Eurofound

Posted workers in the European Union

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This report examines the extent of the phenomenon of the posting of workers, the roles played both by European and national-level legislation in determining the employment and working conditions of posted workers and the roles played by legislation and collective bargaining – and how these two domains interplay. The report is in part an update of earlier work carried out in 2003 by Eurofound into the issue – not least, updating the findings with data from the new Member States, which had not joined the Union at that time. Importantly, the research looks at the possible implications of a number of high-profile decisions taken by the European Court of Justice in cases of posting of workers, which highlighted the at times tense relationship between the twin EU goals of economic freedom and social cohesion.

The study was compiled on the basis of individual national reports submitted by the EIRO correspondents. The text of each of these national reports is available online. The reports have not been edited or approved by the European Foundation for the Improvement of Living and Working Conditions. The national reports were drawn up in response to a questionnaire and should be read in conjunction with it.

Introduction

Posted workers have been at the centre of a lively debate at European level, addressing both legal and political questions. The search for the answers to these questions has helped to clarify the content of European labour law and its interplay with the core principles of the European Union, such as the free circulation of goods, services and people.

When it was adopted in 1996, many labour law experts initially regarded the **Posting of Workers Directive**[1] (EU Directive 96/71/EC) as being of limited relevance for the transformation of European and national labour law. This assumption was based on the understanding that the Directive's main purpose was to allow the application of the host country's complete set of labour laws to posted workers (see for instance Biagi, 1996). Contrary to these early expectations, the treatment and regulation of posted workers has prompted a thorough scrutiny of the compatibility between national rules and European regulations. It has also pointed to the need for clarification of the relationships between the industrial relations domain – especially collective bargaining – and the legislative framework, as a prerequisite for establishing clear obligations on the part of companies posting workers abroad within the European Union.

Moreover, as the Posting of Workers Directive is concerned with applying minimum protections to posted workers, a key debate has developed around the definition and limits of such core protections and particularly the question of whether they encompass the entire set of the national labour protection regime.

Finally, a key issue is the prevalence of the posting of workers. There is a substantial lack of information about the extent of the phenomenon. The European Commission addressed this lack of information at the time of the preparation of the 2007 **Communication on Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers** (COM(2007) 304 final); **see also the attached Staff working document** SEC (2007 747 final). In its Communication, the Commission stressed that 'there are no precise figures or estimates of posted workers in the EU' (p. 3). The overall situation does not seem to have changed substantially in this respect.

The EIRO network has already investigated the posting of workers. The first comparative study was published in 1999 (**Posted workers and the implementation of the Directive**), focusing on the implementation of EU Directive 96/71/EC. A follow-up study was carried out in 2003, through a series of national **thematic features on posted workers**. The purpose of this present study is to update the findings, taking into account developments since 2003 and to include information from the new Member States (NMS), which were not yet part of the EIRO network at the time.

[1] Text in blue corresponds to a hyperlink in the electronic document, available on the Eurofound website.

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In addition, this study intends to investigate the possible implications of a number of decisions by the European Court of Justice (ECJ). These ECJ decisions have questioned the content and scope of national regulations of posted workers' employment conditions and have thus drawn the attention of the European Commission, the Member States and the social partners to the need for either a revision or clarification of the present rules.

It should be stressed, however, that even if the issue of posted workers appears to be topical at European-level, it attracts significant attention only in a small number of countries. Not surprisingly, a public debate exist in those countries directly affected by the ECJ rulings, and sometimes in those sharing important institutional features with these countries, or where there have been industrial disputes over the use of posted workers. These debates usually focus on the role that industrial relations and notably collective bargaining can play in regulating the working and employment conditions of posted workers. As evidence collected through this study shows, the debate at national level often does not clearly distinguish between posted workers and the broader phenomenon of migrant or foreign workers. As a result, the specificities of the situation of posted workers and how this situation is linked to the issue of the transnational provision of services are not always apparent. Indeed, posted workers may share – to varying extents – the employment and working conditions that characterise some categories of migrant work (see the Eurofound reports on the **Occupational promotion of migrant workers** and on the **Employment and working conditions of migrant workers**). However, their position in the labour market is much more particular, as they find themselves between the regulatory framework of the host country and that of the country they habitually work in. The issue at stake is how to combine or balance these two sets of rules and regulatory frameworks with a view to guaranteeing – simultaneously – freedom of service provision and the protection of the workers involved, as well as a level playing field for domestic and foreign companies.

It is important to keep in mind that the main objective of the Posting of Workers Directive was to favour the free provision of services among Member States. As the heading of the SCADPlus **summary of legislation on posted workers** clearly states: 'the European Union wishes to remove the uncertainties and obstacles impeding the free provision of services by increasing legal certainty and making it easier to identify the working conditions in the Member State to which the worker is posted which apply to posted workers'. As far as employment and working conditions are concerned, the Directive envisages laying 'down a nucleus of mandatory rules for *minimum* protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided' (96/71/EU, point 13 in the preamble, emphasis added).

The most problematic aspects, which have emerged in recent years, concern:

- the relationship between legislation and collective bargaining in defining the employment conditions of posted workers;
- the universal applicability of collective agreements and the selection of the collective agreement to be applied, if more than one bargaining level exists (for instance, national, local, and sectoral agreements);
- the scope of the applicable rules and their identification (whether providing all protections or minimum protections, and specifying what those minimum protections are).

The ECJ rulings at the centre of the debate on the posting of workers are Laval und Partneri (C-341/05), Rüffert (C-346/06) and Luxembourg (C-319/06). These rulings aimed to delimit the rules applicable to posted workers. The Laval decision (EU0801019I)[2] – along with its sister case, the Viking case (Case C-438/05), which concerns the right of establishment as opposed to the freedom to provide services – states that a foreign undertaking should not be forced to

[2] The text contains numerous references (such as DK0709019I) to records on the EIRO website; these provide more detailed information on the issues in question. They can be accessed at http://www.eurofound.europa.eu/eiro by simply entering the reference into the 'Search' field.

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adhere to a collective agreement – for instance, by way of strikes, as long as it abides by the minimum requirements set out in the relevant national legislation on posted workers. This is notably the case if the collective agreement includes 'more favourable conditions than those resulting from the relevant legislative provisions' and comprises terms related to 'matters not referred to in Article 3 of the directive' (ECJ Judgement, C-341/05). Article 3 of the Directive refers to the 'terms and conditions of employment' applicable to the posting of workers.

Article 3. of the EU 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

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

   - by law, regulation or administrative provision, and/or

   - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

     (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;

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

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

(…)

According to the Rüffert decision (EU0805029I), public procurement rules cannot require the application of (certain) provisions of collective agreements beyond those set out in the relevant legislation on posted workers and especially cannot require the application of collective agreements that are not universally binding.

Another interesting case is that of Commission v Luxembourg (C-319/06), in which the Grand Duchy of Luxembourg was deemed to fail in fulfilling the obligations set out in the Posting of Workers Directive; part of this failure lay in requiring that conditions exceeding those referred to in Article 3.1 of the Directive be applied to posted workers (EU0808029I).

While these ECJ rulings have been criticised by the **European Trade Union Confederation** (ETUC), some have been welcomed by **BUSINESSEUROPE** (see the EIRO records referred to above). They have also triggered a debate in some Member States – for instance, Denmark (DK0709019I).

The European Commission has undertaken a number of initiatives in recent times to address some of the problems caused by the way in which the existing legislation is implemented, applied and enforced. An important initiative is the **2008 Recommendation on enhanced administrative cooperation** (see **EU calls for urgent action to improve working conditions for 1 million posted workers**). This followed the June 2007 Communication 'Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers' (COM(2007) 304 final). (See also the press release **Commission moves ahead on cutting red tape for service sector while guaranteeing the protection of posted workers**).

Under the French Presidency of the Council, in October 2008, the European Commission invited the European social partners to 'jointly develop an analysis of the consequences of the ECJ cases and the challenges related to increased mobility in Europe and to help re-establish confidence in the further development of the internal market'. Employers and trade unions accepted this invitation to engage in joint work, meeting several times.

In March 2010, the European social partners – **BusinessEurope**, **CEEP**, **UEAPME** and the **ETUC** – published a **report on their work on the ECJ rulings** in the Viking, Laval Rüffert and Luxembourg cases. According to the report, given the controversy sparked by these judgments on 'the adequacy of existing EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment', the social partners 'engaged in this work from a critical perspective trying to find points of convergence.'

They agreed that the most relevant points for their reflection were:

- the context of the single market and impact of ECJ rulings;
- the relationships between economic freedoms and fundamental social rights;
- the challenge of respecting the diversity of industrial relations systems and models;
- responses to the challenges raised by the judgements.

The report comprised:

- the shared observations of European employers and trade unions;
- two separate contributions from employers and trade unions following the same structure and addressing the most relevant points for reflection;
- some final remarks by the European social partners.

In the report, while stressing some points of agreement, the social partners highlight some controversial issues:

> *'The Posting of Workers Directive provides for minimum standards which must be observed to ensure respect for the rights of workers and a climate of fair competition. Although the European social partners agree on this, they have different views on whether these aims are achieved by the Posting of Workers Directive following its interpretation by the European Court of Justice. Whilst both sides recognise the need to compel service providers to comply with a nucleus of rules as defined in the host country, they disagree on the definition of this nucleus as well as on the*

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possibility for trade unions and/or Member States in the host country to go beyond this nucleus of rules. The diversity of industrial relations systems should be respected. In line with the subsidiarity principle, working conditions are and should continue to be determined primarily according to the national rules applicable to a given market, as laid down in national law, collective agreements or practices, taking into account European laws and regulations regarding minimum standards.'

The ETUC has developed a **comprehensive position** on the issues raised by the ECJ decisions on the Posting of Workers Directive (in the Laval, Rüffert and Luxembourg cases) and on the freedom of establishment (in the Viking case) and released a resolution with a number of **proposals for revising** the Posting of Workers Directive in early 2010. According to the ETUC, the ECJ rulings have 'exposed the weaknesses of the EU's legal framework' and are 'endangering social partnership models' (ETUC, 2010, p. 2). In the ETUC opinion, the ECJ rulings affirmed that in the EU legal order, market freedom should be regarded as more important than the fundamental social rights to collective bargaining and action, thereby 'limiting the scope for Member States and trade unions to take measures and actions against "social dumping" and to demand better protection and equal treatment of local and migrant workers in the host country' (ETUC, 2010, p. 2). The approach the ETUC is following to address these issues is two-fold. First, it calls for a Social Progress Protocol to be attached to the treaties to make 'absolutely clear' that the economic freedoms must be interpreted in a way that respects social fundamental rights and embeds economic freedoms in a broader concept of social progress and of the harmonising upwards, and progressive improvement, of working conditions and social systems. Secondly, it calls for an urgent revision of the Posting of Workers Directive, which should ensure that the same rules apply to foreign and host countries' employers, including those from outside the EEA and Switzerland (which is the present coverage of the Directive), and the full operation of the social fundamental rights, notably to collective bargaining and collective action.

With a view to contributing relevant information and analyses to the debate, the main objective of this EIRO comparative report is to provide:

- updated data on the extent of use of posted workers in EU Member States;
- an overview of existing national legislation on posted workers, with a view to assessing the potential impact of the recent ECJ judgements;
- an illustration of the positions and actions of the social partners and governments regarding posted workers;
- an overview of collective and individual disputes that have involved posted workers.

The study is based on national reports by EIRO correspondents in 27 countries (all EU countries except France, and including Norway). For detailed information on individual countries, readers should refer to the national reports. Norway has been included in the study, since it is covered by the EU Posting of Workers Directive according to the EEA Agreement (Annex XVIII. Health and safety at work, labour law, and equal treatment for men and women) and is an established member of the EIRO network.

How many posted workers?

The quantitative aspect is not the main issue of the posted workers phenomenon; the impact of the regulation of their working conditions on national labour protections is far more important. Furthermore, there is no direct relevant link between the number of posted workers and the impact on labour protection. In theory, there could be a significant impact with just a single case of or even with none. Still, it is important to assess the quantitative size of the phenomenon before turning to its qualitative aspects.

