“Social dumping” and posted workers: a new clash within the EU

European companies often post employees to another EU country to work there temporarily. These ‘posted workers’ must be paid at least the minimum wage of the host country, yet their wages can be lower than the wages of local workers. Now proposals for ‘the same pay for the same work at the same place’ are creating new clashes between EU countries.

BY: ELENA VACCARINO AND ZSOLT DARVAS         DATE: MARCH 7, 2016

Ministers from high-wage and low-wage EU countries are clashing over the treatment of posted workers, but the problem of undeclared work is slipping under the radar.

President Juncker stated in 2014 that “in our union, the same work at the same place should be remunerated in the same manner”, sparking a debate on revising the Posting of Workers Directive (PWD).

Posted workers are EU citizens who have an employment contract in their home country, and are temporarily posted to a host EU country by their employer when their employer provides a certain service, for example if a Polish construction company builds a house in Germany.

Several ministers from central European EU member states have called for better implementation of existing rules, while ministers from higher-wage EU countries are demanding the modernisation of the rules to ensure ‘equal pay for the equal work at the same place’.

The European Commission’s 2015 work programme introduced a labour mobility package, which includes a targeted review of regulation on posted workers. The review will look at how to prevent “social dumping” and abuse of the free movement of services. This mobility package will likely be discussed in March 2016.
We review the various dimensions of the debate on posted workers from an economic perspective.

**Competition with low wage-cost suppliers**

Wages and prices increase with the level of economic development. For example, wages are higher in Austria than in the Czech Republic, while in Bulgaria wages are even lower. Wages are higher in countries where labour is more productive.

Companies in high-wage countries compete with companies in low-wage countries in three ways, as underlined by André Sapir:

- Importing goods from low-wage countries,
- Importing services (involving the posting of workers) from low-wage countries,
- Offshoring production to low-wage countries.

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Posted workers represent just one way to exploit wage differences across countries, and there is no evidence that posted workers have a stronger effect than the other two.

However, EU citizens tend to feel more strongly about posted workers than about importing goods or offshoring production, because they are present in high-wage countries and thereby more visible.

**Impact on the economy and employment**

Economic integration which involves trade in services, has a positive effect on the economy and employment of high-wage host countries which receive posted workers, as argued by André Sapir (2015). However the positive effect excludes workers in the host country facing the competition.
Higher competition leads to efficiency and productivity gains and lower input prices, which benefit the economy. The effect is unambiguously positive for low-wage countries, since cross-border service providers benefit from efficiency gains, while posted workers receive more income for the duration of their posting than their income at home.

Sapir also highlights that the intra-EU question on posted workers should be seen from a broader perspective, taking into account globalisation, technological change and an ageing population.

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If a version of the “same pay at the same place” principle is introduced, European firms would become less competitive globally, due to the less competition and the associated efficiency losses.

In fact, one may argue that after an introduction of a “same pay at the same place” regulation, the logical next step would be to introduce tariffs on goods imported from EU countries with lower wages.

Frederic De Wispelaere and Jozef Pacolet (2015) suggest that posting workers in other countries can be seen as a stabilisation tool in a currency union, in order to support adjustment to asymmetric shocks.

Posting involves workers being temporarily employed in another EU country, but still being taxed in their home country if the posting period does not exceed half a year. They are charged social security contributions in their home country if the posting does not exceed two years.

In this way posted workers have a positive impact on the home country, decreasing unemployment, and increasing household incomes and labour tax revenues. The posting of workers can even mimic the impacts of fiscal transfers.
and wage flexibility to some extent.

**Regulation of posted workers**

A number of safeguards are in place to protect the social rights of posted workers, according to the Posting of Workers Directive (Directive 96/71/EC), adopted in 1996 and in force since December 1999. Posted workers are subject to the host country’s laws, regulations or administrative provisions concerning:

- minimum rates of pay (i.e. minimum wage), including overtime rates;
- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- conditions of hiring out workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, of children and of young people;
- equal treatment between men and women and other provisions on non-discrimination.

These conditions apply to all professions and industries when they are laid down by the law, regulation or administrative provisions of the host country.

In some countries the above issues are not laid down by law, regulation or administrative provision, but by collective agreements or arbitration awards. In such countries, they apply at least in the construction sector, while member states have the right to apply these conditions in other sectors too.

While minimum wage requirements of the host country apply to posted workers, posted workers continue, to pay their social security contributions in the member state where they are normally based for up to two years. During this period they do not pay social security contributions in the member state where they are temporarily posted.

Companies providing cross-border services therefore have a cost advantage when
social security contributions are lower in their home country than in the host country.

