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Revision of the EU Posting of Workers Directive, Social Dumping and Trade Unions' Position

Abstract In 2016, the European Commission proposed a revision of the Posting of Workers Directive and it led to a great deal of debate, with a sharp East–West division in the political reactions. The proposal aimed at eliminating certain kinds of social dumping, arguing that the same work in the same place would get the same pay. Ministers and parliaments in several Central and East European countries raised their voice against the revision. Employers' organizations were generally negative, while the trade union confederations at European level were positive but not uncritical; they wanted a more radical reform. No manifest East–West cleavage became visible in the trade union movement. Even in countries dismissive of the revision, the main labour organizations supported the dominant trade union responses.

Keywords Posting of Workers Directive · East–West conflict · Union attitudes

Introduction

In the summer of 2018, the revision of the EU Posting of Workers Directive (PWD) was adopted by the European Council after more than two years of debate (Directive 2018; Van Nuffel and Afanasjeva 2018). It had then already been approved by the European Parliament. The amendments modified the balance between, on the one hand, EU freedom of providing services and, on the other, its legislation supporting the protection of workers. The debate that preceded the final decisions was quite intense and involved the European Commission, the EU Parliament, EU Member States, the main organizations of the social partners as well as others. The whole issue was very much a matter of social dumping for the trade unions.

The EU rules regarding posting of workers mean that companies from any Member State can win tenders in any other Member State. The original Directive lets companies use lower wages to be competitive, although it postulated a number of restrictions. Still, the arrangement allowed them pretty good chances to increase their market shares and profits, but also to provide more jobs and make jobs more secure for their workers. In this way, there were benefits to reap for both employers and employees, possibly entailing social dumping.

Social dumping is a frequently debated concern in the EU, not least in connection with the enlargement with Central/Eastern European countries. As these Member States generally have lower wage levels and less favourable working conditions than is the case in particularly the Northern, Central/Western and Western parts of Europe, there are differences for various actors to exploit. Notably, a similar discussion took place several years earlier in connection with the entry of Greece, Portugal and Spain as EU Member States (e.g., Bernaciak 2012: 10–12; 2014: 21–23; Voss et al. 2016: 21).

When the European Commission (2016c) in March 2016 proposed a revision of the PWD, questions related to social dumping came into focus. A stated ambition in the proposal was that posted workers should be subject to the same rules as local workers. It can then be asked with whom trade unions in different countries feel solidarity. Is it above all with trade unions in other countries or with their national companies or

maybe their home nation? We will examine how various actors and in particular trade unions—both in the sending and in the hosting countries—reacted to the Commission’s suggestion of reducing the differences in employment and working conditions between local and posted workers. If the Central/Eastern European organizations regarded the existing system of posting of workers in the EU as advantageous, we could expect them to be against the suggested revision of the PWD. This implies the idea that their interests are best served if they can compete with lower wages, which is presumably unacceptable for unions in other parts of Europe. Thus, the new proposal might pave the way for a conflict or a tension that could be detrimental to transnational trade union cooperation.

The structure of the chapter is the following. First, there is a short description of the phenomenon of posting of workers. Then a section comes on key concepts such as social dumping and solidarity. It is followed by a brief presentation of the first PWD from 1996 and the associated Enforcement Directive (ED) from 2014. After that we outline the main features of the European Commission’s proposal to change the PWD. The main research question is what to expect from trade unions concerning this proposal. To provide some background, we give some examples of what has happened in other contexts. Trade unions can have different loyalties and it cannot be taken for granted whether they will be in solidarity with their own companies’ opportunities for development, with their own country’s economic interests or with trade unions in other countries. The empirical basis for the analysis is the reactions on the proposed revision of the PWD from the political scene and from the social partners. Our focus is on trade unions—due to our concern with the conditions for cross-border trade union cooperation—but we will look at their reactions in relation to other actors’ responses. Finally, we summarize and interpret the empirical results and discuss their implications for cross-border trade union cooperation.

What Do We Know about Posting of Workers in Europe?

For several years posting seemed to be a very marginal phenomenon (European Commission 2016a: Annex II; De Wispelaere and Pacolet 2018; Voss et al. 2016: 14–20). Eventually there was some substantial increase but from a very low level. Still in 2017, it was only a tiny fraction of total EU employment.

The first PWD from 1996 contains a definition of the concept of posted worker; Article 2.1 says that the term denotes someone ‘who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’ (Directive 96/71/EC). The information available is rather uncertain, but one data source commonly used to describe the phenomenon is the information on the Portable Documents A1 (PDs A1), required to establish ‘that the holder is properly affiliated to the social security system of the Member State which has issued the certificate’ (De Wispelaere and Pacolet 2018: 12). When it comes to social security coordination in the EU, a crucial principle is that individuals ‘are subject to the legislation of a single Member State only’ (De Wispelaere and Pacolet 2018: 8). The PDs A1 cover somewhat different categories of persons. The most important category includes those who are covered by Article 12 of the Basic Regulation (Regulation 2004). These persons ‘are posted by an employer to another Member State to perform work’ or they can be self-employed ‘who go to pursue a similar activity in another Member State’ (De Wispelaere and Pacolet 2018: 12). There is also a smaller, but increasing, category of PDs A1 issued according to Article 13 of the Basic Regulation; these certificates refer to employees or self-employed who work in two or more EU Member States. It should be noted that the number of posted individuals is lower than the number of PDs A1, because a person can have several certificates during a year.

