

# Posted Workers within the EU – More Flexibility for the Labor Market or a Risk Factor for Social Dumping?

Cross-border labor mobility in the EU does not only cover ‘permanent’ labor mobility but also all types of ‘temporary’ labor mobility such as business trips, seasonal work and posting of workers. The latter concerns non-resident foreign workers whose employment relation is with a non-resident entity, so-called ‘posted workers’. There is a strong link between the export and import of services and the use of intra-EU posting as the former may require the physical presence of workers.

Western European countries seem to have a rather dual relationship with the use of intra-EU posting: it is often considered a ‘Trojan horse’ while its use has increased significantly. Moreover, the almost exclusive focus by both scholars and politicians on risks of ‘social dumping’ in labor-intensive sectors may have influenced public perception and acceptance of this type of labor mobility among Member States. Above reality shows that further efforts should be made to map out the number, characteristics, and impact of intra-EU posting. Empirical evidence may refute or confirm existing perceptions and may support evidence-based policy both at national and European level.

This specific issue on posted workers zooms in on a number of Member States (Germany, Austria, France, Belgium and Slovenia), often with a focus on a specific sector (e.g., the German meat industry, the Belgian construction sector) or phenomenon (e.g., posted third-country nationals). The first article briefly introduces the social security and labor rules applicable to posted workers and describes the main trends and economic consequences of intra-EU posting. The last article argues that labor mobility by the provision of cross-border services also needs to be taken into account when calculating the employment of a country.

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## The Posting of Workers in the EU at a Glance: A Multidisciplinary Introduction

The United Nations Economic Commission for Europe (UNECE 2018) states that the concept of “international labour mobility” includes “all movements of natural persons from one country to another for employment or the provision of services.” This comprehensive definition does not make a statement about the frequency and duration of the employment abroad, nor does it make, from a European law perspective, a distinction between movements based on the free movement of workers (Article 45 TIEU), the freedom of estab-

lishment (Article 49 TFEU), or the freedom to provide services (Article 56 TFEU). Consequently, this term, and thus cross-border labor mobility in the EU, does not only cover “permanent” cross-border mobility or cross-border commuting but also all types of “temporary” cross-border labor mobility such as business trips, seasonal work, circular labor mobility, and posting of workers. The latter concerns the activity of a company sending (i.e., “posting”) workers for a limited period of time from one Member State to another in

order to provide services there. There is a strong link between the export and import of services and the use of intra-EU posting as the former may require the physical presence of workers. Consequently, the evolution of intra-EU posting, a form of labor mobility that is employer-driven (unlike the “worker-driven” types of labor mobility under the free movement of workers and the freedom of establishment), may depend on the evolution of cross-border trade of services.<sup>1</sup>



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Western European countries seem to have a rather dual relationship with the use of intra-EU posting: it is often considered a “Trojan horse” while its use has increased significantly. Moreover, the almost exclusive focus by both scholars and politicians on risks of “social dumping” in labor-intensive sectors (e.g., in construction, road transport, meat processing, agriculture, shipbuilding, and live-in care) may have influenced public perception and acceptance of this type of labor mobility among Member States. The “marginalization” of intra-EU posting seems to have an impact on European and national policy decisions, which today are mainly directed towards enforcement rather than promoting free movement of services by limiting legal and administrative barriers.

The reality described above shows that further efforts should be made to map out the number, characteristics, and impact of intra-EU posting. Empirical evidence may refute or confirm existing perceptions and may support evidence-based policy both at the national and European level. This calls for a broad approach that takes into account the impact of intra-EU posting on all economic actors involved (posted workers, posting undertakings, local employers and workers, service recipients (i.e., “clients”), tax authorities, labor inspectorates, etc.). However, at the same time, this calls for a more detailed and thus narrow approach as costs and benefits for the economic actors involved may differ greatly depending on the sector of activity. Finally, this mapping should distinguish between the use of intra-EU posting (which is perfectly legal) and the infringements it entails in some specific sectors of activity.

Furthermore, it can be argued that the provision of services by intra-EU posting has several benefits compared to other types of intra-EU mobility. Labor emigrants are no longer taxed in their Member State of origin. Consequently, emigration erodes the number of people left to pay taxes. This is in contrast to

posted workers, who continue to pay taxes in their Member State of origin. As a result, intra-EU posting may have positive consequences on the labor tax revenues of Member States. Moreover, there are concerns that emigration may lead to “brain drain,” labor shortages, and a worsening of the demographic outlook in the Member State of origin. Such costs may turn up less when persons are posted temporarily to another Member State. Finally, economists consider intra-EU labor mobility well suited to absorb an economic shock. In such an event, people are moving from high to low unemployment regions in the EU. However, one tends to narrow the discussion on the role of labor mobility in the EU as an adjustment mechanism to mere labor migration. This might be one of the least suitable forms of labor mobility (see above for disadvantages of labor migration for the Member State of origin), in contrast to intra-EU posting.