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However, the 1996 Directive is not always correctly applied. There have been various abuses, some related to exploitation of posted workers and others to subcontracting, where posted workers have sometimes been left without being paid, sometimes when the company had disappeared or never really existed (letterbox companies).

To combat this, the European Commission proposed an Enforcement Directive in March 2012, which was approved in April/May 2014 (Directive 2014/67/EU). Notably, the enforcement directive is almost four-times as long (about 12,000 words) as the 1996 directive it aims to enforce (about 3300 words).

The 2014 enforcement directive specifies a number of ways to enforce the rules, including cooperation between national authorities, clarification of penalties and fines and introducing a subcontracting liability.

The enforcement directive was negotiated for about two years and so should reflect a compromise between various stakeholders, but the European Trade Union Confederation (ETUC) found the compromise insufficient and called for further amendments, as can be seen in several of their communications here.

During the negotiations in 2012-14, ETUC's major concern of was the appropriate protection of the rights of posted workers, but not the ‘same pay at the same place’ demand, which currently features in the debate.
Social dumping?

Some refer to ‘social dumping’ in the context of posting of workers (e.g. European Commission).

Whether this is the right expression depends on how it is defined. Concerning international trade of goods, ‘dumping’, is typically used to describe the practice where a producer of a foreign country price their export goods in the home country either below the price charged in its home market or below its cost of production.

When the Posting of Workers Directive is abided by, this is not the case with posting of workers from low- to high-wage countries: services offered in a high-wage country by a company residing in a low-wage country must charge a higher price than in its home market, because the wage cost of posted workers is higher than the wage cost of a home workers.

This is partly because posted workers typically receive some bonus over their home wage for the duration of posting, and in any case the minimum wage of the host country applies, which is higher than the minimum wage at home.

Companies posting workers may abuse the rules and pay less than the minimum wage, or price their service below their costs. But when this happens, the issue is the enforcement of the rules.

Moreover, service providers in the host country may also pay less than the minimum wage and charge their prices below their costs.

By drawing insights from economic theory, sociology and institutional political economy, Magdalena Bernaciak (2014) defines ‘social dumping’ as “the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining competitive advantage”.

She argues that the creation of the internal market and EU enlargement to the east and to the south have made social dumping more pertinent, by providing market participants with new strategic opportunities to contest social norms.

However, in our view it is not clear how posting of workers can fit her definition: when the Posting of Workers Directive is abided by, companies posting workers do
not undermine or evade existing social regulations. They are obliged to comply with the social regulations of the host country, including minimum wage regulation.

André Sapir (2015) uses the definition of social dumping as “downward pressure on social conditions due to competition from countries with lower social conditions”. This definition also involves the possible impact on lowering wages in high-wage host countries.

As we highlighted above, companies in high-wage countries compete with companies in low-wage countries by importing goods from low-wage countries, by importing services from low-wage countries and by relocating their production to low-wage countries: all three channels can led to a reduction in wages in high-wage countries.

Yet competition arising from any sources may lead to a downward pressure in wages, so in our view, to avoid confusion and the negative connotation, instead of ‘social dumping’, competition between high-wage and low-wage countries should be emphasised.

**Posting letters on posting of workers**

Ministers from low-wage and high-wage countries have debated the President Juncker’s ‘equal pay’ proposal. Last summer two groups of ministers sent letters to the European Commission expressing their views.

The labour ministries of several high-wage EU countries pointed out in June 2015 that fair intra-European competition is threatened because employers of posted workers have an unfair advantage compared to employers in host countries.

They highlight that the maximum duration of posting is not defined in the directives, and on several occasions the ‘temporary’ posted positions become so long that they resemble a permanent jobs in the host country.

They draw the attention to the improper and abusive use of the Posting of Workers Directive and while they welcome the 2014 Enforcement Directive, they demand the “modernisation” of the directive to ensure “equal pay for the equal work at the same place”. They also ask whether the current regulations concerning social
security contributions (whereby posted workers continue to pay their contributions at home) is justified.

The labour ministers of nine central European EU countries, instead, argued that the 2014 Enforcement Directive already provides clear safeguards to protect the rights of posted workers and respect fair competition. Given that the Enforcement Directive has been agreed recently and not yet been implemented fully, a revision would be premature and divisive.

They argue that pay rate differences do not constitute a means of unfair competition, but are just a structural feature of a union of heterogeneous countries and result from different levels of economic development, tax systems, labour law regulations and social welfare systems.

The central European ministers argue that any reference to “equal pay for the equal work at the same place” is misguided and incompatible with a genuine single market. As regards payments of social security contributions, they highlight the importance of the home country, because thereby posted workers will retain a continuous insurance history in their home country to which they will return when the posting position is ended.

