Novitz, T., & Andrijasevic, R. (2020). Reform of the Posting of Workers Regime: An assessment of the practical impact on unfree labour relations. *Journal of Common Market Studies*, 58(5), 1325-1341. <https://doi.org/10.1111/jcms.13033>

Peer reviewed version

Link to published version (if available):
[10.1111/jcms.13033](https://doi.org/10.1111/jcms.13033)

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Reform of the Posting of Workers Regime – An assessment of the practical impact on unfree labour relations

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Abstract

The 2018 Amending Directive is the most recent response to the failings of the European Union (EU) legal framework for the posting of workers. This article uses an original case study of workers posted from Serbia via Hungary to Slovakia as a basis on which to assess the practical impact of this latest Directive. We recognise the capacity for EU Member States to do more to protect posted workers than was possible previously. However, we also note significant regulatory omissions relating, in particular, to the manufactured uncertainty of employment and immigration status, limited supply chain regulation and obstacles to trade union representation. We identify the need to address in greater detail the complex operations of transnational temporary work agencies involving third country nationals which can produce legal uncertainty and foster unfree labour relations.

Keywords

Posting; third country nationals; temporary work agency; employment; supply chain; remuneration; trade union

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Introduction

In the context of the global financial crisis, followed by a sovereign debt crisis (Reinhart and Rogoff, 2016), we have seen intense competition between employers to cut labour costs and a lack of regulatory commitment by States regarding implementation of labour standards.

Further, these crises hit shortly after ‘enlargement’ of the European Union (EU), such that the stark differentials between accession Central and Eastern European (CEE) States and older EU-15 Member States played into the ferocity of low-wage competition (Novitz, 2007; Zahn, 2017).

The posting of workers regime, operating in this context, envisages that the host State can and will set down certain minimum standards required under Article 3(1) of the Posting of Workers Directive 1996 (PWD).¹ The 1996 PWD defines ‘posted work’, which entails temporary deployment by one’s own employer in another EU State, including by a temporary work agency (TWA). The aims of the PWD are to protect the vulnerable posted worker, to clarify the obligations of the host State and also flag the costs of the service provider (Evju, 2010). Posted workers do not gain rights to equal treatment applicable to workers exercising their free movement rights under Article 45 of the Treaty on the Functioning of the EU (TFEU). Instead, posting is the manifestation of a service provider’s entitlements under Article 56 TFEU. In this way, the PWD combines humane, regulatory and commercial objectives, albeit rather awkwardly, despite the supplementary adoption of a PWD

¹ Directive 96/71/EC of the European Parliament and of the Council of 16.12.96 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (PWD).

Enforcement Directive.² From 2010 onwards, the incidence of posted work increased dramatically by an estimated 49%, while posted workers were often paid less than 50% of previous wages for the same job (EU Commission 2016b, p. 13 and p. 36). Finding the price of their labour undercut, local workers have engaged in ‘fake posting’, pretending to be from another EU State or seeking hire through a TWA originating in another EU State so as to gain some access to paid work (Cremers, 2011). So-called ‘letter box companies’ have emerged that also facilitate posting through sub-contracting arrangements, which evade labour law and social security protections (ETUC, 2016; McGauran, 2016, p. 46).

The Amending PWD 2018, to be implemented by Member States from 30 July 2020, is the most recent measure taken to reform the posting regime.³ Ahead of its implementation, we ask whether the 2018 Directive could cure the failings of the 1996 PWD, regarding which various concerns had arisen. These related, for example, to the length of postings, hire through TWAs, accommodation costs and the impact of collective agreements (EU Commission, 2016b). We consider the probable impact of the PWD reforms with reference to a case study of workers hired by TWAs from Serbia and transported through Hungary to

² Dir 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Dir 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (Enforcement Directive 2014).

³ Dir 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Dir 96/71 concerning the posting of workers in the framework of the provision of services (Amending PWD 2018).

Slovakia to perform assembly work for an Asian ‘electronics firm, which highlights the need to address further issues, such as uncertainties regarding employment and immigration status.

Our article contributes to the existing literature on posting in a number of ways. First, we offer analysis of posting in the electronics sector, rather than construction work (Arnholtz and Andersen, 2018; Berntsen and Lillie, 2016; Wagner, 2015), or maritime and hospitality sectors (Lillie, 2010; Alberti and Danaj, 2017). Moreover, we address a previously untapped geographical area, considering posting to CEE host States as opposed to the EU-15 as destination countries (cf. discussion of Denmark in Arnholtz and Andersen, 2017; Germany in Wagner, 2015 and 2018; Sweden in Woolfson, Thörnqvist and Sommers, 2010; and the UK in Alberti and Danaj, 2017).

