

New Labour Laws in Old Member States:

The impact of the EU Enlargements on National Labour Law Systems in Europe

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I. INTRODUCTION

On 1 May 2004, eight post-communist states in Central and Eastern Europe joined the European Union (EU).¹ They were followed by Bulgaria and Romania on 1 January 2007, and by Croatia on 1 July 2013. In the years since, these enlargements resulted in an increase in the free movement of workers from 'new' to 'old' Member States, which had a visible impact on the labour markets of old Member States. This chapter questions whether increased migration following the enlargements has also had an impact on the labour law systems of four 'old' EU Member States: Austria, Germany, Ireland, and the United Kingdom.² These countries are interesting for a number of reasons. The different transitional measures put in place in these Member States allow the countries to be grouped into two categories.³ On the one hand, Austria and Germany placed heavy restrictions on workers from new Member States entering their labour markets, which were only lifted in 2011 (for the 2004 enlargement) and in 2014 (for the 2007 enlargement) and, in the case of Germany, in 2015 for Croatia. Austria's restrictions on Croatian workers will be maintained until June 2020. In addition, Austria and Germany negotiated and implemented special arrangements for posted workers. Nonetheless, Austria and Germany experienced significant inflows of new Member State workers. Ireland and the United Kingdom immediately opened their labour markets following the 2004 enlargements, and both countries witnessed a substantial increase in the numbers of new Member State workers compared with pre-enlargement levels. Largely as a result, they would each impose transitional measures on Bulgaria and Romania when those states joined the EU, and the United Kingdom would extend those measures to Croatia until June 2018.

* I would like to thank Bernard Ryan for comments on earlier drafts of this chapter which substantially improved the final version. All errors or omissions remain my own.

¹ The following countries acceded in 2004: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. For ease of reference, workers from the Central and Eastern European Member States that joined the EU since 2004 are referred to collectively as 'new Member States' even though it is recognised that at the time of publication these Member States and their citizens are no longer 'new'.

² The research upon which this chapter is based is expounded in more detail in R Zahn, *New Labour Laws in Old Member States*, (Cambridge, Cambridge University Press, 2017).

³ The transitional measures lasted for 7 years in total; two years initially, followed by a three-year period, followed by a further two-year period in the case of serious disturbances in the labour market. The transitional measures did not apply to Cyprus and Malta. The legal basis for the restriction can be found in the Accession Treaties at [2003] OJ L 236; at [2005] OJ L 157; and at [2012] OJ L112.

In order to assess the impact of post-enlargement migration flows on the Austrian, German, Irish and British labour law systems, this chapter proceeds as follows. Section II contextualises the enlargements and explains their significance. Section III examines whether the increase in migration post-enlargement led to any changes in the labour law systems in these four countries. It concludes that limited legislative changes can be directly traced to increased migration, post-enlargement. Although, labour markets have absorbed the new arrivals, new Member State workers' impact on their host country's societies should not be under-estimated. Post-enlargement migration has led to an intensification of competition in the labour market and placed a burden on health, education and infrastructure in local communities at a time when these were already struggling to adapt to an increasingly globalised world.

Section IV then discusses the labour law reforms at EU level which have occurred since the enlargements. These have focused on the posting of workers, against the background of allegations of wage undercutting, as the numbers increased substantially across the EU as a whole following the enlargements. Austria and Germany, in particular, recorded a substantial increase in posted workers in certain sectors. Ireland and the UK were affected less. The main relevant regulatory framework governing posted work had been the Posted Workers Directive (PWD), adopted in 1996.⁴ The PWD, and its interpretation by the Court of Justice of the European Union (CJEU) in *Laval*, was the subject of a plethora of critical commentary calling for a revision of the Directive.⁵ Subsequent legislative developments include the adoption of the Enforcement Directive⁶ in 2014, the revised PWD in 2018⁷ and the establishment of the European Labour Authority in 2019.⁸ These reforms are welcome but it remains to be seen whether and to what extent they will be effective.

⁴ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [1996] OJ L 18/1.

⁵ Case C-341/05 *Laval un Partneri* [2007] ECR I-11767. There is a vast amount of literature on the judgments. For different views, see M Freedland and J Prassl, *Viking, Laval and Beyond* (Oxford, Hart, 2004), M Rönmar (ed), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Deventer, Kluwer, 2008), R Blanpain and AM Swiatkowski (eds), *The Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia* (Deventer, Kluwer, 2009), and articles by A Dashwood, T Novitz, M Rönmar, S Deakin and S Sciarra in (2007-2008) 10. *Cambridge Yearbook of European Legal Studies*. For a non-academic critique of the decision see the ETUC's response to the judgment available at <https://www.etuc.org/en/document/etuc-response-ecj-judgements-viking-and-laval> and A Bücker and W Warneck (eds), *Viking – Laval – Rüffert : Consequences and policy perspectives* (ETUI, Brussels, 2010).

⁶ Directive 2014/67/EU [2014] OJ L 159.

⁷ Directive 2018/957/EU [2018] OJ L 173.

⁸ Regulation 2019/1149 [2019] OJ L 186/21.

II. CONTEXTUALISING THE ENLARGEMENTS

The enlargements in 2004, 2007 and 2013 differed from previous ones for a number of reasons, which help to explain the subsequent increase in migration. First, income differentials between the new and old Member States were markedly larger than those of previous enlargement rounds. Second, the iron curtain and the subsequent maintenance of immigration restrictions on the accession states throughout the 1990s prevented large scale migration movements from the CEE States pre-enlargement.⁹ These circumstances led to a climate of fear amongst workers and trade unions in old Member States, particularly Austria and Germany, that the new Member States' economic integration following enlargement would lead to large migration flows, which would result in an intensification of competition within the labour market such as had not occurred after previous enlargements.¹⁰

As a result, transitional measures which severely restricted the right to free movement of citizens from Central and Eastern European states were proposed in 2000 by Germany, with the support of the main trade union confederation (DGB).¹¹ At the time of the 2004 enlargement, Germany had a high rate of unemployment which particularly affected low-skilled and unqualified workers.¹² As it was expected that Central and Eastern European nationals would primarily engage in these types of work in Germany, the government foresaw increasing tension and falling wages in the labour market, due to increased competition.¹³ Similar arguments were put forward in Austria, and it was estimated that the Austrian labour market would need up to twenty years to prepare for free movement of labour without restrictions.¹⁴ Geographical proximity between Germany, Austria, and the Central and Eastern

⁹ European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements* (Nuremberg, EIC, 2009), 2.

¹⁰ See further D Vaughan-Whitehead, *EU Enlargement versus Social Europe?: The uncertain future of the European Social Model* (Cheltenham, Edward Elgar, 2003).

¹¹ See DGB, *Die EU wird größer* (Berlin, DGB, 2004) and E Jileva, 'Visa and Free Movement of Labour: The Uneven Imposition of the EU *Acquis* on the Accession States' (2002) 28 *Journal of Ethnic and Migration Studies* 683.

¹² In 2004 there were approximately 4 million unemployed people in Germany: see Bundesagentur für Arbeit, *Arbeitsmarkt in Deutschland – Zeitreihen bis 2011*.

¹³ Bundeszentrale für politische Bildung, 'Fünf Jahre Arbeitnehmerfreizügigkeit in Deutschland', 28 April 2016 www.bpb.de/politik/hintergrund-aktuell/226107/arbeitnehmerfreizuegigkeit.

¹⁴ See E Walterskirchen and R Dietz, *Auswirkungen der EU-Osterweiterung auf den österreichischen Arbeitsmarkt. Studie im Auftrag der Bundesarbeitskammer* (Wien, Österreichisches Institut für Wirtschaftsforschung, 1998).

European States also led to predictions of a greater influx of workers to Germany and Austria than to countries which are geographically more distant. It was hoped that the time between enlargement (2004 and 2007) and the lifting of the transitional arrangements (2011 and 2014 respectively) would enable the new Member States to improve their economic and social conditions, to reduce the incentives to migrate, or to post workers.¹⁵ The legal basis for the transitional arrangements can be found in the Accession Treaties which (with the exception of those between the EU Member States and Cyprus and Malta) allowed Member States to enact national measures which restricted the free movement of workers from ‘new’ to ‘old’ Member States (and vice-versa) for the first two years following accession. The Accession Treaties further allowed the extension of these national measures for an additional period of three years. After that, an EU Member State that applied national measures could continue to do so for a further two years if it notified the Commission of serious disturbances in its labour market. Altogether, the national measures restricting access to the labour market cannot extend beyond an absolute maximum of seven years. Individuals moving as service providers are not affected by these provisions. Only Austria and Germany were permitted, under the Accession Treaties, to restrict the free movement of services involving the posting of workers for up to seven years post-accession (discussed below).

