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## CHAPTER 4

# MOBILITY AS A EUROPEAN POLITICAL BATTLEGROUND: ISSUES AND ACTORS IN THE REVISION OF THE POSTING OF WORKERS DIRECTIVE

*Sébastien Michon and Marco Rocca*

### 1. Introduction

Intra-EU mobility has long been a hotly debated issue, particularly so since the 2004 enlargement of the EU. This debate comprises a wide range of issues, sometimes making it hard to pinpoint any single one. To cite only the most recent glaring example, the question of the free movement of workers has been particularly salient in the Brexit debate. As Claire Kilpatrick points out, this issue was foreshadowed by the 2014 EU-Swiss dispute over migration (Kilpatrick 2018, 68). Indeed, in the lead-up to the United Kingdom referendum, the then UK Prime Minister, David Cameron, had obtained a series of “concessions” from the EU in order to try and make the “Remain” option more appealing to the UK electorate.<sup>1</sup> The free movement of workers was one of the four areas of intervention foreseen by the document. Moreover, during the post-referendum Brexit debate, Jeremy Corbyn, the Leader of the Opposition, set himself apart by making a distinction between the issue of the free movement of workers and that of the posting of workers.<sup>2</sup>

This chapter aims to open the black box of the production of European public action in the legislative process to review the posting of workers.<sup>3</sup> The perspective developed here combines a

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<sup>1</sup> A New Settlement for the United Kingdom within the European Union, OJ 2016/C 69 I/01. These changes were conditional upon the UK voting to remain in the EU.

<sup>2</sup> See for instance Jeremy Corbyn on Andrew Marr Show (BBC), January 13, 2019, <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/13011901.pdf>: “I’m not against the free movement of people. What I want to end is the undercutting of workers’ rights and conditions [...] and I did in the referendum actually make quite a lot about the whole issue of what’s called the posting of workers directive on that issue.”

<sup>3</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

structural analysis of the stances taken within the “field of Eurocracy” (Georgakakis 2013) and a textual analysis of the evolution of the Directive’s revision from the Commission’s proposal to the final text.

The proposal for a Posted Workers Directive (PWD) was first tabled by the EU Commission in 1991, and after protracted negotiation and three different drafts was adopted in 1996. The issue of the posting of workers first gained political prominence during the campaign for the French referendum on the EU constitutional treaty through the infamous figure of the “Polish plumber” and in connection with the negotiation of the Services Directive (Crespy 2010).<sup>4</sup> A few years later, the decisions of the Court of Justice in a series of landmark cases (the most famous being the *Laval* decision<sup>5</sup>) put this question squarely at the center of the debates about the EU social dimension. In the words of the Monti Report, these decisions revived “the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level” (Monti 2010). Member States’ interventions in the procedures leading up to these decisions also illustrated the stark picture of the divide between “old” and “new” Member States (plus the United Kingdom), with the former group broadly favoring the possibility of applying national standards to posted workers and the latter advocating a stronger reading of the freedom to provide services (Bercusson 2007). Member States were again divided along similar lines in their reactions to the Commission’s proposed revision of the PWD, tabled in 2016. Germany, Austria, Belgium, France, Luxembourg, the Netherlands, and Sweden supported the principle of “equal pay for equal work in the same place,” while Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Czechia, Romania, and Slovakia argued against the revision, considering it “incompatible with the Single Market.”<sup>6</sup>

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<sup>4</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the internal market, OJ L 173, July 9, 2018, 16–24.

<sup>5</sup> CJEU, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, December 18, 2007, ECLI:EU:C:2007:809. See also Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, April 3, 2008; CJEU, Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, June 19, 2008.

<sup>6</sup> See Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the

This divide made compromise extremely difficult at EU level, as highlighted by negotiations that led to the compromise of the Enforcement Directive (Bernaciak 2015, 234), proposed by the EU Commission in 2012.<sup>7</sup> In particular, the adoption of this instrument clearly showed how a reform of the PWD itself might prove impossible for the EU legislator. Indeed, when the Commission put forward its initial proposed revision of the PWD in 2016, it met with eleven negative reasoned opinions from national parliamentary chambers, mirroring, with few exceptions, the divisions between “old” and “new” Member States mentioned earlier, even though the procedure aimed to ensure that the subsidiarity principle was respected by EU legislation.<sup>8</sup>

Several national parliaments deplored the fact that the proposal came too soon after the adoption of the Enforcement Directive (Slovakia, Romania, Latvia, Lithuania, Estonia). However, many more “yellow cards” leveled an explicitly political-economic critique at the proposal, complaining about the loss of competitive advantage for posting undertakings, the excessive administrative burden, and the impact on SMEs (Romania, Latvia, Lithuania, Hungary, Estonia, Czechia, Bulgaria). It is worth mentioning that the Danish Parliament also sent a reasoned opinion that focused on one specific aspect of the proposal. The opinion notably criticized the absence in the reform of any reference to national law and/or practice in the context of the definition of remuneration. We will come back to this in the next section.

