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**POSTED WORKERS' RIGHTS IN THE EU LABOUR  
MARKET**  
**TOWARDS A UNIFIED EUROPEAN LABOUR LAW?**

**Ph.D. DISSERTATION**

**Theses**

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## I. Summary of the research

2020 bears with particular importance from the point of view of European labour market integration. On one hand, it marks the end of the Europe 2020 programme, adopted by the European Union in the wake of the financial crisis of 2007-08, aiming at re-establishing a “smart, sustainable and inclusive” European Union focussed on economic growth while promoting a tighter social and territorial cohesion. On the other hand, 2020 also coincides with the removal of last outstanding labour market access barriers, finally allowing all EU citizens – independently from their nationality – to benefit from all the EU economic freedoms, including the right to free movement and work within the Single Market. Deliberately, or by coincidence, 2020 is also the planned implementation date of the controversial revision of the posting of workers regulation, implementing the principle of “equal pay for equal work” not only with regards to the workers who accessed the labour market of another Member State out of their own initiative, but also for those who has been temporarily seconded by their employer, thus preserving their home employment relationship.

The regulation of postings has been the field of EU employment law which has developed the most dynamically in the past four decades, not only because of the amendment of codified law. From the massive politicisation of the Services Directive (2006/123/EC) and the uproar following the *Laval Quartet*<sup>1</sup> to the open political conflicts surrounding the adoption of the Enforcement Directive 2014/67/EU, the revision of the Posting of Workers Directive 96/71/EC (hereinafter “PWD 96/71”) has come to symbolise the tension between East and West, between free

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<sup>1</sup> The Laval Quartet includes the following cases of the CJEU: Case C-438/05, *Viking Line* [2007], ECR I-10779; case C-341/05, *Laval un Partneri* [2007], ECR I-11767; case C-346/06, *Rüffert* [2008], ECR I-01989; case C-319/06, *Commission v. Luxembourg* [2008], ECR I-04323.

trade and social protection, between employers and workers, and most of all, it became a symbol of the struggle about what the EU should become.

The conflict of powers and interests related to postings has been pending resolution for almost four decades. The phenomenon of the posting of workers has been conceived in the 1980s to foster the creation of the Single Market and the full integration of the market of services by facilitating the provision of services through own personnel if the service provider was based in a member state under transition period that has significantly lower wage/social security protection levels than the receiving member state. The institution of posting however became more visible after the 2004 Eastern enlargement and the 2007-08 financial crisis, as the appetite of the new accessing member states for cross-border mobility, as well as the need for non-traditional employment structures in view of cutting operational costs has shed the light on the phenomenon of posting as a viable alternative to conventional labour mobility.

This increase in postings, together with the financial crisis of 2007-08 and the liberalisation of the services market in 2009 revived the need to re-regulate/reform the requirements of provision of services through the deployment of own personnel (posting of workers) to avoid “social dumping”. Nonetheless, the reform of the regulation of postings at European level – from both substantive (labour law) and enforcement point of view – turned out to be a ‘political hornet’s nest’, given the complex and intertwined economic, political and EU constitutional issues it raises, touching the very essence of the European Union’s structure, such as the hierarchy between the core EU economic freedoms (in particular, the freedom of establishment, the freedom to provide services, and the free movement of people), as well as the distribution of competences between the EU and its member states.

## **II. Methodological approach of the dissertation**

The implementation of the Enforcement Directive 2014/67/EU (in force since June 2016), the adoption of the European Pillars of Social Rights and of the new Posting of Workers Directive (EU) 2018/957 in 2017 and 2018 respectively, as well as the establishment of the European Labour Authority in 2019 put back the spotlight on the issue of the posting of workers, reopening the discussions about the role of the European Union and the legitimacy of an even more harmonised European labour law and social policy.

### *a) Methodology*

The thesis is based on the EU primary and secondary legislation regulating the issue of posting of workers, including preparatory materials and working papers issued by the European institutions. The thesis also analyses the case law of the CJEU relevant to the question of posted workers, published since the 1960s to date.

The author also attempted to review the academic reviews and articles published in relation to the role and challenges related in general to labour mobility within the EU and also specifically to the question of posted workers and the legitimacy of a ‘Social Europe’ and within this, a uniform European labour law. Given the immense material published during the past four decades, the list of analysed literature is non-exhaustive, but includes the review of the most recent contributions on the issue of intra-EU posting of workers from the contemporary CEE, western and Nordic authors.

The form of methodology adopted throughout is therefore doctrinal.

