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Posted workers – for some it matters

Mikkel Barslund, Matthias Busse and Frederic De Wispelaere

Summary

The European Council, Parliament and Commission are about to start trilogue negotiations over the revision of the posting of workers Directive (PWD) of 1996. The aim of the revision is to ensure, among others, the principle of *equal pay for equal work at the same place,* limit the maximum posting duration and address increasing involvement of temporary work agencies in the business. The past year has shown how acutely sensitive these issues are and arriving at this point has required substantial political capital.

Some have argued that this energy would have been better spent elsewhere, but in fact for some member states a lot is at stake. Postings have a large impact on (net) receiving countries such as Belgium, particularly when looking solely at its construction sector where posted workers make up 25% of the Belgian workforce. Likewise, in some (net) sending countries, such as Slovenia, outgoing posting makes up 7% of overall employment. A restriction on posting would have significant ramifications in these labour markets and for fiscal/social security revenues.

The proposed revision is unlikely to render the majority of postings unprofitable, but some postings may disappear. In any case, those participating in the upcoming trilogue on posting will have to be mindful of the consequences for the single market while addressing the shortcomings in the current PWD.

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Contents

List of Figures

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Informal debates on a potential revision of the posting of workers Directive (PWD)[1] have been with us ever since the accession of new member states in 2004 and 2007. After much spent political capital and many fierce debates, the Council decision by Labour and Social Ministers earlier this week on October 23rd and today's plenary vote in the European Parliament paves the way for a revision of the Directive. The next step will be the trilogue procedure of reconciliation between the Parliament, Commission and Council. Some have argued that this energy would have been better spent elsewhere, but for some member states (and their workers) a lot is at stake.

1. What are posted workers and where does the system create tensions?

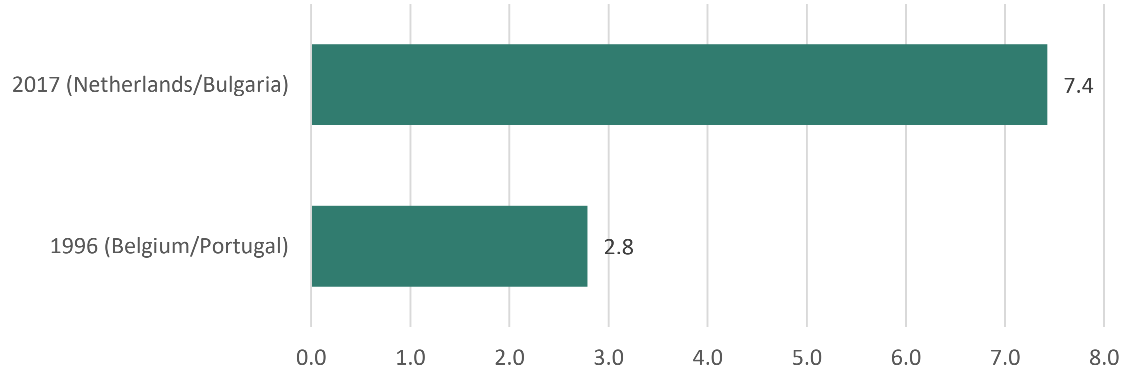
Posted workers are persons sent (*posted*) by their employer to another member state to provide services on a temporary basis. While abroad, they remain in their home countries' social security system and continue to pay contributions there for up to 24 months.[2] This avoids a disproportionate administrative burden of switching between social security systems when the workers are only temporarily providing services in another member state. In addition, a 'hard core' set of terms and conditions of employment determined by the host country must be respected according to the PWD. It is worth noting that self-employed persons are not covered by the PWD. Since the Directive deals with temporary cross-border service provision, it is based on legislation governing the single market.

While free movement of labour has also featured heavily in recent political discourse (e.g. in the Brexit debate), posting has created tensions of its own. According to the original Directive, posted workers have to respect the minimum wage arrangements in the receiving countries but can otherwise exploit their cost competitiveness. Of course, a posted worker may be hired – and many are – because the particular skillset is not available on the local labour market or due to higher productivity of the foreign worker. For a significant proportion of posted workers, however, cost competitiveness plays a crucial role. This is where the wage differences across countries come into play, since a posted worker from a low-wage country may be willing to work for a wage that is significantly below the average local remuneration. When the PWD was first implemented, the ratio of the highest to lowest wage was 3:1, whereas today it is has risen to more than 7:1 (see Figure 1).

[1] 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.

[2] Based on Regulation (EC) No 883/2004.

