective system of monitoring.²³⁴ Therefore, it is unclear which are the precise consequences of posting for the Dutch construction sector. Research conducted by Dutch trade unions illustrated that posted workers earn less than the Dutch workers in the transport and construction sector.²³⁵ In a similar vein, reports indicate that not all foreign employers, which are posting workers to the Netherlands, comply with the mandatory Dutch minimum wage as laid down within the generally binding collective agreements. As Houwerzijl argues, workers from Eastern European countries undermine the Dutch labour markets and set pressure on the local wage levels²³⁶.

4.3 Level playing field

In order to evaluate the scope of protection of posted workers as provided by respectively the Belgian and Dutch legal framework, the general implementation of the PWD will be discussed first. Afterwards, the domestic concept of minimum rates of pay will be examined, and at the end, the wage gap between local and posted construction workers will be determined in Belgium and the Netherlands.

4.3.1 Implementation of the PWD

Belgium

The PWD has been transposed into the Belgian legislation under terms of the Belgian Implementation Act (Law of 5 March 2002) and has been implemented by a Royal Decree.²³⁷ Furthermore, the Belgian Implementation Act aimed to introduce a simplified system for the administration of social documents which had to be delivered by the employer of the posted worker (the foreign service provider) to the Belgian authorities.²³⁸

²³⁴ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 25

²³⁵ European commission, 'Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors', *Contract No VC*, no. 36, 2015, p. 78

²³⁶ Mijke Houwerzijl, 'Aanpak van schijnconstructies op de Europeaniserende Nederlandse arbeidsmarkt', in Bonjour, L. Coello Eertink, J. Dagevos, C. Huinder, A. Ode, & K. de Vries (Eds.), *Open grenzen, nieuwe uitdagingen: Arbeidsmigratie uit Midden- en Oost-Europa*, Amsterdam, Amsterdam University Press, 2015, p. 2

²³⁷ For the context, see also Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 68

²³⁸ Roger Blanpain, *European labour law*, Kluwer law international, 2008, p. 103

The situation in Belgium is unique because it implements the PWD in a maximalist way.²³⁹ The Belgian Implementation Act goes a step further²⁴⁰ than the PWD by extending the protection of the posted worker beyond the limits of the nucleus of terms and conditions of employment.²⁴¹ Rather than laying down a nucleus of labour conditions, article 5 of the Belgian Implementation Act states that the employer of the posted worker has to comply with all labour, wage and employment conditions as laid down within legal, regulatory and collective agreed documents in Belgium. Non-compliance will be sanctioned by criminal law.²⁴² Especially the Belgian trade unions were in favour of the application of this equal-treatment-principle since it was seen as a way to minimize social dumping.²⁴³ At the same time, the broad implementation of the PWD raises the question whether it conforms with the strict interpretation of the PWD by the CJEU.²⁴⁴ The Belgian legislator argued that the Belgian Court will monitor case-by-case whether provisions are compatible with the PWD and thus with the free provision of services. Also the personal scope of the Belgian Implementation Act is broader than the PWD: the Belgian Act does not make a distinction between different types of posting but incorporates a more general definition: ‘*a worker who carries out work in Belgium and who usually works on the territory of one or more other States than Belgium or who was recruited in a State other than Belgium*’²⁴⁵. This means that also posted workers from non-EU member States are covered by the Act.

The Netherlands

In 1999, the PWD was implemented in the Dutch legislation by means of the Act ‘*Wet Arbeidsvoorwaarden bij Grensoverschrijdende Arbeid*’ (Hereinafter, WAGA). In the first place, The WAGA implemented the provisions of the PWD in a minimalist way. As argued by Cremers, the motto of the Dutch government at that time can be described as ‘transpose no more and no less than necessary’.²⁴⁶ For instance, only posted workers in the construction sector could in the first place rely on the Dutch general applicable collective agreements. In contrast, posted workers in other sectors were only covered by the ‘hard core’ of conditions as laid down within Dutch legislation, including the Dutch minimum wage.

²³⁹ Roger Blanpain, *European labour law*, Kluwer law international, 2008, p.107; Jan Cremers, Jon Erik Dølvik, and Gerhard Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, *Industrial Relations Journal*, no. 38(6), 2007, p. 532

²⁴⁰ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 69;

²⁴¹ Belgium Implementation Act (Act of 5th March 2002), art. 5 (1)

²⁴² Ibid

²⁴³ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 68

²⁴⁴ See for instance the Luxembourg case as discussed in section 2.7.6

²⁴⁵ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 69

²⁴⁶ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 105

In 2005, after the enlargement of the EU, the Dutch legislator extended the scope of the WAGA, and from then on, workers from other sectors were covered by sectoral collective agreements as well as long as they were universally applicable.²⁴⁷ In the context of the implementation of the ED in 2016, the WAGA has been replaced by a new act, the '*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*' (hereinafter, WAGWEU). The WAGWEU comprehends the implementation of both the PWD and the ED. In line with the PWD itself, three main forms of posting are identified within the WAGWEU: subcontracting, intra-group posting and posting through temporary agency work.²⁴⁸ Article 2 of the WAGWEU refers to certain provisions in Dutch civil law which have to be applied to posted workers as well: joint and several liability²⁴⁹, payment of salaries²⁵⁰, minimum paid annual holidays²⁵¹, equal treatment²⁵², administrative requirements²⁵³, health and safety²⁵⁴, and the protection of pregnant women²⁵⁵.

With respect to 'public law/administrative law', posted workers are covered by the Dutch acts that represent the 'hard core' of protection of posted workers in the Netherlands as derived from the application of Rome I with respect to the nucleus terms of employment as laid down in the PWD (see above, section 2.7.3).²⁵⁶ Those Acts include the Minimum Wage and Minimum Holiday Allowance Act, the Working Hours Act, the Working Conditions Act, the Placement of Personnel by Intermediaries Act (Waadi) and the Equal Treatment Act. The acts are not explicitly mentioned in the WAGWEU since they are already applicable to posted workers under article 9 of Rome I.²⁵⁷

With the introduction of the WAGWEU, the Dutch legislator amended the law governing the universal applicability or inapplicability of collective agreements (AVV), by stating that also posted workers are covered by the Dutch generally applicable collective agreements with respect to the nucleus terms of employment.²⁵⁸

²⁴⁷ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 103

²⁴⁸ WAGWEU, art. 1 (1)

²⁴⁹ artikelen 616a tot en met 616f

²⁵⁰ Dutch Civil Code, art. 626

²⁵¹ Dutch Civil Code, art. 634-642

²⁵² Dutch Civil Code, art. 646, 648, 649, 681

²⁵³ Dutch Civil Code, art. 655

²⁵⁴ Dutch Civil Code, art. 658

²⁵⁵ Dutch Civil Code, ar. 670

²⁵⁶ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 107

²⁵⁷ Document of the Dutch government on the WAGWEU <https://zoek.officielebekendmakingen.nl/kst-34408-3.html>

²⁵⁸ The maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay; the conditions of hiring-out of workers; health, safety and hygiene; protective measures with regard to the terms and

In short, one might argue that the Dutch legal framework on posting has been developing over the last decades. At this point, the Dutch legal framework on posting is in line with the PWD itself (some provisions are literally copied from the Directive), and both the personal and the substantive scope of protection of posted workers are similar or even identical to the PWD itself.