The most recent examination of these data refers to 2017. Data are available for EU Member States, but also for Iceland, Lichtenstein, Norway and Switzerland. In 2017, the PDs A1 were calculated to correspond to 1.2% of total employment in the EU. This meant an increase over the previous year with over 22% and compared to five years earlier with

almost 84%. The largest numbers of PDs A1 were issued in Poland and Germany with more than 533,000 and almost 400,000 respectively (De Wispelaere and Pacolet 2018: 21, Table 4). These two countries have been at the top for several years. In third and fourth place we find Spain and Slovenia, each with approximately 190,000 PDs A1. Compared to 2016, Germany had an increase of almost 54% and compared to 2012 its increase was about 64%. The corresponding figures for Poland were roughly 12 and 68%.

On the receiving side Germany and France show the highest numbers, with Belgium as third. The largest net senders (according to Article 12) in 2017 were Poland, Slovenia and Slovakia and the largest net recipients were France and Germany, followed by a number of countries that were close to each other: Austria, Belgium, Switzerland and the Netherlands.

The most interesting aspect for the purpose of the current chapter is to what extent the flows go from low-wage to high-wage countries.¹ In this respect, we focus on information about PDs A1 given out according to Article 12 of the Basic Regulation (De Wispelaere and Pacolet 2018: 27, Figure 8). Notably, during 2017, the clearly largest category of postings happened between high-wage countries. It made up about 40% of the totals. The most relevant flow here—from low-wage to high-wage countries—was the second largest category. It accounted for slightly more than 29% of the total transitions. In third place there was the category moving from medium-wage to high-wage countries (almost 18%). All other flow types were small. There is also information about the PDs A1 issued in 2017 (under Article 12) on sector of activity. Approximately 47% of the postings then occurred within construction (De Wispelaere and Pacolet 2018: 31, Table 9). Two sectors—the service sector and other industrial activities (i.e., with construction excluded)—had roughly 26–27%.

It is more difficult to get an exhaustive picture of the duration of postings, because these data are available only for a limited number of countries. For 2017, we have access to information for 17 countries that issued PDs A1 under Article 12 (De Wispelaere and Pacolet 2018: 34, Table 12). The weighted average was 98 days. There is a wide spread between the countries: low figures for Luxembourg and France (less than a month) and high for Estonia, Ireland, Croatia, Latvia, Hungary and

Finland (over 200 days). It should be repeated that a person can be sent more than once during a year.

Key Concepts

With increasing international competition, the concept of social dumping often gets a central place in the debate. Through the EU enlargement to the East with former socialist countries it has been very much a matter of the East–West relationship. Magdalena Bernaciak (2016: 510) has identified three aspects of this EU enlargement making the fear of social dumping relevant. The first is the opening-up for Western capital to invest in low-wage Central/Eastern European countries, either by moving existing companies or by starting new businesses there. All such investments cannot be described as social dumping, but some of them can. The second aspect is intra-EU mobility of labour allowing people to move from the East to the West and in the new country work for lower pay and under inferior working conditions than others. Finally, companies can temporarily offer services in any other EU Member State, which thus means posting of workers. The PWD sets up certain limits to how wage levels and working conditions can deviate from those in the host country, and the revision of it is about making the rules stricter for posting companies.

We must keep in mind that the phenomenon of social dumping is not limited to a cross-national dimension; it has a much wider application and may very well take place within a country or even within a single company (Bernaciak 2014: 25). This chapter, however, concentrates on the cross-national dimension, due to our interest in the possibilities and difficulties for transnational trade union cooperation.

The concept of social dumping has value-related connotations that are unquestionably negative, but its theoretical meaning is frequently unclear or unspecified. As a consequence, many different interpretations may be implicated. Vague concepts can have a major political and ideological impact, sometimes perhaps precisely because of their lack of clarity. It is obvious that there is a need for theoretical and conceptual clarification. Some authors have taken on this task, for example Bernaciak

(2012, 2014, 2015). In developing her definition, she criticizes several other scholarly uses of the concept. There is, for example, a tendency to confuse lower wages and inferior employment with social dumping and ‘unfair’ competition. It is moreover common to mix positive and normative elements and to take the standards in high-wage countries as universal frames of reference. Another problem is that many studies are single-case studies, which may not even appear to be related to the same phenomena. In an attempt to ‘avoid normative traps and to bring different manifestations under a common analytical umbrella’, Bernaciak (2014: 16) defines the key concept as ‘the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a short-term advantage over their competitors’.

This is a helpful clarification, but some remarks are justified. It seems that the word ‘self-interested’ is redundant in Bernaciak’s definition; it should be sufficient to say that the actors’ aim is to gain advantage over others. In addition, the word ‘short-term’ also appears to be a dispensable limitation. The argument that speaks for including it is that competition is a relative affair. If someone engages in social dumping, others may soon follow suit with the result that the advantages gained by the first actor simply vanish. This is undeniably a realistic scenario, but there can nonetheless be situations in which dumping companies and companies abiding by norms and regulations exist side by side for a longer period of time. It can still be beneficial for the latter to avoid a ‘race to the bottom’, for example because of the advantage that lies in maintaining cooperative relations with unions. Likewise, it remains an open question where to draw the line between ‘short-term’ and ‘long-term’. A perhaps more important observation is brought up by Jens Arnholtz and Line Eldring (2015: 82–83). They note that the concept of ‘social regulations’ in Bernaciak’s definition presupposes some kind of norm. Therefore we need to examine how these norms are created and become guiding principles.

