
Posting not Forcing: Tackling the unfree labour of third-country nationals in the posting regime in the European Union

Jelena Starcevic, PhD candidate, School of Labour Studies, McMaster University
January, 2021

Third Country nationals are exposed to unfree labour due to their vulnerable position at the intersection of posting and migration regimes in the European Union. This situation not only hurts third country nationals, but the European markets and values, as well. The brief provides recommendations for European Commission to ensure separation between labour and migration policies in the EU member states as well as widening the authority of the European Labour Authority.

Introduction

Labour mobility plays an important role in the economic growth of the European Union (EU). Labour mobility in the EU has a dual character; it can be viewed as internal mobility (or intra-EU mobility) or as external mobility. Internal mobility encompasses freedom of movement of workers who are nationals of member states, while external mobility refers to movement of so called third-country nationals (workers who are not citizens of the EU) to any of the 27 EU member states. External mobility is also vital to the economic development of the EU, as it provides a possibility to quickly address the fluctuation in the demand for labour (The Hague Programme, 2004). The two mobility regimes are governed by different principles and jurisdictions: the internal mobility is based on the fundamental principle of the freedom of movement under the treaties establishing the EU (where the EU has main jurisdiction), while external mobility, though shaped by the EU migration policies, is under the authority of each member state.

The posting of workers is a special category of internal mobility envisioned under the framework of freedom to provide services, rather than freedom of movement of workers. This different regulatory framework (the freedom to provide services) places posted workers under different sets of worker's rights and protections. The main characteristic of posted workers is that they are temporarily performing work or providing services on the territory of a different (receiving) state, thus participating in their labour market, while still being employed in another (sending) state. Since its creation in 1996, the posting regime has been highly contested as the protection of labour rights often had to take a back seat to ensure competitiveness of the EU internal market (Rijken and De Volder, 2009). With the opening of the EU market to free movement of services, the posting regime allowed companies to make strategic choices between regulatory regimes, often engaging in regulatory arbitrage or

regulatory evasion. Regulatory arbitrage can be defined as “exploitation of differences between national systems” (Bernsten and Lillie, 2015, p 53) within limits set out by the posting regime; while regulatory evasion encompasses violations of formal rules and their concealment from regulatory authorities (Bernsten and Lillie, 2015).

Much of the tension and debate over the last 20 years within the posting regime has been concentrated around companies choosing to post workers from low-wage countries of the new EU member states to high-wage countries of the old EU member states, thus engaging in cost-saving social dumping (Picard and Pochet, 2018; Bernaciak, 2015; Cremers et al, 2007). Within the labour mobility and the posting regime, social dumping can be best understood as a possibility of displacement of labour costs (Erickson and Kuruvilla, 1994) by posting workers from countries with lower labour protective regimes or looser regulatory frameworks and differences in wage levels (Bernsten and Lillie, 2015) that leads to the evasion of existing social regulation (Bernaciak, 2014).

Another major concern regarding the posting regime was a noticeable increase in the use of intermediaries. The posting of workers more frequently occurs through temporary work agencies, subcontractors or between subsidiaries of multinational enterprises (European Agency for fundamental rights, 2019; Bernsten and Lillie, 2015). These intermediaries can engage in posting of workers from lower-wage countries or even third countries, resulting in a combination of legal regulations governing labour and social rights of those workers, leading to poor working conditions, increased vulnerability and precarity of those workers, and “precarious societies in general” (Kresal, 2016, p 87).

In efforts to address some of those concerns, the European Commission had to revise several times, the original regulation of posting of workers (**Directive 96/71/EC concerning the posting of workers in the framework of the provision of services**), more notably in 2014 (**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**) and 2018 (**Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services**). The latest amendments “aim to guarantee a level playing field for businesses and respect for the rights of workers.” (Directive 2018/957, 2018, p 1).

This overview of the posting regime is illustrative of regulatory evasion or regulatory arbitrage that results in labour exploitation of EU nationals. However, this policy brief is concerned with third country nationals who are exposed to substantially worse labour exploitation due to the added factor of their migration status. Despite the growing numbers of third country nationals found in the posting regime, they have been ignored in the rounds of revisions mentioned above. This policy brief aims to draw attention to these workers and the condition of unfree labour they experience due to their vulnerable position in the intersection of posting and migration regimes. The policy brief covers 2 main issues: 1)

unfree labour of third country nationals in the posting regime; and 2) the question of responsibility and liability for protection of labour rights of third country nationals found in the posting regime.

