



POWBRIDGE

Bridging the gap between legislation
and practice in the posting of workers



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**Bridging the gap between legislation and practice in the posting of
workers**

POW-BRIDGE

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**The gap between legal procedures and practices in posting rule
enactment: a comparative working paper**

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Abstract

In this working paper we investigate how the Posting of Workers Directive interplays with and is influenced by other EU and national rules and regulations on labour law, migration law, social security, health insurance, temporary agency work, and company law and how this might lead to potential inequalities, unfair competition, and exploitation of posted workers, and identify gaps between national policy and implementation practice. We do that through the insights collected from 92 interviews with employers, public authorities, social partners, and non-governmental organisations. The research takes a comparative cross-national approach that includes six EU Member States (Austria, Hungary, Italy, Poland, Slovakia, Slovenia) and two candidate countries (Serbia and North Macedonia). Our findings indicate that while posting regulation is designed at the EU level, the understandings of what the rules mean and how they are embedded in national legal frameworks vary. This has resulted in significant differences in the transposed national regulatory frameworks for posting and the other related rules we analysed. Some of these differences have led to ambiguities and enactment challenges in terms of interpretation of rules, their implementation and enforcement, as well as the validation of national enforcement and protection mechanisms and strategies. The differences in the legal frameworks across countries are faced by enforcing public authorities and employers. Our research indicates that while there are different categories of employers based on whether they abide by the posting rules or break them, the latter category is not a clear-cut category of law offenders but is comprised of abusive companies as well as those entangled in the complex transnational regulatory framework and the regulatory differences across countries. The complexity of the regulatory framework, enforcement structures and protection mechanisms are also transferred to workers, which combined with personal factors results in underreporting, lack of detection, and hence insufficient preventative or reparatory interventions on the side of the authorities and the social partners. Measures could be taken to simplify and converge rules and procedures on posting and other related areas, increase the capacities of enforcement agencies and social partners in monitoring and providing support to posting companies and posted workers, reduce social dumping practices, as well as strengthen collaboration across institutions and borders.

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1 Introduction

The posting of workers is a topic that has attracted a lot of attention among the research and policy communities. One of the main issues identified is how the Posting of Workers Directive (96/71/EC) (hereafter PWD) is implemented at the national levels and how this implementation affects labour standards in the different Member States (Arnholtz and Lillie, 2020). However, the PWD does not apply in isolation, as there are other regulatory frameworks interacting with it at the EU level as well as at the national levels. In this working paper we investigate how the PWD interplays with and is influenced by other EU and national rules and regulations on labour law, migration law, social security, health insurance, temporary agency work, and company law, how this might lead to potential inequalities, unfair competition, and exploitation of posted workers, and identify gaps between national policy and implementation practice. We do that through the insights collected from 92 interviews with employers, public authorities, social partners, and non-governmental organisations. The research takes a comparative cross-national approach with eight European countries as its geographical focus. They include six EU Member States (Austria, Hungary, Italy, Poland, Slovakia, Slovenia) and two candidate countries (Serbia and North Macedonia).

The guiding research questions are:

- How does the implementation of the Posting of Workers Directive interact with other EU regulations, such as social security, health insurance, temporary agency work and company law?
- How does the implementation of the Posting of Workers Directive interact with national regulations related to posting such as the rules on social security, health insurance, temporary agency work and company law?
- How does the interplay of EU and national rules on posting and the related areas influence employers' practices and their deliberations to engage in posting?
- What are the differences across national frameworks among EU Member States and between EU Member States and candidate countries?

The research combines a comparative macro-micro perspective. The macro perspective focuses on laws and regulations that define the principles, rules and provisions of social security and health insurance as well as on legislation on temporary agency work and company law and describes how these interact with the PWD. The macro analysis is conducted through country case studies and desk review. The micro level provides insights on practices with a particular emphasis on employers, enforcement agencies and social partners.

Our findings indicate that while posting regulation is designed at the EU level, the understandings of what the rules mean and how they are embedded in national legal frameworks vary. This has resulted in significant differences in the transposed national regulatory frameworks for posting and the other related rules we analysed. Some of these differences have led to ambiguities and enactment challenges in terms of interpretation of rules, their implementation and enforcement, as well as the validation of national enforcement and protection mechanisms and strategies. The differences in the legal frameworks across countries are faced by enforcing public authorities and employers. Our research indicates that while there are different categories of employers based on whether they abide by the posting

rules or break them, the latter category is not a clear-cut category of law offenders but is comprised of abusive companies as well as those entangled in the complex transnational regulatory framework and the regulatory differences across countries. The complexity of the regulatory framework, enforcement structures and protection mechanisms are also transferred to workers, which combined with personal factors results in underreporting, lack of detection, and hence insufficient preventative or reparatory interventions on the side of the authorities and the social partners. Measures could be taken to simplify and converge rules and procedures on posting and other related areas, increase the capacities of enforcement agencies and social partners in monitoring and providing support to posting companies and posted workers, reduce social dumping practices, as well as strengthen collaboration across institutions and borders.

The paper is structured as follows: after a concise overview of the existing literature, we explain our methodology and the posting context in figures and trends. The analysis is divided in five sections of the paper: an analysis of the posting and labour mobility regulation, an analysis of the enforcement structures and protection mechanisms, public authorities' practices and challenges, employers' practices and challenges, and worker protection. We discuss our findings in the conclusion and provide some recommendations on bridging the gap between legislation and practice.

2 An overview of the existing literature

The posting literature covers an array of topics from legal analysis to enforcement, to employer practices, and worker protection. The strand of the posting literature that focuses on the legal understanding of the PWD, especially on the way how the national and transnational courts have interpreted the Directive and its interplay with national legislation and collective bargaining mechanisms is quite broad. Initial articles discussed the interpretation of the text of the Directive, particularly the floor of rights guaranteed, the transposition of the Directive, and its interplay with national legislation (see e.g., Evju, 2010; Evju and Novitz, 2012; Houwerzijl, 2010, Menz 2005; Novitz, 2010). In these publications the issue of different standards across national systems and the problematic issue of posting companies' potential regime shopping practices were already raised (see also Houwerzijl, 2014; Leiber, Matuszczyk and Rossow, 2019; Wagner and Berntsen, 2016).

The interpretation of the Directive was eventually addressed in court. At the national level, court cases were mainly initiated by trade unions addressing questions of unequal pay and by public authorities addressing questions of social security contributions. The literature that discusses national cases is small, but there is one recent compendium of national case studies by Rasnača and Bernaciak (2020) that analyses these proceedings in several EU Member States. According to the authors, very few cases make it to national courts as most countries, especially those with strong social dialogue, use special mechanisms to resolve industrial relations disputes, such as arbitration, mediation, and third-party conciliation systems. This trend has been shifting recently, as foreign companies are increasingly using the courts by arguing that national industrial relations mechanisms put foreign posting companies at a disadvantage, and therefore have been pushing for a shift on the decision-making power from national industrial relations institutions towards courts of law (see Arholtz and Andersen, 2018; Kahlert and Danaj, 2021). Interestingly, the literature informs that posting companies pursue cases in the host countries, whereas posted workers prefer to sue in their own country, which has implications for the outcome, as national courts are reluctant and often incompetent to interpret and apply the laws of other countries where the plaintiffs, i.e., the workers, were posted to (Rasnača and Bernaciak, 2020).

The literature has also focused on the deliberations of the European Court of Justice (ECJ), in particular the *Laval Quartet*, which comprises four cases, namely *Laval*, *Viking*, *Rüffert* and *Commission vs. Luxembourg*. The court has mostly ruled in favour of the companies to use their competitive advantage in the larger European market. These rulings transformed the minimum protection stipulated in the Posting of Workers Directive from a floor to a ceiling of rights for posted workers (Barnard, 2009; Cremers, 2010; Kilpatrick, 2009) suggesting that economic freedoms have been prioritized against social rights. This position seemed to change with a 2015 decision, C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, when the Court decided in favour of Finnish Unions' claim that they are entitled to represent posted workers in their claims against their employer, and that posting companies should pay wages, bonuses and other benefits to posted workers based on the rates stipulated in the host country collective agreement (Cremers, 2016; Danaj and Sippola, 2015; Lillie & Wagner, 2015). The decision, however, has not been executed yet, as the company has appealed the case (Matyska, 2020).

A second strand of the posting debate which combines academic and grey literature focuses on the PWD enforcement challenges. This strand intersects with the legal literature as

enforcement challenges derive partially from the interpretation of the Directive and other related regulation, which as discussed in the previous paragraphs have required the intervention of national courts and ECJ. In addition, various studies have identified different challenges enforcement agencies face, such as: the knowledge challenge to interpret national and community law, how the different levels of regulation should interact with each other, and how they should be enforced in practice; weak sanctioning mechanisms that affect their power of intervention and enforcement of rules on foreign companies, especially when they leave the country; lack and/or inadequacy to monitor violations, including language and multicultural skills; insufficient personnel, e.g., labour inspectors; and finally, representation gaps (Cremers, 2016; Čaněk et al., 2018; Danaj and Zólyomi, 2018; Iannuzzi and Sacchetto, 2020; Leiber et al., 2019; Thörnqvist and Bernhardsson, 2015; Wagner and Berntsen, 2016).

Intra-institutional and cross-border cooperation is considered another enforcement challenge. The main issues raised in the literature include: the reactive or ad hoc nature of cooperation combined with diverging institutional objectives or approaches (Danaj and Zólyomi, 2018), the varied use and the inadequacies of information exchange platforms like Internal Information Market System (IMI) (Čaněk et al., 2018; Cremers, 2020; Danaj and Zólyomi, 2018; Wagner and Berntsen, 2016), as well as financial and sustainability constraints deriving from the project-based nature of many cooperation initiatives (CIOFS FP, 2019).

The third strand focuses on posting companies. The literature informs that employers' attitude towards rule enforcement is influenced by the type of project, i.e., there is a higher propensity to abide by the rules in larger public works projects (e.g., the construction of a metro line) or projects of public importance (e.g., the construction of power stations) that are more closely monitored by the social partners, the media and the general public (Arnholtz and Refslund, 2019; Berntsen and Lillie, 2016; Danaj and Sippola, 2015; Lillie and Sippola, 2011). The very existence of long supply chains seems to increase the risk of certain companies' (mal)practices that have produced conditions of unfree labour as the example of Slovakia suggests (see Andrijasevic and Novitz, 2020; Novitz and Andrijasevic, 2020). However, there are differences in attitudes to rule enforcement among companies depending on where they are located in the supply chain. Findings from Denmark and the UK show that large companies that act as main contractors are more exposed to scrutiny and therefore are also more inclined to abide by labour standards; medium companies that act as subcontractors in the middle of the supply chain experience the pressure to provide cost-efficient services and help preserve a positive public image of the main contractor; small firms at the end of the subcontracting chain that act as the direct employer of the posted workers, and who are more inclined to make a profit with minimum costs, are found to be less inclined in abiding by the general labour standards and/or collectively bargained standards of the host country (Arnholtz, 2019; James et al., 2015). In addition, research in Denmark also showed that companies embedded in the local community are more inclined to observe rules than foreign ones which might not be aware or interested in abiding by local rules (Arnholtz, 2019).

Another important distinction is the type of relationship between the employer and the posted workers. While posting was intended to facilitate the supply of temporary services across the European single market (Cremers, 2006), hence workers should already have an employment relationship with the company prior to their posting assignment, researchers and social partners have observed that posting has been transforming from a business strategy certain companies employ to provide a service through cheap foreign labour to a business model in

which certain companies specialize only in supplying cheap EU and third country national (TCN) labour (Arnholtz and Lillie, 2020; Buelen, 2019; Cremers, 2020; ZRC SAZU, 2019). The implications for this form of posting are that such companies are more interested in making a profit than abiding by labour standards in the host countries. A noticeable difference stands also on whether the employer is a company or a temporary work agency (TWA), with the latter being more problematic in terms of rights and obligations to workers (Andrijasevic and Novitz, 2020; Berntsen and Lillie, 2015). To minimize social dumping practices, the issue of TWAs was addressed in the amended 2018 PWD of 2018 recognizing them as direct employers for the posting period.

The study of employers' practices has led to the identification of three kinds of regulatory behaviour, namely conformance, arbitrage, and evasion (Berntsen and Lillie, 2015). According to Berntsen and Lillie (2015) *conformance* is to the general system but with the possibility of manipulating rules for cost advantage; regulatory *arbitrage* happens when firms negotiating for exemption from host country rules and the application of another set of foreign rules as transnational service providers; and regulatory *evasion* occurs when employers violate rules and try to hide it in order *not* to abide either by the sending or the receiving national regulatory systems. Some of the most dubious or fraudulent practices include mis/underrepresentation of skills, bogus or fake posting of locally hired workers declared as if posted from lower income countries, bogus self-employment as well as undeclared work of workers who should be technically posted but are not officially, and so on (Cillo, 2018; Cremers, 2014). Another practice is that of letterbox companies registered in certain countries with the intention to evade tax payments, collective labour agreements, labour laws and social security contributions, which have sometimes been used to post workers and therefore allowed for dubious and exploitative practices (Hastings and Cremers, 2017; McGauran, 2020).

A fourth strand discusses the issues related to working conditions and worker protection. Some authors have examined the loopholes and points of contention between transnational, national and sectoral labour market regulatory frameworks across national systems and discussed the resulting inequalities among national (or locally based) workers and posted workers (Alberti and Danaj, 2017; Arnholtz and Hansen, 2013; Arnholtz and Lillie, 2020; Houwerzijl, 2014; Wagner, 2018). The sectoral dimension is also found to be particularly relevant when studying the posting of workers and their working conditions. Comparative research has found that posting employers in the construction sector are found by labour inspections to be particularly prone to labour law and OSH violations (Danaj and Zólyomi, 2018). Research conducted on letterbox companies in the transport sector registered in Slovakia has also indicated neglect of providing proper working conditions for posted drivers and OSH violations (BTB, 2019).

The literature has also studied the role social partners have played in protecting the labour rights of posted workers using various combined strategies to fight social dumping via posting such as posted worker recruitment engagement, political influence and regulatory enforcement, collective agreement extension and enforcement, and workplace-level structures (Arnholtz and Refslund, 2019; Berntsen and Lillie, 2016; Danaj and Sippola, 2015; Krings, 2009; Lillie and Greer, 2007; Lillie et al., 2020). Despite these strategies, unions continue to face several challenges such as accessing workers, especially in workplaces where there are no union structures, building trust with a hyper-mobile workforce, and enforce decisions of

public authorities and/or courts on companies that leave their national territory (Danaj and Sippola, 2015; Meardi, 2012; Refslund, 2018).