A valuable contribution has been made by Annette Thörnquist (2013, 2015) in her analyses of false self-employment (which is rather common, for example, in construction, cleaning, road haulage and certain other

industries) as a form of social dumping. Genuine self-employment theoretically means that workers are the owners of their means of production, that they work independently and that they provide goods or services to several clients (Adlercreutz 1964: 6–7). In reality, however, we often find a grey zone in which formally self-employed persons work for only one principal. These persons are subject to conditions similar to those of dependent employees but without having the same rights and protection defined in labour law or through collective agreements. Such arrangements may represent a way of evading certain regulations and hence of lowering labour costs and for that reason they must be regarded as cases of social dumping. Thörnquist (2013: 5; 2015: 414) points out that the method is being used both as a *mode of exploitation* in the capital–labour relationship and as a *strategy for survival* among workers. This is undeniably an important qualification to be taken into account and it is fully in line with Bernaciak’s concept according to which different kinds of ‘market participants’ can resort to social dumping.

Acceptance of a wage reduction or of lower standards in other respects can no doubt be a way for employees to protect their jobs. If their workplace is threatened by downsizing or closure it may be a necessity for continued existence. Another case might be when firms from low-wage countries sidestep rules and norms to win contracts in countries with higher wages; in that way new employment opportunities can be created for their staff. A corresponding reasoning can be applied to job seekers. They sometimes agree to lower wages and/or inferior working conditions than normal just to get a job at all; otherwise they have no income to live on. For example, undocumented immigrants frequently accept much worse conditions than other employees in the country they have moved to, merely to secure survival. Social dumping may thus be a matter of protecting existing jobs as well as a way of creating new job opportunities.

For employers, a simple motive for engaging in social dumping is to increase profits. Such behaviour is associated with two possible advantages for them. On the one hand, if prices are kept the same, it is likely to lead to a greater surplus and, on the other hand, if prices are lowered it is possible to obtain a larger share of the market. In the first case profits can be expected to increase rather quickly and in the second case they will

supposedly be higher and/or more secure in the future. In other words, the choice of strategy may be a matter of different time horizons. Furthermore, also for companies, social dumping can be a matter of securing survival. A company threatened by bankruptcy may have an urgent need to cut costs and one way to achieve this is to lower wages and/or to degrade working conditions.

Susanne Pernicka and her collaborators (2015) have argued that stressing economic interests and utility maximization does not make justice to trade unions' social ties with other unions and their commitment to solidarity values and norms. They consider the notion of solidarity 'a universal principle' for trade unions, 'based on the common interests of all workers' (Pernicka et al. 2015: 3). In accordance with these statements it is claimed that we need a neo-institutionalist perspective to pay attention to values and norms and to specify institutional orders and processes (additionally, see Pernicka and Glassner 2012, 2014).

The concept of solidarity is not really discussed in the above-mentioned publications by Pernicka and colleagues. Rebecka Gumbrell-McCormick and Richard Hyman (2015; Hyman 2002) have provided some useful insights into the complexities of the concept by outlining different interpretations of it. The first version takes its starting point in shared identity, which means that people have certain characteristics in common; they can be members of a nation, a tribe or a social class and this may create a sense of belonging and loyalty. The second understanding presupposes awareness that common interests are best taken care of collectively. For trade unions it is evident that employees' interests must be pursued by a collective organization. Solidarity is then founded on both the objective conditions and the perception of these. There is also a third interpretation of solidarity as 'mutuality despite difference', which can be 'a sense of interdependence' or 'an expression of the obligations of humanity' (Gumbrell-McCormick and Hyman 2015: 2; italics removed). This third meaning can be taken to lean towards charity.

Yet another distinction suggested by Gumbrell-McCormick and Hyman (2015: 2) is that between solidarity *with* and solidarity *against*. This implies conflict and may therefore be less relevant for the third concept above ('mutuality despite difference'). In contrast, a typical example

of how the conflict perspective can be relevant is when workers feel solidarity *with* one another and *against* employers. Having a clear counterpart—especially if this actor is perceived as antagonistic—can certainly strengthen cohesion among workers.

For trade unions, a core principle is to avoid underbidding among workers. If some workers ask for less pay than others for the same kind of work, it is difficult to make joint demands against employers. Underbidding represents a threat to the possibilities of keeping up wage levels and other employment and working conditions. A measure of solidarity is a key factor for success, but cohesion within and between unions can be exposed to strains, not least in international context where national interests may overthrow other considerations. Divisions between trade unions are likely to be detrimental to transnational trade union cooperation, which is the underlying concern in our analysis. It is important to note that solidarity can go in different directions. The aim of this chapter is to examine a set of circumstances where this might be the case.

The Directives of 1996 and 2014

Posting of workers is allowed according to the four freedoms of mobility in the EU—of goods, services, labour and capital. The freedom of providing services in the internal EU market was ensured by the Treaty on the Functioning of the European Union, but there was a need for some further regulation.

The first directive on posting of workers was implemented by the EU in 1996 (Directive 96/71/EC). We have already seen how the Directive defined the term ‘posted worker’. The PWD was aimed at providing a set of common rules for postings and guarantees for ‘a level playing field for businesses’. Although its general preamble mentions ‘respect for the rights of workers’, it was not oriented towards safeguarding that posted workers be treated the same way or get equal pay as workers in the host country (Voss et al. 2016: 22). However, a ‘hard core’ of rights as defined ‘by law, regulation or administrative provision’ concerning employment and working conditions must be followed (Directive 96/71/EC: Article 3.1). In the construction sector, and in other sectors if Member States

so decided, the hard core could also be defined by ‘collective agreements or arbitration awards which have been declared universally applicable’ (Directive 96/71/EC: Article 3.1). The rights included rules regarding issues such as minimum rates of pay, maximum work periods, a minimum of rest periods, a minimum of paid annual holidays and regulations on health, safety and hygiene at work as well as non-discrimination.