In practice, the transitional measures meant that most new Member State workers (from the 2004, 2007 and 2013 enlargements) required a work permit in order to take up a job in Austria or Germany during the full 7-year transition period (although Germany lifted its restrictions on Croatian workers on 30 June 2015). In Austria, citizens from the new Member States had to obtain a work permit (*Beschäftigungsbewilligung*), through their employer, from the public employment service (*Arbeitsmarktservice* – AMS) before being allowed to work.¹⁶ The AMS was required to carry out an economic needs check similar to that applicable to non-EU citizens before it could grant a work permit.¹⁷ In addition, the regional advisory board (*Regionalbeirat*), made up of representatives of the social partners and the employment service, had to authorise the employment of the new Member State worker concerned in order for a

¹⁵ DGB, *Die EU wird größer*, above n 11.

¹⁶ See §32(a) *Ausländerbeschäftigungsgesetz* (AuslBG). See G Chaloupek and J Peyrl, ‘EU Labour Migration: Government and Social Partner Policies in Austria’ in B Galgóczi, J Leschke and A Watt (eds), *EU Labour Migration since Enlargement: Trends, Impacts and Policies* (Aldershot, Ashgate, 2009).

¹⁷ See S Schumacher, J Peyrl and T Neugschwendtner, *Fremdenrecht* 4th edn (Wien, ÖGB Verlag, 2012), 305-7 and §4b AuslBG. In carrying out an economic needs check, citizens from new Member States had to be given preference over third-country nationals.

permit to be issued. Work permits were initially granted for one year; subsequent permits were issued for two years, followed by five years. The geographical remit of the permit also varied.¹⁸

In Germany, work permits (*Arbeitsgenehmigung-EU*) which were granted by the German Federal Employment Agency (*Bundesagentur für Arbeit*) were required for most jobs¹⁹ with exceptions for certain specific categories, namely students working during their holidays, managers and academics.²⁰ The work permit was initially in the form of a temporary permit (*Arbeitserlaubnis*) and, after 12 months of uninterrupted access to the labour market, the worker received a permanent work permit (*Arbeitsberechtigung*)²¹ which conferred a right of unhindered access to the labour market and which was not linked to the employer. New Member State workers could apply for the permit before or after entering the country. Once a work permit was granted, the worker could avail himself of his rights as a worker under EU law. Germany also had a large proportion of new Member State workers who entered the country as seasonal workers. These workers and their employers had to apply for a work permit from the Federal Employment Agency under a bilateral agreement signed between Germany and their home Member State. Germany signed bilateral agreements with all new Member States.²²

In addition, Austria and Germany negotiated a concession which allowed them to introduce transitional measures applicable to posted workers in service sectors where serious labour market disturbances were likely should free movement be granted. In Austria these included gardening/horticultural services, construction, home care, industrial cleaning and social work. Austrian employers wishing to post new Member State workers were required to apply for a ‘posting permit’ (*Entsendebewilligung*) before being permitted to post workers. Such a permit was granted only after a labour market check confirmed that Austrian workers were unable to carry out the relevant work.²³ In Germany, posted workers from the new Member States working in construction and related branches, industrial cleaning and interior decoration could work in Germany only within the framework of a service contract procedure

¹⁸ See § 14a and § 15 AuslBG. This system was abolished in 2014.

¹⁹ § 284 Abs. 1 Sozialgesetzbuch (SGB) III Arbeitsgenehmigungsrecht-EU.

²⁰ § 9 Arbeitsgenehmigungsverordnung (ArGV).

²¹ § 12a Abs. 1 and 4 ArGV.

²² For more information on the scheme as well as an overview of the legal framework see BMAS, *Information zur Beschäftigung ausländischer Saisonarbeitnehmer in der Landwirtschaft*, available at

http://www.vsse.de/vsse/offene_dokumente/FAQSaisonarbeitskraefte.pdf.

²³ §18(3) AuslBG.

(*Werksvertragsverfahren*) which imposed quotas on permissible numbers of workers entering the country and which were administered by the Federal Employment Agency. Posted workers from the new Member States thus still needed a work permit but the requirement for a visa was abolished.²⁴

The Austrian and German positions contrasted sharply with those of Ireland and the UK, where workers from the Central and Eastern European states that joined the EU in 2004 were granted free access to the labour market from the date of accession, with only minor restrictions being imposed. Both countries had adopted a more open approach to immigration before the 2004 enlargement, driven by labour market shortages.

In Ireland, migration had risen even before enlargement, during the period of the Celtic Tiger boom, as a result of a shortage of labour, coupled with a relatively unregulated, flexible labour market.²⁵ Ireland did not therefore avail itself of the transitional measures in order to restrict the free movement of labour in the context of the 2004 enlargement. However, following the United Kingdom's decision to introduce the Worker Registration Scheme (WRS) – discussed below – the Irish Government felt it necessary to place minor restrictions on new Member State workers' access to social and welfare benefits, so that Ireland would not be more attractive to job-seeking new Member State workers. A 'habitual residence condition' was thus introduced in 2004 in response to public concerns about 'welfare tourism'.²⁶ That restricted new Member State workers' access to welfare benefits for at least two years from their date of arrival in the British-Irish common travel area.²⁷ In order to fulfil the condition, a person needed to show both a right to reside in Ireland and habitual residence there. The latter was assessed by reference to five factors: whether Ireland was their main centre of interest; the length and continuity of residence; the length of purpose of any absences; pattern of employment; and, their future intention to remain in Ireland.²⁸ A different approach was then taken as regards labour market access by nationals of Bulgaria and Romania, which Ireland

²⁴ See further <https://www.arbeitsagentur.de/unternehmen/arbeitskraefte/werkvertragsverfahren>.

²⁵ G Collins and G Boucher, 'Irish Neo-Liberalism at Work?' in G Boucher and G Collins (eds), *The New World of Work: Labour Markets in Contemporary Ireland* (Dublin, Liffey Press, 2005), 8.

²⁶ J Heyes and M Hyland, 'Supporting, Recruiting and Organising Migrant Workers in Ireland and the United Kingdom: A Review of Trade Union Practices' in Galgóczi, Leschke and Watt, above n 16.

²⁷ The benefits were *inter alia* jobseekers' allowance, state pension (non-contributory), carers' allowance, disability allowance, and child benefit.

²⁸ Department of Employment Affairs and Social Protection, 'HRC - Guidelines for Deciding Officers on the determination of Habitual Residence' www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx.

restricted immediately following the 2007 enlargement (again in line with the United Kingdom's position). Bulgarian and Romanian nationals were required to apply for a twelve-month work permit before being able to start work in Ireland. The Irish Government initially announced in December 2011 that the system would remain in place until 2014.²⁹ However, the transitional measures were lifted with immediate effect in July 2012, when free access was granted in response to the low numbers of workers applying for work permits.³⁰ No restrictions were placed on Croatian nationals.

The United Kingdom had announced in December 2002 that it would not impose restrictions on new Member State workers.³¹ The decision not to impose transitional measures was informed by predictions that 13,000 – 15,000 new Member State workers would come to the UK per annum.³² However, there was a widespread fear that migrants would pose a threat to the benefits system and disrupt the labour market.³³ The United Kingdom Government thus announced a modification of its plans in February 2004, to require workers from the new Central and Eastern European states to register under a Worker Registration Scheme as permitted by the Accession Treaties.³⁴ The rationale was to enable monitoring, so that 'if, contrary to our expectations, the numbers cause particular problems in one sector of the economy or across the board, we will be able to act swiftly and to take the necessary measures to protect our labour market.'³⁵ The WRS required the worker to register within a month of joining a new employer.³⁶ Under the Accession Treaty, once the worker had been in continuous employment for 12 months they obtained full labour market access, and the duty to register ceased at that point. The WRS also had implications for access to social benefits: as that was limited to those legally resident in the United Kingdom, for most nationals of Central and

²⁹ M Freeman, 'Ireland to keep restrictions on Romanian and Bulgarian workers' *The Journal* 17 December 2011.