3 Methodology

In this comparative working paper, we identify gaps between legislation and practice in posting rule enactments based on findings from eight country case studies conducted in Austria, Italy, Hungary, North Macedonia, Poland, Serbia, Slovakia, and Slovenia. The country cases selected for the research include both sending and receiving EU Member States as well as two candidate countries which have already transposed the Posting of Workers Directive in their national legislation and are posting workers to EU Member States. Each case study combined a macro-micro perspective. The macro perspective focused on national laws and regulations that interact with the implemented PWD drawing on a review and analysis of legal texts and relevant literature. The micro level encompassed insights on practices and challenges in the application of laws and formal procedures related to posting from the perspective of three main stakeholder groups: posting employers, social partners, and public authorities. For this, interviews were conducted with posting employers, street-level bureaucrats, and representatives of employers' organisations and trade unions in each country. The interview participants were purposively selected to include employers and social partners from the construction sector which is one of the main industries for the posting of workers. The paper discusses the results of the case studies comparatively. Results from the case studies are complemented by secondary data drawn from available statistics on cross-border labour mobility and posting.

3.1 Data collection

In all eight countries, data were collected in two phases. The first phase of data collection comprised the identification and review of the national legislation and policy measures pertaining to posting, cross-border labour mobility, temporary agency work, social security, health insurance, company law and any other relevant regulation. Legal and policy documents under study included rights and obligations of posted workers, of cross-border mobile workers, and of posting companies, as well as conditions for cross-border service provision. In the second phase, qualitative semi-structured interviews were carried out with employers, representatives of public authorities and social partners. The latter included both employers' organisations and trade unions. In some countries, interviews were also carried out with representatives of NGOs (Slovakia), posting experts (Austria and Slovenia) and representatives of a temporary work agency (Poland). The construction sector was covered in all case studies and some additionally included interviewees from the transport sector (Hungary, Italy, and Slovenia), the care sector (Poland and Serbia) and the manufacturing sector (Italy, Slovakia, and Slovenia). A particular feature of the interviews was the use of vignettes which comprised of short realistic cases describing a specific situation related to posting (the vignette cases are presented in the Annex). Qualitative studies that used vignettes as a data collection method (Barter and Renold, 2000; Jenkins et al., 2010; Svendsen, 2016; Kandemir and Budd, 2018; Sampson and Johannessen, 2019) show that this method is especially useful to explore potentially sensitive topics that participants may feel reluctant to discuss. In the context of our research, the vignette cases helped to investigate how different and often complex regulations related to posting influence stakeholders' practices.

The interviews took place between May and December 2020 and were carried out via phone or video conference, as well as face-to-face. Altogether, 92 interviews were conducted. Table 1 provides information about the number of interviews per stakeholder group for each country.

Table 1: Number of interviews by stakeholder group

Stakeholder group	Number of interviews								
	Total	AT	HU	IT	MK	PL	RS	SI	SK
Employers	22	3	-	-	3	5	3	5	3
Employers' associations	18	3	2	2	1	4	2	2	2
Trade Unions	17	2	2	4	2	2	2	2	1
Public Authorities	28	2	2	4	4	4	4	5	3
Other	7	3	-	-	-	-	-	1	3
Total	92	13	6	10	10	15	11	15	12

Source: POW-Bridge Country Reports (2021).

Notes: For Poland, one interview with a TWA is reported under the category 'Employers'. The category 'Other' includes for Austria an interview with a posting expert and two interviews with representatives of the Construction Workers' Annual Leave and Severance Pay Fund; for Slovakia, three interviews with NGOs; and for Slovenia, an interview with a representative of private accounting services.

The interview responses were thematically ordered and analyzed following the qualitative thematic analysis based on Guest et al. (2012) to create a comprehensive picture of the situation in question and of the observed challenges.

3.2 Challenges and Limitations

Various challenges were identified by the country case studies. One of the main limitations was the recruitment of posting employers. Many of the eight countries highlighted the difficulty to convince employers to participate in the study. Austria, North Macedonia and Serbia, for instance, stated that several employers, who engaged in cross-border service provision, were unwilling to share information about their point of view due to a lack of interest in the study and fear about tough questions. Despite efforts to get posting employers participate in the research, we were not able to conduct any interviews with them in Hungary and Italy. Furthermore, seven out of eight countries reported that the fieldwork was negatively affected by lockdown and other restrictive measures due to the COVID-19 pandemic. Face-to-face interviews were not always possible and sometimes could only be conducted remotely (by phone or teleconferencing software) which restricted access to potential stakeholders.

In terms of limitations, half of the countries observed a lack of existing national literature and statistics on the posting of workers. The researchers of the Austrian, Hungarian and Slovak case studies underlined the need for further research on the topic in general and especially regarding temporary work agencies that are involved in posting (including letter box companies).

The limited knowledge of several stakeholders about legislation on the posting of workers posed another challenge. This was particularly the case in the two candidate countries (North Macedonia and Serbia) where a general lack of understanding and awareness among stakeholders about posting rules within the EU was noted. Another limitation that was pointed out in the Polish and Slovenian case studies related to the delayed implementation of the revised PWD. In both countries, changes to bring their national legislations in line with the amended Directive were still ongoing at the time of the interviews, which made some stakeholders reluctant to share their views about the revisions and their possible impact on practices.

4 Figures and trends

4.1 Labour market overview

The overall labour market situation strongly differs across the eight countries. According to data from Eurostat, all countries experienced an increase in their employment rates between 2017 and 2019. In 2019, the highest employment rate for the population aged 15-64 was recorded in Austria, Slovenia, and Hungary (all above 70%) (Table 2). In contrast to a strong decline in unemployment in Hungary, North Macedonia, Poland, Serbia and Slovakia during the same period, the unemployment rate declined only slightly in Austria, Italy, and Slovenia. Three countries – Italy, North Macedonia, and Serbia – still had a rather high unemployment rate, above the EU average of 6.3%, in 2019.

A common challenge facing all eight countries, albeit to varying degree, is labour shortage particularly for skilled workers. Job vacancy statistics that measure unmet labour demand show that the annual job vacancy rate in 2019 was highest in Austria (3.0%), Hungary and Slovenia (above 2% in both) and lowest in Poland and Slovakia (1.1%). Sector-wise, there was a relatively high share of vacant positions in industry and construction in Austria (3.2%), Slovenia (2.8%), Hungary (2.6%) and Poland (1.4%).

Furthermore, statistics show considerable differences in average monthly wages and minimum wage levels across the eight countries. In 2019, the monthly minimum wage ranged from 279 EUR in North Macedonia to 1,500 EUR in Austria. Of the six countries that are EU Member States, Hungary had the lowest minimum wage at 464 EUR per month. Eurostat data available for four of the eight countries on minimum wage earners suggest that more than 10% of employees in Slovenia (15.2%) and Poland (12.1%) were paid less than 105% of the national minimum wage in 2018. The corresponding figure for Hungary and Slovakia was 7.7% and 5.7% respectively.

Table 2: Key labour market indicators, 2019.

	AT	HU	IT	MK	PL	RS	SI	SK
Employment rate, 15-64 (in %)	73.6	70.1	59.0	54.7	68.2	60.7	71.8	68.4
Job vacancy rate (in %)	3.0	2.5	1.5	1.6	1.1	-	2.3	1.1
Unemployment rate, 15-74 (in %)	4.5	3.4	10.0	17.3	3.3	10.5	4.5	5.8
Average monthly gross wage (in €)	4,380	1,073	2,633	606	1,100	643	1,754	1,092
Monthly gross minimum wage (in €)	1,500	464	-	279	523	308	887	520

Source: Eurostat online database, POW-Bridge Country Reports (2021) for information on average wages.

Notes: Monthly gross minimum wage for North Macedonia refer to 2018. Italy and Austria have no national minimum wage. However, due to its high collective bargaining coverage rate of 98-99% almost all employees in Austria are covered by a collectively agreed minimum wage rate of 1,500€ per month.

4.2 Posting figures and trends

The posting of workers as a specific form of cross-border labour mobility has become an increasingly prominent and competitive way of service provision among the EU Member States, especially in sectors like construction. Data on posted workers (Table 3) in the European Union mostly rely on the issuance of ‘Portable Documents’ A1 (PD A1) of the competent Member States¹. Latest statistics on posted workers of the year 2018 show that the majority of the eight countries are predominantly sending countries. Only Austria has more incoming posted workers than outgoing posted workers.

Table 3: Posting figures in 2018.

AT	HU	IT	MK	PL	RS	SI	SK
Number of posted workers sent ¹							
110,687 (88,117)	64,217 (54,326)	169,774 (148,863)	570	605,785 (238,525)	15,615	127,059 (85,999)	135,151 (93,316)
Number of posted workers received ¹							
119,907	17,090	73,927	-	26,714	570	9,173	13,993
Labour market share of incoming posted workers (in %) ²							
2.83	0.39	0.33	-	0.17	0.04	0.95	0.55
Main country of destination for posted workers							
DE IT CH FR	DE AT NL BE	FR CH DE ES	DE	DE FR BE	DE	DE AT BE	DE AT CZ
Main country of origin for posted workers							
DE SI SK HU	DE SK IT AT	DE ES AT FR	-	DE IT ES	-	HR DE AT	DE PL HU

Source: De Wispelaere et al. (2019), POW-Bridge North Macedonia Country Report (2021); POW-Bridge Serbia Country Report (2021).

Notes:

¹For Austria, Hungary, Italy, Poland, Slovenia and Slovakia, data refer to the total number of PDs A1 (the figure in brackets shows the number of PDs A1 according to Article 12 of the Basic Regulation). In the case of North Macedonia and Serbia, data refer to the number of posted workers.

²Own calculation based on De Wispelaere et al. (2019) and Eurostat [lfsi_emp_a] indicating the share of incoming posted workers relative to persons employed aged 15 years and older.

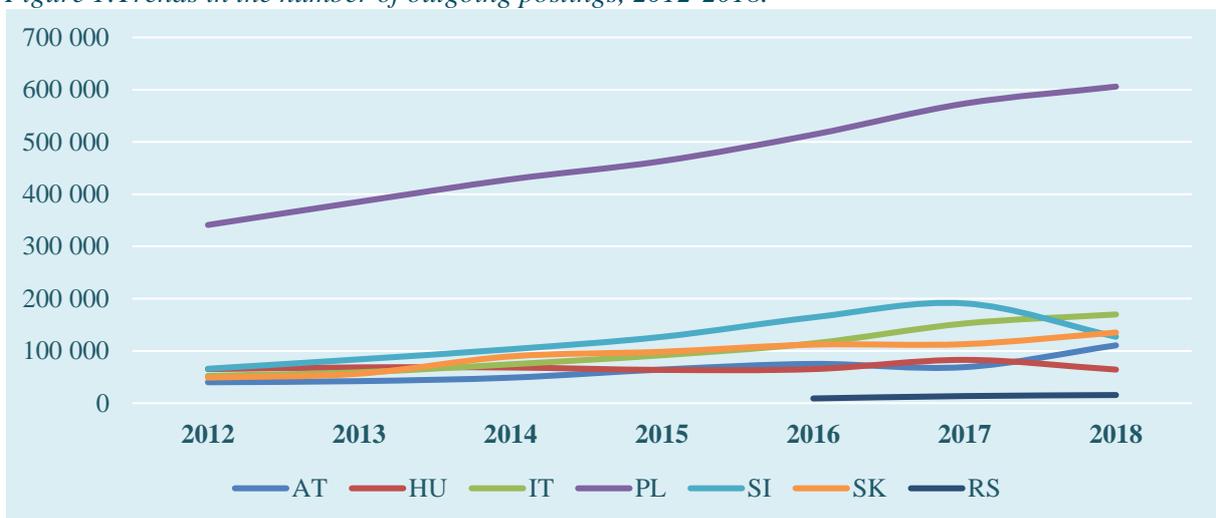
The labour market share of incoming posted workers in the eight countries ranges from 0.04% in Serbia to 2.83% in Austria. Issued PDs A1 divided by sectors indicate that the construction sector is by far the most important regarding the posting of workers. In 2017, the year for which the latest data are available, more than 30% of posted workers in Austria, Poland, and Slovakia, more than 40% in Hungary, and around 60% in Slovenia worked in the construction industry (De Wispelaere et al., 2019). Data for 2016 show that the labour market share of

¹ Note that multiple PDs A1 can potentially be issued to one person within one year.

incoming posted workers in the construction sector was higher in Austria, Hungary, Italy, Poland, Slovakia, and Slovenia than for the total economy (De Wispelaere & Pacolet, 2017). Germany is among the most frequent destinations for workers posted from the eight countries. Other main destination countries include Austria, France, Belgium, and Switzerland. Germany is also one of the main countries of origin of posted workers received by the eight countries.

Data on the number of outgoing postings reveal an increasing trend over the years (Figure 1). Since 2012, Austria, Italy, Slovakia, Poland, and Slovenia have experienced a significant increase in the number of outgoing posted workers, although in the case of Slovenia, there was a sudden decrease in 2018. Similarly, the number of incoming workers has more than doubled in Austria, Hungary, Poland, and Slovenia over the period 2012-2018 (De Wispelaere et al., 2019).

Figure 1: Trends in the number of outgoing postings, 2012-2018.



Source: De Wispelaere et al. (2019), NES (2020) outgoing.

Note: For Austria, Hungary, Italy, Poland, Slovenia and Slovakia, data refer to the total number of PDs A1 issued by the country. For Serbia, data refer to the number of outgoing posted workers. No data on trends are available for North Macedonia.

5 Posting and labour mobility rules interplay at the EU and the national levels

5.1 The transposition of the PWD into national law in the eight countries

The transposition of the PWD has not been even across all EU countries. The legal measures have varied from the extension of the labour law to include posted workers, to amendments to the existing legislation, to the passing of laws on posting or all forms of cross-border labour mobility (Hollan and Danaj, 2018; Houwerzijl, 2010; Lind, 2010; Novitz, 2010; Schlachter, 2010). Until the PWD was revised in 2018 to stipulate that host country pay scales including collective bargained wages should be applied for posted workers, it was unclear whether these workers could be covered by collective agreements, leading to disputes between receiving countries' trade unions and the posting companies, some of which also processed in national and EU courts (for more on this see 5.2).

