On illegal posting by temporary work agencies. Between use and abuse of the European Union's legislation

Salomè ARCHAIN*
Dipartimento di Scienze Giuridiche, Università di Firenze

ABSTRACT: This work moves from assessing legislation and case-law on both free movement of services and individuals which can be considered as a litmus test for the EU integration process. In such an analysis, the case of illegal job posting will be privileged by addressing challenges and vulnerability posed by available legal framework. The results of this analysis show that migrant workers, both from the EU and from third countries are employed in situations of subcontracting or supply of manpower by temporary work agencies, which lead them to be exploited and used as a way to circumvent controls. Thus, the current scenario claims for new ways to enhance equality of employment and working conditions between local and migrant workers.

1. Introduction

Labour exploitation is considered as a pervasive phenomenon universally condemned[1]. Exploitation occurs in many economic sectors and affects both EU and third-country nationals, whether a worker has or has not a regular residency permit. However, most of these situations remain invisible and – even once labour exploitation has been detected – victims' access to justice reveals itself as a weak instrument unable to counterbalance the growing social and economic vulnerability which drives global working mobility.

* Contatto: Salomè ARCHAIN | salome.archain@unifi.it

[1] See e.g. selected ILO instruments: Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Protocol of 2014 to the Forced Labour Convention, 1930 and Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).

In this scenario, EU Member States diligence obligations shall be considered under a broad definition of

> severe labour exploitation which is not always a consequence of trafficking and consists of taking certain actions, using illicit means, for the purpose of exploitation. Nor are victims of such exploitation necessarily coerced into working; they are victims of such exploitation because their work experience encompasses conditions that fall far below what can be considered acceptable in law[2]

New ways to circumvent controls, within the framework of free movement of services and establishment in the EU when concerning the posting of workers, need to be analysed as dangerous risk factors for labour exploitation. The relationship between economic freedoms and fundamental rights – such as the right to fair and just working conditions established by Article 31 of the EU Charter of Fundamental Rights – could open the floor for discussion on effective measures needed to avoid the enlargement of grey areas of labour exploitation. Under Treaty provisions on the free movement of services, businesses are enabled to move in a different country together with their workforce or, in case of temporary work agencies, post their workers as the main aspect of their service activity, to carry out projects. These workers who move cross-border with their employer – or are sent to another country to provide an employment activity – are called 'posted workers', emphasising that their base remains the one of the country of origin rather than the state where they are carrying out the labour activity. This situation raises a choice as to which employment and social security standards should be applied to posted workers: if those of the home state or those of the host state, or a combination of the two. Whenever "a free movement of services entails or is even based on a movement of workers who are necessary to perform the contracted service in the host country"[3], workers will not be covered by free movement provisions and, particularly, by

[2] See EU Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union*, report summary of March 2016, at the following link: http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-severe-labour-exploitation-summary_en_0.pdf, p. 2.
[3] M. De Vos, *Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?*, ERA Forum, September 2006, Vol. 7, p. 357.

Article 45 TFEU[4], because these workers will not become part of the host country's labour market, mainly because of the temporary nature of their employment activity and since they will return to their country of origin or residence after the completion of their job. Thus, neither under private international law rules[5], national labour standards of the host country shall apply to those workers. Considering that free movement of services generates international competition between labour standards, the legal distinction between an actual movement of 'services' (Article 56 TFEU) – which cannot be limited by national restrictions – and a movement of 'workers' (Article 45 TFEU) – which entails the abolition of any discrimination and the application of the principle of equal treatment – needs to be analysed in order to guarantee fair and just working conditions.

1.1. Legal ambiguities and improper implementation of EU and national rules on posting of workers

The Posted Workers' Directive lays down "a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided"[6]. The concept of minimum rates of pay may, according to the Directive, be defined by national law and/or practice of the host state (Article 3 para 1).The European Court of Justice in its case law answered to the question on whether the Directive should be interpreted as providing a floor of protection that the host states must extend to posted workers or as establishing a ceiling of employment conditions that host states are allowed to extend to posted workers[7]. Thus, the so-called *Laval-quartet of cases* has in many respects clarified the interpretation of Articles 43 and 56 TFEU and the Posting of Workers Directive.

[4] See e.g. ECJ Case C-113/89, *Rush Portuguesa*, 1990; joined Cases C-49/98,C-50/98,C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte*, 2001.
[5] See 1980 Rome I Convention which allows posted workers to remain employed, in the absence of a chosen law, under the employment law of the country of habitual employment.
[6] See Directive 96/71/EC, para 13 of the preamble.
[7] Malmberg J., *The impact of the ECJ judgments on Viking, Laval, Rüffert and Luxembourg on the practice of collecting bargaining and the effectiveness of social action*, document required by the European Parliament's Committee on Employment and Social Affairs, May 2010, p. 7-8. Available at this link: http://www.europarl.europa.eu/activities/committees/studies.do?language=EN.

The answer given by the Court was to interpret the Directive almost as exhaustive coordination of the national measures for protecting workers in posting situations. The Court's interpretation thus comes rather close to an understanding of the Directive as a ceiling. It is true that the Directive does not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law. Further, Member States may also extend conditions of employment on matters other than the nucleus of mandatory rules if they concern public policy provisions (Article 3 para 10). However, the concept of public policy provisions is interpreted strictly[8] and this possibility is not open to trade unions since they are not bodies governed by public law[9]. Even considering the above-mentioned possibilities for national action, as a consequence of the Court case law, the idea of equal treatment of domestic and foreign service providers, as regards wages and employment conditions, has been rejected in favour of a principle of minimum protection. Thus, a case of posting is not considered a situation of unacceptable social dumping so long as the hard nucleus of the host State is applied. Other differences in labour standards between the host State and the State of origin are not regarded as unfair competition, according to this interpretation of the Directive, even if driven (and resulting in fact) by the intention of low-cost workers' exploitation.

Lastly, in the following paragraphs, are going to be considered the problems arising by the (ab)use of European legislation on the posting of workers in the field of the provision of services. Starting from the ECJ's interpretation of the Posted Workers Directive and the definition given to the notion of unfair competition, it shall be analysed which space remains to national criminal law in order to address 'unlawful' cases of cheap workers' exploitation. The (ab)use of posting creates a sophisticated form of 'labour interposition' where, however, the focus of interest is moved from the posted workers to the legislation of the country of origin of those workers. Indeed, the exemption from the application of the principle of equal treatment to posted workers established by Regulation 883/04 on the coordination of social security systems, allows competition between social security systems. Posted workers

[8] See ECJ Case C-319/06, *Commission v. Luxembourg case.*

[9] See ECJ Case C-341/05, *Laval case*, judgement of the ECJ (Grand Chamber),18 December 2008, para. 84 of the decision: "not being bodies governed by public law, they (trade unions) cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law".

continue to pay social security contributions in their home country, while they are working in another Member States. Thus, the weak application of minimum rates of pay and other core elements of employment conditions to posted workers, appears to be even more weakened in its intention to balance social dumping based on national difference of wages, because of the application of the social security system of the country of origin, which (in order to have a profit from labour costs differentials and legal regime to be applied) is quite always cheaper than that in force in the host country where the work is carried out.

1.2. Applicable employment conditions to posted temporary agency workers

Starting from the provision of the Posted Workers Directive which relates to the working and employment conditions applicable to posted temporary agency workers, Article 3 para. 9 of Directive 96/71/EC allows Member States to go beyond the minimum requirements for general cases of posting as stated by Article 3 para 1. The Article, as seen before, seeks to apply the same conditions and terms of employment as comparable agency workers in the destination country. This means that the applicable regulation on equal pay should be the same as that which is applied to agency workers who are assigned at the national level. This is defined by Article 5 of the Directive 2008/104/EC on temporary agency work, which includes the options of derogations from equal pay and particularly, derogations made by collective labour agreements[10]. Article 3(1)(f) of Directive 2008/104/EC refers to working and employment conditions that have been set out by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking. These aspects all relate to: i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and ii) pay. Thus, the concept of "terms and conditions of employment" seems to be wider than the corresponding provision of the Posted Workers Directive. This is because it also encompasses provisions laid down by any kind of collective agreement. Therefore, it seems possible to guarantee that company-level agreements are respected and that they can also be

[10] For an overview of the issues which relates to the implementation of the Posted Workers Directive see Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016.

applied to posted agency workers. However, even within the normative framework of the Temporary Agency Work Directive, the application of the principle of equal treatment between posted temporary agency workers and national workers it is not strongly affirmed and neither implemented by the Member States. Indeed, as Article 3 para. 9 of Directive 2008/104/EC is only an option, rather than a legal obligation, Member States are also free to apply only the hardcore of rights established by the Posted Workers Directive. This includes minimum rates of pay, but not fully equal treatment. As shown by a recent Study for the EMPL Committee (Table 1), there are currently 15 Member States that apply the equal treatment provisions of the Temporary Agency Work Directive, while 13 Member States are yet to set any specific provisions for posted agency workers.