4.3.2 Minimum rates of pay

Belgium

In line with the overall Belgian implementation of the PWD, also the concept of the minimum wage has been implemented in a broad way. As laid down within article 5 of the Belgian Implementation act, with respect to the pay of posted workers, the Belgian legislation and general applicable CLA's apply. Traditionally, in Belgium, in absence of a statutory minimum wage, the minimum wages are set by means of national and sectoral collective agreements.²⁵⁹ Posted workers are automatically covered by those sectoral collective agreements as they are declared universally applicable.

In line with the PWD, the Belgian Implementation Act excludes the contribution supplementary occupational retirement pension schemes from the minimum rate of pay.²⁶⁰ While assessing the binding collective labour agreements for the Belgian construction sector, it becomes clear that the Belgian interpretation of the 'minimum rate of pay' covers a wide range of provisions which are related to the pay of the (posted) worker: minimum gross wage²⁶¹, seniority bonus²⁶², remuneration of overtime²⁶³, bonus for shift work²⁶⁴, and other wage allowances²⁶⁵. Moreover, both foreign and local service providers in the Belgian construction sector are obliged to contribute to funds, by means of bad-weather stamps equal to 2.10 percent of the gross pay²⁶⁶ (those funds compensate the worker for the lack of work due to bad weather conditions). Besides that, also foreign service providers, have to contribute to Belgian schemes, by means of fidelity stamps amounting 9.12% of the gross pay of the (posted) worker²⁶⁷, aimed at giving the

conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality of treatment between men and women and other provisions on non-discrimination.

²⁵⁹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 62

²⁶⁰ Belgium implementation act 5(1)

²⁶¹ CLA of 12 June 2014 (123 570)

²⁶² CLA of 19 May 2009

²⁶³ CLA of 12 June 2014 (123 049) and Royal Decree 213 on working in companies governed by the JBC 124 (RD 26/09/1983, BOG 07/10/1983, 28/04/2010 Act containing various provisions, BOG 10/05/2010

²⁶⁴ CLA of 19 May 2009

²⁶⁵ CLA of 13 October 2011 (106 851), CLA of 12 June 2014 (123 049)

²⁶⁶ CLA of 12 September 2013 (117 345) article 2

²⁶⁷ CLA of 12 September 2013 (117 345) article 2

construction workers an end-of-year bonuses. An exception is made for foreign service providers who can demonstrate that they are already contributing to similar funds in the country of origin.²⁶⁸

Given these points, it can be noted that the concept of the ‘minimum rates of pay’ has been implemented in a broad manner, since it encompasses a wide range of elements concerning pay, including contributions to sectorial funds. Belgian rules on contributions to the secondary pension scheme are instead in line with the PWD, as those contribution are explicitly excluded from the scope of protection.²⁶⁹ The same applies to allowances specific to the posting which are seen as a contribution to the minimum rate of pay, while pay for travel, board and lodging incurred on account of posting are not considered as such.²⁷⁰

The Netherlands

As mentioned before, because of the direct application of the Rome I legislation in the Netherlands, posted workers are also covered by public law provisions – including the Dutch Minimum Wage and Minimum Holiday Allowance Act. As a consequence, also posted workers are entitled to receive the Dutch minimum wage while being asked to perform their services in the Dutch territory. A comprehensive Dutch definition of the ‘minimum rates of pay’ can be found in the AVV, and is similar to the PWD and related case law (see section 2.7.4).

The general applicable CLA for the construction sector does not contain a definition of the concept of rates of pay but provides rather a list with provisions that apply to posted workers as well.²⁷¹ The result is that construction workers who are posted to the territory of the Netherlands are entitled to receive the minimum wage as laid down with the general applicable CLA for the construction sector, including allowances such as the overtime allowance, shift work allowance, travel expenses allowances, no-claim bonuses and more (see table 2).

²⁶⁸ Royal Decree of 28 April 2014 declaring generally binding the collective labour agreement of 12 September 2013, concluded by the Joint Committee for the construction sector, on allocation of fidelity stamps and bad-weather stamps

²⁶⁹ Belgium implementation act 5(1)

²⁷⁰ Belgium implementation act 5(1)

²⁷¹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 65

Table 2: Overview of the Dutch composition of the minimum rate of pay as applied to posted workers as well

Included in the minimum wage	Excluded from the minimum wage
The applicable periodic wage on the pay scale	occupational pension schemes
the applicable reduction in working hours per week/month/ year/period	entitlements to social security exceeding the statutory minimum
surcharges for overtime, shifted hours, irregular hours, including public holiday allowance and shift allowance	
interim pay rise	
Expense allowance: travel expenses and travel time allowance, board and lodging costs and other costs that are necessary on account of performing the work	
increments	
end-of-year bonuses	
extra holiday allowances	

4.3.3 Wage gap

Belgium

A. Gross minimum wage

As illustrated in table 3, based on the general applicable CLA for the construction sector, posted workers in the Belgian construction sector are entitled to a certain minimum wage based on their classifications under terms of enjoyed vocational training and the nature of work they have to perform. For instance, a construction worker in category I is defined as a worker who did not enjoy vocational training and is concerned with activities where no specialization is required. Those classifications are quite abstract and based on Belgian standards. As argued by Houwerzijl and Van Hoek, in order to create a level playing field, the application of such an entire wage structure is of paramount importance.²⁷² This statement can be confirmed by table 3 which illustrates the wage differences between the minimum wage in the national collective agreement (flat rate) and the relative higher minimum wages (job ladder), as laid down within

²⁷² Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', To the European Commission Contract, no. 96, 2011, p.19

the CLA for the Belgian construction sector. At the same time, research indicates that in practice, the wage structure is not always respected by foreign service providers.²⁷³ As a consequence, the posted workers receive a minimum wage which is equal to the lowest category of the CLA. In this respect, non-compliance is a more important issue.

Table 3: Gross minimum wage applied within the Belgian construction sector in 2017

	Classification	Hour	Week	Month
<i>Not covered by CLA for the construction sector</i>	National minimum wage	€ 9,30	€ 372,00	€ 1.618,20*
<i>Covered by CLA. for the construction sector</i>	Cat. I	€ 13,93	€ 557,24	€ 2.423,99
	Cat. IA	€ 14,62	€ 584,92	€ 2.544,40
	Cat. II	€ 14,85	€ 593,96	€ 2.583,73
	Cat. IIA	€ 14,62	€ 584,92	€ 2.544,40
	Cat. III	€ 15,59	€ 623,60	€ 2.712,66
	Cat. IV	€ 14,85	€ 593,96	€ 2.583,73
	Head of team (III)	€ 16,76	€ 670,52	€ 2.916,76
	Head of team (IV)	€ 17,37	€ 694,88	€ 3.022,73
	Foreman	€ 20,12	€ 804,64	€ 3.500,18

* National minimum wage is €1531,93 based on a 38-hour week

B. Social security contributions

Despite the broad protection, foreign service providers can have a comparative advantage based on labour costs due to the social security contributions (see table 4 for an overview). Indeed, the social contributions paid by the employer in Belgium are generally relatively high in comparison with Sending States. For instance, a Cypriot service provider might send construction workers to the territory of Belgium for a large construction project. While complying with the minimum rate of pay in Belgium, the Cypriot company has still an advantage in terms of labour costs since it has to pay 26.87% less social contributions than Belgian construction companies.

