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Comparative Analysis of Implementation of Posting of
Workers Directive 96/71/EC and Enforcement Directive
2014/67/EU

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ABSTRACT

This paper is looking the differences in the implementation of The Posting of Workers Directive 96/71/EC and Enforcement Directive 2014/67/EU. The aim is to answer the question if there is a difference in the implementation between countries sending or receiving. It is expected that there are some differences in the implementation. In the paper there are two groups, namely sending countries and receiving countries and they are based on the tendency to post or receive posted workers. The research has been done with a qualitative method where firstly the directives and other relevant legislation have been analysed. After that, there are four countries used as examples implementation. Sending countries are represented by Poland and Estonia and receiving countries by Germany and Finland. Firstly, there is an analyse how the implementation has been done by these countries, and then it is analysed what differences and similarities there is within the group. After analysing similarities and differences in the groups, the groups are compared.

On this comparison, it is seen that there are not many similarities between the groups, other than that all countries have implemented the directives. All countries have implemented the directives in different matters, and in the level of translations and information available are great differences. Main differences found are the difference between the status of labour unions between the groups, and how much power they have. Also, both receiving countries have been taken measures against illegal employment, and overall the there is much more protection of worker on receiving group.

Keywords: Posting of Workers, Implementation, Labour Law, Freedom of Services

INTRODUCTION

Freedom to provide services is one of the freedoms established in Treaty of the Functioning of the European Union. On the basis of this freedom, companies have the right to offer their services in all countries in the Union¹. This aspect requires that establishments shall be able to have their own workers with them when carrying out the work abroad. This principle has been established in case law², but case law is not in the focus of this paper and therefore not analysed in this paper. These workers, carrying out their work in some other place than they habitual working place are called posted workers. Before the Directive of Posting of Workers was established, posted workers were not covered exclusively by any legislation so general legislation of working and social affairs was applied to them as well as general contract principles. The Posting of Workers Directive 96/71/EC (hereinafter the Directive) and Enforcement Directive 2014/67/EU (hereinafter the Enforcement Directive) that are analysed on this paper, have been established to make sure that posted workers are protected where ever they carry out their work. Despite these Directives there have been, and still is, great differences on the wage level³ and that creates tension between states inside of the Union. During the time of drafting the Posting of Workers Directive, the discussion was mostly about the fear that workers coming from lower paid states would replace workers of the receiving country. On the other side, states feared that they would lose the bargaining advance if they would have to meet the requirement of the receiving country⁴. Question about wages and rights of the posted workers is still in the political discussion on the Union level and it is ongoing balancing between senders and receivers⁵. Overall, Unions legislative matters are commonly driven by economic considerations⁶ among others.

This paper aims to find an answer to the question of the differences in the implementation of Directives due to the status of the state as a sender or receiver of the posted worker. It is expected that there are some differences between those categories and similarities within the groups. In this paper, countries are divided into posting countries, based on their tendency to post more workers than receive, and receivers' countries, tending to act controversial. It is hard to look into the topic without considering the work and legislative culture around the implementation, and the culture is

¹ Craig, P., De Burcha, G., (2015) *EU law; Text, Cases and Materials*, Edit. 6th, Oxford University Press, p. 794

² See as an example *Rush Portuguesa* – case

³ Krings, T., A (2009). *Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour*, European Journal of Industrial Relations, Vol 15 No 1, Ireland; Sage Publication p.52

⁴ Cremers, J., Dolvik, J. E., Bosc h, G., (2007). Posting of Workers in the Single Market: Attempts to prevent social dumping and Regime Competition, *Industrial Relations Journal* Vol 38:6, London; Blackwell Publishing Ltd. p. 527

⁵ *Ibis*. p. 526

⁶ Watson, P., (2014). *EU Social and Employment Law*, 2nd ed, Oxford; Oxford University Press, p. 5

almost impossible to absorb only from legal writings. This paper is only focusing on the implementation, and only when truly necessary cultural and other aspects are taken into consideration.

First part is analysing international legislation, especially directive 96/71/EC and directive 2014/67/EU. Other legislation to be analysed on this section is the relevant parts of Rome conventions, and other legislation covering agreements and workers on the European Union level. The first chapter is, aiming to highlight the parts members states are able to regulate based on national interest. The second chapter is analysing countries which are mostly responsible for posting workers. In this chapter national legislation of Estonia and Poland are seen from the relevant part of concerning posting of workers and used as an example for the senders. The third chapter is controversially analysing the legislation of Finland and Germany which representing countries receiving workers. Second and third chapter together are aiming to show the differences in the implementation of the directives and bring to attention similarities and differences found within the groups. The fourth chapter is comparing those two group and concluding the difference level between the groups.

This paper is qualitative research, and it is done by analytical and comparative methods. The main method is analysing legislation both at the international level and on the national level. The legislation is only analysed on the relevant parts. This paper covers also other international legislation, aiming to clear out the differences between posted workers and other similar situations.

1. REGULATIONS

There are two directives on European level exclusively covering posting of workers. Besides them, there are several other agreements, regulations and other type of legislation what shall be taken in consideration when observing this topic. Directive 96/71/EC and Enforcement Directive 2014/67/EU are merely guidelines and they leave open several points, therefore it is essential to look also to the national legislation and other agreements when posting workers. The political discussion of workers' rights is balancing between ensuring economic growth and human rights, as well as arguing in what extent these sides shall be taken in to account⁷.

1.1 Historical overview

European Union is established for the economic cooperation and from its early days stable and working economy has been the main aim of the union. The Directive did not establish the possibility for people to move for work related reasons and there were situations where workers were posted, and cross-border contracts were established. On that time these contracts were made based on private international law principles about the selection of applicable law and non-discriminatory principle⁸. Before the Directive was elaborated there were a political debate what all shall be included, and especially what sources can be included⁹. Naturally, laws and regulations of the Member States would count and able to state minimum standards, but the discussion occurred whether the collective agreements shall hold role on the same matter¹⁰.

When the Directive was elaborated, social concerns came one of the main aim, but the focus was not on the rights of the workers, it was rather on prevention of social dumping¹¹. Later, Unions legislation has been taken more and more social values and rights in concern. On the international level agreements made in ILO and YK as well as statements made in the European Convention on

⁷ Langille, B. A., (2005). Core Labour Rights – The True Story (Reply to Alston) *The European Journal of International Law*, Vol. 16 No.3 *l.b.*; EJIL P. 411-412

⁸ Evju, S., (2010). Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Conflict, *The Cambridge Yearbook of European Legal Studies*, vol 12, 2009-2010, Hart Publishing; Oxford and Portland, Oregon p. 155

⁹ Davies, P., (1997) Posted Workers: Single Market or Protection of National Labour Law system, *Common Market Law Review*. Vol. 34, Netherlands; Kluwer Law International p.580

¹⁰ *Ibid.* p. 580

¹¹ Weatherill, S., (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation, *Regulating the Internal Market; Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation*, s.l.; Edward Elgar Publishing, p. 81- 82

Human Rights and Social Charter have had great impact to rights of the workers¹². Earlier focus can also be seen on the early decisions given based on the Directive. Those decisions underlined the fact that the freedom to provide services and right to have establishment's own workers, whether they were Member State nationals or third country nationals, was more important than the rights of the workers¹³. Costello and Freedland also argued that the status of posted worker would not be needed if there would not be needing to post third country nationals. This reasoning is the bases to the free movement of persons, European citizen can move freely, and laws of the hosting country would automatically apply. Therefore, they argued that posted worker status is created for economical purposes, not to protect the worker¹⁴. On the other hand, Cinzia Peraro argues that the Directive has brought universal requirements which are used to pursue and ensure high level of protection concerning posting of workers, and even the measures to be legislated are under the sovereignty of Member States these requirements are more than welcome¹⁵. Overall the trend of legislation making in the Union has shifted from purely market focused to take more in to account social and humanitarian aspects, as well as equal treatment.