Equal treatment between local and cross-border temporary agency workers	Belgium, Bulgaria, Croatia, Czech Republic, Germany, Denmark, Spain, France, Italy, Luxembourg, Malta, Netherlands, Romania, Sweden, United Kingdom
Application of the hardcore only	Austria, Cyprus, Estonia, Greece, Finland, Croatia, Hungary, Ireland, Latvia, Poland, Portugal, Slovenia, and Slovakia

Table 1: National regulation of temporary agency work in the context of posting[11]

This complicated legal system has been addressed also by the European Confederation of Private Employment Services (Eurociett) as in need of clarification. Eurociett calls for an in-depth legal analysis on the interrelation between the Directive 2008/104/EC on temporary agency work and the Directive 96/71/EC on the posting of workers in the context of the provision of services, as both Directives address the employment and working conditions of agency workers[12].

[11] Data Source: EU Commission 2016, Impact Assessment, Annex VI.

[12] See Eurociett Position Paper, *EU Labour Mobility Package: Posting of agency workers and the cross-border provision of services*, 9 November 2015, p. 5, available at this link: http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/2015_AW_Regulation/Eurociett_Position_Posting_of_Workers_-_Nov._2015.pdf.

1.3. Social security rights and tax payment of posted temporary agency workers: the effects on labour costs

Under EU law applies the *lex loci laboris* rule, the principle according to which any worker who works in a given Member State is subject to the whole body of legislation of that State to ensure equal treatment and non-discrimination (host country principle). Posting of workers – and thus posting of temporary agency workers –, however, constitutes a derogation from this principle, as posted workers remain attached to the social security system of their home country. The reason for derogation was that, in case of posting, the full application of host country control principle would have led to a very complicated system to be implemented. The fear was that workers who may have been posted for very short periods of time to different Member states would have to adhere to the social security systems of all countries. Consequently, European policymakers considered that such "unnecessary and costly administrative and other complications (…) would not be in the interest of workers, companies and administrations (…) in order to give as much encouragement as possible to the freedom of movement of workers and services"[13].

In case of posted temporary agency workers this means that migrant workers need to adhere to the social security system of the country where the temporary work agency, at which they are employed and which sent them to another State to carry out an employment activity, it is established. Indeed, these provisions are not treated in Directive 96/71/EC or in Directive 2008/104/EC but are encoded in three regulations concerning social system coordination[14]. According to the social security coordination rules, as mainly set out in Regulation n. 883/2004 and the implementation Regulation n. 987/2009, social security contributions concerning posted workers need to be paid in the State where the employer normally carries out the activity.

By the same token, posted workers can claim social security benefits (such as those related to unemployment, pensions and work accidents) in the country where they are

[13] See European Commission, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, December 2013, *cit.* p. 7/53.

[14] See Regulation 1408/71/EEC of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation 883/2004/EC of the European Parliament and of the of Council of 29 April 2004 on the coordination of social security systems; and the implementation Regulation 987/2009/EC of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation 883/2004/EC on the coordination of social security systems (text with relevance for the EEA and for Switzerland.

insured[15]. Access to the health system via the European Health Insurance Card (EHIC) is the sole right posted worker can enjoy in the host state where the employment activity is carried out. For the purposes of social security coordination, workers are posted "by companies that normally carry out their activity in the home Member State, to perform paid work on behalf of their employer, for a limited duration of time"[16]. This means that, under this more concrete definition of posting than that of Directive 96/71/EC, the sending company must conduct a substantial part of its activity in the Member State where it is established. Furthermore, there must be a direct relationship between the posted worker and the sending company.

Finally, according to Regulation n. 883/2004, the duration of posting cannot exceed 24 months. Even if this maximum limit can be derogated by longer periods of posting (of up to five years), if it is based on agreements between sending and receiving Member States (Article 16 of Regulation n. 883/2004), this is an example of relevant differences from the Posted Workers Directive, where the temporariness of posting remains undefined. Indeed, the Posted Workers Directive expressly requires the temporariness of the posting of individual employees (Article 2 para. 1). However, the wording of Article 2.1, which refers to "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works", does not contain any indication as to clearly define the temporary nature of the posting of workers. It must be underlined that the limitation period must be defined with respect to the duration of the employment relationship with the employer. In fact, the general rules to select the law applicable to the employment contract are stated in Regulation (EC) n. 593/2008, the Rome I Regulation on the law applicable to contractual obligations. The Rome I Regulation clarifies that, with regards to an individual employment contract, work carried out in another country should be regarded as temporary, if the employee is expected to resume working in the country of origin after carrying out his tasks abroad[17].

As regards the payment of taxes, it has to be noticed that there are no coordination rules determining which Member State will tax labour income in the context of posting. In the

[15] *Ibidem*, E. Voss, M. Faioli, J. Lhernould and F. Iudicone, pp. 25-27.
[16] K. Maslauskaite, *Posted Workers in the EU: state of play and regulatory evolution*, policy paper 107, Notre Europe Jacques Delors Institute, 24 March 2014, p. 10, available at this link: http://www.institutdelors.eu/media/postedworkers-maslauskaite-ne-jdi-mar14.pdf.
[17] See for further analysis the Final Report of March 2012, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services*, Ismeri Europa, p. 18-20.

absence of a specific regulation, the general principle that income tax is paid in the country in which the income is earned applies. Indeed, the OECD Model Tax Convention on Income and on Capital[18] stipulates that the posted worker will be subject to income tax in the sending country on the basis that they work for less than 183 days within a period of 12 months in the receiving country. For periods longer than 24 months, the receiving Member State has the competence to levy both taxes and contributions. While for periods between 183 days and 24 months, income tax is levied by the receiving Member State and social security contributions are levied by the sending Member State.

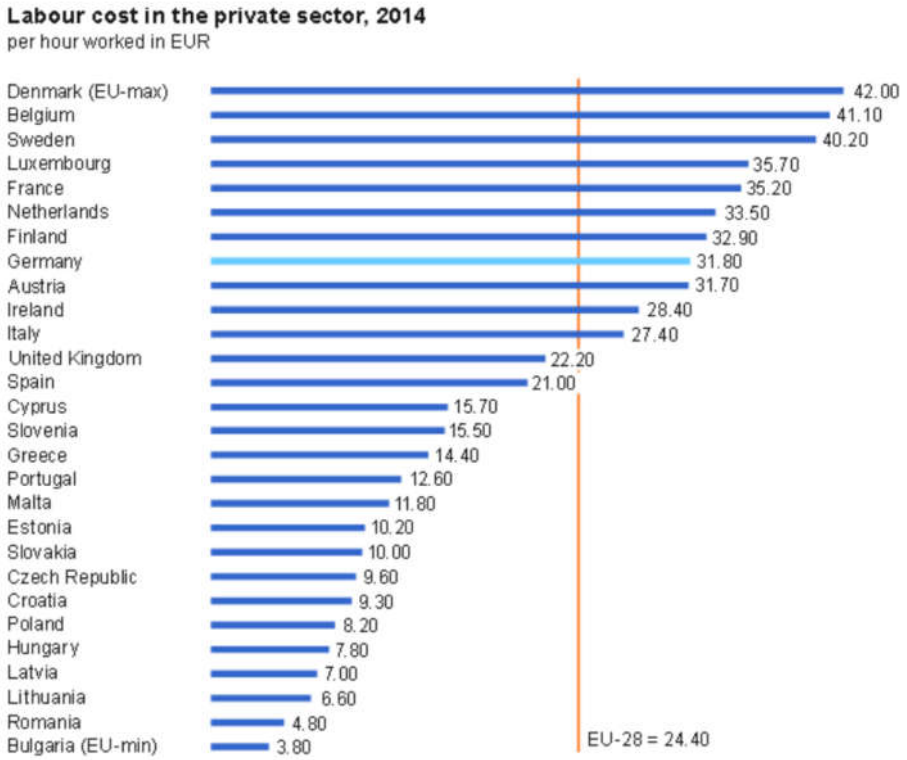

Table 2: Labour costs in the private sector, 2014[19]

[18] See Working Party No. 1 of the OECD's Committee on Fiscal Affairs. Updates were published in 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2015. The next update of the OECD Model Tax Convention is tentatively scheduled for mid-2017.

[19] Labour costs consist of gross earnings and non-wage costs, where the main component of the latter is the employer's social contributions. Source: E. Voss, M. Faioli, J. Lhernould and F. Iudicone, (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, Annex 4 Figure p.75.

The differences on income tax and social security contributions between the EU Member States, as shown below in Table n. 2, make room for companies providing cross-border services to have a cost advantage when social security contributions and income taxes are lower in the sending country than in the receiving country. Further, it will be considered how, because of these differences in labour costs levels within Member States, even if the net salary of posted workers is the same as nationals, posting a worker from a Member State with social security contributions and income taxes lower than the receiving country, saves an employer a significant amount of labour costs. The reasoning made by the European Commission in the 2016 Proposal for a revision of the Posted Workers Directive, was that even if rules and provisions of the Directive are fully applied, labour costs of posted workers are lower, mainly due to different social security contribution levels. Indeed, as seen before, these are regarded as the major motivation of companies in the receiving countries to employ posted workers in their undertaking. Table 3 can be useful to comprehend the actual differences in labour costs throughout Europe.