The difference in social contributions is likely to play a big role in the European construction sector since it is driven by labour costs (see chapter 3). The Belgian legislator acknowledged the disadvantage of Belgium service providers in the area of social security and proposed to reduce the contribution rate of

²⁷³ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.73; Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 38

Belgian employers to 25%.²⁷⁴ Furthermore, a budget of € 605 million has been reserved for the construction sector in order to reduce the social burden of Belgium service providers.²⁷⁵

Table 4: An overview of social security contributions to be paid by the employer and the employee in respectively Belgium and the Netherlands, and in 7 sending States.

	Country	Social contributions paid by employer	Social contributions paid by Employee	Total
<i>Receiving MS</i>	Belgium	34,67%	13,07%	47,74%
	Netherlands	18,47%	27,65%	46,12%
<i>Sending MS</i>	Poland	20,61%	13,71%	34,32%
	Cyprus	7,80%	7,80%	15,60%
	Portugal	23,75%	11%	34,75%
	Romania	23,45%	16,50%	39,95%
	Slovakia	35,20%	13,40%	48,60%
	Slovenia	16,10%	22,10%	38,20%
	Hungary	23,50%	18,50%	42,00%

Source: KPMG, Employer social security tax rates and Employee social security tax rates, 2018, available at: <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/social-security-employee-tax-rates-table.html> and <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/social-security-employer-tax-rates-table.html>

C. Taxation

With respect to taxation, it appears that that the effective personal income tax rate is extraordinary high in Belgium. In the example given in table 4, the effective personal income tax is calculated based on a monthly wage of €2000 by applying the marginal rate while ignoring specific provisions on tax allowances and deductions. Despite that, it gives a clear idea about the amount of personal income tax that has to be paid per country. It is noteworthy that Belgian workers (in the construction sector) pay a higher share of tax than workers being posted from Eastern Member States during the first 183 days of posting. While the different personal income tax rates do not affect the competitive position of Belgian service providers directly²⁷⁶, it is arguable that Belgian construction workers have a lower net wage than workers being posted from Central and Eastern Member States.

²⁷⁴ Frederic de Wispelaere and Jozef Pacolet, ‘An ad hoc statistical analysis on short term mobility–Economic value of posting of workers. The impact of intra-EU cross-border services, with special attention to the construction sector.’, 2016, p. 17

²⁷⁵ Ibid

²⁷⁶ As the burden is at the level of the employee

Table 5: An overview of the personal income tax for a person who earns €2000 a month in different Member States

	Country	Annual wage	Personal income tax	Effective tax rate
Receiving MS	Belgium	€ 24.000,00	€ 7.971,00	33,2%
	Netherlands	€ 24.000,00	€ 2.306,77	9,6%
Sending MS	Poland	€ 24.000,00	€ 4.796,66	20,0%
	Cyprus	€ 24.000,00	€ 899,80	3,7%
	Portugal	€ 24.000,00	€ 6.165,00	25,7%
	Romania	€ 24.000,00	€ 3.840,00	16,0%
	Slovakia	€ 24.000,00	€ 4.560,00	19,0%
	Slovenia	€ 24.000,00	€ 5.849,69	24,4%
	Hungary	€ 24.000,00	€ 3.600,00	15,0%

Source: Your Europe, tax rates of Member States available at <https://europa.eu/youreurope/citizens/work/taxes/income-taxes-abroad/>, calculated manually by author

The Netherlands

A. Gross minimum wage

As starting point, a foreign worker being posted to the territory of the Netherlands is entitled to receive the statutory minimum wage as laid down in the Minimum Wage Act. Moreover, in case that the posted worker performs work that falls within the scope of a Dutch general applicable collective agreement, the posted worker will be entitled to receive the minimum wage as laid down within the generally binding sectoral collective agreement as well. In the case of the construction sector, the Collective Agreement for the Dutch Construction Industry²⁷⁷ entails a wage scale based on the qualification of the worker (see table 6). The qualification of a worker is based on the nature of the work and on the level of expertise of the worker.²⁷⁸ The wages within this job ladder exceed the Dutch statutory minimum wage significantly. As both local and foreign employers have to comply with the entire wage structure, the wage gap due to differences in the gross wage is minimal within the Dutch construction sector as both foreign and local service providers have to comply with the entire wage structure of the CLA. However, also here, it is important to underline that often, foreign service providers apply only the lowest classification to the posted workers.²⁷⁹

²⁷⁷ CAO Bouw en Infra 2017-2018 is general applicable up to and including the 31st of March

²⁷⁸ The CLA is available at <https://content.helloflex.com/PublicCaoDocument/e9141d42-7997-4593-ba3f-f2b23b053b74/downloadcao.pdf>

²⁷⁹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 73; Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 38

Table 6: Gross minimum wage applied within the Dutch construction sector based on the general applicable CLA for the construction sector in 2017

	Classification	Hour	Week	Month
<i>Not covered by CLA. for the construction sector</i>	Statutory minimum wage	€ 9,03	€ 361,25	€ 1.565,40
<i>Covered by CLA for the construction sector</i>	Category A	€ 13,22	€ 528,80	€ 2.291,44
	Category A, foreman's allowance	€ 14,80	€ 592,00	€ 2.565,31
	Category B	€ 13,99	€ 559,60	€ 2.424,91
	Category B, foreman's allowance	€ 15,57	€ 622,80	€ 2.698,77
	Category C	€ 14,87	€ 594,80	€ 2.577,44
	Category C, foreman's allowance	€ 16,45	€ 658,00	€ 2.851,30
	Category D	€ 15,90	€ 636,00	€ 2.755,97
	Category D, foreman's allowance	€ 17,48	€ 699,20	€ 3.029,83
	Category E	€ 16,69	€ 667,60	€ 2.892,90

B. Social security contributions

The wage gap between local Dutch and foreign construction workers due to social security contributions is limited since the contributions of social security from the perspective of the employer are relatively low (see table 4). On the contrary, the social contributions to be paid by the worker are much higher in the Netherlands than in the sending Member States. This might result in a lower net wage for workers being covered by the Dutch tax system which might affect the competitive position of service providers indirectly.

C. Taxation

Provided that taxes differ depending on national law, the effective personal income tax rate is relatively low and not likely to result in a deprivation: a worker who has a gross wage of €2000 pays relatively less tax in Netherlands than in the sending Member States (see table 5). Overall, it can be said that the wage gap is minimal, in the event that the foreign service provider complies with all the conditions of the local collective agreement for the construction sector.

4.4 Monitoring and enforcement

4.4.1 Juridical traditions

Belgium

As mentioned above, the Belgian labour law conditions in the legislation and general applicable collective agreements apply to workers being posted to the territory of Belgium as well. Traditionally, the Belgian system represents an ‘*ordre public*’ tradition as all labour law provisions, both private and public law, are subject to criminal sanctions.²⁸⁰ For this reason, contractual provisions with a private law character, such as the “generally applicable collective agreements” are enforced by criminal law.

