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THE ENFORCEMENT OF POSTED WORKERS' RIGHTS ACROSS THE EUROPEAN UNION

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1. Introduction

In the European Union ('EU') legal order the protection of posted workers has been addressed through various legislative acts with the aim of regulating substantial aspects, i.e. work terms and conditions when moved temporarily abroad by virtue of the principles of equal treatment and non-discrimination, and, as happened recently, through procedural measures mainly falling within the administrative and judiciary cooperation where mutual trust shall govern.

The aim of the present analysis is to go through the European framework on the posting of workers, the underlying principles and relevant legislation, and then focus on those provisions concerning the defence of their rights. Although workers related matters are under Member States' sovereignty, it is certainly welcome a European action that introduce obligations and uniform requirements in order to pursue and ensure a high level of effectiveness of posted workers' protection. That is why attention is paid to the Enforcement Directive and its implementation into the Italian legal order, given that it raises issues related to judicial remedies and, in particular, to cross-border collective redress. Transnational litigation in employment contexts still does not find a legislative basis at EU level and private international law issues need to be addressed as well, given their function of safeguarding weaker parties by establishing protective grounds for the determination of jurisdiction and applicable law. In light of the existing regulations and non-binding instruments the necessity to act is pointed out.

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2. The protection of posted workers across the European Union

The free movement of workers across the European Union granted by EU primary law[1] is closely linked to the creation of an area of freedom, security and justice. Thanks to the European economic integration process, mobility of workers has increased, and in recent years many efforts have been made by European institutions to protect workers. These have addressed difficulties deriving from the need to safeguard the enlargement of the labour market at European level, but also to ensure the effective guarantee of fundamental freedoms provided by the Treaties in order to avoid social dumping within national labour markets.[2] Fundamental freedoms are implemented by the Union with the aim of guaranteeing a level playing field for businesses and respect for the rights of workers.

"The completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed".[3] Therefore, fair competition and the smooth functioning of the internal market may be distorted if no rules impose the respect of certain working terms and conditions.[4] The objective of judicial cooperation in civil and commercial matters is thus to create and develop an area of freedom, security and justice in which the free movement of persons is guaranteed.[5] Regulating procedures at the EU level contributes to safeguarding the protection of the same rights in all Member States, based on the principle of mutual trust. This enables market actors (workers, consumers and businesses) to benefit from the internal market. To reap the full benefits of the European judicial area, access to justice must be made easier, particularly in cross-border proceedings.[6]

In this context, relevant legislative actions were adopted in order to regulate the posting of workers that moved in one Member State in the framework of cross-border provision of services: Directive 96/71,[7] Directive 2014/67[8] (hereinafter 'the Enforcement Directive') and the

[1] See Article 45 of the Treaty on the Functioning of the European Union ('TFEU').
[2] M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, VII ed., Padova, 2016, p. 156.
[3] Recital 3 of Directive 96/71, see *infra*.
[4] M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 157.
[5] See Recital 1 of Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, in OJ L 012 of 16 January 2001, pp. 1-23) and Recital 4 of Brussels I Recast Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December *2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, in OJ L 351 of 20 December 2012, pp. 1-32).
[6] Communication from the Commission to the European Parliament and the Council, *An area of freedom, security and justice serving the citizen*, COM(2009)262 final of 10 June 2009, at p. 13.
[7] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 *concerning the posting of workers in the framework of the provision of services*, in OJ L 18 of 21 January 1997, pp. 1-6. For an analysis, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 158-164; S. GIUBBONI, *Libertà economiche fondamentali e diritto del lavoro, oggi*, in *Rivista giuridica del lavoro*, 2015, n. 4, pp. 811-829; D. DIVERIO, *Art. 56 TFUE*, in F. POCAR. M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, pp. 425-426; U. CARABELLI, *Una sfida determinante per il futuro dei diritti sociali in Europa: la tutela dei lavoratori di fronte alla libertà di prestazione dei servizi nella CE*, in *Rivista giuridica del lavoro*, 2007, n. 1, pp. 33-134. On posted workers and private international law issues, see C. FRATEA, *Mobilità nell'impiego e diritti dei lavoratori: riflessioni tra cooperazione in materia civile e relazioni esterne dell'Unione europea*, in *Freedom, Security & Justice: European Legal Studies*, 2017, No. 1, pp. 45-66.
[8] 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*

2016 proposal for a Directive amending the former.[9] Overall, these acts are aimed at guaranteeing working conditions across EU Member States by providing minimum standards and imposing the adoption of effective mechanisms for the protection of posted workers' rights.

Directive 96/71 addressed the issue concerning which national law should apply to posted employees temporarily working in another Member State,[10] in light of European Court of Justice case law. Posted workers are still employed by the sending company and therefore subject to the law of that Member State in terms of the employment relationship. According to the Directive, they are entitled by law to minimum conditions provided by the legislation of the host Member State in which the tasks are carried out.[11] In other words, the Directive established a core set of terms and conditions of employment which need to be complied with by the service provider in the Member State where the posting takes place to ensure the minimum protection of the posted workers concerned. As referred to in its first Recital, the abolition of obstacles to the free movement of persons and services constitutes one of the objectives of the Community pursuant to (former) Article 3, lett. *c* of the EC Treaty. Indeed, the ultimate goal of the Directive was to enhance the economic dimension of the European market by protecting persons enjoying their right to freely move.[12]

As mentioned above, the Directive draws inspiration from the Court of Justice case law. In the *Rush Portuguesa* judgment of 1990 the Court of Justice incidentally affirmed the applicability of the law of the host Member State.[13] The case concerned the provision of services of a Portuguese undertaking in France and the interpretation of Articles 59 and 60 of the EEC Treaty (now Articles 56 and 57 of the TFEU). In the ruling, the Court held that such Articles "must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower *in situ* or the obtaining of work permits for the Portuguese work-force".[14] In its reasoning the Court

Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), in OJ L 159 of 28 May 2014, pp. 11-31.

[9] European Commission, Proposal for a Directive of the European Parliament and of the Council *amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, COM(2016)128 final of 8 March 2016.

