

EU Law on Posting of Workers and the Attempt to Revitalize Equal Treatment

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Abstract:

This article aims to examine to what extent the recent reform of the Posting of Workers Directive (PWD) may represent a proper instrument to correct the well-known pro-market approach adopted by the case law of the CJEU (“Laval quartet”) and favour more worker-friendly interpretations. The revised Directive is analysed under the heading of the equal treatment rule between local worker and posted workers in order to emphasize some critical aspects of the EU law which could reduce the practical impact of that rule, especially in case of long-term postings. The idea is that even though this Directive has also been adopted as a measure of employee protection, it only partially affects the position of the home-state employers wishing to post their employees to the territory of another Member State on a temporary basis. For example, for various reasons, the scope of the equal treatment rule could be curtailed and thus restrictively interpreted by the courts.

Keywords: EU Internal Market; Freedom to Provide Services; Posting of Workers; Equal Treatment, Social Dumping.

1. Introduction.

For at least four years, the reform of the Posting of Workers Directive (PWD) has been at the centre stage of EU political debate. This reform was originally announced by president Juncker in his speech before the European Parliament of 15 July 2014. In spring 2016, the Commission adopted a first Proposal for a revision of the PWD in order to revise the rules on the terms and conditions applicable to posted workers and ensure that posted workers receive “equal pay for equal work in the same place”. However, unsurprisingly, the Proposal caused much controversy and the split between “old” and “new” Member States, and

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particularly between receiving countries and sending countries, was unavoidable¹. This is why the Commission's proposal was discussed for more than twenty months, and it was only in February 2018 that an agreement was found between the co-legislators so that in June 2018 the final text of a revised Directive 2018/957/EU (amending Dir. 96/71/EC)² was approved by the Council.

Reading the preamble, the main aim of this Directive is very clear. Recital 4 states: "more than 20 years after its adoption, it has become necessary to assess whether Directive 96/71/EC of the European Parliament and of the Council still strikes the right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other".

The important CJEU judgments, that have come to be known as the "Laval quartet", have clearly demonstrated that finding the proper balance between competing objectives at stake – as in 1996 the authors of the PWD tried to do – is very difficult. There is no doubt that the "Laval quartet" marked a fundamental shift in the nature of the relationship between national social systems and internal market law, as originally configured by the Rome Treaty. In fact, as is well-known, the Court clearly overturned the presumption in favour of the principle of territoriality, at least in the context of the freedom to provide services, interpreting and using Directive 96/71/CE on the posting of workers (PWD) as an instrument to allow "regime portability in favour of workers"³. In doing so, to some extent, the Court provided an explicit invitation to regime shopping and allowed a market paradigm based on wage competition to play an increasingly important role in the law on the posting of workers. Consequently, the EU's freedoms, and particularly the freedom to provide services, collided with national social policy to the detriment of national rules. This is very problematic in the more recent context as the economic crisis, the growth in pay gaps between Member States and the reform of European economic governance have contributed to questioning the role and status of national social spaces.

In 2018, the adoption by the European Parliament and the Council of revised Directive 2018/957/EU signalled a change on the horizon. Many observers think that the revised Directive could represent a turning point⁴. The aim of this directive is clearly to correct the

¹ The difference in the conflicting interests at stake is evident. As is well-known, whereas higher wage countries, i.e., Member States, mainly from Western Europe, receiving a large number of posted workers, have been in favour of an extension of the scope of the PWD by promoting an equal pay rule, Central and Eastern Member States, i.e. low-wage countries, triggered a "yellow-card-procedure" to block the Commission's proposal, as they have a national interest in not expanding the applicability of the host State's labour standard to posted workers. In particular they claimed that the realization of "equal work for equal pay in the same place" would mean the loss of the competitive advantage that companies established in their territory enjoy due to their lower wage costs.

² Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance) PE/18/2018/REV/1, OJ L 173, 9 July 2018, 16–24.

³ In other words, an employer moving from a less regulative state to a more regulative one is entitled to the protection of the weak standards and rules applied in the "country of origin": Deakin S., *Regulatory Competition in Europe after Laval*, Centre for Business Research, University of Cambridge, Working Paper No. 364, 2008, 21. See also Kenner J., *The Enterprise, Labour and the Court of Justice*, in Perulli A., Treu T. (eds.), *Enterprise and Social Rights*, Kluwer Law International B.V., The Hague, 2017, 199-247: "following these cases, the PWD is so constrained in its application that, in its present form, and in isolation, it offers very limited potential to be used by the host Member State to prevent social dumping and may even be promoting it".

⁴ For example, Giubboni S., *Il diritto sociale europeo alla ricerca dell'autonomia perduta: opportunità e rischi*, in *Politiche sociali*, 2019, 3. For a partly different view, see Franzen M., *Die geänderte Arbeitnehmer-Entsenderichtlinie*, in

pro-market and less protective CJEU approach and focus more on the need to protect the rights of posted workers. Some of the key changes to the text, such as those relating to remuneration and equal treatment – which this article aims to discuss – seem to have been introduced in order to find a better balance between EU rules on free movement in the single market and the social dimension at national level and, therefore, preserve the autonomy of the national systems of labour law (host States’ room to manoeuvre with a view to preventing social dumping).

As will be seen below, however, the practical impact of these changes in terms of a shift of values underpinning the internal market should not be overestimated. It is doubtful, for example, whether, and to what extent, a reform like this can really represent a proper instrument to correct the former pro-market approach adopted by the CJEU and favour worker-friendly interpretations inspired by a substantive approach of equal treatment between local worker and posted workers.

2. Equal Treatment of Local Workers and Posted Workers? One Step further than the Directive 96/71?

As previously mentioned, after the Laval quartet, there is an urgent need to reopen and amend the substantive content of the 1996 Directive as that Directive had been read and used in ways that leave foreign service providers from countries with lower wage levels “significant possibilities further to increase their competitive advantage, if not through outright fraud, then through advanced regime shopping”⁵. It had become clear that the CJEU had found a way to interpret the provisions of the PWD not as a “floor” of rights but as a “ceiling”⁶, putting the territorial application of labour law under pressure.

One of the main criticisms relating to the posting framework was that the posted employees of a cross-border service provider, unlike migrating workers, are not entitled to equal pay, or equal treatment like workers in the host State; as a matter of fact, EU provisions grant posted workers the right to be treated equally only in relation to minimum wage but not in relation to any higher pay that may be provided under a collective agreement. Therefore, the practice of posting, in this environment, will inevitably cause social dumping.

