

**INTRA-EU POSTING:
COSTS AND BENEFITS**
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**Implementation & application of the Posting
of Workers Enforcement Directive (PWED)**

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How is labour law enforced?

- Both self-enforcement (private enforcement) and State enforcement (administrative & criminal enforcement)
- Some inherent difficulties that hinder compliance and enforcement:
 - employers** often have strong incentives for non-compliance;
 - employees** usually face various barriers that prevent self-enforcement;
 - effective enforcement by the **State** is costly and complicated.

Cross-border context: no 'free movement of inspectorates' & highly complex legal situation

Barriers to effective enforcement of PWD

- high worker mobility
- “ So every time you have to figure out exactly what is
- the law that applies to this person.
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- You know, does he have a Dutch contract? Does he have a Polish contract or a Romanian contract? Is he even under EU law?

And that makes it almost impossible for us to really organise these people.”

Complex intersection of legal areas

- **PIL in employment relationships:** Article 8/9 “Rome I” (= Reg. 593/2008)
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- **Internal market law / labour law:** Posting of Workers Directive (Dir. 96/71) + (differing) national implementation measures and national substantive labour law provisions
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- **Company law rules impacting on ‘corporate mobility’:** A mixture of national PIL rules /substantive law and EU freedom of establishment (case law)

Promise of the PWED: fostering ‘genuine posting of workers’, enhancing compliance to and enforcement of the PWD

- Tools to define/distinguish: ‘genuine’ established posting companies & ‘genuine’ posted workers
- Enhanced access to information / cooperation between administrative and inspection services, including better identification of persons (notification systems) / cross-border exchange of information
- Joint & several (chain) liability / Measures with respect to cross-border legal proceedings + execution of judgment and sanctions ⁵

Key questions

- (How) is the **PWED** implemented in national law and/or practice (governance) of the Member State?
- (How) is **national PWE law** applied / complied to?
- How to reconcile ‘holistic’ approach by cross-border business with ‘silo approach’ (based on separate legal areas) of national inspectorates/authorities?

National transposition measures communicated by the Member States

- <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0067>
- Transposition deadline: 18/06/2016
- 4 Member States seemingly did not take any (legislative) measures yet

Enhanced information on national websites?

Art. 5 PWED

- **Examples 2017:**
- http://www.postingofworkers.at/cms/Z04/Z04_10/home
- <http://www.answersforbusiness.nl/guide/posting-employees>
- https://www.business.belgium.be/en/managing_your_business/human_resources
- **Compare to issues identified in Report 2011:**
“Information provided on the posting of workers” by Institut du travail Universite Strasbourg, France
- <http://ec.europa.eu/social/BlobServlet?docId=6667&langId=en> .

- **Article 4 PWED**

- Gives tools to ask ->

1. Where is the service provider established?

2. Is the worker **temporarily** carrying out work in a Member State other than the one in which he or she normally works?

How to assess ‘limited period of time’?

- **Recital 13 PWD:** employers who post workers **to perform temporary work** in the territory of a Member State where the services are provided.
- **Recital 36 Rome I:** work carried out in another country should be regarded as **temporary** if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.
- **Rush Portuguesa point 15:** where there is a **temporary movement** of workers who are sent to another Member State to carry out work as part of a provision of services by their employer. **In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.**



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- **Assessment of 'indicative elements' Article 4(3) PWED**
 - (a) the work is carried out for a limited period of time in another MS;
 - (b) the date on which the posting starts;
 - (c) the posting takes place to a MS other than the one in or from which the posted worker habitually carries out his or her work according to Rome I;
 - (d) the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
 - (e) the nature of activities;
 - (f) travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
 - (g) any previous periods during which the post was filled by the same or by another (posted) worker.

- Where there is no genuine posting situation and a conflict of law arises, **due regard should be given to the provisions of Rome I** that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit. **Member States should ensure that provisions are in place to adequately protect workers who are not genuinely posted.**

Why will it still remain difficult to combat bogus arrangements?

- « **Letterbox companies** »:
- Legal entities established on paper in any EU jurisdiction without a (strong) link to economic substantive activities carried out in that jurisdiction
- **Holistic approach:** Cost cutting via tax avoidance, lower labour standards and social security fraud

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Bulgarije, ster in Europa

Vaste vlaktaksen Bulgarije kan zonder enige twijfel beschouwd worden als DE 'outsourcing ster' in Europa. Sinds 2007 gelden volgende ...