[10] Under Article 2 of Directive 96/71 "posted worker means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works". The Italian Legislative Decree No 72 of 25 February 2000 (in *Gazzetta Ufficiale* No 75 of 30 March 2000), which transposed the 1996 Directive, specified that a period is limited when the posting of the worker in the Italian territory is predetermined or predictable in relation to a certain future event. Similarly, the Italian Legislative Decree No 136 of 17 July 2016 that implemented Directive 2014/67 and repealed the 2000 Decree, under Article 3, paragraph 3, lett. *c*, *d* and *e*, clarifies the concept of limited period. On the Decree No 72 of 2000, see S. TORTINI, *Il distacco dei lavoratori tra la Direttiva comunitaria ed i faticosi passi della disciplina nazionale*, in *Il lavoro nella giurisprudenza*, 2011, No 8, pp. 779-789.

[11] See Article 3 and Recital 6 of Directive 96/71. For an analysis, see G. ORLANDINI, *Mercato unico dei servizi e tutela del lavoro*, Milano, 2013, pp. 38-42. This Article is further clarified in the 2016 proposal by introducing a few amendments, such as the term 'remuneration'. However, in relation to this, some national parliaments raised many doubts about its compatibility with the principle of subsidiarity, because it violated Member States' prerogatives in this field (for more information, see *http://europa.eu/rapid/press-release_IP-16-2546_en.htm*).

[12] See *supra*, Recital 3 of Directive 96/71.

[13] Court of Justice, judgment of 27 March 1990, *Rush Portuguesa Ld[a]* v *Office national d'immigration*, case C-113/89.

[14] Court of Justice, *Rush Portuguesa*, cit., para. 19.

also affirmed that "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means".[15] It means that the legislation of the host country shall apply to workers temporarily posted in its territory. Accordingly, such law may better protect workers' rights while respecting the freedom of transnational provision of services.[16] The Court further affirmed that the host Member State shall enforce its law by any means when the protection conferred under its law is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established.[17]

Since the adoption of Directive 96/71, documents of the European institutions[18] and the European Court of Justice case law[19] reported several deficiencies and problems of incorrect implementation or application of the Directive. In order to pursue the effective implementation and respect of obligations upon Member States in cases concerning posted workers in the framework of the provision of services, the Enforcement Directive intervened to fill the gaps and overcome difficulties arising from the application of the former regime.

3. The Enforcement Directive and its implementation into the Italian legal order: the Legislative Decree 136/2016

Directive 2014/67, which Member States were required to comply with by 18 June 2016,[20] aimed to improve, enhance and reinforce the way in which Directive 96/71 was implemented, applied and enforced in practice across the European Union, by establishing a general common framework of appropriate provisions and actions. It imposes measures to prevent any circumvention or abuse of the rules, as well as the obligation to establish proportionate and effective sanctions. At the same time, it ensured guarantees for the protection of posted workers' rights and the removal of unjustified obstacles to the free provision of services.[21]

[15] Court of Justice, *Rush Portuguesa*, cit., para. 18.
[16] In this regard, see Recital 5 of Directive 96/71: "any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers".
[17] Court of Justice, judgment of 21 October 2004, *Commission of the European Communities* v *Grand Duchy of Luxembourg*, case C-445/03, par. 29.
[18] See Proposal for a Directive of the European Parliament and of the Council *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, COM(2012)131 final of 21 March 2012, p. 4 ff.; for further considerations, see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The implementation of Directive 96/71/EC in the Member States*, COM(2003)458 final of 25 July 2003.
[19] Especially in the so-called *Laval quartet* judgments: Court of Justice, Grand Chamber, judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, case C-438/05; Grand Chamber, judgment of 18 December 2007, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, case C-341/05; judgment of 3 April 2008, *Dirk Rüffert* v *Land Niedersachsen*, case C-346/06; judgment of 19 June 2008, *Commission of the European Communities* v *Grand Duchy of Luxemburg*, case C-319/06.
[20] See Article 23 of Directive 2014/67.
[21] See Proposal COM(2012)131 cit., p. 11, and Article 1 of Directive 2014/67. For an analysis, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., pp. 164-167; A. ALLAMPRESE, G. ORLANDINI, *La Direttiva 2014/67 del 15 maggio 2014 di attuazione della Direttiva 96/71 sul distacco transnazionale dei lavoratori. Un primo commento*, available at *www.cgil.it*; G. ORLANDINI, *Mercato unico*, cit., pp. 117-127; E. VOSS, *Posting of*

On the one hand, the Enforcement Directive specified how to identify a genuine posting, by providing for factual elements set forth in Article 4 that are considered indicative and non-exhaustive and do not need to be satisfied in every posting case.[22] Particularly, paragraph 2 lists elements in order to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment, whereas paragraph 3 concerns the assessment of whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works. The identification of such elements, factual situation and circumstances in which a posted worker is expected to carry out his or her activities, is closely linked to the purpose of preventing, avoiding and combatting abuse[23] and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU or of the application of Directive 96/71. The implementation and monitoring of the authenticity of posting required the introduction of indicative elements, facilitating a common interpretation at Union level.[24]

On the other hand, the assessment of said constituent factual elements, the temporary nature of posting and the condition that the employer is genuinely established in the Member State from which the posting takes place need to be carried out by the competent authority of the host Member State and, where necessary, in close cooperation with the home Member State,[25] also through exchange of information.[26]

In order to put into effect the provided framework and fulfil its objectives Member States were required to comply with it by promptly and adequately transposing the Directive into their legal orders. Aimed at pointing out the envisaged purposes of the 2014 Directive and how it could have improved the existing framework by introducing substantial aspects and procedural mechanisms, a first critical appraisal is herewith provided to the Italian Legislative Decree No 136 of 17 July 2016 that implemented it[27] and repealed the former Legislative Decree No 72 of 25 February 2000 that transposed Directive 96/71.[28] Although the two European legislative acts

Workers Directive – current situation and challanges, Study PE 579.001, 2016, pp. 42-62, available at *www.europarl.europa.eu/studies*.

[22] Recital 5 of Directive 2014/67. See also Proposal COM(2012)131, cit., pp. 13-14; M. ROCCELLA, T. TREU, *Diritto del lavoro dell'Unione europea*, cit., p. 165.