Figure 1. Ratio of highest to lowest average wage in an EU



Notes: Wage = Average compensation per employee. Luxembourg has been excluded.
Data source: AMECO.

Domestic minimum wages provide some measure of safeguard, but some member states fear downward wage pressure and speak allegorically of 'social dumping'. Opponents of the revision point to the single market, which rests on the free provision of services across borders, and assert that posting as such cannot be considered 'unfair competition'. The PWD can be seen as an instrument to manage the tension between the heterogeneity of social systems and wage conditions across member states and the freedom to provide services throughout the territory.[3]

Particularly over the past year, this debate has led to a deepening division between some member states, which is often portrayed as pitting the East against the West, i.e. net sending vs. net receiving countries.[4] The PWD, in particular the rules governing the remuneration of posted workers, is also at the epicentre of the Commission's call for 'fair mobility', which was echoed in President Juncker's 2017 State of the Union speech. The issue is clearly of political importance. But it is imperative to keep in mind that posting also matters from a macro-perspective. As is often the case, however, the impact is highly heterogeneous across countries and economic activities.

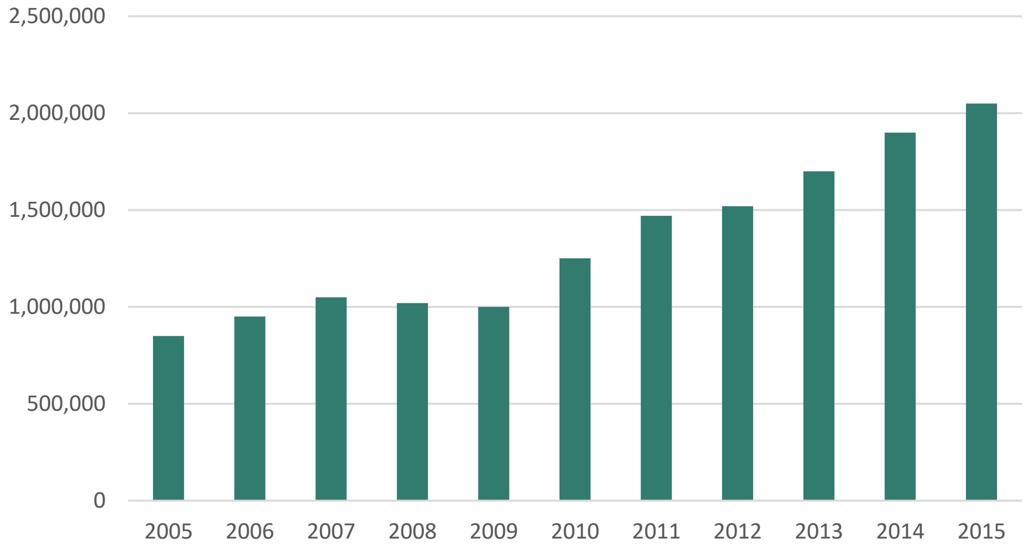
2. Why posting matters economically

In 2015 – the latest year for which data are available – just over two million workers/self-employed received a so-called A1 form. It establishes a presumption that the holder is properly affiliated with the social security system of the member state which has issued the certificate. It is issued to posted workers, among other groups, when they temporarily provide their services in other member states (Figure 2).

[3] M. Barslund and M. Busse (2016), "Labour Mobility in the EU: Addressing challenges and ensuring 'fair mobility'", CEPS Special Report No. 139, CEPS, Brussels.

[4] M. Barslund and S. Blockmans (2016), "Brexit will deepen the fault lines within the EU over mobility", CEPS Commentary, CEPS, Brussels, 12 July.

Figure 2. Increase in the number of postings in the EU, 2005-15



Notes: The same person can be posted several times in any given year. Figures include also workers active in more than one member state; in 2015 only 1.5 million individuals were defined as posted workers.
Data source: European Commission.

These two million workers make up 0.9% of total EU employment, so roughly 1 in 100 workers falls into this category. Not all of them are actual posted workers, however. Moreover, postings on average only last 98 days, although exact numbers are not available for some member states. Nevertheless, this means that in terms of full-time equivalency their share in employment shrinks to 0.4% of employment. [5]

In other words, the revision deals with around one-half of 1% of EU workers. But does that mean that posted workers, economically speaking, constitute a marginal issue?