Unfree labour of third country nationals in the posting regime

Workers who move within or into the EU are particularly vulnerable to cases of labour exploitation (European Agency for fundamental rights, 2015). The EU anti-trafficking regulation imposes an obligation for EU member states to recognize certain forms of labour exploitation as criminal offences, namely forced labour or services (including begging), slavery or practices similar to slavery and servitude (**Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims**). Additional forms of labour exploitation are left for the interpretation of each EU member state. According to the Eurofound study, most EU member states just regulate forced labour as a criminal offence and they do so in accordance with the International Labour Organization (ILO) Forced Labour Convention (Eurofound, 2016). The ILO Convention defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily (ILO, 1930). However, workers from other countries, driven by their economic or social conditions, accept working conditions that amount to the moderate or severe levels of labour exploitation that often go unperceived, due to the lack of categorization as forced labour (European Agency for Fundamental Rights, 2015).

For those reasons, unfree labour is a useful concept that helps us understand the labour exploitation of third country nationals in the posting regime that may not constitute criminal offences under the EU anti-trafficking framework. Unfree labour explains the relationship between production and legal regimes that creates a compulsion for labour exploitation, in which workers find themselves in a continuum of exploitation along different points of the labour relationship, from recruitment to exit (Fudge, 2018).

The labour exploitation of posted workers is found in the inherent tensions between ensuring freedom to provide services, as defined in article 56 of the Treaty of Functioning of European Union (which was the legal basis for adoption of the Posting Directive) and ensuring freedom of movement of workers (article 45, TFEU). A study done for the European Parliament’s Committee on Employment and Social Affairs (EMPL) from 2016 recounts for an increase in “abusive and fraudulent practices which involve the exploitation of posted workers” (Voss et al, 2016, p. 8). In addition, significant differences in national regulations and rulings made by the Court of Justice of the European Union (namely *Laval*, *Viking* and *Rüffert*) limited the scope for enforcing the protection of the workers. The struggle to avert labour exploitation is even more complex when it comes to third country nationals. Third country nationals bring an additional element of concern for external borders protection and different migration policies. In this gray area, companies and intermediaries can profit from regulatory evasion and arbitrage between competitiveness and labour protection, and from vulnerable positions of third-country nationals working in an EU member state through a regime of posting.

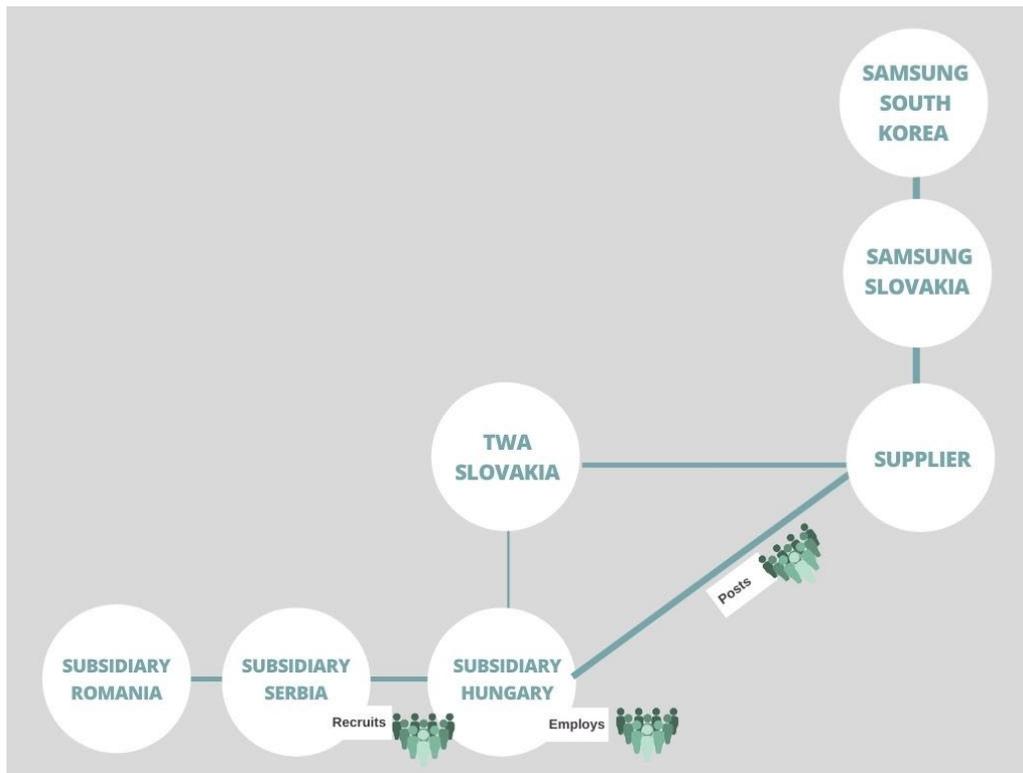
Under the posting regime, third-country nationals who are legally employed by a company or a temporary work agency, can be posted to another EU member state, this means that they are also granted internal mobility despite their third-country national status. Through the posting regime, a third country national does not have to obtain a work permit in the host country, instead they can obtain a work permit from the country they are posted from (Kali & Lillien, 2016). Once the third country national obtains the legal right to work in one EU member state, they can be legally posted to another EU member state. Companies and recruiters capitalize on the existing differences in migration systems of the EU countries by bringing in third country nationals through those migration systems that have relatively open migration streams for certain third countries or stipulate specific exemptions. In these cases, posting is used as a way to lower the cost of labour, but also to avoid migration policies.