There is a substantial lack of data regarding the overall number and characteristics of posted workers throughout the EU. This is because reporting and monitoring schemes on posted workers are rare. A system for collecting administrative data is present in only a handful of countries, mostly in some of the central and eastern European countries, despite the fact that the issue of posted workers seems to be rather marginal there. In other countries, estimates are available at best. In many cases, there is an almost complete lack of information. As a consequence, there is a risk that analysing and comparing the few existing data is highly misleading, since figures are based on different sources and often refer to subsections of posted workers.

Most notably, no information is available on the employment and working conditions of posted workers, even in countries where data collection is more developed.

When considering the implications of the Posting of Workers Directive on the regulation of employment and working conditions, it is important to specify the various situations in which the posting of workers can take place, according to the Directive (Article 1). As part of the transnational provision of services, posting of workers can occur when undertakings established in a Member State meet the following conditions:

- they post workers to the territory of another Member State under a contract concluded between the undertaking making the posting and the party for whom the services are intended (Article 1.3(a));
- they post workers to an establishment or to an undertaking owned by the group in the territory of another Member State (Article 1.3(b));
- they are a temporary employment undertaking or placement agency and hire out a workers to a user undertaking that is established or operates in the territory of a Member State (Article 1.3(c)).

As a first step, various situations need to be considered. It is possible to distinguish between:

- companies that send abroad their own employees to provide services directly to their customers, possibly on-site;
- companies that post employees to their foreign branches or subsidiaries;
- temporary work agencies that provide workers to foreign user companies to work on their premises.

Whereas the first and the third option clearly require a specific contract for the provision of services, in the second case, the posting of workers may or may not depend on a specific contract – for instance, in the case of a subsidiary set up for the sole purpose of receiving posted workers for assigned contracts (or when the posting represents only a minor aspect of the subsidiary activities). This question of contracts may also apply in cases where workers are posted in foreign branches or subsidiaries of large multinational companies; this is, reportedly, a common situation, especially for technical and managerial staff, sometimes with a view to providing training and developing the skills of the workers involved or assisting temporarily the workers and managers on site. In this case, even if the foreign subsidiary has its own customers who may benefit from the posted workers, the ‘services’ are essentially provided in-house, from the headquarters to the subsidiary. Those involved are usually regarded as ‘expatriates’, rather than ‘posted workers’, and often receive a number of benefits for their work abroad. Any monitoring of posted workers will likely include them in the overall numbers and it can be hard to separate these workers out; however, they are not expressly linked to the transnational provision of services and their situation appears to lie outside the objectives of the Directive. To get an accurate picture, it would be necessary to discriminate between the different cases described above, the sector of economic activity and the type of posting as envisaged by the Directive. This would require information about the positions of the workers involved and the number of permanent employees of the firm to which the workers are posted. Unfortunately, this level of detail is not currently available.

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Moreover, the posting of workers should be investigated from two sides of the relationship: both the posting of domestic workers abroad and the posting of workers of foreign companies in the national territory have to be considered. Combining the data from the two types of situation would provide a complete picture of the circulation of posted workers. Within the EU, there is a requirement that employers apply to the relevant national authorities for an E101 form to certify that a worker already pays social security contributions in his or her country of residence (Council Regulations 1408/71 and 574/72) and are therefore exempt from paying in the country where they are temporarily working; this requirement could be used to collect relevant data at the point of origin. Since the same form is then submitted to the social security authority in the country of posting, it would also be possible to check the information at the point of destination. However, this data does not seem to be readily available in a number of countries. Also, it does not allow for distinguishing between the different types of posting described above and can include duplications: an E101 certificate is issued for any instance of work abroad, even by the same person. E101 forms would also be issued for self-employed workers who are temporarily carrying out their activities in a foreign country. For this reason, it is crucial to establish an effective reporting system in the country of destination in order to get reliable data on posted workers.

Finally, the practice of posting workers also includes third-country non-EU companies. The focus of the Directive is on 'free movement of persons and services between Member States'; therefore art 1 (1) specifies the scope of the Directive which applies to 'undertakings established in a Member State which (…) post workers (..) to the territory of (another) Member State. Nevertheless, external trade is also concerned, as per art.1 (4), 'undertakings established in a non Member States must not be given more favourable treatment than undertakings established in a Member States'. Moreover, in practice, most Member States regulations made 'no distinction on the basis of the seat of the posting undertaking, with respect to the Working conditions to be respected under the Directive' [E.C.P.W 03/2010, Secretariat draft 02/06/2010]

As illustrated above, the posting of workers is a multifaceted and complex issue and it can be difficult, where data is available, to interpret it correctly. To complicate matters further, in almost all countries for which figures are available, underreporting is believed to be common practice and controls are difficult. It can be concluded that the capacity to control the phenomenon through monitoring tools and inspection activities seems rather weak.

A proper monitoring system of posted workers in the framework of the provision of transnational services is not present in any country. None of the national correspondents could provide information on either the basic quantitative aspects, in terms of total numbers and distribution by gender and sectors, or the qualitative elements of these workers' employment and working conditions. Information on the latter, which is of course crucial for effectively assessing the operation of the posting of workers within the EU, was completely absent from the national reports. Instead, in a number of countries, there are more or less developed reporting systems of an administrative nature (Table 1). In many cases, such administrative data are not publicly available. The EIRO national reports describe notification systems of different types in at least 15 EU Member States.

Reporting and notifications systems

In a small number of countries, it seems that information on posted workers is particularly scarce. In Ireland, for instance, no data are available on the number and basic characteristics of posted workers. Italy is in the same situation; experts believe that the phenomenon is quite limited and concentrated in specific industries, such as petroleum, some metalworking branches, and construction, where a certain increase in posted workers has been recorded in recent years. In 2008, the main Italian trade unions claimed to have received more reports than in previous years that highlighted non-conformity of employment and working conditions of posted workers with the standards set by collective agreements.

In Latvia, no reliable information exists on posted workers. In the Netherlands, no specific information on posted workers is collected. The only data and studies available deal with foreign workers and not posted workers as such.

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In Sweden, there are no data on the number of posted workers. Some very rough estimates made at the time of the Laval case put the overall number of posted workers at around 2,200 persons in the construction, electrical and metal sectors, but these data are considered unreliable.

In Austria, there is no proper monitoring system to oversee the posting of workers. Yet, the regional offices of the Labour Market Service (**AMS**) issue permits referred to as ‘EU placement permit’ (EU-Entsendebestätigung) and ‘foreign placement permit’ (Entsendebewilligung). The EU-placement permit covers third-country nationals posted by EU undertakings, including ‘new EU citizens’ if the undertaking is established in one of the 10 NMS in central and eastern Europe. Foreign-placement permits cover third-country companies posting workers to Austria, as well as ‘new EU’ companies in certain sectors, including social services, construction and cleaning (see **Access authorisations** on the AMS web site). Between 1 January and 31 March 2009, a total of 2,768 foreign nationals were posted to Austria, including both ‘new EU’ and third-country workers. No other specific information is available.

Belgium introduced in 2007 an online notification system (**Limosa**) for ‘every form of employment in Belgium of foreign employed or self-employed persons’ (as defined by the **Federal Public Service – Employment, Labour and Social Dialogue**), which also covers posted workers. Unfortunately, data from the Limosa system are not publicly available. The law establishes a simplified system of documentation for the first six months of posting, provided the undertaking sends an advance secondment notice to the Social Legislation Inspectorate with a number of details on the posting contract, the activity to be performed and the workers involved. Moreover, the documents required in the country of origin must be available at the place of posting for inspection. In 2003, an ad hoc study on posted workers in Belgium, France and the UK examined the number of E101 forms issued and received by Belgium (Ghailani, 2004). In that year, 60,882 E101 certificates were issued by Belgian authorities, while 50,995 forms were received. It appeared that most cross-border postings involving Belgium were concentrated in neighbouring countries, such as the Netherlands, France and Germany.

In Bulgaria, the company receiving the posted workers (or benefiting from the services provided by posted workers) has to communicate to the regional offices of the National Employment Agency (**EA**) the acceptance of the posting and confirm abidance with the rules set out in Article 3 of the Directive. This way, the EA should be able to set up a database of posted workers. The system is quite recent and no information is available yet on the number and characteristics of posted workers. In the construction sector, following a bilateral agreement between Germany and Bulgaria signed in 1991, there is a monthly reporting system, which indicates the posting of an average of 363 workers per month from Bulgaria to Germany in 2008.

In Cyprus, there is an application and permit system administered by the Department of Labour of the Ministry of Labour and Social Insurance. Since the introduction of the legislative framework in 2002, only five requests were submitted between 2006 and 2009 for a mere 17 workers – 13 in the construction sector and four in financial services.

In the Czech Republic, there is quite a developed system of data collection administered by the Ministry of Labour and Social Affairs. It requires all undertakings to which workers are posted or which benefit from such workers to inform the local Labour Office and provide detailed information on the posted workers and on the content and location of the activities to be performed. According to Ministry of Labour data, in 2008 some 13,700 workers were posted to the Czech Republic. The main sectors involved in posting were manufacturing (53%), construction (23%), and mining (9%). The great majority (88%) of posted workers were men.

In Germany, there is no central source providing information on posted workers. Only in the construction sector, due to the requirement to pay contributions to the Leave and Wage Equalisation Fund of the German Building Industry (**ULAK**), is it possible to identify the annual number of building workers posted to Germany. It is interesting to note that

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the number of posted workers has constantly declined in the German construction industry since 2005. In that year they numbered almost 77,000, whereas in 2008 this number had declined by around 30% to fewer than 53,500.

In Denmark, there are different sources of information, although none is regarded as comprehensive. First, since 2005, data regarding the number of E101 forms of posted workers have been collected by the Danish National Security Agency. This channel provides only the total number of posted workers. Second, since May 2008, a register of service providers has been set up (the **RUT-register** at the Danish Commerce and Companies Agency, an agency of the Ministry of Economy and Commerce). However, the information collected is still not completely reliable and is not publicly available. Third, a number of estimates have been produced in recent years based on data on foreign companies that are registered in Denmark for the purpose of providing services. This was done through limited sample surveys or by looking at the amount of value-added tax (VAT) paid by these firms. Data on E101 forms show an increase from some 5,300 certificates in 2005 to more than 12,000 in 2008. At present, this is probably the most complete source, even if underreporting is believed to be significant. It should be mentioned that the same information is available for Danish workers posted abroad. The E101 database indicates, for instance, that in 2008 there were a total of almost 20,000 Danish workers posted in EEA countries and Switzerland, of whom around 8,000 was posted in one country for up to one year.

In Estonia, only some information on domestic workers posted abroad is available through the issue of E101 certificates for workers posted to EEA countries by the Social Insurance Board. In 2007, there were around 10,000 such workers, the majority of whom (more than 60%) were in construction. Data from 2006 show that workers posted abroad are predominantly men (90%).

In Finland, there are no precise data on posted workers, no notification system being in existence. However, the employer representative body in Finland must keep a number of documents regarding the foreign undertaking, the posted workers and their employment and working conditions, which have to be made available to inspectors in case of checks. The **Finnish Centre for Pensions**, the central body of the statutory earning-based pension system, estimates that thousands of foreign workers are present in Finland for short or long secondments. As for domestic workers posted abroad, only some information is available through the issuing of E101 forms. According to the Finnish Centre for Pensions, the annual number of workers posted to other countries over the 2005–2006 period was between 5,000 and 6,000 people, with the top destinations being Sweden, Germany, US and Norway (mostly in manufacturing, transport and storage, and communication).

In Greece, no data is available, despite a notification system that requires companies posting workers to inform in advance the Corps of Labour Inspectors (**ΣΕΠΕ**) about the service to be provided, the posted workers involved and their employment and working conditions. According to union sources, posted workers are used especially in the public works and construction sector, in the petroleum industry, in shipping and in catering.

