

# Posted workers regulations as a cohesion test in the enlarged European Union:

divergent interests of trade unions, employers'  
organisations and governments

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# Executive summary

The cross-border posting of workers – which operates in accordance with the freedom to provide services in the European Union – is both a controversial and topical issue. It touches upon a fundamental issue for the shape of the “Social Europe” model, which defines the relationship between economic freedoms of the EU internal market (including the freedom to provide services) and social policy, including the protection of workers’ rights.

The final formulation of the amendment to the Directive on posted workers was approved by EU ministers responsible for social affairs during the Bulgarian Presidency on June 21, 2018 on behalf of the Member States’ governments. However, Poland and Hungary voted against the adoption of the amended Directive’s provisions, while Latvia, Lithuania, Croatia and the United Kingdom abstained from voting. The objection of two countries and abstention of four others shows that consensus on the posted workers regulations has not been reached and that the slogan “the same pay for the same work regardless of where it is performed” made by the President of the European Commission, Jean-Claude Juncker, has not been understood and entirely accepted in some parts of the EU. Nevertheless, the amended Directive is to enter into force in 2020 after three years of stormy negotiations (2016-2018).

Tensions between countries were visible throughout the whole legislative period; it is enough to mention the “yellow card” procedure in which almost all the parliaments of the new Member States, plus Denmark, took part. The adoption of the amended Directive on posted workers did not bring this tension to a close, confirming that the conflict is long-lasting. In October 2018, the governments of Hungary and Poland submitted a complaint to the Court of Justice of the European Union related to the amendments. The complaint claims that the new regulations limit the freedom to provide services within the EU (Article 1 point 2 a and b of the Directive), which is prohibited by art. 56 of the Treaty on the Functioning of the EU. It has been alleged that the new regulations on the remuneration of posted workers and other administrative duties are disproportionate. In addition, they are in contradiction to art. 53 par. 1 and 62 of TFEU, which provides an obligation to facilitate the provision of cross-border services. The complaint also concerns the application of new provisions (Article 3 (3) of the Directive) to transport services.

The map of potential conflicts in the debate on posted workers is intrinsically complex. We are dealing with the convolution of interests of various groups and entities: companies posting their employees, companies in hosting countries that compete with companies from sending countries, posted workers themselves earning in other Member States, as well as workers in a host country who may be afraid that the long-term employment of posted workers will lead to a lowering of their labour standards (social dumping) or even to their loss of their jobs. On the top of that, there are national governments

trying to define the public interest, and EU-level institutions who look at the issue from a somewhat different angle. To confuse the whole picture even more, there are also some fraudulent practices like “letter-box” companies who post workers in situations where a company does not carry out actual activity in a given country, the bogus self-employment of posted workers, and the evasion of remuneration and social security contributions (including retirement, disability or health insurance).

The amendment of the Directive on posted workers does not take these issues into account and does not modify the very essence of posting; it instead aims primarily at strengthening compliance with existing rules. Previously, the Enforcement Directive 2014/67/UE was adopted to put in order some problematic aspects. Nevertheless, further developments have shown that the implementation of the Enforcement Directive alone has not solved many tensions. It has instead revealed a growing fear that the European Union itself might be simply an economic project which does not take into account the implementation of social integration and convergence processes. The debate on the posting of workers showed that the main axis of conflict pits Western Europe against Eastern Europe. In the former, protectionist tendencies look set to intensify, while in the latter there is still an enthusiasm towards for idea of a single market.

It is far too early to conclude the debate on the posting of workers. However, some challenges can be highlighted.

Firstly, work on the Mobility Package has not been completed yet. This is intended to answer the key question of including cross-border transport drivers in the scope of the Directive on posted workers (excluding cabotage). It is clear from the data collected in this report that the model of remuneration for international transport drivers in all surveyed countries (Poland, Romania, Slovakia and Lithuania) is based on the payment of a significant part of remuneration (defined as a daily allowance and a lump sum) without social security contributions. This practice, which results from national regulations, is the main element of competitive advantage based on lower labour costs. When juxtaposing these practices with the provisions of the European Pillar of Social Rights adopted by all Member States in Gothenburg, it is clear that drivers from the new Member States do not have equal access to social protection.

Secondly, apart from the incomplete arrangements between the EU Parliament, the European Commission and the Member States regarding the issue of posted workers regulations, there are also other problems. On the one hand, there are the complaints of the governments of Poland and Hungary mentioned above, and on the other – the actions of the European Commission towards Germany, France and Austria related to the introduction of minimum wages that also apply to drivers transiting through the countries. The European Commission expressed the opinion that the introduction of these regulations disproportionately limits the freedom to provide services. The rulings of the Court of Justice of the European Union may turn out to be as controversial in this respect, and as debatable as the decisions made in the case of the famous Laval Quartet.

Thirdly, it seems that the posting of the third-country nationals by companies from new Member States to provide services in old Member States will become more and more important. This is due, among other things, to the “draining” of the labour markets of the new Member States, which is the result of strong migratory processes on the one hand, and good economic growth in recent years on the other.

Fourthly, the debate on posted workers has also shown how difficult it is among the EU’s trade union movements to establish a coherent position as the state of industrial relations vary considerably between Member States. This is evident from observation of the poor organisation of drivers in the new Member States and of the very weak social dialogue between trade unions and employers’ organisations in the transport industry. As a result, the European Transport Industry Federation, which should propose general solutions regarding minimum standards for all EU drivers, does not feel strong enough to do so, and only tries to protect drivers from the old Member States with respect to posting of workers procedures.

## Introduction

The appearance of regulations pertaining to posted workers was a reaction to the enlargement of the European Union with the Southern European states of Greece, Spain and Portugal in the 1980s. For the first time, the integration processes meant the inclusion of the countries with a noticeably lower level of social and economic development, and with significantly different types of industrial relations compared to the core states. However, it was the enlargement of the EU to include the post-socialist states in Central and Eastern Europe in the first decade of the 21st century that became a real test for social cohesion, the European single market and a grand challenge for the effective operation of posted workers mechanisms in the EU. The key barriers in this respect were vast differences in the wage levels – which resulted in massive migration flows from CEE states to Western states – and, essentially, diverging standards of industrial relations and social protection.

The debate on posted workers, related to the European Commission’s attempt to amend the Posting of workers Directive 96/71/WE of 1996, is a lens which brings into focus many structural tensions that are troubling today’s European Union; these include a clash of social rights and single market freedoms, and a collision of the “old” and the “new” Member States’ interests. From the perspective of trade unions, the issue of posted workers is a litmus test illustrating the state of social development in the EU; employers’ organisations see posted workers regulations as limitation of freedom to provide services; and governments’ reactions depend on their position in the sending-receiving constellation: receiving countries adopt protectionist strategies, and sending countries opt for a liberalisation of the law.

Most studies on the posted workers mechanism elaborate on their impact on host countries’ labour markets and the working conditions of the workers, while the perspective of sending countries is often overlooked and inadequately articulated in the European debate. Therefore, it is important to introduce balance and to juxtapose both perspectives, enabling the expression of CEE stakeholders’ interests, including their intrinsic complexity and diversity. This report will serve to complement the public debate with the perspective(s) of four sending countries; namely – Lithuania, Poland, Romania and Slovakia, each of which represent a slightly different context within the CEE region.

Poland sends the largest number of all posted workers in the European Union (over ¼ of the total number). These workers are present in most of the largest receiving countries and their working conditions vary from very poor to very good. Slovakia is an example of a country where there is a discussion among social partners on the balance between raising labour standards and ensuring the competitiveness of domestic enterprises. Self-employed posted workers also play a crucial role in the practice of this mechanism. Lithuania is an interesting case study in negotiating provisions of posted workers’ Directives when we take into account the permanent collapse of industrial relations. Romania, in turn, appears an example of the extreme precarisation of posted workers (in the case of international drivers) sent from a troublesome labour market. Moreover, due to the significant (labour) migration from third countries – mainly Ukraine – to the CEE region, the horizontal issue of posting third-country nationals to EU markets will be also elaborated on in this report.

### The main research areas included the following:

- The positions of social partners – namely trade unions and employers’ organisations, lobbyists initiatives and governments in the public debate towards the amendment of the Directive on posted workers 96/71/WE (also including the “yellow card” procedure undertaken by several EU Member States in 2016 – see more on this “yellow card” procedure in the sub-chapter: Social partners’ positions in CEE countries on revising regulations on posted workers);
- The legal classification of cross-border transport as subordinated to posted workers’ regulations (including the debate on the Mobility Package) and the assessment of this solution from the perspective of key national stakeholders;
- The participation of third-country nationals in the mechanism of posting workers.

The study has been carried out using two key research methods: desk research (analysis of existing data) and an expert questionnaire.

The desk research covered the current legal situation regarding the posting of workers – with particular reference to recent changes and the possibility of posting citizens from third countries; as well as an analysis of public discourse in the CEE region on the posting of workers, with an indication of the different positions of stakeholders (trade unions, employers’ organisations, governments, EU institutions). Particular emphasis has been put on the most controversial issue, which is the classification of cross-border road transport as in fact the posting of workers.

The expert questionnaire was completed by research experts in the countries in question, namely – Lithuania, Poland, Romania, and Slovakia. The methodology of this study was primarily developed and refined by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), which cooperates with a network of correspondents operating in all European Union countries (and beyond). This method consists of filling in a standardised qualitative questionnaire based on the analysis of existing data (statistics, research reports, scientific literature, media inputs) and discourse analysis in each of the countries. The advantage of this method is that it combines in-depth expert recognition of the national context and the assessment of key events and the validity of stakeholders’ actions with the possibility of conducting comparative cross-country analysis based on standardised criteria. In addition, it enables up-to-date information available only in national languages to be obtained. An outline of the research tool used in this study can be found in the annex to the report. The following experts contributed to the national analysis: Eglė Radišauskienė and Inga Blaziene (Lithuanian Centre for Social Research, Lithuania), Alexandra Johari (Institute for Public Policy, Romania), Monika Martišková (Central European Labour Studies Institute, Slovakia) and Andriy Korniychuk (Institute of Public Affairs, PAX). The Polish case study has been elaborated on by the authors of the comparative report.

The report is structured in accordance with the listed research areas, thus the presentation of the key challenges for regulations on posted workers will be followed by parts dedicated to the Mobility Package and transnational transport. The last empirical part elaborates on the horizontal issue of participation of third-country nationals in the mechanism of the posting of workers. The report is briefly concluded with some remarks and recommendations for the stakeholders in the CEE region.

# Key challenges in the public debate on posted workers

## Legal bases for the posting of workers in the EU

The posting of workers is regulated in European Union law by the following two acts:

- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereinafter Directive 96/71)<sup>1</sup>
- Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereinafter Enforcement Directive).<sup>2</sup>

Posted workers are persons sent (posted) by their employer to another Member State to provide services on a temporary basis. While abroad, they remain in their home countries’ social security system and continue to pay contributions there for up to 24 months<sup>3</sup>. This avoids the disproportionate administrative burden brought about by switching between social security systems when workers are only temporarily providing services in another Member State. In addition, some minimum set of employment conditions determined by the host country must be respected, according to Directive 96/71 (see Table 1 for details).

**Table 1.** Key posted workers protections assured by Directive 96/71/EC

Area of protection	Content and essential protection parameters	Additional comments, in particular the possibility of derogation
Working time / minimum rest periods	Working time regulations must be applied in line with the law of the host country, if set.	If working time standards are not set, regulations binding in the sending country apply.
Annual leave	Annual leave regulations must be applied in line with the law of the host country, if set.	This requirement does not apply to employees employed for up to 8 days for the first installation of delivered products (except for construction work indicated in Directive 96/71).  There is a possibility of derogation from this requirement due to the small scope of work performed under delegation conditions by entities other than temporary work agencies.

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

<sup>2</sup> Directive 2014/67/EU of the European Parliament and of the Council 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.

<sup>3</sup> Based on Regulation (EC) No 883/2004.

Minimum remuneration (including overtime wages)	<p>Minimum wage must be recognised by the law or practices (i.e. collective bargaining) in the host country.</p> <p>Additional benefits should be considered as part of the minimum wage, unless they are paid for the reimbursement of expenditure actually incurred as a result of posting, such as travel, subsistence and accommodation costs.</p>	<p>This requirement does not apply to employees employed for up to 8 days for the first installation of delivered products (except for construction work indicated in Directive 96/71).</p> <p>National law may allow the derogation of this requirement for enterprises other than temporary work agencies, when the posting period is no longer than one month; special sectoral regulation is also allowed.</p> <p>There is a possibility of derogation from this requirement due to the small scope of work performed under delegation conditions by entities other than temporary work agencies.</p>
Employee leasing	Employee leasing regulations must be applied in line with the law of the host country, if set.	If the regulations are absent in the host country, regulations of the sending country apply.
Health and safety	Employee leasing regulations must be applied in line with the law of the host country, if set.	If the regulations are absent in the host country, regulations of the sending country apply.
Protection of pregnant women, children and youth	<p>Regulations on the protection of women, children and young people must be applied in line with the law of the host country, if set.</p> <p>This issue is subject to extensive regulation in order to harmonise EU law.</p>	If the regulations are absent in the host country, regulations of the sending country apply.
Equal treatment of men and women and other antidiscriminatory regulations	<p>Equal treatment regulations must be applied in line with the law of the host country, if set.</p> <p>This issue is subject to extensive regulation in order to harmonise EU law.</p>	If the regulations are absent in the host country, regulations of the sending country apply.

Source: Nowak-Far, A. (2017) *Dyrektywa o pracownikach delegowanych: proponowane zmiany regulacyjne i ich negocjacje*, Instytut Spraw Publicznych, Warsaw

However, interpretation of some provisions of Directive 96/71 was unclear. For example, in case C-396/13 *Sähköalojen ammattiliitto ry versus Elektrobudowa Spółka Akcyjna*, the issue of minimum remuneration components that are a subject of a collective agreement was under the scrutiny of the Court of Justice of the European Union (CJEU). In this judgment, the CJEU accepted that Directive 96/71 refers to the standards of the host country when the posting State did not provide this standard of protection. In this context, the Court determined which of the remuneration components required by Finnish law were to be paid by the Polish employer (namely: minimum wage, subsistence, travel costs, a holiday bonus; the following components were not included in the minimum remuneration: accommodation, food vouchers).

The Enforcement Directive aims at providing administrative solutions that are to serve the correct implementation of Directive 96/71. In particular, its provisions are to prevent abusive practices conducted by entrepreneurs who do not sufficiently abide by regulations specified in Directive 96/71. The implementation Directive also defines national measures that can be used to monitor the working conditions of posted workers and processes of information exchange between monitoring institutions from sending and hosting countries. In particular the Directive sets more ambitious standards to inform workers and companies about their rights and obligations (Article 5); establishes clear rules for cooperation between national authorities in charge of posting (Article 6); provides elements to improve the implementation and monitoring of the understanding of posting to avoid the proliferation of “letter-box” companies that use posting as a way to circumvent employment rules (Article 3); defines the supervisory scope and responsibilities of relevant national authorities (Article 7); improves the enforcement of workers’ rights, including the introduction of joint and several liability for the construction sector for the wages of posted workers as well as the handling of complaints (Article 12).

### The scale of posting and the specificity of CEE countries

The most common methodology applied by the European Commission to prepare EU-wide estimations concerns the Portable Document (PD) A1 – a formal statement on the applicable social security legislation between the Member States. It proves that a posted worker or a person employed in more than one Member State pays social contributions in another Member State. However, this method of collecting data has some methodological limits<sup>4</sup>, e.g., the number of PDs A1 issued is not necessarily equal to the number of persons involved, as several PDs A1 may have been issued to the same person during the reference year. The number of individual posted workers is estimated to amount to roughly 60% of the total number of PDs A1 issued (De Wispelaere & Pacolet, 2017). This means that, on average, each individual person has been posted 1.7 times during the observed period. As regards the number of individual persons employed in two or more Member States, this is estimated to amount to some 87% of the number of PDs A1 issued for these persons. This means that, on average, each individual person received some 1.1 PDs A1 during the reference year.

<sup>4</sup> The European Commission (2016) mentions that having a PD A1 is not a mandatory requirement for posting since it is not a condition of the posting rules. Moreover, the PD A1 can also be awarded with retroactive effect. Data on the number of PDs A1 issued according to Article 12 of the Basic Regulation are available from a receiving perspective, which is, however, an underestimation of the total number of PDs A1 received. These forms are also received for several other cases, mainly because persons are active in two or more Member States.

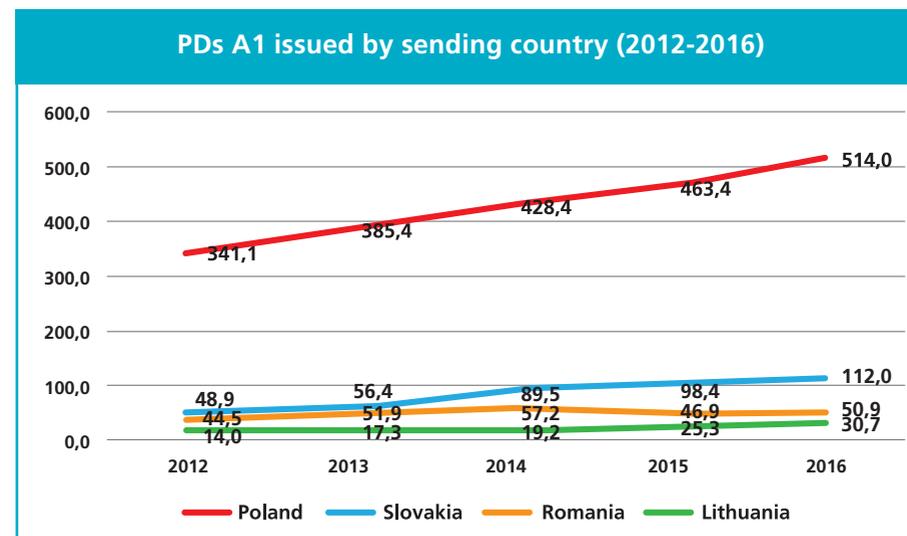
The available data suggest that posted workers constitute a minority of labour migrants in the EU. The total number of individual persons involved amounts to 0.6% of total EU employment (De Wispelaere & Pacolet, 2017). Analysis of the scale of labour migration in the context of posted workers performed by looking at European and national data is difficult for a number of reasons. Maslauskaitė (2014) draws attention to the lack of one comprehensive data source that would enable comparative study across Member States. The European Commission observes that in some cases less than half of the Member States reported the data requested by the EU (De Wispelaere, Pacolet, 2017). For instance, Poland, which is the main sending Member State, reported figures on the number of individual persons involved, and on the duration of the posting period, for the first time in 2016. Eurofound (2010) in its analysis of posted workers in the European Union drew attention to the lack of national reporting systems in Estonia, Poland, Greece, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Sweden and the United Kingdom. Only in Austria did the collected data allow the total amount of foreigners posted for work to be determined. As of 2016 (the latest factsheets available), the aggregated data collected by the EU<sup>5</sup> allows the country of origin of posted workers to be identified, although their nationality remains unclear.