	Dutch worker	Posted worker from Portugal	Posted worker from Poland
Net salary	1,600	1,600	1,600
-/- social security (paid in the sending country)	496	81	350
-/- taxes (paid in the receiving country, i.e. after the 183-day period)	81	81	81
Gross salary	2,177	1,762	2,032
Percentage saving as compared to a Dutch worker		19.1%	6.7%

Table 3: Savings made by companies through posting[20]

The examples made using a hypothetical case of posted workers from Portugal and Poland to the Netherlands could be easily transposed to other cases of posting and the result

[20] *Ibidem*, *Posting of Workers Directive - Current situation and challenges*, p.27, at the following link: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.

will always underline a percentage of savings made by companies when posting workers from a country with labour costs higher than the State of origin of the company. Even if regulations on social security coordination and income tax rules allow companies to pay these kinds of non-wage labour costs in the State of origin and to be competitive in the market, at least some of the legal uncertainties and regulation loopholes of the normative framework of posted workers shall be reviewed in order to guarantee the correct implementation of the principle of equal treatment to posted workers.

A first improvement in this direction, as it will be stressed in the next paragraphs, is represented by the provision contained in the new Proposal for a Directive amending the Posted Workers Directive[21] under Article 1 paragraph 2 of the proposal, which replaces the reference to 'minimum rates of pay' by a reference to 'remuneration' and it provides a new sub-paragraph by replacing Article of Directive 96/71, imposing on Member States an obligation to publish information on the constituent elements of remuneration.

The specification of components of minimum rates of pay has been already dealt with by some Member States, in order to solve national issues on the application of the principle of equal treatment. The Italian Ministry of Labour and Social Affairs, for example, has answered the questions asked by the Italian Confederation of Transport, Shipping and Logistics within Consult N. 33/2010[22]. The Ministry underlined that the expression used by Article 3(1) of Legislative Decree 72/2000, of "same working conditions", must be read in conjunction with Article 3 of Directive 96/71which states the hardcore of protection to be guaranteed to posted workers. The Commission, with communication N. 304/2007, also confirmed that Member States are required to verify the equivalence of working conditions and in particular, the application of minimum wages, including overtime payments, irrespective of the country of origin of the employer (in case of posting of third-country nationals by extra-EU companies, in absence of a bilateral agreements, the Italian Court of Cassation ruled that the principle of the country of origin, in the field of social security

[21] 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 framework of the provision of services COM(2016) 128.

[22] See Consult n. 33/2010 by *Ministero del Lavoro e delle Politiche Sociali, Direzione Generale per l'Attività Ispettiva*, Prot. 25/I/0017136, at the following link: http://sitiarcheologici.lavoro.gov.it/Strumenti/interpello /Documents/332010.pdf.

contributions and taxes, shall no longer apply[23]). The Ministry thus stated that, as part of the expression "minimum rates of pay", should be considered seniority, when clearly provided by the relevant collective agreement (see Constitutional Court Decision N. 697/1988) and all kind of capital disbursements which rely on the worked period, considering the gross salary.

The intention is to avoid a comparison between different national labour systems as regards each single constituent elements of pay, which would be impossible to achieve, and rather to consider the minimum rates established by collective agreements as the gross amount. Further information upon the Italian definition of the constituent elements of retribution, even if the specific definition of salary remains within the provisions of applicable collective agreements[24], will be published every year by the Ministry of Labour, as announced by Legislative Decree 136/2016 which implemented the Enforcement Directive within the Italian legal system and provided specifically by Article 7 (1). Nevertheless, these clarifications made by the Italian Ministry of Labour do not safeguard posted workers from gaining an overall gross salary lower from that of national workers. Indeed, as it has been said before, social security contributions and taxes remain regulated by the country of origin principle (see Article 12 of Regulation 883/04/EC) and this situation allows great savings in labour costs, even when minimum rates of pay of the receiving country are respected. Furthermore, the identification of the tax and contribution base is regulated by the country of origin rules. Thus, what usually happens is that the part of salary higher than the salary normally paid for the same activity in the country of origin is not considered as part of the tax base and is instead ascribe as indemnity allowance or travel expenses, which are completely tax-free for the employer[25].

In the next paragraphs, the application of the rules on posting will be analysed, distinguishing between cases of incorrect identification of the national definition of minimum rates of pay (such as the case of Romanian contracts), cases of national temporary work agencies which try to supply workers using European rules even if not applicable in order to be competitive with foreign agencies and lastly, cases of illegal posting which are based on

[23] See the Italian Court of Cassation, decision n. 16244/-25 September 2012, http://www.ediesseonline.it/riviste/rgl/sentenze/corte-di-cassazione-sezione-lavoro-n16244-25-settembre-2012.

[24] As it was specified by the Italian Ministry of Labour and Social Affairs in its report upon the Directive Proposal, see http://www.senato.it/japp/bgt/showdoc/17/DOSSIER/973650/index.html?part=dossier_dossier1-sezione_sezione2&spart=si&parse=si.

[25] See G. Orlandini, *Mercato unico dei servizi e tutela del lavoro*, Diritto del Lavoro nei sistemi giuridici nazionali, integrati e transnazionali, Franco Angeli Edizioni, 2013, pp. 72-73.

the complete abuse of the institution of posting of workers and which represent a new frontier of labour exploitation.

2. A case study on 'Romanian contracts' publicised in Italy by temporary job agencies.

Practical consequences of the choices made while regulating the situation of posting, will now be described by considering some debated Italian cases on the 'use' (in the next paragraphs, the possibility to define these situations as an abuse of law, will be analysed) of EU legislation as a legal way to circumvent national laws and gain access to the labour market with lower costs while exercising the freedom to provide services. A first case of 'Romanian contracts' deals with a recent advertisement publicised in Emilia Romagna, in March 2015, by the Work Support Agency, a temporary work agency established in Romania. The advertisement, which has to be framed in a well-known pathology of the European legislation on road haulage sector[26], openly challenged the economic advantages which enterprises could benefit from using posted workers through Romanian temporary work agencies. The leaflet[27] was directed to the enterprises established in the Province of Modena and foreshadowed a downward trend on labour costs to defeat the grip of economic crisis. It was specified a clear cut of 40% of labour costs while promising maximum flexibility of temporary agency workers. The absence of labour and social security contributions to be paid to the Italian Institutions in case of posting to this country was openly publicised to circumvent high work-related costs currently existing in this country. Further, it was stated no responsibility for the user in cases of on-the-job injuries or posted workers' illnesses.

Lastly, as it will be examined below, some of the fundamental components of retribution, as they are considered by the Italian legislation (for example additional monthly payments and severance pay) were excluded from the lists of labour costs as if they were not part of the notion of minimum wage which should be ensured to posted workers. Immediately

[26] See F. Bano, *La territorialità del diritto: distacco transnazionale di manodopera a basso costo*, Lavoro e Diritto, 4/2015, pp. 583-602. See also on the critical issues relate to the road haulage sector, COM (2014) 222 final, Report from the Commission to the European Parliament and the Council on the State of the Union Road Transport Market, Brussels, 14.4.2014.

[27] See further on http://worksupportagency.com/it/index.php.

after the full media coverage of the leaflet, then came the reaction of trade unions' representatives[28] and the answer given by the Ministry of Labour with an official statement[29]. According to the Ministerial Memorandum (Circular n. 14/2015) the problem of Romanian contracts must be strongly opposed not to let unfair competition based on the restriction of workers' rights to get access to the Italian labour market. It was, above all, underlined how, during inspection activities, attention should be given to elusive practices used by temporary work agencies and it should be clarified which is the proper applicable normative framework in such cases of posting. Thus, the focus of the Memorandum concerns the regulatory system applicable to posted workers, mainly asking for the correct implementation of the law in force in the place where the work is carried out, as specified by the Posted Workers Directive. Workers who are posted from one State to another of the European Union, by a temporary work agency, should be granted the same working and employment conditions as provided by the law in force in the host country, continues the Ministry of Labour. When the activity is carried out in Italy, the core conditions of employment applicable to posted temporary agency workers are those set by Legislative Decree 276/2003 (and its successive amendments) and by collective agreements.

However, the complete disapproval of the leaflet's content both from the Ministry of Labour and trade union's representatives is undermined by the fact that part of workers' labour conditions, as promised by the Work Support Agency, are indeed accepted under EU law, even if some of them are still debated by Members States (such as the rules governing the payment of social security contributions). The rest of the leaflet promised working conditions which were rightly condemned as unlawful, but which were still representing a huge and spread problem of the application of the principle of equal treatment as regards minimum wages to posted temporary agency workers (which is often not respected or, were applied, strictly interpreted).