In our comparative analysis, all six EU Member States initially transposed the 1996 PWD by incorporating it in their existing labour legislation. However, four of them (Austria, Poland, Slovakia, Slovenia) and both candidate countries (North Macedonia, Serbia) have eventually passed specific laws on posting or the transnational provision of services. All countries allow posting in all sectors of activity, although North Macedonia's 2012 law is specifically on posting in the construction sector. At the time of writing this paper, only Hungary, Italy and Slovakia had already transposed the amended 2018 Directive into national legislation (see Table 4).

Austria is the only country under study where all aspects of posting (including those stipulated in the Enforcement Directive) are incorporated in one single law (the Anti-Wage and Social Dumping Law), other countries such as Poland, Slovenia, Slovakia and the candidate countries of North Macedonia and Serbia have posting laws but also make reference to posting in other legislation. Whereas Hungary refers to the monitoring and enforcement of posting rules in various laws such as their national labour codes and the labour inspectorate laws, and Italy has issued special decrees on posting. This means that public authorities at the national level and posting companies should be aware of and understand the way the various national laws and regulations interplay on the different aspects of posting they cover in order to be able to abide by the national legal framework. Terms and conditions for posting companies or employers are relatively clear. Yet, there are some points of contention that could also lead to abuse. For example, in some countries, it was reported that although the legislation distinguishes between posting and business trips (Poland) or intra-company transferrals (Poland, Slovakia), the complexity of worker mobility represents a potential barrier, even for large multinationals when HR specialists cannot clearly distinguish between various types of transfers and postings. Therefore, certain provisions of services could qualify as both, and hence the easier option might be used more frequently. Slovenian law requires companies to apply for the PD A1 form by de-registering and re-registering workers prior to their posting assignment abroad in their online social security and health insurance system (e-VEM), and then once again when they return. Workers can be registered under Article 12 of the Basic Regulation on the Coordination of Social Security Systems in the European Union (No 883/2004), which qualifies them as posted workers or under Article 13 of the same

regulation. However, as the requirements for registering workers under Article 12 are more demanding than those of Article 13, it has been reported that some companies prefer to register workers under the latter (Zirnstein et al., 2021).

Table 4: Overview of national posting laws and regulations

	Posting Regulations/Laws	Penalties	Subcontracting liability	Transposed PWD 2018/957
AT	Anti-Wage and Social Dumping Act (LSD-BG)	Administrative penalties for violating reporting obligations and for underpayment The fines can be cumulated and there is no upper limit. If the fines are not paid, employers may face a prison sentence	Yes, on remuneration and document keeping	Yes (September 2021)
HU	2012 Labour Code Section 8/D of the Act LXXV of 1996 on Labour Inspection for administrative requirements	Administrative penalties for violating reporting obligations, for illegal posting, for non-compliance with payment of wages and social security contributions	Yes, on information sharing, wages, and social contributions	Yes
IT	Legislative Decree No. 72/2000 Legislative Decree No. 136/2016 Circular Letter No. 1/2017 Legislative Decree No. 122/2020	Administrative penalties for violating reporting obligations, illegal posting/employment and for underpayment Prison sentence (for illegal employment and posting of minors)	Yes, on workers' pay and social contributions	Yes
MK	Law on Working Relations from 2005 2012 Law on posting of workers from the Republic of North Macedonia in other countries for carrying out construction works through project contracts and other seasonal works Bilateral agreements with Germany on posting workers and with Slovenia and Qatar on seasonal workers ² Law on Employment of Foreigners Law on Records in the Field of Labour	Administrative penalties for violating reporting obligations, illegal employment, and unlawful holding of workers' work permit	No	No
PL	2016 Law on posting of workers regarding supplying services Labour Code National Labour Inspectorate Act Code of Civil Procedure	Administrative penalties for violating reporting obligations	No	No
RS	Labour Law 2016 Law on conditions for posting workers abroad and their protection Bilateral Agreement with Germany Law on Employment of Foreigners	Administrative penalties for violating reporting obligations, contractual obligations, illegal posting/employment and not fulfilling allowance, health and transport obligations	No	No
SI	Employment Relationship Act Transnational Provision of	Administrative penalties for contractual obligations, illegal posting/employment and not	No	No

² The bilateral agreements with Qatar and Slovenia were inactive at the time when the research was conducted.

Services Act	fulfilling transport obligations Interruption of the right to exercise their activity in SL for foreign companies		
Act no. 351/2015 on cross-border cooperation in posting of workers for the purpose of service provision Labour Code (Act no. 311/2001) SK Amendments of the Act no. 5/2004 on Employment Services and Act no. 404/2011 on Residence of Foreigners in 2018 § 23a of the Act on Employment Services	Administrative penalties and other sanctions	No	Yes Labour Code (amended July 2020)

In the candidate countries of the Western Balkans, outgoing posting is regulated by different laws than incoming posting (Danaj, et al., 2019). In these countries posting regulation is intertwined with the migration regime in North Macedonia and Serbia, where outgoing posting is regulated in the national labour laws, whereas incoming posting is regulated under the national laws on foreigners. Poland and Slovakia also have special rules about the posting of third country nationals, with several intricate exceptions to whether a TCN worker can be posted or not from these countries to elsewhere in the EU. Slovenia, on the other hand, has bilateral agreements with a few countries of the Western Balkans, which facilitate the work permit procedures for workers from these countries. The fundamental rule in all three countries is that it is not allowed to post TCN workers, unless they have already obtained the Blue Card or are already entitled to work in the country (i.e., have a work permit), which would be applicable to all eight countries anyways. However, in these three countries, there are special exceptions to the exemption rule (such as the issuing of a temporary work permit), which leave room for interpretation and are, thus, used by certain employers to post temporary resident TCN workers from these countries.

Article 9 (1) of the Enforcement Directive allows Member States to make a simple declaration about the workers about to be posted, and as an assessment report on the implementation of the Enforcement Directive of the European Commission informs (2019), all EU countries require such a prior notification, although some countries allow the posting undertakings to submit the notification any time before the start of the service provision, including on the same day (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia Slovenia, Spain, Sweden), while few countries require to be notified the day before (Italy, Lithuania, Romania).

Within the existing legislation, all countries have administrative penalties for failure to comply with reporting and documentation requirements or irregular employment. Some countries have specific penalties for the underpayment of posted workers (Austria, Italy), failure to comply with allowance, health, and transport obligations, (Slovenia, Serbia), or upholding of permits illegally (North Macedonia). Few countries have more serious penalties such as prison sentences for those not paying administrative penalties (Austria) or the posting of minors (Italy) or the interruption of the right to exercise their activity for foreign posting companies (Slovenia). The Enforcement Directive allows Member States to take measures to ensure that in subcontracting chains the contractor to which the employer is a direct

subcontractor can, in addition to or in place of the employer, be held liable by the posted worker. Sub-contracting liability is required in the construction sector, but it is also encouraged to be introduced in other sectors of activity. All Member States have taken measures of liability, although they have not yet been frequently applied in practice in many Member States due to lack of relevant cases. Several Member States and trade unions have, nonetheless, reported that such measures have had a positive impact on the protection of the workers' rights in subcontracting chains, whereas the employers generally did not report any increase in effectiveness on the protection of the workers' rights in subcontracting chains (European Commission, 2019).

5.2 Court decisions on posting

As indicated in the literature review, national and European courts have been actively involved in the interpretation of the Directive. The complexity of the interplay of EU and national regulations and the lack of regulatory harmonization and coordination within the EU and its institutions have led to several disputes about posted workers' rights and national actors' competences, which were sent to courts for deliberation. A considerable number of court cases were tried in national courts that include disputes on wages and working conditions of posted workers, reimbursement of expenses, the applicability of host country legislation and collective agreements, payment, and calculation of social security contributions, and third country nationals (Rasnača and Bernaciak, 2020). While most cases were taken to national courts only, a few had been sent to the ECJ for a decision. Unions and state institutions initiated most proceedings, requesting the ECJ to apply host country terms and conditions to posted workers to prevent inequalities among the work force. The ECJ mostly ruled in favour of the companies to use their competitive advantage in the European market. The ECJ decisions suggest that economic freedoms are prioritized against social rights. One exception is the case C-396/13 (*Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*) where the ECJ decided in favour of Finnish Unions' claim that they are entitled to represent posted workers in their claims against their employer, and that posting companies, should pay wages, bonuses, and other benefits to posted workers based on the rates stipulated in the Finnish sectoral collective agreement (Cremers, 2016; Lillie & Wagner, 2015).

Four of the countries analysed here reported national court cases regarding posting, namely Austria, Hungary, Italy, and Poland. Until the PWD was revised in 2018, it was unclear whether these workers could be covered by collective agreements, leading to disputes between receiving countries' trade unions and the posting companies, some of which also processed in national and EU courts. Even though the revised Directive addresses the issue of remuneration, national commentators like Kártyás (2019) suggest a need for still greater legal clarity concerning posting, especially regarding the application of host country (foreign) laws and collective agreements to outgoing posted workers.

In addition, certain issues such as the distinction between posting and a business trip still awaits resolving. This issue has repeatedly been subject of court decisions in Poland (Szypliewski, 2019). While the PWD establishes maximum periods for posting assignments (up to 24 months in the 1996 Directive and 12 months with the possibility of an extension to

18 months in the 2018 Directive), neither the Polish legislation nor the Directive 96/71/EC defines the minimum period of posting, which means that a worker may also be posted for one day and conditions for both posting and for a business trip are met at the same time. Further clarifications via courts or amended directives are needed.

Hungary (Case C-620/18) and Poland (Case C-626/18) sought the annulment of Amended Directive (EU) 2018/957 by ECJ. They drew attention to the protectionist nature of the directive, which would hinder the implementation of the treaty principle of freedom of movement of labour and services.³ ECJ dismissed the actions brought by Hungary and Poland by arguing that the adjustment was necessary by providing adequate social protection and addressing the rising unlevel playing field between undertakings from sending and receiving countries and the structural differentiation of rules on wages applicable to respective workers.⁴

Our research found that tensions between EU Directives and national legislation have been mostly settled in favour of EU Directives, promoting the principle of freedom of service provision, outlined in Article 56 of the Treaty on the Functioning of the European Union. For example, Italian legislation tried combatting the phenomenon of infiltrating the public procurement sector by organised crime. So, the Procurement Code⁵ limited the bidder's subcontracting to third parties to 30 percent in order. However, in 2019 the ECJ judged that "a restriction on the use of subcontracting such as that at issue in the main proceedings cannot be regarded as compatible with Directive 2014/24", again ruling in favour of community law.⁶

The joined cases "Maksimovic and Others" (C-64/18, C-140/18, C-146/18 and C-148/18)⁷ raised the issue whether national law or European Union Directives need to be enforced regarding administrative penalties. The 2019 ECJ ruling concluded that respective national legislation cannot legislate disproportionate administrative fines on posting employers, because this would hinder the freedom to provide services. The ECJ ruling indicated that at the EU level the protection of the right to provide services in the common European market is at least equally important to the fight against social dumping, if not more important in case the latter hinders the former. The ECJ regarded the practice of high, cumulative fines issued by Austrian authorities as incompatible with the freedom to provide services according to the Treaty on the Functioning of the European Union. Therefore, the ECJ ruled that national legislation is precluded from collecting high, cumulative administrative fines, imposed by the Austrian legislation. They argued that the severity of the penalty must be commensurate with the seriousness of the offence. In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation. The amended PWD further adds that penalties shall be "effective, proportionate and dissuasive" (Article 5).

³ <https://inicjatywa.eu/14018/polska-i-wegry-zaskarzyly-rewizje-dyrektywy-o-delegowaniu-pracownikow/>

⁴ Court of Justice of the European Union, PRESS RELEASE No xx/20 Luxembourg, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200155en.pdf>

⁵ Legislative Decree No. 50/2016 and subsequent amendments.

⁶ cf. Case C-63/18,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=7CFFB980A85C07A88768521A39FEA3AF?text=&docid=218281&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1327087>.

⁷ Judgment of the Court on 12 September 2019 (ECLI:EU:C:2019:723) in the proceedings Zoran Maksimovic and Others, retrieved December 18, 2020 from

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=217671&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10498232>

As a result of this court ruling against the cumulation of fines, posting companies may engage in an “economic calculation” (“wirtschaftliches Kalkül”) to their favours, according to an Austrian Chamber of Labour representative. This consideration, however, may encourage practices of disregard for the obligation of minimum pay or additional payments. Companies could assess whether and when it would make sense financially to take the risk of not paying according to the law and then not providing the wage documents. Then the company could profit from underpayment even when paying fines in one out of ten cases if these fines together turn out to be less than the money saved through underpayment. The concept of proportionality would need to be further clarified in later directives or court regulations. According to an Austrian employer representative, it remains to be seen whether the necessary regulations of this ECJ provision will initiate an amendment process of the Austrian Anti-Wage and Social Dumping Law towards a more employer-friendly version.⁸

In brief, judicial courts address the need for greater legal clarity concerning posting rules, but their decisions may favour certain principles (e.g., freedom of provision of services) at the expense of others (e.g., social protection). And ECJ decisions may undermine national legislations that address national-level issues concerning posting (e.g., organised crime in Italy, “economic calculation” in Austria).

5.3 Posting agency workers

The posting of workers intersects with temporary agency work legislation at both the EU and the national levels. While at the EU level both directives link to each-other by recognizing the posting of temporary agency workers, the variation in national regulations on the relationship between temporary work agencies (TWAs), agency workers and user undertakings (Leiber et al., 2019; Voss et al., 2013; Sartori, 2016; Schömann and Guedes, 2012) has raised questions on the unequal and potentially exploitable position of agency workers, already evidenced in the literature (Berntsen and Lillie, 2015; Novitz and Andrijasevic, 2020). Our research confirms that temporary agency work legislation differs considerably in the eight countries, particularly when it comes to the issue of posting via TWAs. All six EU Member States allow for some form of posting via TWAs to their country, but the conditions of service provision and TWAs’ obligations to posted workers and to the national authorities vary.