According to the De Wispelaere & Pacolet study (2017), most of the PDs A1 in 2016 (the most recent data available) were issued by Poland (513,972 PDs A1), Germany (260,068 PDs A1), Slovenia (164,226 PDs A1), Spain (147,424 PDs A1) and France (135,974 PDs A1). The Polish share amounts to 22% of the total number of PDs A1 issued. From the perspective of the receiving Member State, most of the PDs A1 were received by Germany (440,065 postings), France (203,019 postings) and Belgium (178,319 postings). The German share amounts to 27% of the total number of postings received. Some 52% of the PDs A1 were issued by EU-15 Member States and 47% by CEE countries (and 1.3% by other EFTA countries). Moreover, approximately 85% of postings were received by EU-15 Member States. This shows that there is not only a flow of postings from EU-13 to EU-15 Member States, but also across EU-15 Member States. Some 38% of postings occur from one high-wage Member State to another. The flow from low-wage to high-wage Member States represents a third of total postings in 2016.

As regards the four countries studied in the report, **Poland** issues the highest number of PDs A1 when compared to Slovakia, Romania and Lithuania (and other EU countries) in both nominal and percentage terms (as a share of the total number of PDs A1 issued in EU countries) – see Tables 2 and 3. This number constitutes nearly one quarter of PDs A1 issued in the EU and half of PDs A1 issued in the whole EU-13. This is due mostly to the fact that Poland has the biggest population in the CEE region, but also because some groups of Polish companies – especially in the construction and transport sector – have shaped their business model on the basis of offering lower service costs on foreign (Western European) markets. Nevertheless, it is still rather a small fraction of the country's labour market (approx. 2%). Half of its posted workers in 2016 were posted to Germany, 12% to France, 10% to Belgium, 5% to Sweden and the Netherlands, and 17% to other countries.

Over 8% of the posted workers were self-employed. Poland is also a receiving country, but to a much more modest extent – 17,8 thousand workers were posted here in 2016 (the 14th-most popular country of destination among EU countries). One third of these documents are issued in Germany, 15% in France, 14% in Spain, 8% in Slovakia and Italy, and 24% in other countries. Half of the received workers operate in industry, 18% in the construction sector, 9% in education and 21% in other sectors<sup>6</sup>.

**Table 2.** Number of PDs A1 issued by sending country: Lithuania, Poland, Romania, Slovakia (in thousands)



Source: Own elaboration on the basis of De Wispelaere, F., Pacolet, J. (2017).

Despite the relatively small share (and also small absolute number) of posting from Slovakia, the scale of posting in relation to the country's population is the highest among the studied countries (approx. 3%). 45% of PDs A1 issued in the country concern Germany, 14% Austria, 10% Czech Republic, 6% Belgium, 5% France, 4% the Netherlands and 16% other countries. The highest number of workers, 37%, is posted in the construction sector, 28% in industry and the remaining third to other sectors. In 2016 Slovakia received less than 9.7 thousand posted workers (24% from Germany, 18% from Poland)<sup>7</sup>. When compared to other EU countries, Slovakia posts the highest share of self-employed workers – 37%<sup>8</sup>, as compared to an average 7.3% among EU countries. It is also the highest number in absolute terms – 33.3 thousand, which is a specificity of the country in the region (along with the Czech Republic, which has 20% self-employed people among posted workers). In the questionnaire, the national expert explains this phenomenon as the most usual way to bypass Labour Code regulations and cut labour costs.

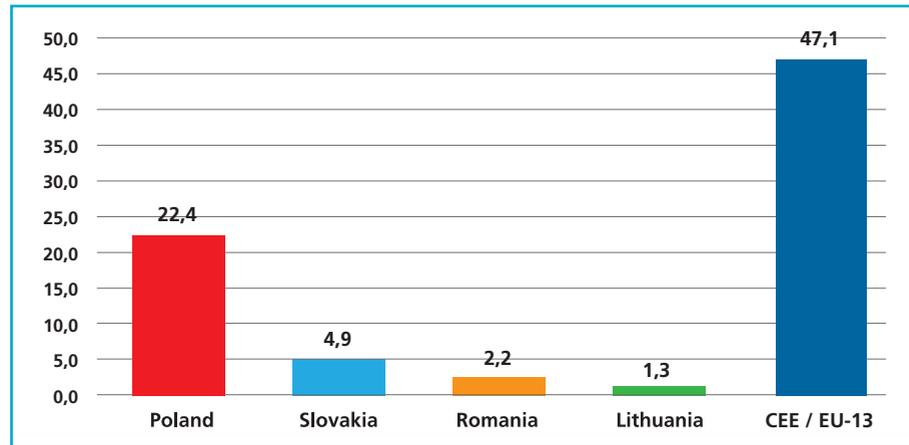
<sup>5</sup> Retrieved on 08.08.2018, from: <http://ec.europa.eu/social/keyDocuments.jsp?langId=en&mode=advancedSubmit&advSearchKey=PostWork>

<sup>6</sup> ibidem

<sup>7</sup> ibidem

<sup>8</sup> Other sources mention as many as 75% of Slovak posted workers as self-employed: <http://migraceonline.cz/cz/e-knihovna/moderni-evropski-gastarbeteri-problematicke-aspekty-vysilani-a-nova-vysilaci-smernice>

**Table 3.** Share of posted workers from Lithuania, Poland, Romania, Slovakia in total number of posted workers in the EU in 2016 (in %)



Source: Own elaboration on the basis of De Wispelaere, F., Pacolet, J. (2017).

**Romania** is an example of a country where the procedure of posting has very low importance – in both terms of sending and receiving workers. The total share of PDs A1 issued in Romania as a share of the total number of documents in the whole EU is also small – 2.2%. Slovakia, 3.5 times smaller in terms of population, posts twice as many workers than Romania. In 2016, over 50 thousand PDs A1 were issued, which constituted less than 0.5% of the country's labour market. Most of the workers were posted to Germany – 38%, 16% to Spain, 15% to Italy, 13% to France, 6% to the Netherlands and 13% to other countries. Half of the workers were employed in the construction sector, 34% in industry. The self-employed constituted just 0.2% of all posted workers. In 2016, Romania received more than 10 thousand posted workers (22% from Germany, 16% from France, 15% from Spain, 11% from Italy). 41% were employed in industry, 21% in construction, 11% in Education, with 28% in other sectors<sup>9</sup>.

In Lithuania, the number of posted workers constitutes similar share of the country's labour market as in Poland. Proportionally to population, the share of PDs A1 issued in the country as a share of the total number of documents issued in the EU is relatively small – 1.3%. In 2016 in terms of absolute number, nearly 31 thousand PDs A1 were issued. 25% workers were posted to Norway, 24% to Germany, 13% to Sweden, 9% to Finland, 7% to the Netherlands, 7% to France, 6% to Belgium, and 9% to other countries. Over half of the workers operated in the construction sector, 34% in industry, with 12% in other sectors. Self-employed posted workers were also marginal in the case of Romania and constituted just 0.4% of all posted workers. Over 2 thousand PDs A1 were issued to register posted workers working in Lithuania. Nearly 45% of them were issued in Poland, 13% in Germany, 8% in France, 6% in Bulgaria, and 5% in Latvia<sup>10</sup>.

In all the elaborated countries a significant increase in issuing PDs A1 has been observed in recent years (Wispelaere & Pacolet 2017). The highest percentage growth concerns Slovakia (130% between 2012 and 2016) and Lithuania (120% in the same period). In the case of Poland, the growth rate is approximately 51% and is equal to the average growth in the EU. In Romania the number of issued PDs A1 fluctuated and in the period 2012-2016 the percentage growth was rather modest – 14% when compared to other countries. Average growth among EU-13 countries was approximately 68%, which shows a significant dynamic in this respect.

Summing up, it has to be highlighted that the four studied countries post, proportionally, many more workers than they receive (this conclusion is valid for all the EU 13) and these circumstances impact on the perspectives of their governments and social partners. However, they also receive substantial number of workers, thus the perspective of a receiving country is not entirely unfamiliar to them. Poland is the key player in the market of posting, representing an significant share in both the CEE region and the whole EU. However, the growth in Slovakia and Lithuania has also been very dynamic in recent years and posted workers constitute a proportionally observable share of their labour markets. In Romania, the posting of workers plays a rather marginal role.

### Social partners' positions in CEE countries on revising posted workers regulations

As mentioned above, the interpretation of the provisions of Directive 96/71/EC has caused many legal and practical problems. Moreover, some stakeholders – mainly in Western European countries, including the European Trade Union Confederation (ETUC) – have criticised the Directive as undermining labour law and general working conditions (especially with regards to the level of remuneration and its components, as well as the level of social contributions and taxes) in host countries, which leads to so called "social dumping". Moreover, due to the competitive advantages of the companies from the EU-18, predominantly in terms of significantly lower costs of services, some Western European companies have been losing their position in European and local markets. Therefore, some members of the European Council, together with numerous stakeholders, lobbied for the Directive to be amended towards more restrictive regulations on posted workers. On 10 March 2016, a proposal to revise Directive 96/71/EC was prepared by the European Commission. Its main provisions included the following changes<sup>11</sup>:

- All rules on remuneration that are applied to local workers should also be applied to posted workers. (In practice, this would mean that remuneration will not only include minimum rates of pay, as is currently the case, but also bonuses or allowances where applicable. Member States were also given the option of obliging subcontractors to grant their workers the same pay as a main contractor.)
- National rules governing temporary agency work should apply when agencies post workers abroad.
- If a posting exceeds 24 months, the labour law of the host Member State should be applied where this is favourable to the posted worker.

<sup>9</sup> Retrieved on 08.08.2018, from: <http://ec.europa.eu/social/keyDocuments.jsp?langId=en&mode=advancedSubmit&advSearchKey=PostWork>  
<sup>10</sup> ibidem

<sup>11</sup> See details here: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2488&furtherNews=yes>

This initiative met with discontent mostly among CEE countries and employers' organisations in sending countries (predominantly from the EU-13). Following the EC's proposal, a "yellow card" procedure was issued by ten Member States, namely: Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia (so, mostly from CEE)<sup>12</sup>, in response to which the European Commission was obliged to re-examine its proposal.

In the European public debate on the review of the Posting of Workers Directive, the main axis of the dispute was determined by the positions of Western countries juxtaposed with the positions of Eastern countries. Additionally, traditional conflict between employers and trade unions complicated the shape of the discussion and created a map of actors and positions somewhat more complex than usual. Among the Western countries, most of the stakeholders supported the need to revise the Directive, while the position was a little more complex among Eastern countries. In general, initiatives emanating from employers' organisations were supported by governments in CEE countries (as evidenced by the initiation of the "yellow card" procedure), while trade unions usually supported the critical position of the ETUC. However, firstly, trade union engagement in this discussion was often limited due to the marginal nature of posting to national labour markets. This issue was perceived as a much smaller problem than the issue of wages, precarisation of employment, etc. Secondly, some attempt to nuance the position formulated by the ETUC and differences between statements could be observed in the opinions of the trade union movements in CEE countries. In 2017 however, under the influence of negotiations in the European Council and a campaign led by the French President Emmanuel Macron, some CEE governments altered their prior positions and supported the amendment of the Directive, together with trade unions, showing that dynamics of the European public debate can bring unexpected results.

An important issue debated in the context of posted workers is also the phenomenon of so-called "letter-box" companies. These are practices that put national labour and employment standards under threat and could serve to encourage social dumping, which is taken here to mean 'the practice (...) of undermining or evading existing social regulations with the aim of gaining a competitive advantage' (Bernaciak 2014). The amendment of the Directive aimed at preventing such practices – i.e., when posting workers, companies were only officially registered and recruiting in a country with competitive wages or lower taxes/social contributions rather than being genuine undertakings pursuing economic operations on a stable basis. Research shows (Cremers 2014) that in practice it was hard to verify in the host country whether the posting was nothing more than the supply of labour or was indeed based on a contract for the provision of genuine services. Host countries had to rely entirely on information from the home country and crucial cooperation and mutual exchange were absent. Some of these problems have been mitigated by the Enforcement directive, however the phenomenon has not yet disappeared entirely.

12 The "yellow card" procedure enables Member States' national parliaments to disagree with an European Commission's proposal up to eight weeks after its publication under EU rules introduced by the Treaty of Lisbon. Short overview of the "yellow card" procedure regarding amendment of Directive 96/71/EC: <https://www.eurofound.europa.eu/publications/article/2016/eu-level-posted-workers-proposal-gets-yellow-card-from-member-states>

## The perspectives of governments and employers

The reactions of the governments in Lithuania, Poland, Romania and Slovakia to the European Commission's proposal to revise Directive 96/71/EC was clearly critical and all the countries commenced the "yellow card" procedure on the basis of similar arguments. This position was supported by employers' organisations in all four countries.

In April 2016, the **Polish** parliament (the Sejm and Senate) issued documents (resolution<sup>13</sup> and opinion<sup>14</sup>) in which they expressed the opinion that the proposed amendment was not compatible with the principle of subsidiarity and proportionality, and would not implement the intent of Directive 96/71/EC better than national regulations in Member States. The resolution stated that current national regulations on minimum wage in the Member States enable adequate social protection of posted workers. Moreover, Directive 96/71/EC takes into account "natural differences between Member States in terms of level of economic development, which translate into differences in levels of wages". Thus, the Lower Chamber of the Polish Parliament stated that a further levelling of wages in Member States should be the result of their gradual economic development rather than the result of legislative actions of the European Union. The opinion prepared by Senate (the Upper Chamber of the parliament) repeated the reasoning of the Sejm's resolution, highlighting the incompatibility of the proposed amendment with the principle of subsidiarity. Both statements were also supported by employers' organisations. The Lewiatan Confederation, which prepared its own document arguing for the rejection of the proposed changes<sup>15</sup> and, later on, the Employers of Poland, Business Centre Club, Association of Employment Agencies and Section of Care Agencies prepared a joint letter to representatives of the European Commission.

The government of **Romania** and the country's employers' organisations acted in the same way as in Poland. They stood against any revision of Directive 96/71/EU, stating that it would have a negative impact which would disproportionately affect Eastern European companies and workers. Furthermore, according to statements made by the Ministry of Labour, the proposed revisions would run counter to the principles of the single market because they would eliminate the cost competitive advantage. Moreover, the long-term effects could even mean the financial bankruptcy of some companies who employ posted workers, leading to a growth in unemployment.<sup>16</sup> The National Council for Romanian SMEs (CNIPMMR) stated that the proposed revision is incompatible with the principles of the single market (in line with the government's arguments) and also that it create an extra burden of increased administrative costs, which would disproportionately affect SMEs.<sup>17</sup> The Romanian Association of Construction Entrepreneurs (ARACO) was also against the

13 Resolution of Lower Chamber of the Polish Parliament on recognition of the proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services to be incompatible with the principle of subsidiarity <http://www.ipex.eu/PEXL-WEB/scrutiny/COD20160070/plsej.do>

14 Opinion of the Senate of the Republic of Poland, of 29 April 2016 on the incompatibility with the principle of subsidiarity of the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services <http://www.ipex.eu/PEXL-WEB/scrutiny/COD20160070/plsen.do>

15 [http://konfederacjalewiatan.pl/legislacja/opinie/prawo-pracy-i-rynek-pracy/1/stanowisko\\_konfederacji\\_lewiatan\\_do\\_projektu\\_dyrektywy\\_zmieniajacej\\_dyrektywe\\_9671we\\_parlamentu\\_europejskiego\\_i\\_rady\\_z\\_dnia\\_16\\_grudnia\\_1996\\_r\\_dotyczaca\\_delegowania\\_pracownikow\\_w\\_ramach\\_swiazczenia\\_uslug\\_com216\\_128\\_final](http://konfederacjalewiatan.pl/legislacja/opinie/prawo-pracy-i-rynek-pracy/1/stanowisko_konfederacji_lewiatan_do_projektu_dyrektywy_zmieniajacej_dyrektywe_9671we_parlamentu_europejskiego_i_rady_z_dnia_16_grudnia_1996_r_dotyczaca_delegowania_pracownikow_w_ramach_swiazczenia_uslug_com216_128_final)

16 [https://adevanul.ro/economie/stiri-economice/olgota-vasilescu-precizeaza-respins-inca-martie-propunerile-macron-privind-detasarea-lucratorilor-1\\_59a01e4e5ab6550c84dd4e7/index.html](https://adevanul.ro/economie/stiri-economice/olgota-vasilescu-precizeaza-respins-inca-martie-propunerile-macron-privind-detasarea-lucratorilor-1_59a01e4e5ab6550c84dd4e7/index.html)

17 [http://revista.universuljuridic.ro/wp-content/uploads/2017/10/04\\_Revista\\_Universul\\_Juridic\\_nr\\_09-2017\\_PAGINAT\\_BT\\_1\\_Dumitru.pdf](http://revista.universuljuridic.ro/wp-content/uploads/2017/10/04_Revista_Universul_Juridic_nr_09-2017_PAGINAT_BT_1_Dumitru.pdf)

proposed revisions, adding that the extra costs facing SMEs would ensure their bankruptcy which would in turn cause unemployment and out-migration of skilled labourers to Western countries with more attractive pay conditions and employment offers.<sup>18</sup>

In **Lithuania**, the Committee on Social Affairs and Labour of the Seimas (Lower Chamber of the Parliament) decided to approve the position of the Government of the Republic of Lithuania, stating that the European Commission's proposal was contradictory to the principles of subsidiarity and proportionality. The Committee delivered its opinion based on the following main points:

- The issue of wages is the sole scope of competence of Member States;
- Wage differences between Member States do not necessarily lead to unfair competition, especially when the principle of freedom to provide services is respected;
- The proposal would restrict business opportunities to provide cross-border services, weaken competition and growth in the EU's single market as enshrined in the main principles of the Treaty on the Functioning of the European Union (the free movement of workers, freedom of establishment and freedom to provide services) and the objectives of the Treaties.
- The application of provisions concerning collective agreements and arbitral awards which had been declared universally applicable to all sectors of the economy, not only in the construction sector, also raised some doubts.