The Netherlands

Within the Netherlands, there is a clear distinction between public law rules on the protection of the worker and private law on the labour contract.²⁸¹ In case of non-compliance with the Dutch working conditions as derived from legislation, the Dutch Labour Inspectorate is competent to sanction the employer by imposing a penalty or fine based on criminal and administrative law. For instance, non-compliance with the Dutch Minimum Wage is sanctioned by the Labour Inspectorate with administrative sanctions.²⁸² However, as described by Cremers and Donders, ‘*provisions in the Civil Code as well as provisions with the character of a public law, are mainly sanctioned by private law mechanisms*’.²⁸³ It is crystal-clear that owing to the fact that posted workers are not familiar with the Dutch system, they might be facing barriers for bringing a case of non-compliance with the Dutch Labour conditions to the Dutch Court. Finally, it is important to underline that the enforcement of collective agreements is within the competence of the social partners themselves and it is also subject to private law.

4.4.2 Role of the Labour Inspectorate

Belgium

Two Labour Inspectorate bodies are responsible for the monitoring of compliance with the Belgian labour conditions by foreign service providers. First of all, the Inspection of Social Laws (Inspectie Toezicht Social Wetten) is competent to monitor the conditions of pay and employment of workers, including the working hours and social security contributions.²⁸⁴ As part of this inspection authority, a special entity has been

²⁸⁰ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.17

²⁸¹ *Ibid*, p. 16

²⁸² Beleidsregel bestuursrechtelijke handhaving Wet minimumloon en minimumvakantiebijslag 2016, available at: <http://wetten.overheid.nl/BWBR0037410/2016-07-01>

²⁸³ Jan Cremers and Peter Donders, *The free movement of workers in the European Union*, CLR/International Books, 2004, p. 111

²⁸⁴ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 95

created in order to address cross-border situations²⁸⁵. As described above, the Belgian minimum wages are laid down in collective agreements. The Belgian Labour Inspectorate is compatible to monitor compliance with general applicable collective agreements as they are binding by a 'royal decree'.²⁸⁶ In case of serious violations, the Inspectorate might transmit a formal report to the public prosecution services which may lead to judicial prosecution or administrative fines.²⁸⁷ The other Labour Inspectorate body, the Inspection of Welfare (Inspectie Toezicht Social Wetten) is involved with the supervision of well-being at the workplace, including health and safety standards.

The Belgian social partners have an informal role with respect to the monitoring and enforcement of the applicable labour conditions by sending companies: in case of non-compliance with the Belgian collective agreements, trade unions can respond by means of mediation, regulation and other collective actions within their competences.²⁸⁸ Moreover, trade unions can report the case to the competent Labour Inspectorate Entity which will further investigate the case.

The Netherlands

In the Netherlands, the Labour Inspectorate is centrally organized and responsible for the enforcement of the Minimum Wage and Minimum Holiday Allowance Act (Wml), Posting of Workers by Intermediaries Act (Waadi), The Working Conditions Act, and the Netherlands Working Hours Act.²⁸⁹ Regarding compliance issues dealing with social security contributions, the Social Insurance Bank is competent.²⁹⁰

The monitoring and enforcement of the labour conditions of posted workers with respect to the Dutch collective agreements is within the competence of the trade unions themselves. In case of non-compliance, trade unions can start a civil lawsuit against the (foreign) employer that is bound by the collective agreement. However, as Houwerzijl argues, the possibilities of trade unions are most of the times limited to naming and shaming.²⁹¹ In this respect, the role of the Dutch Labour Inspectorate is limited; non-compliance with a (binding) collective agreement in the Netherlands is never subject to administrative or criminal

²⁸⁵ COVRON (Controle Vreemde Ondernemingen)

²⁸⁶ Roger Blanpain, *European labour law*, Kluwer law international, 2008, p. 377

²⁸⁷ Federal Public Service Employment, Labour and Social Dialogue, Supervision of social legislation [online], available at <http://www.employment.belgium.be/defaultTab.aspx?id=38244#social>

²⁸⁸ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 99

²⁸⁹ Jan Cremers, 'Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers nav het Sociaal Akkoord 2013.', 2017, p. 13

²⁹⁰ Ibid

²⁹¹ Mijke Houwerzijl, 'Aanpak van schijnconstructies op de Europeaniserende Nederlandse arbeidsmarkt', in Bonjour, L. Coello Eertink, J. Dagevos, C. Huinder, A. Ode, & K. de Vries (Eds.), *Open grenzen, nieuwe uitdagingen: Arbeidsmigratie uit Midden- en Oost-Europa*, Amsterdam, Amsterdam University Press, 2015, p. 14

sanctions.²⁹² At the same time, in certain sectors, non-governmental monitoring bodies have been introduced aimed at enforcing the labour conditions of general applicable CLA's.²⁹³ For instance, in the temporary agency sector, a certification system has been introduced referred as the NEN 4400 norm in order to monitor temporary agencies on compliance with the Dutch general applicable CLA's for the temporary agency branch.

In 2013, as part of the Sociaal Akkoord (Social Agreement), the Dutch social partners reached agreement to intensify the monitoring and enforcement of labour conditions in line with general applicable CLA's. Thus, nowadays, social partners and the non-governmental monitoring bodies as described above have the possibility to request the Labour Inspectorate to carry out an inspection with respect to the working conditions of a certain undertaking.²⁹⁴ Over 2016, the Labour Inspectorate compiled 36 reports dealing with non-compliance of applicable collective agreements. Trade unions can use those inspection reports while starting a legal proceeding against the defaulting employer. A recent study, analyzed those reports and found far-reaching legal constructions meant to evade the Dutch labour conditions.²⁹⁵ The same study praised the close collaboration between the Labour Inspectorate and the social partners with respect to the enforcement of general applicable CLAs.²⁹⁶

4.4.3 Registration system

Belgium

Already in 2007, Belgium introduced a compulsory registration system for posted workers, named LIMOSA, aimed at monitoring the process of posting to the territory of Belgium. Before the introduction of this system, the Belgian Labour Inspectorate experienced an increase in the posting of workers to the Belgian territory often accompanied with non-compliance with Belgian legislation on pay and other working conditions.²⁹⁷ Taking that, and the accession of new Member States to the EU into account, the registration system was founded with the aim to regain a grasp of the situation.

²⁹² Antoine Jacobs, 'The Netherlands' in Frank Hendrickx, *International Encyclopedia for Labour Law and Industrial Relations*, Kluwer Law International, 2014, p. 274

²⁹³ Stichting Naleving voor Uitzendkrachten (SNCU) with respect to the temporary agency sector and the Technisch Bureau Bouw (TBB) with respect to the construction sector

²⁹⁴ AVV, art. 10; Waadi, art. 8

²⁹⁵ See Jan Cremers, 'Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers nav het Sociaal Akkoord 2013.', 2017

²⁹⁶ Jan Cremers, 'Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers nav het Sociaal Akkoord 2013.', 2017, p. 32

²⁹⁷ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 51

As part of the LIMOSA declaration, service providers have the obligation to report the posting to the Belgian authorities before the commencement of the work in the Belgian territory. This declaration covers a wide range of administrative aspects, including the period of posting, the identification data of the employee, employer and the Belgian client or principal, the economic sector, the place where the work is performed, and the working hours of the employee in question.²⁹⁸ After reporting the posting, the declarer will receive a LIMOSA-1 certificate that has to be carried by the posted worker during the period of posting.²⁹⁹ Service recipients in Belgium are obliged to control whether the posted workers are registered at Limosa by their employer. In case of absence of a declaration, the service recipient has to declare this to the authorities. Non-compliance with those rules may result in a fine up to a maximum of €125,000 for the Belgian user.³⁰⁰ The CJEU ruled that the Limosa-measures³⁰⁰ are a restriction to the free movement to provide services but are justified by overriding reasons of public interest.³⁰¹ If the posting lasts longer than expected, the employer has to submit for a new LIMOSA declaration.