Using an example of a German-Latvian agency in the transportation sector, Cremers explains these mechanisms (Cremers, 2015). Latvian migration policies facilitate the recruitment of third country nationals in case of shortages of skilled labour for international trucking. Under this provision, Philippine workers were brought to Latvia and immediately posted to other undertakings in the EU. The Philippine workers were paid €2.36 per hour, a wage that Cremers describes as nothing short of a “slave wage” (Cremers, 2015, p 182).

Poland is another case of a country that has a relatively open migration system for Ukrainian citizens. Ukrainians can apply for a Polish D-type visa which grants them the legal right to work in Poland. Obtaining a work permit in Poland, allows Ukrainian workers internal mobility in the EU through the posting regime. The Organized Crime and Corruption Reporting Project uncovered a widespread practice of Ukrainians being posted to Estonian companies, where they are paid the Polish minimum wage (€590) instead of the Estonian minimum wage (€1,310) and found to be working excessive working hours (Roonemaa et al, 2020). The misrepresentation of skills’ level, the deductions on the basis of accommodation and travel costs can further reduce the income of third country nationals (Cremers, 2015). Third-country nationals legally residing in the EU, based on a work permit, may risk losing not just work but the right to reside if they were to protest the exploitative practices of their employers. This added risk makes it harder for them, than EU posted workers, to voice their grievances.

More elaborate schemes, usually through long chains of subcontractors, are employed when it comes to third country nationals who do not have the right to work in the EU. Novitz and Andrijasevic provide a detailed overview of the case of Samsung Electronics in Slovakia (Novitz and Andrijasevic, 2020). In this case, we see how companies can use their subsidiaries or subcontractors to conceal regulatory non-compliance and avoid enforcement. This Samsung Electronics case involved a Slovakian temporary work agency and its subsidiaries in Hungary, Slovakia and Romania, and a supplier for South Korean multinational company Samsung Electronics. Serbian nationals were recruited through the subsidiary located in Serbia, while employment contracts were made with subsidiary in Hungary allowing posting to Slovakian supplier of South Korean firm (see Figure 1).

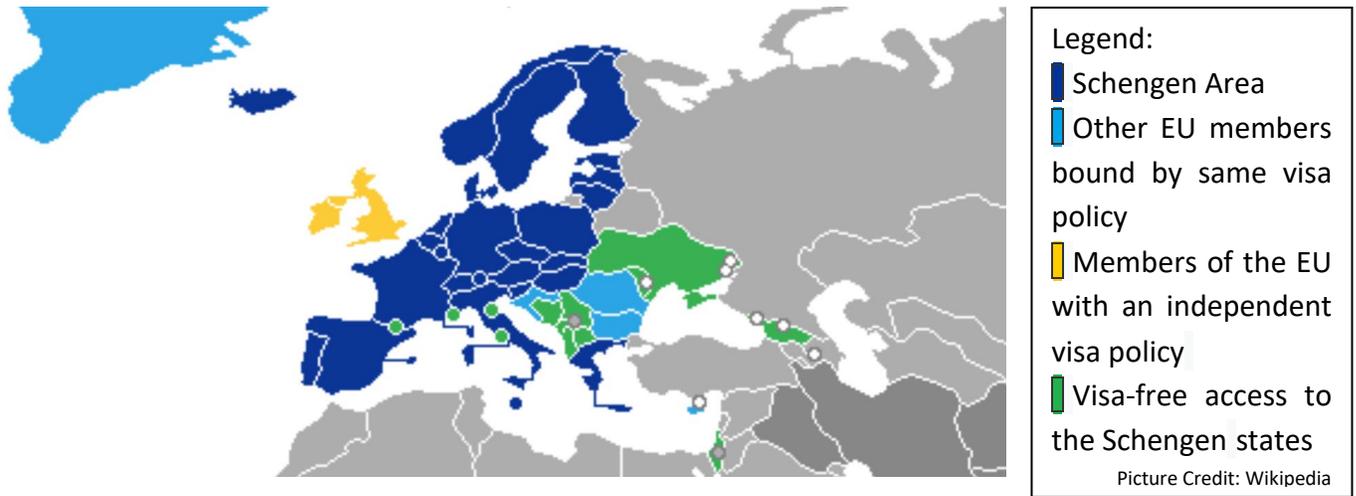
Figure 1. Labour and Production Supply Chain in Case of Samsung Electronics Slovakia