### *b) The Format of the PhD*

The thesis is composed of six parts, beginning with the Introduction and ending with the Conclusions. The central Parts review the main

challenges encountered during the regulation of postings in the past 20 years, as follows:

(i) *Part 1: History and factors influencing the regulation of postings in the EU*

Part 1 provides a definition of the concept of ‘posted workers’ and highlights the difference in the freedom of movement of posted workers and EU workers in general. This Part also provides a high level overview of the history of the regulation of postings at EU level, from the Spaak Report paving the way to the creation of the European Economic Community to the adoption of PWD 96/71, and the shift towards a more social Europe since the early 2000’. Finally, this Part introduces the European Pillar of Social Rights and the principle of ‘equal pay for equal work’, both of which have significant impact on the latest regulation of postings at EU level.

(ii) *Part 2: Legal challenges in the regulation of postings in the EU*

Part 2 analyses the the challenges encountered during the regulation of the phenomenon of posting of workers, at both ‘macro’ and ‘micro’ level, shedding light upon the conflict of interest between the European Union and the Member States, lying in the background of the regulation of labour law and social matters. Namely, prior to the adoption of the Lisbon Treaty, the general position rejected the idea of a Europe-wide harmonisation of national labour law as a precondition for the integration of industrial markets, and focussed on the economic integration of Member States. Consequently, this Part 2 attempts to first identify the core issues and political interests that prevent a sensible reform of the posting regulation, and concluding with the main legislative responses adopted to this date.

(iii) *Part 3: The CJEU as the ‘regulator’ of the posting of workers in the EU*

Part 3 reviews the development of the legislative landscape almost two decades after the adoption of the PWD 96/71 and following the extensive of judicial review of the requirements applicable to postings within the EU by the CJEU. From the famous *Rush Portuguesa* case to the more recent *Martin Meat* ruling, this Part 3 reviews the main case law that established the position of ‘regulator’ of the CJEU with regards to establishing the ‘market access tests’ for postings and determining when a national legislation would restrict the EU economic freedoms.

(iv) *Part 4: Enforcing the principle of ‘equal pay for equal work’ in the EU*

Part 4 reviews the practical difficulties encountered when enforcing the principle of ‘equal pay for equal work’ across the Member States, following the review of the judicial and legislative solutions the CJEU and the European Commission has introduced as an attempt to mitigate the challenges arising from the complex nature of postings. Last but not least, this Chapter introduces the European Labour Authority, established as part of the EU Social Pillar reforms with the aim to overcome the national conflicts related to employment, including postings, under the supervision of an EU level body.

### **III. Main theses and research findings**

The thesis considers the wider issues demonstrated by connecting the research questions raised to the broader picture of the EU, thus coming full circle and reflecting on the primary motivation of the thesis.

The starting hypothesis of this thesis is that the phenomenon of posting of workers is not an isolated issue originated by the 2004 Eastern enlargement, but a complex legal challenge deriving primarily from the 2007/2008 financial crisis and the liberalisation of the services market

in 2009, which – as a consequence of the diversity in labour and social security regulations across the EU – have given a leeway to the raise of atypical employment forms, including amongst others the posting of workers. The issue of social dumping is therefore not exclusive to the ‘new’ Member States in the CEE region, operating with low levels of salary and social security contributions for historical reasons, and will not be resolved by the simple re-definition of the ‘remuneration’ due to posted workers or the duration of postings.

The increasingly visible intervention of the European Union in social matters, and especially in transnational employment situation raises the first question of the thesis:

- (i) *How have economic and political factors affected the regulation of postings in the EU?*

Already prior to the introduction of the first PWD 96/71, the critics of the European Commission’s proposal raised awareness on the complex nature of the issue of posting, being at the cross section of the freedom to provide services and the right of free movement of people, representing opposite interests (economic profitability v. social protection). Prior to the financial crisis of 2007/2008, the priorities of the European Union were clearly market-driven, subordinating the labour market regulations and social policies to the needs of fostering global competitiveness and economic growth. Since 2010, however, the EU has revisited its involvement in the social sphere, introducing measures supporting social inclusiveness, tackling regional labour employment disparities and fighting undeclared work, to balance the negative social consequences of the previous austerity measures.

Taking into consideration that the regulation of employment matters traditionally falls under the shared competence of the European Union and the Member States, with certain areas, namely pay, the right of association, the right to strike and the right to impose lock-outs, remain outside the competence of the EU and within the exclusive autonomy of the Member States, a second question needs to be analysed:



(ii) *What legal challenges have been identified in the application of the PWD during the past 20 years?*

The discrepancies in the regulation of the phenomenon of postings at both EU and national level, as well as disparities in the employment situation of posted workers compared to the local workforce often employed in the same or similar position led the European institutions to adopt, on the proposal of the European Commission, a series of new secondary legislation under the banner of a more ‘Social Europe’, namely:

- Administrative requirements on postings, to guarantee the enforcement of the EU economic freedoms, and at the same time, of worker rights, through the Enforcement Directive 2014/67/EU;
- New substantive requirements on remuneration and the extension of host country labour law to long-term postings through the new PWD 2018/957;
- A new *lex specialis* applicable to drivers posted within the framework of transnational transportation operations – one of the sectors more prone to competitive advantage from new Member States – also forms part of the currently debated EU Mobility Package regulation.

These new legislative acts and initiatives were warmly welcomed by the majority of the EU-15, typically by the ‘high wage’ western countries as finally implementing the principle of ‘equal pay for equal work’, putting an end to the crusade continued by some of the Member States (and especially France) against ‘social dumping’ and the unfair employment conditions of posted workers. Consequently, a third question is analysed:

- (iii) *What responses have the EU legislator and the CJEU introduce the challenges in the enforcement of the PWD and ensuring the principle of 'equal pay for equal work'?*

The CJEU's main case law published in relation to the posting of workers demonstrates how the EU is shaping some of the most sensitive fields of national labour regulation through the judicial activity of the CJEU in order to avoid the legislative intervention in order to solve the 'social trilemma' and define the competence of the EU vis-à-vis Member States in the most sensitive issue of postings: the definition of the minimum rates of pay / remuneration. The impact of the CJEU's landmark case law is clearly detectable in the final text of the new PWD 2018/957 adopted by the Member States.

Due to the nature of the legislative acts and initiatives introduced at EU level, however, the right and obligation to implement and enforce the applicable legislations has been transferred to the Member States, who have interpreted the guidelines received from the EU Institutions in line with their own internal legislation. The discrepancies between each national regulation have raised several difficulties with regards to the practical enforcement of the principle of 'equal pay for equal work', leading to a fourth question to be reviewed:

- (iv) *What are the challenges in implementing and enforcing the principle of 'equal pay for equal work' in the EU Member States?*

The list of control measures introduced into the Enforcement Directive was meant to codify the CJEU's case law, where the CJEU has tried whether different monitoring measures restrict the free movement of services in a way that cannot be justified. When looking at the national monitoring measures introduced to guarantee the application of the PWD 96/71, which have been under scrutiny of the CJEU, the majority of these measures were found to aim primarily at protecting the national labour markets from wage competition instead of ensuring the 'hard core' employment rights guaranteed by the PWD 96/71. Although the

implementation of the Enforcement Directive across all Member States resulted in the establishment of mandatory registration systems for foreign service providers/posted workers, these are not consistent, nor are they comparable across sectors and countries. While the European Commission's primary ambition with the introduction of the Enforcement Directive was to remove any obstacle to the freedom to provide cross-border services by enforcing deregulation at national level, Member States have moved in the opposite direction and introduced new requirements in order to monitor and enforce the proper application of the PWD 96/71. The national variations in administrative requirements and control measures applicable to posting result in cross-border problems and administrative burdens that are in fact perceived as restriction of the freedom to provide services.

#### IV. List of relevant own publications

Fekete, S. (2020) *Administrative requirements and control measures in the Posted Workers Enforcement Directive*, Working Paper, ELW Network (<https://elw-network.eu/administrative-requirements-and-control-measures-in-the-posted-workers-enforcement-directive/>).

Fekete, S./Morew, A. (2019a) *Posted Workers: Simplification of the notification process delayed? European Commission: Report on the application and implementation of the Posting of Workers Enforcement Directive*, Labor Law Magazine (<https://www.laborlaw-magazine.com/2019/12/10/simplification-of-the-notification-process-delayed/>).

Fekete, S. (2019b) Beszámoló a „Magyar ügyek az EU Bírósága előtt” c. konferenciáról, *Jogtudományi Közlöny*, Vol. LXXIV No. 19 (October 2019), p. 419.

Fekete, S. (2018a) The Challenges of Defining Posted Workers, *Hungarian Labour Law E-Journal*, Vol. 2018/1 ([http://hlj.hu/letolt/2018\\_1\\_a/A\\_02\\_FeketeS\\_hlj\\_2018\\_1.pdf](http://hlj.hu/letolt/2018_1_a/A_02_FeketeS_hlj_2018_1.pdf)).

Fekete, S. (2018b) Gondolatok egy találkozó margójára – Emmanuel Macron és a kiküldött munkavállalók, *Themis* (June 2018), pp. 58-79 ([http://epa.oszk.hu/02300/02363/00029/pdf/EPA02363\\_themis\\_2018\\_jun\\_058-078.pdf](http://epa.oszk.hu/02300/02363/00029/pdf/EPA02363_themis_2018_jun_058-078.pdf)).

Fekete, S. (2018c) Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit, *ELTE Law Journal*, No. 2018/1, pp. 73-87 ([https://eltelawjournal.hu/wp-content/uploads/2019/07/06\\_Fekete\\_.pdf](https://eltelawjournal.hu/wp-content/uploads/2019/07/06_Fekete_.pdf)).

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