In the face of these critiques, the Commission issued a response on July 20, 2016, in the form of a Communication<sup>9</sup> in which the proposal was maintained. On the question of the loss of competitive advantage, the Commission stated, “the proposal does not have the objective of aligning wages across Member States. The proposal merely ensures that mandatory rules on remuneration in

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framework of the provision of services [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_6987\\_2016\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6987_2016_INIT&from=EN), p. 5.

<sup>7</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’). OJ L 159, May 28, 2014, p. 11–31

<sup>8</sup> Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

<sup>9</sup> Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2016) 505 final.

the host Member State are applicable also to workers posted to that Member State.” Finally, the adoption of the PWD Revision itself is far from the final word in the mobility debate, as negotiations are still ongoing on highly relevant issues such as the reform of the coordination of social security<sup>10</sup> and cross-border road transport activities.<sup>11</sup>

This chapter is structured as follows. The first section presents the various stances taken toward the project to revise the Directive by stakeholders representing companies and employees’ interests, as well as in the debate at the European Parliament, which acts as a sounding board for all of the various positions. The structuring of stances taken by Members of the European Parliament (MEPs) will be shown to occur through the combination of significant variables of nationality and political position. This part will therefore contribute to the debate on the structuring of European parliamentary space (Crespy and Gajewska 2010). In section 2, we will analyze different versions of the revision as well as the amendments proposed throughout the two-year negotiation period. Section 3, finally, explores conclusions focusing on the comparison of the positions of different actors with the result of the negotiation.

## **2. The revision: The terrain of decision-making and stances**

In the mid-2010s, the revision of the Posting Directive was considered a high-stakes or “very political” subject within and around European institutions. A study of the debate over the revision of the Directive in the European Parliament provides for an understanding of the framing of the debate, as well as the context in which positions were taken before the vote and their structuring influences.

The revision of the Directive proved to be a divisive issue both for the European Commission and for stakeholders, i.e., representatives of employers and employees. At the European Commission, the revision of the Posting Directive was carried out by the Directorate-General (DG) for Employment

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<sup>10</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, 2016/0397 (COD).

<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, 2017/0121(COD).

and Social Affairs, as was the case for the 1996 draft Directive. Given the divergent views held by the DG for Internal Market, which has always advocated for greater market freedom in this case, as well as the *Viking* and *Laval* cases and the Services Directive, the posting of workers was a particularly symbolic issue for the DG for Employment and Social Affairs and one that was at the heart of bureaucratic opposition within the Commission (Louis 2019). But the revision was a high-stakes subject beyond the Commission, as it also divided social partners. The opinions of the European Economic and Social Committee and the European Committee of the Regions, following the publication of the Commission's proposal on March 8, 2016, and the position papers of several interest groups, all illustrated competing points of view on the draft revision of the Directive, whether they were representatives of companies or trade unions. On one side of the debate, a number of representatives of economic interests were not in favor of any revision to the Directive; these included, among others, BusinessEurope, Eurochambres, World Employment Confederation (WEC or CIETT in French), European-Employers.eu (European Subcontractors and Service Providers in Construction, Industry and Services), as well as Ceemet, the European employers' organization representing the interests of the metal, engineering, and technology industries. Position papers from such groups typically argued that there was no need to revise the Directive on the posting of workers. Additionally, several interest representatives mentioned associated risks. For example, BusinessEurope (position paper, May 17, 2016) pointed to the risk of an increased likelihood of undeclared work or fraudulent claims of self-employment. A revision to the Directive would constitute a hindrance to the Single Market by hampering the competitive positions of foreign service providers, overall growth, and job creation, as well as EU convergence. On the other side of the debate, the main interest group of European employees, the European Trade Union Confederation (ETUC), was in favor of a revision of the Directive, viewing it as a way to achieve equal treatment for all employees. ETUC argued that the draft should go even further in terms of reducing the duration of posting: "The ETUC appreciates that the Commission's proposal introduces full equal treatment for temporary agency workers who are posted, and that it aligned the duration of posting to social security provisions. This will fix huge problems of interpretation of the current directive. Nevertheless, the

proposed maximum 24-month posting is too long, as the average duration is 4 months”<sup>12</sup>. The context of the various positions taken, however, cannot be reduced to an opposition between the interests of employers and those of employees, as a number of representatives of small and medium-sized enterprises were not opposed to a revision of the Directive. Indeed, The European Association of Craft, Small and Medium-Sized Enterprises or SMEUnited (formerly UEAPME) reported that its members were divided between those against and those in favor of a revision: “one group of UEAPME members is opposed to the revision or considers it premature in the context of the ongoing implementation of the Enforcement Directive 2014/67/EU. [...] The other group considers it necessary to revise the 96/71/EC Directive while at the same time speeding-up efforts to fully implement and effectively apply the 2014 Enforcement Directive”<sup>13</sup>. As for the European Builders Confederation, they were unambiguously in favor of a revision: “European small construction entrepreneurs welcome the revision”<sup>14</sup>.