[23] There may be abuses because of the lower cost thanks to the application of less burdensome existing protection upon posted workers in their home country.

[24] Recital 7 of Directive 2014/67.

[25] Recital 8, Articles 6 to 8 and 13 to 19 of Directive 2014/67. In particular, Article 6 provides for "mutual assistance without undue delay", and Article 7 states that "the inspection of terms and conditions of employment to be complied with is the responsibility of the authorities of the host Member State". Moreover, Articles 9 and 10 provide Member States with the possibility to impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71, provided that these are justified and proportionate in accordance with Union law.

[26] See Article 5 of Directive 2014/67 and its Recital 18.

[27] *Decreto Legislativo 17 luglio 2016, n. 136, Attuazione della direttiva 2014/67/UE del Parlamento europeo e del Consiglio, del 15 maggio 2014, concernente l'applicazione della direttiva 96/71/CE relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi e recante modifica del regolamento (UE) n. 1024/2012 relativo alla cooperazione amministrativa attraverso il sistema di informazione del mercato interno («regolamento IMI»)*, in *Gazzetta Ufficiale* No 169 of 21 July 2016.

[28] *Decreto Legislativo 25 febbraio 2000, n. 72, Attuazione della direttiva 96/71/CE in materia di distacco dei lavoratori nell'ambito di una prestazione di servizi*, in *Gazzetta Ufficiale* No 75 of 30 March 2000, now repealed by Article 26 of the Italian Legislative Decree No 136 of 2016 cit. On the 2000 Decree, see S. NADALET, *L'attuazione della Direttiva 96/71 sul distacco*, in *Lavoro e diritto*, 2008, No. 1, pp. 37-62.

were considered complementary,[29] the Italian legislator adopted a new act including both of them by supplementing and specifying the content of the 2000 Decree.[30]

Article 1 of the 2016 Decree specifies its scope of application, stating that it applies to undertakings established in another Member State that post employees to work in Italy in another undertaking, provided that an employment relationship exists between the posted worker and the employer in the home country. Following Article 2 that provides for definition of the relevant terms, Article 3 reflects Article 4 of the Enforcement Directive. It deals with factual elements to be evaluated when assessing whether an undertaking genuinely performs substantial activities and whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works. The principle of equal treatment between posted and local workers is prescribed by Article 4, which deals with terms and conditions of employment. Such rights may be defended in accordance with Article 5 both in judicial and administrative proceedings. Other provisions almost reproduce the Directive, such as those on access to information (Article 7), administrative cooperation (Article 8) and the procedures for transnational enforcement of financial administrative penalties (Articles 13 to 24).

The first set of provisions governing the control of the authenticity of the posting may be invoked in case of their violation by the undertaking. Wrongful actions may be sanctioned by national competent authorities and new procedures rule the recognition and enforcement of decisions and sanctions. The provided mechanisms reflect existing systems of cooperation in both administrative and judicial space, based on the principle of mutual trust. Although, in light of the above, it seems that major attention is paid to prevent and combat abuse, the 2014 Directive also established a fundamental right to act, indeed in case of violation posted workers shall be ensured judicial or administrative remedies. Therefore, it is of interest to assess, within the European and Italian legislation, the relevance of posted workers' protection in its both individual and collective dimension. Indeed, as to the first aspect, Article 5 of the 2016 Decree on the defence of rights in comparison with Article 11 of the Enforcement Directive can be considered.

4. Judicial remedies for posted workers and collective redress

According to Article 11, paragraph 1 of the Enforcement Directive, in order to fully respect the rights granted by Directive 96/71, Member States should provide "effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to

[29] In the proposal COM(2012)131 cit., at p. 11, the Commission specified that "[w]ithout re-opening Directive 96/71/EC, the present proposal aims to improve, enhance and reinforce the way in which this Directive is implemented, applied and enforced in practice across the European Union (…)". On the contrary, the 2016 proposal is aimed at amending Directive 96/71. After having national parliaments argued it violates the principle of subsidiarity (with 14 yellow cards within the mechanism of control), the Commission maintained the proposal and further promoted the need to amend the 1996 Directive.

[30] The Decree consists of a set of rules on general provisions, including definitions and requirements (Articles 1 to 4), defence of rights (Article 5), establishment of a control institution (*osservatorio*, Article 6), access to information and administrative cooperation (Articles 7 to 9), obligations and sanctions (Articles 10 to 12), cross-border enforcement of administrative penalties (Article 13), notifications and recovery (Articles 14 to 24) and final dispositions (Articles 25 to 27).

institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended".

Paragraph 2 establishes that the jurisdiction of the courts in the Member States as laid down in the relevant EU or international instruments should be observed. Amongst them, as to the determination of the jurisdictional competence and the recognition and enforcement of decisions in civil and commercial matters, including employment issues, Brussels I Recast Regulation is concerned.[31]

By virtue of Article 6 of the 1996 Directive, posted workers are allowed to bring actions before the courts of a host Member State against an employer whose seat is established in another one. The new Article 11 of the Enforcement Directive, if adequately transposed, should thus enhance the effectiveness of the remedies provided by national legislations, given also the fact that the broad and generic formulation of Article 6 leaves a high level of discretion to Member States, without imposing detailed remedies or requirements to be offered for the protection of posted workers' rights.

In the explanatory statement accompanying the proposal for the Enforcement Directive, the Commission observed that Article 11 relates to the defence of rights, which in itself concerns a fundamental right. Namely, Article 47 of the Charter of Fundamental Rights of the European Union confirms the right to effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union are violated or not respected.[32] It follows that remedies afforded to posted workers need to grant effective protection, otherwise Member States can be held liable for the violation of EU primary law, i.e. the Charter, and secondary law, i.e. the Directive.

Against this background, individual claims, more often than collective actions, are initiated in relation to employment matters, because of the violation of rights or work conditions as stated in national law or collective agreements. In cross-border situations, difficulties may be faced by the employee posted temporarily abroad in terms of the competent authority, the applicable law and legal costs. What is more, such complaints are very often unlikely to be effective for those reasons.