³⁰ A Beesley, 'Government ends restrictions on hiring Romanians and Bulgarians' *Irish Times* 21 July 2012. In 2011, twenty-nine Bulgarians and 313 Romanians applied for work permits under the scheme. See Department of Jobs, Enterprise and Innovation, *Labour Market Statistics* 2011, available at <http://www.djei.ie/labour/workpermits/statistics.htm>.

³¹ For a detailed overview of the debate in Ireland see N Doyle, G Hughes, and E Wadensjö, *Freedom of Movement for Workers from Central and Eastern Europe: Experiences in Ireland and Sweden* (Stockholm, SIEPS, 2006). For an overview of the United Kingdom's position see B Ryan, 'The Accession (Immigration and Worker Authorisation) Regulations 2006' (2008) 37 *Industrial Law Journal* 75.

³² Home Office memorandum of 24 February 2004, 'Consequences of EU Enlargement', published by the House of Commons Home Affairs Committee in 2003–04 *House of Commons Papers* 435

³³ See, for example, S Smith, 'Immigration Hysteria: What they said about ... Immigration and the EU – Tabloids threaten "Flood" of Gypsies', *Guardian*, 21 January 2004.

³⁴ See s 7 of the Accession (Immigration and Worker Registration) Regulations 2004 SI 2004/1219.

³⁵ Home Office, 'Consequences of EU Enlargement', above n 34.

³⁶ For a detailed overview see Ryan, above n 31.

Eastern European states, that would be dependent upon their being in employment and registered.³⁷ Later, in light of the large numbers of new arrivals post-2004, the Government took a political decision to restrict access to their labour market for Bulgarian and Romanian nationals (until 2014), and then for Croatian nationals (until 2018), all of whom were required to apply for permission from the Home Office to start work (for the first twelve months). In line with the various Accession Agreements, none of these restrictions applied however to posted workers or self-employed persons.

III. THE EFFECTS OF ENLARGEMENT UPON EMPLOYMENT LAW

A. Austria

Between 2004 and 2017, the number of new Member State citizens resident in Austria increased from 149,000 to 393,000.³⁸ However, the vast majority of foreign workers still originated from ‘old’ Member States, particularly Germany, and from third countries.³⁹ Overall, it is thought that new Member State workers integrated well into the Austrian labour market and there is only limited evidence that wages for low-skilled work stagnated during this period.⁴⁰ After 2007, there was also a steady rise in the number of posted workers sent from the new Member States to Austria.⁴¹ While Austria did not experience problems with posted workers such as those witnessed in Germany (see below), there were instances of workers being paid less than the collectively agreed wage.⁴²

The lifting of the transitional measures in 2011 created the necessary momentum for the adoption of the Anti-Wage and Social Dumping Act (*Lohn- und Sozialdumpingbekämpfungsgesetz* or LSD-BG) which regulates the payment of workers whose

³⁷ S Currie, *Migration, Work and Citizenship in the Enlarged European Union* (Aldershot, Ashgate, 2008).

³⁸ Information available from Statistik Austria, ‘Bevölkerung nach Staatsangehörigkeit und Geburtsland’, www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html.

³⁹ For an in-depth discussion and analysis of the figures see BMASK, *Arbeitsmarktöffnung 2011*, (Wien, Sozialpolitische Studienreihe, Band 12: 2012), chapter 3.

⁴⁰ *ibid.*

⁴¹ *ibid.*, 333.

⁴² *ibid.*, section 5.3.

employment relationship is governed by private law, including posted workers.⁴³ According to one trade unionist the law ‘would not have been possible without [the fear of low-wage immigration], so we have been pressing for this law for years and we could only push it through because Austrian politics was fearful of immigration.’⁴⁴ The LSD-BG mandates an administrative penalty for remuneration of any worker below minimum – and usually collectively-agreed – levels. In the case of posted workers, remuneration is assessed by reference to comparable Austrian workers.⁴⁵ The LSD-BG imposes joint liability upon the employer and the main contractor in this regard.⁴⁶ It requires employers to keep documentary records in German of the wages actually paid to posted workers, at their place of work.⁴⁷ Employers are also obliged to register postings with a central coordinating body.⁴⁸

Enforcement in Austria is carried out by a number of public bodies, depending on the location of the employer and the subject-matter.⁴⁹ The *Kompetenzzentrum LSDB*, a body created by the LSD-BG, is primarily responsible for posted work, save that in the construction industry this task falls to the Construction Workers’ Holiday and Severance Pay Fund (*Bauarbeiter-Urlaubs- und Abfertigungskasse* or BUAK).⁵⁰ The *Kompetenzzentrum* and BUAK receive notices of violation of the LSD-BG from the financial police, and can commission workplace inspections. Financial penalties arise in the case of failure to register posted work, failure to hold the relevant documents, and failure to pay appropriate wages.⁵¹ For example, penalties range from €1,000 - €10,000 per worker in the case of failure to pay appropriate wages, depending on the level of underpayment. The financial penalties are higher for repeat offenders and where more than three workers are concerned. The LSD-BG also makes provision for the enforcement of penalty notices abroad, although the actual enforcement of these notices may be difficult.⁵²

⁴³ §1 *Lohn- und Sozialdumpingbekämpfungsgesetz* (LSD-BG) BGBl I Nr. 2011/24 amended in 2016 BGBl I 2016/44. This section outlines the amended law which came into effect on 1 January 2017.

⁴⁴ Author’s interview, Proge, 2 July 2013. The interviews were carried out between 2008 and 2013 as part of a multi-year research project on the effects of the 2004 and 2007 EU enlargements on the Austrian, German, Irish, Swedish and British labour law systems. The research was in part funded by a British Academy Small Research Grant and the results were published in R Zahn, *New Labour Laws in Old Member States* (CUP, 2017).

⁴⁵ *Lohn- und Sozialdumpingbekämpfungsgesetz*, § 3(3).

⁴⁶ *Lohn- und Sozialdumpingbekämpfungsgesetz*, § 10.

⁴⁷ *Lohn- und Sozialdumpingbekämpfungsgesetz*, § 22.

⁴⁸ *Lohn- und Sozialdumpingbekämpfungsgesetz*, § 19.

⁴⁹ *Lohn- und Sozialdumpingbekämpfungsgesetz*, § 11.

⁵⁰ *Lohn- und Sozialdumpingbekämpfungsgesetz*, §§ 13 and 15.

⁵¹ *Lohn- und Sozialdumpingbekämpfungsgesetz*, §§ 26-29.

⁵² See Part 3 of the Act and M Lindmayr, *Das neue Lohn- und Sozialdumpingbekämpfungsgesetz: Die neue Rechtslage ab 1.1.2017*, (LexisNexis, 2016), 1.

The LSD-BG is considered to have been effective in ensuring that posted workers receive those rights to which they are entitled. By 2016, BUAk had served notices for underpayment of wages on 494 employers, covering 2,190 workers. Of these, 297 notices were brought against companies posting workers from the new Member States.⁵³ The success of the LSD-BG has been credited to the wide publication of the law amongst Austrian and foreign employers, the high penalties for breach of the law, and regular checks to ensure compliance.⁵⁴

The specifics of the Austrian labour law system also merit mention in this context. Collective agreements, which are legally binding and have the same force as a statute, regulate a large part of the employment relationship, in particular in respect of wages.⁵⁵ Approximately 98% of Austrian workers are covered by a collective agreement.⁵⁶ The main reason for the high coverage is the *Arbeitsverfassungsgesetz*, which provides that collective agreements extend to all members of the social partners.⁵⁷ Not only trade union members but also employers - and by extension all of their workers - who belong to the Economic Chambers (*Wirtschaftskammer Österreich* or WKÖ) are covered.⁵⁸ As membership in the WKÖ occurs *ex lege* as soon as an employer receives their licence to operate a business, the vast majority of employers are members of the WKÖ, and are thus covered by collective agreements.⁵⁹ When coupled with the joint liability provision of the LSD-BG, this system plays a vital role in ensuring that posted workers receive the same wages as comparable Austrian workers.

B. Germany

Despite the restrictions on access to its labour market, Germany remained an attractive destination for new Member State workers after 2004. The number of new Member State workers (including EU8, EU2 and Croatian nationals) increased from 438,828 in 2004 to 1.62

⁵³ BUAk, '5 Jahre Lohn- und Sozialdumping: Erfolge der BUAk im Überblick' (2017) www.buak.at/cms/BUAK/BUAK_0.a/1463650192969/home/home/5-jahre-lohn-und-sozialdumping.