In Hungary, no information exists on posted workers as there are no provisions for registration or notification for the transnational provision of services. Observers believe that the phenomenon is quite limited. More data is present on domestic workers posted abroad: estimates indicate that between 17,000 and 18,000 workers are posted annually to foreign countries. The main destination is Germany, mainly in manufacturing (the automotive sector) and the meat processing industry, but also in construction.

In Lithuania, every employer posting workers to perform temporary work exceeding 30 days or in the construction sector must inform in advance the territorial office of the State Labour Inspectorate (**VDI**) about the employment and working conditions of the employees involved. The VDI received 39 notifications in the 2005–2006 period and 1,943 in 2007–2008. The Lithuanian Labour Exchange (**LDB**) issues work permits for workers posted from third countries. In 2005, there were 660 such work permits, rising to 2,733 in 2008, of which almost 80% were in the construction sector

and around 20% in manufacturing. There is also a system of voluntary notification to the Foreign Benefits Office of the State Social Insurance Fund Board (**VSDFV**), which covers EEA countries (because of the E101 form). However, the information is only partial and concerns typically a small number of countries (Germany, Denmark and Finland). In 2008, there were only 106 notifications. The same body collects data on domestic workers posted abroad, data linked to the issuing of E101 certificates. According to this source, in 2005 some 1,900 workers were posted abroad. This number increased to around 6,300 in 2008.

In Luxembourg, no data are available on the posting of workers, despite the operation of a system of notification to the Labour and Mines Inspectorate, which requires the communication of some details and the holding of a set of documents in case of checks.

In Malta, a notification to the Director of Industrial and Employment Relations is required when a company needs to post workers. A copy of the notifications and documents showing that rules are respected must be kept at the undertaking making use of the posted workers. Between June 2006 and June 2009 there were notifications regarding 903 posted workers.

In Norway, foreign subcontractors posting employees should register with the Central Office for Foreign Tax Affairs (SFU), although some underreporting is probably present. In 2008, about 23,000 posted workers were reported, up from 15,700 in 2005. These workers came from Poland (representing 62% of the total number of workers), the Baltic States (in particular, Lithuania, with 23% of the total), Romania and Bulgaria.

In Poland, no data is available on posted workers from foreign countries, although it is believed that such workers are mainly persons in managerial positions. As for domestic workers posted abroad, information from E101 forms provided by the Social Insurance Institution (**ZUS**) indicates the issuing of almost 230,000 certificates in 2007 for employees with postings not exceeding 12 months, compared to around 133,000 in 2005 (an increase of 72%). Almost half of the temporary workers posted abroad go to Germany (49%), with France (12%), Belgium (8%), the Netherlands (7%) and Norway (6%) receiving significant proportions of the total.

In Portugal, there is no information on posted workers, but in 2009 a notification requirement was introduced, with undertakings posting workers being required to inform the local authorities five days in advance about the identity of workers and of the user, the workplace, and the duration of posting. The Labour Inspectorate estimates that there are few posted workers in Portugal; the General Confederation of Portuguese Workers (**CGTP-IN**) believes they work mainly in managerial and technical positions, with some central and eastern European workers posted to work in agriculture in the south.

In Romania, companies posting workers have to inform, five days in advance, the Labour Inspection Office (IM). Data show that there were some 2,300 posted workers from EU/EAA countries in the first half of 2009, more or less the same number as in 2008. They came mostly from Hungary (which supplied 625 workers), Germany (334 workers), Bulgaria (305) and Italy (191) to work primarily in construction, manufacturing and consultancy. A number of sources indicate that a large number of Romanian nationals are working abroad. In 2008, the National Agency for Employment (**ANOFM**) alone recruited some 52,500 persons to work abroad, with Germany and Spain being the preferred destinations and agriculture and catering the main sectors of employment. However, it is not possible to identify the number of posted workers among them.

In Slovenia, the Employment Service provides extensive information on posted workers, thanks to an advance notification system. In 2007, there was a total of almost 5,600 posted workers, of whom more than 80% were men, mostly employed in construction (34%) and manufacturing (23%). In addition, information on the number of persons

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who receive the E101 form from the Health Insurance Institute of Slovenia (**ZZZS)** is available. In 2008, the ZZZS issued E101 certificates to some 10,500 people for working in Germany (33%), Austria (12%), the Netherlands (11%) and Italy (10%). The main sectors involved were construction (50%) and manufacturing (22%). The E101 forms were issued almost exclusively to men (98%).

In Slovakia, according to information provided by the Headquarter of Labour, Social Affairs and Family (**ÚPSVAR**) based on a special notification card, the number of posted workers in recent years has ranged between around 750 people (in 2004) and around 2,200 (in 2005 and 2007) and was almost 1,000 in 2008, of whom about 90% were men. Most posted workers were employed in construction, metalworking and textiles. As for workers posted abroad, the Social Insurance Agency (**SP**) collects information on the E101 forms and indicates that the number of domestic workers temporarily abroad have increased dramatically since 2005, from about 6,000 to almost 39,000 in 2008. The main destinations are the Czech Republic, Germany, France and Belgium, the main sectors being manufacturing and construction.

In the UK, there is no monitoring system of posted workers in place. In the second quarter of 2008, a special question was included in the Labour Force Survey, responses to which indicate that in the period April–June 2008, there were around 165,000 posted workers, of whom three quarters were men. Most worked in business services (23%) and financial intermediation (14%), manufacturing (14%) and health and social work (12%). Only 4% worked in construction.

As underlined above, the lack of information on posted workers is especially striking when it comes to their employment and working conditions. It would seem that no reporting and monitoring system collects data on the terms of employment applying to posted workers; furthermore, inspection services only rarely cover the posting of workers, so that data on controls and on violations are very limited, even when there are specific bodies or initiatives that cover posted workers as well as non-posted workers (Table 1).

Table 1: *Reporting and inspection systems in the EU and Norway*

Country	Reporting	Inspection
Austria	Placement permits are required for third-country and EU10 nationals.	Special controls and inspections are envisaged for foreign (third-country) nationals.
Belgium	Mandatory 'Limosa declaration' for every foreign employed or self-employed person since 1 April 2007	No special activities
Bulgaria	Notification of the acceptance of posted workers to the regional offices of the Employment Agency; monitoring system in the construction sector following a bilateral agreement with Germany in 1991	The law envisages special control activities on posted workers.
Cyprus	Application and permit system administered by the Department of Labour	No special activities
Czech Republic	A notification system is in place, reporting to the local Labour Offices.	No special activities
Germany	No general reporting system exists. In the construction sector, posted workers must join the Leave and Wage Equalisation Fund of the German Building Industry.	No special activities
Denmark	Data on E101 are collected by the Danish National Security Agency, while the Danish Commerce and Companies Agency set up in May 2008 a specific register for foreign service providers (the RUT–register), which may provide important information in the future.	No special initiatives exist. Blue-collar unions in the construction and agriculture sectors have increased their workplace inspection activities.

Table 1: *Reporting and inspection systems in the EU and Norway (cont'd)*

Country	Reporting	Inspection
Estonia	No data available and no reporting system	Inspections are complaint-based, so a posted worker must file a complaint in order to initiate an inspection. So far, no complaints have been filed. There is a cooperation agreement between the Estonian and Norwegian labour inspection services, but so far there have been no significant exchanges of information.
Spain	Notification to the relevant Employment Authority; however, no data are publicly available.	The Employment Authority informs the Employment and Social Security Inspectorate of any posting of workers. The latter is responsible for overseeing the employment and working conditions of posted workers.
Finland	No data available and no reporting system exists.	No special initiatives exist. Since 2004, a special investigation body has been set up to fight the illegal use of foreign labour in general. Social partners closely collaborate with labour inspection officials, the tax administration and the police and custom offices.
Greece	No data available, despite the presence of a notification system	No special initiatives
Hungary	No data available and no reporting system	No special initiatives
Ireland	No data available and no reporting system	No special initiatives focused on posted workers; however, the Labour Inspectorate has recently reinforced its activities to fight illegal work practices in companies employing large numbers of migrant workers.
Italy	No data available and no reporting system	No special initiatives
Lithuania	Reporting system to the Labour Inspectorate for undertakings established in the EEA and a work-permit system for those set up in third countries	No special initiatives
Luxembourg	No data available, despite the existence of a notification system	A special section was created within the Labour and Mines Inspectorate.
Latvia	No reliable data available	No special initiatives
Malta	The Department of Industrial and Employment Relations must be notified before workers are posted.	No special initiatives
Netherlands	No data available and no reporting system	No special initiatives
Norway	Registration system with the Central Office for Foreign Tax Affairs (SFU)	No special initiatives, but the Labour Inspection Authority, the Police, the Tax Administration and the Directorate of Immigration have established a joint Service Centre for Foreign Workers in Norway to provide information and assistance to both employers and employees.
Poland	No information available and no reporting system	No special initiatives exist. The National Labour Inspectorate (PIP), among its duties as the liaison office for posted workers, may exchange information with corresponding authorities. In 2007, there were exchanges concerning 232 posted workers – mostly from Belgium, France, Germany and the Netherlands.
Portugal	No information is available. Since 2009, a notification system is in operation.	No special initiatives
Romania	Notification to the Labour Inspection Office	No special initiatives
Sweden	No data available and no reporting system	No special initiatives

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Table 1: *Reporting and inspection systems in the EU and Norway (cont'd)*

Country	Reporting	Inspection
Slovenia	Notification system to the Employment Service	No special initiatives
Slovakia	Notification system to the Employment Office	No special initiatives exist. In 2007–2009, the National Labour Inspectorate (**NIP**) received an average of 10 requests per year to check the employment and working conditions of posted workers, mostly from France and Germany and focused mainly on wage levels and overtime bonuses.
United Kingdom	No data available and no reporting system	No special initiatives

Source: *EIRO national contributions*

Studies

There are very few studies focusing on the issue of posted workers. This contributes to the difficulties in assessing the extent and the characteristics of the phenomenon at the European level. Only a few studies involve some field work on the employment and working conditions of posted workers. Not surprisingly, the available research concentrates on two of the countries where the debate on posted workers is more prominent – Denmark and Norway.

In Denmark, some studies in the construction sector also considered the union affiliation and bargaining coverage of posted workers. According to a report published in 2008 (Hansen and Andersen, 2008), between 2% and 4% of foreign workers were unionised. In the same year, another study (Pedersen and Andersen, 2008) indicated that some 5%–15% of foreign posted workers in Denmark were covered by collective agreements. More recently, in a survey of Polish building workers in the greater Copenhagen area, 38% declared that they benefited from a collective agreement, while the remainder did not know whether they were covered or what a collective agreement entailed (Hansen and Hansen, 2009). From a more qualitative perspective, existing studies have shown a clear differentiation – in terms of wage levels, working time and job quality – between posted workers from the EU15 and from the NMS of central and eastern Europe (Poland, the Czech Republic, Slovakia, Slovenia, Hungary, Romania, Bulgaria, Lithuania, Latvia and Estonia). While posted workers from EU15 countries tend to share the same employment and working conditions as Danes, posted workers from the above NMS work more often at lower pay levels, with longer working hours and in lower-quality jobs. Unions have tried to recruit posted workers from these countries, with a view to strengthening their claim for collective bargaining, but their attempts have not been very successful so far.

In Norway, a number of studies have been carried out on the employment of central and eastern European nationals – both posted workers and people hired directly by Norwegian firms. A 2006 study found that companies in the construction and manufacturing sectors tended to employ workers from the central and eastern European Member States through service provision rather than via direct hiring. In these sectors, firms employed foreign workers more frequently: 19% of construction companies and 15% of manufacturing companies had used labour from central and eastern European countries, while 10% of companies in the catering sector had done so (Dølvik et al 2006). When repeated in 2009, the survey showed an increase in the use of central and eastern European workers to 33%, 39%, and 32%, in the construction, manufacturing sectors and catering sectors respectively.

A study on Polish workers in Oslo (Friberg and Tyldum, 2007) showed that Polish posted workers had significantly lower wages and worse working conditions than individual Polish labour immigrants. Irregularities in employment were widespread among posted workers. However, the distinction between posted workers and immigrants was not very marked, as only a minority of posted workers (some 15%) had effectively worked for their Polish employer in their home country (NO0704019I).