We draw on the analysis offered by Wagner (2018) of the ways in which formal legal norms interact with the particular vulnerabilities of these workers. We note two dynamics: first, that immigration and employment status are rendered uncertain intentionally as a mechanism of control; second, that there is an absence of ‘social solidarity’ (Wagner, 2018, p. 13) and meaningful access to trade union representation in the host State which could offer voice for those engaged in posted work. Further, building on literature regarding TWAs (Andrijasevic and Sacchetto, 2017; Rombouts and Houwerzijl, 2018; and Gordon, 2017), as well as that on the treatment of third country nationals (TCNs) under the posting regime (Chudzikova and Bargerova, 2018; and Mussche and Lens, 2018), we show the systemic role of TWAs in recruitment and management of temporary migrant labour within global supply chains. In so doing, we point to the short-term service mobility of TCNs through TWAs as an integral element of the European labour market.

An additional original aspect of this article stems from combining legal analysis with critical social science scholarship on posting. Analysis of the legal framework is usually secondary in international relations and political economy literature. By assessing the practical impact of the Amending PWD 2018, we identify the capacity for Member States to do more to protect posted workers than was possible previously, although we wonder whether CEE governments seeking to attract investment will take advantage of this opportunity. Other concerns remain, such as the potential to exploit legal uncertainties regarding employment and immigration status, alongside limited access to trade union representation, including collective bargaining and action.

Temporary migrant workers in Slovakian electronics supply chains

In Slovakia, as in other so-called ‘accession States’ in CEE, electronics companies utilise a temporary migrant workforce through TWAs to meet their production demands (Andrijasevic and Sacchetto, 2017). Here, we identify the concrete practices by which workers are temporarily imported to perform work in an EU Member State from what is regarded in the EU as a ‘third country’ through another EU State. We use the example of ‘LP’, an acronym for a TWA with headquarters in Slovakia and operating through subsidiaries in Serbia and Hungary (and later Romania). This is a more complex TWA operation than is so far seen in other spheres (Rombouts and Houwerzijl, 2018). Information was gathered by one of the authors in 2016⁴ and 2019 via interviews in Slovakia and Serbia with workers (12), TWAs

⁴ The 2016 data was gathered as part of a larger research project examining how the expansion of transnational production is engendering new forms of international migration.

(8), trade unions (3), local labour office (1), labour inspectorate (1), Ministry of Labour (1) and NGOs (2). Original data was triangulated with information from secondary sources such as NGO and trade union reports, newspaper articles in Serbian and Slovak outlets and the Facebook page of the TWA under scrutiny. Triangulation allowed a crosscheck of the accuracy of information gathered regarding recruitment and employment practices as well as labour rights violations.

Advertising posts on a Serbian website and Facebook page, LP Serbia explained it was a subsidiary of LP Slovakia, with experience in placing 8000 workers with 100 firms in sectors including the food industry and electronics. This was specified to be manual work that could be rapidly learnt, usually in production lines. Men and women - whether single or in couples, married or not - were eligible if aged 18 to 50 years and tested negative for hepatitis C and B. Knowledge of Slovak, Hungarian or Russian was said to be helpful, but not essential, setting up the potential for vulnerability by reason of limited language skills. Their pay would be €2.20 per hour with an expectation that there would be sufficient work to earn €500 or more per month.

Both EU and non-EU nationals were sought. Non-EU nationals were informed that they could only stay for up to 90 days and could return to work again in Slovakia only after 90 days in Serbia. EU workers could stay longer and earn after a year €3 – €5 per hour and potentially be hired directly by the employer. Payment of wages would take place on the 16th

from 2013 to 2018, which involved fieldwork in the Czech Republic, Slovakia, Turkey and Hungary. See Andrijasevic and Sacchetto, 2016 and 2017.

day of every month. Shifts would be for twelve hours with a thirty-minute unpaid break permitted only if allowed by the line managers. Food could be prepared at the dormitory or bought from the factory canteen for approximately €3. If workers left before the end of the contractual 90 days, they would forfeit a service bonus (25%) from the electronics firm for which they ultimately worked, an LP bonus (10%), and had to pay a fine of €30.

Workers would not pay for transport by coach from Serbia to Slovakia (but they would need evidence of travel insurance when travelling through Hungary). If ill, workers would be solely responsible for covering their own hospital treatment costs and if they did not perform satisfactorily in their first ‘probation’ period of 10 working days, they could be sent home, and in that case would have to arrange and pay for their own transportation. The same would apply if workers switched agencies during their contract, or there were redundancies.

Accordingly, LP recommended that the workers keep €30-50 in cash. Once in Slovakia, there would be ‘free’ shared accommodation (between two – four persons) and transport to and from the plant where they would work. However, if they did not work or were fired, workers then had to pay themselves for their accommodation and should leave immediately. On arrival in Slovakia, they signed contracts that we were able to examine, which described them as ‘posted workers’ employed by the Hungarian agency and temporarily posted to Slovakia.