⁵⁴ Ibid.

⁵⁵ *Arbeitsverfassungsgesetz*, §§ 2 and 11.

⁵⁶ R Mosler, 'Entwicklungstendenzen im Kollektivvertragsrecht' (2012) 3 *Das Recht der Arbeit* 283, 284.

⁵⁷ *Arbeitsverfassungsgesetz*, § 12.

⁵⁸ The WKÖ mainly represents small- and medium-sized enterprises.

⁵⁹ *Arbeitsverfassungsgesetz*, § 8.

million in 2019.⁶⁰ Polish and Romanian workers, whose numbers rose particularly following the lifting of the transitional measures in 2011 and 2014, make up the largest groups. Taken as a whole, the increase in migration was described as ‘manageable and controllable’.⁶¹ The vast majority of new Member State workers worked as skilled professionals, thereby filling labour market shortages.⁶² The generally positive political response to EU migration (as opposed to non-EU migration which has received a more mixed response⁶³) in Germany must be seen in the light of changing German demographics. As a result of a continual low birth rate and ageing population, Germany depends heavily on immigration of skilled labour.⁶⁴

However, allegations of wage undercutting resulting in the loss of local jobs emerged in certain sectors where posted work is prevalent, such as the meat industry and construction. There was evidence that service providers from the new Member States often paid posted workers wages well below the rates paid to Germans.⁶⁵ Workers who challenge their employer are often sent back to their country of origin only to be replaced by other workers.⁶⁶ Another issue which has arisen concerned social insurance contributions, which could be paid in the sending country and created the potential for non-payment because of a lack of cross-border enforcement.⁶⁷

The 1996 Posted Workers Act (*Arbeitnehmer-Entsendegesetz* or AEntG) had introduced the concept of joint liability, applicable to the German signatory of a service contract and a foreign subcontractor.⁶⁸ However, the extensive use of sub-contracting through German and foreign letterbox companies, and the cross-border nature of posted work make

⁶⁰ Bundesagentur für Arbeit, *Auswirkungen der Migration auf den deutschen Arbeitsmarkt Deutschland* (August 2019) <https://statistik.arbeitsagentur.de/Statistischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Auswirkungen-der-Migration-auf-den-Arbeitsmarkt.pdf>.

⁶¹ Interior Minister, Thomas de Maizière, quoted in F Gathmann, ‘Die aufgeblasene Armutseinwanderung’, *Der Spiegel*, 26 March 2014.

⁶² ‘Deutschland profitiert von Zuwanderung aus Osteuropa’, IZA Press, 30 December 2013.

⁶³ Particularly since the 2015 ‘refugee crisis’ when Germany adopted an open-door policy which resulted in 890,000 refugees arriving in one year. This has led to intense and ongoing political debates in Germany. See further O Kösemen, *Willkommenskultur in Deutschland* (Policy Brief Migration, Bertelsmann Stiftung, 12.2017) and Deutscher Bundestag, *Auswirkungen von Migration auf die deutsche Volkswirtschaft*, WD 5 - 3000 - 011/19, 27 February 2019.

⁶⁴ Bertelsmann Stiftung, *Zuwanderung und Digitalisierung*, 2019.

⁶⁵ L Czommer and G Worthmann, *Von der Baustelle auf den Schlachthof: Zur Übertragbarkeit des Arbeitnehmer-Entsendegesetzes auf die Deutsche Fleischbranche*, IAT-Report 2005/3 (Gelsenkirchen, Institut Arbeit und Technik, 2005).

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *Arbeitnehmer-Entsendegesetz* (AEntG), § 14.

enforcement of liability difficult despite the existence of joint liability.⁶⁹ For example, the Food, Beverages and Catering Union (*Gewerkschaft Nahrung-Genuss-Gaststätten*, or NGG) reported that, in the meat sector, workers were posted for years to the same employer, but that their contract changed every six months to another letterbox company, which went bankrupt when the tax authorities start to check, or when workers demand to be paid unpaid wages or holiday time.⁷⁰

The AEntG defines specific sectors in which a generally binding collective agreement for the sector applies to posted workers. From 1997 onwards, within the framework of the AEntG, sectoral minimum wages had been negotiated by the social partners in the construction industry and declared universally-applicable by the Federal Ministry of Labour and Social Affairs. After 2010, as a result of post-enlargement migration, the AEntG's scope was successively widened, to extend negotiated minimum wages in a number of sectors, including the meat industry, waste management, cleaning, forestry, and care work. However, such sectoral minimum wages depended on the social partners being able to negotiate a collective agreement in the first place. In sectors where this was either not possible or which were not included in the AEntG, posted workers could be paid the minimum wage of their country of origin.

The payment of low wages to posted workers, and the increase in post-enlargement migration through posted work, therefore intensified an ongoing political debate as to the benefits and disadvantages of a minimum wage.⁷¹ Between 1996 and 2013, low wage employment in Germany grew from 19.6% to 24.3% of workers.⁷² At the same time, collective agreement coverage declined: in 2015, only 51% of West German and 37% of East German workers were covered by a collective agreement, down from 70% and 56% respectively in 1996.⁷³ The German trade union confederation (DGB) therefore launched a nationwide campaign for the government to introduce a statutory minimum wage in 2007 as a result of the

⁶⁹ K McGauran, *The impact of letterbox-type practices on labour rights and public revenue*, (Brussels, ETUC, 2016).

⁷⁰ *ibid*, 22.

⁷¹ See A Buntentbach, 'Missbrauch von Werkverträgen', (Berlin, DGB, 29 July 2013).

⁷² SK Futh, *Strategische Kommunikation von Gewerkschaften*, (Wiesbaden, Springer, 2018), 254.

⁷³ *ibid*, 255.

increase in low wage employment and in light of the eventual lifting of the transitional measures in 2011.⁷⁴

The campaign for a statutory minimum wage sought to place an obligation on the government to intervene in the labour market by setting a wage applicable across *all* sectors. Despite employer opposition, the introduction of a statutory minimum wage enjoyed broad public support, and the relevant law was adopted in April 2014, before coming into effect on 1 January 2015.⁷⁵ There are now two parallel minimum wage systems. The statutory rate acts as a minimum threshold applicable across the board. Higher sectoral minimum wages can be negotiated by the social partners. The statutory minimum wage is set by an independent commission (*Mindestlohnkommission*) made up of employer and trade union representatives. Enforcement is carried out by the relevant statutory authorities (*Finanzkontrolle Schwarzarbeit*), and the main penalties for non- or under-payment are fines and possible exclusion from public contracts. The *Mindestlohnkommission* also runs a telephone hotline where workers can report breaches. Initial reports suggest that the statutory minimum wage has had a positive effect on the low wage sector overall.⁷⁶ In-work poverty has decreased while wages in the low-wage sector have increased. However, there is continued evidence that enforcement of payment of the minimum wage remains problematic, particularly in the service/catering industry, home care and construction.⁷⁷ This can be traced back to the limited resources allocated to the relevant enforcement authorities and the lack of workplace representation in these sectors through either works councils or trade unions.

The experience of post-enlargement EU migration is heavily sector-dependent. While Germany is reliant on immigration and the migration of skilled labour in particular is welcomed, its prevalence in the growing low-wage sector where workplace representation is weak or absent, has led to tensions in the labour market. Legislative reforms have had some success in tackling under-payment of wages and exploitation of workers but systemic enforcement problems remain.

⁷⁴ See DGB, *Die Mindestlohnkampagne im Rückblick* available at <https://www.dgb.de/schwerpunkt/mindestlohn/kampagne>.

⁷⁵ Mindestlohngesetz vom 11. August 2014 BGBl. I S. 1348.

⁷⁶ C Riechert and L Nimmerjahn, '2 Jahre Mindestlohn – ein positives Zwischenfazit' (2017) 65(2) *Arbeit und Recht* 45 and T Pusch, *Bilanz des Mindestlohns: Deutliche Lohnerhöhungen, verringerte Armut aber auch viele Umgehungen*, (Policy Brief WSI, Hans Böckler Stiftung, 03/2018).

⁷⁷ Pusch *ibid*, 4-6.