At same time, the opinion stressed that Lithuania supported the position that the rights of posted workers should be respected and guaranteed. Discussions on the revision of the Directive also took place in the Tripartite Council of the Republic of Lithuania, where all social partners are represented. However, no official statement was formulated.

**Slovakia** also took part in the "yellow card" procedure and the government formulated a critical statement towards the proposal to revise the Directive. In May 2016, the European Affairs Committee of the National Council of the Slovak Republic (Národná Rada Slovenskej Republiky, NRSR) approved the reasoned opinion that argued that the proposal violates the subsidiarity principle and that the Commission had not carried out extensive consultation before proposing the measure.<sup>19</sup>

<sup>18</sup> <https://www.curiereulnational.ro/Economie/2017-11-07/Dezasarea-lucratorilor-transfrontalieri-produce-ingrijorari>

<sup>19</sup> It is worth mentioning that the group of countries that issued a "yellow card" also included Denmark. However, the reasoning prepared by the Danish Parliament differed significantly from other (CEE) countries. The proposal to revise the Directive on posted workers was that the EU's regulations should not interfere with national wage setting mechanisms which in Denmark are embedded predominantly in collective bargaining and depend on social partners' autonomous decisions.

## The perspective of trade unions

In general, the positions of trade unions in Lithuania, Poland, Romania and Slovakia were in line with the ETUC's statement and supported the Commission's proposal. However, there was some specificity in these positions that distinguished them from Western European organisations.

In **Poland** on 16 May 2016, all three representative employees' organisations – namely NSZZ "Solidarność", the All-Poland Alliance of Trade Unions (OPZZ) and the Forum of Trade Unions (FZZ) – prepared a joint statement within the Social Dialogue Council, supporting the amendment and the ETUC's position, and criticised the position of the Polish Parliament, the Polish Government and employers' organisations. The trade unions argued that the introduction of changes would safeguard a balance between the freedom to provide services and the rights of posted workers, e.g., through collective agreements. The letter also criticised the position of the Parliament and employers' organisations, claiming that the amendment would not comply with the principle of subsidiarity. The trade unions also argued that the issue of additional benefits (as a component of minimum wage) should be clarified (daily subsistence, reimbursement of travel and accommodation expenses). Once again, the issue of an insufficient consultation process at the European level was raised in this opinion letter. Two months earlier (on 16 March 2016), the trade union NSZZ "Solidarność" announced a detailed position on the amendment supporting the proposed changes. Despite general support, "Solidarność" argued that the amendment should cover a wider scope of regulations, i.e., the right of trade unions to negotiate on behalf of posted workers, defining the joint liability of subcontractors for working conditions, inclusion of transnational transport within the definition of posted workers. The trade union also criticised the insufficient consultation process with European social partners by the EU.

In **Romania**, in August 2017 the National Syndicate Bloc (BNS) stated its strong support for the proposed amendments, citing the beneficial reduction in unfair competition, and a consolidation of the social dimension as a positive step on the way towards the elimination of the "exploitation of posted Eastern European workers". They argued that the maximum posting period should not be longer than 24 months; that the remuneration schemes of each Member State should be transparent and accessible for free and that collective agreements should apply to posted workers. BNS also demanded the introduction of a clear requirement of previous employment in the country of origin, and for trade unions to be allowed to engage with and exert pressure equally on local and foreign companies.<sup>20</sup> However, this was rather an incidental initiative and the involvement of Romanian trade unions in the European public debate was limited.

<sup>20</sup> <https://www.bns.ro/info-bns/366-comunicat-de-presa-bns-speram-ca-vizita-presedintelui-frantei-dl-emmanuel-macron-sa-marcheze-un-moment-de-repozitionare-a-romaniei-in- ceea-ce-priveste-detasarea-lucratorilor>

In **Slovakia**, the major trade union organisation, the Confederation of Trade Unions (Konfederácia odborových zväzov, KOZ) opposed the “yellow card” as well, although information about this stance was only published in 2017, when it was expressed within a meeting of Czech tripartite members in March 2017<sup>21</sup> and during the discussion organised by the member of the EP member Eduard Kukan in May 2017<sup>22</sup>. This may indicate the issue’s rather low importance for the trade unions. There were no advanced actions undertaken by Slovakian trade unions in respect of the posting of workers Directive.

**Lithuanian** trade unions expressed their support for the revision and joined the ETUC’s statement. However, the opinions were expressed within national social dialogue during meetings of social dialogue bodies and expert conferences. Employees’ organisations became more active with regards to the issue of transnational transport (see the next chapter) as the transport sector accounts for a substantial part of the county’s GDP (12%).

### Change of positions

In 2017, the French President Emanuel Macron commenced a campaign aimed at convincing some of the opponents of the Directive’s revision to vote in the European Council for the adoption of the amendment. He visited several CEE countries: Austria, Bulgaria, Czech Republic, Romania and Slovakia. Despite official attempts, the President ostentatiously did not visit Poland and Hungary, which were perceived as the main inhibitors of the amendments. Under the influence of the campaign, all the countries he visited decided to change their position and supported the amendment, while Poland and Hungary maintained their prior position.

The Slovak government engaged in compromise negotiations in August 2017 after a meeting of Prime Minister Fico with French President Macron and the Czech and Austrian Prime Ministers in Salzburg. Slovak politicians used the two arguments in favour of the new directive amendment. The first was the increasing pressures on the Slovak labour market as a receiving country and the associated increase of foreign employees in its territory. In this context, the Prime Minister used a similar argument to the French politicians, saying that domestic workers should be protected from the social dumping caused by migration: “Why should our employees be disadvantaged compared to the cheaper workforce coming from Ukraine, Serbia, Vietnam or I don’t know where?”<sup>23</sup> The second argument was the wage decrease of Slovak posted workers abroad after the latest directive amendment from 2016. According to the administrative data on the wages of posted workers from the Social Security Authority (Sociálna poisťovňa, SP), wages of posted workers decreased from 900 EUR to 700 EUR. “Which employee would go to Germany or Austria to work for lower wage than the average in Slovakia? There must be some fraud, the money is either paid in cash or in per diems. Leading companies have not shared their profits with their employees. It has led us to change our attitude,” said the Minister of Labour, Ján Richter<sup>24</sup>. The reason for the decrease is not clear. It might be that Slovak posted workers undertook positions with lower value added or that

there are reporting frauds misusing per diem payments. This attitude switch was further attributed to the Slovak government effort to be the part of the “EU core” and thus interpreted as a political decision. “We have said ourselves that our requirements for solving the problem of refugees or dealing with the dual quality of food are our absolute priority, and in the area of the posted workers directive we see a space to retreat from some of our current positions. In part, this is a political decision to create a space for compromise in other areas,” claimed representative of the Ministry of Labour, Branislav Ondruš<sup>25</sup>. Trade unions (KOZ) welcomed the limitation of the length of employee posting to 18 months, and remarked that even 6 months would be enough and would better capture the reality of a meaningful posting. KOZ was part of the “Posted workers’ rights” project and campaign<sup>26</sup> but has remained rather silent in the public debate, nor has it engaged in influencing public opinion.

Separate visits by President Macron were paid to **Romania** and **Bulgaria**, where he met the presidents and prime ministers. The President of Romania agreed to alter the country’s initial position, despite strong criticism of the revision of the Directive and support from employers’ organisations. He expressed the will to find a compromise solution satisfying both Eastern and Western Europeans:

“We need to see things as they are. On the one hand, there is dissatisfaction in France that there are workers that are apparently trying to elude the system, rather than fit into it. On the other hand, we can see there are very many Eastern Europeans, for instance people in Romania, who want to work in Spain, Germany, France. If this is the situation, it is very clear we need to improve this directive. It is unacceptable to see this dissatisfaction, on the one hand in Western Europe, and on the other hand, the wish of people in the East to live better. Both are legitimate, and if this Directive produced such disagreements in approach, it doesn’t mean that people in France are not right or that people in Romania are not right. It means the Directive is not clear or good enough”<sup>27</sup>.

During the visit to Bucharest the issue of the extension of an exclusive military contract with a Romanian helicopter producer was also discussed. In both Romania and Bulgaria the issue of further integration with the Schengen zone were elaborated and President Macron declared his support for Bulgaria and Romania in the process.

**Poland** and **Hungary** were omitted from the itinerary of visits on purpose and this was interpreted as a political gesture made by President Macron. The distant position was also interpreted as a sign of a negative attitude of the leader of En Marche! Towards the general political directions taken by the Hungarian government headed by Victor Orbán and the Polish government headed by Beata Szydło – both representatives of a populist turn in the EU. This visit changed the set of votes in the EU and paved the way to find a compromise on the final provisions of the amended Directive on posted workers.

21 <http://kozs.rsk/2017/03/30/spolocne-rokovanie-slovenskej-a-ceskej-triparity-socialni-partneri-zohravaju-silnu-ulohu-pri-formovani-sveta-prace/>

22 <https://euractiv.sk/section/podnikanie-a-praca/news/vyslani-pracovnici-smernica-rozdeluje-staty-a-stresuje-dopravcov/>

23 <https://euractiv.sk/section/podnikanie-a-praca/news/na-cestu-do-jadra-sme-otocili-v-otazke-vyslaných-pracovníkov/>

24 ibid

25 <https://euractiv.sk/section/podnikanie-a-praca/interview/ondrus-slovenske-firmy-ktore-vysielaju-rozdeluju-zisky-neferovo/>

26 the meeting with the Czech tripartite members in March 2017.

27 <https://www.romania-insider.com/macron-bucharest-visit-2017/>

### Final changes in the amended Directive

Following intensive negotiations between the Commission, the Council and the European Parliament, the Council adopted the revised Directive on 21 June 2018. The final version retains many of the key elements proposed by the Commission, but with a number of amendments:<sup>28</sup>

- Long-term posting: A Posting can last up to 12 months, with a possible extension of six months (the Commission had originally proposed 24 months). After this period, the full provisions of the host Member State's labour law will apply;
- Remuneration: All host country rules applicable to local workers will also apply to all posted workers from day one, i.e., the principle of equal pay for the same work in the same place will apply. As regards other elements of remuneration, the revision introduces clearer rules for allowances, while travel, board and accommodation costs are not deductible from workers' salaries. As stipulated by the Enforcement Directive, the mandatory elements that constitute remuneration in a Member State must be available on a single national website;
- Working conditions: Member States may apply large, representative regional or sectorial collective agreements. Previously this was valid only for universally applicable collective agreements in the construction sector. As regards accommodation conditions in the host country, existing national rules for local workers away from home for work must be applied;
- Posted temporary agency workers: The revised PWD ensures equal treatment of posted temporary agency workers. The same conditions applicable to national temporary employment agencies will also apply to those cross-border agencies hiring out workers;
- Transport: The new elements of the Directive will apply to the transport sector once specific EU legislation for this sector (currently under negotiation) is applied.

# Transnational transport and posting of workers

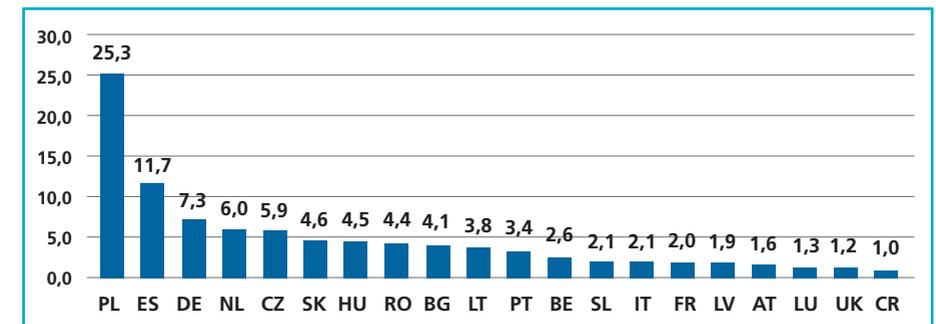
The European Commission's Mobility Package is a collection of 3 initiatives concerning the governance of commercial road transport in the European Union. It represents the biggest change to EU road transport rules, covering many aspects of the industry's activities.

### Context

Road transport plays a leading role in the transport economy. Relatively stable over the last 15 years, in 2015 road freight transport accounted for almost 50% of the freight market, while water transport and rail had, respectively, around 36% and 12% of the market share. Around 2/3 of road freight is national, and 1/3 transnational<sup>29</sup>. Bus and coach travel by road accounted for slightly more than 8% of passengers in 2015, compared to air transport, which carried 9,8%, and rail 6,7%<sup>30</sup>.

According to Eurostat, in 2014 there were roughly 554,000 registered road freight and removal companies and 361,000 road passenger transport enterprises in the EU. The road haulage sector in the EU employs about 3 million people. Freight companies are predominantly small – 90% have fewer than 10 employees and account for around 30% of the sector's turnover. These enterprises tend to compete mainly on the price of services, with labour cost being a key factor in their competitiveness.

**Table 4.** Share of carriers in the EU per country (in %)



<sup>29</sup> An overview of the EU Road Transport Market 2015, European Commission DG for Mobility and Transport

<sup>30</sup> The road passenger transport sector is highly fragmented in terms of company size and range of services, including long-distance, school transport or shuttle services. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EUROPE ON THE MOVE An agenda for a socially fair transition towards clean, competitive and connected mobility for all, COM/2017/0283 final

A study drawn up for the Commissions on the EU road haulage market noted the increasing importance in recent years of large pan-European logistics providers, which offer reliable door-to-door truck services<sup>31</sup>. From the point of view of further considerations, the market share of international transport is the most important.

## State of the art

The Posting of Workers Directive has been in force since December 1999 and aims on the one hand to protect the social rights of posted workers in the context of the cross-border provision of services, and, on the other, to ensure fair competition. According to the Directive, posted workers must be covered by a core set of the employment terms and conditions of the host country in which they provide the service. These conditions refer, among other things, to maximum work and minimum rest periods; minimum paid annual holidays; minimum rates of pay; the conditions of hiring-out workers; health, safety and hygiene issues at work; equal treatment and non-discrimination. The Directive applies to three types of posting: the direct provision of services under a service contract between two companies; posting to an establishment or company owned by the same group (intra-group posting); and, lastly, hiring out workers through a temporary employment agency established in another Member State.

Some Member States recently adopted national laws on a minimum wage in the road transport sector. On 1 January 2015, Germany introduced a minimum wage act<sup>32</sup>, which applies to all transport companies providing transport services in Germany, including those not based in Germany. France adopted a similar law in 2015, and its implementing act on 7 April 2016: it entered into force on 1 July 2016 and applies to international transport and cabotage, transit excluded<sup>33</sup>. On 16 June 2016, considering that these national provisions disproportionately restrict the freedom to provide services and the free movement of goods, the European Commission launched infringement proceedings against these two countries<sup>34</sup>. Similarly, on 27 April 2017, the Commission initiated an infringement proceeding against Austria<sup>35</sup>, owing to its decision to apply the updated Austrian Act against wage and social dumping to the road transport sector<sup>36</sup>.

## Proposal

### European Parliament

In its resolution of 9 October 2008 on the implementation of social legislation relating to road transport, the European Parliament underlined its concern related to the high number of infringements of social provisions in the road transport sector<sup>37</sup>. It called on the Commission to provide for preventive and coercive measures to improve enforcement and to set up guidelines for a uniform definition of infringements.

On 18 May 2017, the European Parliament adopted a resolution on road transport in the EU, which contains a significant section on the improvement of social conditions and safety rules<sup>38</sup>. To enhance the sector's competitiveness, the Parliament insisted on the need to ensure a level playing field between operators. The resolution urged Member States to implement and enforce EU rules more strictly. It asked them to step up checks, in particular in relation to compliance with driving and rest times. It also asked the European Commission to clarify the application of the Posting of Workers Directive to the road transport sector, and to improve its enforcement.

Earlier, on 14 September 2016, the European Parliament adopted a resolution on social dumping in the EU, addressing this issue across all sectors, including mobile workers in the transport sector. Parliament insisted that Member States should improve cross-border cooperation and information exchange between inspection services to improve the efficiency of controls in combating and preventing social fraud<sup>39</sup>.

In 2013, the European Parliament commissioned a study<sup>40</sup> on road transport hauliers' social and working conditions and updated it in 2017<sup>41</sup>. The study highlighted a general deterioration in working conditions, as well as disparities in social provisions and labour costs in the EU that encourage social dumping. It made several recommendations, such as strengthening the enforcement mechanisms, introducing reporting mechanisms on the implementation of the Posting of Workers Directive and enhancing cooperation between Member States.

31 Report on the state of the EU road haulage market, Task B: Analyse the State of the European Road Haulage Market, Including an Evaluation of the Effectiveness of Controls and the Degree of Harmonisation

32 [https://www.gesetze-im-internet.de/englisch\\_milog/englisch\\_milog.html](https://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html)

33 <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORTEXT000032376624&categorieLien=id>

34 [http://europa.eu/rapid/press-release\\_IP-16-2101\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2101_en.htm)

35 [http://europa.eu/rapid/press-release\\_IP-17-1053\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1053_en.htm)

36 <https://www.eurofound.europa.eu/publications/article/2017/austria-updated-law-against-wage-and-social-dumping-comes-into-force>

37 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-475>

38 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0228>

39 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0346>

40 [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_TRAN\\_ET%282013%29495855](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_TRAN_ET%282013%29495855)

41 [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2017\)602000](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)602000)

## European Commission

In 2009, as required by Directive 2006/22/EC, the European Commission submitted its first report on the penalties for serious infringements of the social rules in the RTS. It noted that Member States used different types of penalty<sup>42</sup>. While all countries imposed financial penalties, 15 provided for the immobilisation of a vehicle and only seven used imprisonment. Moreover, the size of fines varied appreciably. For instance, manipulation of tachography is penalised with a fine of €586 in Lithuania, €2,460 in Poland, €6,232 in Italy and up to €30,000 in France. The report also noted that neither the definitions nor the grading of serious infringements were homogenous across the EU. An ex-post evaluation of social legislation in the RTS, outsourced by the Commission, covering the three interrelated acts, Regulation EC No 561/2006, Directives 2002/15 and 2006/22, was published in 2016<sup>43</sup>.