This fundamental problem had been left untouched also by the Posted Workers Enforcement Directive (2014/67/EU: ED), adopted on 15 May 2014⁷: it only sought to prevent abuse of posting, taking into account that, in the opinion of the majority, the posting

Europäische Zeitschrift für Arbeitsrecht, 2019, 3-23, according to whom the Directive clearly aims to protect the interests of the higher wage countries but leaves many problems of interpretation to the courts in relation to the principle of equal treatment, especially in cases of long-term postings.

⁵ Countouris N., Engblom S., *Civilising the European Posted Workers Directive*, in *Viking, Laval and Beyond*, Hart, Oxford, 2014, 287.

⁶ See also Hendrickx F., *A Post-Laval Case: Exa and Minimum Wages for Posted Workers*, in *Comparative Labor Law & Policy Journal*, 2011, 101: “After Laval, it has become clear that there are limitations to the protection that host states may wish to impose on foreign service providers. In the Laval-judgment, the Court pointed out that article 3(1) of the Posting Directive “relates only to minimum rates of pay” and cannot be relied upon to impose rates of pay “which do not constitute minimum wages” (cf. § 70 of the judgment)”.

⁷ Schmid-Drüner M., *The revision of the Posting of Workers Directive* (Briefing Employment and Social Affairs), European Parliament, 2017.

provisions of the Directive 96/71 have not been effective in practice, and Member States and employers have had difficulty in implementing, applying, and enforcing the Directive⁸.

Only in the original proposal for a new directive presented in 2016 did the Commission acknowledge the need for a more protective regime for posted workers' social rights clearly intended to address issues relating to equal treatment⁹.

It is significant that although the EU Commission's proposal explicitly mentioned the famous guiding principle of equal pay for equal work in the same place, the new Posting Directive is silent on this point. For this reason, according to some authors, this "principle has no legal grounds. It is nowhere to be found in the text of the Directive"¹⁰.

However, it should be pointed out that in the revised directive there are two important references to the more general concept of "equality of treatment". First, according to the new wording of art. 3(1), Member States are obliged to ensure that foreign undertakings guarantee, "on the basis of equality of treatment", that workers who are posted to their territory follow Member State rules and treatment in a number of areas such as, for example, maximum work periods or a minimum number of paid annual holidays, as well as minimum wages. At the same time, the new art. 3(1) seems to widen the hard nucleus of working conditions of the host state to the extent that it substitutes the term "minimum rates of pay" with the term "remuneration".

Secondly, a significant reference to equal treatment can also be found in the new art. 3(1a) which introduces a new provision for long-term postings. In this respect, Dir. 2018/957 seems to go one step further than the Directive 96/71, where equal treatment is only mentioned in art. 3(8), which uses the term "equality of treatment" in order to underline that

⁸ Rocca M., *The Reform of the Eu Directive On Posting Of Workers Fortune Smiles on the Juncker Presidency?*, in Casale G, Treu T. (eds.), *Transformations of work: challenges for the national systems of labour law and social security. XXII ISLSSL World Congress*, Giappichelli, Torino, 2018, 1171: "The reform of the PWD should be seen as the second limb of the intervention initiated with the Enforcement Directive. The latter was meant to curb regulatory evasion by companies, by lowering the obstacles for the cross-border application of sanctions and by attacking practices such as the use of bogus posting. The present reform of the PWD aims at addressing the risks posed by regulatory arbitrage and conformance. Or, following a different taxonomy, the risk posed by legal social dumping".

⁹ This need had been also recognized by the European Committee of Social Rights (ECSR) that delivered a decision in 2012 directly concerning the compatibility of the EU legal framework for the posting of workers, as interpreted by the CJEU, with the European Social Charter. In this decision the ECSR stated that posted workers are indeed migrant workers and thus should have the right "to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining". Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, 12 July 2012. See also Rocca M., (9). In the opinion of the ECSR, according only minimum protection to posted workers, as well as economic and social rights which are more limited than the ones guaranteed to national workers, constitutes discriminatory treatment, which cannot be justified by the objectives of facilitating cross-border movement of services.

¹⁰ Lhernould J.-P., *Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services What will change in 2020?*, in *Europäische Rechtsakademie (ERA) Forum*, 2019. According to this author, the directive in question is an "interesting example of how internal market legislation may strengthen the social face of the EU". See also Laagland F., *Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection*, in *European Labour Law Journal* 2018, Vol. 9(1), 50–72: "This example shows that the Member States are still capable of achieving a broad enough political consensus within the European institutions for the adoption of legislation to temper, or correct, judicial decisions".

all undertakings in a similar situation must be subject to the same obligations¹¹. At first sight, the revised Posted Workers Directive seems to raise hopes that posting may acquire a more social “face” and the legal framework will be able to mitigate against the most harmful effects of social dumping. However, the practical implications that could derive from this new directive are, to some extent, controversial.

3. Equality of Treatment, “Remuneration” and Collective Agreements.

It is important to note that even if the revised directive mentions the expression “equality of treatment” [articles 3(1) and 3(1a)] and replaces the reference to “minimum rates of pay” of art. 3(1)(c) of the PWD with “*remuneration*”, this does not mean that it creates a right for a posted worker to be treated no less favourably than a local worker.

As far as the rule of equality is concerned, the question arises whether in the context of posted workers, the scope of this rule could be curtailed and therefore restrictively interpreted by the courts. As is well known, according to CJEU case law, equality is based on the Aristotelian principle whereby like things should be treated alike. In other words, a breach of the principle of equal treatment because of different treatment for similar situations presupposes that the situations concerned are *comparable* and therefore that two individuals treated alike are *similarly situated*. Thus, considering all the elements that characterise the posted workers’ situation and that of the local workers, this requirement is difficult to meet, because, unlike local workers (who are permanently present in the local job market), posted workers are posted *temporarily* to another Member State to perform a service contract and do not seek access to the labour market of the host State.