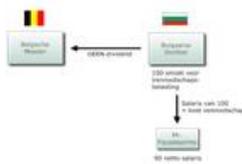
Loonkosten in Bulgarije

Ondernemen in Bulgarije



Welke vennootschap kies je in Bulgarije?

1) Limited Liability Company: de zogenaamde EOOD (1 aandeelhouder) of OOD (meerdere ...



U wilt Bulgaarse belastingplichtige worden?

Situatie 1: geen link tussen uw Belgische en Bulgaarse vennootschap
Voorbeeld 1 De ...



Belasting en sociale lasten: hel in België, walhalla in Bulgarije.

Een aantal factoren zorgen voor een extreem groot verschil tussen Bulgarije en België ...



Zoek

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Vergeet 11.11.11!

10.10.10

- 10% personenbelasting
- 10% vennootschapsbelasting
- 10% van de totale Belgische loonkost

Cost comparison: Belgian vs Bulgarian worker

	België	Bulgarije
Nettoloon	€ 1 800,00	€ 400,00
+ sociale zekerheidsbijdragen werknemer + ingehouden bedrijfsvoorheffing (personenbelasting werknemer)		
Brutoloon	€ 2 996,85	€ 510,27
Jaarlijks bruto salaris	€ 33 200,00	€ 6 123,24
+ sociale zekerheidsbijdragen werkgever + andere directe kosten en indirecte kosten		
Jaarlijkse totale werkgeverskost	€ 51 105,60	€ 7 213,18
Maandelijks totale werkgeverskost	€ 4 258,80	€ 601,10

- **Article 4(2) PWED:** allowing for assessment of whether there is a ‘genuine establishment’, based on factual elements such as:
 - Place of registration, administration, office space, professional licence
 - Place of performance of substantial business activity, number of (administrative) staff, size of turnover....

Cross-border contacts between inspectorates

- **Frequent queries to authorities in ‘sending’ countries:**
- Is the posting company legally established in Poland?
- Does this company conduct significant activities in Poland?
- **Does this company employ posted workers on the basis of an employment relationship?**
- In which sector does the company conduct its activity?
- Does the company provide services in the context of temporary work agency, and if so has it been registered in the register of employment agencies?¹⁷

ETUC research project: company & ownership search reveals

- **Not stable businesses** with specialised staff
- Often: registered in eastern Europe and address in EU 15
- **Workers not employed by same company for more than six months**
- Subcontracting contracts passed on from one letterbox company to another (within the same ownership chain)
- This **obscures employment relationships** and making access **to justice for workers** in case of violations such as unpaid wages **next to impossible**
- Legal entities largely connected to **individuals who own a series of companies**
- **Legal advice sector**: spin-off industry, reinforcing and proliferating abusive practices for own interests

Should companies be able to register anywhere?

- From a 'letterbox perspective' the answer is obvious...
- However, **national laws** determine the legal existence and capacity of a company either by the place of its incorporation (**incorporation theory**) or by the location of its actual administrative office (**real seat theory**).

- Acknowledge the **functional interdependence of rules combating letterbox practices** and **align** (and or interpret in a consistent manner) these **rules across legal fields** (strengthening the approach in **Art. 4 Dir. 2014/67 & Art. 5 Reg. 1071/09**)
- Make assessment of valid incorporation under the laws of a MS conditional (**at least in certain risk sectors**) on... **disclosure**, (minimum **capital** for limited companies) & **personal joint and several liability of directors/owners**

Target ‘letterbox’ (sub)contractors

- Restrict or exclude ‘labour only’ subcontracting from procurement procedures and limit their use in CLA’s
- Make use of **Art. 12 (4) EPWD** and extend j&s or chain liability for wages to all (cross-border) participants in the chain
- Increase & enhance (cross-border) registration (such as ERRU), licensing, certification tools

Target legal advisors of ‘letterbox’ companies

- See **Art. 2 AMLD**: scope includes auditor, tax advisors, notaries and ‘other independent legal advisors’...assisting in ‘creation, operation or management of (..) companies. **Applicable to letterbox practices or clarification needed?**

Final observation

- For ‘smart and effective’ combating of letterbox practices and ‘fake postings’ consistent approaches and regulation of issues across legal fields is a *sine qua non*

Many possibilities for improvement but no
easy solutions ☹️

Dank u voor uw aandacht,

Thank you for your attention,

Merci pour votre attention.

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