1.2 Directive 96/71/EC

Directive 96/71/EC (hereinafter the Directive) concerning the posting of workers in the framework of the provision of services¹⁶ gives the basis for the protection of posted workers by the central mechanism of protection via article 3¹⁷. Member State shall have implemented the Directive by 16 December 1996¹⁸ and the Directive sets out the main principles what measures concerning posted workers can be regulated by receiving member states. On the time this regulation in the question

¹² Liukkunen, U., (2002). *Lainvalinta kansainvälisissä työsopimuksissa*, 2nd ed. Vantaa, Kauppakaari Lakimiesliiton Kustannus / Talentum Media Oy, p.18

¹³ Costello, C., Freedland, M., (2016). *Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens? Temporary Labour Migration in the Global Era; The Regulatory Challenges*. s.l.: Bloomsbury Publishing p.40-43

¹⁴ *Ibid.*, p. 42.

¹⁵ Peraro, C., (2017). *Enforcement of Posted Workers' Rights Across the European Union, Freedom, Security & Justice: European Legal Studies No 2* Editoriale Scientifica. Napoli

¹⁶ 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, OJ L 18, 16.12.1996

¹⁷ Riesenhuber, K., (2012) *European Employment Law*, Ius Communitas Series, Vol 4. 2nd ed. Cambridge; Intersentia p. 202

¹⁸ Report from the Commission services on the implementation of 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, 2003, page 2

was given the main aim was to get same health and safety rights for posted workers that nationals of the member state already have.

The Directive respects the Rome Convention considering the law applicable to contractual obligations¹⁹. According to the Convention, parties have right to choose the governing law applicable to the contract based on article 3. At the same time, the rule set out in the article 6 (2) of the Convention “the contract shall be governed by the law where the worker habitually carries out his work”. Based on this rule posted worker would be governed by the legislation of the posting country, and this would give unjustified advantage on the competition. For this need, the Directive has been given to ensure an atmosphere of fair competition and ensure the rights of all workers.²⁰ The directive is governing all establishments established in member states, when they post workers other than seagoing personnel within merchant navy undertaking²¹. The establishment can send a worker to do the first installation or to do initial assembly without the worker to be counted as a posted worker if the period of sending does not exceed eight days²². It has to be acknowledges that this exemption does not apply to construction workers listed in the annex of the Directive²³.

The article three of the Directive sets out terms and conditions of employment which in the minimum can be regulated by receiving country²⁴ and applied to posted workers in same extent than other habitual workers of the area. According to the Directive the terms and conditions can be laid down by universally applicable collective agreement or arbitration award, which would apply in the same way to all establishments on the geographical area and practicing the same profession or acting in the same industry.²⁵ Collective agreements are the most common way to lay down minimum terms and conditions in the Nordic countries. Minimum terms and conditions can also be laid down in legislation, and it is up to the receiving country to make sure that they are applied correctly.²⁶ Therefore it is important for the posting establishment to not only know the legislation of receiving country but also be familiar with applying collective agreements.

Areas concerned in these terms and conditions of employment are working time, conditions and equality. It is left open for members states to regulate minimum pay, rest periods and maximum working times. There can also be conditions about hiring out, hygiene, safety and health

¹⁹ Convention 80/934/EEC on the Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980, OJ L 266, Vol 23, 9.10.1980, p.1.

²⁰ 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, OJ L 18, 21.1.1997 (5)

²¹ *Ibid.* Art.1.

²² *Ibid.* Art 3 para 2

²³ Annex of the Directive 96/71/EC.

²⁴ Directive 96/71/EC Art 3

²⁵ *Ibid.* Art 3 para 1 and 8

²⁶ *Ibid.* Art 3 para 1

requirements at work as well as special conditions applied to children and young workers and workers going to give birth or recently given birth. The main aim of these outlined terms and conditions is to make sure that establishment from other member states cannot prevail establishments habitually acting on the area at the expense of workers. Even there is intense to create a coherent union with equal standards of living this is not yet true and there are great differences between regulated minimum wages, working times and other terms and conditions within member states.

The first paragraph of the article three of the Directive stating the terms and conditions for employment²⁷ gives the core rules and areas to legislate for the member states. These topics are the core of any employment contract. Article three also gives a possibility for the member state to regulate the insignificant work not counted as a posting and how the period of posting is to be calculated.²⁸ By the negotiations, member states are able to also make exceptions to the core rules within certain limits. These exceptions are about minimum pay claim not applying to the other that rented workers posted to under a month.²⁹

In addition to the terms and conditions left to be regulated by member states, they are also able to define what are the conditions for worker³⁰. Overall the posted worker is a person who is posted by a company from a Member State and carries out work for the limited time in some other state than the state of habitual work. This possibility makes a great variety between countries, and on the definition of who is seen as a worker³¹. States are able to define when the activity is counted as an independent work and what is seen as dependent work³². This indicates directly to the protection level of the workers and defines the difference between workers covered by the Directive or not since posted worker shall always depend on the posting establishment³³.

Overall, the biggest differences in the implementation comes from core matters in the article three as well as the ways worker and posting establishment can find information³⁴ and can file a claim within the jurisdiction³⁵ of the receiving country. There shall be a special observation of these aspects when the person is going to be posted.

²⁷ Directive 96/71/EC Art 3

²⁸ *Ibid.* Art 3 para 6

²⁹ *Ibid.* Art 3 para 3 and 4

³⁰ *Ibid.* Art 2 96/71/EC

³¹ Reci, S., (2016) Posted Workers Directive 96/71/EC in the Framework of Free Movement of Services, *Mediterranean Journal of Social Sciences*, Vol 7 No 3, Rome-Italy; MCSER Publishing p. 46

³² *Ibid.* p. 46

³³ *Ibid.* p. 46

³⁴ Directive 96/71/EC Art 4 para 3

³⁵ *Ibid.* Art 6

1.4.1 Special Status of Construction Workers

In the Directive Construction workers has been given a special status. Most of the areas of construction field have been specified in the Annex of the Directive and left out from the scope of the Directive. This means that those fields are covered by the national collective agreements³⁶. This can also be seen in the implementations of the Directive, States have acknowledged the possibility of construction works to be left to the grey zone and they are aiming to regulate them.

1.3 Enforcement Directive 2014/67/EU

Since 1996 posting of workers has increased and even Directive 96/71/EC have laid out the core matters, there is a need for new and more specific ruling to make the field coherent. Enforcement Directive 2014/67/EU (hereinafter the Enforcement Directive) continues where the Directive ends, highlighting the responsibilities of Member States on both sides of posting. Enforcement Directive is not focusing purely on the core matters anymore, it gives out structure how these matters shall be monitored and what kind of co-operation is to be expected between the Member States.

In the first article of the Enforcement Directive the core aim has been stated as “better and more uniform implementation application and enforcement in practice of Directive 96/71/EC”³⁷. Overall, there are no changes made to the matters found in the Directive and it stays in force as a whole. Enforcement Directive also tends to strengthen the position of the third article of the Directive and establish a new level of fair competition. A great part of the Enforcement Directive is the specified rules how the core aims shall be implemented in the Member States.