Another interesting case of the Romanian contracts, this time in the hotel and catering industry, has been identified in July 2013 at the military base of Colle Isarco during an

[28] See Cgil Emilia Romagna, *Contratti rumeni, Cgil Emilia Romagna: il Governo si muove*, Rassegna Sindacale, 10 April 2015, link: http://www.rassegna.it/articoli/contratti-rumeni-cgil-emilia-romagna-il-governo-si-muove.
[29] See the content of the statement at the following link: http://www.cliclavoro.gov.it/Normative/Circolare_MLPS_9_aprile_2015_n.14.pdf.

inspection of the INPS Labour Inspectorate[30]. The Inspectors inflicted a fine of € 120,000 to the Marconi Group, a company that manages the logistics base of Colle Isarco and other similar facilities in Italy, for failure to comply with labour law standards. Even in this case, a temporary work agency established in Romania, the Agentia Roma Srl, supplied Romanian workers to the Marconi Group. A long list of infringements was alleged against the company by the Labour Inspectorate. First of all, because workers were paid in part with Romanian currency on a rechargeable credit card and in part with an additional amount of money, reaching the monthly average of € 900 net, which included also severance pay and thirteen-month payment. Conversely, the minimum rate of pay stated by the applicable collective agreement provided for a monthly pay of € 1,350 net for an employment contract of 40 hours a week. After interviewing the temporary workers involved, they further denied having received any other additional payment, even if a down payment given in advance to employees was indicated in the payroll. Thus, these documents have been turned to Fiscal police and to the Public Prosecutor of Bolzano, in order to make further investigations. The list of infringements continues with the failure to comply with the supplementary provincial payment of € 50 per month, the omission of recording work's hours and of payments as regards social security contributions.

Trying to shortly summarise what it is provided, under EU law, to be granted by the employer of temporary agency workers, it could be helpful in order to compare this legal framework to the case of Romanian contracts and finding out disputable aspects. Under EU law the agency is the employer and, as the employer, must guarantee, in agreement with the user undertaking, a wage that is not lower than that paid to ordinary workers of the same level employed by the user undertaking. Thus, posted workers must receive appropriate training for the job to be performed and appropriate information on health and safety in the workplace. Temporary work agencies have the following obligations towards their employees: a) agencies must pay remuneration at least equivalent to that to which comparable employees of the user enterprise are entitled; b) in the case of those employed under an open-ended contract, agencies must continue to pay employees during periods when they are not working; c) agencies must pay the required insurance and social security contributions; d) they must

[30] See the results of the inspection at the following link: http://mediaware.selpress.com/UILCA/it/IT/Read?art=163716&a=c2VncmV0ZXJpYUB1aWxjYWxvbWJhcmRpYS5pdA==.

grant paid annual holidays; e) they must pay the end-of-service allowance on termination of an open-ended employment contract; f) they must pay for employee insurance against accidents at work and occupational illness[31].

What remains to be further analysed of the employment conditions of posted temporary agency workers are those elements which are strictly interpreted by the leaflet of the Work Support Agency so that employment conditions of posted workers become obviously far from being equal to that of the user's comparable workers.

2.1 The core elements of minimum rates of pay

Within the provisions of Directive 96/71/EC it is unclear, solely on the basis of the wording of the text, as to which components of wage should be regarded as those constituent elements of the minimum rates of pay which have to be paid to posted workers in the host country. Considering that, according to Article 3 para. 1 of the Posted Workers Directive, "the concept of minimum rates of pay (…) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.", this ambiguity has led to relevant uncertainties at the national level and to different approaches defining minimum rates of pay in the European Union.

As regards the regulation of posting by temporary work agencies, some ambiguities caused by the flexible definition of minimum rates of pay within the more general regulation of posting remains. Indeed, as above mentioned, even if in case of posting by temporary work agencies, Article 3 para 9 of Directive 96/71/EC allows Member States to go beyond the minimum requirements for general cases of posting as stated by Article 3 para 1, this is only an option. Article 3(1)(f) of Directive 2008/104/EC generally refers to equal pay for posted temporary agency workers, but this approach was followed only by some Member States. Thus, in order to consider the employment conditions really applied to every posted worker, it is essential to analyse the definition of minimum rates of pay as the common ground of protection of worker's rights.

[31] R. Blanpain and R. Graham (eds), *Temporary Agency Work and the Information Society, Kluwer Law International*, 2004, p. 143-157.

As overall, the main objective of the regulation of posting was the promotion of transnational provision of services in "a climate of fair competition and measures guaranteeing respect for the rights of workers" (para. 5 of the preamble of Directive 96/71/EC). Therefore, a detailed study of what are the components of the payroll of posted workers, it is a useful test in the supervision of social dumping. This study is necessary even more in time of revision of the legislation on posting. In its 2016 Impact Assessment[32], the European Commission stated that:

> In light of EU labour market conditions, including wage differentials and diversity of wage-setting regimes, in the context of an enlarged European Union, the balance struck by the 1996 Directive to establish a climate of fair competition has changed considerably. (…) The gap between Member States on minimum wages has constantly increased since 1996, from a ratio between the lowest and the highest minimum wage of 1:3 to 1:10[33]

The unclear definition made by the Posted Workers Directive of "minimum rates of pay", caused lots of uncertainties and variety in the composition of its meaning. There is only a narrow area of well-settled solutions that can be reminded. "The minimum rates of pay refer to the gross salary and they include overtime rates"[34]. Nevertheless, there is no tangible solution in many other cases, based on which posted workers are paid different rates depending on whether Member States include, for example, bonuses, allowances, mobility-related costs, holiday pay or social protection advantages, in the definition of minimum rates of pay. Further, it should be considered if, in the host Member State, the matter of the constituent elements of minimum rates of pay is addressed to collective agreements or to the law. In 22 out of 28 Member States[35], there is a generally applicable statutory minimum

[32] See EU Commission, Commission Staff Working Document, Impact Assessment accompanying the document "*Proposal of the European Parliament and 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 service",* Strasbourg, 8 March 2016, SWD(2016) 52 final, p. 13.
[33] *Ibidem*.
[34] See FGB Study on Wage Setting 2015, p. 16, in Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), *Posting of Workers Directive - current situation and challenges*, Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, p. 32.
[35] See K. Fric, *Statutory minimum wages in the EU 2016*, Eurofound, 29 January 2016, Table 1 where are listed EU countries which do apply generally binding statutory minimum wage as of 1 January 2016 (Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania,

wage. In most EU Member States (Austria, Denmark, Finland, Italy and Sweden), where there is no statutory minimum wage, as the lowest rate payable by employers to workers, the minimum wage level is set by collective agreements. These agreements can either be generally binding (like in Finland) or not. In Italy, for example, while such agreements only apply to "enterprises and workers that are members of the bargaining social partners, case law adopts collectively agreed minimum wages as a reference for other employees"[36].

Country	Seniority allowance	Allowances/Supplements for dirty, heavy, dangerous work	Quality bonus	13th month bonus	Travel expenses
Austria	Yes	Yes	No	Yes	No
Belgium	Yes	Yes	Yes	Yes	No
Bulgaria	No	Nc	No	No	
Croatia	n.a.	n.a.	n.a.		
Cyprus	No	Nc	No	No	No
Czech Rep.	No	Nc	No	No	No
Denmark	n.a.	n.a.	n.a.		
Estonia	No	Yes	Yes	No	No
Finland	n.a.	n.a.	n.a.		
France	X	x		x	No
Germany	Yes	Nc	No	No	No
Greece	Yes	Yes	No	Yes	No
Hungary	No	Nc	No	No	No
Ireland	No	Nc	No	No	No
Italy	Yes	Yes	No	Yes	No
Latvia	No	Nc	No	No	No
Lithuania	No	Nc	No	No	No
Luxembourg	X	X	X	X	
Malta	No	Nc	No	No	
Netherlands	No	Nc	No	No	No
Poland	Yes	Yes	Yes	Yes	No
Portugal	No	n.a.	n.a.		
Romania	No	n.a.	n.a.		
Slovenia	Yes	Yes	Yes	No	
Slovakia	No	Nc	No	No	No
Spain	No	Yes	Yes	Yes	No
Sweden	n.a.	n.a.	n.a.		
UK	n.a.	n.a.	No	No	No

Source: FGB 2015, EU Commission, Impact Assessment

Table 4: Elements of minimum rates of pay in EU Member States[37].

Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom) and EU countries which do not (Austria, Cyprus, Denmark, Finland, Italy and Sweden).

[36] *Ibidem*, Fric K., Eurofound, 29 January 2016, p. 1.

[37] *Ibid*em, Voss E., Faioli M., Lhernould J. and Iudicone F. (authors), Study for the EMPL Committee, IP/A/EMPL/2016-07, PE 579.001, June 2016, p. 33, Table 6.

As shown by the previous Table 4, this has resulted in a significant variety of national concepts as to different types of expenses, allowances or bonuses being an element of minimum rates of pay or not. Looking at the rulings of the European Court of Justice, no further clearness is given to the definition of a common notion of minimum wages. However, in the *case Commission vs. Germany* the Court has stated that

> allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind[38].