Foreign TWAs can post workers to Austria under the same conditions as posting companies. In Hungary, they can post workers if they are registered themselves or have a subsidiary registered in the country. In Italy, TWAs are exempted from providing the authorisation to provide temporary work services by Italian authorities if they have one issued from the competent authority of the EU Member State where they are based. In Poland, non-EU TWAs cannot post TCN workers to Poland. TCN workers employed in Poland can be posted elsewhere in the EU if the TWA has a subsidiary registered in Poland. In Slovakia, the legislation distinguishes between temporary staff allocation and posting, with stricter rules for the former thus pushing companies to prefer posting as a form of cross-border service provision. In Slovenia, only locally licensed TWAs can post workers, including TCN workers that have a permit to work in the country.

⁸ Anna-Maria Minihold. EuGH kippt Millionenstrafe im Fall Andritz, retrieved December 18, 2020, from <https://www.wko.at/branchen/k/industrie/eugh-kippt-millionenstrafe-im-fall-andritz.html>.

In terms of remuneration, workers posted via TWAs should receive the same salaries and other compensations as regular workers in all EU countries. The differences are noticed in terms of the legal rights and obligations between the TWAs and the user undertakings. In Austria, national legislation stipulates the same obligations about prior notification procedures to Austrian authorities, the TWA acts as the employer of the posted worker for the duration of the posting assignment in all aspects, except occupational safety and health, for which the obligation stands with the Austrian user undertaking. In Hungary, the employer's rights can be shared between the TWA and the user undertaking but the right to terminate employment remains exclusively with the TWA. The Hungarian 2012 Labour Code also regulates the process of informing the worker about the terms of the posting assignment when TWAs are involved. According to the respective Hungarian law, TWAs are responsible to inform workers, however, user undertakings are also obliged to inform TWAs about the terms and conditions of employment to be provided to the worker. In addition, regardless of the equal treatment between workers posted via TWAs and other employers, there is a fundamental difference in the employment relationship between workers hired via TWAs and the rest, because agency workers' employment can be terminated at a shorter notice, which makes these workers easier to dismiss and therefore more vulnerable. Italy and Poland have similar obligations as Hungary for user undertakings to inform TWAs and those in turn inform their posted workers about the terms and conditions of their posting assignment.

The TWAs in candidate countries, on the other hand, currently cannot provide services via posting abroad. The Serbian Law on Temporary Agency Employment adopted in 2019 does regulate posting via TWAs, however the posting articles (no. 10 & 12) will come in force when the country becomes an EU Member State (Article 37). Serbian and North Macedonian public and private employment service providers and/or agencies can mediate the employment of their co-nationals abroad but cannot act as employers during the assignment abroad. Firstly, there is a confusion about the mediator role National Employment Services provide for temporary employment abroad in response to agreements with Germany signed by both North Macedonia and Serbia mainly in care. Secondly, in the case of Serbia, the confusion comes from agencies as a form of business (mainly agencies for care services), which send people abroad for short-term work. Predominantly found in the grey economy, it is not easy to trace the direct employer for workers send via these agencies as the salaries go through the agencies, but people are technically hired by the users. In addition, these assignments are short term and workers stay in the country with tourist visas or within the 90-day visa free Schengen agreement for candidate countries like RS.

All eight countries have measures against TWAs that do not abide by national regulations. The main form of penalty are fines (Austria, Hungary, Italy, Poland, Serbia, Slovakia, Slovenia), and in some countries TWAs' licenses can also be suspended and/or revoked (North Macedonia, Serbia), or excluded from the list of TWAs administered by the Central Labour Office (Slovakia).

5.4 The impact of posting on workers' social protection contribution

Posted workers are subject to the social security and health insurance regulations in their home country based on the Basic Regulation ((EC) No 883/2004) on the coordination of

social security systems. For the posting process inside the EU, the PD A1 form confirms the compliance with social and health insurance regulations in the country of origin. For the candidate countries these requirements are regulated by the national social and health insurance framework laws⁹ and in existing bilateral agreements on social security. The duration of social and health coverage is also regulated in the above regulation (Art. 12), according to which a posted worker would have the coverage under the country of origin for a maximum of 24 months after which the insurance relationship is transferred to the social security system of the host country with the obligation to pay contributions there.¹⁰ The country of origin principle regarding social security of posted workers within the abovementioned time period applies as long as the posted person is employed by the initial posting employer for the entire duration of the posting and is not sent by the employer to replace another posted worker.¹¹ Additional conditions are set out in Art. 14 of the implementing regulation, which include that the posting employer should normally carry out its activities in the territory of the sending Member State and that posted workers should be insured in the sending country immediately prior to being posted.¹² In order to determine that these conditions for posting are met, Member States may establish specific criteria in their national laws, as exemplified in Table 4 that compares the conditions provided in the Hungarian and Slovenian legislation for verifying attachment of posting employers and posted workers to their social security system.

Table 5: Criteria for establishing attachment to the social security system in the Hungarian and Slovenian legislation

HU (Social Security Act)	SI (Transnational Provision of Services Act)
<p>The posting employer</p> <ul style="list-style-type: none"> - must be legally registered by the court of registration in Hungary; - has a significant domestic economic activity: the proportion of domestic employees within the average number of employees employed in the course of domestic and foreign economic activity (production, distribution and other service activities) will reach, or the share of revenue from domestic activity in total revenue reaches 25 percent; or the employer can show that significant domestic economic activity is probable (especially if the enterprise carries out continuous production activities in Hungary); or the employer (and not an establishment of the company, but the company itself has an ownership interest of at least 25 percent in an undertaking which carries out significant economic activity, or the legal predecessor of the employer fulfils the condition of significant economic activity. - must carry out an activity belonging to the same branch of the national economy abroad. 	<p>The posting employer</p> <ul style="list-style-type: none"> - has been entered in the Business Register of Slovenia for at least two months; - has an open transaction account, which is registered in the tax register in accordance with the law governing the financial administration and is not blocked; - an employer employing between five and ten workers, employs at least one worker who is continuously covered by compulsory pension and invalidity insurance, compulsory health insurance, parental care insurance and unemployment insurance (hereinafter: compulsory social insurance) for at least six months or, if the period from the establishment is shorter, from the establishment onwards; or that the employer employing more than ten workers employs at least three workers who are continuously included in compulsory social insurance on this basis for at least six months or, if the period from the establishment is shorter, from the establishment onwards; - in the last 12 months or, if the period from the

⁹ North Macedonia: the law on Pension and Disability and the law on Compulsory Social insurance. Serbia: the law on Contributions to the Social security.

¹⁰ For postings longer than 24 months, an extension can be requested from the competent insurance authority in the home country and, if granted, the posted worker can remain covered in the home country.

¹¹ Art. 12 of the Basic Regulation ((EC No 883/2004) on the coordination of social security systems.

¹² Art. 14 of Regulation 987/2009 for implementing Regulation 883/2004 on the coordination of social security systems.

	establishment is shorter, from the establishment onwards, the total number of hours of inclusion of all employees employed by the employer in this period in compulsory social insurance on the basis of posting did not exceed 80 percent of the total number of hours social insurance based on employment with the same employer.
The posted worker must be entitled to health care in Hungary without interruption for at least 30 days immediately prior to the starting date of the posting.	The posted worker is continuously included in compulsory social insurance in Slovenia for at least 30 days on the basis of full-time employment or on another appropriate legal basis.

Source: POW-Bridge Country reports for Hungary and Slovenia

Monitoring and control of whether posted workers continue to be covered by the sending country for social security based on national specifications depends on what these national rules and obligations are. The public authority in charge of social and health insurance of the posted workers are the national social or health insurance funds. In Austria, there is a specific agency, BUAK (The Construction Workers' Annual Leave and Severance Pay Fund) that monitors posted workers in the construction sector. As reported in the country case studies, enforcing compliance with national social security rules is often weak due to two main factors: first, fragmented responsibilities of institutions (distributed either geographically or in terms of competences within and among institutions) and second, low capacities of the public authorities responsible for verifying and monitoring social and health insurance. Social insurance regulations seem to be difficult to verify and therefore enforce across borders, between EU countries that send and receive posted workers and especially if a non-EU country is part of the process. The electronic exchange of social security information (EESSI)¹³ is not fully functional yet (EU countries are at different stages of implementation) (although all the Member States are obliged to implement EESSI in 2021). Moreover, it is still unclear how non-EU countries (to which the regulation applies if there is posting practiced to the EU) might cooperate in this regard as they cannot be part of the EESSI until they become full members. Furthermore, the new EU data protection regulations (GDPR) seem to pose additional challenges when the host countries try to check social and health insurance compliance. In the case of health insurance, verification is made easier among EU countries through the European Health Insurance Card. In theory, this guarantees that posted workers receive the same medical benefits as the rest of the insured people in the respective country. For candidate countries, posted workers can benefit from medical care as per the stipulations of the bilateral agreements between the sending and the receiving country. If the sending country has no bilateral social security agreement with the receiving country, posted workers can use only emergency care.

Social security and health coverage differ in terms of contributed amounts and, respectively, the entitled benefits. The distribution of burden between employee and employer differs significantly across the eight countries as displayed in Table 5.

¹³ <https://ec.europa.eu/inea/en/connecting-europe-facility/cef-telecom/projects-by-dsi/electronic-exchange-of-social-security-information-%28eessi%29?page=1>

Table 6: Social and health insurance contributions in the case countries, 2019

		AT	HU	IT	MK	PL	SI	SK	RS
Social security contributions	Employee	16	18.5	7.2	20.5	15.3	19	10.3	14.75
	Employer	21.23	16.7	24	-	14.1	13.9	23.3	11.5
Health insurance	Employee	3.87	-	2.8	7.5	9	6.36	4	5.15
	Employer	3.87	-	8	-	-	6.56	10	5.15

Source: for social security contributions, OECD 2020, Taxing wages 2019 data; for health insurance, PWC Worldwide Tax Summaries, 2020.

Note: In Hungary, social security contributions include health insurance.

Some employers try to exploit possibilities by reducing the posting costs to the detriment of workers' entitlements. They do so by paying the minimum wage only, by hiring posted workers on a part time basis or for a few days per month only. Another possibility to lower the costs is to choose a 'cheaper' form of contract. One such example is reported in Poland, where some employers opt to send posted workers under 'civil law'¹⁴ contract and not under the regular 'labour code contract'. The 'civil law' form of contract guarantees much less social security for the posted employees (i.e., no social security benefits, paid leave, or unemployment benefit). Some countries try to diminish these practices, i.e., Serbia does not permit the contribution base to be lower than twice the minimum monthly contribution base.

Safety in the workplace, working conditions, the possibility to rest and rehabilitate, the level of remuneration and respectively the level of social and health insurance coverage, all have an impact on the workers' health and wellbeing. Protection against work accidents, information about OSH risks, and protective equipment are frequently lacking for posted workers (Danaj and Zólyomi, 2018). Language barriers add a further layer of vulnerability (Zólyomi and Danaj, 2019). Unpaid overtime, a common issue reported by workers posted from Hungary for instance, has implications not only in terms of current loss of income, but also for social contributions and building up entitlement for future benefits. Workers often accept in-cash payments for overtime without understanding the consequences it has in full (e.g., lower amount of unemployment benefits in case of job loss). Reporting OSH violations is difficult for posted workers for various reasons (e.g., lack of information about available complaint mechanisms, language barriers, fear of authorities). For instance, the Italian legislation stipulates workers can complain during controls and inspections when there is not a safe working environment, but complaints are rarely used. In the case of proved violations, often the fees which are applied to the employer will end up being deducted from the employees' remunerations, which makes the reporting process even more complicated. Some positive practices of protection of the right of posted workers come from Poland, where sector-specific association, representation and information have brought some results. For instance, dedicated bodies to protect and support wood workers, carers, construction workers improved their work conditions and access to fair remuneration.

5.5 Company law and other overlapping regulations

National company, corporate and cross-border company mobility laws within the EU are quite diverse. Our research indicates that national company laws do not intersect sufficiently with

¹⁴ There are 2 types of civil law contract, the contract of mandate and the contract to perform specific work.

national posting legislation. Company or corporate laws in all eight countries studied here do not make any reference to posting although the provision of services via foreign subcontractors that post their workers continues to increase within the European labour market. Based on the country reports, apart from the posting-specific laws, foreign companies and sometimes posting specifically are mentioned in diverse laws across countries. The Slovak commercial law, for example, mentions posting specifically by stating that only registered companies are entitled to post workers in and out of the country. The Slovene legislation has special provisions that require companies to post workers only within the frame of the activity for which they are registered. And the Hungarian social security legislation requires companies to have substantial domestic activity to be able to post workers abroad. In North Macedonia, the Law on Trade Companies stipulates that the foreign companies and foreign sole proprietors have the same obligations as local companies but does not mention posting, and only the Law on Labour Relations covers all employers, including local and foreign undertakings that post workers to and from North Macedonia. The Act on employment promotion and labour market institutions (2004) in Poland refers to the posting of TCN workers in the context of intra-company transferrals and in terms of contractual specifications and residence permits.

To address issues of potential abuse of foreign companies operating in their territory, including posting companies and/or TWAs, some countries have specific laws or provisions, such as the Anti-Wage and Social Dumping Law in Austria; the Act no. 85/2005 on Illegal Work and the Act no 125/2006 on Labour Inspection in Slovakia; and Article 35 of the Italian Procurement Code, which establishes thresholds on public contracts available EU-wide, and Article 213, which assigns the National Anti-Corruption Authority (ANAC) the role of supervision and control of public contracts and the activity of regulating them, in order to prevent and combat illegality and corruption. In Italy there are also specific provisions in the national legislation on joint liability between the user undertaking and the posting company (Article 29 of Legislative Decree 276/2003) or the posting temporary work agency (Article 35 of the Legislative Decree No. 81/2015) on workers' pay and social contributions. In Hungary, TWAs are legally obliged to provide a collateral to be able to register and operate, which is set as a measure to prevent bogus/fraudulent agencies.

In some countries, laws against fraud and abuse have penalties only for companies, whereas in others they also prosecute workers, e.g., in Slovakia; although an interviewee from the Slovak National Labour Inspectorate claimed that they do not customarily impose financial penalties on workers. Regardless of the existence of different laws at the national level, how rules are enforced against companies also might differ depending on whether they are foreign or domestic and whether they fall under the purview of a particular law or another. For example, in Slovakia the Labour Inspectorate may impose sanctions on the posting employer only for breaching the law on posting, not for illegal work.