In September 2016, the Commission published its inception impact assessment<sup>44</sup>. It highlighted the 'ambiguous, unfit or unenforceable' character of some social provisions leading to non-homogeneous implementation and uncoordinated national measures. The assessment observed that the implementation of the Posting of Workers Directive raised legal issues in particular when the link between a driver and host country was weak. It also highlighted inconsistent and ineffective cross-border enforcement, and the lack of joint controls by Member States. The assessment recommended adopting measures with a view to improving enforcement.

The new proposal indicates that enforcement requirements and checks, including on transport company premises, must include checks on compliance with the Working Time Directive 2002/15/EC. Article 8 is modified to expand cooperation and exchange of information between Member States, and a deadline of 25 working days (3 working days in urgent cases), is set to respond to a request for information submitted by another Member State. The national risk rating system is also amended to make it more consistent, efficient and available to controlling authorities or, upon request, to another Member State. The European Commission proposes the establishment of a uniform formula to calculate this risk, with the criteria used specified.

The proposal sets specific rules regarding certain aspects of the Posting of Workers and Enforcement Directives in the road transport sector,. It establishes a three-day threshold for posting in a period of one calendar month, below which the host Member State's social framework (minimum pay rates, minimum paid annual holidays) does not apply to international road transport operations. Above three days, these minimum social conditions apply for the entire period of a posting. Minimum social rules should always apply to cabotage<sup>45</sup> operations, which by definition take place entirely in a host Member State, irrespective of their duration and frequency. Lastly, the proposal provides for specific requirements and control methods to apply to road operators and drivers to check compliance with the Posting of Workers Directive's provisions in the road transport sector.

42 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009DC0225>

43 <https://ec.europa.eu/transport/sites/transport/files/facts-fundings/evaluations/doc/2016-ex-post-eval-road-transport-social-legislation-final-report.pdf>

44 [ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_move\\_005\\_social\\_legislation\\_en.pdf](https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_move_005_social_legislation_en.pdf)

45 Cabotage operations are 'national carriage for hire or reward carried out on a temporary basis in a host Member State' as defined by Regulation EC 1072/2009. Regulation EC 1073/2009 provides a more complete definition.

## Process in the European Parliament

### Stakeholders' views

In preparing its proposal, the European Commission carried out extensive stakeholder consultations. In 2016-2017, it launched a public consultation<sup>46</sup> and an SME panel survey<sup>47</sup> on the enhancement of social legislation in the RTS. General patterns emerged, showing that the differing application of social rules was a very important legislative challenge for a majority of respondents and that the use of different tools for checks was an obstacle to the effectiveness of the rules.

Various stakeholders, including the Confederation of European Businesses (BusinessEurope), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the European Association for Forwarding, Transport, Logistics and Customs Services (CLECAT), the International Road Transport Union (IRU) and the European Transport Workers Federation (ETF), expressed their views on social legislation in road transport sector.

BusinessEurope underlined the importance of the enforcement of social legislation<sup>48</sup>. This concern was shared by CLECAT, which additionally recommended strengthening the ERRU to provide harmonised enforcement<sup>49</sup>. CLECAT and UEAPME both considered that the current Posting of Workers Directive is not adapted to the road transport sector – the former called for a special law, adapted to the specificities of the road transport sector<sup>50</sup>.

In its 2015 policy proposals, the ETF proposed extending enforcement practices to social and labour regimes without amending EU legislation. It suggested cooperation between three levels of enforcement: roadside, back office, and company checks – thus pooling enforcement intelligence and technology. It also recommended the application of mandatory pre-notification of each posted worker, according to Enforcement Directive 2014/67/EU<sup>51</sup>.

Ahead of the launch of the Commission's proposals, ETF and 27 of its member organisations from 20 European countries (including the former Yugoslav Republic of Macedonia and Norway) adopted the Warsaw declaration<sup>52</sup> on 5 April. They called on the Commission to include ETF proposals in its road initiatives to guarantee better enforcement, the safety of drivers and a level playing field for businesses.

On 10 October 2017, transport and logistics associations and chambers of commerce and employers' confederations signed a mutual declaration against the application of the Posting of

46 <https://ec.europa.eu/transport/sites/transport/files/2016-social-legislation-road-specialised-summary.pdf>

47 <https://ec.europa.eu/transport/sites/transport/files/2016-social-legislation-road-specialised-summary-sme-panel.pdf>

48 [https://www.busseurope.eu/sites/buseur/files/media/position\\_papers/internal\\_market/2016-12-06\\_busseurope\\_position\\_paper\\_-\\_road\\_transport\\_in\\_the\\_single\\_market\\_-\\_identifying\\_the\\_challenges\\_and\\_the\\_way\\_forward.pdf](https://www.busseurope.eu/sites/buseur/files/media/position_papers/internal_market/2016-12-06_busseurope_position_paper_-_road_transport_in_the_single_market_-_identifying_the_challenges_and_the_way_forward.pdf)

49 [www.clecat.org/media/CLECAT%20position%20on%20Road%20Transport%20in%20the%20European%20Single%20Market.pdf](http://www.clecat.org/media/CLECAT%20position%20on%20Road%20Transport%20in%20the%20European%20Single%20Market.pdf)

50 [www.ueapme.com/IMG/pdf/UEAPME\\_Transport\\_Forum\\_position\\_on\\_Social\\_Legislation.pdf](http://www.ueapme.com/IMG/pdf/UEAPME_Transport_Forum_position_on_Social_Legislation.pdf)

51 <https://www.etf-europe.org/files/extranet/75/45160/ETF%20proposal%20on%20enforcement%20solutions%20EN.PDF>

52 <https://www.etfeurope.org/files/extranet/75/47277/ETF%20Warsaw%20declaration%20original%20signed%20version%20EN.pdf>

Workers Directive to international transport in the EU<sup>53</sup>. The signatories underlined the Directive's inadequacy for international transport operations, its administrative burden for road companies and the risk that it could lead to even greater competition (for instance from self-employed drivers or companies established outside the EU circumventing posting rules)<sup>54</sup>.

### National Parliaments

On 27 July 2017, the Polish Senat sent a reasoned opinion on incompatibility with the subsidiarity principle<sup>55</sup>. The Polish Senat assessed the proposal negatively, considering it to violate the fundamental principles of the EU, such as the functioning of the internal market, the right of establishment and the freedom to provide services<sup>56</sup>.

The Parliament of the Czech Republic's Chamber of Deputies (Resolution no 416, 21 September 2017) stated that the proposed deadline of 3 days is too short, and that after the expiry of this time limit the application of the Posting of Workers Directive is not applicable to transport workers, which defeats the purpose of the proposed adjustment – to take into account the specificities of the highly mobile transport sector.

The Senate of the Parliament of the Czech Republic (11 October 2017) claimed wage differences in some Member States to be an unfair competitive advantage because they are related to the different living conditions in Member States, differences that can only be eliminated by gradual convergence; moreover these wage differences are counterbalanced by additional costs – compared with domestic carriers – which result from the fact that services are provided across borders. What we find extremely interesting, from a rhetorical point of view, is the opinion concerning a weekly rest period. The Senate did not agree with the prohibition from taking a weekly rest of 45 hours or more in a vehicle because the Senat considered this provision to be discriminatory, to increase the cost of transport and also to be difficult to implement considering the current insufficient number of suitable resting places on the territory of Member States; looking for suitable resting places could, on the contrary, lead to an increase in CO2 emissions because drivers would have to choose longer routes where resting places would be available – this is not, however, in compliance with the declared intent to reduce CO2 emissions from road transport.

The Romanian Parliament Senate (26 September 2017) strongly recommended excluding international road transport from the scope of Directive 96/ 71 of, given the mobile nature of the activity:

- The re-evaluation of the three-day period from which the deployment period begins in the case of international road transport operations, because it is unrealistic and the proposed calculation method is exaggerated and restrictive, and will in fact determine a reduction, including the specified time frame;

- The period of derogation must be at least 16 days. For a driver who performs international road transport operations to be considered posted in a Member State, the total working time in the Member State's territory should be over 50% of the total number of days in a month.

### Legislative process

In the European Parliament, the legislative file was allocated to the Committee on Transport and Tourism (TRAN), where Merja Kyllönen (GUE/NGL, Finland) was appointed rapporteur. On 16 October 2017, the TRAN committee organised, along with the Committee on Employment and Social Affairs (EMPL), a joint public hearing on the working conditions of mobile transport workers<sup>57</sup>. Representatives from transport workers' and road operators' organisations agreed on the need to enforce the rules better through more rapid implementation of smart tachographs and to clarify the notion of transit. Some speakers underlined the risk of creating an additional burden for SMEs. On 22 November 2017, the TRAN committee organised a second public hearing on the Mobility Package, which focused on market and social aspects<sup>58</sup>.

The rapporteur's draft report was issued on 21 December 2017<sup>59</sup>. The EMPL committee adopted its opinion on 24 April 2018<sup>60</sup>.

Overall, 595 amendments<sup>61</sup> to the draft report were tabled<sup>62</sup> by 23 February 2018. On 4 June 2018, the TRAN committee organised an exceptional meeting to vote on this legislative file as well as on the other Mobility Package proposals. In terms of enforcement and posting, it adopted nine compromise amendments, the sixth of which fully excludes international and transit transport operations from posting workers. Cabotage and the road leg of combined transport carried out in the same host Member State would be covered by posting rules.

The TRAN committee adopted the report with 27 votes in favour and 21 against, as well as the decision to enter into trilogue negotiations. However, during the June 2018 plenary session, according to Rule 69c(3) of the Parliament's rules of procedure, the mandate was announced in plenary and subsequently challenged. On 14 June 2018, a vote took place in which Members rejected the TRAN committee's mandates to launch negotiations on the three proposals in the package. This is the first time since the new procedure under Rule 69c came into force (January 2017) that the plenary has rejected committee mandates. Members have the possibility to table new amendments. On the posting proposal, on which it is associated committee under Rule 54, the EMPL committee decided to re-submit its amendments, previously rejected by the TRAN committee. The TRAN committee report, with amendments, was voted on during the July 4<sup>th</sup> plenary session.

53 <http://www.stopneoprotectionism.eu/669-mutual-declaration-against-application-posting-workers-directive-international-transport-operations-in-the-eu/>

54 <http://www.stopneoprotectionism.eu/669-mutual-declaration-against-application-posting-workers-directive-international-transport-operations-in-the-eu/>

55 „In areas in which the European Union does not have exclusive competence, the principle of subsidiarity, laid down in the Treaty on European Union, defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States” Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

56 [http://www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2017\)0278](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2017)0278)

57 <http://www.europarl.europa.eu/committees/en/tran/events-hearings.html?id=20171002CHE02581>

58 <http://www.europarl.europa.eu/committees/en/tran/events-hearings.html?id=20171113CHE02862>

59 [http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE615\\_504](http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE615_504)

60 [http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE615\\_267&secondRef=02](http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE615_267&secondRef=02)

61 [http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE618\\_064](http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE618_064)

62 [http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE618\\_251](http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE618_251)

On July 4, 2018, the project was sent back to the Transport Committee. The ETF presented it as a success. Frank Moreels, ETF President, welcomed the result as “a victory for workers, the ETF and trade unions across Europe. The biggest risk was that the European Parliament would adopt disastrous positions, where international drivers would work longer hours with less frequent time off – and all for less pay than local workers. The ETF has worked tirelessly to convince MEPs that such reforms would be bad for road safety and the fair treatment of workers. I’m pleased that we convinced them, because a Europe that undermines jobs and traps workers in unfair conditions is a Europe that loses the trust of its citizens.”

Roberto Parrillo, President of the ETF Road Section, called on MEPs to get back to work. “We’re delighted that MEPs rejected the worst-case options, but Europe’s 3 million professional drivers are left in limbo. What rules can they expect to apply to the sector? There were many positive amendments on the voting programme today, but they were also rejected. Our politicians need to listen to workers and their unions, get back to the Committee, and design a Mobility Package that meets the EU’s promise for a fairer, more social Europe!”. Eduardo Chagas, ETF General Secretary, pledged that workers and unions would keep up the pressure. “We will not give up the fight for a decent Mobility Package, a key pillar of our Fair Transport campaign against social dumping in Europe. Our demands are clear and reasonable: equal pay from the very first day for international drivers; no sleeping in vehicles at the weekend; a safe amount of rest time to protect drivers, passengers and all road users. Politicians at the European Parliament and in national capitals need to deliver<sup>63</sup>.”

At the Council meeting on transport, telecommunications and energy in June 2017, Member States welcomed the Commission’s efforts to clarify the existing rules and step up enforcement measures<sup>64</sup>. The Working Group on Land Transport examined the proposal from June to November 2017. The Estonian Presidency presented a progress report to the Council on 5 December 2017<sup>65</sup>. On this occasion, ministers welcomed the progress report<sup>66</sup> and several of them highlighted the compromise reached by social affairs ministers in October 2017 in the context of the revision of the Posting of Workers Directive; this compromise established that changes to the Posting of Workers Directive will apply to the RTS only once the lex specialis enters into force<sup>67</sup>. However, several ministers noted that transport-specific rules for posting would require considerable work. Regarding control, delegations agreed on strengthening administrative cooperation and on the use of electronic information from tachographs for road checks.

The subsequent Bulgarian Presidency examined the draft compromised from January to May 2018 and made considerable progress on the technical, and some political, issues. It published a progress report on 30 May 2018<sup>68</sup>. At the Council meeting on transport, telecommunications and energy on 7 June 2018, the Bulgarian Presidency presented its progress report and took stock of the progress achieved on the legislative file. A general approach could not be reached<sup>69</sup>.

63 <https://www.etf-europe.org/a-line-in-the-sand-for-transport-liberalisation-european-parliament-rejects-harsh-proposals-on-pay-and-rest-time-for-drivers/>

64 [http://www.consilium.europa.eu/en/meetings/tte/2017/06/08-09/7utm\\_source=dsm-auto&utm\\_medium=email&utm\\_campaign=Main+results+-+Transport+issues+-+Transport+Telecommunications+and+Energy+Council%2c+08-09%2f06%2f2017](http://www.consilium.europa.eu/en/meetings/tte/2017/06/08-09/7utm_source=dsm-auto&utm_medium=email&utm_campaign=Main+results+-+Transport+issues+-+Transport+Telecommunications+and+Energy+Council%2c+08-09%2f06%2f2017)

65 [data.consilium.europa.eu/doc/document/ST-14841-2017-INIT/en/pdf](http://data.consilium.europa.eu/doc/document/ST-14841-2017-INIT/en/pdf)

66 [www.consilium.europa.eu/media/31971/st15303en17-v3.pdf](http://www.consilium.europa.eu/media/31971/st15303en17-v3.pdf)

67 [data.consilium.europa.eu/doc/document/ST-14841-2017-INIT/en/pdf#page=22](http://data.consilium.europa.eu/doc/document/ST-14841-2017-INIT/en/pdf#page=22)

68 [data.consilium.europa.eu/doc/document/ST-9259-2018-INIT/en/pdf](http://data.consilium.europa.eu/doc/document/ST-9259-2018-INIT/en/pdf)

69 [http://www.consilium.europa.eu/en/meetings/tte/2017/06/08-09/7utm\\_source=dsm-auto&utm\\_medium=email&utm\\_campaign=Main+results+-+Transport+issues+-+Transport+Telecommunications+and+Energy+Council%2c+08-09%2f06%2f2017](http://www.consilium.europa.eu/en/meetings/tte/2017/06/08-09/7utm_source=dsm-auto&utm_medium=email&utm_campaign=Main+results+-+Transport+issues+-+Transport+Telecommunications+and+Energy+Council%2c+08-09%2f06%2f2017)

## Review of the national perspectives

### Lithuania

According to the statistics of the State Social Insurance Fund Board within the Ministry of Social Security and Labour, there were 69,010 drivers in Lithuania in 2017.

The Government stressed the importance of balance in the EU road transport services market, because of potential foreign competition between carriers; the problem of provisions for drivers’ returning home and the enforcement of requirements; the possibility of provisions being applied differently to third-country nationals and to EU carriers.

Employers’ organisations, mainly the Lithuanian National Road Carriers’ Association “Linava”, stressed that the Mobility Package was particularly unfavourable to the geographically peripheral countries of the EU. Proposals providing for time constraints of cabotage operations, and for the application of the minimum wage for duration of their return journeys to their country of registration, favoured countries situated in the central part of the EU. The employers’ organisations supported the exclusion of transit movements from the scope of the regulation of the Directive.

The Government and the employers’ organisations took the position that the Posted Workers Directive was not applicable to road transport. The employers’ organisations indicated that the future be determined by the debate on lex specialis in the Council of Transport and the Committee of Transport in the EU Parliament. They fear that it could cause an imbalance in the transport sector, with price growth and the reduction of business competitiveness in the EU.

Trade unions supported the full implementation of the principle of equal pay for equal work. They stated that working conditions, e.g., overnight stay, working hours, weekly rest, return home, as well as wages including daily allowances for cross-border truck drivers, should be improved.

Public debates on cross-border truck drivers’ wage structures, daily allowances and social guarantees currently take place not only between trade unions and employers’ organisations, but also in the Tripartite Council and its specialist working group on transport. On 27 February, 2018 the above mentioned specialist working group (as well as the Tripartite Council, in a subsequent meeting held on 13 March, 2018) agreed that the discussion on the granting of daily allowances and the possibility to modify the present taxation of a proportion of remuneration and daily allowances should continue. In view of the fact that the problem of the taxation of labour and daily allowances is now emerging in a specific sector only (road transport), it is appropriate to address this problem in collective negotiation and not amend the existing regulations. The main problem is that truck drivers are paid a 1.3 minimum monthly gross wage (currently 1,3\* €400 = €520 gross) and the rest of the amount is daily allowances, as is established by a government regulation. As a result

of this remuneration formula, the social guarantees of truck drivers are not insured, e.g., if they are ill, they receive sickness allowance calculated only from their basic wage. Thus, if the monthly salary is lower than €520 or the hourly rate is less than €3,185 and the calculated total amount of daily subsistence allowance is equal or less than 50% of the wage (or hourly remuneration), the daily allowance shall be exempt from taxation. If the calculated daily subsistence allowance is for a total amount of more than 50% of the wage (or hourly remuneration), the exceeding part (50%) is subject only to income tax at 15%. If the monthly salary is equal to or higher than €520 (€400x 1.3), or the hourly rate is equal to or higher than €3,185 notices (€2,45 x 1,3), all the allowance is tax-free.