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The regulatory framework: implementation problems and recent developments

The Posting of Workers Directive establishes a common framework for the provision of transnational services within the EU: it identifies a 'hard core' of national rules in the host country to be applied to posted workers, safeguarding at the same time the possibly better conditions that employees may be granted through law or collective bargaining in the country where they habitually work.

First of all, the Directive defines the matters applicable to posted workers. Article 3.1 lists the elements of the 'terms and conditions of employment' set out in the host country legislation that posting firms should apply to posted workers:

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

Article 3.10 authorises the extension of the above list to other matters. Host countries are allowed to demand the application to posted workers of provisions from their own legal systems relating to terms and conditions of employment, other than those referred to in Article 3.1, 'in the case of public policy provisions'.

Secondly, the Directive addresses another important aspect, the nature of the regulation (regardless of whether it results from law or collective agreement). While Article 3.1 restricts the application of terms and conditions resulting from collective agreements on the matters expressly listed solely to posted workers employed in the building industry, Article 3.10 again broadens the application of collective agreement rules: it allows Member States to extend to posted workers the application of 'terms and conditions of employment' set out in national collective agreements concerning the activity of service providers operating in other sectors.

Article 3.8 specifies that these collective agreements must be declared 'universally applicable', meaning that they 'must be observed by all undertakings in the geographical area and in the profession or industry concerned'. In the absence of a formal system for declaring collective agreements to be universally applicable, Member States may regard, as the equivalent to collective agreements of universal application, those that are simply 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned' and/or 'which have been concluded by the most representative employers' and workers' organisations at the national level and which are applied throughout national territory'. In all cases, Member States are required to ensure equality of treatment for national and foreign undertakings in a similar position.

Leaving aside at this stage questions of definition and technical issues, which can be relevant in the actual operation of the national regulatory frameworks, it is possible to identify two fundamental choices that the Member States could make when implementing the Directive: implement either minimum or full protection; and implement protection either through legal instruments or through autonomous collective bargaining.

Minimum versus full protection

The national regulators can identify a limited set of basic protections that must be guaranteed for posted workers as a sort of 'safety net' or they may apply to posted workers the entire system of labour and work protections granted to resident workers (by using Article 3.10 on the 'public policy' clause). Such a choice applies to both legislative provisions and collective bargaining, though in a different way. In fact, legal instruments essentially define minimum protections,

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on top of which the parties to the employment contract, either individually or collectively, can add further guarantees. Therefore, 'minimum' versus 'full' protection in this domain should be understood in terms of the scope of regulation. Minimum protections do not extend beyond those strictly listed in Article 3.1, while broader or full protections could be so wide as to include the entirety of labour legislation. In the case of collective agreements, the legislation implementing the Posting of Workers Directive could stipulate that bargained minimum protections simply replace the legal ones listed in Article 3.1, or it could provide for the complete application of collective agreements to posted workers.

The distinction between minimum and full protection is a crucial issue. First of all, it can be used as a criterion to cluster the approaches of the different Member States. Secondly, the recent ECJ rulings (notably in the Luxembourg case) suggest that the first choice mirrors the actual intentions of the European regulator, whereas the second breaches the fundamental right of freedom of provision of services. Indeed, this highlights that the rules on posted workers do not belong to the domain of labour law but rather to that of commercial law. In the labour law domain, minimum protections and international standards can always be improved in favour of workers: they are a floor on which governments and social partners can build further guarantees. In the commercial law field, by contrast, the basic protections are the maximum limit in order to allow compatibility with the goal of fostering competition; any additions would be regarded as unjustified constraints on the provision of services and hence equivalent to non-tariff trade barriers.

Legislation versus collective agreement

Protection of posted workers can be granted through applying either (certain) legislative instruments or collective agreements. This is the second key aspect of the regulation on posting of workers, since it challenges the nature of the national industrial relations systems. Moreover, as has clearly been underlined in the recent ECJ rulings – in particular, the Laval and Rüffert cases, but also the Viking case with respect to the freedom of establishment – it also restricts the possibility for national trade union organisations to engage in disputes and conflicts that concern the working conditions of workers posted by foreign undertakings and, more specifically, to demand the application of domestic collective agreements.

Of particular importance is the requirement envisaged by the ECJ that the choice to privilege collective bargaining can be made only if 'universally binding' agreements or arbitration awards exist. This requirement seems to go beyond the letter of the Directive, which includes 'generally binding agreements' and deals signed by the 'most representative' social partners. Therefore, trade unions can only claim the implementation of the legal or universally binding rules. Given these restrictive ECJ rulings, the role of industrial relations in the case of posted workers can be weakened, especially in voluntarist and 'decentralised' industrial relations systems, but also in cases where there are no legally sound rules that allow for the extension of bargaining coverage.

This confirms that posted workers are considered to be part of the undertakings that post them, rather than workers who can be actively represented and protected in their temporary foreign workplace – again, commercial law taking precedence over labour law. Posted workers can benefit only from universally, pre-existing, binding regulations, either of a legislative nature – which typically sets minimum protection levels – or of a contractual character. In practical terms, this means that posted workers are not part of the labour relations system in the country where they temporarily work. In the host country, posted workers are not regarded as actors in industrial relations: they can benefit from protections set by the domestic legislator or the social partners, but without being directly involved in shaping these protections. They can only contribute to the regulation of their employment relationships through the industrial relations system in the country where they habitually work or through individual agreements with their foreign employer.

In practice, most of the national laws implementing the Posting of Workers Directive mention both law and collective agreements as means for setting the protection levels for posted workers. Collective agreements relevant for posted

workers are usually universally binding. Nevertheless in some countries, such as Lithuania and Malta, no universally binding collective agreements exist, thereby limiting the actual protection of posted workers to the legal minimum guarantees. In other situations, collective agreements just replace the legal minimum protections, but they do not apply in full to posted workers.

Beyond these main two alternatives, other, less crucial options, exist. Member States can also decide whether or not to impose special requirements in terms of notification and registration on undertakings posting workers – the obligation to designate local representatives and the keeping of specific documents for inspection purposes. Here again, the recent ECJ rulings specify that the administrative burden cannot be excessive, in order to avoid disproportional constraints on the provision of services. A further choice open to Member States is to either integrate the rules on posted workers in existing legislative instruments (such as the Labour Code) or pass specific laws on posted workers. This is basically a technical decision, which may greatly depend on the traditions of different labour law systems. Indeed, this last option seems to present Member States with an effective choice; in contrast, the others have been greatly constrained by the ECJ rulings. According to the prevailing interpretations of the decisions, the protections of posted workers should be kept to a minimum, granted primarily through legislation and avoiding excessive administrative burdens – or ‘red tape’.

Against this background, it is interesting to look at the choices made by the different countries and see whether and how the recent rulings of the ECJ may have reduced the options effectively open to the Member States. Moreover, some examples will be presented of how the Member States reacted to the emerging ECJ jurisprudence and in which directions. This is of course very likely to take place in the case of the countries involved in the different decisions, but the debate that has arisen thereof may have had broader consequences. Indeed, another part of this study will review the reactions of the social partners to the new situation.

Table 2: *The national legal framework on posting of workers, EU and Norway (2009)*

Country	Transposition of the Directive	Protection levels	Type of regulation	Application to temporary agency workers (TAW)	Public procurement
Austria	Amendments to different laws	Broad	Legislation and collective agreement (CA) (universally binding by mandatory employer representation)	Complete legislation	No requirements
Belgium	Specific law	Broad	Legislation and CA (universally binding by law)	Complete legislation	No requirements
Bulgaria	Specific law	Minimum	Legislation and CA (universally binding by law)	TAW is not present in Bulgaria	No requirements
Cyprus	Specific law	Minimum	Legislation and CA (most representative)	TAW is not explicitly regulated, practically non-existent	No requirements
Czech Republic	Amendments of different laws	Minimum	Legislation and CA (universally binding by law)	Complete legislation (but contradiction in the text)	No requirements
Germany	Specific law, construction sector only plus many extensions to other sectors	Broad	Legislation and CA (made universally binding by a special legal procedure)	No special rules	Possible (Rüffert case)

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Table 2: *The national legal framework on posting of workers, EU and Norway (2009) (cont'd)*

Country	Transposition of the Directive	Protection levels	Type of regulation	Application to temporary agency workers (TAW)	Public procurement
Denmark	Specific law	Broad	Legislation and CA (most representative)	Regulated by collective : same rules for posted workers; law expected by January 2011 in application of EU Directive	The Danish state adopted ILO Convention 94, which requires that same rights and conditions are ensured for all workers. This covers large state works, but it is recommended that regional authorities follow the same approach.
Estonia	Specific law	Minimum	Legislation and CA (universally applicable by law – pay)	No specific regulations for TAW; workers involved in transnational TAW are treated like posted workers.	No requirements
Spain	Specific law	Minimum	Law and CA (universally applicable by law)	As for other posted workers	No requirements
Finland	Specific law	Broad	Legislation and CA (universally binding)	Complete legislation	CA universally binding must be applied
Greece	Specific law	Minimum	Legislation and CA (universally binding by law)	Complete legislation	Law and CA must be applied
Hungary	Amendment to existing law (Labour Code)	Minimum	Legislation and CA (universally applicable by law - construction)	Like other posted workers	No requirements
Ireland	Amendments to existing laws	Broad	Legislation and CA (universally applicable Registered Employment Agreements (REA) and agreements reached by Joint Labour Committees (JLC) by law – construction and other sectors)	Complete legislation	Possible (for instance, under the 2005 Dublin City Council agreement)
Italy	Specific law	Broad	Legislation and CA (most representative)	Complete legislation	A 'social clause' included in public procurement legislation requires the full application of relevant CA.
Lithuania	Specific law (and amendments)	Minimum	Legislation and CA (universally binding by law – not applied in practice, no such CA)	No special rules	No requirements
Luxembourg	Amendment to existing law (Labour Code)	Broad	Legislation and CA (universally binding by law)	Complete legislation	No requirements
Latvia	Amendment to existing law (Labour Code)	Minimum	Legislation	No special rules	No requirements

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Table 2: *The national legal framework on posting of workers, EU and Norway (2009) (cont'd)*

Country	Transposition of the Directive	Protection levels	Type of regulation	Application to temporary agency workers (TAW)	Public procurement
Malta	Specific law	Minimum	Legislation and CA (universally binding by law – not applied in practice, CA only at company level)	No special law on TAW	Terms of employment must be disclosed in advance
Netherlands	Specific law	Minimum	Legislation and CA (universally binding by law)	Complete legislation	No requirements
Norway	Amendments to existing laws	Minimum	Legislation and CA (universally binding by law – construction and shipbuilding)	Complete legislation	Conditions on terms of employment including collective agreements
Poland	Amendments to existing laws (Labour Code)	Minimum	Legislation	Complete legislation	No requirements
Portugal	Amendments to existing laws (Labour Code)	Minimum	Legislation and CA (universally binding by law)	Complete legislation	No requirements
Romania	Specific law	Minimum	Legislation and CA (universally binding by law)	Like other posted workers	No requirements
Sweden	Specific law	Broad	Legislation and CA (most representative)	Complete legislation, like posted workers	No requirements
Slovenia	Employment Relationship Act	Broad	Legislation and CA (universally binding by law)	No special rules	No requirements
Slovakia	Different amendments to existing law	Minimum	Legislation and CA (universally binding by law)	No special rules on TAW	No requirements
United Kingdom	Employment Relationship Act	Broad	Legislation	Complete legislation	No requirements

Source: *EIRO*

National choices and ECJ decisions: Minimum or full protection?