Although the Enforcement Directive implements the Directive 96/71 by clearly establishing the right to act, probably it could have stated specific rules that cover the collective dimension of posted workers' protection in light of the Court of Justice case law and former legislative proposals. Indeed, in line with the Court's findings in the *Laval quartet* judgments and the withdrawn 2012 proposal on the right to take collective action,[33] Article 1, paragraph 2 of

[31] Regulation (EU) No 1215/2012 cit.

[32] Proposal COM(2012)131 cit., at p. 18. On the right to effective remedy, see G. D'AVINO, A. MARTONE, *Il diritto ad un ricorso effettivo e ad un giudice imparziale* ex *art. 47 della Carta dei diritti fondamentali*, in A. DI STASI, *Spazio europeo e diritti di giustizia. Il Capo IV della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padova, 2014, pp. 139-210.

[33] Proposal for a Council Regulation *on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, COM(2012)130 final of 21 March 2012 (the so-called 'Monti II Regulation'). It is interesting to note that this proposal was submitted on the same day of the proposal for the Enforcement of Posted Workers Directive, COM(2012)131 cit.; however, the former proposal was withdrawn since the yellow card procedure was triggered, because some national parliaments affirmed its non-compatibility with the subsidiarity principle. On the dismissal, see F. FABBRINI, K. GRANAT, *Yellow Card,*

Directive 2014/67 provides that "the [Enforcement] Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice".[34]

With the aim of implementing such objectives, remedies should be ensured both in judicial and administrative proceedings, including the right of trade unions to act. Indeed, associations, organisations or other legal entities, which should be entitled to act on behalf or in support of posted workers, may better represent posted workers' rights.

Recital 34 of the Enforcement Directive encourages Member States to offer posted workers effective complaint mechanisms through which they may lodge complaints or engage in proceedings either directly or, with their approval, through relevant designated third parties, such as trade unions or other associations, as well as common institutions of social partners. National rules of procedure concerning representation and defence before the courts, competences and rights of trade unions or other employees representatives under national law or practice shall be observed,[35] though they may vary widely.

Paragraph 3 of Article 11 regards the role of trade unions. It states that Member States shall ensure the right of trade unions or other similar associations to be engaged on behalf or in support of the posted workers in any judicial or administrative proceedings with the objective of implementing Directive 96/71 and the Enforcement Directive itself. It is undisputed that social partners have a role in the protection, and thus in the enforcement, of workers' rights that may assume a significant relevance in cross-border situations. In general, trade unions can initiate legal proceedings whenever an employer violates the applicable labour legislation or collective agreements and the related negotiations are unsuccessful. However, as a disadvantage, only members of the trade union can benefit.

Having regard to national legal orders, a mechanism of collective redress is provided for consumers in most EU countries, as a means to protect the weaker contractual party. It could also be found in relation to other policy matters, such as competition or environmental law. In national employment contexts, trade unions, organisations or associations are generally entitled to act on behalf of employees within political dialogue or even before the courts claiming for the respect of workers' rights. However, a European framework on the legitimacy of trade

but No Foul: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike, in *Common Market Law Review*, 2013, No. 50, pp. 115-144.

[34] This is the so-called 'Monti clause'. Similar to the 2012 proposal on the right to take collective action and to Article 85 suggested within the proposal for a recast of the Regulation No 44/2001 (COM(2010)748 final of 14 December 2010), this clause is based on the findings of the report *A new strategy for the single market – at the service of Europe's Economy and Society* presented on 9 May 2010 by Prof Mario Monti. He recommended to: (i) clarify the implementation of the Posting of Workers Directive and strengthening dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services; (ii) introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called 'Monti Regulation'), and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

[35] See Article 11, para. 4, lett. *c*.

unions to defend posted workers and cross-border collective redress in general (i.e. trade unions of one country representing posted workers from a different State) is lacking.[36]

In this respect, Article 11 of the Enforcement Directive may constitute a starting point for the establishment of a common regime on collective redress where employees and employers are involved. It clearly recognises the right of trade unions to engage in any judicial or administrative proceedings, though without providing any requirements. In this regard, it has to be reminded that according to paragraph 4 of Article 11 "national rules of procedure concerning representation and defence before the courts" shall apply. However, that is the crucial point: due to differences between domestic systems, workers may face difficulties in seeking representatives that may act on their behalf or in support of them.

Under this aspect, some issues raise as far as the Italian legal order is concerned. It is indeed of interest to point out how the legislator transposed the provision at hand on judicial remedies for the protection of posted workers' rights, including collective action.

Article 5 of Decree No 136 of 2016 simply states that workers are entitled to judicial or administrative remedies. It does not reproduce the wording of Article 11 of the 2014 Directive, nor does it appear to reflect its whole content. In the explanatory report drafted by the Italian Chamber of Deputies,[37] it is emphasised that under Article 5, despite the cases concerning Article 3, paragraph 4, on the possibility for posted workers to apply before the courts when posting activity is not genuine to ask for the conclusion of an employment contract with the undertaking where they were or are posted, employers moved to Italy may seek protection of their rights as granted by Article 4 of the 2016 Decree in judicial or administrative proceedings.

In the accompanying table of equivalences,[38] with reference to Article 11 of the Enforcement Directive, it is specified that such provision is implemented through both Article 5 and Article 3, paragraph 4, which, as mentioned before, states that in cases where the posting of (non-Italian) workers at an undertaking established in Italy does not prove to be true, the worker shall be effectively considered as employee by the host undertaking where he or she carried out the required activities. It offers a direct remedy when a violation of the constituent elements of a genuine posting under Article 4 of the Enforcement Directive, and respectively Article 3, paras. 3 and 4 of the 2016 Decree, occurred. Indeed, the worker automatically qualifies as an employee of the undertaking established in Italy, so he or she is entitled to be granted all rights deriving from a valid employment contract concluded there. In cases of a non-authentic posting, administrative penalties are prescribed under paragraph 5 upon the sending undertaking and the one where the worker was posted.

To sum up, the Italian legislator stated that Article 3, paragraph 4, and Article 5 of the 2016 Decree transpose Article 11 of the Enforcement Directive, even if it clearly appears that the Italian Decree does not literally implement the European provision at issue, especially with regard to the right of workers' organisations to institute judicial or administrative proceedings in accordance with paragraph 3 of Article 11.