These terms seem exploitative, but the evidence gathered from workers suggests that the reality was worse. When interviewed, workers described how, when travelling over the Hungarian and Slovakian borders, they were warned not to disclose that they were travelling for work, so that they only entered on visitor visas. This meant that, in practice, they were not considered lawfully posted from Serbia (or Hungary) and they understood that they were ‘black’ working ‘illegally’ without any social security or health contributions. In terms of

working conditions, long days in excess of fourteen hours occurred when demand was high, while when demand for work was low inadequate hours were provided for subsistence. If workers were absent three times, even in case of illness, they were dismissed.⁵ Holiday and rest break entitlements were rarely observed. As the head of a TWA explained in an interview, in fact the accommodation and transport were not free but deducted from monthly pay. This was standard practice. Moreover, salaries were paid in cash at the dormitories without pay slips, so that deductions could go unchallenged. Sani Dermaku, the Serbian ambassador to Bratislava, reported that every month his staff helped Serbs who said that they were deceived by TWAs, which had confiscated their passport or left them without money.

Workers also faced problems due to their accommodation. Their dormitories were placed in the middle of industrial ruins. It was difficult for workers to go into town, as to do so one needed to cross the fields or walk on the highway, which could lead to fines as pedestrians were not allowed on those roads. It was not permitted to have friends or guests to visit. In other words, the housing ensured workers' isolation and potential exposure to exploitation.

Trade union representatives or labour inspectorates did not assist these workers, but supported actions that heightened their vulnerability. In Sered, a strike organised by the trade union OZ KOVO protested against violation of the collective agreement when the 342 Serbian agency workers outnumbered the 300 Slovak workers. In Voderada, in western Slovakia, the trade union supported a petition by local residents who feared that Serbian workers would replace the Slovak workers. The labour inspectorate in Nitra signalled to the police 'illegal' work at an electronics assembly plant, resulting in detention of 92 workers

⁵ See <https://karmina.red/posts/do-slovacke-u-potrazi-za-poslom/>

and deportation of several others (corroborated by Chudikova and Bargerova, 2018, pp. 12 – 14). The prevalent conditions have promoted a lack of worker solidarity and an absence of State protection.

EU and non-EU nationals possessed (ostensibly) different legal rights under EU law. That legal complexity was compounded by their recruitment by a Serbian agency, contractual relations with the Hungarian agency, and payment by the Slovak agency to do work for an electronics company. This dispersion of responsibility in terms of who might be their employer or ultimately responsible for their circumstances poses both practical and legal problems (Prassl, 2015; Alberti and Danaj, 2017, p. 3068). For some workers the situation became even more problematic when LP Serbia shut down and they were told to sign new contracts immediately (without translation) with a Romanian subsidiary, as they would otherwise receive no pay. The overall picture is of an isolated vulnerable workforce, distant from any meaningful source of assistance.

Transnational uncertainty in posting and unfree labour relations

In this section, we consider what protection and redress was available to the workers in our case study under the existing EU legal framework relating to posting of workers. We do so by analysing the 1996 PWD and the accompanying 2014 Enforcement Directive, as well the entitlement to non-discrimination enshrined in the TFEU. The aim is to identify the weaknesses of the current EU framework that generated isolation from collective representation and what we term ‘transnational uncertainty’ (which might also be understood as ‘liminal legality’ as described by Fudge, 2018). These weaknesses were exploited by TWAs, with palpable practical effects on workers, especially TCNs. Our aim is to provide the

basis to assess, in the next section, the extent to which the Amending 2018 PWD can plug existing gaps in protection against exploitative unfree labour relations.

Recruitment of a vulnerable workforce

On its Facebook page, LP expressed interest in recruiting non-EU nationals (namely nationals of Serbia) and EU nationals such as Croatian citizens resident in Serbia. This is an interesting choice in that both categories are susceptible to considerable vulnerability: the former are TCNs and less protected within the EU, while the latter are an ethnic minority with limited access to the formal labour market in Serbia. Many of the Croatian Serbs interviewed in our study had escaped from Krajina (a territory within Croatia) to Serbia during the Croatian War of Independence and had been internally displaced persons, that is, war refugees.

This is relevant because Croatian nationals residing in Serbia were legally entitled to exercise their free movement rights under Article 45 of the TFEU, namely to move to another EU Member State such as Slovakia without a visa, work there without a work permit and, to the extent that they are able to support themselves, reside there for an indefinite period of time. Any discrimination on grounds of nationality would then be illegitimate regarding employment, remuneration and other conditions of work. Yet, their experience of vulnerability in terms of access to work in Serbia meant that they had little economic security or confidence to make the ‘shift’ from posting to free movement (cf. Alberti and Danaj, 2017, p. 3080). This lack of capacity was compounded, when in Slovakia, by the solitude of the dormitories in which they were housed, as well as their linguistic isolation, alongside separation from forms of collective worker representation.