As can be seen in Table 3, only three countries – Latvia, Poland and the UK – have assigned exclusively to the law the definition of the employment and working conditions of posted workers. All other countries have foreseen the possibility of also regulating their terms of employment by collective bargaining. Two of these, Lithuania and Malta, stipulated that this should apply through universally binding agreements – agreements that have not yet been concluded. In Lithuania, the social partners have never used the possibility to request from the Ministry of Social Security the extension of collective agreements to entire sectors or territories. In Malta, collective agreements are concluded at only company level. The UK also uses only legislation for regulating the employment relationship of posted workers, but it has extended the scope of regulation beyond the aspects listed in Article 3.1 of the Directive. All other countries opted for recognising the role of collective bargaining with respect to posted workers, either replacing the legal minimum protection levels with levels agreed through bargaining, or extending the entirety of the guarantees granted by collective agreements to posted workers.

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Not surprisingly, some consistency is apparent in the way in which countries regulate the employment conditions of posted workers. Once the main choice is made, it applies to both legal regulation and collective agreements.

Countries that limit the application of legal protections to minimum levels also envisage that collective agreements can merely replace such minimum levels, while – where legal guarantees extend beyond the strict list in Article 3.1 – collective agreements also apply broadly to posted workers (even if the details and scope of such extension may differ across countries).

In terms of protection levels, the distribution of the countries is relatively balanced: 16 countries implement only minimum protections, while 11 apply broader protections. The majority of the NMS (which are mainly exporters of labour) have implemented the Directive by imposing on workers posted in their own territories only the minimum requirements stated in Article 3.1, applying their own labour law. These countries are Bulgaria, the Czech Republic, Cyprus, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Romania and Slovakia. Among the EU15, Greece, the Netherlands, Portugal and Spain decided to adopt the same approach, as did Norway. Of course, companies that post workers abroad can legitimately continue to apply to posted workers the labour law (and collective agreements) of their countries of origin for these same elements of the employment relationship, in case these are more favourable to workers than those of the host state.

In contrast, a majority of the EU15 Member States, and Slovenia (countries that are mainly importers of labour and apply a more protective – and thus more expensive – regulation of employment) have implemented the Directive by trying to fully exploit the possibility of extending the application of national labour law to workers posted to their territories. In some cases, the implementation foresees the application of the complete legislative and collectively agreed set of rules on all matters and in all sectors. This is the case for Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, Luxembourg, Sweden and Slovenia. Effectively, legislators in these countries, making use of Article 3.10 of the Directive, have declared the main part or even the entire national labour regulation as 'public policy provision'. Neither the EC Treaty nor Directive 96/71 contains any definition or qualification of the term 'public policy provisions'. Therefore, these Member States adopted their own notion of this concept, one that appears to embrace the entire national corpus of labour laws.

The question is whether this 'national notion ' of 'public policy' or 'public order' can be considered compatible with that recently elaborated by the ECJ in relation to Article 49 of the EC Treaty (TEC), on the freedom to provide services within the Community (now Article 56 of the Treaty on European Union (TEU) and following; Davies, 1997). Since the end of the 1990s, the ECJ – encouraged by the Commission - has carried out a rigorous but prudent evaluation of the conduct of those Member States which, on grounds of public policy, have extended the application of their national labour law beyond the matters explicitly listed in Article 3.1 of the Posting of Workers Directive. The ECJ has pointed out that, generally speaking, European law does not impede the extension of the application of national laws or national collective agreements to posted workers, even if the level of protection offered by the host Member State is higher than the minimum standard resulting from European law. This operation is, nevertheless, subject to three tests:

- equal treatment (formal and substantial) between national and other European firms;
- effective and genuine protection of the posted workers;
- proportionality between the need for protection and the limitation of the free movement of services (Davies, 2002; Giesen, 2003).

Table 3: *Regulation of posted workers in EU and Norway*

		Collective agreements		
		None	Minimum	Broad
Legislative provisions	Minimum	Lithuania****, Latvia, Malta****, Poland	Bulgaria, Czech Republic, Cyprus*, Greece, Estonia, the Netherlands, Norway, Spain, Hungary**, Portugal, Romania, Slovakia	
	Broad			Austria, Belgium, Denmark*, Finland, Germany, Ireland***, Italy*, Luxembourg, Slovenia, Sweden*

Notes: *Agreements signed by most representative social partners, **collective agreements only in the construction sector, *** only sectoral **Registered Employment Agreements** (REAs); ****in principle, minimum protections can be defined by universally binding collective agreements, but in practice there are no accords of this kind.
Source: *EIRO*

Protection standards

The ECJ has repeatedly stressed that the assessment of worker protection standards should take place with reference to the posted workers alone and not to workers already operating in the national market. Regarding the application of Treaty rules, the ECJ has made it clear that the host national legislator should not regard posted workers as part of the national labour market, as they will return to their country of origin at the end of their mission. Accordingly, the standards concerning the free movement of workers (Articles 39 of the Treaty establishing the European Community (TEC) and following, now Article 45 TEU and following) are not applicable, whereas those concerning the free movement of services are. For more on this see:

- ECJ joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98, 71/98 *Finalarte* [2001] ECR I-7831, paragraph 22;
- ECJ case C-1139/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 15;
- ECJ case C 43/93 *Vander Elst* [1994] ECR I-3803, paragraph 21.

Furthermore, the protection granted must be real, that is, genuinely advantageous for the posted worker. For more, see:

- ECJ, joined Cases C 369/96 and 366/96 *Arblade* [1999] ECR I-8453, paragraphs 52–54;
- ECJ case C-165/98 *Mazzoleni* [2001] ECR I-2189, paragraphs 34–37;
- ECJ case C-164/99 *Portugaia Construcoes Lda*, in FI, 2002, IV, 216, paragraph 29;
- ECJ joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98, 71/98 *Finalarte*, paragraph 48.

A guarantee that the posted worker will be granted the same rights once they return to the country of origin, or guarantee of rights referring to false needs, is considered by the ECJ as a barrier to the national market, constituting therefore an unjustified protection of the national market (infringing Article 49 TEC, now Article 56 TEU). Moreover, insignificant additional protection offered to posted workers cannot justify a significant obstacle to international competition in the supply of services. For more,

- see ECJ joined Cases C 369/96 and 366/96 *Arblade*, paragraph 75;

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- ECJ case C-165/98 *Mazzoleni*, paragraphs 30–41;
- ECJ joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98, 71/98 *Finalarte*, paragraphs 49–52.

However, a substantial benefit for posted workers might well justify a significant restriction of the competitiveness of transnational service providers on the national market. It is hard to see how such a balance would be defined or assessed in practice, notably by national judges in specific cases (see ECJ, joined Cases C 369/96 and 366/96 *Arblade*, paragraph 75; Case C-165/98 *Mazzoleni*, paragraphs 37 and 41).

Public policy provisions

More recently, the ECJ has adopted an extremely strict notion of 'public policy', thus making exceptional the application of national norms considered as 'public policy', as per Article 3.10 of the Posting of Workers Directive. In the ECJ's view, the interests of host/labour importer states and home/labour exporter states are balanced when posting companies are obliged to observe the regulation of the host state only on the matters explicitly listed by Article 3.1 of the Directive. These matters have apparently evolved from being minimum requirements to constituting the maximum requirements that posting companies are bound to respect.

The ECJ has clarified that it is not *national* public policy unilaterally determined by the Member State that justifies the extension of the host state's labour law to matters other than those listed by Article 3.1 of the Directive. Rather, it is the requirements of *international* public policy that allow for such an extension. This can be deduced from Declaration 10 annexed to the Directive (see ECJ, Case 319/06, *Luxembourg*, [2008] ECR I-209, paragraph 32). The latter interpretation is clearly much stricter than the former: international public policy legitimises the application of national laws only when it is absolutely necessary to protect the fundamental rights of a person or the sovereignty of the state. Furthermore the host state must satisfy the burden of proof of concordance with this definition of public policy provision.

This last, more radical, reasoning has led the ECJ to affirm that in all matters regulated by European Directives the application to posted workers of a higher level of protection than the minimum granted by European law cannot be imposed on foreign companies. (See ECJ, Case 319/06, *Luxembourg*, in respect of the extension of the application of Luxembourg's laws on part-time and fixed-term contracts.) According to the reasoning of the ECJ, such higher-level protection cannot be considered a public policy provision, since the Member States, by approving the European Directives, have already agreed on the appropriate minimum level of protection to be granted in the European Internal Market.

Furthermore, the 'minimum protections' as regards the matters explicitly listed in Article 3.1, must be also interpreted in a strict sense. In the cases of Laval (see ECJ, Case 341/05, *Laval un Partneri Ltd* [2008] ECR I-51), Rüffert (see ECJ, Case 346/06, *Rüffert* [2008] ECR I-128, paragraph 38), and Luxembourg (see ECJ, Case 319/06, *Luxembourg*), the ECJ has specified that the mandatory application of 'minimum rates of pay' set by the host state must be rigorously limited to the 'minimum wage' as defined by the UK concept, the minimum hourly wage being stipulated to be equal for every type of job in any sector.

According to this strict interpretation, the ECJ has deemed that – pursuant to Article 3.1 of the Directive – it is not possible to include in the concept of 'minimum rates of pay' the following:

- sectoral minimum wages set by collective agreement that are not universally applicable by law, as with the Swedish wages discussed in the Laval case;

- minimum wages set by collective agreement that are universally applicable by law but only for a sector or for a region in the host member State, like the German wages discussed in the Rüffert case;
- the system of indexation of minimum wages set against inflation by law, as discussed in the Luxembourg case.

According to the opinion of the ECJ, the Directive also prevents Member States from indirectly reaching the same result by applying (in matters others than the ones in Article 3.1) their own labour law as a condition for companies to be admitted to public procurements (See ECJ, Case 346/06, *Rüffert*, paragraph 33). However, in the legal order of some Member States, these requirements have been set as a condition for participating in public procurements and they have not been changed until now. This is the case for Germany, Italy, Denmark, Finland, Malta, and Greece. It is worth noting that the UK has not introduced by law any social clauses as conditions to be respected in order that public procurement contracts be awarded; nevertheless, each public administration is free to introduce such requirements in its contracts. A similar situation can be found in Ireland.

Germany has limited the extension of national law to posted workers (on matters other than those listed in Article 3.1) to the sectors widely exposed to the risk of social dumping due to the prevalent employment of unskilled labour – the construction sector, plumbing, and electrical works. Even if this solution seems a reasonable way to preserve the functioning of the national labour market, it is doubtful that it would be considered compatible with the notion of public policy used nowadays by the ECJ. Indeed, compatibility seems to have been already dismissed in all the rulings mentioned above. Whereas Member States pleaded the necessity of avoiding a shock to unskilled labour on their markets (see ECJ, Case 319/06, Luxembourg, paragraph 53; Case 341/05, Laval, paragraph 103), the ECJ based its conclusions on formal arguments, without taking into account or assessing the economic situation – in particular, sectoral employment and wage data.

The Posted Workers Act, introduced before the adoption of the EU Directive, was seen as a way to hinder 'social dumping.' It has also been used as a means of introducing nation-wide minimum protections (essentially in terms of wages, in all domestic companies through a special extension procedure) and of combating low wages in Germany. This latter aspect attracted criticism from employer organisations, notably outside the construction sector which was originally the only one covered by the law. Interestingly, the law has been used since its inception to establish minimum protection in an increasing number of sectors, so that the relevance of posted workers appears somehow incidental. Of prime importance seems to be the creation of a level playing field for all companies, including foreign undertakings, that post workers to Germany (DE0710019I). While the unions welcome the use of the law in this direction – at least until a national minimum wage legislation is implemented – the employers are quite critical, as they believe this is a misuse of the law on the posting of workers.

Temporary agency work

None of the Member States has adopted a special regulation regarding workers posted by temporary employment agencies established in another host state (see Table 2). Consequently, in countries with specific legislative provisions on temporary agency work (TAW), the entire body of labour law of the host state must be applied to posted temporary workers. In cases where TAW is not regulated, the rules on posted workers apply. It is important to stress that the choice of extending the complete legislation on TAW to posted workers should be deemed perfectly compatible with the Directive, in so far as Article 3.1 d) states that every Member State shall grant the application of its own 'conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings' to foreign posted workers.