The regulations of the conditions for posted workers have given rise to a great deal of debate, for example about the existence of ‘unfair’ competition, fraudulent practices, circumvention of regulations and the difficulties of ensuring a level playing field. Various actors have shown a significant inventiveness in these respects. For example, we find ‘letter-box’ companies established in low-wage countries just to enable posting of low-paid workers in high-wage countries. In 2014 the PWD was therefore supplemented with the ED (Directive 2014/67/EU), the purpose of which was to combat various forms of abuse and to strengthen the practical application of regulations regarding posting of workers. The ED was not initiated to obtain another definition of the hard core or to remedy the inconsistencies between the PWD and the national social security systems. Its objective was to increase transparency, facilitate controls and guarantee the application of penalties and the collection of fines, should such measures be justified.

The European Commission’s Proposal

As mentioned, the European Commission (2016b) proposed a revision of the PWD in March 2016. The ETUC (2010) had then for many years demanded ‘a framework of firm and fair rules, combining open borders and adequate protection of workers’. It seems that the Commission was in a similar way of thinking. The existing rules required posting companies to abide by a set of core rights in the host Member State (see further below), in which workers may have higher standards. This means that employers were obliged to pay the receiving nations’ statutory minimum wages. Nevertheless, there could be large wage differences between posted and local workers, because the latter were often paid well above the minima. To put it in another way words, wage dumping could

become a reality. The Commission's proposal included several measures to change this.

The original PWD was directed to providing a regulatory framework for the transnational provision of services. According to the Commission, it should guarantee fair competition among businesses (a 'level playing field') and respect workers' rights, but the latter objective was not given top priority. The revision was aimed at remedying deficiencies in the existing regulations. In its work program for 2016, the Juncker Commission announced that it would 'present a targeted revision of the Posting of Workers Directive to address unfair practices leading to social dumping and brain drain by ensuring that the same work in the same place is rewarded by the same pay' (European Commission 2015: 8). In a press release in 2016, it was emphasized that the economic and labour market situation had changed significantly since 1996 and with the expansion of the single market, wage differences had increased, 'thereby creating unwanted incentives to use posting as a means to exploit these differences' (European Commission 2016b: 7). It was moreover argued that this development altered the level playing field between companies, with a negative impact on the functioning of the single market. There was also an ambition to improve the PWD's consistency with other parts of EU legislation like the Temporary Agency Work Directive and Regulation 883/2004 on the coordination of social security systems.

The Commission proposed changes in the PWD in regard of three main topics: remuneration of posted workers; rules on temporary agency workers; and long-term posting. Remuneration is a wider concept than the PWD's concept of minimum rates of pay. It includes other elements such as bonuses and pay increases due to seniority. The goal of the proposal was that there should be the same rules of remuneration for posted and local workers, given that these rules are defined by law or by 'universally applicable collective agreements'. Moreover, the Commission suggested that the rules established by 'universally applicable collective agreements' should be extended to posted workers in all economic sectors and not only to those in the construction sector. In addition, Member States would have the possibility of applying the same regulations in case of subcontracting.

Another important part of the proposal was that posted temporary agency workers must be treated the same way as local temporary agency workers. The objective was to create equality between posted and local employees. The current EU legislation required that domestic agency workers be subject to the same conditions as their colleagues in the user company. The proposal thus wanted to extend this principle also to those posted by temporary work agencies from other Member States.

A further suggestion was that postings lasting longer than 24 months should make workers subject to the labour laws of the host Member State. This was already the case according to the social security legislation, but the principle would hence be extended to labour law. For example, after two years a posted worker should be protected against 'unfair' dismissal if the host country has such legislation, no matter whether or not the home country has any such legal provisions.

After more than two years of debates, the revision of the PWD was approved, when both the European Parliament and the European Council adopted it. The revised PWD is to be transposed into national laws by the end of July 2020 and it cannot be applied before that date. The final version is broadly in line with the Commission's original proposal, although some changes were made. One such change was that labour market rules in the host country apply earlier than the Commission had proposed. When a posting has lasted for 12 months, with the possibility of an extension with 6 months, the posting company must follow the labour laws in the hosting country. As noted above, this time limit was 24 months in the Commission's original proposal. We could observe that the revised PWD does not apply to the transport sector, which often has a cross-border character. For this sector the 1996 Directive is still in force. The current chapter is mainly concerned with the discussions that took place after the Commission had published its plan.

It could be expected that the Commission's proposal would encounter different reactions among various actors. To some extent these reactions could be predicted, but it was not so obvious what the answers from trade unions would be. The quotation below illustrates some responses among trade unions in connection with recent EU enlargements and the EU principles of freedom of movement of goods, capital, services and labour:

While unions in Western Europe focused on the risk of social dumping, their counterparts in the East welcomed unrestricted access to Western labour markets. This is not to say, however, that the latter supported cost-based competition. In relation to the free movement of workers, they insisted that the nationals of new member states should work in EU15 for the same wages as domestic employees. In the mid-2000s, they manifested their anti-social dumping position by joining an EU-level mobilisation drive against the draft Services directive ... Justifying their stance, they argued that they did not want to be the cause of 'unfair' competition with fellow workers in the West. (Bernaciak et al. 2014: 70)

A principal rationale behind trade unionism is that workers should avoid underbidding each other. This means that they should make agreements with their employers collectively—through their organizations—instead of each employee doing so individually. Thereby dumping can be avoided, but it becomes more complicated in an international setting when two or more trade unions, often subject to very different circumstances, are involved. What happens when jobs are at stake in different countries? Can conflicts between trade unions then be avoided? By looking at some previous cases, when transnational union solidarity has been put to the test, we can get a glimpse of what might be expected.