This relative diversity of views was reflected throughout the debate in the European Parliament. A close reading of the parliamentary debates in session, an analysis of the votes in the text by nationality and group of MEPs), as well as interviews with parliamentary assistants of the European Parliament who followed the issue, together illustrate both the role of the government of Europe in framing the debate and the range of structuring influences in the context of taking a position on the issue.

When the text reached the European Parliament in March 2016, a revision to the Directive seemed rather expected by the “government of the European Union” (Smith 2010). First, the College

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<sup>12</sup> ETUC, March 2, 2016: <https://www.etuc.org/en/pressrelease/posted-workers-revision-equal-pay-some>

<sup>13</sup> UEAPME, October 11, 2016: [https://www.mobilelabour.eu/wp-content/uploads/2017/06/stanowisko-UEAPME\\_Note\\_Posting\\_of\\_Workers.pdf](https://www.mobilelabour.eu/wp-content/uploads/2017/06/stanowisko-UEAPME_Note_Posting_of_Workers.pdf)

<sup>14</sup> March 8, 2016, <http://pr.euractiv.com/pr/posting-workers-european-small-construction-entrepreneurs-welcome-revision-138584>

of Commissioners left this question in the hands of the DG for Employment. Second, the Economic and Social Committee and the European Committee of the Regions were already favorable to the project: the European Committee of the Regions insisted, for instance, on the necessity of reducing the duration of posting from twenty-four to twelve months (December 7, 2016). Similarly, the leaders of the European Parliament were also not holding the process back. On the one hand, the members of the Conference of Committee Chairs decided to include the text, not in the Committee on the Internal Market, but in the Committee on Employment and Social Affairs, which initially favored the revision and the protection of workers. Furthermore, the Parliament's decision to create a co-rapporteurship, i.e., a pair of rapporteurs from the two main political groups (the European People's Party or EPP and the Socialists and Democrats or S&D), impacted the handling of the text (Yordanova 2013; Yoshinaka, McElroy, and Bowler 2010). This decision underlines leaders' willingness to reach a compromise on the text: "At a high level upstream, there has been an agreement, it has to be EPP-S&D in order to have a broad enough base to begin with, and not start with a sterile, diehard, left-right opposition."<sup>15</sup> This practice is fairly common in the treatment of texts that divide EU members, aiming to promote broad compromise among the EPP and S&D groups as well as, a priori, Alliance of Liberals and Democrats for Europe (ALDE) and even the Greens. Given the internal tensions between elected representatives from postcommunist countries and those from the old Member States within the EPP, this practice also enabled those who wanted a revision to rally their most leftist members and ensure that the debate was not monopolized by elected representatives hostile to the revision (among others, elected representatives from the European Conservatives and Reformists [ECR] and Europe of Nationals and Freedom [ENF] groups plus the Non-Inscrits [NI]).

As is often the case with "very political" reports, candidates for the rapporteurship were particularly numerous within both EPP and S&D: "There were seven candidates in the EPP. Two German, one Polish, one Czech, one Slovak, and one French. It was very much in demand."<sup>16</sup> The appointment of MEPs Morin-Chartier for the EPP and Jongerius for the S&D group as co-rapporteurs

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<sup>15</sup> Interview with a parliamentary assistant, October 2017.

<sup>16</sup> Interview with a parliamentary assistant, Strasbourg, October 2017.



also contributed to directing the debate toward a revision. Born in France in 1947, Elisabeth Morin-Chartier was the first woman Quaestor of the European Parliament since 2014. She joined the EP in 2007 following a political career at the local (particularly regional) level. She has been involved in the Employment and Social Affairs Committee since 2009 and contributed to several reports during the seventh legislature (on the European Social Fund in particular). Agnes Jongerius of the Netherlands was born in 1960 and is a former leader of the Dutch Trade Union Confederation. A Member of the European Parliament since 2014, she very quickly became active in the institution as Vice-Chair of the Committee on Employment and Social Affairs and, on several occasions, as a shadow rapporteur.

This decision illustrates the trade-offs regarding the distribution of rapporteurs (Daniel 2013). The fact that two rapporteurs were chosen corresponded to the usual process of division of parliamentary labor. This choice was based on internal recognition, longevity, and expertise. De facto, both Morin-Chartier and Jongerius were fairly well recognized within the Assembly and their parliamentary committee, as both were active, assiduous, and invested in its works (through meetings, reports, and written opinions). Nevertheless, the choice of the actors involved in the dossier represents a shift, when compared to the previous stage of the Directive's implementation. For the EPP, Morin-Chartier succeeded Danuta Jazłowiecka, the rapporteur on the Directive's implementation in 2014, who opposed its revision. Above all, the rapporteurs chosen come from two of the EU's founding countries and not from one of the postcommunist countries, whose representatives were largely opposed to a revision of the Directive (like Jazłowiecka): "It was tense. The representatives of the Eastern Member States were very, very virulent at the very idea of revising the rules. Initially, they did not even want to revise the rules. And we could feel that it was going to be very complicated."<sup>17</sup>

The leaders of the European Parliament (President, Bureau of the Parliament, leaders of the political groups, coordinators of the groups on employment) thereby created generally favorable conditions for the revision process of the Directive.