Source: Author's mapping of supply chain in Samsung case based on information from the Novitz and Andrijasevic, 2020

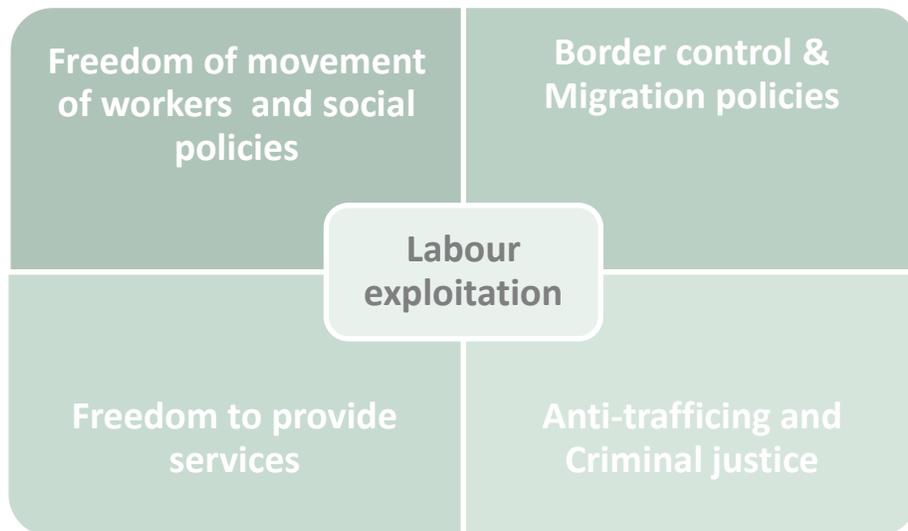
In this case, the temporary work agency used the visa exemption clause that Serbia has with the countries of the Schengen area that allows Serbians the right to enter the area without visas for a period of 90 days within 180-day period (see Figure 2). The visa waiver system between the Schengen area and Serbia brought much needed freedom of movement for Serbian nationals, but also increased the cases of abuse by companies and recruitment agencies offering employment in the EU without procuring necessary work permits. Here, different approaches of member states add to the confusion. Some member states consider third country nationals to be illegally employed in case they are illegally staying in the EU, while others consider employment illegal if third country nationals are legally staying but their residence permits do not allow performance of economic activity. In the particular case of Serbian workers posted from Hungary to Slovakia, after enduring diverse forms of labour exploitation, they were deported to their home country without access to any remedies.

Figure 2. Map of Schengen Area and countries that have visa free regime



This overview clearly indicates how the intersection of freedom of movement of workers and freedom to provide services with the protection of external borders and different migration policies pose a grey area where companies and intermediaries can profit from vulnerable positions of third country nationals working in an EU member state through a regime of posting (see figure 3). The structure of the posting regime itself, as we have seen, allows companies to engage in different fraudulent activities contributing to various forms of labour exploitation. Additionally, in the case of third country nationals, these risks of abuses are exacerbated by third country nationals’ fear of losing their right to reside in the EU or being deported.