That depends on one's perspective. As a start, compared with the regular mobility flow – i.e. people moving from one member state to another – it is of the same order of magnitude.[6] Hence, it may be marginal for the EU as a whole, but from the perspective of certain member states or sectors it is not. For example, Slovenia issued 127,000 A1 forms in 2015, which would correspond to 13.5% of its employment. Even taking into account the previously mentioned caveats, the reliance on posting is remarkably high, accounting for around 6% of employment. In the case of Slovakia and Poland, the unadjusted share is 4% and 3%, respectively. From the

[5] J. Pacolet and F. De Wispelaere (2016), "Posting of workers - Report on A1 portable documents issued in 2015", study commissioned by Directorate-General for Employment, Social Affairs and Inclusion, European Commission, December.

[6] C. Alcidi, M. Barslund, M. Busse and F. Nicoli (2016), "Will a European unemployment benefits scheme affect labour mobility?", CEPS Special Report No. 152, CEPS, Brussels, December (https://www.ceps.eu/system/files/SR152%20EUBS%20and%20Labour%20Mobility.pdf).

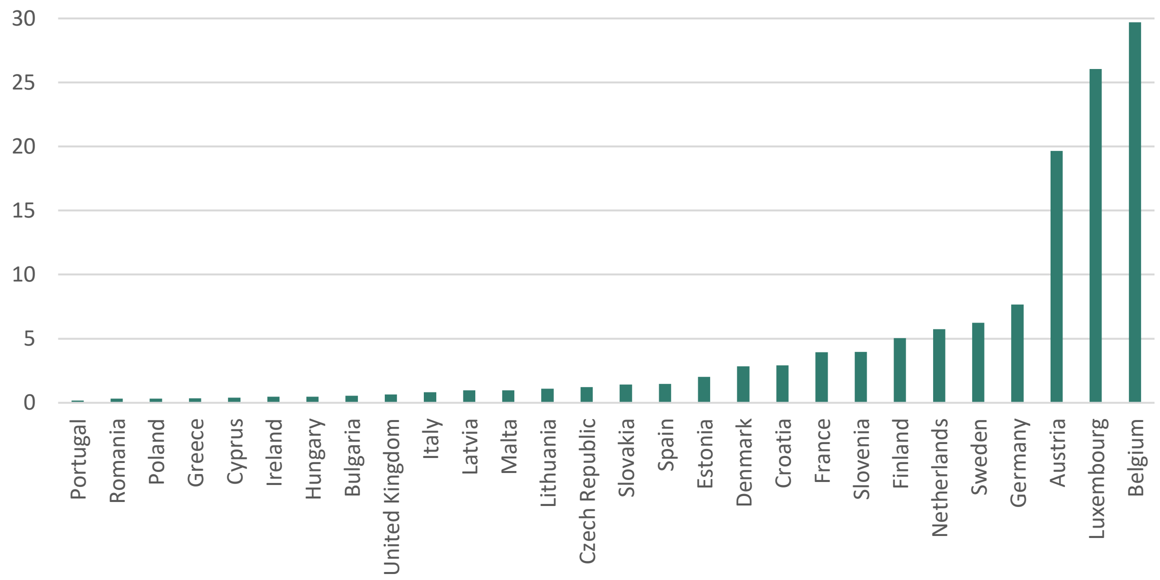
perspective of the receiving country, posted workers account for 4.5% of total employment in Belgium.[7]

3. The sectoral impact

Secondly, some sectors are more affected than others. The construction sector is responsible for more than one-third of all postings and here the local impact can be significant. Unfortunately, only a few member states publish the outgoing postings by sector. But among those that do, one can take the example of Slovenia where the number of full-time equivalent posted workers accounts for 46% of all construction employment.[8] In other words, nearly every second Slovenian construction worker is posted abroad.

From a receiving-country perspective, Belgium faces the largest impact (see Figure 3). In that country's construction sector posted workers make up over 25% of employment in 2016. This figure has tripled since 2007, when they constituted only 8% of construction employment. This is in addition to general mobility patterns across the EU, which in the case of Belgium, is similar to those of posting flows.

Figure 3. Received posted workers in the construction sector (% construction sector employment) 2016



Note: The figures are not adjusted for full-time equivalence.
Data sources: European Commission and AMECO.

[7] F. De Wispelaere and J. Pacolet (2017), "The size and impact of intra-EU posting on the Belgian economy. With a special focus on the construction sector", HIVA, KULeuven.

[8] This is a cautious estimate since the applied average duration of postings from Slovenia was used in the adjustment and it can be assumed that the duration in the construction sector was longer than the overall average.

What is more, it is not just about the current number but also about the dynamics (cf. Figure 2). Overall posting has increased between 2010 and 2015 by 40%. But Belgium is now receiving nearly twice as many posted workers as it did in 2010, and at the same time, the number of postings from Slovenia has increased by 40% per year within the same period.