Our review of the legal framework on posting and other related legislation points to the need for further convergence at the EU level and better alignment across regulations. Efforts to increase convergence in the EU have come in the form of a company law package proposed in 2018 by the Commission that aimed to encourage cross-border company mobility by addressing the considerable inconsistencies in the national legislations of Member States, while at the same time protect stakeholder interests (Biermeyer and Meyer, 2018). From an enforcement perspective, an obvious benefit of having EU-wide regulations on companies

operating across borders is that they could help increase transparency, make sure these companies have genuine economic activity, and impose group liability when they establish or register themselves in other Member States, which would help prevent dubious practices such as letterbox companies (McGauran, 2020). From a worker protection perspective, measures targeting workers' rights of information, representation and participation at all levels and the increase in monitoring, control and transparency of company structures and activity would increase the level of protection of posted workers from possible abusive employers (Hoffmann and Vitols, 2018).

6 Enforcement structures and protection mechanisms

6.1 Enforcement by public authorities

Competent public authorities both in the sending and receiving countries have been enforcing the EU Posting of Workers Directives, subsequent national legislation, and bilateral agreements to protect posted workers. The enforcement structures usually extend to several institutions at the national and local level, with different authorities responsible for specific aspects of posting. Each country differs slightly depending on the legal framework and what institutions are responsible for different aspects of posting such as wages, social security, health insurance, occupational health and safety and so on. Typically, agencies under the ministries of health, social policy, employment, finance, interior affairs, or foreign affairs may be involved and require intersectoral collaboration. They include:

- Social insurance agencies are responsible for the coordination and administration of health and social insurance of workers to be posted abroad. They issue the portable documents A1 in all the sending countries. The social insurance agencies verify if the company and the posting itself meet the criteria of posting such as duration of prior employment of the to-be-posted employee and payment of social security contributions usually for at least one month before the posting start date. The social insurance agencies also check the legal status of any temporary work agency and its business type, since a type of business must correspond with a type of services the posted worker will carry out in the receiving country. This is the case for all six of the EU countries, but the situation is different in the candidate countries, where the social insurance agencies are involved only if there is also a bilateral social coordination agreement between them as sending countries and the target country. In the case of Slovenia, the social insurance agency is also involved in the process of de-registering the posting status of the workers and their re-registering as working again in the country.
- Labour inspectorates are national or local enforcement authorities checking compliance with the labour law and labour relations. They conduct inspections at the workplaces. If there is an assumption that legal obligations of posting were violated (e.g., relating to remuneration), the labour inspector notifies the Social Insurance Agency. Austria is a special case where the labour inspectorate is only concerned with occupational safety and health regulations.
- Tax authorities verify the compliance with pay for posted workers in both the sending and the receiving country. In the latter, they typically can freely access the place of employment, request information and inspect documents. Austria has a dedicated Competence Centre “Fight against wage and social dumping” to investigate pay levels of posted workers.
- The finance police are typically a branch of the finance ministry and operate as an anti-fraud agency to fight illegal employment practices including wage and social dumping, including compliance with minimum pay, social insurance, and tax laws (e.g., in Austria and Italy).

- District administrative authorities (metropolitan and county government offices) are responsible for monitoring and enforcing compliance with employment regulations (employment contracts, undeclared work, working time, wages, etc.). They carry out administrative penal proceedings, for example underpayment falls under administrative criminal law.
- In case of the posting of TCNs, the Foreign Police (e.g., in Slovakia) closely cooperate with the Labour inspectorates meaning that they jointly carry out inspections at workplaces, while the Foreign Police units control compliance with the migration law and the labour inspectorates control compliance with the labour law.

In some countries, the construction sector is subject to additional laws and authorities to protect construction workers. For example, the Construction Workers' Holiday and Severance Pay Fund (BUAK) in Austria employ investigators to ensure leave and severance pay entitlements are being paid, and the Joint National Committee for Building Workers' Welfare Funds (CNCE) in Italy enforces holiday pay, thirteenth monthly salary, sick-leave and workplace accident pay, as well as worker training.

Other stakeholders participating in the enforcement and support structures with respect to posting are employers' associations, trade unions, chambers of labour and chambers of commerce. They are parties in collective bargaining at national, industry and company level and can engage actively in, for example, the protection of posted workers' rights or in conflict mediation (for more on worker protection mechanisms see section 9.1).

6.2 Enforcement through transnational cooperation

Proper implementation of the Posting of Workers Directive and following regulations requires establishing transnational cooperation between various institutions. The above-mentioned agencies cooperate with authorities of other EU Member and EEA States and provide mutual assistance as set out in the Enforcement Directive. This includes obtaining and providing information as well as request authorities to monitor compliance with labour-law provisions, investigate further or decide on enforcement.

Transnational enforcement and cooperation occur through direct contact between public authority staff such as labour inspectors of the sending and receiving countries. From a sending perspective, there is often little knowledge about the working conditions of workers abroad including posted workers. This is particularly true for interactions between EU countries and candidate countries or potential candidate countries. Therefore, bilateral protocols and agreements have been established especially between those countries (e.g., between Serbia and Slovakia, or Slovenia with Bosnia & Herzegovina) to ensure efficient exchange of information and control. The quality and intensity of cooperation differs from country to country and may depend on capacities of a country's local enforcement agencies. Moreover, the exchange of information or documents between countries is often carried out via email communication which may cause delays in handling cases.

Within the European Union, cooperation of labour inspectorates may also take place through the online, computer-based Internal Market Information (IMI) system, which only EU countries participate in for administrative cooperation of national, regional, and local

authorities. The EU candidate countries and potential candidate countries do not yet have access to IMI. The amended PWD introduced updates to IMI, including new questions concerning all mandatory elements of remuneration, accommodation, and allowances. Transnational cooperation takes place through the IMI system mainly in the context of:

- controls relating to sending companies (e.g., request for missing documentation to the competent authorities in the sending country, verification of authenticity of sending companies and posting, control of tax payment, social security contributions and health insurance in the sending country);
- notification of an administrative or judicial order imposing a penalty;
- recovery of sums due for administrative sanctions; and
- collaboration in judicial investigations concerning postings from or to the host country.

Labour inspectorates and other public institutions have used the IMI system more widely in the last few years. The system still works with delays in certain instances or answers questions unclearly. The European Labour Authority is expected to take over the coordination of cooperation between national inspections in Member States.

Social insurance agencies are currently piloting to use the Electronic Exchange of Social Security Information (EESSI), e.g., for verifying the authenticity of A1 documentation. This tool is still not (fully) operational across the EU; and candidate countries like MK and RS would not have access to it either way until they become full members. As a single access point EESSI is expected to speed up the exchange of documents and information between social insurance entities across borders.

7 Enforcing posting regulation: public authorities' practices and challenges

Enforcement practices by public authorities are typically accompanied by challenges. For example, intra-institutional or cross-border collaboration reveals a need for more systematic, effective information sharing.

7.1 Public authorities' enforcement practices

Public authorities' enforcement practices require their involvement at three stages: the provision of information about posting rules, the execution of administrative requirements, and inspections. As different authorities are responsible for different aspects of posting, the monitoring and control of posting rules requires intensive joint collaborations.

7.1.1 Access to information

Providing accessible information about posting falls into the obligations of the public authorities as stipulated in the Enforcement Directive. This means that all countries should have a national website on posting, which all six of EU countries in our study do, although the degree of information and the languages in which it is presented varies. The most elaborated websites with the largest number of languages (seven) are the Austrian and the Slovak posting websites. In Slovenia, the social ministry established a website in 4 languages, however the relevant legislation is only available in Slovene. The Hungarian, the Italian and the Polish websites are only in national languages and English. The two candidate countries of North Macedonia and Serbia do not have national websites on posting yet.

Except for the national websites on posting, institutional websites also provide some information on posting, usually in relation to the aspect that the institution is responsible for. So, labour inspectorates, social insurance institutions, holiday and severance pay funds, financial police, foreign police, all provide some information on the posting of workers. In addition, those institutions which are responsible for administrative requirements, such as the application of the PD A1 form, also provide the forms necessary for employers to fill in and submit to the authorities. In some cases, these forms are downloadable (Austria, Hungary, Italy, Slovakia), in other cases the whole submission process is electronic (Slovenia, Poland). The need for expedited procedures and the COVID-19 pandemic highlighted the need for quick and systemic solutions, which two of the countries in our case have already adopted.

Despite the existence of national posting websites and other institutional websites providing information on various aspects of posting, in all eight case studies it was reported that information is difficult to access, either because it is fragmented or insufficient (e.g., information about relevant collective agreements in the receiving countries is often missing), or because the national regulations are so complex that it is difficult especially for foreign companies to navigate properly without specialized assistance.

7.1.2 Administrative requirements

Administrative requirements from a sending country perspective follow a similar procedure in all eight countries. Companies must report their intention to post their workers to the home country authority through an application process by submitting a form either virtually or in

hard copy, accompanied by several documents that verify their relationship to the worker and their terms of employment and of posting, the company's business status and that they fulfil all administrative requirements to post their workers. This process also involves the request for the issuance of the PD A1 form and the procedures for appeal in case the request is denied. The procedure should usually take between 7-8 days, but in some cases, it can take longer, often if further clarifications and verifications are considered necessary by the authority. While online application procedures have expedited processing times for Slovenia as the response is generated by the system, it has also complicated the process of appeal, which companies must then do by appealing to the courts.

7.1.3 Inspections

Public authorities are also responsible for monitoring and controlling the application of the posting rules, hence based on their mandate they conduct inspections in the companies' premises or the workplace. Inspections can cover the verification of documents, but also occupational safety and health, accommodation, employment status, migration status, the payment of wages, and taxation. The labour inspectorate is the institution in charge of inspections in all the reviewed countries except for Austria, where inspections are carried out by the financial police. In North Macedonia, although on-site inspections are under the authority of the Labour Inspectorate, including workplaces abroad, so far, no inspection has been undertaken. Most inspections, however, are initiated once a complaint is lodged or there has been an accident in the workplace. Several interviewees in the different countries believed that many cases of violations regarding posting go undetected because of the lack of more frequent inspections, the limited access to the workplace inspectors might have in certain sectors such as domestic care, or more broadly because of the temporary nature of the postings which make it difficult for public authorities to monitor all companies in real time. Meanwhile, there is also a lack of substantial number of complaints by posted workers, who do not often approach the authorities either in the sending or the receiving countries to report any abuse or irregularity they might suffer.

7.1.4 Intra-institutional collaboration: joint inspections

Because competences are distributed among different public authorities and each public authority's mandate may be narrow and limited in both sending and receiving countries, public authorities need to collaborate across policy sector. Cooperation of authorities to jointly investigate a construction site may cover human rights (criminal police), migration status (foreign police), labour rights (financial police, labour inspectorate, construction site inspectors), occupational safety and health (labour inspectorate, accident insurance), and financial issues (financial police). Three of the countries studied here reported joint inspections: in Austria, multiple authorities conduct joint inspections (financial police, labour inspectorate BUAK, AUVA); in Hungary, joint inspections are carried out by the labour inspectorate, the tax authority and the police; in Slovakia, joint inspections are carried out by the foreign police that checks migration status and the labour inspectorate that checks labour standards. Transnational joint inspections are relatively rare, but do occur; however, they are mostly ad hoc, or project-based and therefore lack sustainability (see Danaj and Zólyomi, 2018).

Furthermore, different institutions may have separate databases such as on employment, pensions, or health, which cannot always be accessed by other institutions, so information

needs to be shared on a regular basis. However, some systems are not yet set up for joint data sharing across national institutions and the fact that mandates differ across countries makes it difficult to access certain information transnationally. For example, the financial police in Austria cannot obtain information in the IMI system on social insurance, but they need to go through the Austrian social insurance to do so. Furthermore, as mentioned in section 6.2, only EU countries have access to IMI and will be able to connect through EESSI once it is fully operational, therefore it is necessary for candidate countries like North Macedonia and Serbia to establish bilateral data sharing protocols.

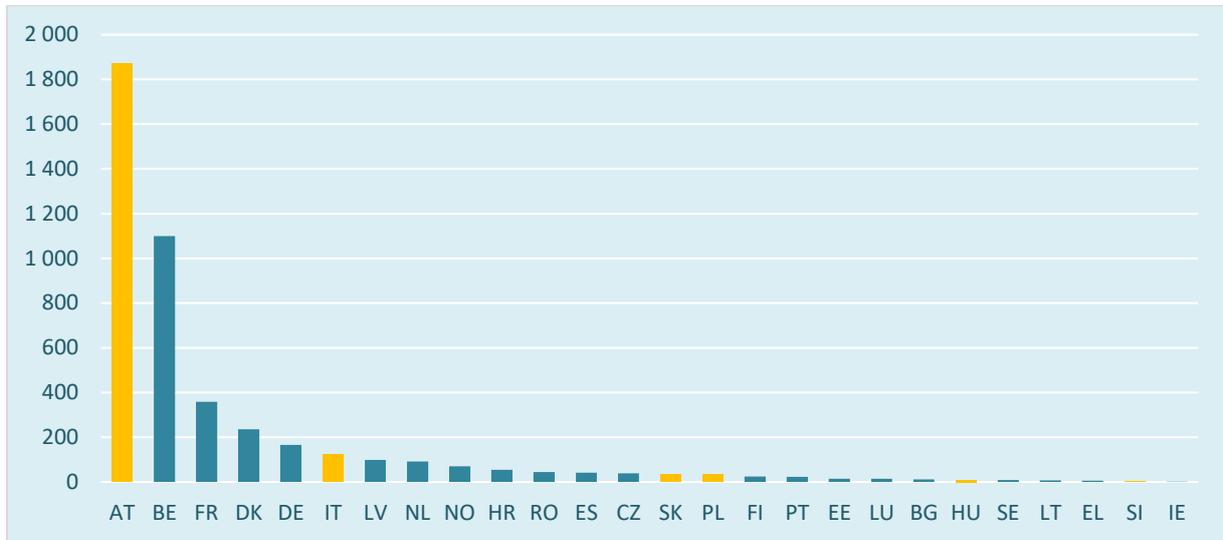
7.2 Public authorities' enforcement challenges

The interviewees from public authorities pointed out numerous challenges related to the implementation of the provisions on the posting of workers. We identify three main levels of enforcement challenges: the transnational, the national, and the sectoral/workplace levels.