C. Ireland

Ireland experienced a large influx of workers immediately following the 2004 enlargement. By 2007, new Member State workers made up nearly 3% of the Irish population.⁷⁸ Between 2004 and 2007, a total of 422,958 Personal Public Service (PPS) numbers were issued to new Member State workers.⁷⁹ This was an unprecedented inflow of migrants looking for work in an economy whose labour force in 2004 was only 1.9 million.⁸⁰ The economic crisis which began in 2008 had a marked impact on migration flows to Ireland, however. Unemployment rose from 6.4% in 2008 to 14.7% in 2012.⁸¹ Amongst new Member State workers, unemployment increased from 5.5% in 2007 to almost 20% by 2010.⁸² New immigration also dropped sharply after 2007. Whereas in 2007, some 98,298 PPS numbers were issued to new Member State workers, the corresponding figures were 50,300 in 2008 and 18,448 in 2009.⁸³ Between 2010 and 2017, the rate remained relatively steady, with an average of 14,296 new PPS numbers issued to EU8 workers each year.⁸⁴ At the same time, the number of PPS numbers issued to Romanian, Bulgarian and Croatian workers steadily increased, from 2,914 in 2010 to 16,340 in 2017.⁸⁵ There is limited reliable data on the number of posted workers in Ireland, but the overall numbers of posted workers appear to be small, with a fall from 5,014 in 2010 to 4,159 in 2015.⁸⁶

It was generally thought that Ireland benefitted significantly from migration from the new Member States and the political debate around the effects of EU8 migration was positive in Ireland.⁸⁷ Reference was made repeatedly to Ireland's history of a country of emigration. For example, during the Second Stage of the Employment Permits Bill 2005, it was suggested that:

⁷⁸ G Hughes, *Free Movement in the EU: The Case of Ireland* (Berlin, Friedrich-Ebert-Stiftung, May 2011) 13.

⁷⁹ Based on Central Statistics Office data. See *Table FNA02: Employment Activity of Foreign Nationals by Broad Nationality Group, Year of Entry and Year*, at statbank.cso.ie/px/pxeirestat/statire/SelectVarVal/Define.asp?Maintable=FNA02&PLanguage=0.

⁸⁰ Hughes, *Free Movement in the EU*, above, n 78.

⁸¹ Central Statistics Office, *Seasonally Adjusted Standardised Unemployment Rates (SUR)*, 2008-2012.

⁸² Hughes, *Free Movement in the EU*, above n 78 at 15.

⁸³ Central Statistics Office, *Table FNA02*, above n 79.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Information from Jozef Pacolet and Frederic De Wispelaere, *Posting of workers Report on A1 portable documents issued in 2015* (European Commission, 2016)

ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes.

⁸⁷ Hughes, *Free Movement in the EU*, above n 78.

The Government's progressive strategy was demonstrated by its brave decision to allow workers from the new EU member states to live and work in Ireland. This decision has benefited not only our economy but also our society in terms of the diversity one sees in every town in the country. [...] It is wonderful, therefore, that the Minister and the Government are giving an opportunity to people from abroad to come to Ireland and secure employment. We are reciprocating what was done for us in Britain and elsewhere.⁸⁸

Despite such positive rhetoric, concerns around social integration of new Member State workers remained. As Hughes points out, the social partners 'expressed concerns about the strain which [EU migration] had placed on infrastructural, educational and other resources and about the speed at which the foreign-born population increased from around three per cent to 10 per cent in the ten year period 1996-2006.'⁸⁹ In addition, even though workers who came to Ireland from the new Member States were predominantly young, and often highly educated, they were willing to 'downgrade' and to work for low wages in low-skilled jobs.⁹⁰ Some data indicating that new Member State workers in certain, labour-intensive sectors earned less than comparable native employees, or were paid less than collectively-agreed rates of pay.⁹¹ There was however no evidence of major displacement of Irish workers by new Member State workers.⁹² In large part, this seems due to the reforms promised following the Gama and Irish Ferries disputes which occurred shortly before (Gama) and immediately after (Irish Ferries) the enlargements.

The first phase of the Irish Ferries dispute began in December 2004, when it reflagged one of its vessels – which operated between Ireland and France - to the Bahamas, and then sought to replace 150 Irish-based workers with agency staff, who were to be paid substantially less than the Irish minimum wage.⁹³ Although that initial dispute was settled in early 2005

⁸⁸ Seanad Éireann Debate, vol. 183, No. 50, Employment Permits Bill 2005: Second Stage, 24 May 2006.

⁸⁹ Hughes, *Free Movement in the EU*, above n 78, 25. See also ICTU, *Observations and Recommendations on the Application of Transitional Measures on the Accession of Bulgaria and Romania to the EU on 1st January 2007* (Dublin: ICTU, 2006); and Dáil Éireann Debate, vol. 625, 11 October 2006, Priority Questions – EU Enlargement for Fine Gael's position.

⁹⁰ See A Barrett, S McGuinness and M O'Brien, 'The Immigrant Earnings Disadvantage across the Earnings and Skills Distribution: The Case of Immigrants from the EU's New Member States' (2012) 50 *British Journal of Industrial Relations* 457.

⁹¹ *ibid*

⁹² FÁS, *The Irish Labour Market Review 2006* (Dublin, FÁS, 2006), 7.

⁹³ For a detailed overview of the facts see T Krings, 'Irish Ferries, Labour Migration and the Spectre of Displacement' in M Corcoran and P Share, *Belongings: Shaping Identity in Modern Ireland* (Dublin: Institute of Public Administration, 2008).

following industrial action, in September 2005 the company announced the replacement of a further 543 Irish-based workers on its British-Irish routes, by Central and Eastern European agency workers who would be posted to work. To facilitate this change, three further ships were to be flagged in Cyprus, in order to circumvent applicable Irish labour law and, in particular, minimum wage legislation. In response, SIPTU, the trade union concerned, requested the Labour Court to recommend that the terms and conditions of employment of those Irish-based workers who wished to stay with the firm would remain at current levels, and that the collective agreement be maintained until it could be voluntarily renegotiated. The Labour Court acceded to both requests.⁹⁴ A deal between SIPTU and Irish Ferries would be reached in mid-December 2005 which allowed the outsourcing to proceed, but on the basis that the Irish minimum wage would be enforced.

The Gama case did not involve EU nationals but it raised similar concerns to the Irish Ferries dispute in that posted workers were being paid less than the mandated minimum. It was also linked with the Irish Ferries dispute in subsequent campaigns and so merits mention. The case began in 2000 and involved the posting by a Turkish company of 600 Turkish workers to work on a number of public infrastructure projects for its wholly owned Irish subsidiary (Gama Ireland).⁹⁵ In 2005, it came to light that Gama was paying workers below both the registered employment agreement which set wage rates in the construction industry and the national minimum wage. Following an investigation by the Labour Inspectorate and the relevant trade unions, it became clear that work records had been destroyed and workers' money was being paid into a complex web of international bank accounts. The dispute was initially resolved through the Labour Relations Commission in August 2005, when Gama agreed to abide by the relevant registered employment agreement. However, a separate action was brought on behalf of 491 Turkish workers in the Irish courts claiming *inter alia* unpaid overtime, punitive damages and accumulated interest, for a total amount of €40.3m.⁹⁶ The Court of Appeal upheld two High Court decisions permitting the Irish courts to hear the claims. However, after the case was brought, the majority of workers left Ireland and Gama Ireland ceased to operate,

⁹⁴ *Irish Ferries v. Seaman's Union of Ireland* CD/05/1016 Recommendation No. 18390 11th Nov. 2005.

⁹⁵ See further A Afonso, 'The Domestic Regulation of Transnational Labour Markets: EU Enlargement and the Politics of Labour Migration in Switzerland and Ireland' in L Bruszt and R Holzhaecker (eds), *The Transnationalization of Economies, States and Civil Societies: New Challenges for Governance in Europe* (London: Springer, 2009).

⁹⁶ See *Abama & ors v Gama Construction (Ireland) Ltd & anor* [2015] IECA 179 (31 July 2015) and 'Court upholds right of Gama workers to take cases in Ireland' *Irish Times*, 31 July 2015.

highlighting the difficulty of sanctioning a non-compliant employer based in a foreign jurisdiction.

