



Posting of workers in the European Union: an exploitative labour system

Sophie Robin-Olivier

IREDIÉS, La Sorbonne School of Law, University Paris 1 Panthéon Sorbonne, Paris, France
Corresponding author. E-mail: srobinolivier@gmail.com

(Received 20 September 2022; accepted 20 September 2022)

Abstract

This article unpacks some severe forms of exploitation of workers, resulting from the use of free provision of services for purposes that it was not intended to fulfil, under internal market law. It explores how this evolution of posting relates to the existence of a market resting only on the international assignment of workers, and proposes that the European Union (EU) takes steps to limit or prohibit assignment of labour, especially in the sectors (agriculture, meat sector, construction) where posting of workers, as some recent cases show, leads to extreme forms of exploitation that can be tagged as slavery.

Keywords: posting of workers; free provision of services; labour exploitation; slavery; temporary work; third country nationals

1. Introduction

Posting of workers has gone through radical transformation. A legal regime, intended to ensure a balance between the economic freedom of companies, and the protection of workers has turned (in part) into a system based on the exploitation of human labour, in forms which, for the most extreme, can be considered slavery.¹ The objective of this contribution is to revisit the history of posting and to point at the forms of exploitation it entails, that EU law should combat, instead of supporting. Our aim is to throw light on the fact that posting of workers has become a legal environment favorable to the exploitation of workers, to a point which is no longer acceptable.

Of course, posting of workers has many facets. In part, and hopefully in a large number of cases, posted workers perform their activity in decent conditions, and posting provides a framework for temporary mobility, on behalf of an employer whose activity is mainly carried out in the Member State, in which it is established. The case law does not provide a good observation post for these forms of non-problematic posting, which, for the largest part, do not give rise to litigation. They are nevertheless showing that EU law on posting is properly functioning, in many instances, and should not, as a whole, be called into question. For executives in the auditing and consulting sector who carry out assignments with clients in a country other than that of their employer, engineers who go to technical offices, pilots and stewards of airlines who do not belong to the 'low cost' segment, among others, mobility within the European Union, when it takes the form of posting, does not entail any loss of protection, precariousness, or particular risk.

But these situations, which justify a facilitated system of mobility for workers, in order to carry out their activity, should not mask that posting has, to some extent, departed from the function it

¹For an historic approach of the forms of human beings' exploitation, see namely: P Ismard, B Rossi, and C Vidal (eds), *Les mondes de l'esclavage* (Seuil 2021).

© The Author(s), 2022. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

was intended to fulfil. By becoming an extremely effective instrument for reducing labour costs in certain sectors, international posting has become an economic activity in its own right, based on attaching workers to the least costly legal system.

Instead of deriving from the concrete conditions of the economic activity of a corporation, the applicability of a national social law is artificially organised, in such cases, in order to allow the provision of a labour supply service that meets the demand of certain sectors of activity. A business model has emerged. A legal situation is created to produce economic effects. What had existed, but in very specific fields, quite discreetly,² has become a market that seems to be flourishing.³

As an author rightly analysed, the postulate of the embeddedness of a company on a territory as well as the belonging of employees to one local establishment have been shattered, and are now used to build business strategies of companies of Community dimension, or, more generally, of transnational companies operating on the European market.⁴ The concept of posting of workers has become highly fluctuating and fluid, and the relationship with an establishment of the company, on a national territory, a purely legal operation disconnected from realities, allowing for all kinds of setups.⁵ This discrepancy between the operation built on the circumvention of national borders by transnational companies and the way in which EU law reacts to this situation favors frauds and social optimisation⁶

This evolution has taken place over the last thirty years, in parallel with the emergence and expansion of global supply chains. These global supply chains have developed into exploitative labour systems, another version of modern slavery.⁷ Like global supply chains, EU service provision chains, which include the provision of labour and rest on the EU legal regime of posting, essentially aim at maximising profits, while reducing the political and legal responsibility of those who reap the benefits of these activities.

As awareness grew on the impact of this phenomenon on human rights and living conditions, new instruments were designed to take into account its international dimension, and the existence of networks diluting employers' liability. In the Union and in its Member States, the law has not remained inert in the face of subcontracting chains, in which the provision of labour allows the social rights of the workers involved to be evaded.⁸ However, EU law has remained too timid, too tolerant, with regard to what appears, today, to be the source of unacceptable forms of exploitation.

One striking example is indeed the recent case involving the company Terra Fecundis, and the undignified living and working conditions of the agricultural workers posted by this company,

²For instance, concerning scuba divers, posted under conditions designed to avoid the application of French law, *v* the decision of the French highest court for criminal matters: Cass. crim. 12 mai 1998, n° 96-86479 <<https://www.herveguichaoua.fr/jurisprudence/marchandage-pret-illicite-de-salarie/prejudice-subi-par-le-salarie/article/privation-de-la-loi-francaise>> accessed 11 October 2022.