Examples of Cross-Border Trade Union Rivalry and Cooperation

A frequently referenced case of social dumping is what happened in Vaxholm, Sweden, in 2004. The Latvian company *Laval un Partneri* had won a contract at a construction site by paying much lower wages than normal for Swedish construction workers. Hence, the Swedish trade union *Byggnads* demanded that the company should sign a Swedish collective agreement. *Laval* then signed two agreements with the parallel trade union in Latvia, still however with much lower pay rates than in the host country. In response thereto, *Byggnads* began a blockade of *Laval*, with some sympathy actions from other Swedish trade unions, and the company eventually went bankrupt. The issue was brought to

the European Court of Justice with support from the Confederation of Swedish Enterprise. The Court found that the Swedish unions had the right to take action, but that their actions were not in proportion to the matters concerned. A crucial aspect was also that the unions could not invoke a statutory minimum wage, as Sweden has no such arrangement (cf. Chapter 3 in this book).

There is no need here to go further into the legal aspects of the *Laval* case (for details, see, e.g., Ahlberg et al. 2006; Bücker and Warneck 2010; Woolfson et al. 2010); the point to be made is just that trade unions may end up in viewing social dumping from very different positions. Despite the question at issue, the relationship between *Byggnads* and the Latvian counterpart never became hostile, but perhaps a little cooler. When our research team interviewed an official at the Swedish organization in 2011 (Lovén Seldén 2014: 94), he said that the relationship with the Latvian union had deteriorated for a while at the time of the conflict. This situation had no longer duration. Actually *Byggnads* had for several years provided various kinds of organizational assistance to the Latvians and continued to offer support also after the turmoil created by the *Laval* events. We also made an e-mail interview with a representative of *LBAS*, the Latvian peak trade union. The interviewee emphasized that the cooperation with *Byggnads* had progressed in recent times. Already in 2005 *LBAS* and the Swedish confederate organization *LO* signed an agreement 'to explore the idea of solidarity and to strengthen cooperation between both organizations' (Lovén Seldén 2014: 94, Note 38).

Other Swedish unionists interviewed by our research team in 2011 talked about the *Laval* quartet verdicts functioning as an alarm clock. It meant that it would be necessary for the trade unions to work more actively with unions from other countries and with lobbying in Brussels. The respondents also emphasized the important role of the Swedish trade union office in Brussels and of personal networks and good personal relations. In other words, although the *Laval* experience must be seen as a defeat, it appears to have had some positive effects on transnational trade union cooperation.

An important distinction is that between central-level and plant-level cooperation among trade unions. Bernaciak (2011) shows this by comparing union responses to the EU draft Service Directive and their

actions with respect to investments and jobs at GM/Opel factories. The two settings provided very different preconditions. In the first case, it was a matter of contacts between top-level unionists in various countries, whereas plant-level unionists were directly involved in the GM/Opel affairs. Moreover, the issue of the EU draft Service Directive was about outlining a declaration and not about making prompter decisions over investments and jobs. The Directive could no doubt have long-term consequences for work opportunities and living standards, but the rivalries between the GM/Opel factories had an immediate relation to the situation for the workers concerned. In spite of the tough competition in the latter situation, it was possible for the trade unions to establish concrete cross-border commitments and links.

Other examples may also be worth considering. Transnational trade union cooperation is generally more likely to develop in multinational companies (MNCs) (e.g., Arrowsmith and Marginson 2006; Bieler 2005), but this does not exclude the rise of inter-plant rivalries in MNCs making such cooperation difficult. We find illustrations of trade union cooperation and rivalry in the competition between European GM/Opel automotive plants some years ago (Andersen 2006; Banyuls et al. 2008; Bernaciak 2010, 2011, 2013; Gajewska 2008; Pernicka et al. 2015). The company was trying to handle its long-lasting problems with profitability in different ways, among other things, by arranging bidding matches between plants.

One case is the contest over the Opel Zafira model between two GM/Opel plants: one in Gliwice in Poland and the other in Rüsselsheim in Germany (Bernaciak 2010: 124–126; 2011: 36–38; Pernicka et al. 2015: 12). Evidently, the chances for winning were related to workers' claims regarding employment and working conditions. The establishment in Gliwice already had an advantage over the establishment in Rüsselsheim by having considerably lower labour costs. In addition to this, the Polish plant-level trade union—a unit of *Solidarność*—signed a concession agreement with the local management including a three-year wage freeze and lower wages for new recruits. As a consequence, the Gliwice factory obtained the largest part of the production of the Zafira model.

Transnational worker solidarity was definitely put to the test, but cooperation between Polish and German trade unions could nevertheless develop. After the investment had been made in Gliwice, *Solidarność* started to prioritize wage increases and improvement of working conditions and then received support from their colleagues in the West. It was important for the Germans with coordination with the Poles to avoid underbidding. The Polish unionists, for their part, had something to achieve from being cooperative, as in exchange they could receive various kinds of assistance.

GM/Opel's European Works Council (EWC)² played an important role in relation to the company's restructuring efforts, to some extent successfully restraining trade union rivalries (Banyuls et al. 2008; Bernaciak 2013: 142–143; Gajewska 2008; Pernicka et al. 2015: 11–12). In 2005, a union committee was set up to avoid 'beauty contests' between five European plants—in Belgium, Germany, Poland, Sweden and the UK—as to the selection for the production of the Opel Astra model. It was called the 'Joint Delta Working Group' and the members soon signed the 'European Solidarity Pledge', demanding fairness in the distribution of investments and assuring that they would not hold separate dialogues with management at the various sites (Bernaciak 2010: 125–126). Still it appears that the British unionists broke the agreement by having negotiations with and making concessions to the Ellesmere Port management (Pernicka et al. 2015: 13–14). Moreover, within the Delta Group, *Solidarność* continued to argue for further resources to Poland on the basis of competitive advantages (Bernaciak 2010: 125–126). In addition, participation in East–West trade union cooperation did not prevent the Gliwice unionists from engaging in a competition with the Zaragoza plant in Spain over another Opel model (Meriva).