The Directive did not establish a full definition of what type of activity is counted as a posting of workers. The Enforcement Directive aims to unify that field in the article 4 by giving out outlines what shall be considered as posting and the main aim for these outlines is to prevent circumvention and abuse of the Directive. Other areas which have been improved in the Enforcement Directive are access to information³⁸ and administrative cooperation³⁹ as well as a way of enforcement of

³⁶ Hellsten, J., (2006). *On the Social Dimension in Posting of Workers; reasoning on Posted Workers Directive, Wage Liability, Minimum Wages and Right to Industrial Action*, Publication of Labour Administration; Vol 301. Helsinki; Ministry of Labour p. 55

³⁷ 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 co-operation through the Internal Market Information System (‘the IMI Regulation’). OJ L159, 28.5.2014, p.1-31 art 1 para 1

³⁸ Enforcement Directive 2014/67/EU Chapter II

³⁹ *Ibid.* Chapter III

directive⁴⁰. Within the added requirements about access to information, it has been cleared out what categories of information shall be given and in what form. There are also requirements of language and publishing websites. After the Enforcement directive has come in to force the Member States are responsible to collect all universally applicable terms and conditions of employment, despite whether it is based on the legislation, universal applicable collective agreement, or any other applicable source.⁴¹ Member States are also obligated to produce the information about social rights⁴² as well as social partners and agreements the posting establishment shall take into account⁴³. Administrative cooperation within this directive is fortified the need of the well-established information system which makes it possible to answer request within the maximum of 25 working days⁴⁴ and keeping the operational cost as low as possible since assistance shall be provided free of charge⁴⁵. To ensure that measures established in the Enforcement Directive will make it to practice, there are also new powers given for the competent authorities. This includes as an example power to give an administrative fine for the establishment not obeying the rules in the receiving country⁴⁶.

Greatest freedom for the Member States within implementation has been given on the area of control measures⁴⁷. In chapter IV of the Enforce Directive is stated the measures Member State can implement the legislation, but the list is not exhaustive in the sense of future needs⁴⁸. Neither can obligations derived from the Union Legislation be affected by measures implemented based on this article⁴⁹. Member States are left the opportunity to legislate the needed documentation for affective monitoring of their obligations established in the Directive and in the Enforcement Directive. Member States can require the sender establishment to make a simple declaration for the host states' competent authority when it is posting workers on states' territory. On the declaration, information can be required about service providers identity, as well as information on persons designated to handle liaisons and representing service provider in the case of collective bargaining with relevant social partners. Other information that can be required is anticipated duration of posting, number of posted workers, address(es) and nature of work carried out. The sender may also be obligated to retain copies, make available or keep certain documents, translate

⁴⁰ *Ibid.* Chapter V

⁴¹ *Ibid.* Chapter II art 5 para 2 (a) (b)

⁴² *Ibid.* para 2 (c)

⁴³ *Ibid.* Para 4

⁴⁴ *Ibid.* Chapter III art 6 para 6 (b)

⁴⁵ *Ibid.* Para 9

⁴⁶ *Ibid.* Chapter VI art 15

⁴⁷ *Ibid.* Chapter IV art 9

⁴⁸ *Ibid.* Chap IV art 9 para 2

⁴⁹ *Ibid.* Para 3

them to the language accepted by hosting state, as well as deliver copies of them for authorities of the hosting Member State. When obligation is established it is also ensured that Member State can make inspection rounds and random checks, as long as they are not disproportionate or discriminatory⁵⁰.

Since it has been noted that the hosting state is responsible for making sure that the regulations are followed by the posting establishments, there shall be a threat of punishment for the case of failing fulfilment of the obligations. Therefore, the Enforcement Directive gives a great variety of tools for workers as well as hosting state to react to misbehaviour⁵¹. On the point where the workers' right has been violated he can take legal measures against the entities via terms of host states legal system and the host state shall ensure that there are the affective ways for the worker to do so⁵². The fact that there are no guidelines, other than the requirement of being affective, for the enforcement of legal claims, there is variation between the Member States. The Enforcement directive leaves open the possibility for trade unions, and other legal entities having reasonable interest to make sure that the Directive and the Enforcement Directive are followed, to represent and support the workers making the claim within the legal procedure⁵³. It is also taken into consideration that subcontracting may rise the possibility to avoid legal responsibilities risen in these directives. To avoid this, it is stated in the Enforcement Directive that direct subcontractor can be held liable⁵⁴.

Whereas the Member States can follow their own juridical system within the claims made by the worker, it is not the case with administrative fines. The Enforcement Directive lays out rather strict rules what type of the co-operation between the Member States shall be, what are the proper ways to give notification about administrative penalties, how they are collected and how the request for assistance shall be done⁵⁵. Overall the Enforcement Directive keeps open the possibility for states to still regulate the minimum protection for the posted workers stated in the Directive. The Enforcement Directive also gives tools for states to supervise these regulations, guidelines how to establish the structure and co-operation and leaves open for the Member States to regulate some important measures. The option to legislate about the information needed when the establishment is registered as a poster and the workers and posters possibility to defend their right via host states legal system are the points making the biggest differences in the Member States. These are also

⁵⁰ *Ibid.* Chapter IV art 10 para 1, 2

⁵¹ *Ibid.* Chapter V

⁵² *Ibid.* Chapter V art 11 para 1

⁵³ *Ibid.* Chapter V art 11 para 3

⁵⁴ *Ibid.* Chapter V art 12

⁵⁵ *Ibid.* Chapter VI

the facts that are going to be in the main focus for this paper when the Enforcement Directive and its implementation is in the focus.

1.4 Other Regulatory Matters

No kind of legislation occurs in the vacuum and therefore none of the directives or agreements occurs in the vacuum either. Posting of workers is a specific topic, and still, there is a great amount of other legislation affecting how these Directives be applied. Posted workers are covered by several social agreements, as an example European Social Charter and agreements made by ILO, and naturally, all fundamental freedoms and other basic rights and obligations are applied. There are still few legislative elements closely connected to the posting of workers and they are shortly analysed.

1.4.1 Rome regulation

Rome regulation I is covering the principles of applicable legislation to the contracts. The main principle of this regulation is that contracting parties are able to agree on the used legislation, and it can be even legislation of third Member State. Rome regulation covers that principle of how the legislation shall be chosen if the contracting parties have not chosen it on the contract. On the matter of employment contract, the main principle is that the legislation of the country of the habitual working place shall govern.

Rome regulation is covering all kind of contracts and its' principles are established as not to have gaps. Rome regulation is applicable in the whole EU and therefore it is important to recognise that the rule of the Directive is partly controversial with the Rome regulation. If the Rome regulation would be applied to posting of workers in the same way that to other contracts it would mean that the legislation of posting country would always apply and this would give advance to the countries with lower living standards and lower minimum remunerations.

1.4.2 IMI regulation

IMI regulation is about Market Information System and the Enforcement Directive requires the use of it⁵⁶. Market Information System used today is formally established⁵⁷ on the Regulation No

⁵⁶ *Ibid.* Chapter VII, Art 21

⁵⁷ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and prevailing Commissions Decision 2008/49/EC ('the IMI regulation) Chapter 1, Article 2

1024/2012 of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System. IMI is a system to be used to help cross border cooperation within competent authorities. And the main aim of it is to make communication between competent authorities in different countries easy, by using a bilingual search tool to recognise their counter parts, pre-translated answers and questions and mechanism build for users to follow the progress of their request⁵⁸.