7.2.1 Transnational challenges of public authorities

Transnational cooperation and enforcement pose large challenges and have been difficult to achieve up to now. International enforcement appears to work with respect to criminal law, but not with respect to administrative law. Exchange of information and documentation relating to posting across borders through the Internal Market Information System (IMI) is sometimes very slow. The pace of cooperation plays a key role in investigating complex cases, for example if letterbox companies are involved in potential misconduct or if ownership or business relations of the companies engaged in postings are complicated. The quality of cooperation differs from country to country, varying from intense collaboration and flexible responsiveness of the national enforcement bodies to slow responsiveness, which makes certain investigations last even several months. Additionally, absence of deadlines for responses make dealing with the cases more difficult. Several interviewees identified limited control in the sending countries as an obstacle to assess and control labour conditions and compliance with the regulations in the receiving countries. Austria is by far the country that sends the highest number of requests, not only within our sample, but also in the EU (Figure 2). The reach of IMI is still limited in most countries in terms of both sending and receiving requests on the posting of workers, and the accession countries are not yet part of the system.

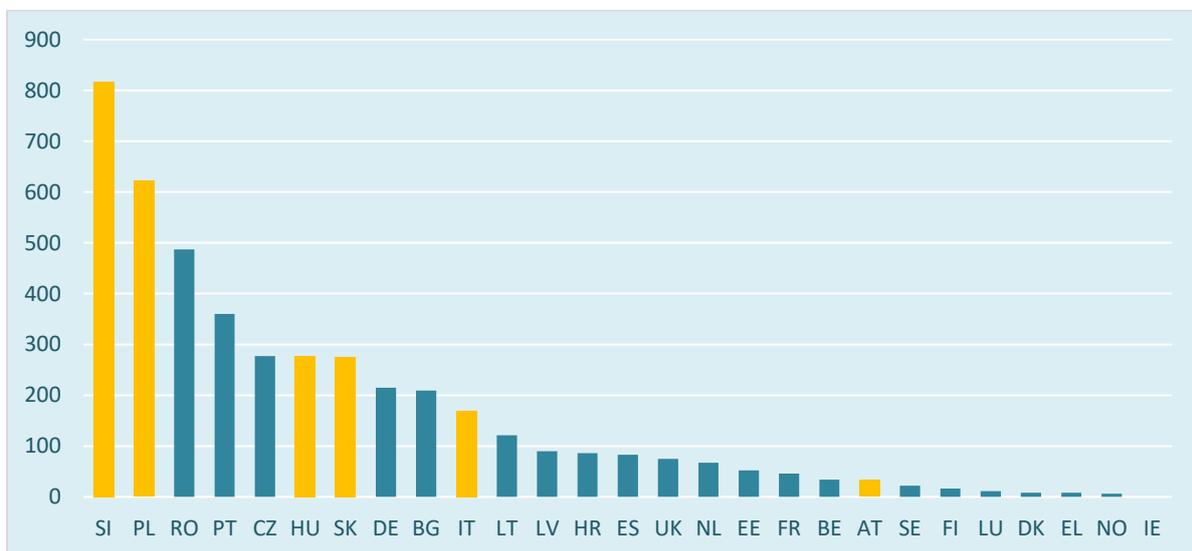
Figure 2: IMI requests on posting of workers by sending Member State, 2019



Source: European Commission, Internal Market Information System Statistics
https://ec.europa.eu/internal_market/imi-net/statistics/2020/07/requests/index_en.htm

In terms of requests received, Slovenia and Poland received the highest number of requests in 2019 comparatively across the EU, which is understandable considering that they are also among the main sending countries of posted workers.

Figure 3: IMI requests on posting of workers by receiving Member State, 2019



Source: European Commission, Internal Market Information System Statistics
https://ec.europa.eu/internal_market/imi-net/statistics/2020/07/requests/index_en.htm

The European Labour Authority may be a future solution for cross-border enforcement for both the labour and social security domain. So far ELA collects information, observes, and discusses issues, but has not yet the right to enforce regulations and impose fines across borders.

7.2.2 National challenges of public authorities

Differences between national and European standards may require public authorities to direct a higher degree of effort towards informing about and enforcing national laws. For example, different OSH requirements among countries may pose an added enforcement challenge. Agencies enforcing workers' safety and health find that some sending companies fulfil their home country's OSH requirements, which may be slightly different or at times lower than the host country's requirements. In general, the OSH framework Directive is transposed to all European Member States, but Member States could have adopted higher standards, thereby maintaining differences across the EU. In the case of posting companies and posted workers, it may thus be more a matter of neglecting OSH standards due to the temporary cross-border nature of posting. For example, Austria seems to enforce its own national OSH standards and posting companies to Austria may not be fully aware of these selectively higher national standards than the European minimum ones. Further training and better access to information on OSH standards would be needed for employers and workers alike. Another challenge for enforcement agencies is the difference in administrative penalties between the European directive and national laws. After court ruling of "Maksimovic and Others", Austrian authorities are, for instance, no longer allowed to impose not-proportional, cumulative fines to companies. When some companies operate illegally, the current penal regulations may remain insufficient to deter illegal practices and to defend the employees' rights.

Distinct labour and health laws across Member States appear to make it difficult for labour inspectorates to investigate cases as well. For instance, while countries such as Spain recognize the declaration of the employer as proof of legal work employment (Dodi and Melenciuc, 2018), in countries like Slovakia the employment contract signed by both parties must be submitted to demonstrate a legality of work contract. The same applies to the different sanction systems the Member States implement. For example, a respondent of the Labour Inspectorate explained that while Austria imposes fines to both legal entities and natural persons, Slovak inspectors impose penalties solely on legal entities (companies). This causes problems in law enforcement across borders as in this instance Slovak authorities cannot fine individuals as it might be requested by foreign counterparts. Another problem can arise in health insurance coverage. For example, the Serbian health insurance covers only urgent medical help. However, as the urgency is assessed by the receiving country, the Serbian health insurance agency may not consider the case urgent, therefore, it will not reimburse the expenses. Some of these challenges can be mitigated by bilateral agreements that coordinate specific national regulations.

7.2.3 Sectoral and day-to-day operational challenges of public authorities

Sectoral challenges refer to the specific regulation and practices public authorities have to apply due to the nature of the sector, whereas workplace challenges refer to public authorities' day-to-day operation, for example when working in the field such as on construction sites.

As discussed in section 5 of the paper, the transposition of the posting rules is nuanced across countries; differences are also noticed at the sectoral level. Two sectors in particular add to the challenge of enforcing posting rules in our case studies, namely the care sector and the transport sector. Posting in the care sector work, especially home care, is reportedly frequently used in Poland. This sector operates under a different legal framework to other sectors, i.e., civil laws contracts, which do not fall under the competency of the social

insurance institution, and therefore it is a difficult subject to control for public agencies. The sector is also characterised by various forms of contractual irregularities, including informal employment. Enforcement agency respondents in the Polish case reported the challenge of monitoring standards in people's private homes which has implications for civil rights and therefore makes it difficult for them to detect any violations, which further increases the risk of exploitation of these workers. The transport sector on the other hand is a challenge, because not all forms of international transport fall under posting, and it is difficult for authorities and employers alike to make sure they are following the right legal framework and procedures, as was reported in the Hungarian case.

The complexity of the posting and other related rules is combined with low levels of knowledge on posting specifics by enforcement agencies (e.g., in North Macedonia, Slovakia). Posting falls under several jurisdictions which requires intersectoral knowledge. Sending countries such as North Macedonia identified low level of knowledge and preparedness of human resources within public authorities as a major challenge to control and monitor payment and taxation of employers when they post workers abroad. Furthermore, North Macedonia has not yet developed a joint database for monitoring labour mobility from and to the country, and therefore information cannot be easily shared across units. On the other hand, employers usually also have low level of knowledge on specific posting regulations as opposed to regular employment, as reported in Poland.

Understaffing and limited personnel capacities were mentioned by interviewees in Hungary, Italy, North Macedonia, Poland, Slovakia, and Slovenia as a continuing challenge facing labour inspectorates and other public authorities such as financial police units. Staff shortage would slow down the investigation of complex cases, as the whole process of investigation is then slower, considering the broad agenda that law enforcement bodies must handle. Staff shortages affect waiting times for controls or obtaining answers from public authorities. Both trade unionists and labour inspectors in all countries indicated the need to increase the staff of labour inspectorates and provide for a greater number of controls.

Language barriers are one of the difficulties encountered by interviewed labour inspectors and other investigators, which affects enforcement activities both on sending companies and on posted workers (e.g., Austria, Italy). This confirms earlier findings on the impact of language barriers in enforcing OSH standards and labour rights in general for posted workers (Zólyomi and Danaj, 2019). Language barriers between inspecting officials and workers are sometimes combined with the unease and fear among workers who often are also uninformed. Their language barriers may result in the difficulty for workers to fill in questionnaires. Normally, no translators are available unless it is an investigation of a criminal charge or a major work accident, so some information may not be conveyed accordingly.

To address public authorities' enforcement challenges transnationally, nationally and at the workplace, cross-border communication and data sharing, harmonising of national regulations, investment in financial and human resources as well diversifying of communication strategies in the field to overcome language barriers may be furthered.

8 Implementing posting regulation: employers' practices and challenges

Our empirical research suggests that the interplay of EU and national rules on posting and the related areas influence employers' practices and their deliberations to engage in posting in two ways. The decision is driven by economic activity interests, in the sense that posting allows companies to do business and employ their workers beyond national labour markets and that it is cost-efficient. However, both aspects relate directly to the application of rules on posting as well as social security and company law. In our research we find that posting rules are quite complex and demand a great deal of knowledge and resources, which can lead to rule violations either because of the challenge of abiding by national and EU regulations or because through rule violations or circumventions, posting employers are able to remain competitive and make a profit. In this part of the paper, we firstly discuss employer practices and then present their challenges, as reported by employers, social partners, and public authorities.

8.1 Employers' Practices

During our fieldwork we identified two types of practices: law-abiding practices and violations. As already discussed in Section 5 of the paper, regulations around posting differ across countries. Although based on common EU laws such as the PWD, the Enforcement Directive, TAWD, and the Regulation (EC) 883/2004 on the coordination of social security systems, national rules on posting, migration, social security, agency work, and company law intertwined with bilateral agreements, legal decisions, and wage-setting mechanisms, such as minimum wage or collective bargaining agreements, have produced quite complex regulatory frameworks. Rule enforcement has intensified as posting has become a more politically sensitive form of cross-border labour mobility and national enforcement agencies and social partners have increasingly been mobilizing to prevent any form of abuse and social dumping.

To abide by all the regulations in both sending and receiving countries, companies need to educate themselves and/or employ specialized services provided by legal, accounting or consultancy companies. This is especially the case for the rules in receiving countries. The use of specialized legal and accounting services was reported by companies who post workers to and from Austria, Italy, Poland, Slovakia, and Slovenia. The lawyers or consultant companies are usually serving as the locally based contact person/address required of posting companies in various countries and providing support to companies in the preparation and keeping of all necessary documents, in fulfilment of posting companies' obligations such as tax services or housing, as well as legal representation, when necessary.

However, the size of the company seems to be the determining factor of the use of specialized services. Such services can be quite costly; therefore, it is mostly large companies that would consider the benefits of having on retainer a lawyer and/or a consulting company specialized on posting. In the case of Austria, where the Anti-Wage and Dumping Law makes both main contractor and the posting subcontractor liable to fulfil Austrian legal obligations, we found main contractors hiring legal support to cover their posting subcontractors, as well. The stricter rules with additional costs have in some cases served as deterrents for smaller

companies, who opt for other forms of labour mobility and service provision to countries with stricter rules, as it was reported in the Slovak case study. Nonetheless, other companies from lower-income countries still maintain their competitive advantage as social contributions, taxes and other obligations remain comparatively low to the rates that might be paid in the higher-income receiving countries.

Apart from the size of the company, other influencing factors to employers' practices are bilateral agreements, the use of temporary agencies, and the sector. Bilateral agreements are found between the candidate countries of North Macedonia and Serbia and certain EU countries, in terms of posting quotas, double taxation and social security coordination; as well as between EU Member States in the case of special paritarian structures in the construction industry for holidays and severance pay (e.g., between BUAK in Austria and CNCE in Italy). Bilateral agreements add another layer of coordination to posting and are supposed to facilitate cross-border labour mobility. The agreements between the two candidate countries and Germany are reported to indeed help in having posting companies abide by the rules of posting. Whereas in the case of paritarian institutions, it was reported that despite the commitment of Austrian and Italian public institutions and their ongoing cooperation, not all posting companies collaborate with them. In the case of Austria, it was reported that some companies do not claim their holiday and severance pay funds out of fear they might be found doing something irregular, whereas in the case of Italy, the registration with CNCE also brings other costs and obligations, such as covering workers' training, which might act as a deterring factor. In addition, institutions like BUAK and CNCE do not have their equivalent in all EU Member States, which makes coordination across national agencies complicated.

The second factor are temporary work agencies that are sometimes used to minimize employer obligations. As discussed in section 5.3 of this paper, TWAs have similar obligations in terms of remuneration and information on terms and conditions for posted workers; however, there are differences on their mandates across countries and their hiring and termination obligations to workers are sometimes easier, which might lead to them being used for posting as 'less complicated' practices. In our research, we did not speak to any TWAs, so this insight comes from the public authorities interviewed in Hungary, Slovakia or Serbia and the literature (see e.g., Berntsen and Lillie, 2015; Novitz and Andrijasevic, 2020).

At the same time, there seems to be a sectoral dimension to the degree posting companies abide by their obligations. So, less violations seem to have been found in manufacturing than in construction or the domestic care sector. In the case of Poland there is also quite substantial undeclared work found in the hiring of non-local EU workers in the domestic care sector, who could be posted should terms and conditions have been applied.

Based on these influencing factors, several posting companies are found to be using various tactics of non-compliance, circumvention, or violation of posting rules and obligations in the eight countries. We identify four categories of violations according to the aspect of posting, namely employment misrepresentation and irregularities, wage and salary-related irregularities, social security irregularities, and reporting/documentation irregularities. Based on the country posting profile, violations reported in the Austrian and Italian case studies refer to companies posting to these countries; whereas violations reported in the other six countries (Hungary, North Macedonia, Poland, Serbia, Slovakia, Slovenia) refer to companies posting from these countries. We summarize the reported rule violations in Table 6.