In response to the Irish Ferries and Gama cases, in December 2005, the Irish Congress of Trade Unions organised a national day of protest under the heading ‘Equal Rights for all Workers’.⁹⁷ It also delayed its agreement to participate in new social partnership negotiations (planned for 2006) until it received guarantees from the government and employers that employment laws and their enforcement would be strengthened, in order to prevent a recurrence of such cases.⁹⁸ The outcome of the social partnership negotiations was the ten-year agreement - *Towards 2016* – concluded in June 2006, which set out a number of measures designed to improve the protection of workers’ rights in Ireland.⁹⁹ These measures included the establishment of a statutory office dedicated to employment rights compliance, a substantial increase in the number of Labour Inspectors, and higher penalties for non-compliance with employment law. A National Employment Rights Authority (NERA) was set up on an interim basis in 2007 as an agency of the Department of Jobs, Enterprise and Innovation, to provide impartial information on employment rights legislation to employers and employees and to monitor enforcement of employment rights through labour inspections. The Employment Law Compliance Bill 2008 was to have given a statutory footing to NERA and to enact the other measures agreed in *Towards 2016*, but the pressures of the economic crisis meant that the Bill was allowed to lapse in 2011. At the same time, as Doherty pointed out, ‘one consequence of austerity [was] a reduction in resourcing of all State agencies, compromising their ability to adequately carry out their functions.’¹⁰⁰

The Workplace Relations Act 2015 then introduced a range of reforms to the enforcement of employment standards.¹⁰¹ It established the Workplace Relations Commission (WRC), which subsumes the existing employment tribunals, including a labour inspectorate to replace NERA, so ensuring that one single body dealt with all employment claims at first

⁹⁷ Hughes, *Free Movement in the EU*, above n 78, 23.

⁹⁸ *ibid.*

⁹⁹ <https://www.welfare.ie/en/downloads/Towards201626June06.pdf>. As a result of the economic crisis, *Towards 2016* was modified by a Transitional Agreement in 2008-2009: https://www.ictu.ie/download/pdf/t16_review_and_transitional_agreement_oct_08.pdf.

¹⁰⁰ M Doherty, ‘New Morning? Irish Labour Law Post-Austerity’ (2016) 39(1) *Dublin University Law Journal* 29.

¹⁰¹ For an overview and discussion of the reforms see M Bolger, ‘The Workplace Relations Bill: World-class or Legally Flawed?’ (2015) 12(1) *Irish Employment Law Journal* 21; A Kerr, ‘The Workplace Relations Reform Project’ (2016) 7(1) *European Labour Law Journal* 126.

instance.¹⁰² The focus of the Act is on early resolution of disputes as close to the workplace as possible. The WRC has a statutory duty to ensure high standards of compliance with employment legislation.¹⁰³ Inspectors appointed under the Act have extensive powers, to enter workplaces, to inspect records, and issuing compliance notices and fixed payment notices where an employer has breached its obligations.¹⁰⁴ Failure to comply with a compliance notice is a criminal offence.¹⁰⁵ Overall, the reforms of the Act have been welcomed, as it makes the system of rights enforcement easier to navigate for all workers. However, the emphasis on the resolution of individual rights-based disputes leaves room for doubt as to the extent to which its mechanisms will be effective for migrant workers, given the lack of support for individual workers at workplace level, through trade unions or otherwise.

Irish employment legislation applies in principle in its entirety to all workers, including posted workers. That principle included registered employment agreements (REAs) in those sectors where they had been agreed, such as the construction industry. However, in 2013 the Supreme Court declared the system of universally-applicable REAs unconstitutional, on the grounds that it was an impermissible exercise of legislative power to bind employers who were not party to an REA. Although the Industrial Relations (Amendment) Act 2015 reintroduced the REA system, REAs now only bind the workers and employer(s) that are parties to the agreement. Ireland thus lacks a mechanism to declare collective agreements universally applicable, and posted workers are entitled to the national minimum wage, but cannot enforce higher rates of pay contained in collective agreements, if their employer is not party to the agreement. The 2015 Act permitted this problem to be alleviated in some sectors through Sectoral Employment Orders (SEOs). Applications to adopt an SEO may be made by a trade union alone, by an employer organisation alone, or jointly by both, provided the union or employer organisation is ‘substantially representative’ of the workers or employer ‘of the particular class, type or group in the economic sector’ concerned.’¹⁰⁶ An SEO does not involve bargaining between employers and unions, but rather the unilateral imposition of standards in relation to pay, sick pay and pensions by Ministerial Order, after a recommendation from the Labour Court.¹⁰⁷ It is a pre-condition to examination of a recommendation by the Labour Court

¹⁰² Workplace Relations Act 2015, s. 41.

¹⁰³ Workplace Relations Act 2015, s. 11.

¹⁰⁴ Workplace Relations Act 2015, ss. 28 and 36.

¹⁰⁵ Workplace Relations Act 2015, s. 7

¹⁰⁶ Industrial Relations (Amendment) Act 2015, s 14(2).

¹⁰⁷ Industrial Relations (Amendment) Act 2015, ss 16 and 17.

that it is satisfied that it is ‘normal and desirable’ or ‘expedient’ to have the SEO proposed, and that a recommendation would promote ‘harmonious relations’ in the sector.¹⁰⁸ An employer in a sector where an SEO operates may apply for an exemption for a maximum period of 24 months, but only on the basis that the employer’s business is “experiencing severe financial difficulties”.¹⁰⁹ The first SEO was adopted in October 2017 in the construction sector, and was followed by Orders for mechanical engineering in 2018 and electrical contracting in 2019.¹¹⁰

Overall, new Member State workers integrated well into the Irish labour market due, in large part, to its flexibility, a growing economy, and a shortage of low-skilled labour at the time of the 2004 enlargement. Although enforcement problems of labour rights remain, the rapid increase in migration did not lead to negative reactions from Irish-based workers (unlike in the UK – see below). In part, this is due to a wave of legislative reforms triggered by three concurrent events: the arrival of large numbers of new Member State workers after 2004, the Irish Ferries dispute, and the Gama case. Taken together, these three events provided the necessary momentum for substantial employment law reforms. As David Begg, the General Secretary of Congress, explains:

We had to make a working assumption that, if not addressed, it was only a matter of time before we had another Irish Ferries situation, albeit on land. Without a robust legal and enforcement architecture to deal with it our evaluation was that such a dispute would release very damaging social and racial tensions.¹¹¹

The measures which were negotiated in 2006 were described by Congress’s General Secretary in the following terms:

I have no hesitation in saying that these measures in their totality, and in the context of the legislation necessary to implement them, represents the single biggest leap forward in social policy initiated in this country. Other important social policy changes were inspired by the EU but this is the biggest thing we have ever done of our own volition.¹¹²

¹⁰⁸ Industrial Relations (Amendment) Act 2015, s 15.

¹⁰⁹ Industrial Relations (Amendment) Act 2015, s 21.

¹¹⁰ Sectoral Employment Order (Construction Sector) 2017 (SI No 455 of 2017), Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2018 (SI No. 59 of 2018) and Sectoral Employment Order (Electrical Contracting Sector) 2019 (SI No 251 of 2019). All of these cover pay rates, sick pay and pensions.

¹¹¹ D Begg, ‘Managing the Labour Market: Implications of EU Expansion and Ireland’s Experience’, Address to conference on Race and Immigration in the New Ireland, University of Notre Dame, 14-17 October 2007.

¹¹² D Begg, ‘Immigration, Integration and Cultural Identity’ (2007) 2 *Translocations* 181, 185.

Although not all of the measures were implemented due to the onset of the economic crisis, there have nonetheless been a number of reforms in recent years which, in their entirety, mean that Irish labour law has changed significantly due, in part, to post-enlargement migration.

D. United Kingdom

At the time of the 2004 enlargements, employers in the United Kingdom labour market – as in Ireland’s – were often struggling to find workers to fill posts, typically for low-skilled or physically strenuous work, in key areas of employment such as agriculture, construction, food-processing and hospitality. After the opening of the labour market, by 2007, nationals of new member states made up about 1% of the population in the UK.¹¹³ Between 2004 and 2008, 1.24 million National Insurance Numbers were allocated to new Member State workers in the UK, and a total of 926,000 applications were approved under the Worker Registration Scheme.¹¹⁴ By May 2016, it was estimated that 2.1 million EU citizens were working in the UK.¹¹⁵ The global financial crisis, and its disproportionate impact on Southern European States, also led to an increase in migration to the United Kingdom from the old Member States. The number of EU citizens migrating to the United Kingdom fell after the 2016 referendum on EU membership in 2016, but as of August 2019 there were still more EU citizens coming than leaving.¹¹⁶ The number of posted workers in the UK remains low although numbers have increased to 57,226 workers in 2015.¹¹⁷ Data is limited but the majority work in construction, education and industry.