This appears to be in contradiction with the interpretation of Article 3.1 to include 'maximum protections'. In a single domain, namely TAW, it is possible to enforce 'full' protection, while in general only 'minimum' protection should be enforced.

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National choices and ECJ decisions: law or collective agreements?

Article 3.10 of the Directive offers to the Member States the option to implement the protections through collective bargaining rules. Nevertheless, this option is somewhat theoretical in countries with no legal arrangement whereby collective agreements can be declared universally applicable throughout whole sectors, as is the case for Cyprus, Sweden, Denmark and Italy (Table 2).

As clarified above, Article 3.10 allows Member States to extend to posted workers the application of all terms and conditions of employment set out in national collective agreements and concerning the activity of service providers operating in sectors others than construction. However, these collective agreements must be 'universally applicable' or, in the absence of a formal system for declaring collective agreements to be universally applicable, 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned' and/or 'which have been concluded by the most representative employers' and workers' organisations at the national level and which are applied throughout national territory'. Member States are required to always ensure the equality of treatment for both national and foreign undertakings in a similar position.

Some Member States have implemented the Posting of Workers Directive, stating that those undertakings that post workers are required to respect the provisions of the national collective agreements declared universally applicable, even if they address issues beyond those mentioned in Article 3.1. These are Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, Luxembourg, and Slovenia. Others have limited this extension to national collective agreements dealing with minimum wages. This option was chosen by Bulgaria, the Czech Republic, Cyprus, Greece, Estonia, the Netherlands, Norway, Spain, Hungary (in the construction sector), Romania and Slovakia.

The case of Sweden is peculiar in this respect as the extension of collective bargaining provisions is not envisaged by law but rather left to the operation of collective bargaining; the Posting of Foreign Employees Act (1999) recognizes the right of association and the right of negotiation in connection with foreign posting (Section 7). This is the key reason behind the attempts by Swedish trade unions to collectively negotiate the terms of employment of posted workers (see section on 'Level of debate and social partner actions'), which led to the dispute around the Vaxholm/Laval case.

Germany and Ireland have extended the application of collective agreements to posted workers only in those sectors that are particularly exposed to low-wage competition due to their significant use of unskilled labour. Germany has progressively extended the obligation to respect pay rates set by collective agreements – declaring them universally applicable – to posting undertakings that are active in the following sectors:

- the construction industry;
- electrical trades;
- painting trades;
- roofing trade;
- the building-cleaning industry;
- mail delivery services (this extension is still under review in the courts);
- special services in mining;
- further professional training;
- waste disposal;

- industrial textile services;
- security services.

It is worth noting that temporary work agencies are covered neither by the Posted Workers Act nor by universally applicable collective agreements, which means that there are no generally binding minimum wages for temporary workers posted to Germany. Ireland has only imposed the application of the Registered Employment Agreements (REAs) and the minimum wages and terms of employment set by Joint Labour Committees (JLCs). Since many REAs are actually company agreements, the main area of extension is in the construction sector. Other examples are the printing sector REA and the electrical contracting industry REA.

Italian and Danish laws implementing the Directive have required posting undertakings to respect all the provisions of national collective agreements that are not universally applicable but were signed by the most nationally representative trade unions and employer associations. These collective agreements, according to Article 3.8 of the Directive, can be considered equivalent to those of universal application. The main problem here is how to ensure the equal treatment of national and foreign companies if the latter are required to apply national collective agreements in full, agreements that are not mandatory for national companies. In fact, these collective agreements are binding only for the signatory parties and the national undertakings and workers directly represented by them. Should these agreements be mandatory for posted workers, they would bind foreign companies posting workers, while national companies would remain exempt.

The ruling on the Laval case has shown the significance of the issue for those Member States, such as Sweden and Denmark, that did not set minimum wages by law or by universally applicable collective agreements. According to Article 3.8 of the Directive, the sectoral collective agreements that establish the minimum wage, signed by the most representative trade unions and employer associations could, somehow, be considered generally applicable. However, insofar as it is not binding for all national companies in the sector, the mandatory application of that minimum wage cannot be extended to foreign companies without breaching the equal treatment principle. Consequently, foreign companies could legitimately apply to their posted workers the minimum wage set by law or collective agreement in their country of origin.

In Italy, even though collective agreements are not universally applicable, the minimum wage that they set is considered binding, even for undertakings that have not signed the collective agreement and do not belong to the signatory employers' associations. Italian case law considers this minimum wage to be consistent with the right to a sufficient and proportional wage, a right enshrined in Article 36 of the Italian constitution. In Italy, the minimum wage set by collective agreements can therefore be regarded as universally applicable to national undertakings operating in the sector. For all other matters regulated through collective agreements, the Italian situation is rather similar to the Swedish one, regarding the implications of the Laval case.

National reactions to ECJ decisions

Denmark has tried to make its system compatible with the opinion expressed by the ECJ in the Laval case by amending in 2008 its Act on posting of workers. This has been achieved partly through codifying existing practice on preconditions for collective action, and partly through introducing further requirements for obtaining a collective agreement with foreign service providers. These adjustments specify the three conditions under which industrial action is justified to enforce the application of collective agreements. The agreements should:

- cover the entire Danish territory;
- have been signed by the most representative social partners;
- clearly state the rates to be applied by the foreign service provider.

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Luxembourg also changed its rules following the ECJ decision and included more elements in addition to those explicitly qualified as public policy provision, such as the minimum indexation mechanism. The rules on part-time and temporary employment were repealed and the obligations on foreign undertakings regarding notification, the establishment of a local representative and document keeping were reduced. These modifications have been discussed with the social partners, which expressed differing views, the unions pressing for having full indexation of salaries (not only of minimum levels).

In Sweden, a commission was set up to develop recommendations to revise the existing regulations in response to the Laval case. The commission presented the results of its investigation in December 2008, and proposed to limit trade unions' rights to call for industrial action. In particular, trade unions would not be allowed to take industrial action with a view to forcing a foreign undertaking to sign a collective agreement, if the employer were already applying wages and terms of employment equivalent to those set by Swedish collective agreements (SE080429I; SE0801019I; SE0706029I).

Uncertainty remains over the question regarding under which circumstances it is possible to extend the application of collective agreements dealing with matters other than those stated in Article 3.1. Can these provisions be extended to posted workers if they satisfy requirements of universal application and of equal treatment alone? Or must the extension also be justified on grounds of public policy reasons, as required for the extension of national laws?

In the Luxembourg ruling, the ECJ seems to have opted for the more restrictive interpretation. In this case, the Court has deemed incompatible with the Posting of Workers Directive the provision of Luxembourg's law of implementation, which obliges foreign posting companies as well as national companies to apply sectoral collective agreements in full. In the ECJ's opinion, Luxembourg did not prove the absolute necessity of this general extension for keeping order and ensuring the functioning of its own society and labour market. Therefore, the extension is regarded as a barrier to the free movement of services, and hence incompatible with Article 56 TEU.

As a consequence of the different ECJ rulings, the room for manoeuvre by national trade unions trying to govern conditions and terms of employment practiced by posting companies has become very limited: trade unions cannot organise strikes or other forms of protest designed to push foreign companies into signing agreements and respecting minimum conditions set by national collective agreements; furthermore, the national legislator cannot support trade unions' actions either. Following the ECJ rulings, national legislators cannot, by legislation alone, oblige foreign posting companies to apply collective agreements on matters beyond those listed in Article 3.1 of the Directive, even if the agreements are universally applicable. It has to prove that this choice of extension is based on public policy provisions.

The ECJ's most recent rulings have made it extremely difficult to extend protections beyond those listed by Article 3.1 of the Directive (see ECJ, Case 341/05, Laval, paragraph 108; Case C-438/05, Viking Line [2008] ECR I- 51, paragraph 81). According to this interpretation, when free movement of services clashes with the collective defence of rights practiced within national systems of industrial relations, the former will almost always prevail.

Administrative checks

As illustrated above, it is currently almost impossible to know how many workers are posted in Europe, as reliable, relevant data is missing for most countries, with the exception of the Czech Republic, Finland, Lithuania, Slovenia and – since 2008 – Denmark. In all other cases, data, if at all available, is patchy or based on estimates. This is a substantial obstacle to any quantitative comparison of figures across countries.

However, some Member States have established a mandatory system of ex ante notification (Greece, Lithuania, Luxembourg, Slovenia, Spain and, since 2009, Portugal) or registration (Finland and, since 2008, Denmark) of Community undertakings supplying cross-border services that involve the posting of workers. Some, such as Belgium,

Finland and Luxembourg, oblige posting companies to have a site, a representative and/or to keep all documentation related to the contracts of the posted workers in the host state's territory.

These provisions could be very useful for monitoring and controlling the phenomenon, especially if they were extended to more countries. However, according to the ECJ, most of them impede the free movement of services and are hence incompatible with European law. Advance registration or authorisation, the obligation to have a site or a representative in the host state, and even the obligation to keep documents regarding the terms and conditions applied to posted workers or to translate them into the official language of the host state can be regarded as trade barriers (see ECJ, Case 319/06, Luxembourg).

According to Article 4 of the Directive, and the opinions expressed by the European Commission and the ECJ, host-state labour inspectorates (or other competent authorities) should ask for cooperation, from their counterparts in the home state, on checking the conditions of employment applied by posting companies to posted workers. However, this cooperation is currently not foreseen at all. None of the Member States have set up any kind of regulation of the checking and cooperation activity, despite the **2008 EU Commission Recommendation on 'enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services'**.

Checks on the conditions applied to posted workers are, in effect, done only by the host-state inspection services when visiting the workplace while the service is carried out. Consequently, checks and the enforcement of regulations on posted workers depend on the quality and quantity of local administrative inspections in each host state.

There are some new interesting cases of cooperation between trade unions of neighbouring countries, which try to manage the situation of posted and cross-border workers, providing them with information on the conditions and terms of employment to be applied and services of legal protection (see the following section – **Level of debate and social partner action**).

Finally, very few cases involving posted workers have – to date – been brought before national labour courts. Neither foreign undertakings nor national undertakings or trade unions have appeared to complain about – respectively – the binding conditions imposed by the host state's legislation, and cases of social dumping by foreign posting companies.

Level of debate and social partner action

In many countries, the issue of posted workers attracts at most limited attention in the public debate, even the social partners regarding it as a marginal question. In certain cases, the discussion is, rather, focused on foreign workers in general and on temporary-agency workers, and on the irregular situations that sometimes characterise these employment relationships. Posted workers are sometimes associated with this debate. For example, posted workers do not constitute an important issue in Cyprus, the Czech Republic (although foreign workers and TAW do), Latvia, Malta (where the issues of foreign workers and undeclared work are more topical), the Netherlands (where foreign workers and TAW attract a lot of attention), and Poland (where the focus is on foreign workers in general). Typically the absence of any debate is linked to the marginal relevance of 'in-bound' posting in each country. 'Out-bound' posting of workers is apparently of much less interest and therefore not at the centre of public discussions.

Trade unions

In a number of other countries, there is only marginal reference to posted workers. This is the case in Bulgaria, Estonia, Greece and Hungary. The Bulgarian trade unions have launched cooperation with their Greek counterparts on common union recognition and protections (see section on **Cross-border trade union cooperation** for details). The Estonian Trade Union Confederation (**EAKL**), in the framework of the Laval case, put forward a demand to the government to

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support the position of the Swedish trade unions, maintaining that social dumping should be avoided and that the employment and working conditions in the host country should be respected including by posting undertakings. In Greece, unions have sometimes denounced the use of cheap labour by foreign subcontracting companies, mainly in the sectors of tourism, construction and petroleum products.

In Hungary, in 2004, a case of alleged irregularities recorded, by the German authorities, during a wave of checks involving some 300 Hungarian firms (the so-called SoKo Pannonia and the SoKo Bunda cases) raised public interest, especially because the allegations were later dismissed. However, its impact was limited, as a number of companies went bankrupt in the meantime. The issue of posted workers has returned to the headlines in the meantime, due to allegations that the Budapest airport authority used posted workers as strike breakers (HU0903019I).