In all cases, the question has to do with the selection of a point of comparison. According to the new wording of Article 3(1), a posted worker, as will be seen below, is entitled to the same “remuneration” as a local worker from the host country. However, in order to bring a remuneration claim under Article 3(1) PWD, the applicant needs to indicate someone who is paid better for doing equal work and can represent a point of comparison. Clearly, there must be a local worker in the host country who can serve as a point of comparison. What is less clear is to which local worker he/she should be compared¹². However, as the sixth Recital seems to suggest, when comparing the remuneration of a posted worker and the remuneration of a local one (and, therefore, due in accordance with the national law and/or practice of the host Member State), “the relevant case-law of the Court of Justice of the European Union is to be taken into consideration”. This means that key principles relating to equal treatment could apply to these claims as well. However, this approach also has its drawbacks. It is clear that (unlike in cases of sexual discrimination) the comparator (i.e. person chosen for comparison) does not need to be a person of the opposite sex. However, it is important to point out that the CJEU has acknowledged that the basic principle of equal

¹¹ See also Schiek D., Forde C., Alberti G. (eds.), *EU Social and Labour Rights and EU Internal Market Law*, European Parliament, Directorate General for Internal Policies, 2015, 41: “In its regulatory concept, the principle of equal treatment between undertakings, the EU term for corporate economic actors, does not leave scope for equal treatment of posted workers with workers in the host state. In refusing to grant the right to equal treatment to workers who move through posting, the Directive is based on the Court’s case law”.

¹² See also Lhernould J.-P., *Directive (EU) 2018/957*, (11).

pay enshrined in the Treaty (art. 157 TFEU) does not extend to hypothetical comparisons¹³ as is found in the direct discrimination provisions. Thus, the requirement for an actual comparator could also limit the effectiveness of the rule of equality in the context of posted workers, especially in sectors dominated by foreign workers.

It could be argued that in order to assess whether the person chosen for comparison is engaged in the same or broadly similar work (work of equal value) and can therefore be considered in a comparable position, a range of factors such as the nature of the work, training and working conditions should be taken into account¹⁴. As in the field of sexual equality, for posting too, the levels of qualifications, skills and experience need to be taken into account. Moreover, it cannot be ruled out that a posted worker's lower seniority may be appropriate to justify a pay differential because, as the Court explained in *Danfoss*¹⁵, the length of service usually goes hand in hand with experience, and this experience enables the worker to perform his or her duties better.

The selection of the comparator and the meaning of equal treatment rule are not the only relevant questions. The most contentious is the amendment replacing the reference to "minimum rates of pay" of art. 3(1)(c) of the PWD, by "remuneration".

The substitution of the term "*minimum rates of pay*" by the term "remuneration" may constitute an important innovation. Some years ago, many labour law scholars had already emphasized the fact that the "minimum rates of pay" principle does not fit in with the vision of a socially oriented European integration supported by Treaty provisions¹⁶. It is clear that a substantive modification of art. 3(1) of Directive 96/71, and particularly the introduction of the equal treatment principle for posted workers, could play a crucial role in creating a "level playing field" of social rights and prevent unfair competition within the internal market, especially through the exploitation of the competitive advantage of companies established in Member States with low wage standards¹⁷.

The notion of "remuneration" is broader than that of "minimum rates of pay": it encompasses "all the constituent elements of remuneration rendered mandatory by national law, regulation, or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8" (new art. 3.1).

This means that host States are now allowed to require the service provider to pay its workers not only the minimum wage laid down by the host State's law but also some elements that do not come under this concept, such as seniority allowances, holiday allowances and

¹³ See CJEU, Case C-320/00 *Lawrence v. Regent Office*, in ECLI:EU:C:2002:498; Fredman S., *Discrimination Law*, University Press, Oxford, 2011, 160; Ellis E., Watson P., *EU Anti-discrimination Law*, Oxford EU Labour Library, Oxford, 2012, 226.

¹⁴ See CJEU, Case C-12/179 *Macarthy's Ltd. v. Wendy Smith*, in ECLI:EU:C:1980:103; Ellis E., Watson P., *EU Anti-discrimination Law*, (14), 224.

¹⁵ CJEU, Case C-109/88 *Danfoss*, in ECLI:EU:C:1989:383.

¹⁶ Ales E., *Transnational Wages Setting as a Key Feature of a Socially Oriented European Integration: Role of and (Questionable) Limits on Collective Action*, WP C.S.D.L.E. "Massimo D'Antona" .INT – 63/2008. More recently, Countouris N., Engblom S., *Civilising the European Posted Workers Directive*, in Freeland M., Prassl J. (eds.), *Viking, Laval and Beyond*, Hart, Oxford, 2014, 282.

¹⁷ See European Commission, Commission Staff Working Document: *Impact Assessment. Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD (2016) 52 final 2016, 13.

supplements for dirty, heavy or dangerous work, quality bonuses, 13th month bonuses, travel expenses and meal vouchers¹⁸.

The European legislator aims to codify the more recent CJEU case law, which had already developed a concept of “minimum rates of pay” in a wider sense. For example, in the *Sähköalojen ammattiliitto*¹⁹ case, the Court held that the concept allows Member States to include some elements of remuneration such as basic hourly pay according to pay groups, holiday allowance, a daily allowance, and compensation for travelling time²⁰.

The CJEU stated that the minimum holiday pay that the posted worker must receive during the holidays is intrinsically linked to that what he receives in return for his services and is thus to be regarded as part of the minimum wage (paras. 64–69). Furthermore, daily allowances and compensations for daily travelling time are not paid to the workers in reimbursement of expenditure actually incurred because of the posting – i.e. it is granted on a flat-rate basis – and are therefore to be regarded as part of the minimum wage (paras. 46–52 and 53–57). As far as accommodation costs and meal vouchers are concerned, according to the CJEU these allowances are not to be considered part of the minimum wage because they are paid out as compensation for living costs actually incurred by the workers on account of their posting.

The revised Directive, endorsing the approach developed by this case law, not only tries to identify more clearly what constitutes remuneration (including the posting allowance) and what constitutes reimbursement of expenditure, but it also aims to facilitate the prevention of illegal conduct. In this respect, it is significant to mention that according to the amended art. 3(7), if doubts should arise, i.e. where the rules applicable to the employment relationship do not determine which elements of the allowance specific to the posting are paid as a

¹⁸ See European Economic and Social Committee, Opinion on the “Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services” of 10 March 2017. OJ C 2017/75.

¹⁹ CJEU, Case C–396/13 *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, in ECLI:EU:C:2015:86.