As in the case of Ireland, the United Kingdom’s flexible labour market made it an ideal host country for workers from the new Member States who were often willing to work for low wages in low-skilled jobs.¹¹⁸ There was no evidence that the presence of new Member State workers led to a lowering of employment terms and conditions. Yet this did not prevent a

¹¹³ European Integration Consortium, *Labour Mobility within the EU*, 23.

¹¹⁴ Migration Advisory Committee, *Review of the UK’s transitional measures for nationals of member states that acceded to the European Union in 2004*, April 2009, 17.

¹¹⁵ Office for National Statistics, *Migration Statistics Quarterly Report: May 2016*.

¹¹⁶ Office for National Statistics, *Migration Statistics Quarterly Report: August 2019*.

¹¹⁷ European Commission, *Country factsheet: posted workers in the UK 2016* (2018) available at https://ec.europa.eu/social/main.jsp?pager.offset=25&advSearchKey=posted+workers+&mode=advancedSubmit&catId=1307&doc_submit=&policyArea=0&policyAreaSub=0&country=0&year=0.

¹¹⁸ See M Sumption and W Somerville, *The UK’s New Europeans: Progress and Challenges Five Years after Accession*, Equality and Human Rights Commission Policy Report, together with the Migration Policy Institute, January 2010, 5.

significant perceived negative impact of post-enlargement migration in the United Kingdom which conflated posted work (where numbers are comparatively low in the UK) and free movement of workers. The best known example is the Lindsey oil refinery dispute.¹¹⁹ In December 2008, part of the work on the construction of a new unit at the plant was subcontracted to an Italian company (IREM), which posted its own permanent workforce of foreign nationals to the United Kingdom to carry it out. The decision not to use any local labour resulted in a series of wildcat strikes at the Lindsey Oil Refinery and across the country in 2009. Particular concern was raised in the dispute that it had been awarded the contract because they were able to supply labour at rates that under-cut the British firms who had agreed to an industry standard contained in a collective agreement.

The PWD gives Member States two options to use collective agreements as a method of implementation of the requirements of the Directive. The first option requires collective agreements to be declared universally applicable, i.e. binding on all undertakings in the geographical area and in the profession or industry concerned. The second option allows Member States to base themselves on either — (i) collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned; or (ii) collective agreements which have been concluded by the most representative employers and labour organisations at national level and which are applied throughout the national territory. The United Kingdom does not rely upon either possibility, as it has no legal mechanism which allows collective agreements to be declared universally applicable. IREM was, therefore, by law, not obliged to pay the level set in the relevant collective agreement for the industry.¹²⁰ Although there was no evidence that IREM had breached the industry's standard terms and conditions, the dispute at the time generated a large amount of political and public support. There was a widespread feeling, as evidenced by many of the placards bearing Gordon Brown's pledge of 'British Jobs for British Workers', that British workers should be accorded preference over foreign nationals, in this case EU workers, in the allocation of employment contracts. The underlying issues surrounding the PWD were not well understood in the public debate and were obscured by broader concerns around immigration (particularly, but not limited to, EU migration). Following the election of the Conservative-Liberal Democrat

¹¹⁹ See further ACAS, *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute*, 16 February 2009 <http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0> and R Zahn, "British Jobs for British workers": The problem of collective agreements in the UK' (2010) *Juridical Review* 181.

¹²⁰ See further C Barnard, "British Jobs for British Workers": The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38(3) *Industrial Law Journal* 245, 256–257.

government in 2010, changes were made to all EU migrants' entitlement to out-of-work benefits, and to the habitual residence test which proves entitlement to benefits from 2014.¹²¹ Concerns around EU immigration would continue to come to the fore strongly in the run-up to the 'Brexit' referendum held in June 2016.¹²²

Enforcement of workers' terms and conditions is done through a number of organisations: Her Majesty's Revenue and Customs (HMRC) (the minimum wage); the Health and Safety Executive (HSE) (health and safety); the Employment Agency Standards Inspectorate (EASI) (the rights of agency workers); and the Gangmasters Licensing Authority (GLA).¹²³ The GLA was created to enforce the licensing requirement upon labour market intermediaries (agencies and gangmasters) in the farming, food processing and shellfish gathering sectors which was imposed by the Gangmasters (Licensing) Act 2004. The 2004 Act was introduced following the death of Chinese cockle pickers at Morecambe Bay and heavy campaigning by trade unions who saw the GLA as a way to integrate new Member State workers into the labour market.¹²⁴ It is an offence to operate as a gangmaster without such a licence. Since 2012, the GLA has focused on cases where criminal activity has been alleged and on 'the most severe extremes of worker exploitation'.¹²⁵ As Barnard and Ludlow point out, that meant that 'individuals suffering from lower level denial of employment rights do not get the support they need.'¹²⁶

The Immigration Act 2016 then introduced changes to the GLA, including renaming it as the Gangmasters and Labour Abuse Authority (GLAA), and widening its remit to cover what are termed 'labour market offences' under the Employment Agencies Act 1973, the National Minimum Wage Act 1998, the Gangmasters (Licencing) Act 2004 Act and the

¹²¹ See the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 (SI 2013 No. 3032), the Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 (SI 2013 No. 3196), and the Housing Benefit (Habitual Residence) Amendment Regulations 2014 (SI 2014 No. 539).

¹²² See further M Goodwin and C Milazzo, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit' (2017) 19(3) *British Journal of Politics and International Relations* 450.

¹²³ For a broader discussion of the powers of the different agencies and their role in relation to the enforcement of migrant workers' rights, see C Barnard, A Ludlow and S Fraser Butlin, 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' (2018) 47 *Industrial Law Journal* 226-262.

¹²⁴ See further B Ryan, 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain' (2005) 27 *Comparative Labor Law and Policy Journal* 27 and Author's Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

¹²⁵ See the written ministerial statement of Department for Environment, Food and Rural Affairs minister Lord Holbeach, House of Lords 24 May 2012, col WS95 and Department for Environment, Food and Rural Affairs, *Report of the Triennial Review of the Gangmasters Licensing Authority* (April 2014).

¹²⁶ Barnard, Ludlow and Fraser Butlin, 'Beyond Employment Tribunals', above n 123, 28.

Modern Slavery Act 2015.¹²⁷ The GLAA's newly-created Labour Abuse Prevention Officers have the power to arrest suspects, to enter and search premises where they have a reasonable belief that labour market offences are being committed, and to seize evidence.¹²⁸ The changes concerning labour market offences apply to all sectors of the labour market. The 2016 Act also gives the Secretary of State the power to extend GLAA licensing to cover sectors other than farming, food processing and shellfish gathering, though that power has not been used at the time of writing.¹²⁹ These reforms implemented the 2015 Conservative Party manifesto commitment to 'introduce tougher labour market regulation to tackle illegal working and exploitation'.¹³⁰

As in Ireland, new Member State workers, including posted workers (whose numbers are small), generally integrated well into the labour market although enforcement of labour rights remains an issue. The large increase in EU migration after 2004 gave the necessary momentum for the introduction of the GLA but other employment law reforms were limited. However, the perceived uncontrollable nature and negative impact of post-enlargement migration has continued to dominate policy debates on the regulation of immigration in the labour market.

IV. EUROPEAN LABOUR LAW REFORM

The period since the end of the 20th century has largely been one of legislative stagnation in the social policy sphere at the EU level. The main debates over post-enlargement labour law reform have centred on a revision of the PWD, prompted by the decision of the CJEU in *Laval*. In an initial response, in March 2012 the European Commission published two legislative proposals. One proposal – known as 'Monti II' – was for a Regulation to regulate the right of workers to take collective action in the context of the freedom of establishment and the freedom to provide services.¹³¹ That proposal was eventually withdrawn after objections by national

¹²⁷ Immigration Act 2016, ss 3 and 10. The 2016 Act also introduced a number of other changes including a Labour Market Enforcement Agency which are discussed in detail in ACL Davies, 'The Immigration Act 2016' (2016) 45(3) *Industrial Law Journal* 431.

¹²⁸ Immigration Act 2016, s 12.