It is worth mentioning that social data in May 2018 on the average monthly income of truck drivers (this includes both long-distance drivers and local drivers) was €542.

### Romania

The UNTRR (an employers' organisation) voiced concerns regarding cabotage restrictions, the ban on weekly rest hours, the return-home time-frame, and the differences in wages between Western and Eastern EU Member States. These issues were also discussed at the "Transport 4.0" conference held in May 2018 by Trans. EU and the main transport unions of Romania. Augustin Hagiu, president of the Federation of Romanian Transport Operators, declared that the proposed revisions on rest time are motivated by the desire to eliminate competition from the Romanian transport companies<sup>70</sup>.

Romanian MEP Claudia Tapardel (PSD, S&D group in the European Parliament), a member of the Transport Committee in the European Parliament, organised a conference on the subject of the Mobility Package in February 2018. She stated that the proposed measures risk negatively impacting on the European transport industry. She mentioned the cabotage restrictions and the lex specialis as being particularly harmful measures<sup>71</sup>.

In Romania, the Labour Code specifies two kinds of cross-border work: "delegated" and "posted" – unlike under EU law, where there is only one category, that of posted workers. Under the threat that it was infringing EU law, Romania transposed the Directive on Posted Workers into Law 16/2017. However, the Labour Code has not been harmonised with the Posted Workers Directive or Law 16/2017, so it still contains the two categories of workers. Any Romanian company that posts workers in another EU state must do so under the provisions of Law 16/2017 as "posted workers". In order for their workers to qualify as a "posted" and to be recognised as such under the Posted Workers Directive, a company must obtain and complete an A1 application form for each posted employee<sup>72</sup>.

Therefore, in theory, Romanian cross-border truck drivers are recognised as posted workers by national legislation, provided that their company obtains A1 application forms on their behalf. In practice though, some transport companies often do not obtain the A1 application forms and declare their cross-border truck driver employees to be "delegated" workers and not "posted"<sup>73</sup>. The biggest reason for this, according to most sources researched, is the bureaucratic complexity and length of time it takes to obtain an application. While in Poland, for example, the A1 can be completed and downloaded online, Romanian companies must submit several forms and attestations from different agencies in original copies to the National Health Insurance House (the institution authorised to release A1 forms)<sup>74</sup>.

Under the provisions of Law 16/2017, posted workers are guaranteed the same working conditions as the workers in the EU states they are posted to. This applies to minimum wage, rest times, working hours and health and safety at the workplace<sup>75</sup>. In contrast, delegated workers, as defined by art. 43 – 44 of the Labour Code, are paid according to minimum wage standards in the delegating state, in this case Romania. Concretely, the biggest difference between "posted" and "delegated" workers according to Law 16/2017 and articles 43-44 of the Labour Code, respectively, is that "posted" workers benefit from the same working conditions as the workers from the state they are posted to, whereas for "delegated" workers the conditions in their original work contract continue to apply regardless of what state they are delegated to. In conclusion, Romanian cross-border truck drivers can, under national law, be recognised either as posted or delegated workers and for the worker to qualify as the former, he/she must have an A1 form.

The main points of contention for the National Union of Road Haulers of Romania (UNTRR) are the following:

1. The proposed lex specialis increases costs for Eastern EU haulers while keeping their basic wages lower than those of their Western EU counterparts. For example, Eastern EU haulers are paid below €1/km while in the Western EU haulers are paid €1.5/km.
2. The proposed cabotage restriction to 5 days is unfair because it disproportionately affects Eastern EU haulers.
3. The obligation to return home every 3 weeks.
4. The obligation to spend the 45-hour compulsory rest period in a hotel/motel instead of in the cabin.

The proposed revisions to rest time were also contested by the president of the Federation of Romanian Transport Operators, Augustin Hagiu<sup>76</sup>.

<sup>70</sup> <https://www.trans.eu/ro/actualitati/conferinta-transport-4-0-augustin-hagiu-lipsa-fortei-de-munca-si-migratia-soferilor-sunt-printre-problemele-majore-din-transporturi>

<sup>71</sup> <http://www.caleaeuropeana.ro/eurodeputatul-claudia-tapardel-psd-sd-organizatorul-unei-conferinte-privind-pachetul-pentru-mobilitate-la-bruxelles-masurile-prezinta-riscul-de-a-afecta-negativ-sectorul-transporturilor-europene/>

<sup>72</sup> <http://www.avocatfranta.com/formular-a1-detasare-in-franta-transport.html>

<sup>73</sup> <http://www.poosh.eu/media/1064/assignment-vs-posting-romanian-workers-in-europe-rodica-novac.pdf>

<sup>74</sup> <http://www.poosh.eu/media/1064/assignment-vs-posting-romanian-workers-in-europe-rodica-novac.pdf>

<sup>75</sup> <https://www.e-camion.ro/2017/06/15/arti-contrazole-fiscale-si-detasarea-transnationala/>

<sup>76</sup> <https://www.trans.eu/ro/actualitati/conferinta-transport-4-0-augustin-hagiu-lipsa-fortei-de-munca-si-migratia-soferilor-sunt-printre-problemele-majore-din-transporturi>

## Slovakia

Slovak international transportation companies are represented by the Association of Road Transport Operators of the Slovak Republic (ČESMAD). The association represents around 1000 road transport operators from Slovakia and its long-term goal around the issue of posted workers is to withdraw the transportation sector from the Directive on posted work; this is also the official statement of the Slovak government in this issue<sup>77</sup>. Another acceptable option for ČESMAD is to include per diems as a part of the considered wage within the Directive's regulation. Trade unions represented by KOZ are in accordance with ČESMAD and demand that the truck drivers should not be considered as posted workers.

In Slovak legislation, truck drivers are recognised as the domestic workers on business trips abroad. Based on this understanding, international transport drivers are entitled to per diem compensation, which is not the subject of social contribution payments. This allows employers to pay low wages (even at the level of the Slovak minimum wage) and thus pay low social contributions, while paying the rest of the drivers' wages in per diems. Within EU states, business trip per diems vary from €36 EUR per day in Bulgaria to €45 EUR in the Netherlands and €53 in Ireland.

In the legislation, international drivers are not recognised as a special category of workers and thus fall under the regulations for domestic workers that may be sent to another country on a business trip. The working conditions of all drivers (domestic and international) are regulated by the Act on the organisation of working time in transportation No. 196/2007 Coll. and per diem payments are regulated by the Act on travel compensation No. 283/2002 Coll. The general understanding of international drivers as employees on business trips is further supported by the statement of the Labour Inspectorate, which states that "in the context of Slovak labour law, international freight transport drivers are not considered as posted employees but as employees on a foreign business trip. In order for a truck driver to be considered a posted worker he would have to be sent from the territory of the Slovak Republic to the territory of another EU Member State on the basis of a contract concluded between the employer and the recipient of the service and would have to provide transportation services to the recipient of the service (the third party)"<sup>78</sup>.

This complicates the situation for Slovak truck drivers outside Slovak borders: in other EU Member States, Slovak truck drivers are considered posted workers and, when considering their wages, per diem payments are not included. Therefore, when compared with other EU Member States, Slovak drivers receive significantly lower wages compared to their actual payments.

The representatives of ČESMAD claim that the wages of Slovak truck drivers are high enough and that the Slovak drivers are not performing social dumping towards their west EU counterparts. As they suggest, the rules on the employment of truck drivers are different in each country and therefore it is difficult to obey all the rules which are not easy to find and follow. "We are not able to satisfy all the requirements. For instance, if compulsory breaks are part of the working time, it would be 200 per day, which is a wage that even French truck drivers are not receiving" claimed a ČESMAD representative<sup>79</sup>. The problem of compulsory week rest is also difficult to satisfy if a driver carries goods that cannot be leave unattended in a truck.

"In the west there is a demand, and here is the supply," said the general secretary of ČESMAD, Pavol Reich, explaining why Slovak and other Central European truck drivers operate in international transportation. At the same time, ČESMAD claims that there is a lack of drivers in Slovakia and one of solutions is a decrease in the age limit for drivers of trucks and buses. Currently, a truck driver must be 21 years old and bus driver at least 24 years old. "For us, it is very important to catch drivers sooner than 21 years of age because by then they are already employed in another sector," said the ČESMAD representative<sup>80</sup>.

Another problem discussed is the "letter-box" companies seated in Slovakia and employing workers, including third-country nationals, on only a Slovak minimum wage. "There are companies with a seat at an addresses where a truck couldn't even arrive. These people are abusing the common EU market rules and exploiting Slovak drivers," claimed Pavol Reich<sup>81</sup>.

Trade unions are less vocal on this issue. As has been mentioned already, they also support the exclusion of truck drivers from the Directive on posted workers. On the top of that, KOZ points out that there are many self-employed drivers whose wage and working conditions are not controlled. This seems a relevant point, given the high number of self-employed Slovak posted workers.

77 <https://euractiv.sk/section/podnikanie-a-praca/news/na-cestech-jadra-sme-otocili-v-otazke-vyslanych-pracovnikov/>  
78 <https://www.ip.gov.sk/podmienky-prevadzovania-vnutrostatnej-a-medzinarodnej-dopravy/> (in Slovak)

79 <https://nasadoprava.sk/cesmad-ziada-samostatnu-europsku-smernicu-pre-cestnu-dopravu/page/48/>  
80 <https://www.cesmad.sk/en/kategoria/1-oznamy-1/2541-diskusia-na-temu-slovaci-ako-vysielani-pracovnici-v-eu-1>  
81 *ibid*

# Third-country nationals as posted workers and migrant workers in the EU

Due to the growing demand for labour in Western Europe, and also in CEE countries in recent years, it is worth analysing the issue of posting employees from the perspective of the growth of the migration stream from third countries. In the last several years, CEE countries – or at least some of them – have become not only the sending countries of migrants to the West, but also receiving countries for migrants from countries located east of the EU. A significant part of this migrant flow is made up of workers from Ukraine, and its scale has increased with the deterioration of the economic and political situation since the armed conflict in the Donbass. According to the ruling of the Court of Justice of the European Union, third-country nationals legally residing in the EU may be subject to posting procedures to other EU countries. For example, an employee from Ukraine may be posted by a Polish construction company to another EU country to perform an order in accordance with the regulations established by the European institutions and individual Member States. Despite the fact that scarcity of data hampers the estimation of the scale of this phenomenon, an increase in the posting of workers from third countries – mainly from Ukraine – is observed and discussed in the public debate in CEE countries.

The European Commission confirmed that third-country nationals legally employed in one of the Member States are eligible to be posted to another EU country<sup>82</sup>: “It is well-established case law of the Court of Justice of the European Union (CJEU), that the right to post workers covers third-country nationals legally employed by a service provider in the Member State where it is established.” Even several years ago, when looking at the service sector, researchers (including Morano-Foadi and Malena, 2012) acknowledged that “Polish firms can place Ukrainian workers who are legal residents in Poland in German households. However, so far there is no evidence that use has been made of this possibility” (p. 176). The scale of the posting of Ukrainians and other third-country nationals in the EU is not well documented. According to the available data, workers from Ukraine are mostly posted in the Visegrad region (Poland, Czech Republic) and Germany (as of 2018).

On the basis of the expert questionnaire and available research literature (bearing in mind its limitations), a hypothesis may be formulated which describes a certain part of the mechanism of posting workers from third countries to the CEE region. It indicates the special role of Poland in

this process. Ukrainians come to Poland due to the more liberal regulations and existing economic relations (a developed network of employment agencies, the individual contacts of migrants), then employees from Ukraine are posted to other EU countries, including those countries whose immigration regulations are more restrictive. In this way, a subsector of Polish companies has been created – in particular, temporary work agencies – which specialises in attracting employees from Ukraine and other third countries, and then posting them to other EU countries. Ukrainian migrants who arrive in the EU come primarily to Poland and regulate their legal status based on employment. 50% of labour migrants spent 1 to 3 months in the country (Personnel Service, 2018). In absolute terms, in 2016, most A1 forms for posted workers were issued by Poland (513,971). This amounts to 22% of the total number of PDs A1 issued. Moreover, as a sending Member State, Poland issued 50% of the PDs A1 to posted workers (De Wispelaere & Pacolet, 2017). The European Commission reports that on average 45% of the PDs A1 issued to posted workers were to persons employed in the construction sector, which is among the most popular employment areas for Ukrainian labour migrants. Persons posted from Poland mainly provide services in the construction industry. The most significant flow of posting between sending and receiving Member States is from Poland to Germany (130,716 PDs A1/postings), which suggests that Germany would make an interesting case study of the position of Ukrainian workers posted from another Member State.

However, the exact numbers of Ukrainians or other third-country nationals are not known, because such data is not collected under the posting mechanism (neither in Poland nor in any other country under scrutiny in this report). Intermediaries – companies and individuals – play an important role in the process. It should be highlighted that some of these practices might involve the exploitation of migrants, the abuse of their rights and unlawful behaviour, which are known to exist in the context of migrant employment in the country.

The report on working conditions of Ukrainians working in Poland, prepared by the EWL company on the basis of a quantitative study<sup>83</sup>, revealed that 41% of Ukrainian employees receive the minimum wage or less; 49,5% would want to work less than 12h/day; 58% would want to have at least one day off per week; 29% were subject to unlawful practices on the part of their employer; and 26% worked without any registration. Studies from other countries in the CEE region confirm this general trend. The level of formalisation of labour relations in the receiving countries and overall social security (e.g., holiday allowance, sick leave etc.) of Ukrainian labour migrants is relatively low. On average the working week of a Ukrainian migrant is longer and his/her social security status in comparison to the local population is worse. Almost 66% of the respondents worked between 41-60 hours a week. Less than 20% had medical and social insurance during their employment. IOM (2017) observes that 17% of its respondents were willing to work abroad without any formal agreement. Chudžíková & Bargerová (2018) report on similar conditions in the case of Slovakia and conclude that many Ukrainians endure exploitative conditions. The data analysed by Trčka et al (2018, p. 20) “reveals that migrant workers face intense, high-speed workloads with unregulated sanctions for defiance”.

82 Accessed on 08.08.2018 from: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-004937&language=EN>

83 [http://www.ewlhr.eu/wp-content/uploads/2018/08/BADANIE\\_FWL\\_RAPORT.pdf](http://www.ewlhr.eu/wp-content/uploads/2018/08/BADANIE_FWL_RAPORT.pdf)

It should be noted however that these observations are much more applicable to short-term migration from Ukraine. Due to circular and return migration, many citizens of Ukraine tend to agree to lower social security during employment abroad. The case of enduring worse labour conditions in comparison to the local population (also in the case of posted workers) is not common only for Ukrainians, and Polish posted workers in Sweden have bad conditions too (see Thörnqvist & Berhnradsen, 2015). IOM (2016) concludes in its research that the situation of long-term workers from Ukraine is much better, and only 14% of the respondents worked without a formal agreement. A similar observation applies to undocumented migrants (sometimes described as irregular or illegal migration) – a phenomenon that is much more common for short-term migration (IOM, 2016). One should expect to find many of the abovementioned social security challenges in the case of posted workers, among others, because in principle they also carry out short-term assignments.

Since the start of the armed conflict in Ukraine, the amount of labour and educational migration from Ukraine to Poland has grown twofold. The Polish Office for Foreigners has reported on a regular basis about the constant growth of migration from Ukraine since 2013-2014, almost on every indicator (temporary residence, permanent residence, application for international protection, labour migration, educational migration etc.)<sup>84</sup>. Growth of the economy in Poland and emigration of its own population to other EU Member States has additionally contributed to its attractiveness for citizens of Ukraine, because it has opened a niche on the local labour market (see Chmielewska et al, 2017). Last but not least, Polish migration policy, although criticised for its lack of strategic vision and effective integration measures (Grot & Frelak, 2013; Matyja et al., 2016), could be considered liberal for citizens of the Eastern Partnership countries (Ukraine in particular). By adopting several legislative acts on the national level<sup>85</sup>, the government created stronger incentives, among other things, for seasonal workers and students to choose Poland over other potential destinations in the EU. The possibility of being posted to work (or the right to work in general) in another EU Member State based on a visa from the country of first arrival in the EU (usually Poland) is sometimes discussed by temporary work agencies and NGOs<sup>86</sup>. These discussions, however, do not go beyond an elaboration on the formal rights and obligations of a migrant in this process. Job offers with a requirement to hold a valid Polish visa are relatively popular on job portals in Ukraine<sup>87</sup>.

Despite the scarcity of data on the posting of third-country nationals, desk research and expert questionnaires have enabled some light to be shed on this phenomenon. In recent years, experts in the project “Towards stronger transnational labour enforcement cooperation on labour migration”

(STRONGLAB)<sup>88</sup> have arguably come the closest to studying the actual situation of Ukrainian posted workers in several EU Member States (mostly Visegrad and Central Europe). Fedyuk & Meszmann (2018) wanted to analyse the situation of Ukrainian posted workers in the electronics sector in **Hungary**. However, they (p. 3) “found relatively few cases of workers posted to Hungary and had to alter their inquiry according to their findings and concentrate predominantly on the closest proxy: temporary agency workers from Ukraine”.

Chudžíková & Bargerová (2018), while studying Ukrainian workers’ labour rights in **Slovakia**, observed (p.8) that “they can also work as posted workers from other EU countries under the Cross-Border Cooperation Act or in special regimes under the Act on Residence of Foreigners for stays of under 90 days when a residence permit is not needed.” The research by Chudžíková and Bargerová (2018) revealed a few cases when Ukrainian workers came to Slovakia on Polish visas, which in many cases constituted a violation of local labour law. Researchers were unable to identify the cause of such an occurrence, although a reasonable assumption was made about legalisation procedures being more accessible in Poland to citizens of Ukraine. No specific information was reported on the situation of posted workers. The expert questionnaire revealed illegal practices in the Samsung production plant in Trnava – these involved the posting procedure. As an investigation proved, 680 Serbians were employed on the basis of counterfeit documents issued by a Hungarian company giving assurances that social security insurance was being contributed in Hungary. The documents were submitted to Slovak institutions in order to satisfy posted workers regulations and avoid social contributions and taxes. Moreover, the working conditions in the company violated Slovak Labour Code regulations.