In fact, within the construction industry, additional administrative requirements have been laid down such as a registration of attendance at the work site and the visual identification of a construction worker by means of a '*construbadge*'.³⁰² Among scholars, the Limosa system is praised for its effectiveness since it enables the Belgian Labour Inspectorate to conduct targeted inspections aimed at identifying cases of abuse such as the underpayment of posted workers.³⁰³ Moreover, LIMOSA is perceived as a user-friendly and accessible system which offers obvious benefits.³⁰⁴

The Netherlands

At this moment, there is no registration system with respect to the administration of posting in the Netherlands. In other words, service providers do not have a reporting obligation in case they send workers for a limited period of time to the territory of the Netherlands. In 2012, the Dutch government proposed plans to introduce a system similar to the Belgian LIMOSA-system since it would be beneficial for the

²⁹⁸ Ibid, p. 52

²⁹⁹ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p.117

³⁰⁰ Ibid

³⁰¹ Judgement of the Court of 3 December 2014, *De Clercq and Others*, C-315/13, EU:C:2014:2408, paragraph 66

³⁰² Tackling social dumping and fraud in the Belgian construction sector

³⁰³ Jan Cremers, *In search of cheap labour in Europe - working and living conditions of posted workers*, International Books, 2011, p. 52; Jan Buelens, 'Tewerkstelling van buitenlandse arbeidskrachten in de bouwsector.', 2007

³⁰⁴ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 117

enforcement of posted workers in the Netherlands as well.³⁰⁵ However, at the end, they abandoned the idea since such a registration system would be accompanied with high costs of implementation and an administrative burden for companies.³⁰⁶

It is however worth reminding that the ED entails the obligation of Member States to introduce a registration system related to posting. Subsequently, recently, also the Netherlands has introduced a report mechanism under terms of the WAGWEU. However, this provision is not in force since the Dutch government is still working on a digital registration system. Furthermore, it is unclear which organization will be assigned to follow up the administration of registrations. Scholars are critical on whether the Dutch Labour Inspectorate has enough capacity to monitor and enforce those new administrative processes under the WAGWEU.³⁰⁷

4.4.4 Subcontracting liability

Belgium

As mentioned before, EU construction sectors, including the Belgian one, are characterized by chains of subcontractors. The origins of a chain liability in the Belgian legislative framework with respect to the payments of taxes and social premiums on the wage of workers go back to the 1970s, as successful outcome of social dialogue.³⁰⁸ The chain liability in the construction sector has been evolved over the years. The current legislative framework with respect to chain liability within the Belgian construction sector can be seen from two perspectives: chain liability on the payment of tax and social contributions on the wages, and chain liability on the payment of the wage of the employee.

First of all, the service recipient or user undertaking has a withholding obligation³⁰⁹ with respect to the overdue fiscal obligations related to tax and social contributions on the wages paid by the contractor.³¹⁰ At the moment of settlement of the invoice, the purchaser of the services or user undertaking is obliged to assess whether the contractor (service provider) has an open fiscal debt³¹¹ by means of an online tool. If so, the purchaser of the services has the obligation to withhold the fiscal debt from the bill and has to transfer

³⁰⁵ Mijke Houwerzijl, 'Aanpak van schijnconstructies op de Europeaniserende Nederlandse arbeidsmarkt', in Bonjour, L. Coello Eertink, J. Dagevos, C. Huinder, A. Ode, & K. de Vries (Eds.), *Open grenzen, nieuwe uitdagingen: Arbeidsmigratie uit Midden- en Oost-Europa, Amsterdam*, Amsterdam University Press, 2015, p. 19

³⁰⁶ Parliamentary Papers II 2011- 2012, 29 407, no. 132, annex 2

³⁰⁷ Harry van Drongelen and Andre van Rijs, 'De Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie, de detachings-en handhavingsrichtlijn samengebracht', *PS documenta*, no. 2016 (15), 2016, p. 1105

³⁰⁸ There was a scandal in the Belgian construction sector: a large subcontractor did not pay any social security premiums and tax on the wages of its workers. As a response to this, the Belgian legislator wanted to ban subcontracting completely in the 70s. However, the Belgian social partners came with another solution: liability of subcontractors.

³⁰⁹ 35% of the outstanding social debt, and 15% of the fiscal debt

³¹⁰ Act of the National Social Security Office, art. 30 bis; Belgian Income Tax Code, art. 402 & 403

³¹¹ With respect to taxes on wages, social security contributions and social funds payments

it to the public authorities. In case the service recipient fails to do this, it will become liable itself for this tax debt.³¹² This system applies to service recipients towards contractors and to contractors towards subcontractors. By means of this controlling system, the Belgian legislator wants to ensure that both local and foreign construction companies pay the right social security and taxes on the wage of the workers. For the scope of this thesis, we cannot go into depth about the future details this system.

In 2013, before the implementation of the ED, the Belgian legislator introduced a general system for subcontracting liability as part of the Act of 12 April 1965.³¹³ Within this system, user undertakings, contractors, and subcontractors could be held liable for the payment of the wages of (posted) workers as of 14 days after being officially informed by the Labour Inspectorate or a worker about the situation.³¹⁴ This liability goes further than a liability of the user undertaking and covers the whole chain and is thus referred as a chain liability. At the other hand, the liability is restricted to the wage debts which occur after a period of 14 days after the notification by the Belgian Labour Inspectorate or the worker; and at the same time, the liability will be restricted to the payments of wage over a maximum of one year.³¹⁵ In case of a notification, it is likely that the contractor terminates the contract with the (foreign) subcontractor in order to avoid the situation in which the contractor becomes liable itself.

In order to comply with the provisions of the ED regarding subcontracting liability, the Belgian legislator had to introduce a more strict mechanism with respect to the subcontracting liability on wages within the construction sector. This resulted in additional provisions in The Act of 12 April 1965 on the liability of the user undertaking in case of underpayment of the worker within the Belgian construction sector.³¹⁶ The user undertaking is liable for the wages of the activities that correspond to the period of work performed by the worker for the account of the user undertaking. At the same time, based on the exemption-clause in the directive³¹⁷, the Belgian legislator introduced an exemption for user undertakings who received a written statement of the subcontractor in which is stated that the subcontractor will comply with the payment of the workers in question.³¹⁸ However, despite the written declaration, in line with the provisions as described above, also the user undertaking can be held liable for the payment of the wage as of the 14th day after a written notification of the Labour Inspectorate or one of the workers about underpayment³¹⁹.