Competent authorities for matters of posting of workers are not the only ones using IMI system and it was not established directly for this matter. IMI system is used in all kind of cross-border information requests, and as the mean of posting of workers, IMI system comes important when a violation of the obligations occurs. In the situation that worker claims about violation back in his habitual country IMI system makes it possible for the Member States to have affective procedure and therefore administrative fees and IMI are tightly bound together. Over all Member States are using the IMI system actively and in the majority of the countries requests are answered promptly⁵⁹.

⁵⁸ Report from the Commission services on the implementation of 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, 2003, page 2

⁵⁹ *Ibid.* page 3

2. SENDING COUNTRIES

When European Union expanded for the fifth time in 2004 and the new Member States Estonia, Latvia, Lithuania, Poland, Czech, Slovenia, Malta and Cyprus joined the Union⁶⁰, the Union faced the situation where new Member States were welcomed with reservations⁶¹. These reservations occurred as restrictions concerning labour. Some old Member States even established restrictions for freedom of establishment, by restricting posting of workers⁶². It shall also be noted that even there is a European level legislation about posting of workers, due to lower labour costs and differences in labour legislation and labour market system between old EU states and states entered 2004 and later, there is a genuine difference on the development level⁶³. On the time of accession of new countries, old Member states reserved the right to restrict the entrance of the workers from the new Member States up to seven years and most of the countries used it⁶⁴.

2.1. Country Selection

Category of sending countries is based on the tendency of the countries to post more than receive posted workers. Figures stated are values based on A1 documents issued in 2015 and the numbers are collected and published by the European Commission⁶⁵. Within European countries, there is great variety between the amount of posting of workers. Some countries are posting hundreds of thousands, when some are only posting few hundreds, if even that⁶⁶. For the purpose of this paper, there has been two countries selected to act as examples from the category. These countries are within this category Estonia and Poland. Estonia is representing country not having huge figures within sending nor receiving but still having an active flow of workers to Finland. Therefore, there is true activity around this legislation but there is no massive flow to Estonia.

The second country selected is Poland and it is representing sending countries sending an excessive number of workers to several countries. Poland is the main sender in Europe⁶⁷ and as an example

⁶⁰ *Perus tietoa Eusta; Laajentuminen*, (2017) Ulkoministeriö. Accessible: <https://eurooppatiedotus.fi/perustietoa-eusta/laajentuminen/> seen 21 March 2018

⁶¹ Liukkunen, U., (2006). *Cross-Border Services and Choice of Law; A Comparative Study of the European Approach*. Volume 45. German; Peter Lang. p. 19-20

⁶² *Ibid.* p. 20

⁶³ *Ibid.* p. 192

⁶⁴ Krings (2009). p.52

⁶⁵ Pacolet, J., De Wispelaere, F., (2016) Posting of Workers, Report on A1 Portable Documents issued in 2015, European Commission, Brussel

⁶⁶ *Ibid.* p.18

⁶⁷ *Ibid.* p.17

in the year 2015, there were altogether 251,107 postings when only receiving 17,897⁶⁸. Both of selected countries have also a low gross domestic product (GDP) meaning that GDP of both countries are about 40% lower than average of the European countries⁶⁹. Poland Workers are also, highly respected in as an example in Norway.⁷⁰ As these countries are meant to be examples this analyse and comparison, it is naturally not showing the full truth. These two countries have been selected from different ends to establish the greatest coverage and as big picture as possible.

2.2. Estonia

Since Estonia regained its independence 1991, its immigration policy has stayed somewhat conservative, even in the recent years, Estonia has recognised the importance of circular migration⁷¹ and therefore also the importance of free movement of workers and establishment. In 2015 Estonia was posting altogether 5,415 workers which is almost double the amount of 2,315 workers which it receives⁷². Within the posting figures of Estonia, it is noticeable that more than half of them (3,282) are to Finland. Next biggest destination Norway receives only 749 workers and after that, there is no other country receiving more than 360 workers⁷³. Besides this, the Estonian legal field concerning labour laws is characterised by lack of collective agreements⁷⁴. There are only two extended collective agreements that are for the field of transportation and of health⁷⁵.

The Directive has been implemented in Estonia by the Working Conditions of Workers Posted in Estonia Act 2004 and it took effect on 1 of May 2004⁷⁶. There is no specific explanation of worker or employer within the Act, but in the explanatory notes the definition of foreign employer is as follows; ‘foreign employer is an employer who is not Estonian resident’ and furthermore the legal

⁶⁸ *Ibid.* p.18

⁶⁹ *BKT henkeä kohti, kulutus henkeä kohti ja hintatasoindeksit* (2014) EUROSTATS Accessible; http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:GDP_per_capita,_consumption_per_capita_and_price_level_indices/fi#BKT_henke.C3.A4_kohti.2C_kulutus_henke.C3.A4_kohti_ja_hintatasoindeksit
3 May 2018

⁷⁰ Friberg, J. H, (2011) Culture at work: Polish Migrants in the Ethnic Division of Labour on Norwegian Construction Sites, *Ethnic and Racial Studies* vol 35 No 11. Taylor & Francis, pp. 1914-1933

⁷¹ Kaska, V., (2010) *Temporary and Circular Migration: Empirical Evidence, Current Police Practice and Future Options in Estonia*. Tallinn; Estonian Academy of Security Science p. 51

⁷² Pacolet, J., (2016). p.18

⁷³ *Ibid.* p.18

⁷⁴ Report of Estonia p.2

⁷⁵ Implementation Report Directive 96/71/EC p.18

⁷⁶ Working Conditions of Workers Posted in Estonia Act 2004, 1.5.2004

resident of Estonian is a legal body established pursuant to Estonian law.⁷⁷ The Act has also one interesting feature; it requires an employment contract between the natural person and the posting establishment⁷⁸. Therefore, it seems that the requirement of written and a signed employment contract is narrower than requirement about employment relationship laid in the Directive⁷⁹. This difference in the implementation can affect the coverage of the Directive if the person posted and not having concluded a written contract required in the Act. The working conditions applicable in Estonia covers the working and rest time, time of prenatal examination, compensation for overtime work and wages as well as the duration of annual holidays⁸⁰. There is also listed the equal treatment clause, but Estonia has not taken advance to regulate specific conditions for children or young people. Estonia has also Occupational Health and Safety act which shall be applied to posted worker, even it would be less favourable for them⁸¹.

Estonia has implemented the first installation exception, but it has not taken advance of one-month exemption or non-significant work. About remunerations the Act follows the Directive, except it specifically mentions that also cash paid during the working period is counted to the worker's wage⁸². The posted worker has the right to use Estonian legal tools to claim if the posting organisation has violated his rights, but it is also stated that there is no limitation to raise the claim also in the home country of the worker if international agreements allow it⁸³. Estonia has not established any specific legal routes for posted workers, so claims are done in with the regular system⁸⁴ and there is also a limitation to the period worker can raise the claim, and the period is four months for claims arising from the posting agreement, and three years in the case of wage claim⁸⁵.