This edition of the CESifo Forum presents several findings of the research project “POSTING.STAT” (*Enhancing the collection and analysis of national data on intra-EU posting*).<sup>2</sup> For this research project, administrative micro-data on intra-EU posting was extracted and analyzed in the six main “sending” Member States (Germany, Poland, Italy, Spain, Slovenia, and Luxembourg) and “receiving” Member States (Germany, France, Belgium, Austria, the Netherlands, and Luxembourg) of posted workers. This specific issue on posted workers zooms in on a number of Member States (Germany, Austria, France, Belgium, and Slovenia), often with a focus on a specific sector (e.g., the German meat industry, the Belgian construction sector) or phenomenon (e.g., posted third-country nationals). This article briefly discusses the social security and labor rules applicable to posted workers and its economic consequences. In addition, the main trends of intra-EU posting are briefly described.

### OVERVIEW OF THE LEGAL FRAMEWORK APPLICABLE TO POSTED WORKERS AND ITS ECONOMIC CONSEQUENCES

The European legislator and the European Court of Justice (ECJ) distinguishes the situation of posted workers from the one of “standard” mobile workers because the former “return to their country of origin after the completion of their work without at any time gaining access to the labor market of the host Member State.”<sup>3</sup> This legal approach has strong implications on the “transnational social protection” of posted workers and may foster differences in social protection compared to local workers and other groups of mobile workers who make use of their freedom of movement under Article 45 TFEU (e.g., movers

<sup>1</sup> Unfortunately, data on trade in services involving the presence of persons in the territory of another country for the purpose of providing a service is not available (see the last article of this special issue on posted workers).

<sup>2</sup> For more information about this research project and an overview of all country reports, see the following link: <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting>

<sup>3</sup> ECJ Case C-113/89, *Rush Portuguesa. Lda v. Office national d’immigration*, 1990.

of working age, frontier workers, seasonal workers). After all, the consequence of this position is that the question of what protection under labor and social security law can be invoked by posted workers must be answered in the light of the principles underlying the free movement of services, in particular the right of their employer to temporarily provide services in another Member State without hindrance. In this legal context, the application of the labor and social security law of the host country can be considered as a barrier to the exercise of the free movement of services. As shown below, this legal approach has some important consequences.

Which national social security system is applicable to the posted worker and, consequently, where social security contributions have to be paid, is regulated by the “basic” Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009 (hereinafter jointly referred to as the “Coordination Regulations”). One of the key principles of the Coordination Regulations is that persons are subject to the legislation of a single Member State only. In the event of employment, the legislation of the Member State where the activity is carried out usually applies (i.e., the “*lex loci laboris*” principle). However, in some very specific situations, criteria other than the actual place of employment are applied. Intra-EU posting is such a specific situation. The posted worker remains subject to the social security system of the Member State of origin during a period of 24 months. The motivation behind this exception to the “*lex loci laboris*” principle is mainly to encourage the freedom of movement of workers and services and to avoid unnecessary and costly administrative and other complications which would not be in the interests of workers, companies, and administrations.

This policy choice has some important consequences. First, differences in social security contributions paid by employers among “sending” and “receiving” Member States may create a competitive advantage (or disadvantage) for foreign service providers compared to local companies.<sup>4</sup> For example, an employer social security contribution rate of 35.86 percent is levied on French companies while Lithuanian companies posting workers from Lithuania to France will only be subject to an employer social security contribution rate of 1.47 percent. Second, in contrast to other forms of labor mobility, intra-EU posting does not lead to an erosion of the number of people left to pay taxes. Indeed, social security contributions, levied on often higher wages of the host Member State (see below), continue to be paid in the Member State of origin. This is an important source of labor tax revenues for several of the main

sending Member States of posted workers, such as Slovenia. At the same time, however, host Member States do not receive any social security contributions from posted workers. For instance, the Belgian state does not receive a considerable amount of labor tax revenues because social security contributions for incoming posted workers must be paid in the sending Member State and not in Belgium. It is estimated that this “financial loss” amounts to more than EUR 750 million, which is, however, “only” about one percent of the annual sum of labor tax revenues received by the Belgian State from social security contributions. Finally, since posted workers remain subject to the social security system of the sending Member State, a (large) group of posted workers does not have access to the sometimes better and higher social rights and standards in the host Member State. However, when the principle of “equal pay for equal work in the same workplace” is applied (see below), their net salary and purchasing power will often be higher than those of local workers in the host Member State.