### **Table 1 Distribution of the main actors of the procedure in the European Parliament**

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<sup>17</sup> Interview with a parliamentary assistant, Strasbourg, October 2017.

<b>Rapporteurs:</b>
Elisabeth Morin-Chartier (France, EPP)
Agnes Jongerius (Netherlands, S&D)
<b>Shadow rapporteurs:</b>
Anthea McIntyre (ECR)
Martina Dlabaková (ALDE)
Rina Ronja Kari (GUE)
Terry Reintke (Greens-EFA)
Laura Agea (EFDD)
Dominique Martin (ENL)
<b>Rapporteurs for an opinion:</b>
IMCO: Vicky Ford (ECR)
JURI: Jean-Marie Cavada (EPP)
JURI: Jytte Guteland (S&D)

For several months, both rapporteurs increased the number of discussions and hearings with various institutional actors (Ministries and permanent representations of Member States, the Committee of the Regions, the European Economic and Social Committee) and interest representatives (ETUC, BusinessEurope, the Council of European Employers of the Metal, Engineering and Technology-based Industries, the European Federation of Building and Woodworkers, the European Construction Industry Federation, the French Building Federation, etc.).<sup>18</sup> They then wrote their report, which they presented to the Committee on Employment and Social Affairs. On October 16, 2017, Committee members voted on the report, resulting in a majority of thirty-two in favor, eight against, and thirteen abstentions. The distribution of votes reflects positions divided by nationality: among the eight MEPs who voted against, six were from postcommunist countries (three Czechs, two Poles, and one Romanian), and among the thirty-two MEPs in favor, only four were from a postcommunist country. Nevertheless, the case of the revision of the posting of workers confirms that it is necessary to consider criteria other than that of nationality regarding the distribution of positions within the Parliament (Crespy and Gajewska 2010).

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<sup>18</sup> Source: annex to the parliamentary report on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services presented by Elisabeth Morin-Chartier and Agnes Jongerius.

But if nationalities are to be taken into account, so too should political groups: while European United Left/Nordic Green Left (GUE/NGL), Green and S&D MEPs voted for the text, ALDE MEPs voted against it (except the French MEP Robert Rochefort who voted in favor), and ECR MEPs voted against (two out of five) or abstained (three out of five). As for the EPP MEPs, they were in the middle with ten in favor, one against, four abstentions. Such a fracturing of votes within the EPP, despite the fact that the report was coauthored by an elected member of their own group, is rare enough to deserve to be highlighted. An analysis of the vote combining nationality and position in the Parliament shows that it was representatives of right-wing groups (center right and conservative right) from countries importing posted workers who stood out by voting against or abstaining, and that the only elected representatives from postcommunist countries who voted in favor of the report were from the S&D and Greens/EFA groups.

**Table 2 Final vote on the Morin-Chartier and Jongerius report by roll call in the committee responsible**

<b>32</b>	<b>Voting for</b>
ALDE	Robert Rochefort
EFDD	Laura Agea
GUE/NGL	Malin Björk, Rina Ronja Kari, Merja Kyllönen, Barbara Spinelli
EPP	Georges Bach, Jérôme Lavrilleux, Jeroen Lenaers, Veronica Lope Fontagné, Thomas Mann, Elisabeth Morin-Chartier, Dennis Radtke, Claude Rolin, Anne Sander, Sven Schulze
S&D	Guillaume Balas, Brando Benifei, Ole Christensen, Ismail Ertug, Eider Gardiazabal Rubial, Jens Geier, John Howarth, Agnes Jongerius, Jan Keller, Marju Lauristin, Edouard Martin, Georgi Pirinski, Marita Ulvskog
Greens/EFA	Karima Delli, Terry Reintke, Tatjana Ždanoka
<b>8</b>	<b>Voting against</b>
ALDE	Enrique Calvet Chambon, Dita Charanzová, Mircea Diaconu, Martina Dlabajová, Jasenko Selimović
ECR	Zdzisław Krasnodębski, Kosma Złotowski
EPP	Michaela Šojdrová
<b>13</b>	<b>Abstentions</b>
ECR	Anthea McIntyre, Helga Stevens, Ulrike Trebesius
ENF	Sylvie Goddin, Dominique Martin, Mylène Troszczynski
GUE/NGL	João Pimenta Lopes
NI	Lampros Fountoulis
EPP	Danuta Jazłowiecka, Adam Kósa, Elżbieta Katarzyna Łukacijewska, Julia Pitera
S&D	Emilian Pavel