The Enforcement Directive has been implemented in Estonia with additions to Working Conditions of Employees Posted to Estonian Act that came in to force in 2004. First, the objective of the Act has been broadened to cover all the countries of the European Economic Area and Swiss Confederation⁸⁶. The article five considering the minimum protection has changed it wordings giving more responsibility to employers, who shall now ensure that the conditions are fulfilled

⁷⁷ Implementation Report Directive 96/71/EC p. 6

⁷⁸ Working conditions of Employees Posted to Estonia Act 2004, article 3

⁷⁹ Implementation Report Directive 96/71/EC p. 12

⁸⁰ Working conditions of Employees Posted to Estonia Act 2004, article 5

⁸¹ *Ibid.* Article 5 paragraph 2

⁸² *Ibid.* article 6 paragraph 6

⁸³ *Ibid* article 7

⁸⁴ *Ibid*, article 8

⁸⁵ *Ibid* article 7

⁸⁶ Working Conditions of Employees Posted to Estonia 2016, article 1

when earlier conditions were only applicable to the workers⁸⁷. There are also other changes in the terms of employment, mention about parental leave has been taken away and in addition, the mention about conditions for temporary agency work have been given⁸⁸. As an addition to the older Act, this Act requires to posting establishment to name a person who is in responsibility to supervise that Occupational Health and Safety Act is applied properly⁸⁹.

Estonia has established the requirements for simple declaration and they are requiring all the information listed in the Enforcement Directive, even the identification of the workers. This information shall be given for the Labour Inspectorate of Estonia no later than the day posting starts⁹⁰. Estonia has also taken advance about possibility established in the Enforcement Directive article 12⁹¹ to hold the subcontracting chains liable⁹². Also, the requirements of cross border co-operation and notification system has been established⁹³.

2.3. Poland

The size Poland is the second biggest in Europe, and seventh in the world. After Soviet time Poland has been developing itself in great extent, but it is still having one of the lowest GDP, and the legislation covering working conditions cannot be called most modern and protective over the worker. As an example, in Poland employment contract can be determined based on long term illness of the worker, if specific conditions between the term of illness and work period are fulfilled⁹⁴. Labour Unions have been living interesting history complying with the history of the country, and political atmosphere has had great variety affecting to them⁹⁵. Today the ratio of being a member of a labour union is one of the lowest in Europe, only 12 % overall⁹⁶. On the same time, most of the collective bargaining is done on the company level or relatively local level.

⁸⁷ *Ibid.* article 5

⁸⁸ Working Conditions of Employees Posted to Estonia 2016, article 1

⁸⁹ *Ibid.* article 5 paragraph 2¹

⁹⁰ *Ibid.* article 5¹

⁹¹ Enforcement Directive Chapter V, article 12

⁹² Working Conditions of Employees Posted to Estonia 2016 article 5²

⁹³ *Ibid.* article 7² and 7¹

⁹⁴ Polish Labour Code art 53

⁹⁵ *Poland; Trade Unions* (2016) ETUI. Accessible; <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Poland/Trade-Unions> 3 May 2018

⁹⁶ *Ibid.*

Because of this, there are not many collective agreements affecting a whole industry, even it would be legally possible⁹⁷.

Poland has been implementing the Directive in January 1996 by the Labour Code. In the Polish labour code, it is stated that employment contract must be in written form⁹⁸. Also, the wording defining employer is different between Polish labour code and the Directive. In the Polish labour code application scope is the employers, not the establishments which is the wording of the Directive⁹⁹. In the end, this difference does not establish a real interpretation variation since employer defined in Polish labour code is same than establishment in the Directive. The Labour Code includes general requirements for the employment contracts, and what shall be written in the employment contracts. These themes are the type, time and place of the work as well as the remuneration¹⁰⁰. It is also on the responsibility of the employer to let employee know about annual leave, applicable collective agreements and notice period as well as matters of the employment contract no later than 7 days from concluding the contract¹⁰¹. As stated in the Directive, the state has a right to determine the minimum wage, and since there are no universally applicable collective agreements in Poland the minimum wage is yearly given by the State¹⁰².

Implementation of the Directive has been done by the chapter IIa “Employment conditions for employees delegated from a European Union Member State to work in the Republic of Poland”¹⁰³. This chapter states that all the minimum conditions mentioned in the article 3 of the Directive have been taken into concern, and they are applicable to the terms and conditions of employment of posted workers. This chapter also establishes the “eight-day exception”¹⁰⁴ and provides that the minimum conditions are not applicable to navy merchants. It is also notable that Poland has not laid down limits for the posting period or even guidelines how to count the posting period, even the Directive states the calculation periods in article 3 point 6 of the Directive, and therefore it can be seen that there is no limit for the period of posting in Poland. All together Poland has implemented the directive in sufficient matter and there is no confusion or deviation. The implementation has been done in the simple matter, but the field of information applying is scattered and, in some matter, hard to find.

⁹⁷ *Poland; Collective Bargaining* (2016) ETUI. Accessible; <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Poland/Collective-Bargaining> 3 May 2018

⁹⁸ Polish Labour Code art 29 §2

⁹⁹ Polish Labour Code art 3 and the Directive art 1

¹⁰⁰ *Ibid.* Chapter 2, part 1, art 29, §1

¹⁰¹ *Ibid* §3

¹⁰² *Ibid.* Chapter II, art 10, §2

¹⁰³ *Ibid.* Chapter IIa, art 67[^]1 – 67[^]4

¹⁰⁴ The Directive, art 3, point 2

In Poland, the official supervising labour law is the Polish National Labour Inspectorate, also posted workers have full right to complain under the national law. It is also possible to make the claim after returning to the sending country. In some cases, the claim would be proceeded in Poland. The Enforcement Directive has been implemented to the Polish legislation and it came into force in June 2016. It is strengthening the position of the Directive, giving more power to the Labour Inspectorate to ensure that the conditions of posted workers truly are in line with Polish labour code. After this legislation Labour Inspectorate is able to control the status of the worker, whether it is fulfilling the requirements to be posted worker laid in the Enforcement Directive¹⁰⁵. There is also new possibility to give a fine based on criminal offences if there is a breach of the act. Poland has also implemented the registration obligation for the sender establishment as well as other obligations for the sender mentioned in the Enforcement Directive¹⁰⁶. There is three months period for the sender to provide all necessary information, which includes statement for the Labour Inspectorate giving all necessary information for them to conduct an audit on the place of work of posted worker. Due to that fact that the legislation implementing the Enforcement Directive has not been translated one must rely on the articles and statistics written in English.

2.4. Similarities Within the States

Both countries have had similar characters in their history, and it is still to be seen in the legislation and legal culture in some extent. In both countries the level of wellbeing is similar, and GDP and the pay level are comparatively low. Since both countries tend to send much more than receive it can be assumed that workers from these countries do not see their own economic situation as an ideal one. Neither of the countries has strong labour unions or universally applicable collective agreements in the use. Therefore, in both countries, all minimum remunerations are to be found from the legislation, not from collective agreements. This principle goes with all the points left open for the state to legislate.

Both countries have left some of the points off from the implementation, or in other words, not used the right to implement extra requirements. Overall, both countries have implemented both Directives, and they have provided the information into English as well. Even if all the necessary

¹⁰⁵ The Enforcement Directive, article 4

¹⁰⁶ The Enforcement Directive chapter IV, article 9

legislation is not translated in English, there are reliable sources where the information is to be found.

2.5. Differences Within the States

Even with the great number of similarities in near history, these countries have taken their own path. During the Soviet time it was the actual state of ruling that everything from a factory to school was run by the Party¹⁰⁷ and therefore it was basically impossible to run labour unions and require something else than what was on the agenda of the Party. These both factors can be seen from the cultural approach and from the structure of the legislation. Participation present to the labour unions is low in both countries, but they have really different histories. In Estonia, the unions have not been a popular thing among workers and overall any kind of activism is not seen necessarily as a good thing. On the other hand, in Poland labour unions have had political agenda and time to time their participation percent have been great. So even the situation at the present moment is similar, there have been two really different paths to that.