According to the expert questionnaire, the practice of using Polish, Hungarian or Romanian visas for posting Ukrainians, Serbians and others in Slovakia is widespread, however estimation of its scale is difficult. The Slovak Labour Office (UPSVaR) reports that the most numerous groups working in the country among the third-country nationals in May 2018 were Serbians (13.6 thousand) and Ukrainians (7.2 thousand)<sup>89</sup>. The number of Serbians rose by 7.9 thousand when compared with data for 2017<sup>90</sup>. It is still a challenge to give exact numbers on what proportion of these groups were posted workers. The Slovak National Labour Inspectorate (NLI) reports a significant increase in the incidence of illegal work among third-country workers in recent years. This process is due to the fact that the number of foreign workers has increased, and also because of the effort of the Slovak government to control the working conditions of foreigners – especially in the last two years (2017-2018), when the NLI intensified controls of employers employing foreigners<sup>91</sup>. According to the NLI data, there were 46 cases of illegal employment involving third-country nationals in

84 Office for Foreigners in Poland: <https://udsc.gov.pl/statystyki/>.

85 Aliens Act (2013), including further amendments.

[http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=65077&p\\_country=POL&p\\_count=1471](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=65077&p_country=POL&p_count=1471)

Issues regarding the removal of the obligation to have a work permit are regulated by Art. 87 of the Act of 20 April 2004 on the promotion of employment and labour market institutions. Some foreigners are exempt from the obligation to have a work permit in accordance with the Regulation of the Minister of Labour and Social Policy of April 21, 2015 on cases in which it is permissible to perform work for a foreigner on the territory of the Republic of Poland without having to obtain a work permit. The act on the Karta Polaka (“Pole’s Card” – 2007) regulating the situation of people who have Polish origin.

86 <http://jobwest.com.ua/uk/news/rabota-po-polskoi-vize-v-es-mif-i-realnost> ; <http://ostarbeter.vn.ua/roboata-v-es-z-pol-vizoiu.html>;

<http://naszwybir.pl/chy-mozhna-z-polskoyu-vizoyu-pratsyuvaty-v-chehiyi/> (all accessed on 08.08.2018).

87 An example of a job offer with a requirement for Polish visa in Sweden <https://besplatka.ua/obvyavlenie/zhinki-u-klimigovu-kompaniyu-do-shveciyi---klining-shveciya-378080>; Germany <https://besplatka.ua/obvyavlenie/elektrik-germaniya-406361>; and Czech Republic <https://www.eurabota.ua/job/139558/roboata-v-chehi-po-polskoy-vizi-bez-plati-zavakansiyu-at-viktoryia> (all accessed on 08.08.2018).

88 <http://migrationonline.cz/en/e-library/what-bothers-migrant-workers-the-most-unpaid-wages-reveals-unique-research-on-ukrainian-workers-with-polish-visa> (accessed on 08.08.2018).

89 Data source: Labour office, June 2018. Available at: [https://www.upsvr.gov.sk/statistika/zamestnanie-cudzincov-statistika/zamestnanie-cudzincov-na-uzemi-slovenskej-republiky-za-rok-2018.html?page\\_id=77221590](https://www.upsvr.gov.sk/statistika/zamestnanie-cudzincov-statistika/zamestnanie-cudzincov-na-uzemi-slovenskej-republiky-za-rok-2018.html?page_id=77221590) <http://jobwest.com.ua/uk/news/rabota-po-polskoi-vize-v-es-mif-i-realnost> ; <http://ostarbeter.vn.ua/roboata-v-es-z-pol-vizoiu.html>; <http://naszwybir.pl/chy-mozhna-z-polskoyu-vizoyu-pratsyuvaty-v-chehiyi/> (all accessed on 08.08.2018).

90 [http://www.upsvr.gov.sk/statistika/zamestnanie-cudzincov-statistika.html?page\\_id=10803](http://www.upsvr.gov.sk/statistika/zamestnanie-cudzincov-statistika.html?page_id=10803)

91 <https://www.aktuality.sk/clanok/417293/j-richter-zameriame-sa-na-kontroly-firiem-v-ktorych-pracuju-cudzinci/>

2015, 220 in 2016 and 1170 in 2017<sup>92</sup>. The majority of this group consisted of Serbians and Ukrainians. Ukrainians mostly worked illegally in the construction sector (91 cases in 2017) and in administrative and support activities (112 cases), while Serbians were in industrial production (320 cases) and administrative activities (306 cases).

Slovakia eased the access of third-country nationals to the labour market by introducing two amendments to the Act on employment services no. 4/2015 in March 2017 and in May 2018 in order to satisfy employers' demand for labour force. The former amendment allows employment in technical support and maintenance connected to the supply of goods and services for the maximum period of 90 days, and no employment permission is needed<sup>94</sup>. The latter amendment shortened the waiting period for issuing short-term work permits by up to 90 days. The waiting period is to be shortened from the previous 9 months to 10-20 days and will remove employers' duty to prove that a job could not be filled by any Slovak workers<sup>95</sup>. The trade union KOZ pointed out that the 30% threshold refers only to those third-country nationals that are recruited through the simpler, newly-introduced procedure, not all third-country nationals in a company. "If an employer uses other legal ways for employing foreigners, this won't be part of the 30% threshold," KOZ claimed in a statement<sup>96</sup> in February 2018 when the proposal was discussed in Parliament.

On the other hand, the government has called for equal working conditions, and their protection, to maintain labour standards. "We are not interested in the arrival of a cheap labour force that would break down the growth in wages," claimed Richter in May 2017<sup>97</sup>. Therefore, the NLI was commissioned to better control the influx of labour migrants, their working conditions and the legality of their entitlement to work. KOZ expressed its position, highlighting the threat of social dumping if foreigners are granted easier access to the Slovak labour market. In its statement KOZ called for strengthening policy measures that would narrow the skill mismatch on the labour market rather than accepting more foreigners from the third countries. Employers, on the contrary, argued in favour of the influx of foreigners in order to boost economic growth and business development (especially in the context of a shrinking and aging population). In the study by the Entrepreneurs' Alliance of Slovakia (Podnikateľská aliancia Slovenska, PAS) and the think-tank INESS, it was argued that third-country nationals should firstly be accepted from "culturally close" countries such as Ukraine, Serbia, Macedonia or Bosnia and Herzegovina. The report enumerates certain directions that should be undertaken by the government<sup>98</sup>. Slovak experts assessed that most of the Government measures taken in 2017 and 2018 were in line with the PAS's proposals.

Based on the available data, **Czech Republic** also presents an interesting case in the Visegrad region. In an expert report prepared by the Centre for Eastern Studies (2017) on the possible consequences of visa liberalisation between the EU and Ukraine, Czech Republic is presented as a particular case to illustrate the practices of posting migrants from Ukraine to another Member State by Polish companies. The government of the Czech Republic introduced a restrictive migration policy after the world financial crisis. Despite a low unemployment rate (3.4% in 2016), opportunities for Ukrainian labour migrants to come to the Czech Republic via standard legalised procedures became much more limited than in the case of Poland. This meant that a potential migrant had to rely on intermediary organisations in order to get employed in the country. Czech migration policy was partially shaped by social partners (e.g., employers), who argued that immigration would lead to lower wages (social dumping, as reported by the largest trade union ČMKOS, 2017) and general anti-immigration sentiments were proliferated before, during and after the elections by local politicians. Employers on the other hand, similar to their colleagues in Poland, encourage labour migration from Ukraine (Trčka et al, 2018). Partially as a result of these developments, Czech Republic witnessed a rise in the number of labour migrants from Ukraine (several thousand, according to estimates) in 2016. However, their legal status was regulated via Poland (mainly visas issued for temporary work). It is believed that many had been arriving in the country as posted workers, although the exact numbers are difficult to estimate.

This observation is largely confirmed by Cremers (2011), Trčka et al (2018) who, in the case of Czech Republic, report on the so-called "false" posting of Ukrainian workers on Polish visas. False posting is a semi-legal strategy used to circumvent restrictions on the labour migration of non-EU workers. This means that certain posting conditions were not met (e.g., duration of stay, providing services that have no non-dependent features). Čaněk et al. (2017) estimated that the number of posted Ukrainian workers rose from 500 in 2015 to 7,000 in 2017. Trčka et al (2018, p.9) argue that the method of posting via Polish visas has been relatively tolerated. False posting was often detected during labour inspections, which uncovered that companies located in Poland were sending workers from Ukraine to work in not temporarily. Moreover, it was not a service but a so-called intermediation of employment. Finally, a duty to inform the Office of the Czech Republic about the commencement and termination of a posting was breached. During the 2017 labour inspections, 2,290 persons that were found to be engaged in illegal work, of whom 997 were Ukrainian citizens, most often in the construction sector. Moreover, in 2016, administrative expulsion was issued to 1,207 Ukrainian citizens due to undeclared employment – this number doubled in comparison to the previous year (Trčka et al, 2018, p. 10). The researchers also reported on (p.27) "a gap between women and men with the same semi-official status as Polish visa holders – women in the hotel industry earn approximately one euro less than Ukrainian construction workers with a Polish visa" (both sectors were analysed as case studies). Some migrants are members of trade unions in the Czech Republic, but these numbers are not high because of limited or total lack of knowledge of the existence of trade unions among foreign citizens (Čaněk, Kobová 2016).

92 Source: NLI yearly reports on illegal employment

93 Introduction of article 23a par. 1 letter "m" to the Act on employment services no. 4/2015

94 Currently, 13 thousand employees are involved on the basis of this regulation (out of all 22 thousand third-country nationals) despite the character of their work, which suggests an overuse of the mechanism. Another 9 thousand third-country nationals have regular employment contracts, although a full-time contract does not rule out employment through temporary agency work.

95 The procedure concerns the districts with an unemployment level below 5% and foreigners may constitute up to 30% of the total permanent staff at a company. The so-called seasonal work can be performed only in four sectors: agriculture, industrial production, construction and accommodation and food services. The amended legislation allows social partners who are part of the Tripartite Commission to identify and update the list of professions falling under the relaxed regulation once a year.

96 <https://ekonomika.sme.sk/c/20765202/odborari-maju-obavy-z-uvolnenia-pravidiel-pre-zamestnvanie-cudzincov.html>

97 <https://spectator.sme.sk/c/20470071/shortage-of-qualified-labour-hits-slovakia.html>

98 <http://alianciapas.sk/slovenska-ekonomika-potrebuje-na-svoj-rast-novu-krv/>

In **Lithuania**, migration from the third countries plays a marginal role on the labour market and is not an actual answer to the massive emigration flow that has been developing since accession to the EU (approx. 15% of the total population are considered to be out-migrants). This fact defines the specificity of the country as regards the posting of third-country nationals due to its low importance. According to the Department of Migration, there were 10,000 temporary residence permits issued to third-country nationals in 2017, more than half of which were Ukrainians (approx. 60%). In addition, about 23,000 national visas were granted to foreigners in 2017, of which a considerable part were to Ukrainians. A significant growth of in-migration has been observed in the last two years and the group of Ukrainians is mostly responsible for this increase. In the period January-April 2017, Ukrainians registered under national visas and temporary residence permits constituted 51% of all newly-registered migrants in Lithuania, and in the same period in the following year they represented yet 67% of the group. Nevertheless, the group of registered migrants incoming to Lithuania constitutes less than 1% of the total population.

**Table 5.** National visas and temporary residence permits on work basis, numbers

Period January- April	National visas		Temporary residence permits		NV+TRP	
	Total	UA citizens	Total	UA citizens	Total	UA citizens
<b>2017</b>	4,251	2,107	2,813	1,484	7,064	3,591 (51%)
<b>2018</b>	12,361	8,229	4,522	3,099	16,883	11,328 (67%)

Source: expert questionnaire (Eglė Radišauskienė), Lithuania on the basis of Department of Migration data

Some small part of this group might be posted by Lithuanian companies to other EU Member States, but the exact numbers are not known. Conducting a special register for such a small-scale phenomenon is perceived by local stakeholders as unnecessary, as reports the expert questionnaire. The most likely sectors where posting might occur are construction and road transport. Due to its marginal significance, the posting of workers from third countries is not a subject of public debate. In such circumstances, general statements apply: employers express the need for more flexible regulations in order to attract migrant workers, while trade unions indicate that third-country nationals may put wage increases under pressure and might cause social dumping practices in the country.

The case of **Romania** is similar to some extent to the Lithuanian context. A significant out-flow of workers coincides with very low in-flow of migrant workers despite the labour shortage currently being experienced. Moreover, regulations on legalising the stay and employment of third-country nationals in the country are relatively restrictive. According to national regulations, there is a certain quota of work permits for third-country nationals – set by the government – that can be issued each year. In 2018, the quota amounted to 7,000 employees for the whole country, including 1,200

employees under the procedure of posted workers coming to Romania from other EU countries<sup>99</sup>. In July 2018, the Government approved an increase of the quotas, supplementing the initial number up to a total of 10,400 employees, of which 2,400 employees were posted<sup>100</sup>. There are also defined quotas for other forms of employment: 3000 permanent employees, 700 transferred within the same company, 500 highly qualified, 400 seasonal workers, 100 apprentices and 100 cross-border commuters<sup>101</sup>. When compared to the total population, these quotas are very low and represent less than 1% of the number of citizens. Moreover, there is also a minimum wage standard relating to third-country nationals, which is set at the level of the average national wage. According to the expert questionnaire, the main sectors where third-country nationals are predominantly employed are: restaurants, ship-building and construction<sup>102</sup>. There is no data available on the numbers of third-country nationals posted by Romanian companies to other EU Member States.

These restrictive regulations are criticised by employers' organisations and other private sector actors that experience the most problems with labour shortages. They claim that the administrative procedures in hiring third-country nationals are complex and expensive – especially the obligation to pay at least the average salary upon hiring<sup>103</sup>. Considering the fact that for the general job categories third-country nationals are hired in, Romanian citizens' wages start at the minimum wage, the condition that the average wage must be paid is quite high for a lot of Romanian companies to sustain. In this context, the Minister of Finances, Mr. Eugen Teodorovici, proposed the elimination of the average salary condition for the hiring of third-country national workers, the visa tax and other several taxes which impede the hiring of third-country nationals<sup>104</sup>. The proposal has been supported by a group of deputies and senators from several political parties, who proposed a draft law demanding an increase in work permit quotas and a suspension of the condition that these workers must be paid at least the average national salary<sup>105</sup>. The bill was on the way to legislation while the final version of this report was drafted.

Concluding, it might be said that the public debate on migrant workers and the procedure of posting third-country nationals in some CEE countries is beginning to take a similar shape as in Western European countries in recent years. This thesis is related mostly to the CEE countries experiencing significant migrant in-flows, namely Poland, Slovakia and Czech Republic – this influx is driven by labour shortages, low unemployment and economic growth. In Lithuania and Romania, characterised by high emigration and very limited immigration (from third countries), the debate barely exists while the subject is absent. The difference between Visegrad countries and Western Europe, though, is that employees in Western countries are recruited mainly from the Eastern EU Member States under the free movement of persons and freedom to provide services regulations operating within the community, while migrant workers in CEE originate mainly from third countries. The employment and residence of third-country nationals are regulated in a much more restrictive way, therefore their availability is potentially lower and thus prone to unlawful practices.

99 <http://ziaruluminia.ro/mai-multi-lucratori-straini-in-romania-135334.html>

100 <http://www.zf.ro/eveniment/liber-la-turci-si-vietnamezi-guvernul-a-aprobat-cresterea-cu-8-000-a-contingentului-de-lucratori-din-spatiu-extracomunitar-17380050>

101 [https://adevarul.ro/economie/stiri-economice/7000-lucratori-straini-vor-putea-munci-romania-2018-1\\_5a44efdd7af743f8dcf34ac/index.html](https://adevarul.ro/economie/stiri-economice/7000-lucratori-straini-vor-putea-munci-romania-2018-1_5a44efdd7af743f8dcf34ac/index.html)

102 <http://www.zf.ro/eveniment/liber-la-turci-si-vietnamezi-guvernul-a-aprobat-cresterea-cu-8-000-a-contingentului-de-lucratori-din-spatiu-extracomunitar-17380050>

103 [https://www.dnews.ro/romania-deficit-urias-de-forta-de-munca\\_605887.html](https://www.dnews.ro/romania-deficit-urias-de-forta-de-munca_605887.html)

104 [https://www.dnews.ro/romania-deficit-urias-de-forta-de-munca\\_605887.html](https://www.dnews.ro/romania-deficit-urias-de-forta-de-munca_605887.html)

105 <https://legestart.ro/conditii-mai-relaxate-pentru-strainii-care-vin-sa-munceasca-romania/>

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# Annex

## The position of workers from Ukraine in the Poland and other EU member states in the context of posting of workers mechanism - Andriy Korniychuk

### Summary

Posted work of Ukrainian citizens in the EU has not received a lot of attention from the expert community and decision-makers. In many member-states of the EU, the debate on posted workers overlaps with that on economic migration. However, as already noted by the European Commission in the process of preparation of Enforcement Directive 2014/67/UE, a separate analysis of the phenomenon of posting is crucial due to its unique drivers. Incomplete data prevents researchers from showing the full scale of migration and the challenges facing Ukrainian posted workers. Lack of comprehensive information is noticeable both in and outside the EU [Ukraine]. Comparative research is particularly challenging due to incomplete information and different standards of data collection. Nevertheless, the analysis conducted in this study sketches out a somewhat promising direction in which the knowledge about the position of posted workers from Ukraine in the EU could be expanded.

The debate on the topic of posted workers is barely present in Ukraine. The public does not distinguish posted workers as a separate category and is mostly focused on a discussion about the effects of labour migration. Authorities, social partners, experts and media representatives are preoccupied with the analysis of the challenges and opportunities migration of Ukrainian citizens brings. Media outlets tend to report on the [gross] violations of migrants' rights, incidents of exploitation and unfair practices. The debate in the receiving countries (e.g., the case of Poland and the Czech Republic) shows that the presence of posted workers of Ukraine may be discussed in the context of social dumping or placed in the general discourse about the future of national migration policy. Trade unions tend to criticize the potential downward pressure that the posting of workers might create pertaining to wages and working conditions in the receiving countries. The opinion of trade unions often stands in opposition to employers. The latter are in favour of increasing labour mobility of third-country nationals for economic reasons (shortage of labour force in particular).

As of 2018, in absolute numbers, the majority of labour migrants from Ukraine arrive in Poland on a short-term, circular (seasonal) basis. In comparison, their number in other EU member states is small. Ukrainian citizens are predominantly employed in the construction sector. It is already an established fact that the Polish economy faces a shortage of labour force, which is being compensated by workers from Ukraine. Social partners in the country are clearly in favour of such solution. In spite of some signals that Ukrainian citizens are being actively posted from Poland to

neighbouring Visegrad Countries such as the Czech Republic, Slovakia or Hungary, the available data has not allowed to confirm the scale of this phenomenon (with the exception of Czech Republic). According to the European Commission, the most significant flow of posted workers is from Poland to Germany in the construction sector. Poland and Germany make a compelling case for further exploration of posted work of third-country nationals in the EU due to the fact that surveys among Ukrainians clearly indicate that these countries constitute their preferred destinations for economic migration.