A few months later, on May 29, 2018, the revision of the Posting of Workers Directive was adopted by the European Parliament by a large majority (64 percent of voters). The breakdown of

votes closely followed that seen in in the parliamentary committee. The East–West divide was thus not unfounded (see Table 3): 91 percent of Polish MEPs voted against as well as more than 50 percent of Hungarian and Czech MEPs. But here again, such a divide must not be considered universal, since 55 percent of British and 43 percent of Greek elected representatives voted against, whereas only 12.5 percent of Bulgarian and none of the Slovenian elected representatives did so. As in the parliamentary committee, the vote distribution by political group is also explicit. While all Green MEPs and almost all S&D MEPs voted in favor of the revision, the conservative ECR and far-right ENL MEPs voted overwhelmingly against the text. As is often the case, elected representatives were quite divided, and two-thirds voted in favor of the text. However, in keeping with the divisions observed in the parliamentary committees, and in an unusual way with regard to the internal cohesion of the groups at the center of the parliamentary game (Hix, Noury, and Roland 2005), the ALDE elected representatives and the EPP differed in their votes: fewer than two-thirds voted for the revision (64 percent in the ALDE and 61 percent in the EPP). Thus almost a third of the EPP members (29 percent) voted against a revision that was carried out by an elected member of their group.

**Table 3 Distribution of votes in the European Parliament on the revision of the Posting of Workers Directive by nationality (in %)**

		Against	For	Abstention	Total
Poland	%	91	9	0	100
UK	%	55	42	3	100
Hungary	%	53	29	18	100
Czech Republic	%	53	41	6	100
Greece	%	43	50	7	100
Lithuania	%	40	60	0	100
Slovakia	%	40	30	30	100
Sweden	%	37	63	0	100
Estonia	%	33	67	0	100
Denmark	%	29	71	0	100
Romania	%	27	70	3	100
Latvia	%	25	63	13	100
Germany	%	23	67	10	100
Cyprus	%	20	80	0	100
Portugal	%	20	75	5	100
Croatia	%	18	73	9	100
Netherlands	%	17	74	9	100

Bulgaria	%	13	88	0	100
Spain	%	11	85	4	100
Finland	%	10	80	10	100
Austria	%	6	88	6	100
Italy	%	3	86	11	100
France	%	3	69	28	100
Belgium	%	0	74	26	100
Ireland	%	0	100	0	100
Luxembourg	%	0	100	0	100
Malta	%	0	100	0	100
Slovenia	%	0	100	0	100
Total	%	26	65	9	100

**Source:** European Parliament **Field:** all voters (N=656)

**Table 4 Distribution of votes in the European Parliament on the revision of the Posting of Workers Directive by political group (in %)**

		Abstention	Against	For	Total
ALDE	%	2	34	64	100
ECR	%	12	87	2	100
EDD	%	3	50	48	100
GUE/NGL	%	13	20	67	100
NI & ENL	%	57	32	11	100
EPP	%	9	29	61	100
S&D	%	0	1	99	100
Greens	%	0	0	100	100
Ensemble	%	9	26	64	100

**Source:** European Parliament **Field:** all voters (N=656)

A similar breakdown of votes can be found in more or less all of the emblematic texts of the eighth legislature on social Europe (The European Pillar of Social Rights, the creation of a European Labour Authority, and the coordination of social security systems). A study of the parliamentary debate indicates that the arena in which positions were taken was structured around various arguments<sup>19</sup> characterized to a large extent by opposition between regulators and liberals (Crespy and Gajewska 2010).

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<sup>19</sup> [http://www.europarl.europa.eu/doceo/document/CRE-8-2018-05-29\\_FR.pdf](http://www.europarl.europa.eu/doceo/document/CRE-8-2018-05-29_FR.pdf).

On the one hand, those who supported the text stressed that it constituted a step forward in the protection of European workers' rights (among others, Rory Palmer [S&D] and Rina Ronja Kari [GUE]). On the other hand, opponents who put forward more diverse arguments can be divided into several groups. Among them, some GUE MEPs viewed the text as unsatisfactory because it did not go far enough (João Pimenta Lopes, GUE/NGL, parliamentary debate, May 29, 2018). MEPs from the far-right group voted against on the grounds that freedom of movement would create unfair competition (Dominique Martin, ENL). More than a fight between the extreme left and extreme right, the debate was rooted in divisions among the center right (EPP and ALDE) and conservative right (ECR). A group of MEPs from the ALDE, the EPP, and the Conservative right (ECR), primarily from countries “exporting” posted workers, mobilized arguments in favor of maintaining a form of economic liberalism. Their criticisms focused on the consequences of the legal reinforcement of a revision of the Directive. Two main arguments were put forward. First, they argued that the revision of the Directive would lead to an over-regulation of companies: “small and medium-sized enterprises will collapse under the bureaucracy imposed on them” (Danuta Jazłowiecka, EPP). Second, legal reinforcement was seen as a protectionist measure that would restrict the free labor market (ECR and EPP), and therefore they labeled it an obstacle to competition. For Artis Pabriks (EPP), some countries try to protect their service providers and employees, thereby limiting the free labor market. For Zdzisław Krasnodębski (ECR), a revision would serve as an instrument to protect the economies of richer Member States against more competitive companies, mainly from Central and Eastern Europe, but also from Portugal and Spain. These two arguments, of excessive bureaucracy and creating barriers to competition, were put in perspective along with their possible consequences for competitiveness and employment (Ulrike Trebesius, ECR; Danuta Jazłowiecka, EPP) as well as entrepreneurship in Eastern Europe (Czesław Hoc, ECR), which is in line with the arguments of economic interest groups opposed to a revision of the Directive. The division between economic interest groups and the elected representatives of the EPP shows the multidimensional character of the positions. The opposition was not just between public and private interests (Michon and Weill 2022). Ultimately, certain representatives of private interests (for example the European Builders Confederation, a member of UEAPME) and some of the elected representatives of the “liberal” and

“conservative” groups (ALDE and EPP) also had an interest in the legislative intervention and in regulation to create “fairer conditions of competition.”