¹²⁹ Gangmasters (Licensing) Act 2004, s 3(5), as amended by Immigration Act 2016, Sch 3, para 17.

¹³⁰ *Conservative Party Manifesto 2015*, 31.

¹³¹ COM (2012) 130 final, 21 March 2012.

parliaments and others.¹³² The second proposal was for a Directive concerning the enforcement of the Posted Workers Directive, and that was adopted with minor amendments in May 2014.¹³³ The Enforcement Directive aims *inter alia* to raise the awareness of posted workers and companies of their rights and obligations as regards the terms and conditions of employment; to improve cooperation between national authorities in charge of posting; to clarify the definition of posting increasing legal certainty for posted workers and service providers; and, to define Member States' responsibilities to verify compliance with the rules laid down in the PWD. The Enforcement Directive also introduced joint liability for subcontractors in the construction industry. However, the Directive did not address inequality of treatment between posted and local workers, and failed to introduce an EU-wide monitoring system to reduce problems of differential treatment across Member States, or the non-payment of social security contributions in either the home or host Member State.¹³⁴

In a second phase, on 8 March 2016, as part of a 'mobility package', the European Commission proposed a Directive amending the PWD, to complement the Enforcement Directive. The revised Directive was adopted on 28 June 2018.¹³⁵ The revised PWD replaces the reference to 'minimum rates of pay' in article 3(1) of the PWD with the term 'remuneration', and imposes an obligation on Member States to publish information on the constituent elements of remuneration. This means that employers have to apply the rules of the host country in relation to pay/remuneration, as laid down by law or by universally applicable collective agreements, and not just the minimum rates of pay. This amendment builds on the case law of the CJEU in *Sähköalojen ammattiliitto ry*¹³⁶ by entitling posted workers to some of the same advantages such as bonuses, or pay increases according to seniority as local workers. In addition, rules set by universally-applicable collective agreements will become mandatory in all sectors, whereas previously they were so only in the construction sector. The amendments extend the equal treatment principle to posted temporary agency workers, with

¹³² For an overview of the difficulties encountered by the Regulation see The Adoptive Parents, 'The Life of a Death Foretold: The Proposal for a Monti II Regulation' in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Oxford, Hart Publishing, 2016).

¹³³ COM (2012) 131 final, 21 March 2012 and Directive 2014/67 [2014] OJ L 159. For an analysis of the Enforcement Directive, see J Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22 (2) *Transfer* 149.

¹³⁴ See D Schiek, *EU Social and Labour Rights and EU Internal Market Law: Study for the EMPL Committee* (European Parliament, 2015), p 62 and R Zahn, 'Revision of the Posted Workers' Directive: a Europeanisation perspective' (2017) *Cambridge Yearbook of European Legal Studies* 187.

¹³⁵ Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

¹³⁶ *Sähköalojen ammattiliitto ry v Elektrobudowa*, C-396/13, EU:C:2015:86.

respect to remuneration and working conditions. The duration of posting will be limited to twelve months with a possible six-month extension. After this time, the posting can continue but host Member States shall apply all national terms and conditions of employment to the posted worker (rather than just the mandatory list contained in art. 3(1)) as set down in law or collective agreement.¹³⁷ Road transport workers are exempt from the revised PWD; they will be subject to a ‘lex specialis’ on the mobility sector. The revised PWD does not make provision for shared liability which is particularly unfortunate in light of the problems that have arisen with subcontracting chains in all four countries discussed in this chapter.

The Directive is a step in the right direction in that it recognises a problem with the status quo. The introduction of the equal treatment principle, in particular, is to be welcomed. In addition, the use of the term ‘remuneration’ allows for the inclusion of a variety of different elements as part of a pay package. The inclusion of a limit on posting periods is also to be welcomed. However, the Directive falls short in three areas. First, it disregards the full range of wage-setting mechanisms in the member states. As such, the proposed Directive does little to tackle inequality in those countries which make limited or no use of universally applicable or generally applicable collective agreements, but rely instead on other forms of agreement.

Second, although the European Commission recognised the unreliability of existing data on posted work, the proposed Directive fails to establish a more reliable system for the collection of data.¹³⁸ The difficulty at present is that the collection of data depends on the host State’s requirements. In the UK and Ireland, for example, the lack of a requirement to register a posting makes identification of posted workers, and determining their length of time in the country, difficult. Although article 5 mandates Member States to provide effective, proportionate and dissuasive penalties against undertakings that fail to comply with the Directive, it does not establish a uniform system for the collection of reliable data. It therefore remains to be seen whether the PWD’s revised provisions will be effective.

Finally, the revised Directive does not address cross-border enforcement. Regulation 2019/1149¹³⁹ establishes a European Labour Authority (ELA) which was launched in October

¹³⁷ Article 3(1a) although there are limited exceptions contained in art. 3(1a)(a)-(b).

¹³⁸ See European Commission, *Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services* SWD (2016) 52 final.

¹³⁹ Regulation 2019/1149 of 20 June 2019 establishing a European Labour Authority OJ L 186/21.

2019. The European Labour Authority's remit is to assist the Member States and the Commission in their effective application and enforcement of EU law related to labour mobility across the EU and the coordination of social security systems. A number of cases involving posted workers were referred to the ELA for investigation as soon as it commenced work.¹⁴⁰ Although the ELA cannot enforce decisions, it provides a welcome forum for national authorities to cooperate and exchange information on issues of concern around labour mobility, in particular posted workers.

V. CONCLUSION

The EU's Eastern enlargement – unprecedented in terms of its size, historical significance and political and economic consequences – led to a large rise in the number of workers taking avail of their rights under EU free movement law to move from one Member State to another. Most new Member State workers travelled to Austria, Germany, Ireland and the UK despite the existence of transitional measures in the former two countries. New Member State workers integrated well into the host labour markets but the rapid increase in migration placed a burden on local infrastructure, particularly in the UK and Ireland which did not expect large numbers of new arrivals.

There were employment law reforms in all four countries in the period after enlargement although the links to post-enlargement migration are not always clear and often formed part of broader immigration debates. The increase in post-enlargement migration served as a trigger for the adoption of measures to regulate low-wage sectors and low-skilled employment. The reform that was most directly linked to fears of wage undercutting by EU workers was in Austria, where the comprehensive LSD-BG, adopted in 2011, appears to have had its intended effect of preventing payment of wages below collectively agreed-rates. In Germany, from 2010 onwards, the widening of the scope of the Posted Workers Act (the AEntG) was a result of increased migration. At the same time, the introduction of a statutory minimum wage in 2014-2015 was not as a direct consequence of the EU enlargement, although fears over low-wage migrant labour contributed to the success of the campaign. In Ireland, the

¹⁴⁰ <https://www.etuc.org/en/pressrelease/unions-refer-first-exploitation-cases-new-european-labour-authority-investigation>.

presence of migrant workers, including posted workers, contributed to the creation of the National Employment Relations Agency (2007) and then the Workplace Relations Commission (2015) to strengthen the enforcement of employment rights, and to establishment by the Industrial Relations (Amendment) Act 2015 of sectoral minimum rules. In the United Kingdom, the GLA was seen as a way to integrate new Member State workers into the labour market.

At EU level, reforms concentrated on dealing with the consequences of an increase in posted work following the enlargements whose negative effects (although well-publicised) are largely concentrated in certain sectors and limited to particular countries. The revision of the PWD coupled with the adoption of the Enforcement Directive and the establishment of the European Labour Authority addresses many of the problems flagged up in relation to posted workers, and the reforms are therefore to be welcomed. Yet concerns remain over effective cross-border enforcement, shared liability, and the collection of reliable, comparable data.

Overall, the Austrian, German, Irish and British labour law systems were able to accommodate large numbers of new Member State workers, the majority of whom work in low-skilled, labour intensive sectors. There is limited causality between the EU enlargements and labour law reforms although the increase in migration (or the fear thereof) was used in all four countries to introduce legislation to better regulate low-wage employment. Yet, although labour markets have absorbed the new arrivals, new Member State workers' impact on their host country's societies should not be under-estimated. Long-term, social integration has not been straightforward. Post-enlargement migration has led to an intensification of competition in the labour market and placed a burden on health, education and infrastructure in local communities at a time when these were already struggling to adapt to an increasingly globalised world; effects that 'the law' – particularly at EU level – has not been able to deal with adequately and which, in many countries, has polarised debates on immigration.