²⁰ This case marks a turning point because in previous rulings (*Luxembourg, Commission v Germany and Isbir*) the Court had interpreted the concept of remuneration in a narrower sense, giving guidance on what may *not* be included in the minimum rates of pay within the meaning of Directive 96/71. In *Commission v. Germany* (C-341/02), for example, the Court had ruled that additional bonuses for, *inter alia*, heavy work and additional working hours (or similar ones provided for under foreign law or in contracts with the foreign employer) fall outside said concept because they “are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State on the territory of which the worker is posted, and alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other”. In *Isbir* (CJEU, C-522/12, November 7, 2013, in ECLI:EU:C:2013:711) the Court held the same view with regard to the capital formation contribution, in view of its objective and its characteristics as set out by the national court: “Even if such a contribution is not separable from the work done, it is distinguishable from the salary itself. Since its aim, by the formation of a capital amount that the worker will benefit from in the longer term, is to achieve an objective of social policy supported, in particular, by a financial contribution from the public authorities, it cannot be regarded, for the application of Directive 96/71, as forming part of the usual relationship between the work done and the financial consideration for that work from the employer. It is for the national court, however, to verify whether that is indeed the case in the proceedings before it”.

reimbursement of expenditure and which are part of the remuneration, then “the entire allowance shall be considered to be paid in reimbursement of expenditure”.

The shift towards the notion of “remuneration” is understood as an attempt to strengthen the weapons that a host Member State can use to prevent social dumping and reduce chances for foreign service providers to compete on the market “unfairly”: employers must grant posted workers the same treatment that local workers are also entitled to, including allowances, daily flat-rate allowances, and compensation for travelling time.

However, despite this important and appreciable change, there are still many doubts as to whether the revised directive can represent a significant step towards “equality of treatment”.

First, the legal uncertainty surrounding the notion of remuneration still remains an open question²¹: even though the CJEU attempted to provide a clarification regarding the elements of remuneration to be included in the concept of “minimum rates of pay”, it is doubtful whether this case law is perfectly transposable in the context of the new concept of remuneration.

Secondly, the concept of remuneration could be defined by the Member States in many different ways, which could do further damage to legal certainty if one also considers that, as will be seen below, a host State’s choices to classify some types of payments as pay could be reviewed under Article 56 TFEU.

Thirdly, the EU legislator does not substantially change the instruments, and particularly the type of collective agreement that can be qualified as an appropriate minimum standard setter in Member States²². This means that if a Member State does not have a formal system for declaring collective agreements “universally applicable”, and collective agreements (or arbitration awards) cannot be “generally applicable” to undertakings, there is only one way for the State to base its rules on. That member State could only use collective agreements “which have been concluded by the most representative employers and labour organisations at national level and which are applied throughout national territory”. But in this case too collective agreements must apply to all the undertakings covered by the Directive and must ensure “equality of treatment”, meaning the same obligations between national undertakings and posting undertakings in a similar position as regards the matters listed in art. 3(1) and also a requirement “to fulfil such obligations with the same effects”.

This is highly problematic for Italy due to the fact that collective agreements are not universally applicable and it is not (always) possible to prove that they can meet the requirements established by EU law²³: according to Legislative Decree no. 136/2016 –

²¹ Delfino M., *Worker’s Mobility in the European Union: a Labour Law Perspective*, in Marhold F., Eichenhofer E., Igl G., (eds.), *Liber amicorum for Maximilian Fuchs*, Nomos, Baden – Baden (forthcoming).

²² See also Giubboni S., Orlandini G., *Mobilità del lavoro e dumping sociale in Europa, oggi*, in *Giorn. Dir. lav. rel. ind.*, 2018, 907.

²³ However, things could be quite different if one considers specific areas in which collective agreements are entitled by the legislator to modify legal norms, particularly to (de)regulate certain details of labour regulations: for example, define the conditions of fixed-term contracts (Act 99/2013). In cases like this, the extension of the effects of the collective agreement beyond the sphere of the signatory parties is favoured by legislation, although in different ways. It is interesting to note that the selection of the union entitled to stipulate the collective agreement is based on the formula of the comparatively most representative trade union association (which has been preferred to the other formula “comparatively more representative trade union association”). The same formula has been also adopted by the Legislative Decree no. 136/2016. For a full account of the debate on the binding effects of collective agreements in the area of flexible labour contracts see Zoppoli A., *Sull’efficacia soggettiva del contratto collettivo nella disciplina dei rapporti di lavoro “flessibili”*, in Rusciano M., Zoli C., Zoppoli L. (eds.), *Istituzioni e regole del lavoro flessibile*, Editoriale Scientifica, Napoli, 2006, 317.

through which Italy implemented the 2014 directive and amended the previous transposition legislation relating to the Directive 96/71 – foreign undertakings are obliged to guarantee the “conditions of work and employment” governed by the collective agreements referred to in art. 51 of Legislative Decree n. 81 of 2015, i.e. collective agreements stipulated by the comparatively most representative trade union associations [art. 2.1(e)]. However, only the application of the collectively agreed minimum rates of pay at national level may actually be extended, to some extent, to posted workers. This is because, as is well-known, the minimum rates of pay laid down by the national collective agreement have been considered by the established case law as a legitimate criterion to determine the “fair wage” laid down by art. 36 of the Constitution and have an indirectly binding effect also on employers who are not members of the employers’ association that have signed the respective collective agreement. Moreover, in Italy the problem is also that the minimum rates of pay guaranteed as a “fair wage” do not include all the elements of remuneration laid down by the collective agreement and are not determined by the courts on the ground of a uniform notion²⁴.

Lastly, in Member States where there is an increasing decentralisation of bargaining power, and collective agreements have been made more flexible, the question arises as to whether this trend in collective bargaining could undermine the ambition of “equal pay for equal work in the same place”. This is the case of Germany, where there has long been widespread use of the so-called opening clause allowing the actors at plant and enterprise level not only to specify the collective agreement, but also, within certain limits, to deviate from it. According to the CJEU, such a system can be considered to restrict the freedom to provide services²⁵ to the extent that, unlike an employer from the host Member State, an employer established in another Member State has no possibility of avoiding the obligation to pay the minimum wage laid down by the collective agreement governing the economic sector concerned²⁶. The same could be true for all the systems based on negotiations at company level (or requiring negotiation on a case-by-case basis), as they could make it “impossible for the service provider to know in advance the working conditions applicable to posted workers”²⁷.

As far as Italy is concerned, the implementation of the 2018 Directive implies dealing with the concept of pay and clarifying the constituent elements of remuneration that foreign employers have the duty to pay posted workers in the case of short-term and long-term postings. According to Decree Law no. 136/2016 (art. 7(1b)) all information must be published by the Ministry of Labour on the official national website. However, for the reasons mentioned above, this may not be enough to fight wage dumping and to take a

²⁴ Esposito M., Gaeta L., Zoppoli A., Zoppoli L., *Diritto del lavoro e sindacale*, Giappichelli, Torino, 2018.

²⁵ Rocca M., (9), 1173.