As far as the terms and conditions of employment of the posted worker are concerned, Directive 96/71/EC recently amended by Directive 2018/957/EU, is relevant. Under the old Posting of Workers Directive, only “minimum rates of pay” of the host Member State were granted to posted workers.<sup>5</sup> With Directive 2018/957/EU amending the Posting of Workers Directive, posted workers are entitled from day one to all the elements of remuneration of the host Member State (covering also other advantages such as bonuses and allowances) rendered mandatory by law or by collective agreement made universally applicable.<sup>6</sup> This aims to bring the posted workers’ wages closer to those applicable to other groups of mobile workers who make use of their freedom of movement and local workers (announced by the European Commission under the slogan of “equal pay for equal work in the same workplace”). In theory (and in practice), a large proportion of workers will have their wages increased if they are posted to another Member State. This is especially true for workers posted from a low-wage country to high-wage country. For instance, the national minimum wage in Germany is more than three times higher than the national minimum wage in Bulgaria, Romania, and Hungary. This reality shows how sensitive this provision can (and will) be to infringements. In the end, a group of posted workers may already agree to a wage that is twice as high as their wage in the Member State of origin but still below the minimum level in the host Member State.

The financial effects of the above principles are briefly illustrated. It is estimated that the gross

<sup>5</sup> Of course, this principle does not apply when the terms and conditions of employment in the Member State of origin are higher/better compared to these of the host Member State.

<sup>6</sup> When determining the remuneration applicable to the posted worker, a comparison between the remuneration paid under the employment contract in the Member State of origin and the one to be paid in the host Member State should be made in order to apply the highest level of remuneration.

<sup>4</sup> Moreover, social security contributions levied on the higher wages of posted workers earned in the host Member State might be capped in the Member State of origin at a maximum level when an income ceiling is exceeded.

wages for the persons posted to Belgium amounted to around EUR 2 billion in 2020. If they had not been posted but had been employed in their sending Member State, their gross wages would have been approximately EUR 700 million lower. Consequently, their wages increased by about 50 percent. However, the gross wages of posted workers still tend to be (much) below those of local workers. For instance, almost 25 percent of all posted workers to France and even 75 percent of the posted workers employed in the agricultural sector are paid at the French minimum wage. Consequently, posted workers earn on average 30 percent less than comparable French workers employed at the same workplace.

### **POSTED WORKERS IN THE EU: SOME MAIN TRENDS**

Based on 2019 data, there were around 2 million “registered” posted workers and 5.8 million postings in the EU. The EU enlargements of 2004 and 2007 had a huge impact on the scale of intra-EU labor mobility, not least on intra-EU posting. Indeed, the temporary restrictions on the free movement of workers (“the front door” was closed), but not on the free movement of services (“the back door” was open) are probably one the main reasons for the substantial rise of the number of posted workers from Eastern Europe headed towards Western Europe. After all, this opportunity was financially attractive for companies and workers from Eastern Europe as well as for companies in Western Europe active in labor-intensive and price-sensitive sectors of activity. However, statistics show that the import and export of services through posting should not be narrowed down to this single flow. After all, more than half of the posting take place among the “old” Member States.

The main sending Member States of posted workers are Germany and Poland. However, in relation to the total workforce in both countries, the number of posted workers is rather low. In particular, a large part of the workforce in Slovenia is temporarily providing services in another Member State. It is mainly Western European Member States that receive the most posted workers. Indeed, Germany (which makes it both a major sending and receiving Member State of posted workers), as well as France, Belgium, and Austria are the main receiving Member States.

Three types of postings can be distinguished: 1) posting between a company and a service provider (“contract of services” or “(sub)contracting”); 2) posting of workers within the same group (“intra-group posting”), and 3) posting through temporary work or placement agencies. Subcontracting is especially common in price-sensitive and labor-intensive sectors. For instance, in the construction sector in 2017, payments to subcontractors accounted for 24 percent of total turnover and even for 37 percent in the construction of buildings. In this sector, large companies function

as main contractors or as building service providers, while small and medium enterprises (SMEs) take up the role of subcontractors. Empirical evidence shows that French and Belgian “clients” of posted workers are substantially larger than non-using firms in the same sector. The fact that clients of posted workers tend to be larger than non-using firms is consistent with the idea that large firms connect more easily with foreign suppliers or exhibit larger economies of scale while searching for a foreign supplier. This suggests that access to foreign service suppliers through posting of workers mostly benefits the larger firms in a given sector. Consequently, competition will mainly be between subcontracting local SMEs and subcontracting posting undertakings. And it is the larger local companies that will benefit from this competition.