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[36] See *infra*, para. 4.

[37] Camera dei deputati, *Relazione illustrativa dello schema di decreto legislativo recante attuazione della direttiva 2014/67/UE concernente l'applicazione della direttiva 96/71/CE relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi e recante modifica del regolamento (UE) n. 1024/2012 relativo alla cooperazione amministrativa attraverso il sistema di informazione del mercato interno ("regolamento IMI") (296)*, section *"Articolo 5, Difesa dei diritti"*, available at *http://documenti.camera.it*.

[38] Annexed to *Relazione illustrativa*, cit.

Within the legislative process, most Italian representative trade unions were involved and called to express opinions[39] on the draft decree implementing the Enforcement Directive. According to their observations, the transposing legislative act should have permitted trade unions to protect posted workers' rights to the greatest extent possible. It should have clarified that such associations are entitled to institute judicial or administrative proceedings on behalf of or in support of employees and to promote collective actions for the protection of posted workers' rights as prescribed by Article 11 of the Enforcement Directive.

Said requests were not satisfied by the Italian legislator, who did not expressly introduce any provision concerning the right to act of trade unions. Indeed, Article 5 of the Decree No 136 of 2016 does not make any mention of workers' organisations. The question arising is therefore if (Italian) trade unions, associations or organisations are empowered to represent posted workers (in Italy) in judicial or administrative proceedings instituted before Italian courts. In other words, may posted workers be represented by Italian trade unions against the sending undertaking that is established in another Member State before Italian courts? Private international law issues are involved, given the absence of specific rules determining jurisdiction, applicable law, and the recognition and enforcement of decisions at EU level.

Supposedly, the Italian legislator implicitly considered the role of trade unions when referring to the defence of rights granted under Article 4 of the 2016 Decree, given that according to the existing national legislation, organisations may bring judicial claims on behalf or in support of workers.[40] Therefore, it may be assumed that Italian trade unions are empowered to represent posted workers as well.

A rule on jurisdiction was included in the framework of Decree No 72 of 2000, namely Article 6, which literally transposed Article 6 of Directive 96/71, but it does not appear in Decree No 136 of 2016 (that repealed the former Decree). This Article recognised the possibility for posted workers to also claim for the respect of their rights before the courts of another State that is party to an international convention concerning jurisdiction, which covers employment matters.[41] It further afforded a special procedure that did not require the preliminary referral to the dispute settlement body (as in the ordinary labour law procedure) prior to applying before the courts.

Likewise, Article 11, paragraph 1 of the Enforcement Directive contemplates an alternative *forum* for posted workers, other than the State where the sending undertaking is established, that is to say the courts of the host Member State where the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has

[39] *Memorie ANCE, CGIL, CISL e UIL,* annexed to *Atto del Governo sottoposto a parere parlamentare n. 296*, *Schema di decreto legislativo recante attuazione della direttiva 2014/67/UE concernente l'applicazione della direttiva 96/71/CE relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi e recante modifica del regolamento (UE) n. 1024/2012 relativo alla cooperazione amministrativa attraverso il sistema di informazione del mercato interno (Regolamento IMI)*, available at *www.senato.it*.

[40] See E. MASSI, *Distacco dei lavoratori in ambito UE: le nuove regole*, in *Diritto & Pratica del Lavoro*, 2015, No. 34-35, pp. 2027-2033, at p. 2029.

[41] It refers to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (in OJ L 299 of 31 December 1972, pp. 32-42), now replaced by Brussels I Recast Regulation that by virtue of Article 67 "shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments".

ended. Failing any disposition to that effect, this rule on jurisdiction may be applied to trade unions representing posted workers as well.

In conclusion, Directive 2014/67 does not set private international law rules on transnational collective mechanism of judicial enforcement, nor does the existing national legislation, and it gives rise to doubts.

On the one hand, rules at EU level could have established uniform standards as to collective action promoted by posted workers. However, on the other hand, national legislators could have had the possibility to introduce specific provisions on such issue while transposing the Directive. In particular, as far as the purpose of this analysis is concerned, from a first critical appraisal of the Italian Decree a clear reference to the right to collective action is missing. It follows that probably only European and national case law may intervene in order to clarify the real scope of the provisions on the defence of rights.

5. Cross-border collective redress in employment matters: private international law issues

It is undisputed that Directive 2014/67 points out the relevant role of collective action and collective agreements that trade unions may promote on behalf of or in support of posted workers. Namely, Article 1, paragraph 2, Article 5, paragraph 2, lett. *b*, Article 9, paragraph 1, lett. *f*, and Article 11, paragraphs 3 and 4, are based on the fact that "respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the TFEU".[42]

As mentioned before, the 'Monti clause' under Article 1, paragraph 2, expressly safeguards the exercise of fundamental rights as recognised in Member States and at European Union level, such as the right or freedom to strike or to take other action, including collective action, covered by the specific industrial relations systems in Member States, in accordance with national law or practice. In contrast to the previous proposals on the introduction of such a clause, it does not refer to compliance with EU law,[43] but exclusively to the respect of fundamental rights to collective action or agreements as defined in national legal orders.[44] In this regard, the European legislator seems to have admitted a new approach on the balancing test between social rights and economic fundamental freedoms, contrary to the assessment carried out by the Court of Justice in the *Laval quartet* judgments. Indeed, the new provision makes it clear that the legitimacy of collective action needs to be evaluated in accordance with national laws or practice.[45]

In line with this finding and in view of offering effective remedies, Article 9 of Directive 2014/67 on the monitoring compliance imposes on Member States the "obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which

[42] Recital 14 of Directive 2014/67.
[43] However, see Article 28 of the Charter of Fundamental Rights of the EU that grants workers and employers, or their respective organisations, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.
[44] S. GIUBBONI, *Libertà economiche*, cit., pp. 826-827.
[45] S. GIUBBONI, *Libertà economiche* cit., p. 827.

the services are provided". It means that social partners' action that is validly carried out under national law may invoke a higher level of minimum protection as provided for in Article 3.