²⁶ CJEU, Case C-164/00, Portugaia, 35.

²⁷ CJEU, Case C-341/05 Laval un Partneri Ltd. v. Svenska Byggnads arbetare förbundet; Rocca M., (9), 1173; Delfino M., *Worker's Mobility*, (22).

significant step towards “equality of treatment” even if the Act has provided for the consequences of the absence or the incompleteness of information (art. 12).

3.1. The Concept of Remuneration, the Role of Domestic Law and the Freedom to Provide Services.

The revised Directive states that “the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted” (art. 3.3), and underlines that wage setting is a matter for the Member States and the social partners alone and that national systems of wage setting or the freedom of the parties involved must not be undermined (see recital 17).

Furthermore, it is significant that the final version of the revised PWD amends Recital 12 of the Commission’s original proposal, which expressly referred to the proportionality test, making clear that national rules on remuneration “must be justified by the need to protect posted workers and must not disproportionately restrict the cross-border provision of services”.

However, these provisions – some of which have no binding force because they are laid down in the preamble – could be, to some extent, misleading and mystifying.

The point to make here is that although the 1996 directive had already stated that the concept of minimum rates of pay is a matter for national law, this did not stop the CJEU from stating that the domestic policy choice to classify some types of payments as pay could be reviewed under Article 56 TFEU.

In *Isbir*, for example, the CJEU was particularly clear on this point: “The task of defining what are the constituent elements of the minimum wage, for the application of that directive, therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States”²⁸.

A change to this case law in the context of the concept of remuneration, although desirable, in our view, cannot reasonably be expected from the CJEU in future. Actually, the revised Directive, despite the great emphasis laid on the protection of workers’ rights²⁹, seems to primarily maintain its internal-market-oriented character and, most probably, this will continue to play a decisive role in shaping the case law of the CJEU on the matter. In

²⁸ § 46. As some labour law scholars held, the restriction of Member States’ room is due to the fact that Member States “may be tempted to incorporate into notion of “minimum rates of pay” unrelated advantages therefore extending the nucleus of rights provided for by the PWD”: Defossez A., *Directive 96/71/EC*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds), *International and European Labour Law*, Nomos, Baden-Baden, 2018, 654.

²⁹ The introductory recitals, as well as the content of the amendments proposed to the articles of Directive 96/71/EC show this very clearly. Revised Article 1 points out the need to “ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of workers’ health and safety”, adding that the Directive “shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States”.

this respect, the identification of the legal basis of the revised PWD is very eloquent because there is a clear link between legal grounds and objectives.

During the adoption process of the 2018 Directive, the European Parliament had proposed adopting a dual legal basis and added a reference to the Treaty provisions on social policy (Article 153 TFEU) alongside the provisions on freedom to provide services. From this point of view, the choice to enlarge the legal basis could have made the aspect of “rebalancing” the promotion of the freedom to provide services with the protection of workers’ rights more effective.

However, the European Parliament’s proposal was rejected and thus the revised Directive has only the Treaty provision on free movement of services as its exclusive legal basis (although it also refers to social provisions such as Article 3 of the TFEU with its focus on a social market economy and Article 9 of the TFEU referring, *inter alia*, to a high level of employment and social protection). In view of this choice, the directive can only be regarded as an internal-market-oriented act; the competing objectives, such as the protection of posted workers, have been relegated to second-tier status³⁰.

This may lead the CJEU to refrain from interpreting this legislation in a socially friendly way. In fact, there is no doubt that, despite the reference to the proportionality test having been deleted, the revised directive could still, under article 56 TFEU, enable the Court to review the national provisions on pay, ruling on the compatibility of those provisions with the freedoms to provide services.

In the context of posting, case-by-case interpretation could still limit the effectiveness of the principle of equal treatment. The fact that the definition of the concept of “remuneration” refers to “national law and/or practice” does not mean that the Member States may unilaterally determine the scope of the concept³¹, establishing both the constituent parts of pay and the level of those constituent parts.

Even though the concept must include all mandatory constituent elements of remuneration, uncertainty still prevails: indeed, all national rules thought to comply with a piece of EU secondary legislation, still also need to be checked for their compatibility with the Treaty. Thus, there is still ample room for the CJEU to adopt pro-market interpretation and undermine the ability of Member States to apply their national legislation.

For example, as happened in *Riiffert*, if a host State were to require contractors to comply not with the minimum wage agreement – which has been “extended” by governmental action so as to be applicable to all employers – but with another collective agreement, which had not been extended and which requires rates of pay “well above” those required by the former, this would interfere with the free movement of services.

In *Riiffert*, the CJEU found that the German Law on Awarding Public Contracts, which required contractors to agree to pay workers the minimum level of pay did not comply with the Posting of Workers Directive interpreted in the light of Article 56 TFEU. For this reason, it would seem that the host State’s choice to establish the level of the constituent parts of

³⁰ Costamagna M., *The Revision of the Posted Workers Directive as a Meaningful Way to Curb Regulatory Competition in the Social Domain?*, in Borelli S., Guazzarotti A. (eds), *Labour mobility and transnational solidarity in the European Union*, Jovene, Napoli, 2019.

³¹ The CJEU said something similar in other contexts: CJEU, Case C-151/02, *Landeshauptstadt Kiel v. Jaeger* [2003] ECR I-8389, paras. 59 with reference to the concept of working time enshrined in the Working Time Directive 2003/88.

pay (and to classify these constituent parts of pay as “remuneration”) still needs to be reviewed in terms of its compatibility with the Treaty, and in particular with Article 56 TFEU.

4. Long-term Postings. The Relationship between the Enforcement Directive and the Revised Directive.

The specific provision on long-term postings is probably the main change to the revised directive³². In this way, the reform takes an important step towards bringing labour law into line with the scheme in social security coordination, in particular with art. 12 Reg. 883/2014. The 1996 Directive gave no clear indication regarding the temporary nature of posting. Contrary to Regulation (EC) 883/2004, the PWD³³ – apart from exceptional cases such as short-term postings according to arts 3.2 and 3.3 – provided for neither a fixed time limit nor other criteria (e.g. required periods of previous employment in the sending Member State) to determine the temporary character of the posting duration in the host country³⁴. Moreover, the Commission acknowledged that there was a need to address the issue of temporariness for the sake of worker protection³⁵. The lack of clear and quantitative (means of determining the duration or frequency) criteria for assessing “temporariness” (regarding services) (a definition or the characters of “temporariness”) in terms of either the service or the posting, has contributed to ambiguity and favoured malpractice and circumvention³⁶.