³See namely the turnover of the company Terra Fecundis, on which: T Kapp and P Ramackers, 'L'affaire Terra Fecundis, Les principaux enseignements' 1975 (2001) *Semaine sociale Lamy* 5.

⁴M-A Moreau, 'Le détachement des travailleurs dans l'Union européenne: 20 ans après' 7 (2016) *Droit social* 584.

⁵*Ibid.*

⁶*Ibid.*

⁷See namely: A Bunting and J Quirk, 'Contemporary Slavery as More Than Rhetorical Strategy? The Politics and Ideology of a New Political Cause' in A Bunting and J Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2017) 5.

⁸See, firstly, Directive 96/71/CE concerning the posting of workers in the framework of the provision of services OJ L 18/1. On more recent EU actions, see namely: Commission proposals for a corporate sustainability reporting directive (CSRD), 21 April 2021, COM/2021/189 final (Council adopted its position on the Directive on 24 February 2022) and for a directive on corporate sustainability due diligence, 23 February 2022, COM(2022) 71 final. See also Council conclusions on Human Rights and Decent Work in Global Supply Chains, 1 December 2020 <<https://www.consilium.europa.eu/media/46999/st13512-en20.pdf>> accessed 11 October 2022.

established in Spain, on the French territory.⁹ Working conditions of the posted workers were described by the prosecutor of the Judicial Court of Marseille as a transposition of ‘Germinal’¹⁰ in the farms.¹¹ In this case, as a result, directors of the firm were sentenced to particularly severe penalties (prison and heavy fines).¹² This case hints at what international posting has become: the framework for a resurgence, in 21st century Europe, of the worst forms of workers’ exploitation. Working and living conditions of the workers concerned have led to a situation in which the fundamental right to human dignity is violated.¹³ The case also illustrates that the most severe problems arise when workers are migrating from a third country, and their precarious immigration status makes them even more vulnerable.¹⁴

The purpose of discussing exploitation of workers through posting, and the emergence of a new form of modern slavery, is to provoke a change in the way we look at the phenomenon of international posting, and to encourage the adoption of the necessary actions to combat the extreme forms of exploitation relying on the regime of posting. Section 2 focuses on the new market that the international posting regime has brought about and the factors that have contributed to its expansion. Section 3 describes the emergence of a system of labour exploitation, and it examines the means to combat it.

2. The market of international posting of workers

The fact that the difference in rights is at the origin of a market is not, in itself, a novelty. There are, of course, other cases in which the possibilities offered by the choice of the applicable law is used for business purposes. Just as tax optimisation systems, for example, are not all illegal, the activity of international posting of workers is a system of social optimisation, which makes it possible to play on the differences between laws to limit labour costs. The supply of labour, under specific conditions that are those of posting, responds to a demand from certain economic sectors.

A. On the supply side

International posting has become a way of using labour, a way of organising work. It is an economic activity in itself, a ‘business model’, very close to temporary work, from which it borrows some features, but with the particularity of being based on the diversity of legal systems and its exploitation. An international version of the provision of labour has emerged, with specific legal characteristics. The mobility of workers is not based on the need for a company to send its workers

⁹For a description of the case, see Kapp and Ramackers (n 3).

¹⁰*Germinal* is the title of Zola’s novel describing the dreadful working conditions of 19th century workers in the mining sector.

¹¹According to the prosecutor (closing argument, 22 May 2021), on which see B Bissuel, ‘Procès Terra Fecundis : c’était « Germinal » dans les exploitations agricoles » (Le Monde, 22 May 2021 <https://www.lemonde.fr/politique/article/2021/05/22/proces-terra-fecundis-c-etait-germinal-dans-les-exploitations-agricoles_6081125_823448.html> accessed 12 October 2022.

¹²Decision of the Judicial Court of Marseille of 8 July 2021 <<https://www.herveguichoua.fr/actualites/article/condamnations-lourdes-et-exemplaires-dans-l-affaire-terra-fecundis-entreprise-de-travail-temporaire-espagnole>> accessed 11 October 2022.

¹³For further developments on the case, see below Section 3B.