With regard to trade unions established in one Member State acting before the courts of a different country, in the *Sähköalojen ammattiliitto* judgment[46] the Court of Justice clarified that "Directive 96/71 (…), read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, prevents a rule of the Member State of the seat of the undertaking that has posted workers to the territory of another Member State – under which the assignment of claims arising from employment relationships is prohibited – from barring a trade union, such as the Sähköalojen ammattiliitto, from bringing an action before a court of the second Member State, in which the work is performed, in order to recover for the posted workers, pay claims which relate to the minimum wage, within the meaning of Directive 96/71, and which have been assigned to it, that assignment being in conformity with the law in force in the second Member State".[47]

Contrary to what the Polish undertaking argued, that is to say that the Sähköalojen ammattiliitto, the Finnish trade union, did not have standing to bring proceedings on behalf of the posted workers on the grounds that Polish law prohibits the assignment of claims arising from an employment relationship, the Court held that its *locus standi* before the referring (Finnish) court is governed by Finnish procedural law, which is applicable according to the principle of *lex fori*. In addition, under Finnish law, the applicant has standing to bring proceedings on behalf of the posted workers.[48] European judges concluded that Polish law, i.e. Polish Labour Code, to which the Polish undertaking refers, is not relevant with regard to the *locus standi* of the Finnish trade union before the referring (Finnish) court, which is governed by Finnish law, and so does not prevent that trade union from bringing an action before the Satakunnan käräjäoikeus (Finnish court).

In light of the above, national trade unions may represent non-national posted workers and are subject to the *lex fori* that may be the law of the host country.

Accordingly, the question arising is which authority is competent for collective redress promoted by posted workers against the employer established in the home State. In such cross-border situations, may the rule on jurisdiction provided under Article 11, paragraph 1 of the Enforcement Directive be applicable? The existing EU private international law rules, namely Brussels I Recast Regulation, state a protective ground for jurisdiction over individual contracts

[46] Court of Justice, judgment of 12 February 2015, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna*, case C-396/13.

[47] The referring court asked: "(1) May a trade union acting in the interests of workers rely directly on Article 47 of the Charter as an immediate source of rights against a service provider from another Member State in a situation in which the provision claimed to be contrary to Article 47 (Article 84 of the Polish Labour Code) is a purely national provision?; (2) Does it follow from EU law, in particular the principle of effective legal protection flowing from Article 47 of the Charter and Articles 5, second paragraph, and 6 of Directive 96/71, interpreted in conjunction with the freedom of association in trade union matters protected by Article 12 of the Charter, in proceedings concerning claims which have become due for the purposes of that directive in the State where the work is performed, that the national court must not apply a provision of the labour code of the workers' home State which prevents the assignment of a pay claim to a trade union of the State in which the work is performed, if the corresponding provision of the State in which the work is performed permits the assignment of a pay claim which has become due and hence the status of claimant to a trade union of which all the workers who have assigned their claims are members?".

[48] Court of Justice, *Sähköalojen ammattiliitto*, cit., paras. 19-21.

of employment in view of adequately protecting the weaker party,[49] by providing rules more favourable to his or her interests than the general rules.[50]

It must be noted that this Regulation gives relevance to the individual dimension similar to some provisions of the Charter of Fundamental Rights of the EU. Indeed, the collective profile of the protected interests is not mentioned even if it is relevant for the proper functioning of the internal market as well. Likewise, the Rome I Regulation[51] takes into account the individual character of the contractual obligations as stated in Articles 6 to 8 by disposing grounds for the determination of the applicable law that lead to a better protection of the weaker party.[52] Considering the grounds established both in Brussels I Recast (Articles 20 to 23) and in Rome I Regulations (Article 8) as to employment contracts a common and uniform interpretation cannot easily offered, given their different functions, as well as they can be interpreted differently[53].

The idea of collective redress in cross-border litigation is addressed by Article 6 (1) of the Brussels I Regulation, and now Article 8 (1) of the Brussels I Recast Regulation, according to which connected lawsuits can be brought to the courts of a Member State where one of the defendants is domiciled. Article 28 of the former and Article 30 of the latter also include situations of complex litigation by providing for a discretionary stay.[54]

For the determination of the competent authority, by virtue of Article 7(2) of the Brussels I Recast Regulation, an employee or trade union may be sued in the Member State where the harmful event occurred or may occur. The Court of Justice has interpreted this as including both the location of the event causing the damage (e.g. industrial action) and the place where the damage occurred (e.g. where the firm allegedly suffered a loss). At present, the competent court is that of the place where the business which engaged the employee is or was situated; instead, the jurisdiction should belong, in the case of an action by an employee against an employer, to the court of the place of business from which the employee receives daily instructions.[55] As regards industrial action, the *forum* for disputes, in line with the Rome II Regulation,[56] should be the place where the industrial action is to be or has been taken.[57]

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[49] See Articles 20 to 23 of Regulation No 1215/2012. For an analysis, see C. ESPLUGUES MOTA, G. PALAO MORENO, *Section 5: Jurisdiction over individual contracts of employment*, in U. MAGNUS, P. MANKOWSKI (eds.), *Commentary of Brussels I bis Regulation*, Köln, 2016, pp. 534-558; R. CAFARI PANICO, *Enhancing Protection For Weaker Parties: Jurisdiction Over Individual Contracts of Employment*, in F. FERRARI, F. RAGNO (eds), *Cross-border Litigation in Europe: The Brussels I Recast Regulation as a Panacea?*, Padova, 2015, p. 41 ff.; F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)*, Padova, 2015, p. 215 ff.; L. MERRETT, *Jurisdiction over Individual Contracts of Employment (Arts. 20-23)*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015, pp. 239-253.

[50] See Recital 18 of Brussels I Recast Regulation.

[51] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 *on the law applicable to contractual obligations (Rome I)*, in OJ L 177 of 4 July 2008, pp. 6-16.

[52] F. SALERNO, *Giurisdizione*, cit., p. 216.

[53] R. CAFARI PANICO, *Enhancing Protection For Weaker Parties*, cit., pp. 61-62; A. ZANOBETTI, *Employment Contracts and the Rome Convention: the Koelzsch Ruling of the European Court of Justice*, in *Cuadernos de Derecho Transnacional* (Octubre 2011), Vol. 3, Nº 2, pp. 338-358, at p. 355 ff.