Table 7: Reported posting rule violations in the eight countries

	Employment misrepresentation and irregularities	Wage and salary-related irregularities	Reporting/documentation irregularities	Social security and tax irregularities
AT	Categorizing workers as part-time; Pseudo self-employment; Fake posting	Classifying workers too low; Holding back daily allowances and other payments	Registering workers for few days to receive PD A1 and then de-register them although they continue work; Fraudulent issuance of PD A1 (fake documents)	Paying social insurance for part-time work; Not paying social insurance contributions; Reducing BUAK payments; Deregistering shift workers Reporting workers part-time to BUAK; Deregistering employees due to sickness or accident
HU		Compliance with host country minimum wage requirements; Unpaid wages; Unlawful wage deductions; Unpaid overtime.	Document keeping (unavailability of PD A1 forms during inspection); TWAs engaging in posting in the host country without license or registration.	Insufficient health coverage due to specific insurance requirements in some host countries
IT		Selective application of CBAs with the lowest wage rates; Inconsistencies between salary items of the payroll in the sending and the receiving country		Paying part of the salary through reimbursements for expenses or travel allowances to lower social contributions and taxes Avoid registering with the construction holiday and severance fund (CNCE)
MK	Legal procedures for declaring the provision of services abroad are avoided and work is reported as a consultancy and completed within the visa-free period of 90 days; Difficult to distinguish between posted workers and other mobile workers	Expenses for travel and accommodation and additional allowances are paid to the worker in cash or as honorarium	No proper protocols for providing services abroad but signing a new contract that regulates work abroad; North Macedonian authorities are not informed about the posting of their nationals abroad by the posting companies	Cash or honorariums are paid to workers to cover part of their salary and avoid paying proper social contributions and taxes
PL	Use overlapping civil-law contracts; Declare work as business trip rather than posting; Employment without contract (informal)	Pay part of the salary as travel allowance;	Misuse PD A1; TWAs do not register themselves in the host country;	Pay social security contributions from understated salary rates; Employ without contract and therefore pay no social contributions
RS	Irregular employment via agencies without work permits and within the 90 days of the visa-free regime	Overtime and weekend work is not disentangled from regular working time therefore not paid		Employers do not pay social contributions on the difference between the payment above two minimum contribution bases
SK	Confusion between posting and intra-	Including travel costs in minimum remuneration;	Creative accounting: two payrolls;	

	company transfers among employers			
SI	Bypass (TCN) postings through Slovakia; The chaining of companies; The retaining of workers to avoid they are hired by other companies	Minimum wage as required by national legislation	The use and misuse of Article 12 or Article 13 in the PD A1 application; Creative accounting: two payrolls; Avoiding public authority controls by manipulating working time records; Companies acting as TWAs to avoid company obligations;	Declaring minimum wage to minimize taxes and social contributions;

Note: Violations reported for Austria and Italy refer to companies posting to these countries; whereas violations reported by the other six countries (Hungary, North Macedonia, Poland, Serbia, Slovakia, Slovenia) refer to companies posting from these countries.

As it can be observed in the table, various forms within each category are applied. In terms of employment, there have been cases of misrepresentation as fake posting, chaining of companies, bypass posting, consultancies, business trips, intra-company transferrals, bogus self-employment, part-time, as well as total informality. Wage and salary irregularities usually aim to reduce costs by reporting minimum wage for tax and social contribution calculations, while overtime and weekend work are either not paid or paid informally. To meet the salary requirements of the receiving countries formally, allowances are then added to the workers' pay. To sustain these forms of abuse, some companies manipulate the documentation in various forms from the type of PD A1 they apply for and the irregularities in the way PD A1 are used, to the way companies/TWAs are registered with the home and host country authorities, to the abuses in accounting and other relevant posting documents. Employment, pay, and documentation irregularities are interconnected with social contribution and taxation irregularities, as the misrepresentation of posting usually aims to reduce costs by reducing company financial obligations.

In addition to these measures taken early on in the course of posting, we also found cases of companies that even when they are caught by enforcement agencies violating the rules, they challenge any fines or penalties received by addressing the courts and giving start to lengthy procedures that reportedly lead either to allowing enough time for the companies to disappear and therefore avoid legal responsibility or make use of the legal system to change the pleas to the point that the original purpose, i.e. avoid social dumping is neutralized (see also Kahlert and Danaj, 2021).

8.2 Employers' Challenges

Our research indicates that not all irregularities are intentional and that posting companies find abiding by posting rules quite challenging. As already discussed in the previous section, some companies can afford the use of specialized services to assist them in respecting the rules, while others struggle to meet the posting regulatory obligations on their own. We group employer challenges in the following categories: access to information, including language barriers; bureaucratic procedures and processing times; applying the correct remuneration, including CBA rates; abiding by national OSH specifications; and document keeping (Table

7). Our data is based on 40 interviews with employers (22) and employer association representatives (18), therefore the reported challenges by country are based on the input received in the country case studies and might not include all relevant challenges for all countries.

Table 8: Posting challenges reported by company representatives in the eight countries

	Access to information (including language barriers)	Administrative burden	Applying the correct remuneration (including CBA rates)	Social security	Abiding by receiving country national OSH specifications
AT		•	•		
HU	•	•	•		
IT	•	•	•		•
MK	•	•	•	•	
PL	•	•	•	•	
RS		•		•	
SK	•	•	•		•
SI	•	•	•		•

Note: Challenges reported for Austria and Italy refer to companies posting to these countries; whereas challenges reported in the other six countries (Hungary, North Macedonia, Poland, Serbia, Slovakia, Slovenia) refer to companies posting from these countries.

Employers and employer representatives in five of the eight countries reported access to information generally and language barriers as a key challenge to their efforts to follow posting rules. The challenge was presented mostly in finding out the specific criteria of other EU countries rather than their own. Although each Member State should have national websites on posting and other information access points, employers considered the information to be insufficient, unclear, and not always up to date. Language barriers were mentioned as part of the problem, because even when the information might be available, it is not easily accessible as most of the information is in receiving country language, while other language versions might be shorter and perhaps not regularly updated (cf. Zólyomi and Danaj, 2019). Language barriers were also experienced when companies tried to communicate with regional or local public offices in the receiving country, where knowledge of English or languages other than the local one was scarce. In the case of North Macedonia, access to information was found insufficient for both posting rules at home and in the target countries.

The administrative burden was a challenge reported in all eight countries. Posting companies find procedures in the host country complicated, and in each country, there are enough differences that add to the challenge, especially in industries like transport, where multiple countries are involved in the same posting. In Austria, where the Anti-Wage and Dumping Law is designed specifically for foreign service providers, the employers felt there were more bureaucratic burdens for posting companies than for locally based companies, which was considered unfair. The difficulty of navigating receiving country rules and their interplay with national and EU rules put a lot of pressure on posting employers, who have reportedly had to rely on the services of specialized consultants, mainly lawyers but also accountants. Processing times, especially for the issuance of the PD A1, vary in different countries and at

times there is no exact period stipulated in the regulation, which makes it a challenge for posting companies that provide services across border within a set schedule. The calculation of the duration of posting is also subject to interpretation, depending on national legislation as it was reported in the Polish case (Brzozowska et al., 2021). The candidate country status of North Macedonia and Serbia also affect bureaucratic procedures due to the need for work permits, which are simpler in the case of bilateral agreements with Germany, but more complicated with other EU countries as it was reported in the Serbian case (Stanić and Matković, 2021). Document keeping was also identified as a challenge, particularly in the construction sector, where posting companies both from the sending (Slovenia) and receiving (Austria and Italy) perspective found it difficult to keep documents on site, which is a legal requirement for all posting companies.

Applying the correct remuneration was a challenge identified by posting employers to Austria and Italy, as well as from Hungary and Slovenia. While minimum wage could be easily identifiable in countries where this is stipulated in the law, sectoral and other specifications (e.g., skill level, seniority) are more complicated to figure out. The challenge increases in countries with complex collective bargaining agreements such as Austria, where there are 29 CBAs only in the construction industry, and Italy where there are more than 800 CBAs in force. Professional categorizations vary among countries, so identifying the right agreement to apply for each worker is not intuitive. In addition, some employers are also prone to reducing costs, so ‘regime shopping’ within the various receiving country CBAs might lead some of them to intentionally choose an agreement that would facilitate cost saving.

The fourth challenge is the coordination of the social security systems identified in three case studies, namely Poland, North Macedonia, and Serbia. In the case of posting of workers, the workers continue to be covered by the social protection system of the sending country. This also requires coordination among the social security systems of the countries involved, which is already the case in the EU Member States. The situation is different for candidate countries, who still rely on bilateral agreements with individual EU countries, and still have not reached agreements with all (Danaj et al., 2019). It is no surprise then that the challenge of social security coordination was reported by employers in the candidate countries of Serbia and particularly North Macedonia, where the absence of bilateral agreements makes the posting procedure more ambiguous and complicated (Ilijevski and Iloska, 2021).

Abiding by the national OSH regulations of the host country was reported as a challenge for posting companies in the Italian and Slovenian case studies and has also been identified in an earlier study on Slovakia (Hollan and Danaj, 2018). While there are several EU-level OSH regulations in place, including a framework directive, as well as an OSH clause in the posting of workers directive, some EU countries have additional rules and obligations, which posting companies to these countries might not know and find difficult to abide by pre-emptively.

9 Worker protection mechanisms and challenges

Worker protection is addressed in different forms depending on the industrial relations structures present in each of the eight countries. Worker protection is regulated through legislation or in combination with collective bargaining agreements. In this section of the paper, we discuss the mechanisms for worker protection in each country and their challenges.

9.1 Mechanisms for worker protection

The legal framework and mechanisms for protecting posted workers are the same as for workers in general in each host country, except for social insurance, which is regulated by the sending country. Mechanisms for worker protection include public institutions, social partners, NGOs, the legal system, and information platforms.

Public institutions should protect all workers regardless of their employment status in every country. However, public institutions' jurisdiction is national, and most institutions approach the matter from the law enforcement perspective, i.e., they monitor and control the implementation of national legislation and national standards. Because of the transnational nature of posting, enforcement agencies such as labour inspectorates, financial police, or social security institutions need to collaborate across institutions and countries to be able to follow up and address any issues involving posted workers. Apart from the enforcement role, some public authorities also share representative and protection roles, especially if they are governed in collaboration with social partners. Here we can mention paritarian institutions such as BUAK in Austria or the CNCE in Italy that can support posted workers on matters related to their holiday and severance pay. In addition, Austria has the Chamber of Labour, a public institution that provides support and legal advice to all workers in Austria and extends its support to posted workers on wage-related grievances. In Hungary, the Equal Treatment Authority takes complaints about cases of discrimination more broadly by the employers. In Slovenia, the Labour Inspectorate has a mediation role in cases of individual disputes. In Slovakia, posted workers may approach local labour inspectorates directly or fill in the questionnaire anonymously in case they experience any legal misconduct at their workplace. Finally, posted workers can always ask for a legal solution by taking any grievances against their employer to court in the sending or the receiving country. Nevertheless, a language barrier, a lack of information and awareness about their rights together with limited access to the legal assistance may prevent them to do so.

The second set of mechanisms are the institutions of social dialogue, which are not equally developed across the eight countries. So, on the one end of the spectrum stands North Macedonia, which has weak, fragmented collective bargaining mechanisms, and on the other end, there is Austria, which possesses a well-developed social dialogue system. Union support is provided at different levels depending on the national industrial relations system: policy, collective bargaining, and workplace. Previous literature suggests that due to the temporary cross-border nature of their posting assignments, very few posted workers join unions in the receiving country, often after they have been involved in a dispute and need union support (Lillie et al., 2020). But even in a strongly unionized environment, posted workers may not be represented by a union and thus "sit between chairs", because their union membership in the sending countries cannot serve them while they are posted and sometimes the rules of the

receiving country do not make union membership so accessible. This is the case for Austria, for example, where to be a union member, workers must have worked in the country for six months and most posted workers do not. In other countries, it has also been ambiguous on whether host country trade unions can represent workers employed by a foreign undertaking. This was settled with the 2015 ruling *Sähköalojen ammatiliitoo*¹⁵ by ECJ, in which the Court judged that trade unions from receiving countries are allowed to represent posted employees and provide legal assistance. However, these typically take on exemplary cases only, and do not necessarily defend workers for individual claims.

Support to posted workers ranges from provision of information about their entitlements to legal representation, and some forms of support are provided to posted workers even if they are not unionized in the host country. For example, in Austria, the secretaries of the Construction Union (“Gewerkschaftssekretäre”) visit construction sites to offer information and services to posted workers, even when they are not members. In case of labour rights’ violations, incoming posted workers can ask the assistance of the unions in all eight countries in getting informed about their rights and in some cases also in being legally represented by the unions in a grievance procedure. For example, legal offices of Italian trade unions can provide support to incoming posted workers both during conciliations and judicial processes, even if they are not union members.

By providing information on working conditions, trade unions also serve as a hub even across borders. Trade unions may engage in transnational cooperation including lobbying at the EU policy level, information exchange, multilingual awareness-raising and information campaigns, ongoing support for posted workers, and representational support with individual grievances. The Polish “Budowlani” Trade Union (which is a member of the European Federation of Building and Woodworkers, EFBWW) is an example of such transnational union activities. “Budowlani” participates in the project “Information Sharing Agreements” (ISA) that targets the setup of cross-border cooperation agreements involving public authorities, paritarian institutions, and social partners from seven European countries (Italy, Portugal, Spain, Bulgaria, France, Poland, Romania) to enforce rules on social security and terms of employment applicable to posted workers.

Other unions in the other seven countries have been involved in various cross-border collaborative projects targeting posted workers specifically covering one form or more of union action. One of the joint activities of the trade unions across EU countries is that Solidarity Pact that was coined in 2014 within the IndustriAll Europe, the trade union federation established at the European level. The members of IndustriAll Europe are committed to represent the rights of workers that are members of other partner trade unions. Posted workers are then provided with legal counselling.

In addition to trade unions, non-governmental organizations play a role in providing support to posted workers. In all countries there are certain NGOs that assist workers on labour related issues or social issues or migration status. In some cases, like the Slovenian Counselling Office for Workers, posted workers are one of the main target groups. In other cases, NGOs

¹⁵ Judgment of the Court on 12 February 2015 (ECLI:EU:C:2015:86) in the proceedings on *Sähköalojen ammatiliitoo*. Retrieved May 31, 2021, from

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=162247&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=19950497>

assist migrant workers who might have an irregular status, and therefore sometimes posted workers (especially TCN workers), such as the Migration Information Centre (MIC) of the International Organisation of Migration based in Bratislava and Košice, Slovakia, or UNDOK in Austria.