Figure 3. Intersection of relevant EU policies contributing to labour exploitation of third-country nationals in the posting regime



Source: Author’s own visual presentation

The question of responsibility and liability for protection of labour rights of third country nationals found in posting regime

The main instruments for the protection of labour rights of third country nationals is not a regulation based on social policy, but a regulation that forms part of a set of measures to combat irregular immigration. **Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals** (Sanctions Directive) stipulates the measures against illegal employment of third country nationals in the EU. The aim of the Sanctions Directive was to regulate pull factors driving illegal migration found on the side of the employers. The Sanctions Directive stipulates an obligation of the employers to check if third country nationals have valid authorizations to stay in the territory of the EU, including third country nationals recruited for the purpose of posting to another member state.

Additionally, the Sanction Directive stipulates protection measures for third country nationals in the forms of an obligation on employers to pay any outstanding remuneration and an obligation on member states to establish mechanisms to facilitate complaints of third country nationals. The Sanctions Directive obliges Member States to provide for criminal penalties in cases of particularly exploitative working conditions (article 9.) establishing an important linkage with EU anti-trafficking regulation, mainly **Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings**, later replaced by **Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims**.

The Sanction Directive could therefore provide a more meaningful mechanism for dealing with cases of labour exploitation that do not qualify for human trafficking and criminal offences under the EU anti-trafficking regulation. However, this has not been achieved due to the significant variations in its implementation among member states, especially regarding sanctions and accessibility of complaint mechanisms.

In 2014, the European Commission launched infringement proceedings against 20 EU member states for not transposing the Sanction Directive in time. Since then, all member states have complied with the requirement to transpose the Sanction Directive, although there are great variations among member states (European Commission, 2014). For example, the European Commission observed that in some member states the levels of financial sanction do not pose sufficient discouragement for employers not to employ irregular third country nationals. The same variation occurs with criminal sanctions, where it is also true some members states claim that penalizing illegal employment in cases of exploitative working conditions is already covered by their anti-trafficking regulation. Transposition of Article 8 warrants special attention, for third country nationals in the posting regime, because it imposes liability of the entire chain of contractors for the payments of financial sanctions. While the

majority of the member states have introduced liability of first tier subcontractors, the intermediary subcontractors' liability or the due diligence obligations are not stringently defined. The weakest points of the transposition of the Sanction Directive are the ones concerning access to justice and inspections. The European Commission has noted that very few member states (only four) have explicitly regulated the right of illegally employed third country nationals to make claims against employers for any outstanding remuneration; and most members states need to improve their inspections (European Commission, 2014).

The PICTUM position paper offers more insights in the specific provisions of the Sanction Directive aimed at protecting illegally employed third country nationals: accessibility of complaint mechanisms and recuperation of outstanding wages (Soova et al, 2015). One of the basic barriers to achieving an effective mechanism of complaints is that labour inspections, in many EU member states, are accompanied by members of police forces. This, like in the mentioned case of Serbian workers, leads to apprehensions and deportations “even before the undocumented worker has had a fair chance to defend their labour rights” (Soova et al, 2015, p. 3). This is in contradiction with the Sanction Directive that aims to punish employers, not workers, for the illegal employment. The recuperation of outstanding wages is also problematic. The presumption is that the recuperation should be at least at the level of minimum wage, but as we have seen from the examples of posting workers, minimum wages differ significantly across the EU and with a lack of EU level instrument regulating minimum wage, the space for regulatory arbitrage is still present. Despite the ongoing problems with the implementation of the Sanction Directive, the European Commission has not put forward any initiative for amendments.

In 2019, the European Parliament and Council established a new structure called the European Labour Authority (ELA), whose primary concern are the issues of labour mobility and undeclared work. Under the scope of activities of the European Labour Authority, among others, is posting of workers. ELA should provide assistance to national governments and institutions, namely labour inspectorates to eradicate abuses in posting regimes. However, ELA does not have authority over the Sanction Directive, leaving third-country nationals who are illegally staying in EU out of its scope.

Conclusions and Recommendations

The most recent changes to the posting regime that try to level the playing field for companies across the EU member states will not eradicate possibilities of social dumping as third country nationals are still exposed to regulatory arbitrage and evasion of the companies and temporary work agencies looking to cut labour costs. Their migration status makes them more vulnerable to experience some form of unfree labour and silences them from voicing their concerns about labour abuses. The Sanctions Directive does not provide an adequate system of protection mainly due to the lack of separation between labour and migration policies in the EU member states. Therefore, it is urgent to

take measures to reduce the space for companies and agencies to “shop” for cheap labour, not only hurting the third country nationals, but the European markets and values.