Some guidance though has been given by the Court as to which specific components of the wage payments should be considered part of those minimum rates of pay which should be granted in accordance to the Posted Workers Directive. What appears from the case law of the Court is an uphold of the PWD approach that the definition of "minimum rates of pay" should rest totally with national law and/or the practice of the Member State to whose territory the worker is temporarily posted. This was also stressed very clearly by a recent case, *Sähköalojen ammattiliitto ry*[39]*,* where the Court stated that the task of defining what are the constituent elements of the minimum wage, for the application of that Directive, is a matter for the law of the Member State of the posting, "but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States". The flexible nature of the concept of minimum rates of pay is thus set out by the law and by the rulings of the European Court of Justice while the question of how to define it in practice is left to the Member States. This situation, characterised by lack of clear standards, was addressed by the Impact Assessment

[38] ECJ Case C-341/02, *Commission vs. Germany* and see also on other specific components of the wage payment ECJ Case C-522/12*, Isbir.*
[39] ECJ Case C-396-13, case *Sähköalojen ammattiliitto ry.*

accompanying the 2016 Proposal of the European Commission for a revision of the Posted Workers Directive, as generating

> uncertainty about rules and practical difficulties for the bodies responsible for the enforcement of the rules in the host Member State; for the service provider when determining the wage due to a posted worker; and for the awareness of posted workers themselves about their entitlements[40]

This has led the Commission to include in the proposal for a revision of the Posted Workers Directive, under Article 3(1), the substitution of the requirement that posted workers are subject to the minimum rates of pay by the new provision that the same rules of remuneration, laid down by law or by universally applicable collective agreements, as those of the hosting Member State, would also apply for posted workers. In accordance with the Proposal, as the reference is made to remuneration and no more to minimum rates of pay, posted workers should be treated according to the same rules as local workers and employers will have to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, to posted workers as to national ones.

The outcome of such differences between Member States defining the components of the minimum rates of pay is a great variety between EU countries of the rates' level. According to the most recent studies[41] on the levels of the statutory minimum wage (no records have been gathered on the levels of minimum wage stated by collective agreements) applicable in the Member States shows that the lowest minimum wages (less than 500 EUR per month) can be found in the new Member States. Bulgaria (420 BGN/around 214 EUR per month) and Romania (1,050 RON/around 276 EUR per month) apply the lowest minimum wages in the European Union. Malta and Slovenia, together with Portugal, Greece and Spain, form a middle group with minimum wages between 500 and 1,000 EUR per month. Other countries within the western European countries have the highest minimum wages with rates exceeding 1,000 EUR per month.

[40] See EU Commission, *Proposal for a Directive of the European Parliament and 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,* Strasbourg, 8.3.2016 COM(2016) 128 final, p. 11.

[41] See on the more recent levels of statutory minimum wages Fric K., *Statutory minimum wages in the EU 2016*, Eurofound, 29 January 2016, p. 2.

2.1.1. The Italian definition of minimum rates of pay.

Once analysed the current uncertain notion of minimum rates of pay given by the Posted Workers Directive and confirmed by the case law of the European Court of Justice, it seems essential to examine the national definition of minimum rates of pay considering that how to define it is left to the Member States. Particularly it has to be observed the Italian definition of minimum rates of pay, in order to answer the question on the supposed illegitimacy of cheap labour supply such as that promoted by the Work Support Agency in the case of Romanian contracts in the field of posted agency workers in Italy[42].

In case of posted temporary agency workers from other Member States in Italy, the regulation of the employment conditions is contained both in the generally applicable collective agreement on work supply and in the collective agreement which applies to the national workers of the same level of the posted ones employed by the user undertaking. Thus, the level of minimum rates of pay per hour and/or per month is stated by the collective agreement generally binding in the working sector, depending on their professional qualifications, of posted workers. Nevertheless, the general employment and working conditions which apply to all cases of supply of work by temporary work agencies in Italy are stated by another collective agreement, which was lastly updated in 2014[43].

To this latter collective agreement referred the Ministerial Memorandum (Circular n. 14/2015) when addressed as illegal the supply of workers as publicised by the pamphlet of the Work Support Agency. Indeed, the promised cut in labour's costs included the avoidance of the payment of some constituent elements of pay as stated by the national collective agreement on the supply of work. The general exclusion from the payment of the thirteen months and of the employee severance indemnity (TFR) for Romanian temporary agency posted workers is not in compliance with Italian law provisions. Those are elements which were included in the national definition of minimum rates of pay as defined by collective agreements since the Presidential Decree n. 1070/1960 which declared as generally binding the Labour Agreement in the manufacturing sector of 20 October 1946. It is true that Romanian temporary posted workers are officially considered as employees of the temporary work agency which hired them and that, when posted to a country other than that where they

[42] As before mentioned, the definition of minimum rates of pay in Italy is set by collective agreements.
[43] See the extended version of the collective agreement at the following link: http://www.nidil.cgil.it/files/c-c-n-l-delle-agenzie-di-somministrazione-lavoro.pdf.

live and usually work, they remain covered by the contract they signed under the Agency. Nevertheless, European legislation on posting of temporary agency workers states that the working and employment conditions, including pay, which should be applied to them, are the same of the national workers employed by the undertaking of the country where those workers are temporarily posted. The thirteen months and the employee severance indemnity are part of the definition of minimum rates of pay which should be granted to posted workers and paid on a monthly basis depending on, and in the proportion of, the hours worked. The procedure of payment of those elements of retribution is however prescribed in the collective agreement which applies to national workers, employed in the same sector and of the same professional level of posted workers[44]. Therefore, the identification of the rules to be applied in case of posting in Italy are stated by an intricate framework of rules set by collective agreements, which make appropriate and effective checks and monitoring mechanisms to be essential to avoid illegitimate cases of posting. Furthermore, this intricate normative framework should include the recent provision of Article 8 of Law 148/2011, which allows agreements of any levels to derogate from national generally binding collective agreements. The effects of this process of decentralisation on social dumping, are not still clear, especially about the possibilities of derogation from the minimum rates of pay established by national collective agreements. Nevertheless, it will be essential to control future developments in this direction.

The temporary work agency is responsible for the payment of retribution and thus the provisions on the working and employment conditions which should be granted to posted workers, need to be clearly specified in the employment contract. In this sense, it is important to notice the introduction of a liability clause for the payment of retribution in case of posting made by the Enforcement Directive in cases of subcontracting chains. The Italian legislator introduced an even more effective provision, which is applicable in all cases of supply of workers, which stated a general possibility for the user undertaking to be held liable, in place of the agency, by the posted workers[45].

[44] See Italian Ministry of Labour and Social Policies, Statement 9 April 2013, p. 4, at this link: http://www.dplmodena.it/cir19-09.pdf.
[45] See Article 23 para. 1 and 3 of the Legislative Decree n. 276/2003 and the Legislative Decree n. 81/2015, Articles 30-40.

As clarified by the 2010 Vademecum on Posting of Workers within the European Union[46], temporary work agencies established in another Member State should apply, in case of posting of temporary agency workers in Italy (and according to Article 4 of Legislative Decree 72/2000), the Italian normative framework which regards the supply of work by temporary work agencies. Particularly, the provisions which apply both to temporary work agencies established in Italy or established in another country, are stated by Articles 20-28 of Legislative Decree 276/2003, which was recently replaced by Articles 30-40 of Legislative Decree 81/2015.

The 2010 Vademecum underlined that posted temporary agency workers must have the same normative and economic treatment, as was provided at the time by Article 23 para 1 of Legislative Decree 276/2003 (which was modified by Legislative Decree 24/2012 which implemented the Temporary Agency Work Directive and that changed the wording in "same working and employment conditions"), and further that the user undertaking had a shared liability with the agency for the payment of retribution and social security contribution.

With regards to the definition of minimum rates of pay, the Italian Ministry of Labour had answered to consult n. 33/2010[47] stating that in the concept of pay must be included seniority pay increases and all the financial disbursements regarding the period of assignment of the posted worker, without detracting any deduction or contribution (i.e. the gross salary). The Italian Ministry of Labour considered as relevant the definition of "employment income" under national law as stated by Article 51 of decree n. 917/1986 (which is known as *Testo Unico delle Imposte sui Redditi*, or briefly TUIR), used for tax purposes, which includes all bonuses and allowances deriving from the employment activity, without drawing a comparison of every single element of pay rates between the sending and the hosting State, which would still be impossible considering the different regulatory regimes applicable in the European Union. The limits of this definition, even if considering its merits of transparency, have been underlined before as regards the generally lower labour costs based on different social security and tax systems.

[46] Istituto Guglielmo Tagliacarne, Ministry of Labour and Social Affairs of Italy and Labour Inspection Romania (eds by), *Vademecum on Posting of Workers within the European Union, at the use of Labour Inspectors and Enterprises*, EMPOWER project "Exchange of Experiences and Implementation of actions for Posted Workers", Pilot project on working and living conditions of posted workers, 2010, p. 27, available at the following link: http://www.assolavoro.eu/uploads/2012/mlps_-_vademecum_distacco_comunitario.pdf.
[47] See the text of the at the following link: http://anclsu.com/public/imagepost/File/332010.pdf.

2.2. Italian temporary work agencies using employment contracts made upon the Romanian pattern

An interesting evolution of the Romanian model of posted temporary agency workers employment contracts is represented by a recent case of illegal supply of workforce which involved a temporary work agency established in Italy, thus outside the scope of protection of European transnational supply of workers. In this situation, there was indeed no cross-border element characterising the activity of the agency to provide services, because the agency was established in Italy and stipulated Italian contracts with national workers. Nevertheless, as shown by the documents provided for by trade unions' representatives to the Italian Ministry of Labour and Social Affairs and the Labour Inspectorate, the alluring promises, of severe cuts in labour costs, made to Italian undertakings by the agency, were the same as publicised by the pamphlet of the Romanian Work Support Agency.