Selective sectoral protection and collective bargaining

The bulk of the literature on posted work investigates the construction industry (see our Introduction, above). This is not accidental, for while the 1996 PWD contemplates that collective bargaining can set minimum terms and conditions of employment under Article 3(1), this was only contemplated in the construction industry (under the Annex), being optional in other sectors, such as electronics (under Article 3(10)). Moreover, such an agreement had to be ‘declared universally applicable’ (Article 3(8)), with the European Court of Justice (CJEU) finding that a local agreement which only applied to the public sector did not meet the necessary requirements in a public procurement context.⁶ The CJEU had previously clarified in the *Laval* case that collective action in pursuit of a higher minimum wage than the service provider had contemplated was unacceptable due to the unpredictability of costs this could entail.⁷ This apparent reluctance by the CJEU to contemplate collective action and collective bargaining affecting posted workers attracted considerable criticism (Barnard, 2009; Davies, 2008; Kilpatrick, 2009; Malmberg and Sigeman, 2008; Rocca, 2015), but remained good law, despite an attempted but failed political settlement in the Monti II Regulation.⁸

⁶ Case C-346/06 *Rüffert v Land Niedersachsen (Rüffert)* [2008] ECR I-1989.

⁷ Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet (Laval)* [2007] ECR I-11767 at para. 110.

⁸ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, 21.3.2012.

As Mussche et al (2018) recently observed, exports of short-term services are now more prevalent than long-term labour migration through free movement. For example, in January 2017, the Asian electronics plant where workers in our case study were engaged had 570 permanent and 1000 temporary agency workers. We suggest, therefore, that posted work is not an exceptional category, but rather a fundamental part of the structure of European labour relations in which an absence of trade union representation has profound effects. Sectoral and geographical expansion of service mobility poses significant difficulties for trade unions in recruitment and representation of ‘hyper-mobile migrant workers’ and temporary ‘transnational workers’ (Berntsen and Lillie, 2016 and Andrijasevic and Sacchetto, 2016). Trade union strategies have largely been directed at long-term labour migration, but now need to tackle the ‘temporariness’ of employment, which has been obstructed by CJEU caselaw limiting access to collective bargaining and collective action (Hayes and Novitz, 2013). While trade union intervention in protection of posted workers’ interests is far from straightforward, Bernaciek (2016) and Zahn (2017) have offered positive examples of cross-border transnational solidarity between workers and unions, which offers some hope that (with legal support) the recent hostility of Slovakian trade unions to posted workers need not be long lasting.

Uncertain legality

EU ‘posted’ workers are notionally regarded as not gaining ‘access to the labour market’ of the host State (Hayes and Novitz, 2013), being viewed not in terms of their rights to free movement but only in terms of the employer’s right to free movement of services. In accordance with the terms of contracts signed with the Hungarian LP subsidiary, the workers in our case study might be regarded as ‘posted’ under Article 1 of the 1996 PWD via a

‘temporary employment undertaking or placement agency’. This should create entitlements to the minimum ‘terms and conditions of employment’ set out in Article 3(1) of the 1996 PWD which Member States must provide. Certainly, exemptions for workers posted for less than 8 days or less than a month would not apply. In our case study, we have detected potential breaches of basic working time requirements due to long hours working with inadequate rest breaks,⁹ and also deductions of pay for accommodation (and ad hoc cash penalties) which make it doubtful that all workers received in fact the Slovakian national minimum wage of €480 per month, that is €5,760 per year. Access to even these minimal entitlements was further cast in doubt by uncertainty as to whether these workers were in ‘an employment relationship’ with the TWA, which is required by the PWD 1996. It was not clear from their contracts whether they were properly workers under EU law, while they themselves believed that their mode of entry to Slovakia and the lack of deductions for social security and healthcare rendered them ‘black’ or unofficial. While the kinds of criteria recently set out by the CJEU regarding subordination seem to suggest they should be regarded as workers,¹⁰ neither they nor we can be sure.

⁹ See Council Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time OJ L 299/9, 18.11.2003.

¹⁰ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 [2015] 4 CMLR 1.; *NV Kunsten Informatie en Media v The State of the Netherlands*, The Hague Court of Appeal, Judgment of 1 September 2015 available in English at <<http://www.fim-musicians.org/wp-content/uploads/AF0905-1509-court-of-appeal-2015-09-01.pdf>>.

Further, even if they were believed they were legally workers, the workers in our case study struggled to ascertain who was their employer (cf. Borelli, 2018, pp. 50- 51 who calls for clarification from a labour law and social security perspective). TWAs could disappear overnight only to resurface in a new form, leading to contractual relations with LP Hungary, later replaced by a Romanian-based agency, while ongoing payment was provided by the Slovakian agency. This is a further manipulation of the posting situation which even surpasses past ‘fake posting’ scenarios or the use of letterbox companies anticipated by the 2014 Enforcement Directive (see ETUC, 2016). There is potential under Article 12 of the Enforcement Directive for Member States to lawfully impose subcontracting liability, but this merely provides (as observed by Van Nuffel and Afanasjeva, 2018, p. 1423) for ‘joint liability in direct subcontracting situations’, not throughout the whole chain. Further measures can be taken on a ‘non-discriminatory and proportionate’ basis, but they are left to the discretion of countries like Slovakia. Offshore assets can only be accessed under limited circumstances under Article 9 of the 2014 Directive, and its efficacy has been cast into doubt in the *Vavti* case.¹¹ It is possible that new provisions in the Enforcement Directive for labour inspection (in Article 10) and for trade union representation (in Article 11) could have had benefits for the workers in our case study, but post implementation in 2016, it was apparent that labour inspectors and trade unions were unsympathetic to the workers in our case study.