To achieve this, the European Commission should adopt following recommendations:

1. Ensuring better monitoring, reporting and collection of data, as well as coordination among member states
2. Develop and adopt guidelines for member states ensuring the separation of labour inspections and migration enforcement mechanisms
3. Widen the authority of the European Labour Authority to include third country nationals illegally employed in one member state and posted to another member state

Methodology

This policy brief was developed centering the issue of the third country nationals under the concept of unfree labour. Within this framework, the policy brief examined existing regulation on the EU level namely Directive 96/71 (and subsequent revisions) and Directive 09/52 and official communications from European Commission. It also relied on academic literature examining posting regime through the lens of competition and social dumping, as well as reports and investigations from non-government organizations.

References

- Bernaciak, M. (Ed.). (2015). Market expansion and social dumping in Europe. Routledge.
- Bernaciak, M. (2014). Social dumping and the EU integration process. ETUI Working Paper
- Berntsen L., & Lillie N. (2015) Breaking the law? Varieties of social dumping in a pan- European labour market. In Bernaciak, M. (Ed.), Market expansion and social dumping in Europe. Routledge. <https://doi-org.libaccess.lib.mcmaster.ca/10.4324/9781315766607>
- Cremers J., (2015) EU economic freedoms and social dumping. In Bernaciak, M. (Ed.), Market expansion and social dumping in Europe. Routledge. <https://doi-org.libaccess.lib.mcmaster.ca/10.4324/9781315766607>
- Cremers, J., Dølvik, J. E., & Bosch, G. (2007). Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU. *Industrial Relations Journal*
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services PE/18/2018/REV/1, OJ L 173, 9.7.2018
- 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 ('the IMI Regulation') OJ L 159, 28.5.2014
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. OJ L 168, 30.6.2009
- Directive 1996/71/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
- Eurofound (2016), Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour, Publications Office of the European Union, Luxembourg.
- European Agency for fundamental rights (2019). Protecting migrant workers from exploitation in the EU: workers' perspectives. FRA. <https://fra.europa.eu/en/publication/2019/protecting-migrant-workers-exploitation-eu-workers-perspectives>
- European Agency for fundamental rights (2015). Severe labour exploitation: Workers moving within or into the European Union. States' obligations and victims' rights. FRA. <https://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

-
- European Commission (2014). Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals. COM/2014/0286 final
- Fudge, J. (2018). Slavery and Unfree Labour: The Politics of Naming, Framing, and Blaming. *Labour: Journal of Canadian Labour Studies/Le Travail: revue d'Études Ouvrières Canadiennes*.
- International Labour Organization (ILO), Forced Labour Convention, C29, 28 June 1930, C29, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029
- Kali K., & Lillien N., (2016). Protection of posted workers in the European Union: Findings and Policy Recommendations based on existing research. PROMO Project.
- Kresal, B. (2016). The Tense Relationship Between Labour Market Rights and Respect for Dignity at Work: European Dimension. In B. Jan & R. Marc (Eds.), *From Social Competition to Social Dumping* (pp. 85-98). Intersentia. doi:10.1017/9781780687216.006
- Novitz, T., & Andrijasevic, R. (2020). Reform of the Posting of Workers Regime—An assessment of the practical impact on unfree labour relations. *JCMS: Journal of Common Market Studies*.
- Picard, S., & Pochet, P. (2018). The posting of workers saga: a potted version of the challenges engulfing Social Europe. ETUI Research Paper-Policy Brief.
- Rijken, C., & De Volder, E. (2009). The European Union's struggle to realize a human rights-based approach to trafficking in human beings. *Conn. J. Int'l L.*, 25, 49.
- Roonemaa H, Jekaterina Minkova J., Oganov O., Kuley I., Mets M. (2020, January 10). Toiling in Europe's Grey Zone. Organize Crime and Corruption Reporting Project. <https://www.occrp.org/en/investigations/toiling-in-europes-gray-zone>
- Soova K., Keith L., LeVoy M. (2015). Labour rights of undocumented migrant workers in the Employers' Sanction Directive. Platform for International Cooperation on Undocumented Migrants. <https://picum.org/Documents/Publi/2015/EmployerSanctions.pdf>
- The Hague Programme: strengthening freedom, security and justice in the European Union. OJ C 53, 3.3.2005
- Treaty on the Functioning of the European Union, Consolidates Version. OJ C 326, 26.10.2012
- Voss E., Maack W., Faioli M., Lhernould J., Iudicone F. (2016) Posting of workers directive – current situation and challenges. European Parliament's Committee on Employment and Social Affairs