The Easy Work Srl established in Vicenza, in September 2016, was accused by trade union representatives[48] to be carrying out an illegal activity of supply of workers. The agency was offering its services to companies of the municipalities of Veneto, Emilia Romagna, Lombardia, Friuli Venezia Giulia and Trentino Alto Adige, claiming the possibility to hire from the agency itself qualified manpower (carpenters, electricians, plumbers, quality control, and so on), at inflated and highly competitive prices to help companies facing the current crisis in the market. Local firms received such proposals, mostly, via email, in which the agency offered an hourly labour cost ranging from € 13,50 to € 16,50, depending on the type of staff required, ensuring that the cost remained unchanged for hours of overtime work. Moreover, this low price included injury, illness, vacations and thirteen-month costs, also claiming that commissions, charges and other personnel costs, were all being borne by the Easy Work Srl. This situation of fraudulent supply of manpower was strongly condemned and reported to competent authorities by trade unions. Indeed, even if this agency tried to propose undertakings the same low labour costs as foreign temporary work agencies, the equal work and employment conditions between temporary workers and workers directly hired by the user undertaking, should have been guaranteed. The principle of equal treatment

[48] See Comunicato stampa Nidil e Cgil Modena, 16 September 2016, at the following link: http://www.nidil.cgil.it/bacheca/comunicati-stampa/false-agenzie-per-il-lavoro-che-svendono-lavoratori-la-cgil-denuncia-un-nuovo-caso.

to temporary workers should apply both in cases of supply of workers by national temporary work agencies and by foreign temporary work agencies, at least for the minimum employment conditions provided by the Posted Workers Directive and having special consideration for minimum rates of pay (defined as gross salary) established by the relevant collective agreements. Nevertheless, the illegal activity carried out by the Easy Work Srl, was easier to track down and indeed, it was immediately stopped, because social security contributions, administrative burdens of registration and taxes had to be all paid under Italian legislation. Such a situation shows clearly how a coordinated system of controls organised by the Labour Inspectorates and different national authorities – and now enacted by the recent Enforcement Directive, implemented in Italy by Legislative Decree n. 136/2016 – is necessary in order to be able to find out irregularities in cases of transnational supply of workforce. It should be reminded that the administrative burden of prior registration and authorisation – stated by Article 4 of the Legislative Decree n. 276/2003 – for temporary work agencies which supply workers in Italy, is not required for agencies established in another European Member State. As it has been clarified by the Italian Ministry of Labour with Circular n. 7/2005, there is no need for additional authorisation when the agency has already been authorised by the qualified authorities of the State of origin. Furthermore, with respect to economic requirements of temporary agencies, aimed at workers' protection in any case of non-fulfilment and stated by Article 5 paragraph 2 of Legislative Decree n. 276/2003, it has been clarified, by the above mentioned Ministerial Circular, that temporary work agencies can be exempted from the payment of those security deposits and the signing of a bank guarantee, where they have fulfilled similar obligations in the State of origin.

2.3. From the Posted Workers Directive's distortion to the exploitation of migrant workers: trade union reports

The cases analysed in the previous paragraphs show different levels of distortion of the rules on posting. In some situations, there is a restrictive or irregular application of the principle of equal treatment as regards working conditions. In other situations, infringements of EU and national law, concern both equality in retribution and employment conditions, such as maximum working hours and overtime work's payment, and further, it was at stake

the proper payment of social security contributions and taxes in the country of origin. These cases of illegal posting are not easy to identify, even if new instruments of administrative coordination were provided by the Enforcement Directive 2014/67/EU and adequate sanctions are not always set by Member States.

In this scenario, cases of illegal posting are becoming the new front used by companies for hiding serious migrant workers' exploitation. As it will be shown by some recent cases, posting of workers in situations of subcontracting or supply of manpower by temporary work agencies, are increasingly used as ways to circumvent controls, or at least making it harder to obtain verifications. Illegal posting based upon the exploitation of workers allows the highest savings on labour costs by using unfair competition and abuse of workers' rights. Administrative sanctions in these cases are quite useless, even if they are remarkably high such it was in the Italian case of Roma Srl 2003 discussed before. New ways to prevent and punish such situations are needed and maybe, even under the already existing provisions against human trafficking, some protection could be given to migrant workers.

Within Europe, foreign workers are increasingly being abused in the construction and transport sectors, but also in other fields such as farming. Trade unions and Labour Inspectorates try to report and combat this new grey economy in the labour market, some examples will be analysed in the aftermath. In Finland[49], both the Finnish blue-collar union federation (the SAK), and the Finnish Service Union United (PAM) denounced complaints concerning overtime and underpayment. Not only workers have been paid half of what the collective agreement calls for, but employees have even been housed in the middle of a construction waste dump. Further, there have been cases where foreigners have been forced to work overtime under the threat of being dismissed if they refuse. In this case, employees were Intra-EU migrant workers or even third country national, employed by temporary work agencies established in an EU country and then using the posting of workers rules to supply vulnerable workers to companies around Europe. Indeed, when a temporary work agency is established in an EU country, the normative framework of posted workers applies irrespective of the worker's nationality, if the transnational supply of workforce takes place within the European Union. As a common situation, few claims were collected by trade

[49] See data at the following link: http://yle.fi/uutiset/osasto/news/unions_foreign_workers_often_underpaid_overworked/6479057.

unions, because of the fear of employer's retaliation, but it clearly underlines the widespread hidden phenomenon of exploitation of temporary workers used to achieve lower labour costs.

In Germany[50], migrant workers in the construction industry are increasingly faced with abusive posting practices. More and more construction and public works companies are turning to labour subcontractors. Thus, a whole host of firms has sprung up specialising in the supply of cheap labour for construction projects. In most cases, these companies are not genuine construction firms, they look like it on paper, but their only activity is, in fact, to supply labour at a low cost. They usually only pay wages for the first few months and then stop paying and expect the workers to keep going until the job is finished, in the hopes that they will be paid at the end of the contract.

Some irregular situations were presented to German unions representing construction workers, which defended workers who had not been paid for months. In autumn 2014, a group of around thirty Romanian workers turned to the posted workers' advice bureau of the German trade union confederation *Deutscher Gewerkschaftsbund* (DGB), because they had worked on a mall's construction for weeks and were still owed several months' wages. Even in this case, workers used to sleep in one of the construction site containers were paid above the minimum rates of pay for the same work in Germany and most of the time they were not even paid. The investor in charge of the shopping centre has shifted all responsibility for the situation on to the subcontractors that hired the workers. The general contractor has done the same. The latter, moreover, filed for bankruptcy in December. In March 2014, the German union representing construction workers, *Industriegewerkschaft Bauen-Agrar-Umwelt* (IG-BAU), took on a similar case, defending 50 building workers in Frankfurt who had not been paid for months. The company was finally forced to pay the € 100,000 in wage arrears.

In Italy[51], in the agriculture field and mostly with seasonal employment contracts, temporary agency workers irregularly posted from Romania and Poland were reported to be exploited by the Labour Inspectorate of Treviso. Migrant workers employed in Italian fields and vineyards were abused as regards work hours and the application of minimum rates of pay established by collective agreements. Further, in September 2014, the same situation has been reported during the Flai-Cgil campaign against the exploitation of workers in the

[50] See http://www.equaltimes.org/exploitation-of-migrant-workers?lang=en#.WBjG8SR3GWi.
[51] See http://www.ilgazzettino.it/nordest/primopiano/prosecco_treviso_sfruttamento_caporalato-1218114.html.

agricultural sector. Workers employed in this field in Piemonte[52] – both Italians, Intra-EU and Third-country national workers –, were at the time over 70,000 and about 20,000 of these workers were foreigners: 5,500 Romanians, 2,300 Albanians and then Moroccans, Poles, Indians and Bulgarians. The municipality with the higher numbers of foreign workers' employed was Cuneo, where almost 11,000 workers were employed, just over half of the overall number.

Today in Italy the victims of illegal hiring and supply of manpower are about 430,000, between Italians and immigrants (European and Third-Country nationals), and among these more than 100,000 are in a state of severe exploitation and vulnerability from the housing perspective. The practices of "caporals" can be summarised in the non-implementation of collective agreements, a salary ranging between € 22 and 30 per day, work hours between 8 and 12 hours per day, use of violence and blackmail, theft of documents and the imposition of a dwelling. These data were indicated by the Third Report on Agricultural Mafias and Illegal Hiring (*capolarato*) made by the Placido Rizzotto-Flai CGIL observatory[53]. Flai and CGIL, along with other organisations, have recently submitted the national campaign to stop illegal hiring, by launching a petition for the immediate approval of the bill (draft bill 2217) against the exploitation of labour in agriculture, with new penalties and sanctions appropriate to the seriousness of the offence.

Situations of severe exploitation of workers have been characterised by tangled employment relationships both between workers and employers and between workers and caporals, who recruit them to be supplied and allocated to the collection of agricultural products. The working conditions are always precarious and indecent. This kind of infringements have been identified also when employment intermediaries were get involved, mostly temporary work agencies or apparently legal cooperatives which hide activities of illegal supply of workforce (the so-called 'landless cooperatives' used to create fictitious employment relationships and avoidance of contractual rules, which were at first condemned by the Ministry of Labour and Social Affairs in 2007[54]).