Business Europe, the association of national business federations of 34 European countries, also joined the letter-thread. In autumn 2015 Director General Markus J. Beyrer and President Emma Marcegaglia argued that the Posting of Workers Directive and its Enforcement Directive provide the correct framework, while a possible reopening would stop the process of implementation. They also expressed the strong opposition of their member federations to the principle of ‘Equal pay for the equal work at the same place’.

Equal pay for the equal work at the same place?

The letter from the ministers from high-wage countries recognises that the ‘equal pay for equal work at the same place’ principle should apply to all companies, including domestic companies, not only for companies posting workers.

However Markus J. Beyrer and Emma Marcegaglia argue that the adoption of this principle would be an unacceptable and harmful interference from the EU in national wage-setting mechanism. Wages differ between workers doing a similar
job at the same geographical location (and even within a firm) depending on the performance of the worker or the economic situation of the company.

Moreover, business associations from five Nordic countries highlight that the introduction of an ‘equal pay’ principle would destroy their collective bargaining system, which allows wage differences and also different collective agreements even in the same place.

They also highlight that their home wages are typically higher than wages in other countries and thereby workers posted from their countries to other EU countries earn more than local employees there.

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The ‘equal pay’ principle would require that posted workers from high-wage to low-wage countries should either earn less than at home (for example a Danish worker posted temporarily to Bulgaria would earn the current Bulgarian wages, which would make it impossible to post him/her) or that wages be equalised throughout the EU. In our view, that would be a misguided intrusion on the functioning of labour markets. It is hard to see how any EU Treaty would allow such an intrusion.

The number of posted workers

Finally, we report data on posted workers and put those numbers in the context of other mobile workers, and also of undeclared workers.

André Sapir (2015) also highlights that the 9.3 million (2013 data) mobile workers present in the EU can be classified as:

- Migrant workers, i.e. workers permanently residing in host member states: 7
million,

- Non-migrant workers, i.e. workers permanently residing in home member states: 2.3 million, of which:
  - Frontier workers (i.e. commuters): 1.1 million
  - Posted workers: 1.2 million

Migrants and commuters have their labour contracts in their host country, while posted workers have labour contracts in their home country.

Therefore, while the number of posted workers is not small, they account for only 13% of mobile workers present in host countries. Given that total employment was 229 million in the European Economic Area (EEA, comprising of the EU, Norway, Iceland and Liechtenstein), 0.5% of total employment is involved in posting.

Of the 1.2 million posted workers, 480,000 are from the ten central European countries that joined the EU in 2004-07 (‘low wage countries’), 140,000 are from four Mediterranean countries (‘middle-wage countries’) and 590,000 from the rest of the EU, plus Norway and Iceland (‘high-wage countries’), according to 2011 data reported by the European Commission.

Therefore, posted workers from low- and middle-wage EU countries, 620,000 people altogether, account for less than 0.3% of total employment in the European Economic Area.

The three largest home countries from where posted workers originate are Poland (228,000), Germany (227,000) and France (144,000). The four host countries receiving the largest number of posted workers are Germany (311,000), France (162,000), Belgium (125,000) and the Netherlands (106,000). 25% of posted workers are in the construction sector, while they are also present in large numbers in the financial and business services, transport, communication and agriculture.

However there are concerns about whether these numbers are reliable. In particular, the ministers of some high-wage countries argue that the figures mentioned above underestimate the true number of posted workers.
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The elephant in the room is undeclared work, which is a much bigger problem than possible problems caused by posted workers on all three accounts: fairness of competition, protection of the rights of mobile workers and possible negative impacts on declared home country workers.

According to Friedrich Schneider (2012), the share of the shadow economy in output in high-wage EU countries ranges from 9% (Luxembourg) to the high level of 21% (Belgium). Undeclared work can be more labour intensive than declared work, meaning that the share of undeclared work in employment could be even higher than in output.

Therefore, if estimates for the shadow economy rightly reflect the orders of magnitude, the number of undeclared workers could even be 20 times higher than the number of posted workers.

Undeclared work is used by both domestic and foreign firms. Undeclared workers are at the mercy of their ‘employer’, receive no social protection and can be paid below the minimum wage. A posted worker is a more desirable situation than an undeclared worker, also for the host countries, because posted workers are regulated by the Posting of Workers Directive (PWD).

In our view, given the vast number of undeclared workers relative to posted workers, stepping up the fight against undeclared work, including the elimination of abuses of the PWD, is a more promising way to improve fair competition and the respect of workers’ rights than introducing a “the same pay for the same work at the same place” principle.