There was also a further difficulty. The PWD formally only applies to the temporary movement of workers between EU Member States. Our workers’ situation was not always in

¹¹ Case C-33/17 *Cepelnik d.o.o v Michael Vavti*, judgment of 13 November 2018 (*Vavti*), decided on the basis of Article 56 TFEU as the Enforcement Directive was not operative at the time of the relevant events.

practical terms temporary: some had been working through agencies for that same Asian company on and off for years through different TWAs. Secondly, it is unclear whether this situation can be considered as movement between EU Member States as required by the PWD. TCNs residing in Serbia should not be covered by the posting of workers regime unless they are lawfully employed by a service provider established in another Member State, in which case a work permit is not required.¹² Mussche and Lens (2018, pp. 10-11) have identified large numbers of TCNs being posted within the EU and their fundamental role in the EU labour market. In our case study, it is difficult to assess whether the workers were actually ‘employed in Hungary’ before their arrival in Slovakia. This seems doubtful, given the entitlement of a host State ‘to verify that the situation of the workers concerned is lawful and that they are carrying on their main activity in the Member State in which the service provider is established’.¹³ If they were not, and they were ‘posted’ from a third country, Article 1(4) of the PWD provides that the service-provider (LP Serbia) as an ‘undertaking established in a non-member State must not be given more favourable treatment [by the host State] than undertakings [ie TWAs] established in a Member State [i.e. Slovakia]’. In other words, the constraints applying to the hire of posted workers from an EU Member State by virtue of Article 3(1) should also apply to the Serbian subsidiary of LP. However, two inter-

¹² See Case C-43/93 *Vander Elst v Office des Migrations Internationales*, [1994] ECR I-3803; Case C-445/03 *Commission v Luxembourg*, [2004] ECR I-10191; and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. (See also Mussche and Lens, 2018, p. 8.)

¹³ See Case C-18/17 *Danieli & C. Officine Meccaniche SpA*, Opinion of Advocate General Wahl, 26 April 2018, para. 86, citing Case C-91/13 *Essent Energie Productie*, Judgment of 11 September 2014, paras 52 and 57. While in *Danieli*, the CJEU found in a judgment of 14 November 2018 that, on the facts, a work permit was not required, these seem distinguishable from our case study.

related questions then arise: do these Serbian workers satisfy Slovakian immigration requirements and, if not, can they still rely on the minimal protections offered by the PWD?

Immigration requirements versus the PWD

Formally, liberalisation of trade in services is envisaged under Article 26 of the EU-Serbia Free Trade Agreement (in operation since 2009), but posted work is not necessarily covered by the EU-Serbia Stabilisation and Association Agreement (SAA). Title V, Chapter 1 of the SAA relating to free movement makes the claim of Serbian nationals to non-discrimination contingent on (under Article 49) ‘the conditions and modalities applicable in each Member State’ and enables bilateral agreements between the Member States. There is no evidence of such an agreement between Serbia and Slovakia at the time of writing and therefore no basis for legal immigration for temporary posting.

That said, this may not affect the operational requirements of Slovakian immigration in practice. Even in the absence of a legal basis for posting, it seems from the adoption of a 2016 law titled ‘Application of Law in Conditions of Posting of Workers’ that the Serbian legislature does expect Serbian workers to be posted abroad.¹⁴ As a European Migration Network Study has observed, mobile third-country national posted workers may in practical terms be treated in similar ways to ‘those who have entered the Member State directly from a

¹⁴ Adopted 13 January 2016; for a report in English, see

<https://www.ekapija.com/en/news/1332027/application-of-law-on-conditions-of-posting-of-workers-begins-in-serbia>.

third-country’, even if the immigration status of the latter is less secure.¹⁵ An interview with the Hungarian Minister of Labour revealed that, in practice, much depended on the requests made by multinational corporations, such as the large ‘tech’ companies, on a pragmatic basis corresponding to their demands for temporary staff.¹⁶

The problem is that putative illegality may be allowed to defeat the otherwise lawful claims of posted Serbian workers in Slovakia, subject to the terms (and implementation) of the Employers Sanctions Directive.¹⁷ An example was the detention and deportation of temporary workers at Nitra without discussion of the conditions under which they had been engaged, and without (to our knowledge) back payment of wages (Chudzikova and Bargerova, 2018, pp. 12 – 14). While Slovakia as an EU Member State cannot allow LP to be treated more favourably than any other service provider under the PWD 1996, this does not seem to give rise to the full gamut of employment law claims for individual workers. Mussche and Lens (2018, p. 12) consider that immigration regimes restrict the longer-term mobility of TCNs, while posted work makes short term assignments possible. We suggest that immigration regimes can affect the access of posted TCN workers to legal redress. The

¹⁵ Intra-EU Mobility of Third-country Nationals, European Migration Network Study 2013, p. 8.