³¹² Message to contractors and subcontractors in the Construction sector [online], available at <https://www.larciergroup.com/media/wysiwyg/extras/9782804485740/Bericht%20aan%20de%20opdrachtgevers%20en%20aannemers%20in%20de%20bouwsector.pdf>

³¹³ The act of 12 April 1965 on the protection of wage for the employees, art. 35/1, 35/2, 35/3, 35/4, 35/5, 35/6

³¹⁴ Ibid, Art. 35/2

³¹⁵ Ibid, Art. 35/3 (4)

³¹⁶ Art. 35/6/2

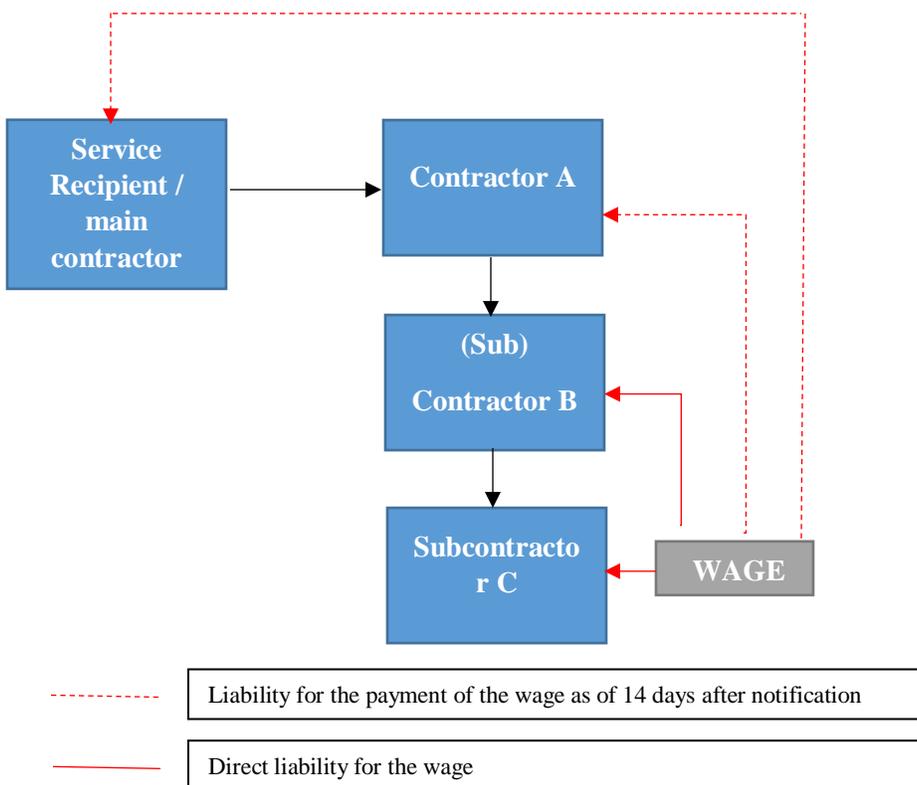
³¹⁷ Exemption based on due diligence, see also section 2.8

³¹⁸ The act of 12 April 1965 on the protection of wage for the employees, art. 35/6/3

³¹⁹ Ibid

In this manner, one may argue that the subcontracting liability in Belgium is limited to the provisions laid down in the ED: the subcontracting liability is limited to the first layer and to the construction sector only. Only after a written notification of the Labour Inspectorate, other layers will become liable for the future wages of the worker. Therefore, one may argue that the protection of the (posted) worker is quite limited under the Belgian subcontracting liability. For instance, in case of underpayment, the posted worker can hold the user undertaking liable for the payment of the right wage. If that firm disappears (in figure 7, (Sub) contractor B), it will become impossible for the worker in question to receive the entitled wage. Moreover, the relative soft rules on due diligence make it possible for entities to avoid subcontracting liability.

Figure 7: The subcontracting liability in the Belgian construction sector



Source: made by author

The Netherlands

In 1982, the Dutch legislator introduced the Wages and Salaries Tax and Social Security Contributions Act which introduced a liability of the main contractor with respect to the payment of social security contributions and income taxes of its subcontractors. This liability is not limited to the first subcontractor but covers the entire chain of subcontractors. However, this liability can be limited by use of a special bank

account, the G-account. In that case, the subcontractor will open a special bank-account with a guaranteed amount of money which can be exclusively used for the payment of social security premiums and taxes.³²⁰

With respect to the payment of wages, in 2010, the Dutch legislator introduced a chain liability within the temporary agency sector under terms of the '*Wet Inlenersaansprakelijkheid Minimumloon*'.³²¹ From then on, next to the (foreign) temporary agency, also the client or service recipient could be held liable for the payment of the outstanding wage and holiday pay of the temporary agency workers. However, the liability was limited to the statutory minimum wage.³²² This form of liability can be described as joint liability since it is limited to the user undertaking/temporary agency. Service recipients can reduce their liability by cooperating with a temporary agency firm that is certificated under terms of the NEN 4400 certificate which means that the temporary agency firm should comply with the applicable Dutch labour legislation. Also foreign temporary agency firms can be certificated under this system³²³.

In 2013, by means of a social agreement, the social partners committed themselves to the fight against sham employment (*schijnconstructies*).³²⁴ As Houwerzijl argues, the concept of sham employment is hard to define since it covers a wide range of abusive practices, both national and transnational.³²⁵ However, obviously, it relates to the idea that some companies try to make advantage of certain juridical structures, which do not reflect the reality of the undertaking, in order to save on labour costs. As part of the social agreement, in 2013, the Dutch legislator wanted to introduce a chain liability also in other sectors outside the scope of the temporary agency sector. The legal basis for this chain liability can be found in article 12 of the ED. As mentioned before, Member States have the possibility to extend the chain liability to other sectors besides the construction sector and to more than one layer.

The Dutch minister of social affairs, Asscher, aimed at extending the scope and the range of the subcontracting liability in a maximalist way. After different proposals, the '*Wet Aanpak Schijnconstructies*' (WAS) introduced a sequential form of chain liability within all sectors. As starting point, in case of underpayment, the worker can hold both his employer and the user undertaking liable for the payment of

³²⁰ Mijke Houwerzijl and Aukje Van hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union', *Contract*, no. 105 (96), 2011, p. 133

³²¹ Dutch Civil Code, art. 692

³²² Mijke Houwerzijl and Saskia Peters, *Inlenersaansprakelijkheid minimumloon: paardenmiddel, papieren tijger of ei van Columbus?*, 2010

³²³ NEN 4400-2

³²⁴ Jan Cremers, 'Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers nav het Sociaal Akkoord 2013.', 2017, p. 10

³²⁵ Mijke Houwerzijl, 'Aanpak van schijnconstructies op de Europeaniserende Nederlandse arbeidsmarkt', in Bonjour, L. Coello Eertink, J. Dagevos, C. Huinder, A. Ode, & K. de Vries (Eds.), *Open grenzen, nieuwe uitdagingen: Arbeidsmigratie uit Midden- en Oost-Europa*, Amsterdam, Amsterdam University Press, 2015, p. 3

his wage.³²⁶ However, in case the user undertaking can prove that he took adequate measures in order to prevent underpayment, for instance by working with a certified subcontractor, he will be exempt from the liability.³²⁷

In case the claims on the user undertaking are unsuccessful³²⁸, the worker will have the right to hold the subsequent contractor in the subcontracting chain liable for the payments of wage.³²⁹ Likewise, in case this attempt is unsuccessful, the worker is entitled to hold the next layer accountable for the payments. All contractors have the obligation to provide the worker with concrete information related to the other contractors (the user undertakings) they are doing business with, in order to enhance the process of chain liability.³³⁰ Moreover, the worker can hold the main contractor or service recipient directly liable for the payments after a period of 6 months of serious underpayment.³³¹