All of this indicates that posted workers can have a pronounced impact on some segments of domestic labour markets. Faced with the challenges implicit in these numbers and trends, it is understandable that the Belgian authorities, confronted with job displacement and downward pressure on wages and social security contributions, seek EU remedies. But this is only one side of the coin.

Some countries have become very dependent on the opportunities created by the PWD and many jobs are potentially at stake. It may reach levels that would noticeably affect public finances. A quick back-of-the-envelope calculation in the box below shows the potential losses for the Slovenian state.

Economic effects of posting: The case of Slovenia

If we estimate that around 100,000 posted workers were sent abroad in 2015 from Slovenia, that would give 50,000 full-time equivalent postings.* Almost three-quarters of Slovenian posted workers are sent to either Austria or Germany where the average wage is 1.8 and 1.6 times higher than in Slovenia. Let's assume for simplicity that Slovenia's posted workers are earning at least the Slovenian average annual wage of €25,000** when working abroad. Consequently, posted workers provide €1.25 billion of taxable income to the Slovenian state, which translates into more or less €300 million in taxes,** corresponding to almost 1% of GDP or 2% of annual government revenues. Moreover, as social security contributions of the employee and employer are also paid in the home country, the loss to the Slovenian state could potentially reach around €500 million. ***

If postings were to be substantially restricted or made unprofitable, a large chunk of these revenues and social security contributions would disappear, since not all of those workers would be easily absorbed by the Slovenian economy in the short run. This would leave a sizable hole in the budget balance and social security system, over and beyond the rise in expenditure due to increased unemployment. Logically, other countries would gain in turn.

* We derive this estimate by combining information from the number of A1 forms issued and the average length of posting per A1 form (Posted workers country fiche, Slovenia: http://ec.europa.eu/social/BlobServlet?docId=15207&langId=en).

** Calculated on the basis of applying tax rates/social security rates to the average wage in Slovenia. If one were to apply the minimum wage of Germany (one of the two main recipients) of €18,000 the figures would be slightly lower, but studies have shown that posted workers on average earn significantly above-minimum wages.

*** For a similar exercise, see F. De Wispelaere (2015), "Posting of workers: The impact of social security coordination and income taxation law on welfare states", HIVA Working Paper.

The case of Slovenia and the other examples cited above show that the impact of a substantial restriction on postings would have profound ramifications for certain countries or sectors.

4. Proposals on the table

The big question then is whether the proposed revision will render posting substantially less profitable and therefore less likely.

The aim of the Commission's proposed changes to the PWD is not to unduly restrict posting, but rather to protect the rights of posted workers. The slogan "*equal pay for equal work at the same place"* is a repeated refrain throughout the debate everywhere. In practise, the Commission's proposal would replace "minimum rates of pay" with normal remuneration with respect to the entitlements of posted workers, aside from the minimum wage and standard labour rights. Moreover, universally applicable collective agreements would be binding for posted workers in all sectors – this is currently only the case for the construction sector. Another key change is the proposed restriction on the duration of a posting to 24 months; thereafter the posted worker would become a regular domestic worker, with all the attendant rights and obligations. Lastly, the revision targets postings via temporary work agencies, which have become more prevalent in the posting business, and seeks to ensure a level playing field and to safeguard the rights of posted workers.

With the plenary vote in the European Parliament, the legislature's position is now finalised - the EP Employment Committee voted with a large majority in favour of the position last week, on October 16th. In large part, the Parliament followed the Commission's proposal. An important difference is the expansion of the legal basis for the Directive. The PWD has so far been based on legislation related to the four freedoms, whereas the Parliament proposes to extend the legal basis to also cover the social *acquis*. While it may seem like a minor change, some countries will take issue with this implicit shift from posting being an exclusively internal market issue towards becoming a labour standards issue. This shift may eventually have important implications for future rulings of the Court of Justice of the European Union. The Parliament was expected to have shortened the maximum duration of posting, but it kept in line with the 24-month maximum suggested by the Commission. In its proposal, the Council advocates changing the maximum period to a 12-plus-6-month rule.

As mentioned in the introduction of this paper, the positions of the Commission, Parliament and Council must now be reconciled within the Trilogue and discussions will commence soon. Since the gap between the three positions is not enormously wide, it can be expected that a compromise will be reached in due time.