Posting through a temporary work agency is also becoming an important type of posting. Figures for France show that 25 percent of the postings by foreign temporary employment agencies are performed by workers that just started working for the foreign company (less than one day before the beginning of the posting abroad), meaning that the use of “hired to be posted” contracts is substantial for incoming postings to France. This means that for one out of four postings from foreign temporary employment agencies, the employment link between the posted workers and the foreign firm is not a usual employment relationship, but rather that the foreign firm hired these workers for posting them to France. Only intra-company postings are characterized by a longer employment relationship between the posted worker and the employer.

The sectoral breakdown shows some strong differences between Member States. Posted workers from “new” EU-13 Member States (i.e., countries that joined the EU in 2004, 2007, or 2013) are mainly active in the construction sector. This is while posted workers from “old” EU-14 Member States are mainly providing activities in the service sector. This reality is strongly reflected when looking at the difference in profile between incoming and outgoing posted workers in several Western European Member States. Countries such as France and Belgium receive a large group of posted blue-collar workers active in labor-intensive sectors such as construction, while most of their outgoing posted workers are concentrated in higher-skilled services. This proves that intra-EU posting is not exclusively “labor-cost” driven. It can also be skills- and project-driven, including in price-sensitive and labor-intensive sectors facing qualitative and quantitative labor shortages.

On average, intra-EU posting represents only a fraction of total employment in the EU. Nevertheless, it has taken a substantial share of the labor market in several labor-intensive and price-sensitive sectors of activity, particularly in the construction sector of several Western European countries (Belgium, Austria, Luxembourg, Germany, and France), in road freight

transport, in the meat processing industry (especially in Germany until recently), in the agricultural sector (especially in France) and finally in the live-in care sector (especially in Germany). In that respect, posting might have led to job displacement effects in some sectors of activity. For instance, employment decreased in Belgian companies by 2 percent the year they started subcontracting services to posted workers.

Imported services are sometimes referred to as a source of “leakage” because they can have the effect of transferring income (wages and profits) earned in one country to another country. In the case of intra-EU posting, the purchase of services from posting undertakings results in an outflow of income and public revenues. This risk occurs, for instance, in the construction sector of several Western European countries. A large share of investments included in the recovery and resilience plans of several Western European countries, submitted to the European Commission in the framework of the “Recovery and Resilience Facility,” is dedicated to the construction and renovation of buildings and dwellings. Given the large presence of posting companies and posted workers in the construction sector of several Western European countries, these recovery plans will not only benefit their economy, but also Eastern-European employment and consumption.

An increasing group of posted workers are third-country nationals sent from another Member State. In several host Member States (e.g., in Belgium, Austria, and France) around one out of five posted workers are third-country nationals. Third-country nationals are mainly posted to another Member State by an employer established in Slovenia and Poland and to a lesser extent in Spain, Portugal, and Lithuania. For instance, six out of ten posted workers from Slovenia are third-country nationals, mainly coming from Bosnia and Herzegovina, and entering Slovenia on the basis of a bilateral agreement concluded between both countries. Furthermore, it appears that a large group of Ukrainians and Belarusians are posted by Polish and Lithuanian companies. Research findings show that posted third-country nationals are mainly employed in labor-intensive sectors and receive lower wages than other posted workers. Moreover, it appears that this group of posted workers is particularly vulnerable to violations to the applicable terms and conditions of employment (sometimes leading to labor exploitation).

This brings us to the “fraudulent” dimension of posting of workers. With regard to the application of the Posting of Workers Directive, infringements such as bogus self-employment and failure to respect the terms and conditions of employment may occur. Re-

garding the application of the Coordination Regulations, infringements such as the non-compliance with the posting conditions as well as paying the correct level of social security contributions are the main concerns. Inspection data may bias the real relationship between posting and cross-border social fraud. After all, inspections mostly take place on the basis of a risk assessment, mainly focused on specific “risk sectors” (e.g., in the construction sector). Such inspections will yield higher infringement rates and may therefore give a distorted view of the actual number of infringements. In 2020, an infringement was found in more than half of the inspections carried out by the Belgian labor inspectorates relating to the compliance with the posting rules. Moreover, the infringement rate for inspections related to the cross-border dimension of social fraud is much higher than for inspections related to the national dimension of social fraud. For instance, inspection data for Austria show that posting companies are much more likely to underpay their workers than domestic companies, especially in the construction sector where 0.9 percent of inspected Austrian companies were suspected of underpayment compared to 38 percent of inspected posting undertakings.

Finally, figures from several main receiving Member States show that the number of available labor inspectors and the number of inspections do not match the attention paid to “social dumping” in the public and political debates. For instance, about 6 percent of the inspectors employed within the Belgian labor inspectorates focus on the fight against cross-border social fraud and thus on the compliance with the posting rules. Due to the fact that much more infringements are found during inspections on cross-border social fraud, it seems appropriate to increase the number of labor inspectors who focus on this area.

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