Based on the available data, it is possible to make a tentative assessment of the challenges posted workers from Ukraine [might] face. In line with the general observations about the short-term migration from Ukraine, the experts must turn their attention to the legal basis of employment and the question of social security of posted workers. Labour migrants from Ukraine (short-term in particular) often tend to overlook the importance of contractual agreement with the employer, agree to work extra hours without adequate compensation, neglect the importance of medical and social security. The level of their knowledge about employees' rights in receiving countries is not particularly high. Membership of third-country nationals in trade unions is not a common occurrence in the EU. The sheer scale of migration from Ukraine in recent years made the citizens of this Eastern European country an easy target for exploitation. In many of the studied national cases (e.g. Poland, Slovakia, Czech Republic), the so-called intermediaries (temporary work agencies, but also various individuals) make use of the vulnerable situation of Ukrainian workers. Civil society and social partners should support labour migrants from Ukraine among others by helping to protect their rights in the receiving countries.

### The availability of migration data in Ukraine

Without a comprehensive approach toward management of migration data in Ukraine, a detailed analysis of the situation of posted workers from the country will remain to be difficult if not an impossible research task. The situation with data availability has improved over the last decade due to active support from the international community (EU's visa liberalization process in particular). However, it has not met the benchmarks set up by many experts yet.

Effective management of migration processes requires accurate information on the volumes and intensity of movement of population and the structure of migratory flows. The availability of data increases the probability of decision-makers and scholars to make insightful observations, realistic predictions and well-elaborated decisions as a result of the empirical based analysis. Lack of information impedes the ability of authorities and research community to assess the impact of migration on the development of the country, complicates management of the migration flows, it does not allow to determine the appropriate instruments to address the ongoing challenges and allocate sufficient funds to their implementation.

The possibility to assess the scale and impact of economic migration of Ukrainian citizens to the EU from the perspective of a sending country [Ukraine] in the context of posted workers is limited mainly due to the lack of comprehensive migration data. The main methodological challenges are as follows: 1). Insufficient capacity (e.g., expertise, financial resources) of public institutions to monitor effectively migration flows (including labour migration); 2). The dependency of the Ukrainian state on the external resources and donor support to carry out a statistical account of the migrating population pursuant to international standards; 3). Lack of aggregated data as a result of the frequent changes in the migration management practices in the framework of individual institutions over the years (e.g., in case of State Migration Service of Ukraine); 4). The irregularity of monitoring and evaluation of the migration data (e.g., the last census in 2001, only 3 attempts to research labour migration on the state level in 2008, 2012 and 2017, none addressed posted work as a separate category); 5). Lack of effective cross-sectoral cooperation among government institutions; 6). Ongoing armed conflict on Ukraine's territory (since 2014) and international focus on other priority areas (e.g., anti-corruption measures, decentralization, judicial reform) limit the possibility to invest more resources into the development of an effective migration policy; 7). The process of collecting statistical data on migration in Ukraine differs from the EU standards on a number of parameters (e.g., the definition of migration, length of stay), which complicates comparative analysis.

The European Union recognized the importance of migration management in the context of political and societal developments in Ukraine. Visa liberalization, which concluded successfully in 2017, was a conditional process for Ukraine, among others dependent on the introduction of an effective systemic approach to the management of migration flows. Already at the beginning of 2010 state authorities achieved progress pertaining to policy legislation (Sushko, 2011). However, the capacity to implement newly adopted legal acts regulating migration management is still a challenge. As a result, institutional capacity building with a focus on the State Migration Service ensued. United Nations, The OSCE Office for Democratic Institutions and Human Rights (ODIHR), International Organization for Migration (IOM)<sup>106</sup> and The European Union Advisory Mission (EUAM) Ukraine are among the institutions that had already contributed substantial financial and human resources to improve the capacity of State Migration Service of Ukraine to manage the migration flows and address the ongoing challenges (e.g., internal displacement, labour migration).

Under constant pressure from the international community, steps have been undertaken by the Ukrainian authorities to improve the availability of data pertaining to migration processes in the country. Yet, the solutions at government's disposal do not allow to show the full complexity of migration processes in the country. Registration of persons at the place of residence carried out by the State Statistics Service of Ukraine (SSSU) on the basis of forms which are filled at the moment of registration in the departments of the State Migration Service (SMS) is the main source of

knowledge about the nature of migration flows. Registration is not a reliable source of information about migration in Ukraine due to the fact that many citizens do not declare officially the change of their place of residence (Malynovska, 2014). Such a pattern is especially noticeable among short-term migrants (e.g., seasonal workers, many of whom could be potentially interested in taking a job as a posted worker in the EU).

Based on the census conducted in 2001, Ukrainian experts concluded that the actual loss of population as a result of emigration abroad during the 1990s could have been at least 1.7 times higher than figures recorded through official statistics (Malynovska, 2014). Ukraine has not carried out a census for 17 years (international best practice is usually a 10-year span), which hampers considerably the ability to analyze the actual migration flows and their effects. Armed conflict in the Donets Basin of Ukraine which began in 2014 has led to a massive internal displacement of the population (almost 2 million citizens) and contributed to the growth of Ukrainian emigration abroad. These latest socio-political developments put an even bigger pressure on the authorities to introduce effective, long-term solutions that can improve the implementation of Ukraine's migration policy (including the process of data harvesting).

State registers could be used to address the loopholes in the existing migration statistics (Malynovska, 2014). The voters' register might provide a more accurate reflection of the location of the population on the country's territory and abroad. In case of general elections, the voting process is not linked to the official registration address of a citizen. There is a possibility to apply for a temporary change of one's address. Alternative documentation (e.g., certificate of ownership, marriage certificate) can be used to confirm the actual place of residence of an individual who declares his/her willingness to vote in the general elections<sup>107</sup>. At the same time, the existing legislation<sup>108</sup> does not permit to use the data obtained during the registration of voters for the purpose of migration statistics. The demographic registry is another possible source of information that has been used effectively in many countries for collecting data on the migration of their citizens. Visa liberalization process drew attention to the importance of establishing such a registry in Ukraine. In 2017, the Ukrainian Parliament adopted the law<sup>109</sup> which regulates the administration of the database. The possibility to use the registry for statistical purposes and migration management has not been effectively explored. The system has been used mainly for processing of documentation such as biometric data (e.g., for issuance of passports).

Monitoring of the labour migration, which lies in the focus of this study, poses an even bigger challenge. The official statistical account is limited to migrant workers who are employed abroad through legally operating companies on the territory of Ukraine (e.g., temporary work agencies). As a result, the state bodies have some general view on the functioning of the private entities that provide employment services. The actual numbers pertaining to labour migration often remain

106 Starting from June 2018 International Organization for Migration has been assisting the State Migration Service of Ukraine with the support of independent experts to monitor regularly the migration processes in the country. The first comprehensive report is expected to be published by the end of August 2018. Subsequently, the Ukrainian authorities are planning to provide monthly analysis of migration flows. See: <https://dmsu.gov.ua/diyalnist/monitoring-migracziijnix-procseziv/zvit-z-monitoringu-migracziijnix-procseziv.html> (accessed on 08.08.2018).

107 Important to note, the rule does not apply in case of local elections, where voting is possible only at the place of official registration. Since 2014, this created various controversies (e.g., accusations of breach of human rights) due to massive internal displacement of population as a result of armed conflict. De jure internally displaced persons at the moment are deprived of their right to vote in local elections.

108 <http://zakon5.rada.gov.ua/laws/show/698-16> (accessed, 08.08.2018)

109 <http://zakon3.rada.gov.ua/laws/show/784-2017-%D0%BF> (accessed, 08.08.2018)

out of their reach. Ukrainian government made several attempts to address this problem through tailored research on labour migration in 2008, 2012 and 2017. The amount of labour migration was estimated at approximately 1.2-1.5 million. The scarcity of research (once in a 5-year span) pertaining to labour migration does not allow to make detailed observations and credible forecasts for the future. Moreover, labour migration research which is carried out by the Ukrainian state is usually financed by external funds (EU, IOM, ILO) which in some cases may obstruct the access to the data for local experts (Malynovska, 2014).

Observations made in this part of the analysis point toward the following conclusions. As of 2018, it is possible to trace certain tendencies when it comes to migration flows in case of Ukraine using data collected by the sending country. An in-depth analysis will be possible only when the Ukrainian authorities embark on a regular monitoring process of the migration flows by using clear and coherent indications that allow for aggregation of data. Furthermore, better cross-sectoral cooperation between state bodies can increase the ability of the research community to see the bigger picture, hence improve the quality of the analysis of the effects of migration on the socio-economic development of Ukraine. Thus, it should not come as a surprise that the topic of posted workers to date has not been thoroughly studied by local experts and researchers.

Data on labour migration is predominantly collected and analyzed by non-governmental organizations, think tanks, academic institutions and private entities (from Ukraine and abroad). In general, calculations from the perspective of sending country are not precise, which means that the research community has to focus on a description of certain patterns and general tendencies. Moreover, estimations of Ukrainian organizations in particular often dependent on figures that are collected by the receiving countries (e.g., Poland) and international organizations (Eurostat in case of the EU, ILO, IOM etc.).

### Scale and nature of economic emigration from Ukraine

According to Eurostat (2016, see Annex), citizens of Ukraine (588 900 beneficiaries, of which 87% in Poland) receive the highest number of first residence permits in the EU<sup>110</sup>. Ukrainians benefit from residence in the EU mainly for employment reasons. However, it should be noted that more than 80% of all applications were submitted in one country - Poland. The most recent analysis of labour migration abroad (2015-2017) conducted by the State Statistical Service of Ukraine can serve as a source of information about the situation of Ukrainian workers, their preferred destination and motivation. However, due to the methodological challenges mentioned earlier in the analysis<sup>111</sup>, the full scale of the economic migration of Ukraine has to be discussed with the support of information gathered by the recipient countries and international organizations monitoring the migration flows in Europe.

In a nutshell, since the start of the armed conflict in Ukraine in 2014, the structure and outlook of labour migration started to shift. The volume of long-term migration and the mobility of young people, women, representatives of northern, central and eastern regions of Ukraine increased noticeably (IOM, 2016). Poland overtook Russia and became the most popular employment destination for citizens of Ukraine.

Centre for Economic Research<sup>112</sup> in a recent analysis (Pintkovska et al, 2018) calculated that the pool of economic migrants from Ukraine may amount to 4 million people, which would make 16% of the population capable of working. The estimated number is based on an assessment of various groups of migrants (long-term, seasonal, undocumented) who leave their country of origin in the pursuit of economic opportunities abroad. IOM estimated that in 2016 (Malynovska, 2016, see Annex) the actual number of labour migrants amounted to 688K (with a potential to grow to 998 K). In 2017 IOM calculated that 915K citizens of Ukraine could reside abroad as a result of employment (at a time of the research), which would make 12% of the population capable of working. Ministry of Social Policy of Ukraine believes that 3.2 million of Ukrainian citizens work abroad (as of July 2018)<sup>113</sup>.

As of 2018, the available data suggest that labour migration from Ukraine is predominantly short-term in duration (57% of migrants spent abroad not more than then 3 months at a time). State Statistical Service of Ukraine estimates that the scale of short-term migration to Poland and Russia (most popular destinations) was even higher than the calculated average (70% and 60% respectively). A survey conducted by Personnel Service (2018) confirms that 50% of Ukrainians working in Poland stay in the country for less than 3 months, every fourth worker from Ukraine – up to 6 months. Geographical proximity plays a major role in the context of the duration of stay. Those who arrive in Poland emphasize this factor one of the most important reasons for choosing the country (Personnel Service, 2018). Ukrainians who move to the Western and Southern regions of Europe in search of employment tend to stay abroad much longer (up to 1 year and longer, SSSU, 2017).

More than half of Ukrainian workers are relatively young individuals (up to 40 years old) with a vocational or secondary education in their background (SSSU, 2017; IOM, 2016)<sup>114</sup>. In general, labour migrants in total numbers seem to be less educated in comparison to the population capable of working that currently resides in Ukraine. According to various estimates, 16% to 37% of economic migrants obtained higher education. Among those who stayed and are capable of working in Ukraine, 48% obtained a higher education diploma. At the same time, it important to note that Ukrainian economic migrants with permanent residence are characterized by the highest level of education among the countries in the Southern-Eastern and Eastern Europe (Piantkivska et al, 2018).

110 <http://ec.europa.eu/eurostat/documents/2995521/8456381/3-16112017-EP-EN.pdf/e690a572-02d2-4530-a416-ab84a7cbf22>. First residence permit means a residence permit issued to a person for the first time. A residence permit is considered as a first permit also if the time gap between the expiry of the previous permit and the start of validity of the new permit is at least 6 months

111 The data from the survey conducted by the State Statistics Service of Ukraine, for instance, should be treated with caution. Although 26.7 thousand households were surveyed, one can doubt whether the interviewed family members were inclined to share the full and truthful information about the migration history of their households (e.g., income, length of stay). The distrust toward the state (government institutions) in post-Soviet areas is still a common occurrence.

112 Based on the data from the UN, the EU, State Statistical Service of Ukraine, State Migration Service of Ukraine, State Border Guard Service of Ukraine.

113 <https://ua.interfax.com.ua/news/economic/515547.html> (accessed, 08.08.2018).

114 IOM in its study calculated that the average age of an economic migrant from Ukraine is 39 years old.

Those who move aboard predominantly work in the construction sector (39%, mostly men) and households (16,4%, mostly women). Other popular sectors of the economy include agriculture, tourism, healthcare, services and transportation (SSSU, 2017). Overqualification is a common phenomenon among others because the majority of Ukrainian workers (especially seasonal ones) are employed in low skilled jobs (SSSU, 2017; Work service, 2018)<sup>115</sup>. Moreover, since gaining independence in 1991, Ukraine is characterized by one of the highest percentages of literacy and education of population in Europe. Yet, the share of highly skilled individuals in labour migration is still relatively small. The estimated number in 2012 was 380K (Piantkivska et al, 2018)., although it could be expected to grow in the future. Majority of skilled professionals looking for jobs in developed countries (e.g., US, Netherlands, Finland, Israel etc.). Important to note, that among well qualified Ukrainians, those working in the IT sector (growing segment of Ukraine's economy in recent years) started considering moving abroad. Very often labour migration takes the form of the relocation of the entire companies to various EU member-states, including the popular destinations such as Poland, Slovakia or the Czech Republic.

Level of formalization of labour relations in the receiving countries and overall social security (e.g., holiday allowance, sick leave etc.) of Ukrainian labour migrants is relatively low. On average the work week of Ukrainian migrant is longer and his/her social security status in comparison to the local population is weaker. Almost 66% of the respondents worked between 41-60 hours a week. Less than 20% had medical and social insurance during their employment. IOM (2017) observes that 17% of its respondents were willing to work abroad without any formal agreement. Chudžíková & Bargerová (2018) report on similar conditions in case of Slovakia and conclude that many Ukrainians endure exploitative conditions. The data analyzed by Trčka et al (2018, p. 20) "reveals that migrant workers face intense, high-speed workloads with unregulated sanctions for defiance".

It should be noted however that these observations are much more applicable to short-term migration from Ukraine. Due to circular and return migration, many citizens of Ukraine tend to agree to lower social security during employment abroad. The case of enduring worse labour conditions in comparison to the local population (also in case of posted workers) is not common only for Ukrainians (e.g., Polish posted workers in Sweden, see Thörnqvist & Bernhardsson, 2015). At the same time, IOM (2016) in its research concludes that the situation of long-term workers from Ukraine is much better, only 14% of the respondents worked without a formal agreement. A similar observation applies to the undocumented migrants (sometimes described as irregular or illegal migration) – a phenomenon that is much more common for short-term migration (IOM, 2016). One should expect to find many of the above mentioned social security challenges in case of posted workers among others because in principle they also carry out short-term assignments.

### Labour migrants' motivation: push-pull factors

Ukraine at one point in history was one of the most developed Soviet republics. The process of democratic transition aggravated by poor governance, corruption, volatility of political life and slow reforms did not allow the country to recover from the societal and economic shocks of the 1990s. Two protest movements on a mass scale in the 2000s (Orange revolution in 2004 and Euromaidan in 2013), followed by political turmoil and an armed conflict (2014) in the Eastern regions of Ukraine contributed to an even bigger uncertainty about the future and growing feeling of insecurity in the society. These developments shape the migration patterns in the country and largely determine people's exit strategies. Ukraine's close cooperation with the EU (Association Agreement, visa liberalization process) which potentially can result in economic development (limit emigration) without an effective preventive strategy implemented by the Ukrainian state can, in fact, encourage individuals to explore labour opportunities around the European community.

Otrachshenko & Popova (2013) and Laphsyna & Düvell (2015) draw attention to life (dis)satisfaction as an important predictor of out-migration in case of Ukraine. Laphsyna & Düvell (2015, p. 6) conclude that: "satisfying social life partly compensates for the dissatisfying financial situation, public services and politics, hence that non-monetary factors have a strong impact on peoples' life satisfaction". As a result, it is possible to argue that non-monetary factors can also serve as effective predictors of the readiness to migrate abroad in search of employment (in case of both, push and pull factors). The research suggests that over the years Ukrainians had a tendency to be particularly dissatisfied with policies addressing poverty, corruption, overall employment opportunities, politicians and health care. In 2018 Ukraine ranked only 138 out of 156 in World happiness ranking<sup>116</sup>, behind such countries like Iraq or Bangladesh.

According to the research by the Sociological Group "Rating" conducted in September 2017 the most common push-factors explaining emigration from Ukraine are 1). Better living conditions abroad (64%); 2). Possibility to ensure a brighter future for children (34%); 3). Lack of decent employment opportunities in Ukraine (23%); 4). Better educational opportunities outside the country (12%). Less than 10% of respondents spoke about instability in the country, family reasons, healthcare and business conditions. 54% of surveyed young people (18-35 years) declared a desire to move permanently abroad. This age group has the strongest motivation to migrate abroad among the surveyed population. What should be alarming for Ukrainian authorities is that young people are also more inclined to remain abroad on a permanent basis. Many of them do so upon completion of their studies abroad.