In this respect, the new directive has the potential to redress disadvantage experienced by posted workers where posting is not temporary.

When the effective duration of a posting exceeds 12 months, EU law now requires Member States to introduce a principle of equality of treatment: Member States must ensure that, irrespective of which law applies to the employment relationship, undertakings will guarantee workers posted to their territory, “in addition to the terms and conditions of employment referred to in the “hard core”, all the applicable terms and conditions of

³² Franzen M., *Die geänderte Arbeitnehmer-Entsenderichtlinie*, (5): (“wichtigste Neuerung”).

³³ See Fuchs M., *Posting. The Legal Panorama of European Labour And Social Security Law*, in *Riv. It. Dir. Lav.*, 2018, 3.

³⁴ Dir. 96/71 used an undefined term: “for a limited period: the worker should be posted “for a limited period of time” to a Member State other than the one in which he “normally works””.

³⁵ According to the Commission, the absence of a time limit has “adverse consequences on the fairness of competition between posting and local companies” and “workers in long-term postings are more exposed to abuses of their working conditions”.

³⁶ The point to make is that also the Enforcement Directive (ED) has a significant gap with regard to the sanctions, i.e., the legal consequences in cases of some forms of misuses, such as, for instance long-term postings, repeated replacements of posted workers or the use of so-called letter-box firms, are identified and verified. The only implication to be drawn from this is that, in these cases, the PWD is not applicable, and the situation should be regarded from the perspective of international private law. The ED does not clarify which employment law would be then applicable to the workers concerned. There can be no doubt that where there is no genuine posting situation, Regulation (EC) No 593/2008 (“Rome I”) has to be taken into account. However, with regard to the determination of the law applicable to individual employment contracts the uncertainty still prevails. See also Zoppoli L., *Il distacco del lavoratore nel quadro giuridico delle fonti multidimensionali*, in Marhold, E. Eichenhofer, G., Igl G. (eds.), *Liber amicorum for Maximilian Fuchs*, Nomos, Baden – Baden (forthcoming).

For an overview on the principle of public policy see Cordella C., *Transnational posting of workers between public policy and collective bargaining*, in Perulli A., Bellomo S. (eds.), *New Industrial relations in the era of globalization: a multilevel analysis*, Cedam, Padova, 2019, 125-136.

employment which are laid down in the Member State where the work is carried out: by laws, regulations or administrative provisions, and/or by collective agreements or arbitral awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8” (Article 3(1a)).

The idea at the root of the introduction of the principle of equality of treatment is undoubtedly the acknowledgment that there is a link between the labour market of the host Member State and the long-term posted worker (recital 9). By virtue of this link, the worker posted in the Member State in which the service is carried out is to be treated the same as workers who belong to the labour market of that country (and with whom, in fact, he carries out the work): indeed, when the posting is of very long duration, the worker gains access to the labour market of the host State to some extent.

The importance of the new provision laid down in Article 3(1a) is clear. That rule is evidently incompatible with art. 8.2 of Regulation Rome I, which established no fixed time limit and should now be considered amended. According to Recital 36 of that Regulation “As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad”.

Application of this Regulation would have had negative consequences also due to the legal uncertainty surrounding the notion of “temporary”: according to some labour law scholars³⁷, in order to exclude the “temporary” nature of a posting, it is necessary to verify that the habitual place of work has changed permanently. Regulation Rome I would probably have led to a higher time limit than that set by art. 3(1a) of the revised directive.

The question arises whether, and to what extent, it is now possible to use the criteria, introduced by the Enforcement Directive (Directive 2014/67/EU: ED), in order to allow the identification of a genuine posting and prevention of abuse and circumvention.

These criteria are intended to help competent authorities in the assessment of both the existence of a real link between the employer and the Member State from where the posting takes place and the temporary nature inherent to the concept of posting (see the indicative, non-exhaustive qualitative list of factual elements under article 4).

Inspired by the experience and the legislative acts in social security coordination, the ED Directive fills, to a certain extent, the gaps arising from the insufficient definition of posting in the Directive 96/71, transposing some jurisprudential rules that have developed in the case law of the CJEU by interpreting art. 12(1) of Reg. 883, arts 14(1,3) of Reg. 987/2009, and decision A2³⁸.

One could argue that the revised directive would narrow down the scope of application of the criteria introduced in the 2014 Directive so that the competent authorities would be entitled to apply those criteria only on condition that the duration of a posting exceeds 12 months. Such a view might be held for reasons of legal certainty. However, the argument is not fully convincing: if it were so, the provision would lose much of its meaning. Moreover, the revised directive in no way amends the Directive 2014/67/EU: it introduces the time limit provision as a mandatory provision for minimum protection. This means that these criteria should be applicable to the same extent as before and that, according to the new

³⁷ Deinert O., *Internationales Arbeitsrecht*, 2013, § 9, Rn. 102.

³⁸ See Fuchs M., *Posting*, (34).

provision, a case where a posting does not exceed 12 months could also be qualified as a non-genuine posting.

4.1 Long-term Postings and the Equal Treatment Rule.

As far as equality of treatment is concerned, it should be noted that in this case that principle is somewhat mitigated by permitting that it not be applied to “procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses; supplementary occupational retirement pension schemes”. Therefore, there is no full extension of the labour law of the host country.

Moreover, the revised Directive allows the host Member State to extend the time limit to 18 months. It is sufficient for the service provider to submit a justified notification. In order to avoid circumvention, art. 3(1a) adds that where an undertaking replaces a posted worker with another posted worker performing the same task in the same place, the duration of the posting must be the cumulative duration of the posting periods of the individual posted workers concerned.

Art. 3(1a) also clarifies to what extent a cumulative duration of the posting periods is to be applied: it is necessary to consider, *inter alia*, the nature of the service to be provided, the work to be performed, and the address(es) of the workplace. However, there is still no clear answer to the question³⁹ of how to establish whether a posted worker has been replaced by another posted worker when a worker’s posting is interrupted; it is not clear whether it should be deemed a continuous posting or two independent ones, both triggering different consequences. On this, the Council referred to Regulation 883/2004 during the debate on the Commission’s original proposal.

In the field of social security, once a worker has ended a period of posting, with no fresh period of posting for the same worker, the undertakings and the Member State themselves can be authorized until at least two months have elapsed from the date of expiry of the previous posting period⁴⁰. Hence, the 24 months period does not apply in such a case because there are two different postings.