[52] See http://www.cgilpiemonte.it/2014/09/campagna-flai-cgil-piemonte-contro-il-caporalato-in-agricoltura/.
[53] See the report on the website of Flai (Federazione lavoratori AgroIndustri) and Cgil: http://www.flai.it/primo-piano/terzo-rapporto-agromafie-e-caporalato-la-sintesi/.
[54] See Consult n. 15/2007, Roma, 12 March 2007, at the following link: http://sitiarcheologici.lavoro.gov.it/Strumenti/interpello/Documents/15/148Brindisi.pdf.

As it has been said before, within the haulage sector two kinds of illegal posting have been reported to the authorities after posted worker's claims. By the interview carried out to some representatives of Filt-Cgil of Liguria and Piemonte, it appeared clear the merciless service activity carried out by several temporary work agencies in this field. First, it was underlined the increasing number of foreign agencies which resort to Italian workers fired by Italian undertakings, who appeared to be then employed by the agencies and newly posted to the same company that previously fired them. Usually dismissed Italian workers are asked to reside for some months in the State of origin of the temporary work agency, in order to comply with administrative procedures and to be employed by the agency with a foreign contract of employment. Those workers are successively posted again to Italy, and often to the same company for which they worked before and employed to provide an employment activity as officially temporary agency workers, with all the consequences in terms of remuneration, social security contributions and taxes connected to foreign temporary employment contracts. Though there is a lack of reliable data on the extent of subcontracting in the context of cross-border service provision and posting, there has been plenty of evidence arising from research studies, and sector-specific experiences, such as those reported by Italian trade unions, which have highlighted that sub-contracting – often with the involvement of employment agencies- is an extensive practice in the building and construction sector as well as in transport, shipbuilding, hotels and restaurants, and other service sectors within Europe. Such practices were reported not only in Italy, but also in other EU countries:

> A Belgian food processing undertaking dismissed its workers and concluded a service contract with a Dutch 'posting agency', which posted a considerable number of German-Polish workers to the Belgian undertaking. They were paid on average 10 Euros less than the company's dismissed Belgian workers before. Trade unions called for a strike because of the dismissal[55]

[55] Source: A. Van Hoek, and M. Houwerzijl, *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 58, in http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.pdf, pp. 39-40.

Another commonly used technique, aimed at minimising labour costs, is the creation of the so-called 'letter-box companies', or affiliates in Member States where social security contributions and taxes are lower[56]. Such companies do not carry out significant economic activity in their country of origin. Their primary purpose is to post workers abroad while taking advantage of lower social security contributions. In addition, these companies are often constructed as a complex multi-level network in the different Member States or even involving workers from third countries. Some examples of these practices can be given by the transport sector:

> In 2011, several transport companies in the Benelux countries received the offer to transfer their workforces to intermediate companies located in Cyprus and Liechtenstein, and to hire the staff through these intermediate service suppliers. With reference to the changes in the coordination of social security as a result of Regulations 883/2004 and 987/2009, the intermediates offered to act as employers for the workforce. The original employer of the truck drivers would become the 'client' and would receive an invoice for supply of services, whilst the truck drivers would continue to work de facto for the original employer. By opening an office abroad – for instance in Cyprus – the intermediates claimed that it was justifiable to offer a Cypriot employment contract to the truckers, even though they did not live there and had never visited the island[57]

There are other situations in which workers, even third-country nationals, were employed by temporary work agencies with the sole intention to post them to another EU country with higher labour costs. An example of this practice, which became prominent in Denmark, Sweden and Germany in 2013, is the case of the German-Latvian agency Dinotrans[58]. The company recruited workers from the Philippines, who were in fact third-country workers that were not entitled to enter the EU. However, they were recruited using the argument of 'a shortage of skilled labour for international trucking' in Latvia, this being

[56] See J. Cremers, *Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping*, ETUI, Brussels, 2014.
[57] *Ibidem*, p, 3.
[58] See: http://www.stoppafusket.se/2013/08/20/drivers-working-for-slave-wages-at-sia -dinotrans/.

one of the justifications upon which permission for such workers to enter the EU may be granted. As soon as they entered Latvia, the drivers in question were hired out to other undertakings in Europe. The company's own financial statements recorded that the haulage contractor was paying these drivers approximately €2.36 per hour, making this practice tantamount to slave labour. Another example could be found in the Hungarian transport sector as several drivers, mainly Hungarians, were on the payroll of a Hungarian subsidiary based in one of the premises of Pricewaterhouse Coopers in Budapest, although they were mainly working for the Dutch headquarters. The Hungarian subsidiary only had one part-time administrative employee on parental leave. These arrangements often involve very complex, multi-level arrangements between several companies established in different Member States, which makes any control very difficult[59].

In addition to these cases of abuse, circumvention and illegal behaviour within the European framework of posting and transnational supply of workers, it has been clarified by interviewed trade union representatives of Filt-Cgil Liguria that, even in cases of apparently correct implementation of European and national statutory legislation – at least as regards the results of controls made upon net retribution of posted workers –, difficulties in the verification of the effective payment of taxes and social security contribution in the agency's country of origin and the ambiguous constituent elements of minimum rates of pay, throw the legitimacy of most posting activities into uncertainty.

Indeed, it has been confirmed by trade unions that even when the net salary in the payroll is equal between direct employees of a company and posted temporary workers, it should be paid attention to the constituent elements of the net salary of the latter group of employees. It has been reported that posted workers are guaranteed minimum rates of pay of the level and qualification provided by the applicable collective agreement of the specific sector of employment, but this minimum rate includes an illegal division into instalments (which can be applied only if allowed by the collective agreement of reference[60] and it is forbidden for TFR) of TFR, thirteen and fourteen months' payments and leaves. Further,

[59] *Ibidem* Cremers, J., ETUI, Brussels, 2014.
[60] See Italian Court of Cassation n. 8255/2010, which confirmed the possibility to divide into instalments thirteen month and leave payments if provided by the applicable collective agreement in the form of a "*patto di conglobamento*".

travel indemnities and overtime payments appeared to be paid as a daily allowance, completely tax-free and included as a constituent element of the net salary.

Thus, as it was stressed before considering social security contribution and tax payments, the apparently equal net salary between posted workers and national employees is instead lower for temporary posted workers. To let these situations to be comprehensible and easily targeted by Labour Inspectors, posted workers claims to trade unions and authorities are of the utmost importance and reports on the illegal cases of supply of manpower are still the pick of the iceberg of a corrupted labour market.

3. Conclusions. Illegal posting by temporary work agencies and possible solutions under Italian and EU legislation

In the event of non-compliance with the provisions of Directive 2008/104/EC by temporary work agencies or user undertakings, Article 10 of the Directive states that Member States shall provide for appropriate measures, ensuring that adequate administrative or judicial procedures are available, to enable the obligations to be enforced. Further, Member States shall lay down rules on penalties, which must be effective, proportionate and dissuasive, applicable in case of infringements of national provisions implementing the Directive. The same was provided by Article 5 of the Posted Workers Directive, which stated that Member States shall ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

As regards jurisdiction, Directive 96/71/EC under Article 6 generally states that, in case of irregular posting in violation of Article 3 of the Directive (terms and conditions of employment), judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right under existing international conventions on jurisdiction, to institute proceedings in another State. Indeed, this provision states a specific clause of the jurisdiction in favour of irregular posted workers within the European Union, which should be considered in addition to what is provided by Regulation 44/2001/CE on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Further, in order to assess the state of administrative cooperation and other aspects of enforcement of the Posted Workers Directive, the aim of Directive 2014/67/EU (which was implemented in Italy by Legislative Decree 136/2016) was to establish a common framework of competent authorities and liaison offices in order to set appropriate provisions, measures and control mechanisms necessary for a better and more uniform implementation, application and enforcement (Article 3). It is stated that Member States are obliged to take the appropriate measures to ensure that the information on terms and conditions of employment is made generally available (Article 5) and the necessity to improve and enhance administrative cooperation between national authorities to exchange information (Articles 6-8). It is given an indicative list of information that Member States may request from service providers to ensure effective monitoring of compliance with the obligations set out in the Posted Workers Directive, but it should be provided that these are justified and proportionate in accordance to EU law (Articles 9-10). The need for a proportionality test about portable documents and communications was influenced by the case law of the European Court of Justice. With the case *Santos Palhota* the Court clarified that:

> Articles 56 TFEU and 57 TFEU do not preclude national legislation requiring an employer, established in another Member State and posting workers to the territory of the first Member State, to keep available to the national authorities of the latter, during the posting, copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period (para. 61 of the judgment)[61]

As regards the prior declaration of secondment, under paragraph 51 of the judgment, it was stated that:

> the Court has already held that a measure which would be just as effective whilst being less restrictive than a work licensing mechanism, prior checks or a confirmation of posting, would be an obligation imposed on an employer established in another Member State to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated

[61] ECJ Case C-515/08, *Santos Palhota*, 7 October 2010.