¹⁶ Interview with two representatives of the *Main Department for Labour Safety and Labour, Government Office of Budapest*, 11 October 2017 (Unpublished summary of the interview, Interview conducted by Márton Czirfusz as part of the STRONGLAB project and reproduced with researchers’ permission).

¹⁷ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

illegality of any entry into the host State may also taint the ability to find there is a lawful employment relationship (Fudge 2018); and uncertainty as to the existence of an employment relationship (and the identity of the employer) can have a chilling effect on workers coming forward to enforce their rights. ‘Liminal’ or uncertain transnational legality operates here, manufactured by TWAs, such that these workers will be unsure of the rights to which they are entitled.

Unfree labour

Scholarship on posted work and that of unfree labour do not often draw on each other, but we consider the latter helpful in explaining the production of vulnerability observed in our case study and its systemic presence within transnational ‘human supply chains’ (Gordon, 2017). Unfree labour relations may be best understood, not simply as modern slavery (O’Connell-Davidson, 2015), but rather as operating within a political economy framework (LeBaron, 2015) in which compulsion and coercion, social relations and the circumstances of the supply of labour are all relevant. Unfree labour relations are accordingly multidimensional and gradated along a continuum (Strauss and McGrath, 2017).

While workers in our case study were at the outset given some information and choices, they also experienced regulatory arbitrage enabling the exploitation of legal uncertainties by TWAs (and ultimately the electronics companies which benefit from their labour). They also found their legal situation so riddled with uncertainty that they were rendered particularly susceptible to coercion, on a scale of significant unfree labour (Phillips and Mieres 2015, p.245). Overall, this is a workforce caught within the supply chain that they have entered voluntarily which they find difficult to exit as they are tied into a contract with a particular

employer, under a menace of penalty and/or non-payment of wages, subject to illicit deductions from pay, vulnerable to deportation, risking homelessness because of tied accommodation, isolated by geography and language, and distant from meaningful legal protections. Further, while unfree labour (in the context of modern slavery) is often viewed from the perspective of the individual worker (Paz-Fuchs, 2016), access to collective representation has been recognised as potentially constitutive of individual freedom (Bogg, 2017). Unfree labour tends to be ‘concentrated in sectors and workplaces with no or very low levels of union activity’, since the lack of collective voice to challenge working conditions has a ‘porous’ effect exacerbating vulnerability (LeBaron and Phillips, 2019, p.12).

The severe constraints on workers’ freedom we found in our case study, which appear to be enabled by the PWD 1996, are becoming a normalised aspect of global production and trade in services on a large scale (Strauss, 2012; Novitz, 2014). Indeed, as Barrientos (2013, p.1066) puts it, subcontracting of short-term services through TWAs is now ‘integral to the flexible commercial functioning of [Global Production Networks] GPNs across borders in a liberalised global economy’.

The Amending PWD 2018: A way forward?

By 2015, evidence gathered by the Commission indicated that posting of workers was posing problems across Europe (see studies conducted by Pacolet and De Wispelaere, 2015 and van Hoek and Houwerzijl, 2011a and 2011b). Following significant pressure from EU Member States (Van Nuffel and Afanasjeva, 2018, p. 1402), the Commission accordingly instigated a consultation procedure on 15 July 2015 and issued a proposal for a revised directive on 8 March 2016 (Lhernould, 2019, p. 249; EU Commission, 2016a, pp. 3 – 4; EU Commission,

2016b, p.4). The Commission's Impact Assessment identified 'unclear rules' concerning, for example, subcontracting, TWAs and the temporary nature of posting (EU Commission, 2016b, pp. 14 – 18). At no time did the Commission phrase its proposals for greater protection of workers in terms of unfree or even forced labour (prohibited under Article 5 of the EU Charter of Fundamental Rights). Instead, emphasis was placed on 'fairness' of competition in the internal market (EU Commission, 2016b, pp. 16 – 27), an objective restated in recital (10) of the recitals to the Amending PWD 2018. However, recitals (1) and (25) do also refer to 'the rights of workers' and of 'posted workers' respectively, which we might take to include (at a minimum) protection from forced or unfree labour.

The 2018 Directive amends the content of the original PWD, creating more stringent norms in some cases and in others giving States a further option to regulate, going beyond the compass of the 2014 Enforcement Directive. There are new limitations on the length of postings (including repeated and chain postings). It is also now clearer that TWAs fall within the scope of the posting regime and that posted workers can claim the same entitlements as other temporary agency workers. There is broader scope for protection of remuneration (as opposed to 'pay') and specific provisions regarding the adequacy of accommodation and associated expenses. However, ultimately the Amending PWD 2018 does not address several of the concerns raised by our case study, namely the uncertain scope of the posting regime relating to TCNs, issues of employment status alongside illegal contracts, the identity of the employer, supply chain regulation and trade union representation. This suggests that instances of unfree labour relations may continue in the context of posted work unless otherwise corrected.

Duration of posting

One of the most significant measures taken concerns the duration of ‘posting’. The Amending PWD 2018 (under recital 9 and new Article 3(1)(a)) sets a 12 (or in some cases 18) month time limit on temporary posting (Van Nuffel and Afanasjeva, 2018, pp. 1421 - 1422). After that time, EU workers are entitled to ‘all the applicable terms and conditions of employment’ on a free movement basis and not just the core protections in Article 3(1) (Rocca, 2018). LP, the TWA in our case study, stated that pay would be increased for EU nationals after a year to achieve parity with local workers, but the Amending PWD 2018 is offering a wider range of rights. Further, the Amending PWD 2018 provides that the qualifying period may be satisfied by cumulative hire of different posted workers for the same task - ‘Where an undertaking as referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall ... be the cumulative duration of the posting periods of the individual posted workers concerned.’ Posting is apparently not to be a permanent structural solution to the demand for low cost labour.

Minimum terms and conditions including remuneration

The Amending PWD 2018 notably includes in Article 3(1) protection of ‘minimum remuneration’ rather than ‘pay’. This change of terminology, which recognises the need for payment of additional benefits (for example relating to health and social insurance), is timely and relevant to the workers in our case study who did not receive these and seemingly had no entitlement to ask for them. Further minimum terms to be laid down by States are (h) ‘conditions of workers’ accommodation’ and (i) ‘allowances or reimbursement of

expenditure to cover travel, board and lodging expenses’. The Amending PWD 2018 clarifies that this applies when posted away from a ‘regular place of work’. That apparent clarification might create difficulties in our case study when the recruitment occurred in Serbia via Hungary but neither country can readily be regarded as a previous ‘regular place of work’. Reimbursement may also prove problematic, given that this is the responsibility of the country of origin (Serbia or Hungary) as opposed to the host State (Picard and Pochet, 2018, p. 4), as is the case already for social security provision (see Borelli, 2018, p. 51). Yet, there is at least now scope for countries like Slovakia to further regulate housing conditions for posted workers within their territory. There is even potential discretion, under an insertion into Article 3(10), for Member States to apply ‘equality of treatment, of terms and conditions of employment on matters other than those referred to in [Article 3(1)] in the case of public policy provisions’. This could for example address the costs imposed on the workers in our case study if they choose to resign, which is one of the factors which indicates that their labour is unfree. However, States like Slovakia would have to decide to prioritise protection of worker interests as opposed to those of larger multinational corporations, such as the electronics company in our case study.

Recognition of TWAs

Reference is made in Recital 12 of the Amending PWD 2018 to the Temporary Agency Work (TAW) Directive¹⁸ and, under new Article 1b, States shall provide that TWAs ‘guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of

¹⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327/9 5.12.2008.

[the TAW Directive] ... to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out'. This means that, after satisfying the qualifying period introduced by the host State, posted workers as temporary workers are entitled to the same 'basic working and employment conditions' as would have applied 'if they had been recruited directly by that undertaking to occupy the same job'.

Member States are also given additional powers under Article 3(9) to require undertakings (although they do not have to do so) 'to apply any other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out'. In other words, it is possible for a host State to regulate further for the protection of TWAs than was possible previously, without such regulation being regarded as a breach of free movement of services; although there is no requirement that this be done. Whether the Slovakian government regulates may depend on the weight placed on protecting vulnerable foreign workers versus attracting foreign investment.

What is clear is that 'the temporary employment undertaking or placement agency shall be considered to be an undertaking' under the PWD as amended. This enables greater opportunities to hold TWAs, key actors within contemporary global labour supply chains, liable for their actions. The ways in which a TWA may be engaged in posting are further clarified under Article 1(3), but remains subject to the proviso 'that there is an employment relationship' between the TWA and the worker.

Employment relationships and illegal contracts

In relation to the requirement that there be an ‘employment relationship’, there is continued uncertainty, such that we have to follow the limited guidance offered by the CJEU (Kountouris, 2018). The recent Opinion of Advocate General Pikamäe in *AFMB* highlights, in the context of application of social security systems, the frequent confusion caused by the ‘gap between appearances and the actual situation’ when seeking to identify the responsible employer.¹⁹ It would also have been helpful for the 2018 Directive to clarify the legality of ‘posting’ from one non-EU Member State through an EU Member State to another EU Member State. As Anderson (2010) and Alberti and Danaj (2017) rightly remark, migration and employment status intersect to produce legal and workplace vulnerabilities. There is a further need to cut through the complexity of contractual relationships exemplified by the use of TCN labour via TWAs by electronics firms.