The structure of legislation differs between the countries. Estonia is implementing within clear and simple approach, as with these directives Estonia have drafted new acts to implement them to national legislation. On the same time, Poland is implementing the Directive via already existing labour code having an article stating the terms and conditions and other necessary measures. There is also new legislation made to implement the Enforcement Directive fully. In both countries, there shall be knowledge of other legislation as well, what is expected since single act does not exist in the vacuum. Definition of the employer is also to be found from different places, and it also differs. In Poland, the definition is found in the labour code where it is stated what are the requirements for the employer. In Estonian legislation, the definition is found from the explanatory notes, but in the implementation, it is let known that this act is applying to the establishments established in another Member State. Altogether both implementations end up to the same conclusion and the coverage of the implementation is same.

¹⁰⁷ Davies, N., (1996) Europe: A History, New York; Oxford University Press, p. 1094

3. RECEIVING COUNTRIES

Most of the old Member States trade unions were on the side of the eastern enlargement and they supported the idea that free movement of workers shall follow directly the other freedoms as well as the employment standards would be best protected not by the means of restrictions but with enforcement of the rights¹⁰⁸. Receiving countries have normally a higher standard of living and they are typically geographically close to the posting countries. The marginal posters are playing with the difference between the absolute minimum what they must pay for the workers and the average what is paid in the receiving country. Also, the margin of profit for the company is one element that could be used for dragging the offered price down and win the bargains.

3.1. Country Selection

Receiving countries meant on this category are the Member States receiving more posted workers than it sends. Based on the A1 portable document issuing figures from 2015 it is seen that Germany is the main receiver of the posted workers with 418,908 received workers when as an example Poland only received 17,897 workers, Finland 18,618 and Estonia only 2,315¹⁰⁹. Even when Germany is posting the second largest number of workers it is still receiving more than double the amount and is therefore categorised as a receiver in this paper. Finland is posting and receiving only a fraction of workers compared to Germany, but it is still active with posting and receiving. Finland and Germany share similar GDP and since they both have almost 20% higher GDP than the average in Europe¹¹⁰. They also share similar working conditions and they both have strong labour unions. Finland and Germany have been chosen based on the quantity differences on the flow of the workers, but also because they have a close connection to posting countries since they are the biggest receivers of the selected countries.

¹⁰⁸ Krings (2009) p. 55

¹⁰⁹ Pacolet, J., (2016). p.18

¹¹⁰ *BKT henkeä kohti, kulutus henkeä kohti ja hintatasoindeksit* (2014) EUROSTATS Accessible; http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:GDP_per_capita,_consumption_per_capita_and_price_level_indices/fi#BKT_henke.C3.A4_kohti.2C_kulutus_henke.C3.A4_kohti_ja_hintatasoindeksit
3 May 2018

3.2. Finland

The directive has been implemented in Finland by Posted Worker Act (Laki lähetetyistä työntekijöistä 1146/1999)¹¹¹. With this act Finland has not used the right to give one-month extension before Finnish legislation starts to affect, neither does it give exemption based on non-significant work. Finland has implemented all required aspects, and the Directive is fully in force in Finland. Minimum wage and other measures of minimum protection have been stated in the specified acts and universally applicable collective agreements. Altogether the Posted worker act starts to affect from the first day person is posted, except if the work is the first installation and does not exceed eight days¹¹².

In Finland, the Enforcement Directive has been implemented by Act on Posting Workers (Laki Työntekijöiden lähettämisestä 447/2016)¹¹³. It is typical for Scandinavian countries like Finland it does not recognise statutory minimum wage, the minimum protection is to be found from the universally applicable collective agreements¹¹⁴. This can also be seen on the implementation, where it is stated that the minimum wage is to be taken from the collective agreement of the working field¹¹⁵. In Finland, the principle of collective agreements is that there is always agreement applicable to every field. It is also stated in the legislation that if there is no specific agreement covering the field it shall be covered by the nearest reasonable collective agreement. In the Act of Posting Workers it is said that even if there is no collective agreement for the field, shall the pay be conventional and fair in the situation that the agreed pay is lower than agreed on collective agreements¹¹⁶. Meaning that posting establishment and worker can agree the pay to be something else than the minimum wage stated in collective agreements, as long as they are reasonable. It is also taken from the Enforcement Directive that the expenses not directly linked to the expenses of the posting can be counted as a wage of the worker¹¹⁷.

¹¹¹ Laki Lähetetyistä töntekijöistä 1146/1999, 9.12.1999, Helsinki

¹¹² *Ibid.* article 4

¹¹³ Laki työntekijöiden lähettämisestä 44/2016, 17.6.2016, Helsinki

¹¹⁴ Liukkunen (2006) p. 204

¹¹⁵ Laki työntekijöiden lähettämisestä; chapter 2, article 5 "Lähetetyn työntekijän vähimmäispalkka määräytyy alihankinnassa ja yritysryhmän sisäisessä siirrossa työsopimuslain 2 luvun 7§:ssä tarkoitetun yleissitovan työehtosopimuksen mukaan."

¹¹⁶ *Ibid*; chapter 2, Article 5 "Jos lähetetyn työntekijän työtä koskevaa yleissitovaa työehtosopimusta ei kuitenkaan ole. Lähtetylle työntekijälle on maksettava vähintään tavanomainen ja kohtuullinen palkka, jos työnantajan ja työntekijän sopima työstä maksettava vastike alittaa sen olennaisesti"

¹¹⁷ *Ibid*; chapter 2 article 5 "lähetettynä olosta työntekijälle maksettavat erityiset korvaukset jotka eivät koske lähetettynä olosta johtuneita tosiasiallisia kustannuksia, katsotaan osaksi työntekijän palkkaa."

Finland has also used the right to require the administrative information and simple declaration established in the Enforcement Directive¹¹⁸. When an establishment is posting workers to Finland it needs to clarify all information listed within the article in the Enforcement Directive¹¹⁹ with light specifications¹²⁰. These specifications are that in Finland it is required to also give the information of the builder and general contractor in the case of building work. It is also stated in the Act of Posting Workers that if the posting is happening between the branches of the establishment and it is under five days there is no need to do the declaration¹²¹, on the other hand, declaration shall be always done when posting construction workers¹²².

Finland has had issues with construction sites avoiding taxes and not meeting other requirements laid down in collective agreements. Due to this Finland also established other protective measures and it explains the tightened requirements for construction workers. The other measures established in Finland is the requirement of identification card that every person working on the construction site shall have. This identification card shall have a picture of the person, and the tax number. This requirement is not seen to make a barrier for freedom of establishment since it is applicable also to the Finnish workers, it is also seen to protect the general interest. Not only is Finland requiring the identification card from construction workers, but the responsibility is shifted to the contractor. The fourth Chapter establishes the Contractors Obligations and one of them is to make sure that the posting establishment is paying right wage and that all necessary taxes are paid¹²³. The contractor has also an obligation to act instantly if worker is claiming that his rights have been violated. In that situation, contractor shall submit notification for the posting company and if necessary take further legal actions. By this addition, Finland takes advance of the possibility established in the article 12 of the Enforcement Directive about holding the subcontracting chains liable¹²⁴

Overall Finland has implemented the Enforcement Directive strictly and is requiring all possible matters. It is also worth of mentioning that the last chapter of the Act of Posting Workers¹²⁵ lays down the principle that the court of location work has been carried out has jurisdiction over the disputes between the establishment posting and worker carried out the work. It is also stated that the posting establishment has the same legal responsibilities in respect to the other legislation

¹¹⁸ Enforcement Directive 2014/67/EU Chapter IV, article 9

¹¹⁹ *Ibid.*

¹²⁰ Laki työntekijäiden lähettämisestä, chapter 3, article 7, paragraph 1-3

¹²¹ *Ibid.*, chapter 3, article 7, paragraph 4

¹²² *Ibid.* chapter 3, article 7, paragraph 5

¹²³ Laki työntekijän lähettämisestä chapter 4

¹²⁴ Enforcement directive, chapter V, article 12

¹²⁵ Laki työntekijän lähettämisestä chapter 8

concerning the equality or work conditions than any other employee in Finland, and the court has jurisdiction to give an administrative fine for the poster.