Personnel Service (2018) in its survey concludes that half of those citizens of Ukraine who work in Poland, which is the top labour destination among Ukrainians, value the geographical proximity of the country. Higher salary has been named as the second most important reason for choosing Poland. Low language barrier placed third. This factor plays a significant role for Polish employers as well. Presence of a network (family, friends) and the availability of jobs are also factors seriously taken into account by citizens of Ukraine when they chose Poland for work.

115 In interviews, 36% of respondents mentioned that they possessed higher skills than required for their job.

116 The report among others looks at such indicators as GDP per capita, social support, healthy life expectancy, freedom to make life choices, generosity, perceptions of corruption. Retrieved on 08.08.2018 from: <http://worldhappiness.report/ed/2018/>

## Preferred destinations of labour migrants from Ukraine

As of 2017, Germany is the desired migration destination for employment for 37% of respondents according to the Sociological Group "Rating". 26% of surveyed Ukrainians would like to work in Poland, 22% - in the United States, 21% - in Canada, 16% - in the Czech Republic, 15% - in Italy, 14% - in the UK, 12% - France or Sweden, 11% - Israel, 9% - Spain, 7% - The Netherlands, 6% - Russia. In other countries, less than 5% of respondents. IOM (2017) presents a somewhat similar picture, however, Poland emerges as the leader – 40% of respondents considered this country their preferred destination for work, while 32% - Germany. Other popular countries include US (14%), Canada (12%), Czech Republic (10%), the UK and Russia (9%).

The figures for actual labour migration paint a slightly different picture from the surveys analysing the preferences of respondents (Piontkivska et al, 2018). In practice, Poland and Russia emerge as the most popular destinations for Ukrainian labour migrants. Italy is the third most popular destination with a total share of 11%, the Czech Republic is estimated to host 9% of all Ukrainian labour migrants, Finland, Hungary, Belarus and Portugal – each has a share of approximately 1-2%. The popularity of Poland and Russia is partially based on geographical proximity and low socio-cultural barriers, which allow for a relatively smooth integration of the newcomers into the local labour market and society. A rapid growth of Poland's total share in receiving labour migrants from Ukraine (a jump from 14% in 2012 to 40% in 2017) has been facilitated by the ongoing armed conflict in the Donbas region. The situation in Eastern Ukraine convinced many Ukrainians to change the preferred destination of employment for practical (problems with actual access to the territory) and symbolic reasons (Russia and its citizens seen as adversaries).

Since the start of the armed conflict, the number of labour and educational migration from Ukraine to Poland grew twofold. Polish Office for Foreigners has been reporting on a regular basis about a constant growth of migration from Ukraine since 2013-2014 almost on every indicator (temporary residence, permanent residence, application for international protection, labour migration, educational migration etc.)<sup>117</sup>. Growth of economy in Poland and emigration of its own population to other EU-member states additionally contributed to its attractiveness for citizens of Ukraine because it opened a niche on the local labour market (see Chmielewska et al, 2017). Last but not least, Polish migration policy, although criticized for the lack of strategic vision and effective integration measures (Grot & Frelak, 2013; Matyja et al., 2016), could be considered as liberal for citizens of the Eastern Partnership countries (Ukraine in particular). By adopting several legislative acts on the national level<sup>118</sup>, the government created stronger incentives among others for seasonal workers and students to choose Poland over other potential destinations in the EU.

117 Office for Foreigners in Poland: <https://udsc.gov.pl/statystyki/>

118 Aliens Act (2013), including further amendments.

[http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&isn=65077&p\\_country=POL&p\\_count=1471](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&isn=65077&p_country=POL&p_count=1471)

Issues regarding the dismissal from the obligation to have a work permit are regulated by Art. 87 of the Act of 20 April 2004 on the promotion of employment and labour market institutions. Some foreigners are exempt from the obligation to have a work permit in accordance with the Regulation of the Minister of Labour and Social Policy of April 21, 2015 on cases in which it is permissible to perform work for a foreigner on the territory of the Republic of Poland without having to obtain a work permit. The act on Pole's Card (2007) regulating the situation of people who have Polish origin.

## Impact of labour migration on Ukraine

When it comes to the media discourse, the majority of outlets tend to concentrate on the [negative] effects mass [labour] migration may bring to Ukraine. Predominantly, they report on the violation of rights and example of exploitation as well as ways to deal with them<sup>119</sup>. As of lately presentations of success stories of labour migration abroad (e.g., entrepreneurs in Poland) have become more popular<sup>120</sup>. Attitude toward Ukrainians in the receiving countries also emerged as a popular topic of discussion<sup>121</sup>. In all of the described cases, the issue of posted workers from Ukraine is not being differentiated from the general discourse about migration flows. The possibility of being posted to work (or the right to work in general) in another EU member-state based on a visa from the country of first arrival in the EU (usually Poland) is sometimes discussed by temporary work agencies and NGOs<sup>122</sup>. These discussions, however, do not go beyond the elaboration on the formal rights and obligations of a migrant in this process. Job offers where the requirement to hold a valid Polish visa are relatively popular on job portals in Ukraine<sup>123</sup>.

Social partners also do not distinguish posted work from the overall labour migration. They tend to focus on assessing the effects of economic migration for the labour market and Ukraine's economy in general. As an example, representative of Federation of Trade Unions of Ukraine spoke about the importance of dealing with massive internal migration but also the phenomenon of brain drain at the ILO session in Geneva in 2018<sup>124</sup>. Trade Union of Construction Workers and Building Materials Industry, which is of interest to this study due to mass migration of Ukrainian construction workers, held seminar in March and June 2018 in Southern Ukraine (Odesa and Mykolaiv). Experts discussed among others the employment of Ukrainians abroad, working conditions of Ukrainian labour migrants (construction workers) in EU countries, experience of European trade unions regarding work with and protection of migrant workers<sup>125</sup>. A similar meeting was conducted in Lutsk (Volyn region) to discuss impact of labour migration on construction sector in Western Ukraine<sup>126</sup>. Following this event, a TV debate took place during which experts discussed the challenges that trade unions face in the context of labour migration of Ukrainians (e.g., workers' rights, social security and higher wages as an instrument regulating labour migration)<sup>127</sup>. Economic migration has a very negative impact on the future of coal industry (many mines are closing down)<sup>128</sup> in Ukraine mainly due to the lack of

119 Examples (accessed on 08.08.2018):

<https://www.eurointegration.com.ua/experts/2018/07/18/7084328/>; <https://www.ukrinform.ua/rubric-economy/2432554-ci-iziditum-ukrainci-na-robotu-v-polsu-i-nadali.html>;

[https://dt.ua/UKRAINE/ru-polschi-zapuskyayut-garyachy-liniyu-dlya-zahistu-prav-ukrayinskih-zarobitchan-271348\\_.html](https://dt.ua/UKRAINE/ru-polschi-zapuskyayut-garyachy-liniyu-dlya-zahistu-prav-ukrayinskih-zarobitchan-271348_.html);

<https://tsn.ua/svit/zhitlyva-migranti-v-polschi-ukrayinci-vidkrivayut-biznes-i-zavoyovuyut-prihlinst-polyakiv-1042310.html>;

[https://www.bbc.com/ukrainian/society/2015/07/150722\\_poland\\_ukraine\\_workers\\_hk](https://www.bbc.com/ukrainian/society/2015/07/150722_poland_ukraine_workers_hk) (all accessed on 08.08.2018).

121 <https://www.ukrinform.ua/rubric-economy/2231505-na-zarobitki-do-polski-ci-lublai-tam-nash-trudovih-migranti.html> (accessed on 08.08.2018).

122 <http://jobwest.com.ua/uk/news/rabota-po-polskoi-vize-v-es-mif-i-realnost>;

<http://ostarbeiter.vn.ua/robova-v-es-z-pol-vizoiu.html>; <http://naszwybir.pl/chy-mozhna-z-polskoyu-vizoyu-pratsyuvaty-v-chehiyi/> (all accessed on 08.08.2018).

123 An example of a job offer with a requirement for Polish visa in Sweden

<https://besplatka.ua/obyavlenie/zhinki-u-klinigovoy-kompaniyi-do-shveciyi---klining-shveciya-378080>;

Germany <https://besplatka.ua/obyavlenie/elektrik-germaniya-406361>;

Czech Republic <https://www.eurabota.ua/job/139558/robova-v-chehi-po-polskiy-vizi-bez-plati-za-vakansiyu-at-viktoria> (all accessed on 08.08.2018).

124 <http://www.fpsu.org.ua/napryamki-diyalnosti/mizhnarodna-robota/14230-predstavnik-spo-robotodavstv-zvernuvysya-do-delegatov-107-sesiji-mizhnarodnoji-konferentsiji-pratsi-mop-2> (accessed on 08.08.2018).

125 <http://www.fpsu.org.ua/nasha-borotba/novini-chlenskikh-organizatsij/14221-ukrbudprofspilkoju-provedeno-seminar-na-temu-trudova-migratsiya-rinok-pratsi-i-zarobitna-plata>; <http://eu-ua-csp.org.ua/news/133-anons-builders-abroad/> (accessed on 08.08.2018).

126 <http://www.fpsu.org.ua/nasha-borotba/novini-chlenskikh-organizatsij/13841-v-lutsku-na-seminari-obgovorili-pitannya-vplivu-trudovoi-migratsiji-ukrajinskih-budivelnikiv-na-rinok-pratsi-zakhidnogo-regionu-ukrajini> (accessed on 08.08.2018).

127 <https://drive.google.com/file/d/1vv3yVwCe0ZdNoGeu1Dkt597P3R1c1h7/view> (accessed on 08.08.2018).

128 <http://www.fpsu.org.ua/nasha-borotba/novini-chlenskikh-organizatsij/12724-viktor-turmanov-u-vugilnii-galuzi-sklalaysya-kritichna-situatsiya-yakshcho-i-nadali-tak-pide-cherz-rik-bude-zakrito-bilshist-derzhavnikh-vugilnikh-pidpriemstv> (accessed on 08.08.2018).

qualified personnel. Confederation of Free Trade Unions of Ukraine focused recently (May, 2018) on the impact of labour migration from Ukraine to Poland<sup>129</sup>. Brain drain and the need to protect migrants' rights have received considerable attention during the discussion.

Ukrainian employers are worried about the lack of labour force (sometimes they refer to catastrophic lack)<sup>130</sup>. Vacancies are not being filled, which has a negative impact on the tempo of economic development. In a study conducted by People Advisory Services of Ernst & Young Ukraine<sup>131</sup>, 69% of employers that were surveyed declared that labour migration will have a serious impact on their activity in the next 3 years. 43% of them already face problems with attracting and keeping personnel, 28% foresee these challenges in the future. 53% of those employees that left their job motivated their decision by employment abroad<sup>132</sup>. As a result, experts recommend Ukrainian employers to consider investing more in attractive social packages (as a possible solution to higher wages offered abroad). They should be also ready to train employees older than 45. One of the biggest and most popular job portals in Ukraine [rabota.ua] observes that the quality of labour force has declined due to labour migration<sup>133</sup>. The number of unemployed people aged over 50 years and those of the retirement age, including among migrant workers who are returning from abroad, is growing<sup>134</sup>. Due to shortage of its own labour force Ukraine must start considering attracting migrants from other countries. Foreigners have already showed interest in high level management positions in Ukraine. Technical specialties and medical sector are also popular choices among them.

Authorities will not be able to address the full range of challenges related to migration in the absence of comprehensive data to back up the potential policy solutions. Despite this challenge, in 2017 a first comprehensive attempt has been made to reflect on the effects of migration on Ukraine through a Strategy of the migration policy of Ukraine for the period up to 2025<sup>135</sup>. It is not possible to assess the effects of the strategic policy in such a short time span. Its success will depend on a set of effective implementing measures, political will and the availability of resources. The situation of posted workers from Ukraine currently is not a matter of public debate but it could be addressed in the future as a dedicated area of country's migration policy, should the authorities decide to implement the strategic goals (Strategic goal number 2 in particular). In the past, however, the Ukrainian political elites often failed to deliver on their promises. The upcoming parliamentary and presidential elections in 2019 could further delay the implementation of Strategy for migration policy 2025.

In the strategy (as it currently stands) authorities mention the multi-dimensional impact of migration on Ukraine, presenting both challenges and opportunities for the country. This conclusion falls in line with the observations of the research community (SSSU, 2017; Libanova, 2006; Malynovska, 2011, 2016; Kravchuk, 2014; Mosey, 2013; Nadtochii, A, 2015; Petroe & Vasiliev, 2015; IOM, 2016). A sub-chapter of the strategy is dedicated to labour migration of Ukrainian population. On one hand, both authorities and experts emphasize that [economic] migration reduces tensions on the labour market, promotes the welfare of many families, becomes the source of external income and transfer of new knowledge and experience. On the other hand, migration causes a shortage of workforce in the country, it often negatively affects family relationships, education of children and the overall demographic situation in the country. The income of migrants drive the consumption in their country of origin and may lead to price increases, inflation, and the growth of imports. Ukraine faces a serious problem of the emigration of highly skilled professionals and young people, many of whom are not returning to their homeland after pursuing education abroad. A number of states in Europe developed policies to attract highly skilled immigrants, young professionals and foreign students. These pull factors together with push factors discussed earlier create a serious challenge for the decision-makers in Ukraine. The migration policies of the receiving states rarely include solutions to prevent brain drain in the sending counties (Korniyshuk, 2015). As a result, the structure of the workforce in Ukraine is negatively affected and the economic growth of the country is inhibited.

Lapshyna and Duvel (2015, p. 15) observe that those Ukrainians who develop their human capital by moving abroad very often do not return to their country of origin. Their solution to this challenge has been formulated in the recommendations to the authorities (p. 17), who "in order to turn migration into a source of development, have to address the disincentives and obstacles to return, remittances and productive investments. Notably, policies that facilitate the reintegration of returnees, removing red tape from business activities and investments, easing international remittances and combating corruption have come out from our study as pressing matters".

Potential solutions to the problems identified by experts can be found in the migration policy goals 2 and 3 included in the strategy 2025. The government intends to „Reduce the negative effects of emigration from Ukraine and increase its positive impact on the development of the state” (Goal 2) and „Create the necessary conditions for the return and reintegration of Ukrainian migrants into Ukrainian society” (Goal 3). Pertaining to the second goal, the decision-makers are sceptical [and rightly so, author] regarding top-down legislative solutions on the national level as a measure that can change in the behaviour of migrants in the long-term perspective. More attention should be paid to the gradual elimination of economic, social and other factors impacting people's economic mobility. What is interesting in the context of this study (topic of posted workers), the government wants to explore on opportunities a broader scale for temporary legal employment

129 <http://kypu.org.ua/uk/news/5/2797-trudovamihratsiivkykytanaslidkydliaukrainyapolskchi> (accessed on 08.08.2018).

130 <https://www.bbc.com/ukrainian/features-43485101> (accessed on 08.08.2018).

131 <https://www.bbc.com/ukrainian/features-43485101> (accessed on 08.08.2018).

132 Ibidem.

133 <https://prohr.rabota.ua/trudova-migratsiya/> (accessed on 08.08.2018).

134 SSSU (based on ILO methodology and without temporary occupied territories and Crimea) calculated an overall unemployment rate of 9,7-9,9% during 2017.

See: [http://www.ukrstat.gov.ua/operativ/operativ2017/rp\\_reg/reg\\_u/rbn\\_2017\\_u.htm](http://www.ukrstat.gov.ua/operativ/operativ2017/rp_reg/reg_u/rbn_2017_u.htm). For people aged 50-59 in 2016 the unemployment rate was 7,3% which is the lowest rate among all age categories during that year (young people aged 15-24 had the highest unemployment rate of 23%). At the same time, their unemployment has increased by almost 2% since 2010. In 2015 it was 6,3%; in 2014 - 6%; in 2013 - 5,1%; 2012 - 5,3%; 2011 - 5,1%; in 2010 - 5,3%. See: [http://www.ukrstat.gov.ua/operativ/operativ2006/rp\\_ean/ean\\_u/arh\\_rbn\\_u.htm](http://www.ukrstat.gov.ua/operativ/operativ2006/rp_ean/ean_u/arh_rbn_u.htm). All accessed on 18.08.2018.

135 <http://zakon0.rada.gov.ua/laws/show/482-2017-%D1%80> (accessed on 08.08.2018).

abroad as an alternative solution that can prevent permanent migration of population. The first can bring economic benefits to the country, the latter poses a serious challenge to its development. Promotion of seasonal work will be implemented through the establishment of tailored programmes, negotiating bilateral agreements with countries interested in Ukrainian temporary and seasonal workers as well through cooperation with national recruitment agencies (temporary work agencies), which could serve as intermediaries in the process between the migrant, sending and receiving countries.

Return and reintegration of migrants is another area worth attention highlighted by the government. The authorities declare the importance of providing professional service within the realm of social policy to those who return. Moreover, ease of doing business, availability of information and legal assistance, support for networks of migrants and diaspora, better coordination between public institutions at home can improve the success of the return and reintegration policy. However, these efforts most likely will not prevent the emigration of Ukrainians as long as the country faces economic downturn and social insecurity, aggregated by the ongoing armed conflict on its territory.

Certain steps had been undertaken by the government to stabilize the situation on the national labour market, which could become a key step preventing further outflow of workers from the country. In 2018 ILO has launched a 5-year programme to create inclusive employment opportunities in Ukraine, targeting youth and people from rural areas, all of which tend to migrate to big cities and abroad in search of better opportunities for employment. Recently, the Ministry of Social Policy of Ukraine adopted implementing measures to a Concept strategy for vocational training of the population, among others declaring readiness to provide improved vocational services taking into account the principle of gender equality<sup>136</sup>. Ministry's pilot project "Helping hand"<sup>137</sup> continues to support unemployed low-income citizens and internally displaced population to open their own businesses. International organizations such as IOM<sup>138</sup> and UNHCR support the government in providing legal assistance and information to citizens of Ukraine who consider working abroad so that they will not become victims of exploitation and human trafficking.

136 <https://www.msp.gov.ua/news/15547.html> (accessed on 08.08.2018).

137 <http://ruk.adopomogu.com.ua/> (accessed on 08.08.2018).

138 <https://mon.gov.ua/storage/app/media/pozashkлина/protydia-torgivli-lyudmi-5torgivlya-lyudmi-v-ukrayini.pdf> (accessed on 08.08.2018).