> duration of their presence and the provision or provisions of services justifying the deployment. Such an obligation would enable those authorities to monitor compliance with the social welfare and wages legislation of the host Member State during the deployment while at the same time taking account of the obligations by which the employer is already bound under the social welfare legislation applicable in the Member State of origin[62]

Furthermore, Directive 2014/67/EU confirmed the possibility for trade unions and other parties to lodge complaints and take legal and/or administrative action against the employers of posted workers if their rights are not respected (Article 11) and subcontracting liability (Article 12). The timeline for transposition into national law of the Enforcement Directive was 18 June 2016, thus more time is needed to evaluate improvements in administrative cooperation and exchange of information about posting workers. The "appropriate measures to enable the obligations" of the EU Directives on the posting of workers to be enforced, were taken by the Italian legislator under Legislative Decree 276/2003, which were both criminal and administrative sanctions established by Articles 18 and 19 of the Decree, as modified by Law 78/2014, but only as regards temporary agency work. Indeed, there are still no specific measures, criminal or administrative, addressing illegal cases of posting within the Italian legal system. Nevertheless, after a recent amendment made by Legislative Decree 8/2016, those sanctions were decriminalised as regards the case of illegal subcontracting (in violation of Article 29 para 1), or illegal posting of workers made by enterprises and the supply of workers made by non-authorised work agencies. Thus, the previous measures applicable in case of infringements of national law regulating the supply of employees made by work agencies, which were a financial penalty of 50 EUR (before Law 78/2014 the financial penalty was only of 5 EUR) per worker supplied by non-authorised agencies (Article 18 para 1) and per worker employed by an undertaking (Article 18 para 2), were transformed in administrative sanctions. The only penalty sanction which remained was the one provided for cases of supply or employment of under-age workers.

Further measures for cases of irregular supply of workers by temporary work agencies are established by Article 38 of Legislative Decree 81/2015. It is first provided that in the

[62] ECJ cases C-490/04, *Commission v. Germany* and C-319/06, *Commission v. Luxembourg*.

event of the absence of a written contract of employment between the agency and the user undertaking, the workers irregularly supplied shall be considered as user's employees. Secondly, in case of irregular supply of workers, as provided by Articles 31 para 1 and 2, 32 and 33 paragraph 1 letters a), b), c) and d) of Law Decree 81/2015, the supplied worker can ask to officially become a user's employee. Nevertheless, since the transposition of the Posted Workers Directive into national law, there was a lack of provisions enabling verifications and inspection on the effective enforcement of the obligation to guarantee equal treatment to posted workers. Indeed, only on 26 October 2016 the Italian Ministry of Labour and Social Affairs published the definition of operational standards and prior declaration of secondment, borne to service providers who post workers in Italy, as required by Article 10 para. 1 of Legislative Decree N. 136/2016.

The only applicable administrative sanctions established in case of illegal posting of workers, shall be notified to the employer within the meaning of Article 33 of Law 183/2010 (in Italian language, *diffida*). When the employer is reachable and identifiable in its State of origin, if applicable, the European Convention on the Service Abroad of Documents relating to Administrative Matters of 1977 shall apply[63]. Nevertheless, employers can be subject to sanctions for the non-compliance with payment of posted workers' salaries, only if charges are directly pressed by abused workers and this is one of the main reasons of the small number of sentences.

Within the Italian criminal legal system, there is another provision providing criminal sanctions for cases of illegal recruitment of workers. The provision of Article 603*bis* of the Italian penal code, introduced by Law 148/2011, refers particularly to illegal recruitment of agricultural workers who mostly are illegal migrants and third-country nationals. The new provision was inserted in the first section of Chapter III of Title XII of the Italian penal code, within the special part of the code devoted to crimes against individual freedom and it has

[63] If the State of origin of the employer has not signed or ratified the 1977 Convention of Strasbourg, it generally applies Article 142 of the Italian civil procedural code and Articles 30 and 75 of Presidential Decree 200/1967 (this is the case, for example, of Romania).

been recently renewed with Law 199/2016[64]. The right protected by the provision is human dignity[65], offended by the deprivation of liberty and the commodification of the human being.

Forced labour, as recognised authoritatively it is still an underestimated phenomenon and characterised by low numbers of charges and reports, but to unanimous opinion is also the most widespread form of modern slavery and less perceived. One possible explanation lies in the fact that, beyond the most extreme forms in which there is a substantial loss of freedom of movement and action of abused workers through coercive and violent methods, labour exploitation occurs in submerged, thus in difficult context to be monitored by competent authorities. Nevertheless, cases of illegal posting of workers by temporary work agencies when workers are exploited especially because of their retribution and employment conditions, such as the case of Romanian contracts stipulated with the Work Support Agency, could be covered by this criminal provision. However, the emergence of these forms of forced labour or severe labour exploitation is difficult because of the vulnerability and fear of the victims, the complicated investigations and sometimes the absence of valid legal instruments, both in terms of assistance of the victims and repression of the illegal activities[66].

One of the elements considered by Article 603 bis like an indicator of the exploitation of workers, is precisely a systematic payment of salary patently dissimilar to what is stated by law or by collective agreements, or otherwise disproportionate to the quality and quantity of work supplied. In the absence of a clear definition of what should be defined as a salary patently dissimilar to law or collective agreements, it is for the Italian Courts to find a clear application of this term to the various scenario of the grey labour market.

Further, as regards the mental element of the offence, as necessary for Article 603 bis to be applicable in a specific situation, a generic intent is required. It is therefore essential that the agent, in addition to the intention to behave in the way defined by the provision, shall be aware and decides to take advantage of the state of need of abused workers.

[64] Law 19/2016, 29 October 2016 replaced Article 603*bis* of the Italian penal code as introduced by Article 12 of Law 148/2011.
[65] See for the interpretation of situations of serious labour exploitation as a breach of a fundamental human right, Italian Court of Cassation section V, 24 September 2010, n. 40045 and section V, 13 November 2008, n. 46128, regarding Article 600 and 601 of the penal code.
[66] See comment on http://www.altalex.com/documents/news/2011/09/27/la-tutela-dal-grave-sfruttamento-lavorativo-ed-il-nuovo-articolo-603bis-c-p#_ftn1.

Another essential element for the illegal recruitment of workers to be addressed as criminal conduct punishable under Article 603*bis* of the Italian criminal code, is the advantage taken by the employer from the state of need (in Italian language, *stato di bisogno o di necessità*) of supplied workers. Those are elements characterising the situation of the illegally employed workers, which cannot be easily proved except for people who live in deprivation or mortal danger. Indeed, it is clearer the definition of the position of vulnerability, which concerns a "situation in which the person has no real or acceptable alternative but to submit to the abusive involved", as defined by Article 2 para 1 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[67]. Under EU law, it is stated that:

> Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs" (Article 2 para 3 of Directive 2011/36/EU). Furthermore, "the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used[68]

The term 'exploitation' however, denotes a range of work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning specifically remuneration, working hours, leave entitlements, health and safety standards and decent treatment. The definition of the term 'severe' is thus of the utmost importance in order to cover situations of labour exploitation which cannot be identified as slavery or cannot be related to trafficking activities. Generally, it can be said that this term refers to forms of exploitation of workers which are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, at first severe labour exploitation includes coercive forms of exploitation, such as slavery, servitude, forced or compulsory

[67] See Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA.
[68] Article 2, para 4 of Directive 2011/36/EU.

labour and trafficking (Article 5 of the Fundamental Rights Charter), as well as severe exploitation within the framework of an employment relationship when, for example, the right to fair and just conditions is not respected (Article 31 of the Fundamental Rights Charter).

In these cases – and because of an accumulation of different risk factors –, Member States are entitled to protection measures adopted by their competent authorities. The issue then is about finding a case of posting by temporary work agencies which could be brought in front of the Court as representing a case of illegal recruitment and exploitation of in need workers. The limited number of cases decided by Courts under Article 603*bis* of the Italian penal code is quite disquieting. An interesting case has been brought in front of the Court of Cassation[69] regarding the exploitation of posted workers by an entrepreneur, who was working in the reconstruction of buildings in the city of Aquila. Even if workers were found to be paid above minimum standards established by collective agreements, they had no right to holidays or illness leaves and were performing working hours up to 13 hours daily, the absence of clear elements of violence and abuse was one of the reasons discussed by the Court in order to decide on the application of Article 603*bis* of the Italian penal code, to these violations.

After the recent amendment of the criminal provision, however, the violence, menace or abuse does not constitute an essential element for application, but instead an aggravation of the sanctions provided. Thus, the few cases decided by the Italian Court of Cassation which were based on the absence of these elements of the criminal conduct could be open to better scenarios after the amendment. It must be recalled that, given the dangers of exploitative working conditions which are increasingly reported to be applied in posting situations, Member States have obligations of due diligence. The European Union and its Member States should raise awareness among citizens of the existence of a variety of forms in which severe labour exploitation takes place when people move either within or into the EU and "efforts to promote a climate of zero tolerance of exploitation of such workers"[70] should be further increased.

[69] See Case n. 16737, 21 April 2016, section V of the Italian Court of Cassation and also Case n. 14591/2014, section V of the Court of Cassation.
[70] See EU FRA Report, *Severe labour exploitation: workers moving within or into the European Union*, 2015, p. 15, available at: http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf.