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RE-EMBEDDING THE TRANSNATIONAL EMPLOYMENT RELATIONSHIP – CAN THE COMMISSION PROPOSAL DELIVER?

Aukje A.H. van Hoek

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Summary

In this paper, I explore the debate on cross-border posting of workers in the EU from the perspective of '(dis)embeddedness'. Posting of workers profoundly challenges the embedding of the labour relationship itself and the market on which the work is performed. In this contribution I will analyse different aspects of the concept to see whether it can provide new insights into the problem of regulating this controversial issue. In doing so, I will look into the following questions: Which rules and mechanisms currently determine the level of protection of an EU worker who is hired to perform services in another Member State? How can these mechanisms be understood from the perspective of embedding? Does the concept shed new light on the controversy surrounding posting of workers? Does it help to predict the success of the current proposal?

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Re-embedding the transnational employment relationship – can the Commission proposal deliver?

Aukje A. H. van Hoek – University of Amsterdam – 2016 – a.a.h.vanhoek@uva.nl

Stating the case.

In March 2016 the Dutch trade union FNV made headlines with its action against a Dutch shipyard, located in Groningen, one of the northern provinces of the Netherlands. This shipyard had replaced most of its Dutch workers by Romanian ones, employed through a Dutch temporary work agency. Making use of the A1 declaration on social security and some special arrangements of Romanian law, the Dutch shipyard was able to considerably reduce its labour costs. According to the FNV the price difference could be as high as Euro 6000 per worker per month. The difference in monthly take-home pay between the Dutch and the Romanian workers was much smaller - as hardly any taxes were paid over the latter's salary - but still considerable when calculated on an hourly basis.¹ The FNV has announced it will sue both the work agency and the shipyard for using a fake construction to undermine both the Dutch collective agreement and the Dutch social security system.

The case is nothing special as regards the situation of the foreign workers, who are largely isolated from the environment in which they work as they are housed by the employer in special accommodation, have different work hours than the local workers, and as a rule don't speak the local language. Situations like these have been reported in shipyards, the meat packing industry, agriculture and construction in different member states.² What makes this case special is the reaction of the trade union to the claim of the employer that employment schemes like these are necessary for the industry to survive in an environment of heavy international competition. The FNV responded that if a company can only survive when it pays its workers according to Romanian standards, the company should move to

¹ Information based on <http://www.volkskrant.nl/economie/-volstrekt-malafide-praktijken-op-nederlandse-scheepswerven~a4257198/> the newspaper mentions Euro 2400 for the Dutch worker and Euro 1600-2200 for the Romanian one, but the hours worked differ considerably (38 against 56). See for an overview of labour costs also Annex IV to the Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services COM(2016)128 final, SWD(2016) 52 final.

² See for example N. Lillie, I. Wagner and L. Berntsen, Chapter 15, Posted Migration, Spaces of Exception, and the Politics of Labour Relations in the European Construction Industry in: M. Hauptmeier and M. Vidal (eds), *Comparative Political Economy of Work Critical Perspectives on Work and Employment*, Palgrave 2014, p. 317; I. Wagner, *Posted Work and Deterritorialization in the European Union A study of the German Construction and Meat Industry*, PhD thesis University of Jyväskylä 2015, p. 24.

Romania. That way at least the employer would fully partake in the Romanian social system and its workers would be able to enjoy their social and family life in the place where they belong.

A trade union advocating offshoring: removal of employment from the territory – that's new indeed. But the principled position taken by the FNV in this case is that the union opposes – and from their position should oppose – the dis-embedding of employment relationships.

In this contribution I explore the problematic of the posting of workers within the EU from the perspective of 'embeddedness'. Does this perspective provide new insights in the problem? The regulatory mechanisms which apply to posted workers are placed in the framework of 'embedding' – thus shedding more light on the concept itself. Reversely, the concept is used as a tool to understand the current problems and evaluate the solution proposed by the commission in its proposal for revision of the posting of workers directive.

Embeddedness in the face of international mobility of workers and services

The term 'disembedded employment' carries with it a clear image of dislocation – of taking the employment relationship out of its wider social context. The term borrows from political economy and refers to the work of Karl Polanyi, Mark Granovetter and John Ruggie.³ The term 'embeddedness' was coined by Polanyi in his seminal work 'The great transformation' of 1944.⁴ The main thesis underlying the concept is that the 'economic' is not self-steering and self-contained but is embedded in a larger institutional framework, a set of rules and practices that have been put in place through a social and/or political process.⁵ In sociology the term is used in a descriptive manner – as a tool to study the real interactions and incentives that shape the market. In the work of Ruggie et al on embedded liberalism the focus is more normative and turns to the interaction between market liberalization and political and social intervention. In the Polanyian paradigm any attempt to liberate the market from the constraints of regulation and social steering will be met with a regulatory counter movement. Hence the commodification of labour in the EU – the fact the labour mobility is part and parcel of the market freedoms – is met by efforts to contain this 'market' by some form of regulation which should guarantee that transnational economic activity is not only beneficial to (one of) the participants, but to society at large.

³ K. Polanyi, *The Great Transformation: the political and the economic origins of our time* Beacon Press 2001 reprint from 1944; Mark Granovetter, Economic action and social structure: the problem of embeddedness (1985) *American Journal of Sociology*, pp. 481-510 ; John Ruggie, International regimes, transactions, and change: embedded liberalism in the post-war economic order (1982) 36 *International Organization*, pp. 379-415 and Taking embedded liberalism global: the corporate connection *Institute for international law and justice working paper 2003/2* NYU school of law.

⁴ Kari Polanyi Levitt, Toward Alternatives: Re-Reading The Great Transformation, *Monthly Review* 1995, p. 3.

⁵ The term has a slightly different meaning in the different schools of sociology and social economy: see G. Krippner et al, Polanyi Symposium: a conversation on embeddedness (2004) *Socio-Economic Review*, p. 109-135; G. Dale, Lineages of Embeddedness: on the antecedents and successors of a Polanyian concept (2011) 70:2 *American Journal of Economics and Sociology* 306-339; J. Caporaso and S. Tarrow, Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets (2009) 63 *International Organization*, 593-620.

In the EU, even at this more advanced stage, social regulation is largely left to the member states. The EU has adopted measures in the area of restructuring, equal treatment and safety and health.⁶ But the more distributive function of social law (wage levels, taxation and premium setting, social benefits and social protection) is exercised at the national level. Despite calls for a 'European minimum wage',⁷ the EU doesn't and cannot under the Treaties intervene in wage setting and social protection.⁸ Also the sensitive area of industrial relations falls outside of the competences of the EU. Accordingly the national systems are responsible for embedding the market on which personal labour is traded for income.

Both the production of goods and services and the provision of labour itself are reined in by the national systems of labour relations, labour law, tax law, social security and social protection. This leads to different levels of embeddedness or – to use another common term – to varieties of capitalism.⁹ Hence, in the case of transnational employment the question of embeddedness takes on an element of geographical distribution: in which system or systems should the transnational employment relationship be embedded? This question is linked to a more fundamental one: to what extent does the liberalization of services undermine the regulatory powers of the state as such – reducing the impact of both home and host state in the case of transnational employment?

From the literature on migration we learn that migration leads to different degrees of 'belonging' to, of solidarity with and involvement in the home state and the host state respectively. Migrants may maintain a strong link with the home state, or rather lose interest in their country of origin. They may acquire a sense of belonging in the host state, or rather remain detached from it. Put on different axis, this leads to four types of migrational belonging – from the double bond of the integrated migrant who also maintains close ties with the home state to the footloose new nomad who doesn't feel integrated in any one society.¹⁰

A similar pattern can be discerned with regard to the employment relation proper.¹¹ The long term migrant worker enters the labour market of the host state and enters into an employment contract there. This contract will exclusively be regulated by the labour laws of the host state – even when the

⁶ The EU social acquis, Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on an European Pillar of Social Rights, SWD(2016)50 final.

⁷ See for example T. Schulten, *Contours of a European Minimum Wage Policy*, Friedrich Ebert Stiftung 2014, <http://library.fes.de/pdf-files/id-moe/11008.pdf> and http://www.debatingeurope.eu/2014/02/13/should-the-eu-set-a-minimum-wage/#.WEKt_n2MWtc

⁸ See Article TFEU 153(5) TFEU.

⁹ G. Menz, *Varieties Of Capitalism And Europeanization, National Response Strategies to the Single European Market* Oxford University Press 2005; A. Ebner, Transnational Markets and the Polanyi Problem, in Chr. Joerges and J. Falke (eds), *Karl Polanyi – Globalisation and the Potential of Law in Transnational Markets*, Hart Publishing 2011, p. 34.

¹⁰ See e.g. L. Zimmermann, K. Zimmermann and A. Constant, Ethnic Self-Identification of First-Generation Immigrants. 2007 *International Migration Review* 41:769–781, p. 773 who use the term 'marginalized' for the group that doesn't feel integrated in either home or host state.

¹¹ Compare Berntsen, L.E., Caro, Erka, Lillie, Nathan, & Wagner, Ines (2015). Posted migration and segregation in the European construction sector. *Journal of Ethnic and Migration Studies* available through https://www.academia.edu/8612506/Posted_Migration_and_Isolation_in_the_European_Construction_Sector

migrant may still be linked to the home state for social security or tax purposes. The employment contract of the truck-driver who passes through a country between his home state and the end destination of the goods, however, will have no or hardly any relevant connections with the transit state. Some labour relations are even scattered to such an extent that they do not seem to belong anywhere – the employment through manning agencies of seamen from cheap labour countries for work on ships flying a flag of convenience being a case in point. These employment relations can only be effectively embedded in a transnational legal order – a role which for maritime labour is performed by the maritime labour convention of 2006.¹² Currently no comparable mechanism exists in any other sector of the economy, either at global or European level.

Where the sense of belonging of the migrant is very personal, the embeddedness of his economic activities has a distinct legal aspect. Here the coordination of legal systems through private international law, international tax law and international social security comes into play.¹³ All these systems do – to some extent – distribute the power to regulate the transnational employment relationship over the countries with a relevant connection to the case at hand.

The normal ‘topos’ of the employment relationship: the place of work.

With regard to law applying to an international employment relationship an important role is played by the Rome I Regulation. This regulation determines the applicable law to contractual obligations. Employment relations are treated as weaker party contracts and submitted to a special protective conflicts rule. Under this rule, the parties themselves may choose the law to be applied to their contract. This choice, however, cannot deprive the employee of the protection afforded to him by mandatory provisions of the law applicable in absence of such choice. The latter law, commonly referred to as the ‘objectively applicable law’ is found by determining the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. Hence the employment contract is embedded in the legal system of the habitual place of work, even during temporary postings abroad. By referring to the *habitual* place of work, rather than the *actual* place of work, this provision stabilizes the law applying to the employment contract: during a temporary posting, the law of the home state remains applicable. The host country may regulate some aspects of the performance of the contract, but its law is not *lex causae* - the law governing the contract as such.

The regulation contains no clear indication as to the question when a posting stops being temporary, making the host country the new ‘habitual place of work’. Thus far, any attempt to specify this term failed, though the preamble to the Rome I regulation does contain some indications as to the elements to be taken into consideration. Hence the regulation does not include a time limit for temporary postings, which may have a duration of months and even years. All that time the host state is not fully ‘in charge’ of the employment relationship evolving within its territory.

¹² N. Lillie, The ILO Maritime Labour Convention, 2006: A new paradigm for global labour rights implementation, in: K. Papadakis (ed) *Cross border social dialogue and agreements: An emerging global industrial relations framework?* Geneva: International Labour Office 2008

¹³ Compare A. van Hoek & M. Houwerzijl (2016). Where do EU mobile workers belong, according to Rome I and the (E)PWD? In H. Verschueren (Ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong* (Social Europe series, 36), Cambridge: Intersentia 2016, pp. 215-253.

Also other elements of the regulation impact on the regulatory power of the state in which the work is actually performed. Article 8(3) Rome I contains an alternative reference rule in case the country where the work is habitually carried out cannot be identified. In that case the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. This rule will not be used much as the ECJ has developed a very wide concept of the 'habitual place of work' which would cover most employment situations. Only peripatic workers, whose work has no stable link to any jurisdiction, seem to be covered by this provision. From a legal perspective these cases represent the penultimate form of disembeddesness.¹⁴

A more important deviation is caused by the interpretation by the ECJ of Article 8(4) Rome I. This provision declares that both pre-established connecting factors – habitual place of work and engaging place of business – may be set aside where it appears from the circumstances as a whole that the contract is more closely connected to another country, in which case the law of that other country shall apply. In the *Schlecker* case this rule was applied to a contract that had been performed in the Netherlands for over ten years. The parties and the courts dealing with the case were in agreement that the habitual place of work of the employee was located in the Netherlands. Yet in the end Germany was deemed to have a closer connection with the contract, mainly because both employer and worker were resident there and the worker was (voluntarily) submitted to the German system of taxes, social security, pension and insurance schemes. One could argue that in this case the wider social embedding of the employee clearly pointed to Germany. However, the performance of the contract was strongly linked to the Dutch labour market. As the multilateral choice of law rules designate one country's – and only one country's - law to apply, a choice has to be made between these two types of embedding.

The *Schlecker* case draws our attention to the importance of the social security and tax position of a mobile worker. In the EU the application of the national social security legislation is coordinated by Regulation 883/2004.¹⁵ This regulation subjects the employee to the social security legislation of the member state in which she performs her work (Article 11 paragraph 3 sub a). Like the Rome I Regulation, Regulation 883/2004 contains a special rule on temporary posting which aims to stabilize the legal position of the posted worker for the benefit of both worker, employer and social security institutions.¹⁶ According to Article 12 paragraph 1 "A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months¹⁷ and that he/she is not sent to replace another

¹⁴ See Van Hoek/Houwerzijl 2016 p. 231: the provision offers in a manner of speaking a 'home for the homeless'.

¹⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Official Journal of the European Union L 166 of 30 April 2004). Corrigendum 7 April 2004, OJ L 201/1

¹⁶ R. Cornelissen, *Conflicting Rules of Conflict: Social Security and Labour Law in: In H. Verschueren (Ed.), Residence, employment and social rights of mobile persons: on how EU law defines where they belong* (Social Europe series, 36), Cambridge: Intersentia 2016, pp. 255-284 p. 267.

¹⁷ A similar rule in the Dutch law on the application of social security regulations limits temporary postings to six months: *Besluit uitbreiding en beperking werknemersverzekeringen 1990* Article 14. The period of non-coverage

person.” The regulation contains special provisions inter alia for seamen, civil servants and people normally working in more than one member state. And finally, Article 16 allows for an exception to the mandatory coordination rules contained in the regulation in the interest of certain persons or categories of persons. This exception needs to be approved by the competent authorities of the Member States concerned.

It is important to note that based on the facts of the case, an exception under Article 16 must have been granted in the Schlecker case as at the time of the dispute the employee had been employed in the Netherlands for much longer than 24 months. Though in the past long extensions of home country coverage were granted under Article 16,¹⁸ currently the Dutch competent authority SVB would not support such an arrangement. The SVB checks whether the posting indeed has a temporary character, whether there are still sufficient links with the home state and whether a change of applicable law would be detrimental to the insurance position of the employee. In any case, no exception is granted if the expected duration of the posting is more than 5 years.¹⁹ Other countries may have a more lenient policy for specific types of workers or specific situations.²⁰ For postings in the context of the free provision of services in the EU, these extensions are rarely needed as most postings stays well within the 2 year limit mentioned in Article 12.²¹ Accordingly in those cases the social security system of the country of origin will remain applicable during the posting.²² Interestingly enough, the Dutch authorities have noticed a shift within the A1 declarations from short term posting to situations in which the employee is said to habitually perform work in more than one country.²³ If in the latter situation 25 % of working time is spent in the country of residence of the employee, the law of that country will apply.²⁴

for postings to the Netherlands under a foreign insurance scheme can be extended to 2 years (Article 15). The maximum duration for temporary posting under the US-Polish treaty is 5 years:

https://www.ssa.gov/international/Agreement_Texts/Poland.html. Dito for US-German relations:

https://www.ssa.gov/international/Agreement_Texts/germ_agt.html

¹⁸ P. Schoukens, D. Pieters, The Rules within Regulation 883/2004 for Determining the Applicable Legislation, *European Journal of Social Security* 2009, p. 87.

¹⁹ Sociale Verzekeringsbank (social security institution)

https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D2_H1_S2_P8

²⁰ Special categories include CEO's and musicians. Specific situations exist in the relationship between Sweden and Denmark, between the Czech Republic and Slovakia, and between Cyprus and Greece. See for all examples Y. Jorens and J. Haidú, Tress – *Training and Reporting on European Social Security*, VC/2007/0188, Final report 2008.

In 2014 20% or more of the PDs A1 issued by Latvia, Finland and Malta relate to common agreements: European Commission / J. Pacolet and F. De Wispelaere, *Posting of workers - Report on A1 portable documents issued in 2014*, December 2015, p. 11. See also the special agreement between The Netherlands, Belgium, France, Luxembourg and Germany with regard to shipping on the river Rhine, *Staatscourant* 2011, 3397.

²¹ The average duration is estimated at 103 days: Pacolet/ De Wispelaere 2014 p. 8 and 29.

²² Problems do however arise with regard to – inter alia – consecutive posting in which each posting is relatively short but the service provision as such lasts longer than 24 months, letter box companies and other instances in which the employer does not perform economic activity in the member state of origin, and hire for posting (situations in which the worker is employed for work abroad and there is no previous employment in the member state of origin).

²³ Compare Pacolet/ De Wispelaere 2014, p. 8 and p. 11.

²⁴ Article 13 Reg 883/2004 and European Commission, Social security for posted workers – practical guide on the applicable legislation December 2013, accessible through http://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm.

With regard to taxation the EU doesn't provide any coordination mechanism. National tax law and bilateral treaties form the basis for (the avoidance of double) taxation of wages. A much followed model is the OECD Model Tax Convention on Income and on Capital 2014 which contains a rule on taxation of income from employment in Article 15. As a rule such income may be taxed in the country in which the work is actually performed. An exception is made for postings lasting less than 183 days in any 12 month period, provided the wage costs are not borne by an establishment of the employer in the state of posting.²⁵ This exception is not made for the benefit of the employee but rather protects the employer against double fiscal burdens and loss of tax deductions.²⁶ In the scheme of the OECD Tax Convention the tax position of the employing enterprise is a crucial factor in deciding on the tax position of the employee.²⁷ Unlike Regulation 883/2004, the Model Convention does not contain a special rule with regard to long term posting. But, again, the Schlecker case suggests that such long term exception are (or were) in fact made.²⁸ But again these extensions are hardly relevant for temporary postings in the context of the EU free movement of services. With the average duration of posting being 4 months, these postings stays well within the 183 days limit. More important, however, is that both home state and host state may grant special tax reductions in case of cross-border employment. These mechanisms compensate the employer for the extra costs of sending workers abroad but also grant him a transnationality bonus. In the FNV case described in the introduction, the Romanian employer hardly paid any taxes and premiums in Romania because of a special deduction for costs – leaving the worker with only a taxable income that was below minimum standards even in Romania. The deductions are a type of export subsidy on labour. These subsidies increase the competitiveness of the national industry but come at the expense of the tax and premium base – as well as the insurance position of the posted workers.

This overview of the existing coordination mechanisms demonstrate that there is a clear acknowledgement that the place where the work is performed is the normal topos of embeddedness of the employment relationship: the importance ascribed to the place of work in private international law finds a parallel in the coordination rules with regard to taxation and social security in cross-border cases. However, in all systems short changes in the actual place of work do not alter the 'habitual place of work'. This creates a level of continuity with regard to the applicable law. In terms of embeddedness: short trips abroad do not disrupt the long-term embeddedness of the individual worker and his employment relationship in the country of origin. The three coordination systems all have their own cut-off point for temporary postings and their own loopholes for extension of the posting period, but the

²⁵ The calculus is based on days spent within the territory of the state in which the work is actually performed – see OECD comment to Article 15. http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/commentary-on-article-15-concerning-the-taxation-of-income-from-employment_9789264239081-49-en#.V49vKk1f3cs#page9 C(15) paragraph 5. See for the adoption of this rule in a tax treaty: Article 15 of the US-German convention for the avoidance of double taxation 1990 - <https://www.irs.gov/pub/irs-trty/germany.pdf>.

²⁶ Commentary C(15) paragraph 6.2.

²⁷ http://download.belastingdienst.nl/belastingdienst/docs/verdragsstaten_ib_ingezetenen_ib4001z4fd.pdf

²⁸ See also <http://www.awvn.nl/themas/internationale-arbeidsmobiliteit/informatie/30-regeling>

mechanisms are similar.²⁹ Yet already here, a slight difference in orientation is evident. Choice of law seeks to embed the contract, whereas the other two mechanisms tend to focus on the worker, and to some extent on the employer. But all lead to a situation in which not all work performed within the territory of country A is subject to A's laws, be it employment laws, tax laws and/or social security.

From migration controls to conflict of laws

It is important to realize that the Rome I Regulation applies to both intra-EU cases and cases with external elements. But the context in which the labour migration takes place is radically different. Outside the context of the internal market labour migration can be and often effectively is controlled by both the home state and the host state. Before accession to the EU, several central and Eastern European countries actively regulated the employment of nationals in other countries both through a system of emigration permits and through the application of home state law to the contract of expatriated citizens.³⁰ Accession blocked both ways of regulation, as the permits were not compatible with the free movement provisions of the TFEU, whereas the national conflict of laws rules were succeeded by the rules of the Rome Convention (currently replaced by the Rome I Regulation) and the PWD.³¹ The combined effect was a sharply reduced influence of the home state on outgoing labour migration. Reversely the old member states, upon accession of the new member states, could no longer control labour migration from these countries to their territory. Engblom describes how the Swedish trade unions are actively involved in the granting of work permits to non-EU workers. They are not only involved in setting the number of permits granted, but also in safeguarding the working conditions these mobile workers should enjoy. The conditions under which the permits are granted include respect for the Swedish collective agreements applicable in the sector. As a result non-EU labour migration to Sweden is very much embedded in the Swedish system of industrial relations. Other old member states likewise control both the influx of foreign workers themselves and the conditions under which they are employed - though in other cases the involvement of the unions might be less pronounced or absent.³² Upon accession, this control was lost with respect to all types of migration of the citizens of the new member states as well as in case of intra-EU posting of non-EU workers. It is replaced by a less than perfect coordination system which is largely based on the interchangeability of national systems.

²⁹ See also E. Voss, M. Faioli, J.-P. Lhernould, F. Iudicone, *Posting of Workers Directive – current situation and challenges*, Study for the EMPL Committee, June 2016, IP/A/EMPL/2016-07 (further referred to as EP Study 2016) p. 25-26. [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU\(2016\)579001_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.pdf)

³⁰ See for Poland A. van Hoek / 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, Contract Number VC/2009/0541, Final Report March 2011, p. 17. Compare outside the EU the work of the Philippine Overseas Employment Administration <http://www.poea.gov.ph/>.

³¹ At the time of accession of the MEE-countries, the PWD was already implemented in the other EU Member States. The applicable law rules were contained in the Rome Convention, which was superseded in 2009 by the Rome I Regulation.

³² Compare also the system imposed by Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. This directive provides in its Article 5(4)(b) that third country nationals must be given a remuneration "not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions" to avoid distortion of competition between companies having (or not) subsidiaries in different Member States.

In truth, the national systems of labour law are anything but interchangeable – especially with regard to wage levels. These differences in regulation between the Member States in combination with the freedoms inherent to the internal market create the possibility of regulatory arbitrage: economic actors may use their economic freedoms to change the law applying to them. When a company relocates its production facility from country A to country B, this will affect the labour law and social security position of the workers employed within the facility. This type of regulatory arbitrage³³ as a result of market integration is widely accepted. The same phenomenon is much more controversial when the regulatory arbitrage plays out within a single Member State.³⁴ There are several ways in which employers may engage in regulatory arbitrage without actually changing the place of work. The main ones are

1. Establishing a separate legal entity in a Member State with low labour costs and using intra-company transfers or the (intra-company) provision of services to deploy workers in the host state
2. Subcontracting to a foreign service provider established in the low cost country
3. Hiring of manpower through a foreign temporary employment agency established in a low cost country.

These constructions, in combination with the coordination rules described above, lead to legal distinctions between groups of workers that don't necessarily match the facts on the ground. For example: for choice of law purposes there is a big difference between Romanian workers who are employed at the shipyard through a Dutch temporary work agency – they qualify as migrant workers and their contracts are governed by Dutch law – and similar workers employed through a Romanian agency – who may be deemed to be posted worker or otherwise employed under Romanian law. The workers themselves might not even realize they are in different legal positions.³⁵ They might be equally disinterested in the Dutch labour market and the Dutch system of industrial relations. And the impact of their employment on Dutch market is identical. But legally the posted workers are set apart from the work force of the host state by the coordination rules described above. In the literature this effect is

³³ The term 'regulatory arbitrage' refers to the possibility that economic actors use differences between legal systems to create a competitive advantage. 'Regulatory competition' occurs when as a result of the arbitrage, countries adapt their laws to change their position on the 'market of legal systems'. See E.M. Kieninger, 'Competition between Legal Systems', in: J. Basedow, K. Hopt & R. Zimmermann (red.), *Max Planck Encyclopedia of European Private Law*, Oxford: Oxford University Press 2012, p. 301 and A.A.H. van Hoek, *Shoppen in het recht: het vennootschapsrecht en aanpalende rechtsgebieden 'ontbundeld'*. In: F. E. J. Beekhoven van den Boezem, & A. A. H. van Hoek (Eds.), *Forumshopping*. Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht; No. 2014). Zutphen: Uitgeverij Paris pp. 59-91 at 60. See also N. Lillie, I. Wagner and L. Berntsen, Chapter 15, *Posted Migration, Spaces of Exception, and the Politics of Labour Relations in the European Construction Industry* in: M. Hauptmeier and M. Vidal (eds), *Comparative Political Economy of Work* Critical Perspectives on Work and Employment, Palgrave 2014, p. 319.

³⁴ L. Calmfors, G. Dimdins, M. Gustafsson Sendén, H. Montgomery and U. Stavlöt, *Why Do People Dislike Low-Wage Trade Competition With Posted Workers In The Service Sector?*, Institute for International Economic Studies Seminar paper No. 771 <http://www.iies.su.se/>; H. Verschueren, Chapter 4 – The Territorial Application of Labour Law in the EU Internal Market in: J. Buelens and M. Rigaux (eds), *From Social Competition to Social Dumping* Cambridge: Intersentia 2016, p. 63-83 at 81.

³⁵ L.E. Berntsen, *Agency of Labour in a flexible pan-European labour market: a qualitative study of migrant practices and trade union strategies in the Netherlands*, PhD thesis Groningen SOM research school 2015 and I. Wagner, *Posted Work and Deterritorialization in the European Union*, PhD thesis Groningen SOM research school 2015.

described as the creation of ‘extra legal zones’, ‘islands of foreign law’ or ‘odd transnational deregulated space, outside the neo-corporatist or statist system of labor market regulation of the host country, while physically very much on the territory of this receiving country.’³⁶ Some of these descriptions use a unilateral host-state perspective on dis-embedding. They are concerned with the question of regulating the labour market as such and the jobs that are part of that market. In that perspective, posting of workers is but one of the possibilities the employer can avail himself of when he wants to escape the regulatory framework of the place of work. The effect on the local labour market is thought to be similar to the replacement of workers under a contract of employment by (mock) self-employed workers or the use of undeclared work. In this strictly unilateral perspective, the application of foreign law to the contract is put on a par with an absence of labour standards. However, as the term ‘extra legal zones’ suggests and the tax law example demonstrates, the transnationality of the employment relationship may indeed decrease the level of embeddedness of the individual relationship as well. How did this dis-embedding come about and how did the member states of the EU respond to it?

Re-embedding the transnational employment relationship – the early days

The late 80’s and early 90’s were a special period for the topic of transnational employment. In 1986 Portugal and Spain acceded to the European Economic Community. Aware that the wage difference between these two new member states and the original member states was considerable, the accession treaty contained a transition period in which the free movement of workers was still restricted, whereas the provision of services was already liberalized. This partial liberalization led to the famous *Rush Portuguesa* judgment of 1990 in which the court of justice stipulated that the movement of workers in the context of the provision of services is part of the latter freedom. Posted workers do not – as a rule – enter the labour market of the host state and therefore cannot be treated as migrant workers.³⁷ Accordingly their employment relationship is not fully submitted to the laws of the host state. But the influx of these workers and the conditions under which they are employed are no longer controlled by immigration rules either. In some host states this created a gap in the regulatory framework which economic circumstances would soon expose.

The *Rush Portuguesa* judgment was given against the back drop of the fall of the Berlin wall in 1989, followed by the reunification of Germany 1990. This geopolitical event led to a construction boom in Berlin. However, due to massive offshoring of construction activities to subsidiaries in other Member States the growth in building activities did not benefit German construction workers, unemployment levels amongst those workers reaching a peak in the early 90’s.³⁸ This offshoring was made possible by the completion of the Single market in 1992 and underpinned by the Rome Convention, which entered into force in 1991.³⁹

³⁶ See for these terms, Menz 2005 p. 79 and 198-199.

³⁷ Menz 2005 p. 3.

³⁸ Menz 2005, p. 2. See also Bundesanstalt für Arbeit, Arbeitsmarkt 1991, p. 667, 668, 681.

<https://statistik.arbeitsagentur.de/Statistikdaten/Detail/199112/ama/heft-arbeitsmarkt/arbeitsmarkt-d-0-pdf.pdf>

³⁹ Rome I: only overriding mandatory provisions – upsets choice of law system- justification needed

IM: obstacle to free provision of services – justification needed

In a book published in 2005 Georg Menz describes the re-regulatory responses in nine northern member states. All of these states were characterized by a thick embeddedness of the employment contract, but the precise response to the opening up of their labour markets depended heavily on the national industrial relations system and the power balances within that system.⁴⁰ Some countries effectively protected their labour markets by imposing local wage standards on the foreign companies. Other countries, such as the Netherlands and Germany, had a more liberal reaction, allowing for the creation of a multi-tiered labour market in which the first tier consists of nationally embedded employment and the second of posted workers, which enjoyed partial embedding at best.⁴¹ The protectionist position is further divided depending on the role played by the social partners. At the time Menz conducted his research Denmark and Sweden were among the most effective countries when measured against the standard of being able to offer workers posted to the territory equivalent protection to workers with purely domestic contracts. Whereas the responses in Austria, Belgium, France and the Netherlands operated largely within the rules of private international law, Denmark and Sweden relied on the system of industrial relations to re-embed transnational employment. This voluntary system, which operated outside the context of private international law, was more encompassing than the more legalistic responses in the other member states.

Both the Rome Convention and the EEC-Treaty allowed the host states to apply their mandatory rules of labour protection – and in particular the rules on minimum wages – to workers posted within the territory. The concept of overriding mandatory provisions in Article 7 Rome Convention provided the legal base for this. This provision is now laid down in Article 9 of the Rome I Regulation. According to Article 9, first paragraph “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.” This definition was ‘borrowed’ from the CJEU in the *Arblade* case which dealt with Belgian rules of labour protection (*lois de police*). Application of overriding mandatory rules compromises the harmonising effect of the Rome I Regulation. This means that Article 9 should be interpreted restrictively. However, it can be inferred from the case law of the CJEU that also according to the CJEU the protection of workers could be an essential interest meriting the use of Article 9.⁴²

Labour law traditionally doesn’t only have a protective character, but also a regulatory one. It regulates the extent to which employment conditions may shape the competition on the market for goods and services. Moreover, labour law is part of a system of industrial relations and a key element of the system of redistribution of the social welfare state. As a result, several countries traditionally have applied their

⁴⁰ *Varieties of capitalism and Europeanization*, Oxford University Press 2005 p. 8.

⁴¹ Illegal employment would be a third tier. Menz 2005, 127. Lillie/Wagner/Berntsen (Posted migration) 2014 p. 323.

⁴² CJEU 23 November 1999, C-369/96, (*Arblade*) ECR 1999, I-8453, ECLI:EU:C:1999:575. The Rome I Regulation is the direct successor of the Rome Convention. The Convention contains rules on overriding mandatory provisions in its Article 7. Though the provisions are not identical in text, the concept ‘of overriding mandatory provisions’ in both provisions may be equated: CJEU 17 October 2013, C-184/12 (*Unamar*), ECLI:EU:C:2013:663. According to inter alia the EP study 2016 p. 22, the PWD provides a binding interpretation of Article 9 Rome I.

labour law on a strictly territorial basis.⁴³ Though the application of host state rules is likely to hamper the free provision of services, the court of justice acknowledged in a series of cases that such restrictions could be legitimate for the protection of workers as long as the rules are transparent and applied in a non-discriminatory manner, and the application is proportionate and effectively increases the protection of the workers concerned. The latter requirement points towards an individual rights approach to the protection of workers, but initially this message did not register. In 1996 the posting of workers directive was enacted, but Menz concluded in 2005 that the directive had no discernible impact on the position of the member states. This changed dramatically with the judgments which became known as the ‘Laval quartet’. Three of those cases – Laval, *Commission v Luxembourg* and *Rüffert* directly concern the posting of workers.⁴⁴ The fourth (*Viking*) deals with collective action against a plan to ‘reflag’ a ferry service from Finland to Estonia.⁴⁵ This latter case will not be discussed here.

Dis-embedding by court order: the PWD in action

Again, the developments with regards to the embedding of transnational employment can only be understood in the context of the economic and political developments of the time. In this context the accession of ten new member states in 2004 (the big bang) followed by the accession of Romania and Bulgaria in 2007 and Croatia in 2013 changed the EU landscape considerably. Not only did the wage differential between the member states move from 1:3 in 1996 to 1:10 in 2016.⁴⁶ The new accessions also changed the balance between member states with densely regulated labour markets and an advanced system of industrial relations on the one hand and those with less dominant industrial relations systems on the other hand in favour of the latter group.⁴⁷

⁴³ Others were more open to the application of foreign law to employment contracts performed within their territory and even might use the openness of their market to foreign law as part of their comparative advantage. For a historical overview of the use of overriding mandatory provisions in cross-border employment disputes in France, Germany and The Netherlands, see A.A.H. van Hoek, *Mobiliteit van werknemers*, Den Haag: SDU 2000.

⁴⁴ CJEU (Grand Chamber) 11 December 2007, Case C-341/05 (Laval), ECLI:EU:C:2007:809; CJEU (Grand Chamber), 11 December 2007, Case C-438/05 (Viking), ECR 2007 I-10779, ECLI:EU:C:2007:772 | CJEU 3 April 2008, Case C-346/06, (Rüffert), ECR 2008 I-01989, ECLI:EU:C:2008:189; CJEU 18 June 2008, Case C-319/06, (Commission v. Luxembourg), ECLI:EU:C:2008:350.

⁴⁵ The services operated between Finland and Estonia. The employer was originally established in Finland but wanted to move to Estonia in order to reduce (labour) costs.

⁴⁶ Impact assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 52 final, p. 13; Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors Contract No VC/2015/0334, Final report January 2016 p. 43: As of October 2010 (most recent data), the highest median gross hourly earnings were recorded in Denmark (EUR 25.00) and the lowest in Bulgaria (EUR 1.50). The highest value was 16 times as high as the lowest value in euros; when expressed in purchasing power standards (PPS) the ratio was 5 to 1.

⁴⁷ See as to wage setting mechanisms Report VC/2015/0334 (footnote 45), p. 14-15

The infamous Laval case is set against the backdrop of the big bang.⁴⁸ It deals with a conflict between the Swedish trade unions and a Latvian company which employed Latvian workers on a construction site in Sweden run by a Swedish contractor. The Swedish contractor and the Latvian employer, though different legal entities, were part of a single undertaking. The Swedish unions wanted the Latvian company to sign the sector agreement and enter into negotiations over a site agreement, as is the usual procedure in Sweden. When the employer refused, the unions called a solidarity strike and effectively put the Latvian company out of business.⁴⁹ In the preliminary procedure the CJEU had to answer a set of questions which would influence two distinct but related aspects of the regulation of cross-border posting in the EU. The first aspect relates to the possibility to extend the minimum protection offered by the PWD; the second pertains to the role of the trade unions and the national systems of industrial relations in the protection of posted workers. The combined result is that the PWD narrows down the possibility for the host state to re-embed the transnational employment relations - either through their industrial relations system or through the creation of overriding mandatory provisions.

The PWD obliges the host member state to ensure that, whatever the law applicable to the employment relationship, the posting undertakings guarantee their workers certain minimum rights under host state law and/or collective agreements which are generally binding.⁵⁰ The PWD specifies the content of this 'hard core' of labour rights, which covers inter alia safety and health, maximum work periods and minimum rest periods and the minimum rates of pay. In the Laval case, the CJEU stipulated that these rights do not only constitute a minimum but also a maximum: The host state may extend the set of rights, but only in as far as the additional rights are based on public policy provisions.⁵¹ In the Laval case the court also suggested that wage levels which do not constitute a minimum wage, cannot be imposed either.⁵² This position was later mitigated in the Ammattiliitto case in which the CJEU accepted that all elements of a wage structure could be part of the minimum rates of pay.⁵³ But the basic premise that the PWD limits the areas of protection which the host state may prescribe, still stands.⁵⁴

The result is that the employment relationship of the posted worker is governed in part by the rules of the home state and in part by the rules of the host state. The host state sets rules on safety and health minimum rates of pay, working time and holiday, non-discrimination, protection of special groups (women/children) and the use of temporary work agencies. But with regard to workers posted to its

⁴⁸For the link between enlargement and developments in the legal status of posted workers, see also M. Rocca, *Posting of Workers and Collective Labour Law: There and Back Again - Between Internal Market and Fundamental Rights*, Intersentia 2016, 18.

⁴⁹ See amongst many others: H. Lindberg, *Union action and strategies in the Swedish construction labour market* Ratio Working Paper No. 217, p. 11; S. Engblom, Chapter 18: Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services in: C. Costello and M. Freedland (eds) *Migrants at Work*, Oxford University Press 2014., p. 345; Rocca 2016, p 10.

⁵⁰ Slightly simplified presentation of the relevant provisions.

⁵¹ The directive also allows to extend the protection of workers employed through temporary work agencies beyond the core protection offered by the PWD - see below.

⁵² Laval paragraph 70. See also *Commission v Luxembourg*, paragraph 47. On the concept of minimum wage see also Case C-522/12 (*Isbir*), ECLI:EU:C:2013:711 and case C-341/02 (*Commission v Germany*) ECLI:EU:C:2005:220.

⁵³ Joint cases C-341/02; CJEU 12 February 2012, C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* ECLI:EU:C:2015:86. For a less restrictive reading of the PWD, see EP Study p. 44-45.

⁵⁴ Compare Engblom 2014, 348.

territory it cannot set standards as to the other aspects of the employment relationship, such as fixed term contracts, the right to unilaterally change the contract, parental leave and the termination of the contract including dismissal.

This splitting up of the single legal relationship into subsets of questions governed by different laws (*dépeçage*) disrupts the coherence of the legal systems involved and thereby may diminish the effectiveness of the protection offered by each of them.⁵⁵ Several labour law scholars have argued that the effectiveness of the core protection depends to a large extent on effective protection against dismissal: does the worker feel empowered to assert his legal position?⁵⁶ Another clear example of interlocking protection is offered by the position of pregnant women and women who have recently given birth. Safety and health rules may contain prohibitions to put pregnant women to work in certain places. The employment law may contain protection against dismissal and a right to pregnancy and maternity leave, whereas the social security system may provide for a substitute income during leave. When these different elements are taken from different laws, the result may be less than consistent, making full enjoyment of the rights granted difficult or impossible.⁵⁷

Article 3 paragraph 10 allows the extension of the protection offered by the host state to provisions having a public policy character. However, if a Member States avails itself of this possibility, it can only do so within the confines of the free movement provisions.⁵⁸ Both requirements together seriously restrict the possibility to apply national rules which are not covered by the 'hard core' of Article 3 PWD. This became evident in the 2008 case of *Commission v. Luxembourg* in which the court basically restricted art. 3(10) to provisions which aim to counter 'a genuine and sufficiently serious threat to a fundamental interest of society'.⁵⁹ Labour law rules will rarely meet that threshold.

Belgium, France and Luxembourg traditionally consider the major part of their labour law to fall within the category of public policy provisions. This is exemplified by the fact that labour law in these countries

⁵⁵ It may also put the redistributive character of the rules at risk.

⁵⁶ W. Daübler, Chapter 2. Human Dignity of Workers and Competition, in J. Buelen/M. Rigaux (eds), *From Social Competition to Social Dumping*, Intersentia 2016, pp. 21-32, at. 22; A. T. J. M. Jacobs and E.J.A. Franssen, Hoe dwingend is de Nederlandse ontslagbescherming bij arbeidsovereenkomsten naar vreemd recht? *Sociaal recht: Nederlands tijdschrift voor sociaal recht*. 2006, p. 113-121.

⁵⁷ Houwerzijl / Van Hoek, *Comparative study* March 2011 p. 84 and *Complementary Study on the legal aspects of the posting of workers in the framework of the provision of services*, Contract VC/2011/0096, final report November 2011, p. 145; Van Hoek, Een schijnbaar simple vraagje: zwangerschapsverlof in het IPR, *NIPR* 2002, p. 296-300; Nunes, De Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid: een (export) product apart, *NIPR* 2000, p. 384.

⁵⁸ C-319/06 para 33. See also Rocca p. 5-6

⁵⁹ Case C-319/06, CJEU 19 June 2008, ECR 2008, I-4323. CJEU Based on the Unamar decision of the CJEU, we may assume that the comparable concept of overriding mandatory provisions in Article 7 of the Rome I Regulation is less restrictive than the notion of public policy provisions in the PWD. Compare Van Hoek, van Hoek, A. A. H., van Hoek, Beëindigingsvergoedingen voor handelsagenten en algemeen belang: De uitspraak van het HvJ EU in de zaak Unamar nader beschouwd, *Ars Aequi* 2014, pp. 466-475 at 471 and Openbare orde, dwingende reden van algemeen belang en bijzonder dwingend recht, De overeenkomsten en verschillen tussen internationaal privaatrecht en interne marktrecht, in: H. Verschueren & M.S. Houwerzijl, Toepasselijk arbeidsrecht over de grenzen heen, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009, pp. 55-90 .

is largely enforceable by criminal law penalties. The public policy character is also extended to the rules on collective labour law – protecting both collective negotiations and the ensuing collective agreements by public law means.⁶⁰ However, in *Commission v Luxembourg*, the court specified that rules on collective labour law as such do not qualify as public policy provisions in the meaning of Article 3(10) of the PWD. Only specific provisions in (generally applicable) collective agreements may qualify as such. Hence, the host state may not impose a duty to negotiate to foreign companies providing services within the territory even when such a duty would exist for domestic companies. The safeguarding of the system of industrial relations as such is not a public policy interest in the meaning of the PWD. Though this question was not put before the CJEU, it is likely that in the pre-PWD days, this interest wouldn't be recognized as a justification for hampering the free provision of services either: in its case law on the free provision of services the court specified that protection of workers is a legitimate public interest which may warrant restrictions to this fundamental freedom, but the provisions imposed must 'confer a genuine benefit on the workers concerned, which significantly adds to their social protection'.⁶¹ Provisions which offer only systematic protection – e.g. by organizing labour in a certain way – do not seem to pass the rule of reason test.

National labour law systems are very diverse in the way they organize the protection of workers. Some countries put an emphasis on legislation, others are purely voluntary in nature, yet others corporatist. The PWD sought to cater for these differences by allowing different ways of standard setting with regard to the hard core protection offered by host states. However, in the *Laval* case the court found that the Swedish way of imposing protective standards by industrial action was not covered by any of the options contained in the PWD. In the *Rüffert* case also a social clause in a German public procurement contract was struck down by the CJEU. The clause obliged the contractor to abide by a non-generally binding regional collective agreement. According to the CJEU this clause did not comply with the directive read in combination with the treaty provisions on free provision of services. Also on this issue the CJEU recently seems to have (slightly) changed its position. In the *RegioPost* case⁶² the Court did allow the local contracting authority to impose a minimum wage provision on the service provider. The Court not only distinguished to two cases on the basis of the facts, but also relied on a change of legislation: Article 26 of Directive 2004/18 on public procurement, which was adopted after the *Rüffert* judgment, specifically authorizes the inclusion of social clauses in public procurement contracts.

From the perspective of embeddedness, the *Laval* quartet was highly disruptive. The embedding of employment contracts is not only a matter of legislation but also very much a result of the wider fabric of socio-economic organization. Standards of behaviour are set not only by law, but also by collective negotiations, workers involvement at the level of the company and rules on (public and private) procurement and subcontracting. If these non-legislative methods are obstructed by EU law, the result is

⁶⁰ Compare Case C-165/98, CJEU 15 March 2001, *Mazzoleni*, ECR 2001, I-02189, ECLI: para 7.

⁶¹ See inter alia Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, CJEU 25 October 2001, (*Finalarte*) ECR 2001 I-07831, ECLI:EU:C:2001:564 para 42 and Case C-490/04. CJEU 18 July 2007, *Commission v Germany*. ECR 2007 I-06095, ECLI:EU:C:2007:430, para 46.

⁶² *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*. CJEU 17 November 2015. Case C-115/14. ECLI identifier: ECLI:EU:C:2015:760

a forced dis-embedding of transnational employment.⁶³ This is evidenced by the aftermath of the Laval judgment in Sweden. After the judgement, foreign service providers became much less willing to sign Swedish collective agreements. If they still did so, this would usually be upon special request of the procuring enterprise and/or the main contractor.⁶⁴ In those cases the procuring enterprise or main contractor is established in the host country and doesn't want to risk social unrest which might affect their relationship with the unions as well.⁶⁵ The Ammattiliitto and RegioPost cases suggest that the backlash of Laval was not entirely lost upon the CJEU. Both can be seen as part of a larger re-embedding programme within the EU.

Narratives and counter-narratives

The discussion on posting of workers is set in the key of the internal market. As a result the debate to a large extent revolves around the question of fair versus unfair competition. The two most important elements of labour law which impact on labour costs are wage regulations and working time. The third problem area is safety and health – albeit for other reasons. Other aspects may cause problems in individual cases, but are mostly absent from the public debate. As fair competition is central in the debate, it is important to note that the concept of fair competition is not clearly defined in EU law. In his article ‘One law, two competitions’ Saydé describes two approaches to the single market which can be discerned in the case law of the CJEU.⁶⁶ In the one approach, the single market is based on regulatory competition: economic actors may exploit the difference between the legal systems of the Member States to reach a comparative advantage. This approach seems to inform the Viking case, in which the court seems to assume that the employer's right to change the legal embedding of workers on a transnational ferry services is inherent to the freedom of establishment. The other approach is described as ‘regulatory neutrality’. In this second approach competition should not be effected by the regulatory framework, but should be based on other aspects e.g. efficiency, availability, quality. The regulatory neutrality paradigm requires a level playing field in which all competitors are bound by the same set of rules. The Rush Portuguesa judgment is to a large extent based on this latter paradigm. Both the case law and the policy documents of the Commission demonstrate oscillating positions between the two poles.

The posting of workers directive tries to establish an uneasy compromise between the two diverging paradigms of fairness. An effort which is doomed to be and remain controversial as the two paradigms are based on radically different political positions. Traditionally labour law is meant to reduce competition based on labour conditions by imposing minimum standards. In Member States with a

⁶³ In the terms of Engblom (2014, p. 347) the Laval judgment wrecked the Swedish model.

⁶⁴ Engblom 2014, 348-9: in the period between the preliminary request of the Labour Court (December 2004) and the ECJ judgment (December 2007) the number of collective agreements concluded by the Swedish Building Workers' Unions with foreign companies was approx. 120 each year. After the judgement it fell to about thirty per year: statistics from the Swedish National Mediation Office.

⁶⁵ In this context it is interesting to note that also in England attempts to re-regulate posted work operated by targeting the domestic contractors and/or procuring enterprises. Accordingly, the embeddedness moves up the supply chain. See Van Hoek/Houwerzijl, Comparative Study, March 2011, p. 26.

⁶⁶ Alexander Saydé, One law, two competitions: an enquiry into the contradictions of free movement law, *Cambridge Yearbook of European Legal Studies* 2010-2011, p.365-413, in particular p. 365-377, 399-401 and 404-413.

highly embedded labour market (e.g. The Netherlands, Belgium) competition on the basis of labour conditions is even more strictly controlled, e.g. by widespread coverage of sectoral collective agreements. Other Member States might have a far more liberalized labour market (e.g. UK). These different political preferences also play out at the European level. There the dispute is often framed in terms of free movement of services versus protection of workers. And as mentioned above, the latter is framed in individual terms: host state protection can only be justified if it offers real additional protection to the workers involved. But if host state protection is meant to benefit the posted workers at the individual level, can these workers renounce their rights in order to be more competitive?

An interesting line of reasoning which entered the debate in recent years, frames the discussion in terms of centre and periphery. In this frame attention is drawn to the fact that posting between the old member states themselves (e.g. from Germany to The Netherlands) is not deemed problematic. It's only when the movement takes place from the periphery to the centre (e.g. from Poland to Germany) that friction arises.⁶⁷ Whereas the possibility to post workers is largely welcomed by the new 'peripheral' member states, it meets with political opposition in the old 'centre'. This difference in interests and perspective is evident from the list of objectors to the new proposal on posting which aims (inter alia) to instate the right to equal pay for equal work for posted workers: whereas Austria, Belgium, France, Germany, Luxembourg, The Netherlands and Sweden are in favour of an equal pay rule, Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Poland, Slovakia and Romania are against.

This difference in both interest and perspective is well-known and already played out in the early days of posting. However, the new line of reasoning draws our attention to the fact that the benefits of the four freedoms are not distributed equally amongst the member states. The freedom to provide services is seen by these authors as the one freedom in which the periphery has a competitive advantage over the centre – because the wage level in the periphery is much lower than in the centre they can offer their services at a lower price. The old centre, which is deemed to have benefitted most from the other freedoms, should not block the periphery from claiming their one advantage. A Polish think tank expresses this in the most eloquent manner by stating that the French have wine, the Dutch tulips and Poland workers.⁶⁸ If French wine and Dutch tulips are allowed to move freely, so should the Polish workers. In my view the centre-periphery perspective is an important addition to the discussion. It rightly points out that the effect of the free provision of services on competition cannot be studied in isolation. However, in the current context it also lays bare the dis-embedding effect of posting of workers: the slogan of the Polish think-tank epitomizes the commodification of labour in the internal market.⁶⁹

Dominant as it may be, the internal market frame is not the only lens through which we can study the posting of workers. The alternative narratives are basically twofold. Several authors have studied the

⁶⁷ Approx. 50% of postings flow between countries with similar wage levels, where it can be assumed that the search for adequate skills rather than cost reductions constitute the main trigger for businesses to look for cross-border service providers: Impact Assessment RPWD SWD(2016)52 final p. 33-34.

⁶⁸ EP study p. 18 with reference to Pacolet and De Wispelaere 2015 and FGB 2015 (for specific sectors).

⁶⁹ Compare D. Ashiagbor, Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration *European Law Journal*, Vol. 19, No. 3, May 2013, pp. 303–324, at 307.

effect of the rules on the free provision of services on industrial relations and industrial citizenship. EU law has impacted negatively on the powers of unions and social partners to impose standards. In the Viking and Laval cases, the right of collective action was restricted by EU law. But the interpretation given to the PWD by the CJEU also seems to restrict the possibility for the social partners to jointly impose their standards on foreign services providers. And finally, under the Ruffert judgement collective agreements which are not generally binding cannot be referred to as the standard to be applied in public procurement contracts. These restrictions impact upon the position of the social partners within the host state.⁷⁰

Posting of workers also affects industrial relations in a different way, directly linked to industrial citizenship.⁷¹ Citizenship implies membership of a political community and the right to participate in the political life within that community. Industrial citizenship is expressed in membership of unions and employers organisations as well as in participation in workplace democracy. Work place democracy is determined by the law applying to the employer – as legal entity and/or enterprise. This law is determined by the location of the employer – be it the legal entity or the enterprise. Posting situation are characterised by the fact that the employer is not established in the member state in which the service is performed. Accordingly, host state law will not govern this element of industrial citizenship. But in practice, the posted workers may not be able to benefit from the rights granted to them in the home state either.

As far as industrial relations are concerned, whether or not posted workers join unions and employers join the employers' organisations in the host state is as much a factual question as a legal one. Even when there are no legal obstacles to join the industrial relations network of the host state, there might not be any incentive to do so. Which brings us to the aspect of social embeddedness. As mentioned in the introduction, Polanyi's theory has spawned a distinct sociological offspring. This is also true in the case of posted workers. In recent years several authors (Lilly, Berntsen, Wagner) have studied the actual level of (non)integration of posted workers in the host state and the effects thereof.⁷² These studies aim to identify groups of workers who are at risk of being exploited because of their precarious position in the host state. The studies do not only cover workers who are posted in the technical-legal meaning of the word, but tend to cover all workers who migrate as part of a de facto dependent employment relationship.⁷³ These employment relationships are characterized by isolation from the host state social environment and continued dependence on the employer for housing, transport etc. The studies

⁷⁰ See on this issue Rocca footnote 49.

⁷¹ N. Lillie, The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework. *Theoretical Inquiries in Law*, 17 (1) 2016, pp.39-62; C. Zhang, & N. Lillie, Industrial citizenship, cosmopolitanism and European integration. *European Journal of Social Theory*, 18 (1) 2015, 93-111

⁷² See for example N. Lillie, I. Wagner and L. Berntsen, Chapter 15, Posted Migration, Spaces of Exception, and the Politics of Labour Relations in the European Construction Industry in: M. Hauptmeier and M. Vidal (eds), *Comparative Political Economy of Work Critical Perspectives on Work and Employment*, Palgrave 2014. An overview of their work on this issue can be found at <http://tilburguniversity.academia.edu/LisaBerntsen>, <http://jyu.academia.edu/NathanLillie>, <http://uni-due.academia.edu/InesWagner>.

⁷³ Caro, E., Berntsen, L., Lillie, N., & Wagner, I. (2015). Posted Migration and Segregation in the European Construction Sector. *Journal of Ethnic and Migration Studies*, 41 (10), 2015, pp. 1600-1620.

demonstrate that the high level of social dis-embedding puts the posted workers at risk of being exploited.

These alternative perspectives are important for two reasons. They try to capture the wider societal cost of posting – mainly in the host state but to some extent also in the home state. Moreover, they offer valuable insights into the reasons why the application and enforcement of labour standards is so problematic in the case of posted workers.

In the case of posting in the technical-legal meaning, both the worker and the employer are external to the country in which the work is performed. That means that neither is firmly embedded in the host state. There might be a lack of knowledge of the applicable rules, the workers might not be in a position to enforce their rights and sometimes there even exists a mutual interest in non-conformity with the rules.⁷⁴ The host state rules are not part of the normal embedding of the employment relationship. Individual workers will make a personal assessments of benefits and costs of claiming their rights. The individual employers will likewise assess the risks and benefits of noncompliance. This balance will be struck differently when both workers and employer are active in het host state on a temporary basis only compared to the situation when both have their home base there. So one can hardly expect compliance and enforcement to be generated from within the individual employment context.⁷⁵ Outside pressure is needed.

One of the characteristics of posting of workers in the context of the provision of services, is that the service recipient often does have his home base in the host state. Whether it is the government in case of procurement, the main contractor in case of subcontracting, or the user company in case of temporary work agencies, the end user of the service is often embedded there. The experience of Sweden in the post-Laval period shows how important the role of the user company is in setting and enforcing the employment conditions of the posted workers. On this point we might take inspiration from the work of Ruggie who studied international trade from the perspective of embeddedness. Much of his (later) work was dedicated to holding end user companies in western countries accountable for the working conditions in the supplier plants in the developing world. Likewise, the end users could be persuaded by social pressure, collective action and/or public opinion, to ensure fair employment conditions in their supply and service chains. It is interesting to see if EU law could stimulate, rather than obstruct this type of social responsibility. Both the enforcement directive of 2014 and the new proposal address this aspect of controlling the contract chain.

Post crisis responses –dis-embedding and re-embedding at EU level

The judgments in the Ammattiliitto and RegioPost cases to some extent mitigate the effect the Laval quartet had on host state regulation of posted workers. But this has not stopped public opinion, trade unions and governments alike from turning against posting of workers and call for equal treatment of all workers employed within the territory. In 2014 a directive was enacted which tried to fight abuses of the free provision of services by circumscribing the concept of posted worker in the meaning of the PWD

⁷⁴ Van Hoek / Houwerzijl, Comparative report March 2011, p. 141; Van Hoek/Houwerzijl, Where do I belong, 2016, p.247/8.

⁷⁵ Compare Lillie/Wagner/Berntsen (Posted Migration) 2014, p. 317.

and enhancing the enforcement of the existing rules. The so-called enforcement directive is still in the process of implementation. Yet, in a 2016 report, the Commission explicitly states that the unlevel playing field due to differentiated wage rules for local and posted workers has deteriorated the acceptance of posting as phenomenon. This led the Commission to propose a revision of PWD itself.

Both the enforcement directive and the proposal further enhance the embedding of the employment relationship of the posted worker in the host state. As such they seem to be part of a new wave of re-embedding, this time at the European level as well. During the Euro-crisis the EU (as part of the troika) put pressure on countries with problematic debts to liberalize their labour markets. One of the points addressed was the national system of extension of collective agreements. The changes imposed led to a dramatic decrease in the number of workers covered by collective agreements in inter alia Greece, Ireland and Portugal. Also in other countries the EU actively promoted deregulation and decentralization of collective bargaining.⁷⁶ At EU level labour regulation was blocked or retracted as part of the Refit programme.⁷⁷ This led to the accusation that the EU was following a dis-embedding agenda. Recently the tables seem to have turned: the Commission has launched not only a proposal to revise the PWD, but a series a proposals which are intimately linked from the perspective of embedding.

The first is the Investment Plan for Europe 2014. This plan tries to stimulate public and private investments in strategic infrastructural projects across the EU.⁷⁸ Thought mainly relying on private investment, the plan also encourages the economically better-off member states to invest in public goods. This should increase demand and kick start the ailing economy. This year the Commission urged (inter alia) Germany to take up its responsibility.⁷⁹ But would Germany be willing to spend money (they don't necessarily have) on projects which - as far as job opportunities go – might mainly benefit foreign contractors and foreign workers? Rules on posting as well as rules on public procurement should ensure the social embedding of such investments.⁸⁰

As mentioned above, the revised rules on public procurement of 2004 already open up the possibility to include social clauses in public procurement contracts. Now the Commission is proposing a revision of

⁷⁶ Collective bargaining coverage down as a result of the global financial crisis: News | 19 October 2015 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_415612/lang--en/index.htm; The sharpest declines (by an average of 21 per cent) were seen in countries hardest hit by the crisis, such as Cyprus, Greece, Ireland, Latvia, Portugal and Romania. ILO, *Trends In Collective Bargaining Coverage: Stability, Erosion Or Decline?* Issue Brief no 1, p. 10 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_409422.pdf ; see also Changes in wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime, Eurofound 2014.

⁷⁷ Communication from the Commission of 2 October 2013 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM(2013)685 final, p. 8 and 11.

⁷⁸ Communication From The Commission To The European Parliament, The Council, The European Central Bank, The European Economic And Social Committee, The Committee Of The Regions And The European Investment Bank - An Investment Plan for Europe, COM(2014) 903 final.

⁷⁹ http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm and Council Recommendation of 12 July 2016 on the 2016 National Reform Programme of Germany and delivering a Council opinion on the 2016 Stability Programme of Germany, OJ 2016 C 299/19

⁸⁰ See for the link between the proposal for revision of the PWD and the Investment Plan for Europe Com(2016)128 final p 3-4.

the PWD as well. The Commission proposal on the PWD was published jointly with a plan to create a European pillar of social rights.⁸¹ Through formulating a series of general principles the Commission seeks to ensure that economic development results in greater social progress and cohesion. There are also plans to revise the coordination rules in social security and to further the protection of workers in the transport sector.

The enforcement directive and the proposed revision focus on three different aspects of (dis-)embedding. Both try to steer the conflict of laws rules towards the application of host state rules. But whereas the proposal also directly deals with applicable standards, the directive focuses on enforcement of the rules already applicable under the PWD. The different elements of the two instrument will be discussed separately in the following paragraphs.

Full(er) application of host state law to transnational employment

The Laval quartet effectively created a multi-tiered labour market in which host state law would apply fully to domestic workers, but on partially to posted workers. In practice, however, there are several types of mobile workers and it is not always easy to separate the ones entitled to (more or less) equal treatment from the narrower group of posted workers to which only the hard core protection may be applied. It was widely felt that some employers misused the rules on posting to circumvent the rules of the host state. So when the enforcement directive was enacted in 2014,⁸² one of the purposes thereof was to further circumscribe the phenomenon of posting in the meaning of the PWD. Employers must be properly established in the home state and workers must have a relevant link to that state prior to the posting, for the posting to fall within the remit of the PWD. If the posting doesn't fulfill these requirements, the host state is freed from the restrictions the PWD imposes. In some cases of non-genuine posting Article 8 of the Rome I Regulation will lead to full application of host state. But sometimes the employment contract may still be covered by foreign law. In that case, the host state is allowed to further the protection of the worker through imposing its binding protective laws as overriding mandatory provisions in the meaning of article 9 Rome I Regulation.⁸³ If the member states don't take advantage of this opportunity, the position of this in-between category of workers may actually deteriorate when the PWD is no longer applied to them in practice. As the enforcement directive is currently transposed by the Member States it is too early to evaluate its effect.⁸⁴ But the risk of creating lacunae in the protection of non-genuinely posted workers is likely to manifest itself in those countries that previously applied their core protection to any work performed within the territory and now feel obliged to implement a narrow definition of posting.⁸⁵

⁸¹ COM(2016) 127 final and SWD(2016)50 and 51 resp. COM(2016) 128 final / SWD (2016) 52 and 53.

⁸² Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ 159/11.

⁸³ See above. Unfortunately, the enforcement of this protection may be difficult, especially when the host state is not the state in which the work is habitually performed under Article 21 of the Brussels I Regulation.

⁸⁴ Compare EP Study 2016 p. 10.

⁸⁵ See for example the Dutch implementation measure: Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie, *Staatsblad* (official journal) 2016, 219.

There is some discussion on the exact size and composition of the group of workers who are not posted in the meaning of the PWD, yet are not covered fully by host state law under Article 8 of the Rome I Regulation either.⁸⁶ The proposal for a Directive amending the PWD tries to address this issue by formulating a specific interpretation of Article 8 of the Rome I Regulation. Under the proposal temporary postings are strictly limited to two years. When a posting exceeds that limit, the host state is deemed to be the habitual place of work under Article 8. The time frame is based on a similar provision in the regulation which coordinates the systems of social security. Like that regulation, the duration of the posting is not calculated on an individual basis, as replacement postings are also taken into account. If a worker who is sent abroad for more than six months replaces another posted worker in the same workplace, the time spent in the host state by either worker is added up. If the combined duration of the postings exceeds the time limit set in the directive, the 'habitual place of work' of the replacement worker is deemed to be in the host state rather than the home state. As a result the law applying to the contract of a posted worker may come to depend on an element outside his or her direct contractual relationship – being the time spent abroad by one of more of their colleagues. This change in applicable law does not only affect the day to day performance of the contract, but also the rules on dismissal or the right to change elements of the contract such as the job description, the hours worked or the location – elements which are not in any way covered by the core protection of the PWD. The rule would create a clear break with the traditional individualistic approach of private international law. Instead of embedding the employment contract, the resulting conflicts rule seeks to embed the job itself. But it can only do so by largely ignoring the transnational characteristics of the individual relationship and its embeddedness in the home state.

The specification of a time frame for temporary postings can serve to enhance legal certainty and increase the coherence between the rules on applicable law and the coordination of social security. However, the current proposal is unclear in its intention and even more unclear in its institutional embedding.⁸⁷ But more importantly, it will not be effective in creating equal protection for posted workers. Several studies estimate the average duration of a posting to be approx. 4 months.⁸⁸ Even if the de-individualizing element of the proposal would be accepted, those postings will stay well within the maximum duration.⁸⁹ And for reaching the goal of equal pay for equal work in the same work place, the focus should be on the dynamics of wage determination, rather than on the law applying to the contract.

⁸⁶ This depends on the exact interpretation of the Schlecker judgment on the one hand and the practical application of the rules on social security on the other.

⁸⁷ The explanatory memorandum seems to suggest that work exceeding the time limit would always be covered by host state law, ignoring the closer connection rule in Article 8. Dito EP Study 2016, p. 46. As to the institutional element, there is serious doubt whether a directive can change the wording and/or interpretation of a regulation.

⁸⁸ Impact Assessment RPWD 2016 and EP study RPWD p. 17.

⁸⁹ The rule may however affect management trainees on international rotations between establishments of the employing multinational enterprise.

The way to equal pay

The Commission presented its proposal for a targeted reform of the posting of workers directive under the slogan: towards a fair and truly European Labour Market.⁹⁰ According to the explanatory memorandum the aim of the Commission is to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner.⁹¹ The preamble specifically refers to the principle of equal treatment that has been enshrined in EU law since the founding treaties.⁹² In order to achieve this, the proposal replaces the concept of 'minimum rates of pay' in Article 3 sub 1 c) of the PWD for the concept of 'remuneration'. Though in the *ammattiliitto* case⁹³ the CJEU already allowed a very broad interpretation of the concept of minimum rates of pay, Member States were not obliged to follow up upon this. The PWD delegated the definition of minimum rates of pay to the individual member states.⁹⁴ And in practice the elements which the Member states considered to be part of the minimum rates of pay differed considerably between them.⁹⁵ The revision will make the broader protection which some Member States already grant to posted workers obligatory in all Member States by harmonizing the concept.⁹⁶ The proposal also imposes an obligation on the Member States to publish the constituent elements of remuneration on their official national website.

As to the way the minimum rates of pay are set, the PWD allows for both statutory minimum wages and wage setting in collective agreements and arbitral awards. In the original directive, host states were obliged to guarantee posted workers the protection of generally binding agreements in the construction sector. Application of such agreements in other sectors of the economy was optional under Article 3 sub 10. The proposal extends the obligation to all sectors of the economy, removing the option to differentiate according to sectoral needs and circumstances.

These new provisions will only affect those Member States which for whatever reason haven't taken full advantage of the possibilities the PWD offered under the latest case law. Though the provisions increase the level of harmonization in the EU, they do not seem to increase the possibilities of host states to reach a higher level of equality between local and posted workers.

Several study indicate that wage differentials between local and posted workers can be quite substantial. In France, the wage differences between foreign posted workers and French workers was estimated to be around 50% in 2006. Around the same time a Danish study in the construction sector put the difference at around 25-28% less.⁹⁷ This difference can be attributed in part to lack of enforcement, but is also caused by the gap between the average wage paid to domestic workers on the one hand and the binding minimum wage set in statute or generally applicable collective agreement on

⁹⁰ <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=2488&furtherNews=yes>

⁹¹ Com(2016)128 final, p. 2.

⁹² Paragraph 5.

⁹³ C-396/13 *Sähköalojen ammattiliitto*

⁹⁴ Article 3(1) final sentence.

⁹⁵ EP Study 2016, p. 33.

⁹⁶ EP study 2016, p. 45.

⁹⁷ EP study 2016 p. 37

the other. Apparently, generally binding rules on wages are only of limited relevance for the actual wage determination on the market. The social embeddedness of the relationship affects both the enforcement of existing rules and the practice of wage setting. How can the relationship between the foreign company and the foreign worker become more embedded in the social context of the host state? The answer may lie in addressing the other agents in the chain of contracts.

Moving up the chain of contracts

Posting of workers takes place in the context of the cross-border provision of services. Sometimes the service recipient simply procures a specific services as an end product in itself. However, more often posting takes place within a chain of contracts in which the service recipients use the posted workers for their own production process. The service recipient may use the service contract to outsource specific tasks or subcontract part of a project to the service provider. But the posted worker may also be integrated into the organization of the recipient through an intra-company transfer or temporary agency work. When these user undertakings are located in the host state (and they often are), they will be embedded there in a more robust way than the posting undertaking. Hence it makes sense to address these host state undertakings both as regards the fairness of the employment conditions which apply in the posting undertaking and their effective application.

The enforcement directive does not affect the standards to be applied, nor the manner in which these standards are set. Its main purpose (from which it gets its name) is to enhance the enforcement of the PWD through the exchange of information, the introduction of a complaints procedures and a system of first tier (optional) chain liability. It's the latter element which is the most interesting from the perspective of embedding. Article 12 allows the Member States to introduce a system of liability of contractors with regard of the minimum rates of pay due to the workers of their immediate subcontractors if and when the latter employ posted workers.⁹⁸ The liability is limited to the wages that have fallen due under the service contract with the sub-contractor and may be avoided – if national law so provides – by fulfilling certain due diligence obligations.⁹⁹ The liability accrues to all employers in the supply chain and is not limited to employers established in the host state.

The proposal for revision of the PWD goes beyond enforcement and directly addresses the standards to be applied. It contains two provisions on this issue, one concerning temporary agency work and one on subcontracting.

In the case of temporary work agencies the debate centers around the question whether and to what extent temporary agency workers should enjoy the same or comparable protection as the workers in the user undertaking. This question is addressed by the TWA Directive of 2008.¹⁰⁰ Article 5 sub 1 of that

⁹⁸ In the construction sector the Member States are obliged to introduce some safeguards: **Directive 2014/67/EU** Article 12 sub 2 jo sub 6.

⁹⁹ E.g. only contracting with certified TWA's and/or subcontractors, compare www.paychecked.nl

¹⁰⁰ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ 2008 L 327/9.

directive stipulates that “the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.” The right to equal treatment covers working time and holidays as well as pay, special protection of pregnant women and minors as well as non-discrimination rules. In all cases, the minimum protection may also be set in a company agreement or other instrument which binds the undertaking.¹⁰¹

The PWD contains two provisions on TWA’s. Article 3(1)(d) includes the rules on temporary agency work in the hard core protection to be offered to posted workers. Article 3(9) allows the Member State to provide that foreign temporary work agencies must guarantee their posted workers the terms and conditions which apply to temporary workers in the host state. Not all Member States have made use of this latter possibility – they only apply the hard core protection of Article 3 PWD to posted temporary agency workers. The proposed revision addresses this latter situation by obliging all Member States to offer the protection of Article 5 TWA Directive to posted workers as well. The optional provision in Article 3(9) is deleted. The new provision will increase the protection of posted temporary agency workers in those countries that currently don’t offer the protection of the TWA directive to TWA workers who are posted temporarily to their territory. It will not increase the protection in those countries that already made full use of Article 3(9). On the contrary: the EP Study of the proposal points out that by only referring to Article 5 of the TWA Directive, the proposal may actually block more encompassing protection of posted workers – something which would currently be allowed under article 3(9).¹⁰²

The second clause proposal which directly addresses the chain of contracts is Article 1(2)(b) of the proposal. This provision adds a paragraph to Article 3 PWD, stipulating that ‘if undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to sub-contract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, the Member State may, on a non-discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1 (1) posting workers to its territory.’ Again, this provision offers the possibility to use the embeddedness of agents higher up in the contract chain to influence the working conditions of posted workers. However, also this provision contains some limitations which may cause it to backfire. For one: it only addresses undertakings established in the host state, making it easy to circumvent the obligation. Secondly: the provision is limited to remuneration. Thirdly, the obligation must be set by law, regulation, administrative provision or collective agreement – which might rule out arrangements by law or agreement under which works councils get involved in any outsourcing or subcontracting. And finally, the Member States must avail themselves of this possibility. As we know from the Laval case, this requirement can prove to be a

¹⁰¹ EP Study 2016, p. 25. The directive allows for some deviations from this rule, inter alia in favour of collective agreements which specifically regulate the employment conditions of temporary agency workers. But these deviations should always ensure adequate protection for the workers.

¹⁰² The study refers to the rights enshrined in Article 6-8 of the TWA Directive.

serious limitation to all kinds of autonomous arrangements.¹⁰³ Not surprisingly, several commentators criticize the way the proposal undermines the prerogatives of the social partners. This would be a most contra-productive result. The embedding of employment relationships is a matter of practices as much as laws. Equal treatment can only be reached when national social partners and/or work place democracy institutions are allowed to set standards for the use of posted workers, provided these are non-discriminatory and transparent.

From the perspective of embedding, the proposal points in an interesting direction. But the risk of the provisions is in what they do not cover. The proposal doesn't address several situations in which a further embedding is possible and also occurs in practice. Missing are for example outsourcing, intra-company transfers and procurement. In all these situations norms may be sets and controls may take place in the companies higher up the chain. It is important that the proposal should not interfere with these mechanisms but rather promote them. The current text doesn't seem fit to do so.

Conclusions

1. The concept of (dis)embeddedness is useful in understanding the problematic of posting of workers in the EU. It not only offers insight into the costs the host state social structures incur from the phenomenon. It also helps to understand the persistency of wage differences between posted and domestic workers and can explain some of the current enforcement problems.
2. However, the term is ambiguous in its meaning. It can refer to the agents involved (worker and employer), to the job, the contract or the market as such. The different starting points may lead to different preferential outcomes in case of conflict.
3. Transnational employment relationships show complex patterns of embeddedness and dis-embeddedness in which the legal position of the worker is often disjunct from the more personal level of embeddedness and the embeddedness of the contract may not run parallel to the embedding of the workplace or job.
4. The contractual embeddedness of the posted worker always has a double face – one looking at the home state and one at the host state. Also in private international law, a balance need to be struck between continued home state attachment and integration in the host state.
5. The embedding of transnational employment relationships in the host state system through private international law is partial – excluding certain relationships, certain topics and certain types of 'regulation'.
6. To be (more) successful in re-embedding the employment relationship, the EU will have to apply an integral approach to mobility – linking tax policies, social security and labour law as well as synchronizing the systems of private international law and market integration.
7. The EU should also look into the current practice of subsidizing the export of labour through tax and social security schemes. These schemes undermine the solidarity base in the home countries and distort the market.

¹⁰³ See Van Hoek/Houwerzijl Comparative report p. 25-26 and Complementary report p. 41 for examples of arrangements which might not be covered by the current proposal.

8. The proposal for a revision of the PWD cannot – in and by itself – succeed in the goal it sets itself of ensuring equal pay for equal work in the same workplace.
9. Equal pay for equal work is not attained by mandatory law, but depends on practices and understandings. EU law (still?) does not manage to take this element (fully) into account.
10. The elements of the proposal which target embedded influencers (main contractors, user undertakings in case of temporary agency work) are likely to be the most effective.
11. However, the current proposal runs the risk of backfiring ‘Laval style’: it might be construed as creating a maximum level of protection in the settings mentioned in the proposal as well as prohibiting the use of other non-generally binding ways to set standards within chains of contracts which are currently employed in the Member states.