According to the Enforcement Directive, EU countries are required to establish an official national website as a one-stop hub on posting information¹⁶. As already discussed in section 7.1.1 of the paper, for accessibility purposes, several national websites provide information in multiple languages. For instance, Austria's official website for both workers, employers and authorities offers information in seven languages:¹⁷ German, Czech, English, Hungarian, Polish, Slovak and Slovenian. The Italian posting website is in Italian and English only. North Macedonia does not yet have a national website on posting, and therefore posted workers from North Macedonia have limited access to information about their rights.

In addition to national posting platforms, other websites managed by public authorities, social partners or private consultancy companies also provide information on posting. The most comprehensive ones, providing information from a worker perspective are managed by social partners. For construction workers, for example, the website <https://www.constructionworkers.eu>¹⁸ offers information in 30 different languages regarding: working conditions in the receiving countries; workers' rights regarding trade union's affiliation in the receiving country; contact details of trade unionists with expertise on the posting of workers.

9.2 Challenges to worker protection

Research findings support that posted workers are quite disadvantaged in the European labour market, even when protection mechanisms are in place. We already discussed the contradictions of the regulatory framework, the tensions between transnational and national regulations, and the enforcement challenges of the legal framework earlier in the paper. As transnationally mobile, posted workers are part of two systems, that of the sending country and that of the receiving country, and while this could potentially mean that they are protected by both, in practice they often fall in the space in-between both systems, where protection mechanisms, although existing, might not be accessible to them. There are several challenges we identified, namely limited awareness, lack of access to information, and language barriers, lack of reporting of violations, and limited representation of posted workers.

Limited awareness of social and labour rights, lack of information and language barriers were mentioned in all country reports to be a challenging factor in workers' protection. Workers may not know about local regulations, for example about remuneration issues such as minimum salary or collective agreements, overtime, the minimum quality of accommodations, or even their own employment and migration status. Posted workers may

¹⁶ "In order to improve accessibility of information, a single source of information should be established in Member States. Each Member State should provide for a single official national website, in accordance with web accessibility standards, and other suitable means of communication (§20)."

¹⁷ Go to www.entsendeplattform.at, retrieved on May 31, 2021.

¹⁸ The website is managed by the European Federation of Building and Woodworkers and is funded by the European Commission (DG Employment).

find legal issues complex and may have difficulties in understanding which legal system applies where (e.g., social insurance in their home country, but labour laws in the host country). Posted workers may not know that certain practices are illegal such as working excessive overtime even when paid (see also in case of care sector: Matuszczyk, 2021). They may feel overly dependent on their employer as their stay in the host country is dependent on their commitment to the same employer. The country reports identified three types of workers as particularly vulnerable. First, workers from very small companies, for example, in small construction sites, may not receive the needed support. They may not have a supervisor or contact person for questions and concerns, and thus may be left to themselves. Second, third country nationals are particularly vulnerable to exploitation and poor working conditions. Third, live-in care workers are especially vulnerable because they – in extreme cases – are isolated and may have no access to the Internet where they could access information and help.

Language barriers are partially influencing the limited awareness in two ways: on the one side, it is the workers' lack of knowledge of receiving country languages that might limit their access to information; on the other side, enforcement agencies typically may not speak the foreign language or have translators on staff when in contact with posted workers. Lack of access to information may result from language barriers according to representatives of both public authorities and social partners. Not speaking the local language of the host country remains an important barrier to information access, although information websites for posting are also translated to other languages. A lack of social network and social capital go hand in hand with language barriers. Fragmentation of responsibility towards workers caused by a long subcontracting chain also may play a crucial role, especially if temporary work agencies are involved in employing or recruiting workers (Novitz and Andrijasevic, 2020).

Lack of reporting violations was regarded as a challenge by public authorities and social partners. Posted workers often do not know where to go or whom to contact if they do not feel treated fairly. Access to legal assistance seems limited. As already discussed earlier in the paper, posted workers do not often take this opportunity, even when they have legal support from unions. And when they do, it is usually after extreme abuse, such as unpaid salaries over a period or employer's refusal to cover health care expenses. The literature also informs that most workers would rather open a court case in their own country rather than in the receiving one (Rasnača and Bernaciak, 2020).

Posted workers often fail to report labour and OSH violations to authorities, partially due to a lack of language proficiency. This can be explained by the workers' general fear of authorities, lack of information about the rules and about available complaint mechanisms, language barriers, but also by their lack of incentive (i.e., as long as the workers are paid, they are willing to work more overtime or tolerate worse working conditions, for instance). They may also fear losing their jobs if they start a job dispute. It may be difficult for them to prove their claim, such as by naming witnesses. Even if a lawsuit were successful and the court decided in favour of the posted workers, the company could have already filed bankruptcy and, therefore, would still not pay out the workers. There is little incentive for workers to claim their rights and stand up against their employers if they do not obtain a positive take-away. Limited cross-border enforcement and transnational cooperation of public authorities add difficulties for posted workers in claiming their rights. Italian labour inspectors reported that they had been encountering difficulties in receiving information from the labour

inspectories of certain sending countries, even when requests are made through the EU-wide IMI system.

Finally, although available, trade union representation and legal support are limited for posted workers. As mentioned in section 9.1, posted workers are typically not union members in the host country. This means that they also do not typically go to the unions or address the court with their grievances. Therefore, although in principle, trade unions and other actors from host countries may provide legal assistance to posted workers and represent them in court, in practice they do not necessarily defend workers for individual claims but prefer to take on exemplary cases only to shape posting policy and practice in their own countries, as it was reported in the Austrian case study.

10 Conclusion

The analysis of the posting regulation (the original PWD, the Enforcement Directive, and the revised PWD) and related regulations such as those on temporary work agencies, social protection, and company law in the six EU countries of Austria, Hungary, Italy, Poland, Slovakia and Slovenia and the two candidate countries of North Macedonia and Serbia indicates that the interplay among these regulations occurs in two different dimensions: at the EU level and the national level in a cyclic process of policy development. While regulation is designed at the EU level, national regulators have their own understandings of what the rules mean and how they should be embedded in their national legal framework, which have resulted in significant differences in the transposed national regulatory framework for posting and the other related rules we analysed. Some of these differences have led to ambiguities and enactment challenges in terms of interpretation of rules, their implementation and enforcement, as well as the validation of national enforcement and protection mechanisms and strategies.

These challenges have been subjected to judicial interpretations initially at the national level, and eventually transferred at the EU level, especially when deliberation involved the interpretation of laws of more than one Member State or when a tension between EU law and national law was observed. The ECJ has ruled predominantly in favour of community law, which has implications for national regulations and their enforcement. The example of Austria is quite illustrative of the full loop that might easily turn into a vicious circle. The country has transposed posting rules through its Anti-Wage and Dumping Law, taking it one step further to include preventative and reparatory measures and structures on social dumping in the form of cumulative administrative penalties. Enforcement agencies in the country have diligently monitored and controlled the implementation of the law and fined any posting companies found in breach of national law. Yet, some companies have challenged the validity of such administrative penalties, addressed in the joined cases of “Maksimovic and Others”. The ECJ regarded the practice of high, cumulative fines issued by Austrian authorities as incompatible with the freedom to provide services according to the Treaty on the Functioning of the European Union. Therefore, the ECJ ruled that national legislation is precluded from collecting high, cumulative administrative fines, imposed by the Austrian legislation and that the severity of the penalty must be commensurate with the seriousness of the offence. Article 5 of the revised PWD also stipulates penalties shall be “effective, proportionate and dissuasive”. Such a decision indeed favours community law, but it also requires the revision or at the least the reinterpretation of community law as translated into national law. It also requires countries to readjust their measures under different principles or perspectives, i.e., protect the freedom to provide services rather than the protection of national standards.

Other aspects of difference we identified relate to the obligations of posting companies as compared to temporary work agencies, the distinction between business trips, intra-company transfers and posting, posting via Article 12 or Article 13 of the Basic Regulation ((EC) No 883/2004) on the coordination of social security systems, and the employment of TCN workers and their posting. These differences come from legal formulations in national laws of posting and other related legislation, but also in the way that public authorities and social partners understand these rules and enforce them. The candidate status of countries like North Macedonia and Serbia further complicates the question of applicability of rules, as posting is

already possible from these countries to EU countries thanks to the transposition of the PWD combined with bilateral agreements on labour mobility with certain EU Member States like Germany or Slovenia, and bilateral social security agreements. Yet, candidate countries' enforcement agencies do not have full access to all enforcement mechanisms, especially when transnational exchange of information and inspecting investigations become necessary and will receive such access only when they become full members (cf. Danaj et al., 2019).

The differences in the legal framework across countries are faced not only by enforcing public authorities, but also employers. Our research indicates that while there are different categories of employers based on whether they abide by the posting rules or break them, the latter category is not a clear-cut category of law offenders. While there are companies that try to reduce costs by cutting corners, i.e., circumventing the rules and not respecting their obligations, there are also other companies that get entangled in the complex transnational regulatory framework and the regulatory differences across countries and therefore end up breaking one rule or another. To be able to apply all posting rules, posting companies need to hire specialized services, which can be afforded by large companies, but not others. As observed in our research, these specialized lawyers and accountants have also grown turning such consultancies into a business model that sustains posting and possibly assist companies in reducing costs, sometimes through questionable practices. These consultancies are also challenging industrial relations systems in the receiving countries, often by re-directing dispute resolution towards courts of law as informed by the literature (see Arnholtz and Andersen, 2018).

Posting companies' practices, whether in breach of posting and other related regulations intentionally or unintentionally, have direct implications for the position of workers they employ. Despite the existence of several mechanisms for the protection of workers, public authorities are usually approaching any irregularities from a law enforcement perspective, i.e., focusing on sanctions rather than other preventative measures or addressing institutional gaps, and the support provided by social partners and NGOs remains insufficient. The latter happens even in countries with strong unions, mostly because of a combination of the lack of sufficient and easy to access information and therefore awareness of workers on the support they are offered, workers' own reluctance to antagonize their employers, which leads to lack of reporting violations they might suffer, and language barriers. The complexity of the regulatory framework, enforcement structures, and protection mechanisms are therefore also transferred to workers, which combined with personal factors results in the underreporting, lack of detection, and hence insufficient preventative or reparatory interventions on the side of the authorities and the social partners.

11 Policy recommendations

The complex regulatory and enforcement configuration, as well as the enforcement, employers and worker protection challenges identified in our analysis suggest that integrated interventions are necessary at the transnational EU level and the national level, targeting different stakeholders: public authorities, social partners, employers, and workers.

Enforcement would already improve if existing mechanisms such as IMI or EESSI were fully operational, and were adjusted to accommodate complex cases, follow-up on requests for information, and facilitate cross-border cooperation. Access to information could be improved not only in terms of facilitating cross-border communication and exchange, but also to provide the necessary information for employers and workers, such as through a consolidated EU platform on minimum wages, national collectively bargained rates, working conditions, and national obligations divided by sector and country available in all EU languages. The European Labour Authority could also take on more responsibilities, in terms of coordinating or facilitating joint cross-border inspections and assisting national enforcement agencies in understanding the complex multi-level regulatory framework. Further legal clarity would also facilitate the application of rules, which can be achieved by developing, for example, guidelines for applying the Posting of Workers regulations and related acts. A better inclusion of candidate countries enforcement agencies in transnational efforts would prevent some of the current challenges and improve their standing in enforcing posting rules.

National rules and procedures could be simplified and clarified in combination with further convergence across Members States in terms of posting rules and procedures and the other related regulations, in particular social security. Rule simplification would facilitate their implementation, monitoring and enforcement. The strengthening of the regulatory framework and its enforcement particularly in sectors prone to labour and OSH violations such as construction would help improve the conditions for workers employed in such sectors. National information campaigns and platforms should be more comprehensive and accessible targeting both outgoing and incoming posting employers and posted workers. A reward system for complying companies and protection guarantees for workers that report violations would strengthen rule enforcement. Ongoing intra-institutional and cross-border training or workshops among enforcement agency personnel would strengthen both their capacities and collaboration. The provision of legal and labour rights consultation and assistance services in collaboration with social partners available to posting employers and posted workers would help in improving access to information and better implementation of rules.

Measures could be taken to reduce bureaucracies and processing times, provide legal support in sorting out the correct terms and conditions applicable to the sector and the specific contracts, and provide targeted awareness-raising on posted workers' labour and social rights. Again, this could be achieved with the active involvement of social partners. Workers in some countries would also benefit from the adoption of collective bargaining agreements and their enforcement, which would increase their level of protection in the home country and reduce the incentives for social dumping practices. The recognition of workers' union membership from the sending country to the receiving country might also help them achieve more support at different stages of their posting assignment, i.e., prior to the posting, during and upon return. At the same time, increasing the efficiency of workplace inspections by targeting smaller companies/workplaces or other undertakings such as temporary work agencies or letterbox companies, which tend to go unnoticed and where most cases of abuse might happen, and combine inspections on looking at possible labour violations more comprehensively, rather than one aspect or another separately, e.g., OSH or employment status.

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13 Annex

Vignette case examples

Vignette#1 (Payment and taxation)

A posting company posts ten workers from country X to country Y to work at a motorway construction. They declare the workers to the authorities in their home country as insured at the minimum wage for this country (e.g., €900). The posted workers are then paid additionally a 'travel allowance' of €600, which increases their salary to €1500 – the minimum wage required in the host country, which is then declared to the host country authority as their pay. The workers were only given the job if they sign a contract with the salary of €1500. Furthermore, because the workers are insured and taxed in the country of origin, the company posting them does not pay taxes and social security contribution on the €600 allowance paid to the workers.

Q: What do you think is happening here?

Q: How do you think does this practice align with EU regulations (and national regulations)?

Vignette#2 (National guidelines on working hours and agency work)

An employment agency established in an EU Member State posts 60 workers to another Member State where they work on a building construction and are employed on short-term contracts. The workload is high and the workers often work overtime exceeding the maximum working hours laid down in the host country's Collective Bargaining Agreement of the sector.

Q: What do you think about this practice? How do you think this practice aligns with the EU regulations?

Q: The workers are unhappy about the overtime and want to do something about it. The agency says that they do not need to follow the country's Collective Bargaining Agreement, because temporary agency work is different from working for a firm. What do you think?

Vignette #3 (Issues and solution process)

The company above sent 10 workers to work on a motorway construction. On the second day of work, a worker gets severely injured on the construction site and needs immediate medical attention.

Q: What is the immediate response of the employer? What steps do they need to take?

Q: Are there any differences between the way this worker is insured while they are posted versus while they are in their home country?