Regardless the contract of employment, those provisions apply to all workers who are performing work within the territory of the Netherlands. In other words, also posted workers are covered by those provisions. Scholars are positive about the far-reaching chain liability as a way to enforce labour conditions more efficiently.³³² Especially, the preventive working is praised.³³³

³²⁶ Dutch Civil Code, art. 616a (1)

³²⁷ Dutch Civil Code, art. 616a (2); See also Huib de Kort, *De introductie van de civielrechtelijke ketenaansprakelijkheid en bestuursrechtelijke ketenaanpak voor betaling van (minimum)loon*, Uitgeverij Paris, 2017, p. 106

³²⁸ Dutch Civil Code, art. 616b (2)

³²⁹ Dutch Civil Code, art. 616b (1)

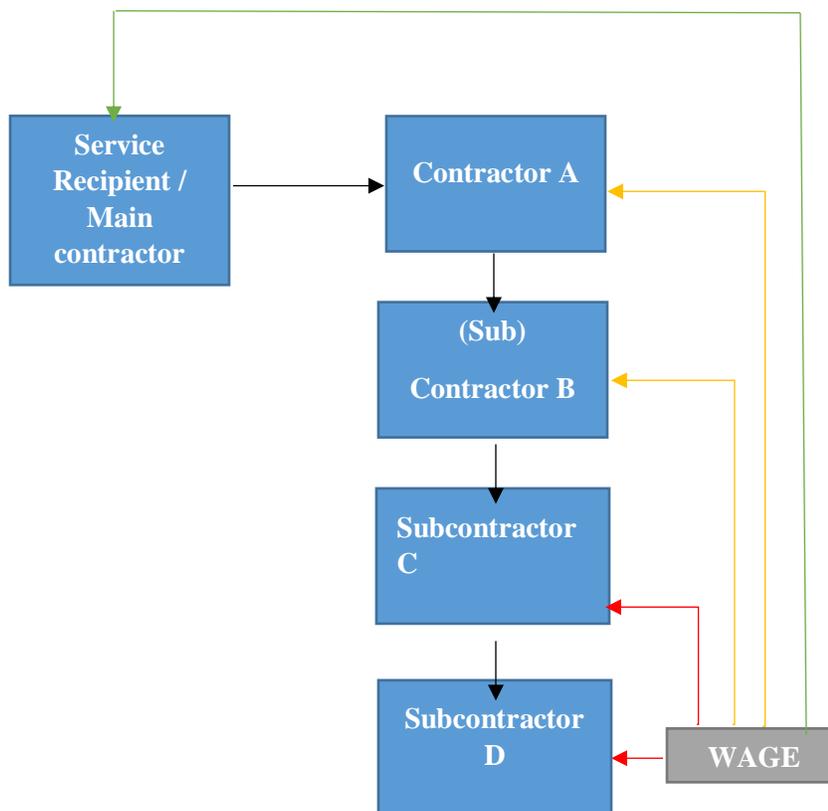
³³⁰ Dutch Civil Code, art. 616e

³³¹ Dutch Civil Code, art. 616b (5)

³³² Mijke Houwerzijl, 'Aanpak van schijnconstructies op de Europeaniserende Nederlandse arbeidsmarkt', in Bonjour, L. Coello Eertink, J. Dagevos, C. Huinder, A. Ode, & K. de Vries (Eds.), *Open grenzen, nieuwe uitdagingen: Arbeidsmigratie uit Midden- en Oost-Europa*, Amsterdam, Amsterdam University Press, 2015, p. 20

³³³ *Ibid*, p.17

Figure 8: The subcontracting liability in the Dutch construction sector



1. Red arrow: Dutch Civil Code, art. 616a (1)
2. Orange arrow: Dutch Civil Code, art. 616b (1)
3. Green arrow: Dutch Civil Code, art. 616b (5)

4.5 Comparison

The main aim of this chapter is to compare how both Belgium and the Netherlands have implemented the EU legislation on Posting and to what extent a level playing field is created within the respective sectors. As benchmarks, we take the scope of protection and monitoring and enforcement in both countries. After analysing the current situation, a conclusive critical assessment will follow on whether the proposed revision of the PWD might improve the current situation by minimizing social dumping within the construction sector.

4.5.1 Scope of protection

In the analysis above, it appeared that workers being posted to the territory of Belgium or the Netherlands, are entitled to the nucleus terms and conditions of employment in respective Member States. While the Belgian implementation is considered as a maximalist approach, in practice, both countries provide an equivalent protection based on the PWD within the construction sectors.

The fact that both Belgium and the Netherlands, have a general binding collective agreement for the construction sector, was found to be beneficial for the position of posted workers. This underlines the importance of general applicable collective agreements with respect to the creation of a level playing field. Based on a detailed wage scale in the collective agreements, they are entitled to receive the same gross wage as local workers. At the same time, it is important to note that not all foreign service providers comply with the job ladder and pay their workers against the lowest scale.

Nevertheless, despite the fact that both local and posted construction workers are entitled to receive the same gross wage, it was found that foreign service providers are likely to have a competitive advantage based on the amount of social security contributions and taxation. In Belgium, employers have to pay a significant higher share of social security contributions than in the Sending States which can rise to a difference of more than 25 percent of the gross wage. In the Netherlands, it turned out that the social contributions paid by the worker are relatively high. Despite the fact that workers have the burden of those social security contributions, it might also affect the position of the Dutch service providers.

In a similar vein, the effective personal income tax rate for Belgium workers earning €2000 a month, is high in comparison with the rates in the Sending States. At this phase, it is also possible to observe, that the effective tax rate difference does not affect the position of Belgian service providers in a direct way. However, the different tax rates may have an impact on the supply of labour in the long-term. While the different personal income tax rates do not affect the competitive position of Belgian service providers directly, it is arguable that Belgian construction workers have a lower net wage than workers being posted from Central and Eastern Member States.

From the above, one can conclude that within the current legal posting framework, it is feasible for companies to gain a competitive advantage by strategic posting construction workers from States with relative low social security rates to the territory of Belgium and the Netherlands. Especially Belgian service providers are sensitive to forms of foreign competition as the social security premiums for the account of the employer are relatively high and thus a burden for Belgian firms in the construction sector. With respect to the Netherlands, local workers have to pay relatively more labour taxes than local workers from Sending States which might affect the position of Dutch service providers indirectly.

This raises the question whether the proposed revision of the PWD offers a solution for this imbalance. The answer appears to be negative, since the two elements behind unfair competition, social security

contribution and personal income taxation, fall outside the scope of the (revised) PWD (see also section 2.6). The revised PWD focuses rather on the remuneration or the gross wage of the posted worker. However, as found in the analysis above, posted workers being covered by a sectoral collective agreement in the Host State, are already entitled to receive the same gross wage as local workers for the same work in line with a detailed wage scale. In other words, the proposal on the revision of the PWD will not bring a solution for the current wage gap in the Dutch and Belgian construction sector.

4.5.2 Monitoring and enforcement

In practice, posted construction workers often fail to receive the rights due to them under the Belgian and Dutch rules on posting. This could be a reason for both Belgium and the Netherlands to focus on control mechanisms in order to ensure that foreign service providers comply with the labour conditions as laid down in respective legislation and sectoral collective agreements. Moreover, effective monitoring and enforcement of posting can be of great importance for the fight against abusive practices such as undercutting and circumvention of minimum rates of pay, fake posting by means of rotational and permanent posting, letterbox firms and bogus self-employed.