[54] B. HESS, *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, in A. NUYTS, N.E. HATZIMIHAIL (eds.), *Cross-Border Class Actions. The European Way*, Munich, 2014, pp. 59-68, at p. 60.

[55] For a deep analysis, see R. CAFARI PANICO, *Enhancing Protection For Weaker Parties*, cit., p. 41 ff.

[56] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 *on the law applicable to non-contractual obligations (Rome II)*, in OJ L 199 of 31 July 2007, pp. 40-49.

[57] With reference to the *Viking* and *Laval* judgments, see U. GRUŠIĆ, *The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind The "Public Law Taboo" in Private International Law*, in *Journal of Private International Law*, December 2013, No. 3, p. 413 ff.

Indeed, with regard to the applicable law, industrial action is considered under Article 9 of Rome II Regulation on the law applicable to non-contractual obligations. This conflict of laws rule determines the law of the country where the industrial action is to be taken or has been taken to be applicable to damages caused, but it only applies to non-contractual liability.[58] This means that it does not cover the consequences for individual employment contracts, which are instead governed by Article 8 of Rome I Regulation on the law applicable to contractual obligations. Such provision determines as applicable, in the absence of choice, "the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country".[59]

Based on the general tendency of the EU private international law system to coincide *forum* and *ius*, which allows courts to apply the law they know better and grants foreseeability and certainty in favour of the weaker party, the place where the collective action is to be taken or has been taken may be suggested, in the absence of choice, as a ground for the determination of the jurisdiction and the applicable law. In accordance with the recent Court of Justice judgment in the *Sähköalojen ammattiliitto* case, the *lex fori* will apply and cover all aspects including *locus standi* of trade unions. Where posted workers are involved, they may be better represented in the host Member State by a local trade union.

The risk of not fully guaranteeing the most favourable solution due to the discrepancy between the provisions at issue[60] was addressed by the 2013 Report of the European Parliament "on improving private international law: jurisdiction rules applicable to employment",[61] after which a Resolution was adopted.[62] It suggested amending Brussels I Regulation to clarify that, in disputes arising from industrial action, the courts of the Member State where the industrial action is to be or has been taken should have jurisdiction. Furthermore, it proposed replacing the 'engaging place of business' clause with a reference to the 'place from where the employee receives day-to-day instructions'. It then underlined the importance of ensuring coherence: "[T]he rules on jurisdiction for labour relations disputes need to be aligned with the relevant rules on applicable law". Following this, however, the European Commission in its response simply noted that specific legislation on industrial action was unnecessary and affirmed that the Court of Justice may solve any doubts on such issue.[63]

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[58] See, in general, F. DORSSEMONT, A. VAN HOEK, *Collective action in Labour Conflicts under the Rome II Regulation (part II)*, in *European Labour Law Journal*, 2011, No. 2, p. 101 ff.

[59] For a comment, see P. MANKOWSKI, *Employment Contracts under Article 8 of the Rome I Regulation*, in F. FERRARI, S. LEIBLE (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich, 2009, pp. 171-216; in relation to the Directive 96/71, see G. ORLANDINI, *Mercato unico*, cit., pp. 39-40.

[60] On the problem of coordination between EU private international law provisions, see A. VAN HOEK, *Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?*, in *Erasmus Law Review*, November 2014, No. 3, p. 157 ff.

[61] European Parliament, Committee on Legal Affairs, Rapporteur: Evelyn Regner, *Report on improving private international law: jurisdiction rules applicable to employment*, 20 September 2013, A7-0291/2013 (2013/2023(INI)), available at *www.europarl.europa.eu*.

[62] European Parliament, *Resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment*, available at *www.europarl.europa.eu*.

[63] See European Commission, *Follow up to the European Parliament Resolution on improving private international law: jurisdiction rules applicable to employment*, 29 January 2014, available at *www.europarl.europa.eu*. For comments see R. CAFARI PANICO, *Enhancing Protection For Weaker Parties*, cit., pp. 55-59.

6. Final considerations

The institutions have engaged in many reflections about the legal context of collective actions in the EU. The common starting point is the recognition of fundamental social rights, whose protection constitutes an objective that EU law must pursue. The 2015 Study of the European Parliament[64] stressed the complexity of the interrelation between EU internal market law and social and labour rights. It also acknowledged that "effective collective industrial action is a precondition of a functioning system of collective bargaining. However, generally wage levels and levels of employment protection are more favourable for workers where trade union representation is effective, which again depends on the scope for collective industrial action".[65]

In the past, other soft law instruments have been adopted in the field of collective action. The European Parliament, in its 2012 Resolution on collective redress, pointed out that "in the European area of justice, citizens and companies must not only enjoy rights but must also be able to enforce those rights effectively and efficiently".[66]

Effectiveness was also emphasised by the 2013 Communication of the Commission, which, specifically referring to the general principles of European private international law, underlined that the Commission should work efficiently in practice to ensure the proper coordination of national collective redress procedures in cross-border cases.[67] From a more procedural point of view, the Commission called upon the Member States to follow its 2013 Recommendation, whose "aim is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at [the] national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse".[68] However, the Commission submitted solely non-binding instruments[69] in order to coordinate national procedures on collective redress with regard to injunctive and compensatory mechanisms. Thanks to the 2017 assessment of the implementation of the Recommendation, as planned under its paragraph 41, it will be of interest to evaluate national measures adopted within collective redress systems. Based on such findings and on possible case law delivered in relation to