This said, it must be underlined that the ECJ rulings and the mobilisation at European level that followed them have seen some involvement of the major trade union organisations in practically all Member States. Throughout Europe, unions generally backed the criticism from the ETUC and demanded the revision of the Posting of Workers Directive. In particular, the ETUC asked for clarification of the supremacy of trade union and worker rights, as recognised by the Charter of Fundamental Rights of the European Union, over economic freedoms. Trade unions demand the introduction in the Lisbon Treaty of a ‘social progress clause’ to strengthen the social dimension of the European Union, to ensure the full use of union rights enshrined in the Charter, and notably to strengthen the role of collective bargaining. As in the case of the employment of foreign labour in general, they also underline the importance of more effective monitoring and sanctioning of illegal practices in the domain of posting of workers, namely through the creation of a dedicated European network to survey and monitor the employment and working conditions of posted workers.

In this way, the European debate over the Directive has involved the social partners even where it is not a key issue at domestic level; however, the involvement and mobilisation of national unions has varied between Member States. For instance, in Austria, only a limited reaction was provoked by the ECJ rulings because it is believed that they do not have significant implications for the regulatory and industrial relations system in Austria, given the almost generalised presence of universally binding agreements due to the mandatory system of employer representation through the Austrian Federal Economic Chamber (**WKÖ**). Nevertheless, trade unions have criticised the decisions: the Chamber of Labour (**AK**) and the Austrian Trade Union Federation (**ÖGB**) consider that the rulings improperly subordinated trade union and worker rights to the free circulation of services.

Similarly the Irish unions fear that the implications of the ECJ decisions may open the way to wage dumping; in particular, they are concerned that the Irish voluntarist industrial relations system may be threatened. However, their principal recent initiatives have been in the fields of migrant workers and TAW with a view to increasing the protections afforded to workers in these groups, thereby reducing differentials in employment and working conditions so to avoid possible tensions between different groups of workers. Posted workers do not figure prominently or directly in their actions.

Limited attention is similarly paid to posted workers in Spain, where the debate focuses on migrant workers in general. The only important initiative was launched in Spain in 2007, when the Construction, Timber and Allied Trades Federation of Workers’ Commissions (**FECOMA-CCOO**) highlighted the situation of Portuguese workers posted by transnational companies to building sites in Spain. These workers, according to union calculations, amounted to around 70,000 people. FECOMA-CCOO carried out an awareness-raising campaign on building sites, distributing information in Spanish and Portuguese about worker rights, which stressed the importance of reporting all violations to the labour inspectorate. The union maintained that in the case of many posted workers, the law was not respected and it asked the employers to check on their subcontractors and demand compliance with the law.

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In Italy, there is neither specific information nor are there special initiatives regarding posted workers. The three main trade union confederations – the General Confederation of Italian Labour (**Cgil**), the Italian Confederation of Workers' Unions (**Cisl**) and the Union of Italian Workers (**Uil**) – have repeatedly and forcefully stressed that the ECJ rulings underline the necessity of strengthening the European dimension of trade unionism, notably through collective bargaining, with a view to guaranteeing posted workers the same protections, rights and employment conditions as enjoyed by resident workers, according to the principle of non-discrimination. Moreover, in June 2009, these union confederations signed a **document listing a number of proposals for revising and improving the Posting of Workers Directive**. The proposals included: a clear statement that the protections covered by Article 3 be regarded as a minimum only, which can be integrated at national level; that compliance with the Directive should be extended to non-EU undertakings; and that the principle of non-discrimination with respect to posted workers should be reinforced.

It must be underlined that a number of unions' activities towards workers are not addressed exclusively at posted workers, but aim to reach foreign workers in general, the reason being that it is often hard to know the exact contractual relationship of the individual worker, especially in such sectors as construction, where several companies may be working simultaneously on the same site. In Belgium, for instance, the Confederation of Christian Trade Unions (**CSC/ACV**) established an information service for Polish builders, distributing leaflets in Polish at construction sites and in Polish churches, with a view to ensuring awareness of minimum rights and stepping up the fight against illegal work (BE0611069I).

The debate on posted workers is particularly important in countries affected by the ECJ rulings, but is not limited to those. As illustrated above, the case of Germany is somewhat exceptional, as the transposition of the Directive seems to have been used to enforce nationwide minimum wages, which 'incidentally' are meant to regulate posted workers. The trade unions have criticised the ECJ decisions and joined the ETUC campaigns, but the specific issue of posted workers seems to have lost relevance in the public debate in recent years. It remains significant in the building sector, where it originated and where the posting of workers was regulated even before the passing of the Directive. Similarly in Sweden the debate, though more intense than in Germany, has followed the ECJ ruling on the Vaxholm/Laval case (SE0412101N, SE0804029I, SE0901029I). The main issue has been the consequences for national labour relations, with the unions fearing that the ruling could endanger the system of industrial relations, while the employers have backed the decision to foster the free movement of services. Before the ruling, the debate had been rather limited, as was the number of disputes involving posted workers (with about 10 over the course of a decade). These disputes mostly concerned refusals to sign collective agreements, low wages or failure to pay workers. In the field of posted workers, the trade unions have followed their traditional role, trying to develop both representation and collective bargaining, as recognised by the law implementing the Directive (see previous section **National choices and ECJ decisions: law or collective agreements?**).

The issue of posted workers is certainly significant in Denmark, Finland, Norway and the UK. In Denmark, the trade unions have developed a number of initiatives, including joint actions with the employers and the authorities (see next section on **Employer positions**).

Among them are information campaigns, recruitment efforts, cooperation with foreign unions and supervision of workplaces with posted workers, with a view to assessing their employment and working conditions. However, it proved particularly difficult to monitor sectors such as construction, where posting can be short and workers are very mobile. Information campaigns included the establishment by the Danish Confederation of Trade Unions (**LO**) of a telephone hotline 'Halo Kolego', from which eastern European workers can get information about worker rights and protections. The United Federation of Danish Workers (**3F**), the largest union in Denmark, created special websites in Polish and Latvian to inform posted workers about their rights and industrial relations in Denmark. Recruitment initiatives were carried out in particular in construction, agriculture and nursery, but with limited results.

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In Finland, the issue of posted workers has been topical since the EU enlargement in 2004, with many companies being set up in Estonia by Finnish employers and a lot of workers being posted to Finland. Social dumping is high on the agenda, especially in the construction sector where the universal applicability of the collective agreement is regarded as a very important issue. At sectoral level, the Finnish Construction Trade Union (**RL**), at times with the participation of the employers, has initiated a number of activities to disseminate among foreign workers information about their rights – both directly on building sites and through the union's web pages. A specific general initiative, which is not confined to posted workers, was the establishment in 2003 of the Finnish Working Life Information Point in Tallinn, Estonia, by the Central Organisation of Finnish Trade Unions (**SAK**).

In Norway, there is a broad debate on social dumping, which involves posted workers, and the government has recently introduced a number of specific measures, often with the support of the trade unions and the criticism of the employers. Indeed, the Confederation of Trade Unions (**LO**) has been pressing the government to take action to combat low-wage competition. The LO's initiative was crucial on many fronts: giving shop stewards the right to check subcontractors' wages and employment conditions; introducing an employer's obligation to ensure that subcontractors comply with the rules on generally applicable collective agreements; and establishing the joint employer–subcontractor liability, in case of non-compliance. The unions have also been critical of the ECJ rulings, especially because they see them as threatening the independence of national governments to use the 'public policy' clause of Article 3.10 and to define autonomous public procurement policies that give specific attention to contractual terms of employment and worker protections.

In the UK, trade unions have been long concerned with the use of posted workers, striving to ensure that the terms of the few remaining national collective agreements (such as in the construction sector) are respected. For instance, in July 2004, the unions supported the statement by the Labour Party, in the so-called 'Warwick agreement', that the 'EU Posted Workers Directive will not lead to under-cutting'. More recently, against the background of the economic downturn, there have been a number of disputes regarding posted workers; however, rather than focusing on their employment and working conditions, the opinion has been voiced by some that posted workers limit job opportunities for UK residents (see section on **Disputes and conflict**).

In general, the Trades Union Congress (**TUC**) has been very critical of the ECJ decisions, as it believes that the ECJ interpretations narrow – without justification – the protections offered to posted workers and the capacity of governments to prevent, through the undercutting of established terms and conditions, unfair competition (UK0910029I). Also in the UK, Unite launched a **Europe-wide petition** for the revision of the Posting of Workers Directive and the introduction of a 'social progress' clause in the Lisbon Treaty.

Employer positions

In the national debates, the positions of the employers are often more differentiated than are the unions'. On the one hand, employers have often welcomed the ECJ rulings by stressing the importance of preserving the freedom of provision of services. On the other hand, especially in sectors such as construction, they have shared with the unions both concerns and initiatives aimed at combating low wages and irregular terms of employment. Moreover, some employer organisations have underlined the positive features of the national systems, such as the cooperation between the social partners and the capacity to ensure social cohesion. This has been for example the case of the Austrian WKÖ and the Belgian Federation of Employers (**FEB/VBO**). Employers often keep information pages and services for companies intending to post workers to their countries. In general, they appear in favour of more effective transnational cooperation and enforcement of rules on posted workers, while at the same time they regard the free provision of services as a key EU goal and therefore welcome any initiatives aimed at reducing unnecessary constraints and administrative burdens on firms.

For instance, the Italian body **Confindustria** appreciated the ECJ decisions that confirmed the importance of the freedom of establishment and circulation of services. The UK Confederation of British Industry (CBI) stated that the free movement of labour and services 'will do more to equalise income levels across the EU than protectionist policies, which have the effect of denying workers from less well-off nations access to developed markets'.

At sectoral level, a number of initiatives by employer organisations exist (at times in conjunction with trade unions and public authorities), notably in those countries where the debate on posted workers is to the forefront. In Denmark, employers cooperate to monitor the application of the rules on posted workers. Employers, trade unions, the police and tax authorities signed an agreement on monitoring the labour market and exchanging information about irregularities. This initiative is particularly important in the construction sector, where the Danish Construction Association (**Dansk Byggeri**) has agreed to collect information on whether their member companies respect existing agreements. However, such monitoring tools, consisting of meetings with subcontractors (including foreign ones), have not proved very successful. In Italy, Confindustria and the union confederations (Cgil, Cisl and Uil) have started talks to negotiate measures aimed at reducing the likelihood of cases of economic and social dumping.

In Norway, the employer organisations have developed initiatives to fight low pay and irregular work. A notable project was implemented in 2002 in the building sector by the Federation of Norwegian Construction Industries (**BNL**). 'Honesty in the construction sector' (Seriøsitet i byggenæringen) sought to gather relevant sectoral actors and regulatory authorities in a joint effort to combat substandard employment and tax practices (NO0312103F). This initiative has later developed into an industry forum for cooperation.

In the UK, the employer organisation in the engineering construction sector, the Engineering Construction Industry Association (**ECIA**), released in February 2009 a set of *Guiding principles for companies*, which should provide support to members about the use of non-UK contractors and labour on engineering construction sites. ECIA underlines that the national agreement for the engineering construction sector, one of the few industry-wide agreements still present in the UK, stipulates that posted workers must be paid the same rates as UK employees. Furthermore, the guidelines state that members should ensure that non-UK contractors also consider UK workers for filling their vacancies: 'It is good practice for the non-UK contractor to explore and consider the local skills availability and to consider any applications that may be forthcoming'. They also underline the importance of informing in advance the local trade unions about the use of posted workers.

At European level actions have been taken in some sectors, jointly between the social partners. The European Social partners in the construction sector have developed a website **http://www.posting-workers.eu**. Following the Social partners description, the web site 'compiles information on legal provisions and regulations affecting construction activities, with the aim of helping firms and workers identify those national legal and conventional provisions which have to be respected when workers are posted from one EU country to another'.