As described by several authors (e.g., Andersen 2006: 38–39; Pernicka et al. 2015: 12), there was a similar bidding contest between the GM/Opel factories in Rüsselsheim and Trollhättan, Sweden, concerning the Vectra model. In 2004, together with the European Metalworkers' Federation, the German and Swedish unions rejected this competition in the joint so-called Copenhagen Declaration (EMF 2004). Despite some twists on the thread, this shared effort indicates that trade unions

can bring about transnational cooperation even under competitive conditions.

According to Bernaciak (2010: 121–122) ‘cross-border union coordination can be regarded as a joint effort to minimize competitive pressure on national workforces, rather than exercising transnational solidarity’. For Pernicka et al. (2015), in spite of some indications to the contrary, the GM/Opel rivalries prove that transnational trade union solidarity can prevail also in highly competitive settings. On the other hand, even if labour actors believe in ‘solidarity as a universal principle’, they ‘still have to accept that their ability (and willingness) to enforce labour cooperation and solidarity beyond national or company borders is rather limited’ (Pernicka et al. 2015: 20).

Trade unions are certainly strategic and interest-based actors that are continuously weighing costs and benefits, but their strategic orientations are constrained or facilitated by the structural and institutional settings in which they operate. The generalizability of the examples above may be discussed, but they show that there can be both rivalry and cooperation between unions in different countries. It was thus an open question what union responses could be expected to the Commission’s proposed revision of the PWD.

Do We Find an East–West Conflict over the Commission’s Proposal?

Following the publication of the Commission’s proposal to revise the PWD there were many reactions. Some of the participants in the debate were simply negative, as they found no reasonable ground for the revision. In contrast, others welcomed the initiative but were therefore not automatically uncritical. An overriding question for us was whether we would find an East–West disagreement on the suggested reform. In the presentation of various responses below, we start with the political scene.

Political Reactions

In 2015, the year before the publishing of her proposal, Commissioner Marianne Thyssen received two letters from two different groups of countries (Voss et al. 2016: 51). The senders of the first one were the labour ministers in a group of high-wage countries (Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden). They demanded a significant change of the PWD that should be governed by the principle of 'equal pay for equal work in the same place'. In their eyes it was necessary to create a better balance between economic and social standards and to avoid social dumping. The second letter came from ministers responsible for labour and social affairs in a group of low-wage countries (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia). It expressed very different arguments. Their contention was that a revision of the PWD would be premature; first, 'a proper assessment' had to be carried out concerning the impact of the ED. Moreover, a revision of the PWD could have very negative effects on the freedom to provide services.

After the publication of the Commission's proposal, the parliaments in the same EU Members States plus Croatia and Denmark showed a 'yellow card' to the European Commission for its suggestion to revise the PWD (Voss et al. 2016: 53–54).³ Denmark was an exception in this group of countries; its reported motive was just that the reform collided with the subsidiarity principle. The Danish parliament actually emphasized that an important objective would be to ensure equal pay for equal work and that the proposal would help to avoid social dumping. The other ten countries all belong to the relatively new Central/Eastern European Member States and they were all negative to the planned revision, also invoking its incompatibility with the notion of subsidiarity.

A few other parliamentary responses (from Italy, Portugal and Spain) conveyed positive opinions over the Commission's proposal (Voss et al. 2016: 53). It should be noted that the European Parliament had not yet declared a unified view about the proposal, but among the political groups the clearest positions were taken by the Group of Socialists and Democrats and the European Conservatives and Reformists Group

(Voss et al. 2016: 52). The first assembly was positive and the second was negative.

The European Commission responded rather quickly to the yellow card procedure. Its main conclusion in the press release was that the proposal on the PWD revision ‘does not constitute a breach with the subsidiarity principle’ and Commissioner Thyssen was cited, saying the following: ‘We have carefully analysed all arguments put forward by national Parliaments and discussed their concerns with them. All things considered, we have concluded that our proposal fully complies with the principle of subsidiarity and we will therefore maintain it. Posting of workers is a cross-border issue by nature. The Juncker Commission remains firmly committed to the free movement of people on the basis of rules that are clear, fair for everybody and enforced on the ground’ (European Commission 2016d).

Briefly summarizing the political reactions to the planned revision of the PWD, we must conclude that the data reveal a rather distinct East–West conflict. It is above all in Central/Eastern European countries that we could observe negative attitudes to the Commission’s proposal. Various opinions against the proposal were put forward. It was assessed as reasonable to wait and see what the effects of the ED from 2014 turned out to be. More importantly, there was also a worry that the new Member States would lose competitive advantages and that the freedom of providing services would be circumvented. A more formalistic point of view was that the reform would interfere with the subsidiarity principle. Other political actors—for example, some parliaments in Southern Europe and the Group of Socialists and Democrats in the European Parliament—were positive to the suggested revision of the PWD.