The information access requirement found from both of the Directives has been taken care in Finland by website maintained by Ministry of Economic Affairs and Employment in Finland¹²⁶. From the website one is able to find all information related to posting, including acts and a great amount of other information about working and living in Finland. Overall Finland has straight rules about making the simple declaration and some specified requirements for the construction workers, at the same time the requirements are meant to ensure the fair competition and prevent avoidance of taxation and are therefore proportionate.

3.3. Germany

Germany is the biggest receiver in Europe. Germany is not only receiving great amounts of posted workers, but it also receives a vast number of immigrants. These both aspects are affecting economy and labour markets of the country, but in this paper, only the posted workers are taken into account. There are strong labour unions in Germany and overall the working conditions are good and there is still a strong base of industrial work and other service occupations. These factors make Germany a tempting target for workers and establishments.

Germany has adopted both the Directive and the Enforcement directive step by step. The implementation is shattered all over the legislation, not only to be found from the labour code but also from several acts talked about later. Germany has been active in protecting the rights of the workers. The latest action it took with France at state was that based on the Enforcement Directive the minimum wage shall apply also to the road transport workers. Other countries do not apply the minimum remuneration regulations to these workers, and after enforcement of the Enforcement Directive the social dumping and other problems on that industry has only been raising¹²⁷.

Germany has been taking active steps to ensure that the aim of the Enforcement Directive is to be filled. One of the measures Germany is using is notification obligation done via minimum wage

¹²⁶ Kröger, T., *Collective agreements and mediation in labour disputes*, Ministry of Economic Affairs and Employment of Finland. Accessible <http://tem.fi/en/collective-agreements-and-mediation-in-labour-disputes> 12 April 2018

¹²⁷ Chargas, E., Kirchner, A., Lindgren, L., (2016) *Legal action against minimum wage in France and Germany: European Commission uses infringement procedures to sanction transposition of laws which, if in place, would eradicate illegal practices and social dumping in the road transport sector*, ETF Road Transport. Accessible; <http://www.etf-europe.org/files/extranet/-75/46198/ETF%20position%20-%20Application%20of%20DE%20and%20FR%20minimum%20wage%20in%20road%20transport%20EN.pdf>

portal¹²⁸. The primary source for this obligation is Ordinance on Minimum Wage Reporting Obligations (Mindestlohnmeldeverordnung) and it has entered into force January 2017. This obligation means that everyone who is posting workers to Germany, or German company who is using rented workforce coming out of Germany has to register pay and several other measures. Germany has implemented the Directive through several legal acts. In the German legislation, worker is defined as a person who is doing depend work for some other party on a German territory and has a civil law contract¹²⁹ of it.¹³⁰ At the same time act constituting posting is defined in the Posting of Workers Act (Arbeitnehmer-Entsendegesetz) and based on it all situations where there is a cross boarder element and employing a worker in Germany are seen as posting¹³¹. Therefore, it appears to be that worker who is self-employed is not counted as a posted worker, and therefore German labour legislation applies as a whole and it is not fully consistent with the directive.¹³²¹³³ Terms and conditions for the posted workers can be found from the working time act (Arbeitszeitgesetz) but mostly all of the working fields and employees are covered by the collective agreements and therefore normally working times and resting periods are found from them.¹³⁴ Annual paid holidays are respectively written in Federal Holidays Act (Bundesurlaubsgesetz) and rates of pay in Posting of Workers Act which is stating the minimum pays for the workers, based on the collective agreements on the fields. Therefore, even if there is no applicable collective agreement specifically for some field, there is always a minimum pay to be paid, and minimum conditions to be fulfilled for all workers in Germany.¹³⁵ This rule is the general one, but there can be differences in the regional basis, and when the worker is hired-out the wage bases on the different act (Arbeitnehmerüberlassungsgesetz), but it shall be “equal” to the pays of the other workers on the “borrowing” company.¹³⁶

Registration obligation is for all establishments posting workers. There are two categories having their own acts covering them. These two acts are Minimum Wage Act (Mindestlohngesetz) and Posting of Workers Act. The Minimum Wage Act is requiring little more information about workers send on certain fields. This categorising is based on the list to be found from Act to

¹²⁸ *Notification When Posting*, ZOLL. Accessible; https://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Obligatory-notification-workers-posted/obligatory-notification-workers-posted_node.html 15 April 2018

¹²⁹ BGB, Civil Code, §§ 611 ff

¹³⁰ *I. Important Legal Notice II. Legislation Transposing Directive 96/71EU in Germany Directive (2015)* Accessible: ec.europa.eu/social/BlobServlet?docId=2376&langId=en 16 May 2018 p.2

¹³¹ *Ibid.* p.2

¹³² *Ibid.* p.3

¹³³ The directive art 1, point 1

¹³⁴ *I. Important Legal Notice II. Legislation Transposing Directive 96/71EU in Germany Directive (2015)* p.3

¹³⁵ *Ibid.* p.4

¹³⁶ *Ibid.* p.4

Combat Clandestine Employment (Schwarzarbeitsbekämpfungsgesetz) and these fields are as an example building industry, hotel and restaurant services, building cleaning and other field typically having connections to illegal employment and tax frauds excreta. The second category covers all other posted workers. The information which shall be given about both workers are personal information of worker, and time and place of the work and the industry. When the notification is done there shall also be information given about responsible authorised representative and agent for the workers and have certain documents available or for inspection in German and record the working hours. The notification shall be given in written form before the work is started. If there is a claim to be made by the worker, it can be done via same channels that other workers as well. If the posted worker is having a claim based on the Posted Worker Act it shall be made to and only to the competent court in Germany, in the other words, to the court of the place of work.¹³⁷

3.4. Similarities Within the States

In both countries, collective agreements and labour unions have the main impact on the minimum remunerations and protection of workers. These collective agreements are negotiated between worker unions and employer unions and they have the status of law. Even when the main principle of having labour unions and having a high rate of participation in them, there is also fundamental differences on the principles of their work. These differences would be discussed under the next headline. Overall in both countries worker has a strong position against the employee and the rights are sometimes defended aggressively. Commonwealth level is good in both countries and social systems are based on the idea that everyone has the equal right to fiscally secure life even in the situation of unemployment, terminal illness or similar situations. Due to state aid what worker would be entitled to if unemployed, workers have much higher security to fight against unfair conditions or practices at the workplace. All together in both countries workers have strong, secured position and great acquired benefits, which posted worker is also entitled to.