Cross-border trade union cooperation

EIRO correspondents also report on the cooperation between trade unions to exchange information and monitor labour market developments in cross-border areas. Even where no special debate on posted workers takes place, some cooperation has been developed with regard to migrant workers in general, which can cover posted workers as well. For instance, the Austrian trade union confederation ÖGB, in the province of Burgenland and the Hungarian trade union **MSZOSZ** have initiated a joint cross-border project (**Zukunft im Grenzraum**). In Bulgaria, the trade unions have concluded a number of agreements on the development of international cooperation. In 2008, the Confederation of Independent Trade Unions in Bulgaria (**CITUB**), the Labour Confederation Podkrepa (**CL Podkrepa**) and the Trade Union Congress (**TUC**) signed an agreement to support migrant workers through mutual trade union assistance. In the 'Seville Manifesto', adopted by the ETUC at its 11th congress, trade unions declared their determination to 'strive for a better framework of mobility of Europe's workers based on the principle of equal treatment in the place where the work

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is done, or the service provided', and to 'promote a pro-active migration policy'. Similar protocols were signed in 2009 between CITUB and the Greek General Confederation of Labour (**GSEE**), which also include cross-border issues. Moreover, CITUB developed a joint project on 'Trade union participation in migration processes' with the Spanish General Workers' Confederation (**UGT**) and the Trade Union Institute for Cooperation and Development (**ISCOD-UGT**) and created information centres for the workers from both countries.

In Italy, as in other countries, the most relevant results in this field have been achieved in the construction industry. In 2008, the Joint National Commission for Construction Workers' Funds (Commissione nazionale paritetica per le casse edili, Cnce) signed a series of bilateral agreements with the German National Construction Workers' Fund (**SOKA-BAU**), the Austrian National Construction Workers' Fund (**BUAK**) and the French National Construction Workers' Fund (UCF). Such accords lay down a set of rules that are meant to guide the application of the Posting of Workers Directive on two main issues:

- the general principle of compliance with the economic and contractual conditions of the country in which the work is performed, in order to prevent every form of social dumping, bid-rigging and unfair competition among firms;
- the introduction of measures to make this principle effective in a way that avoids bureaucratic complications and the duplication of costs for firms.

The agreements affirm a reciprocity rule in the domain of social security, stipulating as they do the mutual recognition of the construction funds of all the countries involved, so that posted workers do not have to enrol in the mandatory schemes of the destination country if they are already members in their country of origin.

The various agreements mentioned were in some cases concluded at the time of the first introduction of the Directive, but little recourse has been made to them. In Slovakia, the representatives of the Metal Trade Union Association (**OZ Kovo**) agreed mutual assistance on posted workers in the so-called 1999 Memoranda Group countries, which include Austria, the Czech Republic, Germany, Hungary, Slovakia and Slovenia. Within this framework, workers posted in any one of these countries would be able to get assistance and support from the domestic trade union system. However, no demands for information have yet been made.

Disputes and conflict

A low level of conflict was reported as regards posted workers. Both collective disputes and individual grievances seem to be episodic in most countries, with very few cases in the past years in each Member State, whether EU-nationals or non-EU-nationals. Again, as underlined previously, the issue of posted workers seems to be closely tied to that of foreign labour. For instance, in Austria there was one case in 2005 regarding the posting of third-country nationals to a construction site where a number of violations in terms of pay, working time and living condition of the 150 posted workers involved were disclosed. These violations were identified through a labour inspection prompted by an alert from the Metalworking and Textiles Union (**GMT**) (AT0605019I).

In Ireland, a high-profile case in 2005 involved the posting of workers from Turkey. GAMA Endustri, a Turkish firm established in 1959, seconded employees to GAMA Construction Limited in Ireland. The Irish unions claimed that the company was not respecting the collective agreement for construction. The dispute was supported by a seven-week strike and concerned about 80 Turkish workers. It was eventually resolved by the Labour Court, which demanded the full application of the collective agreement's provisions and established a set of indemnities for the workers involved.

In Greece, in 2008, the issue of posted workers gained some relevance in the public debate in connection with two cases. The first case concerned the posting of three Greek workers to a French shipyard where they went on hunger strike to demand the payment of their wages, one dying upon his eventual return to Greece. The Greek General Confederation of

Labour (**GSEE**) harshly criticised what it regarded as the brutal exploitation of workers by placement agencies. The second case involved by Hellenic Petroleum's (**ELPE**) contracting of the construction of tanks in Thessaloniki to a Greek company which then subcontracted the work to a Belarusian firm, which used posted workers from Belarus and Lithuania. The Panhellenic Metalworkers' Union (**POEM**), in a letter to the Minister of Employment, stressed that the employment and working conditions of the posted workers were far below the levels required for Greek workers, and also pointed out the unfair competition this entailed for domestic companies, especially at times of economic difficulties.

More cases of disputes were reported for Norway, where the focus has been especially on non-compliance with collective agreements on minimum wages and overtime pay, involving posted workers from eastern Europe in the construction sector. Exceptions in this respect are Denmark, Finland and the UK. In Denmark, almost 400 sympathy strikes have been reported. According to data from LO, in the past two to three years, some 80%–90% of industrial action involved foreign service providers. Moreover, many cases taken to court have involved foreign service providers. In general, collective disputes are aimed at concluding a collective agreement, whereas court cases concern the breach of collective agreements, especially as regards wage levels. The unions in the construction sector appear to be particularly active in both fields. It should be noted that the enforcement of labour court rulings can be difficult if foreign service providers refuse to comply with the sanctions and do not pay fines or damages awarded to their employees.

In Finland, in 2005 alone, the Construction Trade Union (**Rakennusliitto**) initiated 50 industrial actions against undeclared practices with foreign labour, particularly with regard to underpayment. A case that gained some public attention, mainly for the security issues involved, was the posting of 4,000 workers from 60 countries for the construction of a new nuclear power station in Olkiluoto by the French-German consortium AREVA-Siemens. The union demanded access to the site to check compliance with the terms of the collective agreement, but the company refused.

In the UK, a relatively small number of disputes has attracted great attention and raised significant concerns, notably in the civil engineering sector. In early 2009, a widely debated case was the conflict at the Lindsey oil refinery in Lincolnshire owned by **Total**, where posted workers from Italy and Portugal were employed (UK0902019I). Other cases followed in the next few months at two power plants on the Isle of Grain in Kent and in Staythorpe in Nottinghamshire, where subcontractors were reportedly not using UK workers and paying less than the contractual rates to foreign posted workers. In May 2009, the Unite and **GMB** unions took action against Hertel, a Dutch-based contractor at the Milford Haven oil terminal, about the use of 40 Polish workers. Again, trade unions were concerned mainly about two allegations – that posted workers were paid less than the collective agreement rates and that contractors refused to consider job applications from qualified UK workers. The civil engineering sector has also recorded a number of unofficial strikes and walkouts as the recession jeopardised job security. In 2009, the industry unions, again Unite and GMB, included in their demands the renewal of points in the national collective agreement points concerning posted workers, to better align job opportunities and the terms of employment between UK workers and foreign contractors' employees.

Commentary

The subject of posted workers raises a number of issues regarding the fundamental features of the economic and social model of the European Union.

The first issue is that of the domestic regulation of the employment relationship. The Posting of Workers Directive and the relevant ECJ rulings – with their focus on the transnational provision of services - allow for the application of only a limited number of minimum protections to posted workers compared to resident workers, in consideration of the temporary character of their activity and presence in the host country. This is an exception to the general principle of domestic regulation of the employment relationship, which is justified by the principle of free movement of services. Such an exception may be assessed in terms of the proportionality between the benefits of freedom of service provision

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and the extent and scope of the reduction in worker protections – as foreseen in the Directive itself in connection with a possible revision of the rules in the early 2000s.

However, a full assessment of the phenomenon is not possible due to the lack of information on the posting of workers in Europe. Urgent action should include the creation of a monitoring tool, which would collect data on the numbers of posted workers and their employment and working conditions, integrating the sources already available (for instance, the social security systems involved in the issue of E101 forms or the various notification procedures already available) and filling existing gaps. A common, EU-wide monitoring system could keep to a minimum the burden on firms and also reduce the problems of differential treatment in the Member States. The presence of reliable data on posted workers is a precondition for a fruitful debate on their specificities and their needs for protection. Rather than representing an obstacle to the practice of posting workers, notification and registration tools are probably a necessary element for the further development of the practice of posting workers, one that could benefit both companies and employees.

In this field, the participation of the social partners could be a real strength. As we have seen, trade unions and – sometimes – employers have developed initiatives and guidelines to address the issue of posted workers, occasionally at cross-border level. The cooperation between the social partners in the 'posting' and in the 'hosting' countries could provide a sound framework for collecting information and avoiding abuses. As it stands, national public inspection authorities seem to face difficulties in keeping track of the phenomenon and in monitoring the actual employment and working conditions of posted workers. A 'lean' EU-wide notification and monitoring system with the participation of the social partners could provide the necessary information for assessing the extent and features of the posting of workers, thus providing the basis for a fruitful discussion on adapting the legal framework.

Secondly, the restrictions on collective bargaining and collective action imposed by ECJ decisions in case of disputes over posted workers should be considered carefully, as they may infringe the fundamental rights of the posted workers involved. The argument is probably not whether posted workers should be granted collective bargaining coverage and whether this should concern only minimum protections or full protections. One issue is whether posted workers should be integrated in the industrial relations system of the host country, as they are, at least partially, with regard to labour law. This is a very sensitive and complicated aspect. Furthermore, to raise the awareness of posted workers, providing information on their rights is essential: this could be done in various forms – through social partners' organisations or/and social security bodies, for example.

The uneven distribution of the debate on posted workers across countries and the prevalence of the discussion at EU level rather than at national level clearly signal what is at stake here. The key issue is the relationship between the autonomy of the national level of Directive, both through legislation and through collective bargaining, and the nature of the emerging EU legal framework. This EU framework has to strike a balance between economic freedoms, which are at the root of the community project, and fundamental social rights, which have gained increasing importance in the EU regulatory framework since the 1980s.

The overarching EU goal of combining economic dynamism and competitiveness with social cohesion requires a careful assessment of the potential impact of the Directive on posting of workers – firstly, in terms of the impact on the national labour regulations and industrial relations systems and secondly regarding the impact on the balance between economic freedoms and fundamental social rights. The specificity of the EU idea is not to establish a definite hierarchy for solving the two potential dichotomies of national versus European, and economic versus social, but rather to find a progressive combination between these different poles. Therefore, a strengthened role of the social partners at national and possibly also at European level, with a view to establishing a monitoring system and providing some scope for regulating the employment and working conditions of posted workers would contribute to redressing a situation that at present appears to be characterised by the relative prevalence of the economic and European dimensions.

The case of posted workers seems to underline that achieving social cohesion at European level depends to a large extent on maintaining and strengthening social cohesion at national level. It also underlines that economic integration cannot proceed without social inclusion.

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Annex

Table A1: *Official links to information on national legal frameworks for posted workers*

Country	Inspection
Austria	**AMS**
Belgium	**Limosa, Federal Public Service Employment, Labour and Social Dialogue**
Bulgaria	No specific information
Cyprus	**Department of Labour**
Czech Republic	**State Labour Inspection Office**
Germany	No specific information
Denmark	**Danish Working Environment Authority**
Estonia	**Labour Inspectorate**
Spain	**Ministry of labour and Immigration (in Spanish)**
Finland	**Employment and Economic Development Office**
Greece	No specific information
Ireland	No specific information
Hungary	**National Labour Inspectorate, Public Employment Service**
Italy	No specific information
Lithuania	**State Labour Inspectorate**
Luxembourg	**Labour and Mines Inspectorate**
Latvia	**State Labour Inspectorate**
Malta	**Department of Industrial and Employment Relations (PDF)**
The Netherlands	**Ministry of Social Affairs and Employment**
Norway	**Norwegian Labour Inspection Authority**
Poland	**National Labour Inspectorate**
Portugal	No specific information
Romania	No specific information
Sweden	**Swedish Work Environment Authority**
Slovenia	**Ministry of Labour, Family and Social Affairs**
Slovakia	**National Labour Inspectorate**
United Kingdom	**Department of Trade and Industry website** (texts of implementing laws)

Source: *EIRO*

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