### **3. The evolution of the Directive**

In order to analyze the evolution of the legal text throughout the negotiations of the Revision, we will examine different versions and stages. We will mainly refer to the original proposal tabled by the EU Commission (referred to hereafter as “the Proposal”); the report of the European Parliament (referred to hereafter as “the Parliamentary Report”); the general approach agreed by the EPSCO Council (referred to hereafter as “the Council’s approach”), and the text ultimately adopted (referred to hereafter as “the final text”). To avoid (additional) confusion, we will refer to the “original” version of the Posting of Workers Directive as “the PWD.” Although the various documents are concordant with the general direction of the reform, a number of important differences can still be highlighted. In tracking these, we will limit our analysis to the main changes introduced by the Revision.

The most visible intervention of the Revision concerns the remuneration to be applied to posted workers (Lhernould 2018). This materializes the political promise of President Juncker, when he stated that “the same work at the same place should be remunerated in the same manner.” In legal terms, the reference to “minimum rates of pay” in Article 3(1)(c) of the PWD<sup>20</sup> has been replaced by “remuneration” in all the different versions of the Revision analyzed here. However, discrepancies between the three documents started to emerge as soon as it was time to actually define the meaning behind the concept of “remuneration.” The PWD in Article 3(1) referred directly to “the national law and/or practice of the Member State to whose territory the worker is posted” for the definition of “minimum rates of pay.” The Proposal opted for a definition encompassing “all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable.” It was the

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<sup>20</sup> “Member States shall ensure that [...] undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters: [...] (c) the minimum rates of pay, including overtime rates.”

elimination of the reference to “*national law and/or practice*” which prompted the Danish “yellow card.”

It is thus not surprising that this formulation made its way back in both the Council’s approach and the Parliamentary Report. The former retained the definition of the Proposal, while adding that “the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted,” whereas the latter went back to the formulation of the PWD, essentially replacing “minimum rates of pay” with “remuneration.” The final text also includes, in Recital 17, a clear reaffirmation of national competence in setting wages, as well as the fundamental role of social partners in this area.

The Proposal was silent as to the actual items which should be included in such a concept. Recital 12 refers back to the Member States’ competence on this point. The Council’s approach specified (in Recital 12b) that in the comparison between the remuneration applicable in the home state and that in the host state, the gross amount of remuneration should be taken into account, thereby including allowances specific to the posting. The same Recital also specified that reimbursements paid by the employer on account of expenditures actually incurred by the worker should not be deducted from remuneration. This was confirmed in the final text (Recital 18).

The broadening of the concept of remuneration applicable to posted workers clearly goes in the direction of limiting the competitive advantage of posted workers vis-à-vis local workers. In particular, it reduces the possibility of “gray” practices by posting undertakings, consisting of paying a given posted worker the lowest minimum wage applicable in the given Member State and/or sector, instead of the full remuneration to which they would normally be entitled in the host state (Arnholtz and Eldring 2015, 84).

At the same time, the final text makes it compulsory for Member States to publish on the single official national website (created following the Enforcement Directive) the remuneration items



applicable to posted workers.<sup>21</sup> The Proposal, Parliamentary Report, and the Council’s approach are concordant on this point. All the documents, though to a varying extent, consider that the lack of such transparency should be taken into account in evaluating possible infringements by posting undertakings. The Parliamentary Report proposes the strongest amendment in this sense, exonerating the posting undertaking from any responsibility “if the information is not, or is incorrectly, provided on the single national official website prior to the commencement of the posting.” This was also explicitly endorsed by the minority opinion in the Committee on Employment and Social Affairs, prepared by Marina Dlabajová (RE). The transparency requirement is also directly inspired by the case law of the Court of Justice, who, in *Laval*, criticized the Swedish system because it made it “excessively difficult in practice” for the posting undertaking “to determine the obligations with which it is required to comply as regards minimum pay.”<sup>22</sup> The final text retains that the absence of information in the single official national website “shall be taken into account [...] in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive, to the extent necessary to ensure the proportionality thereof.” Considering that national official websites are still rather lacking in terms of updated and precise information, this might provide an important element in the context of future litigations. Indeed, in some recent decisions, the Court of Justice has shown its willingness to strike down as disproportionate sanctions imposed by Member States in the cases of violations of the posting legal framework.<sup>23</sup>

Regarding the issue of remuneration, it is interesting to highlight a telling, though minor, element. We have already mentioned how many of the “yellow cards” raised by several Member States criticized the Commission’s proposal because of its impact on the competitiveness of posting undertakings due to higher labor costs. On this point, both the Proposal and the Council’s approach

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<sup>21</sup> Article 3(1).