[64] D. SCHIEK, L. OLIVER, C. FORDE, G. ALBERTI, *EU Social and Labour Rights and EU Internal Market Law*, Study PE 563.457, September 2015, p. 30, available at *www.europarl.europa.eu/supporting-analyses*.
[65] *Ibid*., p. 31.
[66] European Parliament, *Resolution of 2 February 2012 on Towards a Coherent European Approach to Collective Redress* (2011/2089(INI)), available at *www.europarl.europa.eu*.
[67] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, COM(2013)401 final of 11 June 2013.
[68] European Commission, *Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, in OJ L 201 of 26 July 2013, pp. 60-65. For comments, see B. HESS, *The State of the Civil Justice Union*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds.), *EU Civil Justice. Current Issues and Future Outlook*, Oxford and Portland, Oregon, 2016, pp. 1-19, at p. 8; ID., *The Role of procedural law in the Governance of Enforcement in Europe*, in H-W. MICKLITZ, A. WECHSLER (eds.), *The Transformation of Enforcement. European Economic Law in Global Perspective*, Oxford and Portland, Oregon, 2016, pp. 343-353; ID., *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, cit., pp. 67-68; A. STADLER, *The Commission's Recommendation on common principles of collective redress and private international law issues*, in *Nederlands Internationaal Privaatrecht*, 2013, No. 4, pp. 483-488.
[69] "Neither minimum procedural standards of collective actions, nor a maximum harmonisation have been proposed. The Recommendation and the Communication of the Commission appear as a kind of 'position paper' in an on-going political discussion": B. HESS, *The Role of Procedural Law*, cit., p. 350.

employment contexts at national and European level, substantial and procedural aspects may be outlined in order to define a future European legislation on cross-border collective redress.

Indeed, as noted with regard to the 2013 Parliament's Report on jurisdiction in employment matters, differently from the Commission's opinion, the Court of Justice case law might not suffice when industrial actions are concerned, also because lacking any legislative provision. One consideration, from a broader point of view, lies on the fact that the field of employment and, in general, measures concerning the social context represent a sensitive matter over which national legislators claim their sovereignty. It recently happened in relation to the 2016 proposal amending Directive 96/71, given that the yellow card procedure was triggered, because some national parliaments affirmed its non-compatibility with the subsidiarity principle.

Apart from regulating substantial aspects of employment relationships, in particular through the 1996 Directive and its amending proposal, from a more procedural point of view, the European Union intervened with the 2014 Enforcement Directive in order to impose Member States the adoption of effective means of posted workers' protection, having considered the difficulties in implementing the existing EU law and the risks of abuse. It is however undisputed that Member States are obliged to pursue the 2014 Directive's objectives by transposing it in their legal orders through the means they deem appropriate, and solutions may vary widely. This could be the case of Article 11 of the Enforcement Directive on the defence of rights. According to its provisions it is expressly suggested that Member States have to offer posted workers effective complaint mechanisms; nevertheless when providing such means domestic law and practice need to be respected.

As to the 2016 Italian Legislative Decree, with specific reference to Article 5 on the defence of rights and the right of trade unions to act, some doubts arise in relation to the fulfilment of the objectives under Article 11 of the Enforcement Directive given that it is not properly implemented, lacking any reference to trade unions' actions. Its concrete application will demonstrate whether or not EU law is fully observed. In case of non-compliance, the violation of EU law and fundamental rights, namely the 2014 Directive and Article 28 of the Charter on the right to effective remedy, may be invoked.

In light of the foregoing, given that the 2014 Directive could have offered specific rules on remedies, their regulation was then left upon Member States. It may be argued that judicial systems do not fall within EU competences. However, uniform standards and common private international law rules could have contributed in pursuing a higher level of protection. Strictly referring to the Italian legal order, the legislator did not set provisions concerning collective actions. Overall, from both a European and national perspective, such situation can be described as a missing opportunity or a conscious choice. In this context, it is suggested that some efforts need to be undertaken at EU level in order to regulate transnational litigation in employment matters. What seems to be urgent is to determine proper grounds for the determination of jurisdiction and applicable law for industrial actions promoted by representatives of posted workers taking into consideration the existing rules set forth in Brussels I Recast Regulation, Rome I Regulation and those established in the Directives on the posting of workers.

Effective protection of social rights is a key concept for the elaboration of a EU collective action framework also in consideration of the European Pillar of Social Rights, a policy

initiative launched by the Commission in April 2017[70]. This may raise awareness that a legislative response to the critical balance between market integration, as well as measures undertaken due to the economic crisis, and social labour rights is requested. Member States should realize that an EU action may better regulate cross-border situations even if matters fall within national competences. In practice, an initial step could be revisiting the 'Monti clause' and the 'Monti II Regulation', also by submitting amendments to existing private international law instruments.[71] General principles underlying the EU Regulations that govern civil and commercial matters, such as the coincidence between *forum* and *ius* and the provision of specific connecting factor for the protection of the weaker parties, may be also referred to cross-border collective redress involving posted workers with a view to effectively guaranteeing their rights.

ABSTRACT: The phenomenon of posting of workers is increasing across the European Union Member States and contributes to the development of the internal market. In the framework of transnational provision of services, the Directive 96/71 was adopted with the aim of establishing minimum working terms and conditions, and determining as applicable the law of the host country, in respect of the principles of non-discrimination based on nationality and equal treatment. However, according to European institution studies and Court of Justice case law, the Directive did not grant effective remedies for employees seeking protection of their rights. Against this background, the Directive 2014/67 intervened in order to complement and introduce mechanisms to control the authenticity of posting, to enforce sanctions and impose the duty to inform upon competent authorities. One provision, Article 11, recognises the right to institute judicial or administrative proceedings for the defence of posted workers' rights, also by trade unions. Its transposition into the Italian legal order raises some doubts as to the effectiveness of such remedies. Given that specific EU private international law rules are lacking, it is wondered whether collective redress may be successfully promoted, and which rules apply to cross-border judicial proceedings. In the end, judicial cooperation in civil and commercial matters is closely linked to the free movement of persons, and the general principle of mutual recognition of judgments is necessary for proper functioning of the internal market.

KEYWORDS: Posted Workers – Defence of Rights – Article 11 of Directive 2014/67 – Article 5 of Italian Legislative Decree 136/2016 – Cross-border Collective Redress

[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, COM(2017)250 final of 26 April 2017; Commission Recommendation of 26 April 2017 *on the European Pillar of Social Rights*, C(2017)2600 final; *Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights*, COM(2017)251 final.

[71] C. PERARO, *Right to collective action in cross-border employment contexts: a fundamental social right not yet covered by EU private international law*, in *UNIO - EU Law Journal*, June 2016, Vol. 2, No. 2, pp. 20-38, spec. at p. 38.