Subcontracting chains and the role of trade unions

What is notably absent from the Amending PWD 2018 is the original Commission proposal regarding ‘subcontracting chains’, whereby Member States would have the option to apply remuneration established at company level and other applicable collective agreements to any subcontractor even where posting of workers is envisaged. This was explicitly stated to give ‘the faculty to Member States to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements’ (EU Commission, 2016a,

¹⁹ Case C-610/18 *AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank*, 26 November 2019, para. 78 and para. 85(1).

pp. 7-8). That capacity would remain subject to proportionality tests and non-discrimination requirements. Yet, even so, such a measure would more closely reflect the realities of the labour markets of EU States post austerity measures and the incidence of subcontracting alongside enterprise-based collective agreements as opposed to the ‘universally applicable collective agreements’ (recognized in the *Laval* and *Rüffert* cases). It remains unclear whether these aspects of an equal treatment and public policy approach are permissible under the Amending PWD 2018 insertions into Articles 3(9) and (10) of the PWD. There is acknowledgement in the revised Article 3(8) that it is no longer necessary for collective agreements to be ‘universally applicable’ in order to set terms and conditions of employment. However, such agreements must still be generally applicable to all similar undertakings in the geographical area or concluded by the most representative organisations at national level and be applied throughout the national territory. This means that what are now normalized ‘decentralised systems of collective bargaining’ envisaged by the Commission will not be allowed to affect the terms and conditions of posted workers (Rocca, 2018, p. 7).

In response to the previous resistance of the CJEU to collective agreements and industrial action in posting situations (which interfere with a service provider’s free movement rights), Article 1 of the Amending PWD 2018 inserts a new Article 1a: ‘This 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...’ The provision seems clear on its face, but its interpretation and application will be watched with interest, given that trade union activity (including collective action) can have a deterrent effect on free movement of services, such that Article 56 of the TFEU may well remain the key reference point rather than the Directive (regarding which see Lhernould, 2019, p. 256; Syrpis, 2015; Davies 2014; and also the *Vavti* case).

Arguably, more than a right to strike, the first preliminary step to be taken is to ensure trade union access to posted workers at their dormitories or workplace whether run by TWAs or the ultimate hirer, the multinational firm. At present, the isolated way in which workers in our case study have been housed makes this almost impossible. It is this which would enable meaningful representation for the purposes of Article 11 of the Enforcement Directive and beyond. As things stand, the rhetorical commitment made in Article 1a has little relevance to the workers from Serbia in our case study.

The 2018 Amending PWD makes a variety of improvements to protection of workers posted (for example in terms of duration of posting and remuneration) and more particularly those posted by TWAs. Additionally, EU Member States, such as Slovakia, are given further regulatory options for enhancing those protections, although we appreciate there may be economic imperatives which obstruct such regulatory initiatives. What is absent is an appreciation of the legal and practical limitations placed on the capacity of posted agency workers to defend their employment rights or access trade union representation. Two key disappointments are: first, the failure to address the complexities of forms of migration and hire through TWAs which render employment and immigration status uncertain; and second, resistance to engagement with the practical impediments to trade union representation. These omissions mean that unfree posted labour seems likely to remain a structural element of global production networks, subject to further EU legislative or policy interventions based on the European Pillar of Social Rights adopted in 2017, and any actions taken by the newly created European Labour Authority (Garben, 2019).

Conclusion

In this article, we have examined the legal framework provided by the PWD for the protection of temporary migrant workers, especially TCNs, engaged in electronics assembly in Slovakia. We have shown the inadequacy of the PWD, where workers were overworked and underpaid without social security and health contributions, limited in their ability to leave their employment, tied to isolated dormitories, when their immigration status was not secure, without a straightforward avenue for redress, and deprived of effective voice or representation. The manufacture of legal uncertainty by TWAs in their modes of hire regarding employment and immigration status, which were intertwined, assisted in rendering the workers vulnerable and subject to exploitation. We suggest that this case study is not unrepresentative, but rather reflects a growing trend in global labour supply chains through TWAs, which depend on similar forms of unfree labour relations (FRA, 2015).

In this context, we have examined what the current PWD offers as regards protection of these workers, the limited ways in which the 2014 Enforcement Directive (implemented from 2016) can be of assistance and finally have assessed the scope of the Amending PWD 2018. Significant steps have been taken in the latter instrument to alter the duration of posting, regulate the extensive involvement of TWAs and respond to issues relating to accommodation and other terms of hire. There is also potential for States to take new regulatory options aimed at equality of treatment and public policy objectives, if they are willing to do so. However, issues of employment status, complexities over modes of hire and transport, as well as the particularities of supply chain operations have yet to be fully addressed. More also needs to be done to provide the workers in our case study with effective voice. Ensuring trade union access to their isolated working lives would be a beginning. After

that, we would want to see concrete progress made regarding applicable collective agreements and lawful collective action. It is only through equality and social solidarity (Wagner, 2018) that unfree labour can be challenged. In this sense, recent reforms should not be regarded as a final solution to the problems that beset temporary migrant agency workers or the posting of workers regime.

Acknowledgements

An early version of this paper was first presented at an event on ‘Transnational Labour Law in an Era of Rising Nationalism: A New Role of Public Institutions for Sustainable Market Practices?’ held in June 2018 at the Max Planck Institute for Comparative Public Law at Heidelberg, also supported by the University of Bristol and the EU Horizon 2020 project on Sustainable Market Actors for Responsible Trade (SMART) as well as the German Research Foundation (DFG). We are grateful to participants for their comments, to the JCMS anonymous reviewers for their suggestions, and to Professor Antonio Lo Faro at the University of Catania who very generously offered advice prior to final submission of the accepted version of this article.

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