<sup>22</sup> *Laval*, §110. The CJEU had in fact raised a similar point already in Joined Cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*, November 23, 1999, §43.

<sup>23</sup> See Case C-33/17, November 13, 2018, *Čepelnik d.o.o. v Michael Vavti*, and Joined Cases C-64/18, C-140/18, C-146/18, and C-148/18, September 12, 2019, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*.

included, in Recital 11, a specific reference to the fact that competition was not solely based on labor costs. The Parliamentary Report proposed to delete this reference and replace it with “education and skill level of the labor force.” This replacement was maintained in the final text (Recital 16), so that the Revision now carefully avoids the very term “costs,” probably to sidestep the thorny debate around social dumping (Arnholtz and Eldring 2015; Bernaciak 2015a).

The issue of the application of collective agreements to posted workers was also a particularly contentious one, notably following the *Laval* and *Rüffert* cases. In the former case, the Court had ruled out the possibility of using collective action to force the employer to sign a company-level agreement containing conditions going above and beyond the minimum level established by the PWD. In the latter, the Court first denied the possibility of applying collective agreements only covering a part of a given sector (public contracts).<sup>24</sup> Second, it concluded that a country that has a universally applicable legal system for declaring collective agreement, as was the case in Germany, cannot have recourse to *different* systems to ensure their applicability, such as referring to them in the awarding of public contracts.<sup>25</sup> The different versions of the reform are much less innovative in this regard.

The most important change lies in the extension of the applicability of collective agreements to all sectors of the economy, whereas the PWD only mandated this application for the construction sector, leaving Member States free to extend this to other sectors.<sup>26</sup> The final text confirmed this approach. Interestingly, the Committee on the Internal Market and Consumer Protection of the European Parliament had proposed a series of amendments providing exceptions for specific sectors, notably the manufacture and maintenance of equipment in the medical, rail, defense, aerospace, border security, and health and safety sectors, as well as the training and education of workers (Amendment 39). None of them made their way into the final text.

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<sup>24</sup> *Rüffert*, §29.

<sup>25</sup> *Ibidem*, §27.

<sup>26</sup> Article 3(10) of the PWD.

At the same time, the Proposal did not change the kind of collective agreements that can be applied to posted workers,<sup>27</sup> specifically collective agreements declared universally applicable, collective agreements that are generally applicable to all similar undertakings in the geographical area, and collective agreements concluded by most representative organizations at national level and that are applied throughout national territory. The Parliamentary Report (Amendment 33) added a further category, indicating that Member States can also “base themselves” on “collective agreements which are [...] representative in the geographical area, the profession or industry concerned and offer the most favorable terms and conditions of employment to the worker.” This addition remains rather obscure, in particular for the use of the concept of “representative collective agreement,” when representativeness in general refers to social actors. References to the geographical area and industry are already present in Article 3(8) of the PWD, so the only deviation would be the possibility of applying “representative agreements” that are not “generally applicable.”

This was not included in the final text, which thus confirms that decentralized systems of collective bargaining based on the autonomous extension of collective agreements through the threat of collective action will not be able to include posted workers in the future. Therefore, these systems remain exposed to posting strategies based on formal observance of mandatory rules but actual avoidance of industrial relations practices, being de facto forced to introduce systems for extending collective agreements which would otherwise be alien to their national traditions (Arnholz and Eldring 2015).

Finally, a comparison between the different versions of the Revision highlights a major point of discussion around the legal basis of the PWD. The starting point was the legal basis of the original PWD, i.e., the freedom to provide services (Rocca 2015, 113ff.). The Proposal left this untouched, as did the Council’s approach. The Parliamentary Report in its turn proposed to include social policy, and in particular Articles 153(1)(a) and (b) and 153(2), as a new “legal basis” (Amendment 1). Asked to consider whether the legal basis for the Revision was appropriate, the Committee on Legal Affairs

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<sup>27</sup> Article 3(1) and 3(8) of the PWD.

of the European Parliament confirmed the internal market legal basis with a close vote (thirteen votes to eleven with one abstention), although it suggested that articles on social policy should also be considered as an additional legal basis.

This is far from a purely cosmetic discussion. The internal market legal basis has, in fact, played an important role in shaping the case law of the CJEU on the matter (Davies 2008, 294), and it still appears strikingly ambivalent when read side by side with the new Article 1(1)(a), which clearly defines the PWD as an instrument aimed at the protection of posted workers. As the European legislator does not seem capable of mustering the courage to drive a metaphorical wooden stake through its heart, this ambivalence will thus be allowed to survive, lying in slumber, undead though not quite as alive as before, and potentially ready to rise again.