5. How will posting be affected?

The potential impact of the PWD revision is hard to assess *a priori,* but it is unlikely to render the average posting unprofitable. Notably the differences in social security contributions will remain and these can be sizable.[9] Labour shortages in some professions will not disappear and

[9] European Commission (2016), "Impact Assessment", SWD(2016) 52 final, page 78ff, available at: http://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-52-F1-EN-MAIN-PART-1.PDF.

will continue to be filled via postings (as exemplified by the fact that 50% of postings take place between high-wages countries). Moreover, the principle of *equal pay for equal work at the same place* does provide some leeway to negotiate wages according to productivity, skills, experience, etc.; thus, in practise a posted worker may still earn less (or more) than the average domestic worker. However, some postings in which the worker currently earns just above the minimum wage will be affected. Data on Polish posted workers in Germany, however, show that most of them earn well above the minimum wage.[10] In general, aside from the basic salary, some other forms of remuneration and benefits will now be available to posted workers which will increase the total labour cost related to postings.

Furthermore, posting will become administratively more burdensome. Member states will be required to publish all legalities and elements of remuneration applying to workers posted in that country on a single website. Staying abreast of changes to sectoral wage agreements and other forms of remuneration could make posting of workers too costly for smaller companies. For longer postings, there is the added complexity of transferring the worker to the same status as a regular 'host country worker' after 12(+6) months, and to the host country's social security system after a maximum of currently 24 months. The latter maximum duration may be changed within the on-going revision of the social security coordination regulation,[11] but it is not certain that it will perfectly align with the PWD.[12] The impact assessment conducted by the Commission at the start of the proposed revision argued that the overall effect will be small. [13] It is well known, however, that accurate data on the number and length of postings are not available for all countries and sectors, let alone data on current wages and benefits accruing to posted workers. Hence, assessing the likely impact is fraught with uncertainty. As pointed out earlier, the details matter and show that in some sectors of some countries the revision may have more profound implications.

Fortunately, the proposal foresees a transposition period of three years plus one additional year before the revised Directive comes into force. Therefore, the impact will not be immediate and economic actors can adapt their business models and become familiar with the new requirements.

This in turn may also lead to new 'innovative posting schemes' aimed at circumventing the requirements, just as some black sheep currently attempt to do, e.g. via letter-box companies or the provision of overpriced company-organised housing, which factually reduces the effective wage for the posted worker. To reign in such fraudulent behaviour, the European

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[10] M. Benio (2016), "Labour costs in cross-border services", Kraków University of Economics, April.

[11] Regulation (EC) No 883/2004

[12] See also the call for a broader debate: F. De Wispelaere and J. Pacolet (2017), "Posting of workers: a call for a broader debate", opinion piece, Euractiv, 4 September (http://www.euractiv.com/section/economy-jobs/opinion/posting-of-workers-a-call-for-a-broader-debate/).

[13] European Commission (2016), "Impact Assessment", SWD(2016) 52 final, page 78ff, available at: http://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-52-F1-EN-MAIN-PART-1.PDF.

institutions initiated the enforcement Directive,[14] which by now has been transposed into national law in most member states. It is too early to assess the extent to which the Enforcement Directive has achieved this objective, but in any case, the supervision of postings across-borders is a challenging task as it requires substantial cross-border cooperation between labour market agencies.

In this context, it is not surprising that the idea of a European Labour Authority has recently gained momentum. Such an agency would, ideally, provide a nexus connecting national labour authorities and ensure a consistent level of surveillance inter alia of adherence to the PWD. The establishment of a European Labour Authority would be politically challenging, however, and is bound to be met with strong resistance by national governments over the principle of subsidiarity since e.g. labour inspections remain a national competence. It would also be difficult to implement in practise.[15]

6. Conclusion

In a well-functioning and deeper single market for services, there is no escape from the concept of posted workers. Hence, it is imperative that the practise is carefully and thoughtfully regulated. In a Union with more homogenous social security systems and smaller wage disparities, this could be addressed relatively easily as a mere technical issue. Faster convergence of wages between low- and high-wage countries – a process that largely came to a halt with the onset of the financial crisis in 2008 – would surely help to make the issue less toxic among member states. But until such a scenario becomes a reality, posting will continue to be a political hot potato. With a four-year waiting period before the revised Directive comes into force, assuming the trilogue runs smoothly, and with numerous national elections as well as one for the European Parliament being staged in the interim, it is a safe bet that we have not heard the final word on the subject of posted workers.

[14] Official Journal of the European Union 2014 (http://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX%3A32014L0067).

[15] M. Beblavý (2017), "Is Juncker's enthusiasm for a common labour authority premature?", CEPS Commentary, 18 September 2017.

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