The Social Partners’ Responses

BusinessEurope, the main European confederation on the employer side, and a number of national employer organizations in Poland, the Czech Republic, Malta, Lithuania, Latvia, Portugal, Slovakia and Ireland expressed already in 2015, when the European Commission had announced its decision on a ‘targeted review’ of the PWD, that the

revision would go too far in restraining economic freedoms (Voss et al. 2016: 49). There was also a letter sent to the Commission from Nordic employer organizations, worrying about the consequences of the principle ‘equal pay for equal work at the same place’ for national collective bargaining systems (Voss et al. 2016: 49; italics removed).

When the European Commission’s proposal was published, BusinessEurope declared that it could see no satisfactory reason for a revision of the PWD (Voss et al. 2016: 72). The scheme was assumed to damage the freedom of providing services in the European market, by undercutting the competitive ability of companies crossing borders. A further argument brought forward was that the most important task would now be to fight illegal practices and for this purpose the ED was expected to be a useful tool.

Another sceptical organization was the European Construction Industry Federation (FIEC) (Voss et al. 2016: 73–74). It was doubtful to the added value of the proposal. In 2015, it had authored a joint statement with the European Federations of Building and Wood Workers (EFBWW) in which a number of suggestions were put on the table regarding how to avoid abuse. In spite of its distrustful attitude, FIEC found it reasonable that posted temporary agency workers were treated in the same way as such workers in the host country.

The European Confederation of Private Employment Services (EUROCIETT) was yet another organization that disagreed with the revision of the PWD (Voss et al. 2016: 74). It supported the principle of equal pay for equal work as defined in the EU Directive on temporary work agencies, but argued that 16 Member States had already adopted this principle and that it was an option available for everyone. Instead of revising the PWD, the Commission should focus on getting full impact for the ED.

Interestingly, there was also one employer organization welcoming the European Commission’s proposal, namely the European Building Confederation (EBC) which represents small and medium-sized enterprises in the construction industry (Voss et al. 2016: 74). The EBC pointed out that smaller companies were generally disfavoured by unfair competition. It thus appreciated a change that could help to eliminate exploitation based on wage differentials.

Turning to the trade union side, we find two organizations to be particularly active in relation to the revision of the PWD: the ETUC and the EFBWW (representing workers in the construction sector, the largest industry for postings). As mentioned above, when the Commission's proposal was published in 2016, the ETUC had for many years advocated that the PWD would be revised and unsurprisingly it thus belonged to the welcoming category of actors (ETUC 2016; Voss et al. 2016: 72). This does not mean, though, that the organization considered the proposal sufficient; it had a series of objections. The ETUC endorsed that the concept of minimum rates of pay would be replaced by the broader concept of remuneration, but at the same time it demanded a clear statement in the PWD that competition with labour costs should not occur in connection with postings. The main argument was furthermore that the proposal contained a too narrow definition of the kind of collective agreements that would be applicable. It was claimed that also sectoral and even company-level agreements must be accepted; otherwise, there would be equal pay only for some posted workers.

Another criticism concerned the Commission's suggestion that when postings had lasted 24 months, national law should be applicable. It is unusual that postings exceed two years, which apparently has to do with 'the restrictions on social security contributions'. In addition, the Commission's proposal left the possibility open for bypassing the time limit. According to the ETUC, the maximum duration of posting should be decided by the host Member State in discussions and negotiations with the social partners.

The ETUC also called for the introduction of a mandatory liability mechanism concerning subcontracting. In regard of temporary agency workers, it was insisted that they be treated in the same way as temporary agency workers in the host country. It was furthermore considered necessary that they had a previous period of employment in that country; if not, they must be treated as being regularly employed there.

The EFBWW had similar comments to the Commission's proposal. It welcomed the extension of the PWD to all sectors as well as the introduction of the concept of remuneration. Like the ETUC, the EFBWW wanted no restriction on the kind of collective agreements that would be valid. This means that the national systems of industrial relations must

be respected. On the maximum duration of posting, it was noticed that the 24-month limit was exceptionally long and far from the average.

A fact worth being observed is that the member unions from the Central/Eastern Europe in the ETUC and EFBWW agreed with the positions taken by these confederations. The internal discussions are not made public, but no opposition has been reported. Does this mean that there was no East–West tension in the trade union movement as to the revision of the PWD? Actually, we have found no evidence speaking in favour of any severe such tension. Six main trade unions in the Visegrad group (Poland, the Czech Republic, Slovakia and Hungary) welcomed the Commission’s proposal (Joint Statement 2017). They underlined how important it was to create a level playing field for all actors involved. Fair competition for companies and equal rights for workers were deemed indispensable. In particular it was emphasized that ‘the paramount principle of equal pay for the same work at the same place must be accepted and included in the Revised Directive as its most essential provision’ (Joint Statement 2017; bold style removed). In a separate statement, *Solidarność* (2016) stressed that the proposal went in the right direction to implement ‘the principle of equal treatment of employees’. In a later letter—endorsed by a large number of Central/Eastern European unions—on another draft ETUC resolution, it is made clear that the support for the ETUC’s position on the revision of the PWD was guided by a future-oriented approach (*Solidarność* 2019):

We would like to remind that our organizations, despite pressure from governments and public opinion in our countries, maintained a common and identical [view] with the ETUC’s position on amendments to the Posted Workers Directive. It was because we were looking forward. We understood that we could not be guided by short-term gains in form of enabling our entrepreneurs to build their comparative advantage by competing on the basis of lower wage costs.

In searching for other statements on the PWD revision, we have contacted researchers in Poland, Bulgaria and Romania and they have provided information from their respective countries, after consulting with trade unionists. This data collection did not reveal any discontent with

the Commission's proposal. There is nothing to indicate that Central/Eastern European trade unions to any significant degree sympathize with the views of the critical politicians and parliaments. It should perhaps not be entirely ruled out that some dissatisfaction could exist below the surface. One relevant question to ask in this context is to what extent posted workers are represented by the labour organizations, given the generally low union density rates in the region.