Generally speaking, it is highly problematic that the revised Directive might have a restrictive effect on the freedom to provide services to the extent that, in the event of long-term postings, host Member States now, as a rule, have to impose upon “their” employers an obligation to meet not only the terms and conditions of employment referred to in the “hard” nucleus but those of the entire body of their domestic labour law with the above-mentioned exceptions [(Article 3(1a)].

The Directive clearly aims to protect the interests of the higher wage countries that receive a large number of posted workers, obliging them to apply a principle of equal treatment for

³⁹ According to some German scholars, a similar question arises with reference to the social security law and in particular to Art. 12, paras. 1, Reg. 883/2004. See. Steinmeyer H.D., in Fuchs M., *Europäisches Sozialrechts*, 7. Aufl. 2018, Teil 2 VO (EG) Nr. 883/2004 Art. 12 Rn. 14.

⁴⁰ Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text of relevance to the EEA and to the EC/Switzerland Agreement). *IO C 106*, 24.4.2010, *lgh.* 5-8.

all those working in their territory. The question arises as to how precisely the equal treatment rule and the Treaty, i.e. the provisions on freedom of movement of services, fit together.

Naturally, the CJEU has frequently addressed the question of the compatibility of domestic laws imposing host state standards on posted workers with the relevant provisions of the Treaty on the freedom to provide services. In this vein, it may be useful to mention some of the most important rulings briefly. In *Rush Portuguesa*, the ECJ was particularly explicit in saying that Union “law does not preclude Member States from extending their legislation, or collective labour agreement entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established”.

In its subsequent case law, the Court revisited its approach and brought its case law more into line with its general jurisprudence on the freedom to provide services (*Säger*), where the Court adopted the so-called “market access” test⁴¹ and clarified that art. 49 TFEU requires “not only the elimination of all discrimination against a person providing services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other member states, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”.

Hence, the Court clearly confirms on the one hand that European law does not preclude Member States from applying Member State’s legislation or collective labour agreements that guarantee minimum wages to employers providing services within the territory of that State. On the other hand, however, according to the CJEU, the host national employment rules breach EU law whenever they hinder or restrict the ability of the out-of-state actor to exercise freedom of movement.

To this end, the CJEU not only assesses whether the application of the labour legislation of the host country can be regarded as an obstacle to the free movement of services and whether the [measure’s] restrictive effect can be “justified by overriding requirements relating to the public interest”, but also adopts the proportionality test so that restrictions on the freedom to provide services cannot be justified if the benefit can be seen to be potentially supplied in such a way as to have a lesser impact upon the home State’s freedom to provide cross-border services⁴².

Lastly, the ECJ underlines the importance of the other stage that should be applied in the scrutiny of national laws (the assessment of “genuine benefit”), when the court has to assess whether or not the posted workers’ terms and conditions of employment are improved by the application of the host State’s rules⁴³: the host-state rules apply only on condition that its law does not already provide “essentially similar protection” to posted workers (duplication).

Coming back to the revised Directive and taking into account the established case law mentioned above, it is necessary to assess whether and to what extent the new European

⁴¹ On the so-called market access approach see Barnard C., *Free Movement and Labour Rights: Squaring the Circle?*, University of Cambridge, Faculty of Law Legal Studies Research Paper Series, <http://www.law.cam.ac.uk/ssrn>, 4.

⁴² See for example *Mazzoleni* Case C-165/98, in ECLI:EU:C:2001:162.

⁴³ See *Finalarte* Case C-49/98, [2001] ECR I-7831.

rules may affect the position of the home-state employers wishing to post their employees to the territory of another Member State on a temporary basis.

Article 3(1a) does not clarify the substantive areas in which the host State's employment law, in the event of long-term postings, would be applicable to posted workers concerned. It is important to note that the wording of the new art. 3(1a) significantly differs from the Commission's original proposal. Initially, the host Member State became the country where the work is habitually carried out in the event that the posting exceeds 24 months (art. 2(a)). The consequences are therefore very clear: the law of the host Member State applies to the employment contract of these long-term posted workers unless the parties have agreed to the application of another law in accordance with art. 3 of the Rome I Regulation (original proposal).

In contrast, article 3(1a) seems to be worded more vaguely and it is therefore highly questionable whether, and to what extent, the posted worker is entitled to equal treatment in the case of long-term postings.

The impression is that many problems of interpretation have been left to the courts.

a) There is no doubt that according to art. 3(1a), collective agreements that are not universally applicable cannot be applied to posted workers also in the case of long-term postings. Consequently, in some member States, such as Italy, the same problems of interpretation mentioned above (para. 3) arise.

Indeed, with reference to the long-term postings the revised Directive, on the one hand, confirms the regulatory function of collective bargaining (as it provides that Member States shall ensure to workers who are posted to their territory all the applicable terms and conditions that are laid down "by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8"). On the other, it makes clear that for the countries (like Italy) having no system for declaring collective agreements to be of universal application (if they may not base themselves on collective agreements "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned"), it is possible to rely on "collective agreements which have been concluded by the most representative employers and labour organizations at national level and which are applied throughout national territory" provided that their application ensures "equality of treatment" between undertakings posting the workers and national undertakings that are in a similar position.

As a labour law scholar recently pointed out⁴⁴, the universal (*erga omnes*) application of collective agreements – that the PWD requires in order to ensure equal treatment to all the service providers – is very problematic for their recognition as regulatory sources due to the fact that CJEU has interpreted this concept in a strict sense⁴⁵.

There is no doubt that through the last (previously mentioned) option the revised PWD leaves a door open to Italy: in case of long-term postings, the working conditions to apply to the foreign undertaking could be fixed in accordance with this procedure and the selection of the most representative employers' and labour organizations entitled to stipulate the

⁴⁴ See Ales E., *The Regulatory Function of Collective Agreements in the Light of Its Relationship with Statutory Instruments and Individual Rights: A Multilevel Approach* (forthcoming).

⁴⁵ For example, in *Rüffert* the CJEU held the view that a collective agreement could not be regarded as "generally applicable", because its binding effect covered only part of the construction sector falling within the geographical area of the agreement as it only applied to public contracts (para 28).

collective agreements could be based on the formula, already adopted by the Legislative Decree no. 136/2016, of the comparatively most representative association (which should be preferred to the other formula “comparatively more representative association”)⁴⁶.