In Belgium, non-compliance with labour conditions, are in general enforced by criminal law. For instance, in case a foreign service provider does not comply with the Belgian general applicable CLA for the construction sector, the Belgian Labour Inspectorate has the ability to transmit a formal report to the public prosecutor that brings the cases for the Court. As a consequence, in Belgium more cases are brought before the Court which may indicate that the Belgium State is a stronger promoter of well-defined EU legislation. In contrast, in the Netherlands, labour conditions are merely enforced by private law. Hence, in case of non-compliance with the Dutch collective agreement, the posted worker or the Dutch trade union might start a procedure against the employer in question. In this way, the role of the Dutch Labour Inspectorate is more limited. However, since the Social Agreement in 2013, the Dutch Labour Inspectorate collaborates with the social partners to a greater extent which is perceived as positive within the literature, due to its collaboration in identifying abusive practices.

As it turned out in the analysis above, with respect to monitoring, Belgium can be seen as an example for the Netherlands. Already in 2007, Belgium introduced Limosa, a registration system for posting, which is praised for its effectiveness. Moreover, in contrast to the Netherlands, the Belgian Labour Inspectorate has an active role with respect to the monitoring of labour conditions of posted workers. At the same time, this requires a higher budget for the Labour Inspectorate. This can be justified by the current loss of income

from the perspective of the State, local service providers, and the posted worker. In contrast to Belgium, where the subcontracting liability is limited to the user undertaking in the construction sector, the Dutch legislator implemented recently a sequential chain liability for all sectors which is likely to have a preventive effect on abusive practices under terms of posting. The Belgian legislator could extend its subcontracting liability in line with the Dutch example.

As described above, due to social security contributions and taxes, at this point, no full level playing field has been created under the PWD. As taxes and social security contributions fall outside the scope of the revised PWD, this situation is not going to change. At the same time, even if a perfect level playing field can not be achieved, in order to minimize the disruptive effect of regulatory completion, Member States shall focus on enforcement and monitoring. As turned out in our analysis, Belgium can be seen as a good example for effective monitoring under terms of active involvement of the Labour Inspectorate and the LIMOSA registration system. In its implementation of the ED, the Dutch legislator could base itself on aspects the Belgian system. At the same time, the Dutch subcontracting liability, covering the whole chain, is perceived as more effective than the Belgian one in order to prevent social dumping.

Chapter 5 – Conclusion

The concept of posting of workers within the European Single Market is subject to a heated debate, with Western Member States who are in favour of a revision of the current EU rules, on the one hand, and Middle and Eastern Member States who are strongly against a revision of the current rules on posting, on the other. With this context in mind, the following research question has been conducted:

How are the working conditions of posted workers currently regulated and monitored within the EU and more particularly, within The Netherlands and Belgium, and to what extent might the proposed revision of the Posting of Workers Directive improve the current situation by ensuring a level playing field between local and foreign competitors in the construction sectors in those countries?

5.1 Conclusion

In the 21st century, posting has been subject to a controversial debate. It is of utmost importance to state that the field of posting encompasses a wide range of issues, as it is the case of one freedom of the Internal Market: - the free provision of services-. As a consequence, contrarily to what the free movement of workers implies, posted workers do not gain access to the labour market of the Host State. This clearly explains the reason why posted workers, by way of derogation from the *lex loci laboris* principle, remain subject to the legislation of the called Sending State. Under these circumstances, keeping a variety of labour systems and thus, labour costs between Member States, this will result in an unfair result in an unfair competition climate regarding labour costs between local and foreign service providers. In this context, the PWD has been created in order to protect the posted worker with the ‘*hard core*’ of provisions which apply in the Host State.

As regards to the compensation of the worker, notably this protection is equal to the ‘*minimum rate of pay*’ as laid down within the general applicable collective agreements or the statutory minimum wage. In some critical rulings, the CJEU interpreted the imposition of labour conditions beyond the minimal protection of the PWD, as non-compatible with the free provision of services.³³⁴ With the recent approval of the PWD revision by the Council, characterized by an equal remuneration for posted workers, some might argue that this stigma in favour of the free provision of services has been abandoned. According to this, the question

³³⁴ See for instance the Judgement of the Court of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809 and the Judgement of the Court of 19 June 2008, *Commission v. Luxembourg*, C-319/06, EU:C:2008:350

that raises is to what extent a level playing field has been created between local and foreign service providers under the proposed revision of the PWD.

In order to answer this question, this study provided an impact analysis of the construction sector in two Western Member States, Belgium and the Netherlands, regarding the pay of posted workers and local workers in the construction industry, respectively, of both countries. As clearly demonstrated in this paper, at the EU-level, the construction sectors in Western Member States have been confronted with a relatively high inflow of posted workers from Central and Eastern Member States. This can be explained by the labour costs driven model in the construction sector: posting within the European construction sector is triggered by differences in labour costs. This might be harmful, especially when service providers in Member States with low labour conditions, start to use posting as a way to undermine or evade existing social regulations with the aim of gaining a competitive advantage.

In the comparison between Belgium and the Netherlands, it appeared, that both posted and local workers were covered by the wage scales as laid down within general applicable CLA's. The gross wages as laid down within those collective agreements were significant higher than the national minimum wages of Belgium and the Netherlands. Therefore, it can be concluded that general applicable collective agreements at the sectoral level play an important role for Host States to create a level playing field. Nevertheless, despite the fact that both local and posted workers are entitled to earn the same gross wage, it was found that foreign service providers in the respective construction sectors are likely to have a competitive advantage based on labour costs due to differences in the amount of social security contributions and taxation. The proposed revision of the PWD is not going to improve this wage gap since both taxation and social security contributions are excluded from its scope. Therefore, in order to create a full level playing field, one might argue that there is a need to adopt the EU legislation on social security in line with the *lex loci laboris* principle.

At the same time, even if a perfect level playing field is not achieved, in order to minimize the disruptive effect of regulatory completion, Member States shall work altogether on matters dealing with enforcement and monitoring in order to create a climate of fair competition. The following illegal practices of posting in the construction sector have been identified: undercutting and circumvention of minimum rates of pay, fake posting by means of rotational and permanent posting, bogus self-employment, and the use of letterbox firms. Those illegal practices of social dumping within the construction sector represent the need for adequate monitoring and enforcement. Recently, the ED has been introduced in order to improve the monitoring and enforcement of the PWD. In the comparison, it appeared that Belgium can be praised for its registration system, LIMOSA, and for the active role of the Labour Inspectorate in monitoring the working conditions of posted workers as it is able to format its findings directly to the public prosecutor.

Certainly, with the implementation of a registration system in the Netherlands, the Dutch legislator could base itself on LIMOSA. At the same time, the Dutch subcontracting liability, covering the whole chain, is perceived as more effective than the Belgian one in order to create a level playing field as much as possible.

Overall, the revised PWD, as currently formulated, does not address the current wage gap due to domestic differences in taxation and social security contributions and therefore no full level playing field is created. As a consequence, foreign service providers have a competitive advantage in terms of social security contributions and indirect via personal income taxes. Moreover, it is important to underline, that in order to minimize situations of unfair competition within the construction sector, Member States should focus on compliance with the Host State provisions by means of adequate tracking and screening tools and effective enforcement mechanisms.

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