Trade unions and employers' associations have as a rule responded very differently to the European Commission's proposal for revision of the PWD. The former organizations were relatively positive, whereas—with the EBC as an exception—the latter were sceptical, to a large extent on the same grounds as many of the parliaments in Central/Eastern European countries. When the trade unions put forward criticism, it was mainly because they believed the suggested reform did not go far enough to create equality between posted and local workers. Concerning the questions raised in this article, it is important to notice that the trade unions in those Central/Eastern European Member States where the parliaments sent a yellow card to the European Commission did not agree with their parliaments.

Conclusion and Discussion

The facts examined in this chapter show that the responses to the European Commission's proposal of a revision of the PWD were divided. There was a clear East–West division in the reactions from European politicians. Ministers in nine countries in Central/Eastern Europe and the parliaments in ten countries in the region raised their voice against the revision. Contrary to this, some Southern European parliaments responded in favour of it. In the European Parliament, the Group of Socialists and Democrats was positive and the European Conservatives and Reformists were negative. Regarding the social partners, employers' organizations were typically negative—although with some exception—while the trade union confederations at European level were positive but not uncritical; they argued that the reform did not go far enough. Interestingly, there seemed to be no manifest East–West cleavage in the

trade union movement. In spite of strong negative reactions in many Central/Eastern European parliaments, the main labour organizations in these countries supported the dominant trade union responses. Basically, they were all on the same side in welcoming the revision. In other words, a rather predictable employer-trade union pattern comes into sight.

The European Commission emphasized that social dumping had to be tackled. In consequence, it was essential that the same work in the same place would be paid the same. This was a crucial objective of the revision of the PWD, but it does not mean that the implementation of the Commission's proposal will really lead to equal pay for equal work. At best, as the ETUC pointed out, there would be equal pay for some posted workers. One thing to be aware of is that not even all local employees get the same remuneration for the same kind of job. How could it then be possible for posted workers to get the same pay as local workers? Still, it should not be denied that the PWD revision can be a step in reducing differences between posted and local employees. This implies that the competitive advantages that companies from Central/Eastern European countries have in the provision of services in high-wage countries will shrink. The opportunities of competing with labour costs and social dumping will no longer be as obvious as before. It is the restrictions of these opportunities that many Central/Eastern European politicians have protested against. The trade unions in the same nations have not agreed, but instead consented to the opinions against social dumping expressed by the significant European trade union confederations. They made a choice which set them apart from the rather strong sentiments at home. Is this due to self-interest or to their support of wider union solidarity norms?

There is hardly any definite answer to that question. The classification of industrial relations regimes does not give us any guidance in this regard. We can interpret the evidence as an indication of solidarity between trade unions in different parts of Europe. These organizations appear to be in solidarity with each other, which implies that in many Central/Eastern European countries they take a position contrary to the views of the dominant politicians. They have chosen transnational union cooperation rather than the national road for the future.

One aspect to consider is that the statements on the revision of the PWD were made by central-level unionists in the ETUC, the EFBWW and other organizations. These are unionists who may more easily reach consensus, because they do not directly experience the effects of reforms (cf. Bernaciak 2011). It may be simpler for them to adhere to common trade union ideology with its values and norms. We must not therefore completely reject the idea of the effects of solidarity ideology and a neo-institutionalist perspective may help us to see its influence (Pernicka and Glassner 2012, 2014; Pernicka et al. 2015). Nonetheless, we must also take the role of tangible advantages into account, as Bernaciak (2012, 2013, 2015) has reminded us time after time. Cooperation with other European unions is in many ways important for the weak Central/Eastern European organizations. The latter are likely to have much to gain from sharing the experiences of others and many of them receive handy assistance in building up their activities. This is something that they probably find worth keeping. Also, in the long run, more equal remuneration of posted and local workers may be beneficial for all. Competing with lower labour costs can perhaps generate benefits in the short run, but these may become insignificant in a longer perspective. Yet another aspect is the social dumping in Central/Eastern European nations due to the inflow of workers from countries such as Belarus, Moldova and the Ukraine. How should the Central/Eastern European trade unions respond to such developments? They no doubt have several good reasons to safeguard the principle of equal pay for equal work in the same place.

The fact that labour organizations across Europe share the same or similar views on the revision of the PWD has consequences for transnational trade union cooperation. Being in agreement on this issue will certainly facilitate such collaboration within the European trade union movement. The discussion of the revision of the PWD can be said to have been consensus-building. In that sense, it has promoted or confirmed a cooperative climate. As we could see in the previous chapter, not all issues have developed in such a way. There are other challenges for the European trade unions to deal with.

Notes

1. With the definitions used in the report, high-wage countries include Denmark, Luxembourg, Sweden, Finland, Belgium, the Netherlands, Germany, France, Austria, Italy, Ireland, the United Kingdom, Iceland, Lichtenstein Norway and Switzerland. Low-wage countries are Croatia, the Czech Republic, Estonia, Poland, Hungary, Latvia, Lithuania, Romania and Bulgaria. In addition, there is also a medium-wage category: Cyprus, Spain, Greece, Malta, Slovenia and Portugal.
2. From its start in 1996 up to 2012 it was called the ‘European Employee Forum’ (Pernicka et al. 2015: 9).
3. A yellow card procedure means that the initiator of a legislative change, in this case the European Commission, must reconsider its proposal. It requires one-third of the votes to be effective. The eleven countries represent 22 votes, three votes above the threshold.

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