To mention just one example of such a risk, we can examine one of the most important changes introduced by the final text, more specifically, the broadening of the concept of “remuneration” applicable to posted workers that was mentioned earlier. Here, interpreting the new PWD in light of its legal basis could amount to curtailing Member States’ competences, something that the Court had already noted in *Isbir*,<sup>28</sup> pointing out that the ability of Member States to define the constituent elements of minimum rates of pay under the PWD should not “have the effect of impeding the free movement of services between Member States.” As proof of this risk, it is sufficient to look back at the Proposal, which stated in Recital 12 that the application of national rules on remuneration “should not disproportionately restrict the cross-border provision of services.” It is important to note that this was not included in the final text. Again, in a recent Opinion by Advocate General (AG) Szpunar, in yet another case concerning the posting of workers<sup>29</sup>, the AG based his reasoning on the legal basis of the PWD and came to the quite chilling conclusion that “Guaranteeing respect for the

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<sup>28</sup> Judgment of the ECJ of 7 November 2013, *Tevfik Isbir v DB Services GmbH*, case C-522/12, ECLI:EU:C:2013:711, §37.

<sup>29</sup> Opinion of AG Szpunar of 29 July 2019, in CJEU, Case C-16/18, *Michael Dobersberger v Magistrat der Stadt Wien*, ECLI:EU:C:2019:638.

rights of workers does not foster the transnational provision of services, but restricts it<sup>30</sup> (although such a restriction might ultimately be justified).

The final compromise that left the legal basis untouched therefore poses a major risk regarding the future interpretation of the new instrument. By winning the battle over the legal basis, opponents of the Revision might indeed have planted a timebomb under the whole new edifice. Only time will tell whether the reinforced protective character of the revised PWD will be enough to sway the Court of Justice, or if, on the contrary, the new text will be interpreted in the light of its enduring internal market legal basis, thus leading to a restrictive interpretation of more protective innovations. The most recent decision of the Court concerning the PWD shows how such a restrictive approach might already be at play on issues not covered by the reform, such as the application of the posting legal framework to short-term posting.<sup>31</sup>

#### **4. Conclusions**

A structural analysis of the various stances taken on the draft revision of the Posting of Workers Directive, combined with a textual analysis of the development of the text itself, provides a concrete understanding of the legislative process under consideration. In addition to the diversity of positions taken on the draft revision, this chapter also provides insight into the elements that structure those positions. We argue in favor of not limiting the analysis to nationality but of combining this variable with positionings in the European political arena. The case of the revision of the Posting of Workers Directive is emblematic of the struggles between the EU as a Single Market and a more social Europe, and ultimately about what the European Union should be. The positioning context shows the extent to which the field of Eurocracy is structured by the oppositions between regulators and liberals (Crespy and Gajewska 2010), the public and private sectors, and public services and businesses (Georgakakis 2013).

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<sup>30</sup> *Ibidem*, §23.

<sup>31</sup> See CJEU, *Michael Dobersberger v Magistrat der Stadt Wien*, case C-16/18, 19 December 2019, ECLI:EU:C:2019:1110.

*From the point of view of the elaboration of the legal text itself*, although we decided not to include the amendments suggested by the EP Committee on the Internal Market in our analysis above, a cursory look at those also reveals the importance of the strategic choice to assign the debate to the Committee on Employment and Social Affairs. Indeed, looking only at the major issues, the former Committee had proposed that the maximum length of posting would have to be calculated only on *uninterrupted* posting (Amendment 26), which made the measure extremely easy to circumvent. Furthermore, it had proposed the strongest possible link between the completeness of the national website and the application of sanctions, making these not applicable in cases of “inaccessible, incorrect or insufficient information” (Amendment 31).

Pushing through such a major reform was not achieved without compromises. In terms of the final legal text, these compromises necessarily left behind a few “black boxes,” something which allows multiple sides of the debate to (at least partially) claim victory. We have already mentioned the most visible of these compromises, that is, the maintaining of the “internal market” legal basis for the revised Directive. Similarly, the issue of the transparency and completeness of the information provided by national websites over working conditions was the object of an obvious compromise. The final text states that sanctions should “take into account” whether the information on working conditions applicable to posted workers is provided in accordance with Article 5 of the Enforcement Directive. Notably, this Article requires Member States to make this information “generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards.” The concept of “taking into account” is, of course, weaker than other versions proposed during the negotiations, which thus signals the existence of a compromise.

As with all “black boxes” left behind in these scenarios, ultimately it will be for the Court of Justice to open them. After all, this has also been the story of the original PWD and of the ensuing surprises caused by the 2007–2008 decisions of the Court (Rocca 2015, 209). As we mentioned earlier, past decisions have struck down national measures concerning sanctions against posting

undertakings, in the name of their lack of proportionality.<sup>32</sup> Hence Member States emerging as “winners” from the negotiations at stake should take particular care to bring their national websites in line with the requirements for transparency and completeness, if they want to avoid future surprises once the black boxes start to be opened.

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<sup>32</sup>See Case C-33/17, November 13, 2018, *Čepelnik d.o.o. v Michael Vavti*, and Joined Cases C-64/18, C-140/18, C-146/18, and C-148/18, September 12, 2019, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*

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