For both States, taxes are the main income for the state and overall tax rates are in comparison high. Taxes are needed to keep up the social system in these countries and therefore both States are taking measures in many fields to avoid tax frauds. As one can imagine a posted worker who is not familiar with the rights he is entitled to, is somewhat an easy target for the companies to establish illegal employing. In Germany, the actions against illegal employment have been established in the Act to Combat Illegal Employment and it covers fields having the highest risk

¹³⁷ *Ibid.* p.8-9

to do tax frauds and avoid giving right remunerations for the workers. Information is the key element on this war against illegal employment. Field from this act needs to give more information about their workers, and in Finland, construction worker is seen as a risk field as well. In Finland, these measures are taken by the tax authorities, and that extra information needed is that everyone working on the construction site, has to have a tag with his picture, name and tax number on it, and it shall be in vision all the time. Also, the biggest companies have been establishing different rules to avoid tax frauds even on the last level of their subcontracting chain. A good example of that is SRV, which rules that there shall not be more than three links away from them, everyone has electronic key cards which shall be timestamped whenever going or coming back from the construction site and one is not able to receive this card if not having the Finnish tax number. Therefore, these countries are similarly working against illegal employment but not with similar measures¹³⁸.

As a conclusion, it could be seen that these countries have similar main fundamental principles, where worker is seen as a weaker and easily suppressed party and in need of protection of strong labour unions. Also, it can be seen that illegal employment has been an issue in both countries and there have been actions to demolish these principles. As similar countries culturally and economically, Finland and Germany have been implemented these directives with same interpretations.

3.5. Differences Within the States

Finland and Germany are taking part in the political discussion about posting of workers in different intensity. Germany has taken such aggressive measures with France that they have been noted by ECJ and given notice. This discussion was about if the transportation workers are counted as posted workers and based on the legislation they have on their countries, Germany and France stated that also the drivers shall be entitled to the minimum remunerations stated in their legislation. Finland has not taken this kind of active part to the discussion.

The fundamental base of legislation of Finland and Germany differ from each other in many levels. In Finland, there are no regional agreements, and all labour laws are applicable in the whole country. Also, the implementation is done in a simple way; establishing new legislation to implement these directives. Finnish style of implementing EU legislation is overall simple, in most of the cases, EU legislation is just translated, and open spots filled. On the other hand, in Germany

¹³⁸ *Vastuullisuus*, SRV. Accessible <https://www.srv.fi/vastuullisuus/>

the implementation is done by slightly moderating already existing legislation and making a new law about almost every single topic. It seems that in Germany, everything is done on the level of acts, while in Finland acts are simple and they are explained and given flesh around the bones by guidelines and explanatory memories. As the structure of the legislation is different between the countries, so is the working method of collective agreements. In Finland, minimum remunerations are not to be found in any legislation but always from the universally applicable collective agreements. It is not possible in Finland to work on the field which is not covered by the collective agreement since nearest agreement for similar work is applied. In Germany the system is that collective agreements can be done also just for some region, so on the time of posting, the poster shall know the agreements applying to the field, and to the region, and to the employer. In Finland, it is possible for an employer to have a specific agreement with the national labour organisation and therefore have collective agreement applied just for them. This is also possible in Germany, but the regional level is missing from Finland.

As a conclusion, the main difference is the way of implementation and the structure of legislation, not so much what has been implemented. From the German system, all the information is much harder to find than from Finnish acts. Also, the role in the political discussion is different, and Germany has taken a greater role in it.

4. COMPARISON

4.1. Differences Between the Groups

Working culture cannot be seen without the context of economic culture. In both groups the culture within the groups was pretty similar, the GPA was similar to historical and other factors. These factors are not able to explain all the differences, and this is not even the aim of this paper. It is still be seen that posting countries are tending to have much higher economical situation and overall the pay and wellbeing level is a much higher in these countries. One can also see that there is always a reason why this kind of masses are willing to leave the country after better paid job and therefore it can be said that there are also strong cultural factors affecting to the posting and receiving, not just the implementation of the directives.

These groups and the countries used as an example have been chosen to represent them based on figures explained earlier. As it was expected that there were more differences between the groups than similarities. One of the biggest difference between the groups were the position of the labour unions and collective agreements. In northern countries, as well as German labour unions have a great and steady role in the making of labour legislation. Overall, in sending countries it can be seen that the status of the worker is protected and there is a great amount of benefits these unions have been able to gather for their workers. At the same time, the atmosphere in sending countries tends not to be that good. Even the rights have been protected, there is still a great difference in the pay level, annual holidays and so on. On the same time, the history has given its effect to the way of seeing these unions in the sending countries and overall shaping the attitude against collective organisations.

There is also a great difference within the tendency to protect the own workers of the country. In the sending countries, there are not that many workers coming, and therefore it is not a great threat for the state or for the workers that the newcomers would take their work. In the receiving countries, the situation is different, and it is often seen that the posted workers are taking away the jobs of local workers. There is also tension between posted workers and local workers since the posted workers are ready to work on so much lighter remunerations than local ones, and therefore they are keeping the pays possible lower than they would be if only local workers would be available. The difference also between measures to be taken to prevent illegal employment are at the different level in both groups. Within sending countries, there is not to be found the clear and single measures to be taken against illegal employment, and at the same time in both receiving

countries these measures can be found. Also, the amount of information to be collected is different between the groups, but not that much as it could be.

4.2. Similarities Between the Groups

It can be stated that there is not much in common between the groups. The biggest similarity between the groups is that every country has implemented the regulation, even if it is done in very different ways. The fact that all of the countries have been implementing the regulations is no surprise since both of them are mandatory EU level directives to be implemented. On the same time, it is to be found that both groups tend to have real differences in the way of implementation. In both groups, it was found that there were no generally applicable rules how the directives have been implemented. The way of implementation was similar between Finland and Estonia where the implementation was done via one new and single act. In both Germany and Poland, the implantation was done within already existing legislation, and therefore it is much more shattered and harder to find. There were no other similarities to be found connecting all states, and that tells clearly, how shattered the legal field still is in European Union, even we are going towards similarities.

5. CONCLUSION

The aim of the paper was to find out what kind of similarities and differences there is within the implementation of directives concerning posted workers. These two directives in focus were the Directive 96/71/EC concerning posting of workers and the Enforcement Directive 2014/67/EU. There was also other legislation to be covered, but only from those parts relevant to understanding these directives. Four countries were used as some examples of the implementation and these four countries were Germany, Finland, Estonia and Poland. These countries were selected to represent posters and receivers based on their tendency to post or receive. In the posting group, Germany and Finland have both similarities and differences. The main similarity was the status of the worker and labour unions when the difference was found from the way of implementation and structure of the legislation. In both countries also measures against illegal employment had been taken and that is the one biggest difference between posting countries and receiving ones. Between the posting countries, the situation of labour unions was similar, since truly different from their status in receiving countries. Overall there were not that much similarities within sending countries, there where no special requirements and the implementation has been done in a simple way.

This paper only covers four countries, and this is a small number to represent the whole situation. There were still already some patterns to be found and therefore it would be interesting to expand the research. In the case of further research, it would be reasonable to include also countries from southern Europe, and overall include more countries from both groups. Also, if gone deeper into the topic, also some case law and other legal culture measures could be taken into account. Overall, it is clear that there are some similarities within the groups, and not so much similarities between the groups. It could be interesting and give important knowledge and understanding of the current situation of the European level work markets. With more countries included and taking also legal culture factors in scope, it would result also knowledge of reasoning behind differences, what was not able to be done in this paper.

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