However, even if the parties to a collective agreement are granted by the Italian law the power to regulate terms and conditions for posted workers, it is doubtful whether this can lead per se to the extension of the scope of application of collective agreement to non-organized employers and employees. Generally speaking, in Italy such an approach has been sometimes held by jurisprudence and some labour law scholars⁴⁷ but the arguments are not completely convincing. As a matter of fact, that view could go against the constitutional principles of the second part of Article 39 of the Italian Constitution⁴⁸, in which a specific regulation is provided for in order to make collective agreements generally binding. Furthermore, the adoption of the technique based on the concept of “comparatively most representative union” to define the bargaining agent seems not be helpful at all in resolving the problem as the representativeness is indirectly presumed and is in no way verified through democratic procedures⁴⁹. This is why in Italy the use of the collective agreement as an instrument to regulate posted workers’ working conditions is still highly problematic.

b) Moreover, the question arises as to whether the rules on contract termination may be really excluded from the extension of the hard core for long-term postings. Art. 3(1a) appears to have answered that question in the affirmative. However, some labour lawyers have attempted to argue that host country rules on contract termination are perhaps applicable to posted workers under Article 8 of Rome I. This suggestion is based on the assumption that the question of coordination between the (revised) posting Directive and Rome I Regulation is renewed by the adoption of the revised Directive⁵⁰.

However, this argument is not convincing at all. As a matter of fact, there is no doubt that the new European rules have to be coordinated with the main legal framework that was established by Directive 96/71/EC, which in this respect remains applicable with the wording prior to the amendments introduced by the new one. If so, the provision on applicable law in Article 3(1a) can be seen to supplement the Rome I Regulation [the old Rome Convention (RC)], which is extensively referred to in the Preamble to the 1996 PWD. It is clear from Recital 11 of the Preamble that in the event of conflict, the 1996 PWD takes precedence over the rules of the Rome I Regulation and it is therefore difficult to argue that host State rules (or some of them) on contract termination would be applicable to posted workers.

c) Generally speaking, as far as the law applicable to employment contracts is concerned, for long-term postings, everything depends on the interpretation of the formula “terms and conditions of employment”. This provision is to be read in the light of Article 56 TFEU. As has been shown above, also the “terms and conditions of employment” applied by the host

⁴⁶ See also the footnote no. 37.

⁴⁷ See for example C. Cost. 10 October 1996, no. 344, in *Giur. cost.*, 1996, 3016; Cass. 11 November 2002, no. 17674 in *Foro it.*, 2003, I, c. 443; Carabelli U., Leccese V., *Una riflessione sul sofferto rapporto tra legge e autonomia collettiva: spunti dalla nuova disciplina dell’orario di lavoro*, in A.a.V.v., *Studi in onore di Giorgio Ghezzi*, Cedam, Padova, 345.

⁴⁸ For example, Rusciano M., *La metamorfosi del contratto collettivo* in *Riv. Trim.Dir. Proc.Civ.*, 2009, 29, particularly, 47; Zoppoli A., *Sull’efficacia soggettiva del contratto collettivo*, (24), 331.

⁴⁹ Zoppoli A., *Sull’efficacia soggettiva del contratto collettivo*, (24), 333.

⁵⁰ Lhernould J.-P., *Directive (EU) 2018/957*, (11).

country, in the context of a posting exceeding 12 or, where applicable, 18 months, still need to be checked for their compatibility with the Treaty and can be regarded as an obstacle to the free movement of services. The new Directive does not jeopardize the ECJ settled case law according to which any provision applicable to posted workers must be compatible with that freedom. Even though this Directive has also been adopted as a measure of employee protection, there is no doubt that the EU legislator also safeguards the position of the home-state employers wishing to temporarily post one or more of its employees to the territory of another Member State. Recital 10 speaks of a right of undertakings to invoke the freedom to provide services, including in cases where a posting exceeds 12 or, where applicable, 18 months and makes clear that restrictions to the freedom to provide services are permissible only if they are justified by overriding reasons in the public interest and if they are proportionate and necessary⁵¹.

d) Lastly, another question arises as to whether article 3(1a) can be considered to be in line with the principle of “essentially similar protection” enunciated many times by the CJEU and previously mentioned above. The approach adopted by the Directive seems to be highly problematic: in addition to some home State rules (for example, rules on contract termination), the law applicable to employment contract includes host state rules. Adopting this legal technique came under attack because it was thought that it might increase the probability that undertakings would have to comply with the host-state rules even though home-state law already provides an essentially similar protection. This is likely to hinder the exercise of freedom to provide services by undertakings wishing to post workers⁵². Those consequences could have been avoided or mitigated by recourse to the legal technique adopted by the Commission’s original proposal.

5. Brief concluding remarks.

As this analysis has shown, the revision of the PWD can be welcomed as an important step in the direction of more equal treatment between posted workers and local ones.

After the adoption of this Directive, the legal framework concerning posting may be considered more in line with the social objectives of the EU listed in art. 3 TEU and with the mainstreaming social clause in art. 9 TFEU.

The Directive places great emphasis on the idea of equal treatment between posted and domestic workers in the same location. Both the broad notion of “remuneration” (which replaces the notion of “minimum rates of pay”) now applicable to posted workers and the introduction of a time limit could definitely be a step forward in giving the Directive a stronger social dimension and raising some hopes that posting may acquire a more social “face”. However, the extent to which this new Directive will pursue the aim to reshape the nature and substantive content of the PWD is still an open question. For example, as

⁵¹ Aubauer H., Glowacka M., *Entsende-Richtlinie neu*, in *Gedenkschrift Robert Rebahn*, Manzsche Verlag, Wien 2019, 10.

⁵² See Franzen M., *Die geänderte Arbeitnehmer-Entsenderichtlinie*, (5).

previously indicated, the scope of the equal treatment rule could be curtailed and thus restrictively interpreted by the courts.

Moreover, it may very well be asked whether a reform that comes only through legislative channels could be sufficient to amount to a significant improvement in the law concerning posted workers and could effectively restore the delicate balance between economic freedoms and social rights, or whether it is necessary to also undertake a jurisprudential route.

The EU legislator has left some issues untouched, while it could have further strengthened the Directive's social purpose. The Directive appears to primarily maintain its orientation as a single market measure. The refusal to change the legal basis of the PWD and include social policy (article 153 TFEU) alongside the freedom to provide services may lead the CJEU to refrain from interpreting this Directive in a social-friendly way, favouring market-oriented interpretations, given that its internal-market-oriented legal basis has played a decisive role in shaping the case law of the CJEU on the mattering the past. This is why the revision of the Directive as it stands seems to offer signals still too weak to strengthen the social dimension.

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