¹⁴In several Member States, more than 1 out of 10 posted workers have an extra EU/EFTA nationality according to F de Wispelaere, L de Smedt and J Pacolet, ‘Posting of Workers – Collection of Data from the Prior Notification Tools, Reference Year 2019’ 20 (2021) <<https://ec.europa.eu/social/main.jsp?catId=738&langId=fr&pubId=8416&furtherPubs=yes>> accessed 11 October 2022. See also, illustrating the increase in posting of third country nationals to France, M Munoz, ‘Posted workers from and to France, Facts and figures, 2022’, p 17 and, more generally, the data provided by the POSTING.STAT project <<https://hiva.kuleuven.be/nl/nieuws/nieuwsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting>> accessed 11 October 2022. On the increasing number of third country nationals among posted workers, see also: N Mussche and D Lens, ‘The ECJ’s Construction of an EU Mobility Regime-Judicialization and the Posting of Third country Nationals’ 57 (2019) *Journal of Common Market Studies* 1247.

to another country to provide services to a client, which is the first conception of the freedom to provide services, as it was conceived by the Treaty of Rome. It results from the choice of a company, independently of any international activity, to use an available, qualified and, above all, less expensive workforce. The legal framework of posting, foreseen and promoted by the European Union for the purpose of the expansion of the economic activities of Union companies has given rise to a new type of economic activity, which consists in creating the legal conditions of posting, in order to provide for the demand of labour, and reduce the cost of labour.

The market of international posting is based on the provision of workers, who are not fully covered by the law of the country in which the company for which they work is located. The services offered are services of provision of posted workers. The workers concerned may come from any country in the world, provided that they can be made available within the EU. They may be nationals of third countries,¹⁵ which is increasingly common,¹⁶ and do not necessarily have any connection with an EU country. They may also be nationals of the State in which the posting takes place, another sign, one might think, of the break with the concept of posting as a means of providing services distinct from the provision of labour.¹⁷ Of course, the posting of nationals to their State of origin may concern workers who have made use of their freedom of movement to go and work in another State, which does not prevent their employer from posting them to their State of origin, if necessary. However, it cannot be excluded that such postings are the result of the use of posting as a means of evading part of the social law of the host State, which is not made impossible, under the regime of posting, when workers are nationals of that State.

What better example of the transformation of posting than that of the company Team Power Europe, which was recently referred to the Court of Justice? The activity of this Bulgarian company consists in making workers (who are not necessarily nationals of Member States) available to companies located in another Member State. Team Power Europe is therefore not a temporary work agency like any other but a company whose particularity is to offer, in other Member States (Germany, in this case), workers from Eastern European countries. On the company's website, this unequivocal formula appears: 'Have you ever thought about hiring qualified workers from Eastern Europe, but the language barrier scares you? Forget those concerns. Some of our candidates already have a respectable knowledge of German or English and are also eager to improve their language skills.'

In sectors in which companies like Team Power Europe provide their services (road transport, catering, IT, etc), there is a shortage of personnel in certain EU countries, which seems difficult to remedy. International posting is therefore, first of all, a solution to the lack of qualified manpower. Posting facilitates mobility of workers (from Eastern to Western Europe, in particular): this is its least questionable part, even if this mobility weakens the economy of the countries of origin.¹⁸

The other part of the offer is more questionable because it is based on the exploitation of differences between social legislations, within the Union. Yet this is the core element of the offer of companies like Team Power Europe: to provide workers at lower cost, because a less costly social legislation applies. In this regard, although almost all the rules of labour law of the State where work is performed are applicable, since Directive 2018/957 was adopted,¹⁹ workers remain

¹⁵The case law of the Court of Justice facilitates the posting of third-country nationals, by refusing that Member States impose the obtention of a work permit in the country of performance of the service, unless it can be proved that the provision of services consists solely of the provision of labour. In this sense, see namely: Case C-18/17 *Danieli* ECLI:EU:C:2018:904.

¹⁶Wispelaere et al (n 14).

¹⁷According to Wispelaere et al (n 14), more than 4 per cent of posted workers in France, Italy, and Slovakia were nationals of the host State. More than 6 per cent of posted workers in Slovakia are nationals of this country. In France, this concerns 11 per cent of posted workers.

¹⁸On the phenomenon of *brain drain*, and the need and ways to address it, see namely: European Parliament, 'Report on Reversing Demographic Trends in EU Regions Using Cohesion Policy Instruments' 25 March 2021 (2020/2039(INI)).

¹⁹Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173/16.

nonetheless covered by the social security system of the State of their employer. This is what makes the offer particularly attractive. The activity of companies specialised in posting within the Union, such as Team Power Europe or other companies involved in cases recently decided by the Court of Justice,²⁰ is largely dependent on this applicability of a social security system other than that of the State, in which work is conducted.

B. On the demand side

The example of Team Power Europe indicates that the demand for posted employees, albeit not strictly limited to certain sectors, is nonetheless concentrated in some. In terms of fields and professions concerned, the list displayed on the company's website includes: manufacturing and production, welding and assembly, health care, engineering, IT, and telecommunications, logistics, drivers, painters and varnishers, mechanics, window installers, etc. An entire section is also devoted to ship maintenance and repair, the company's area of specialisation, which recalls that shipyards are one of the sectors in which international posting plays a crucial role.

The list of fields of activity of Team Power Europe's clients is more diversified than the results of recent statistics on the distribution of posting by sector, which place construction and road freight in the lead.²¹ The measurement of the phenomenon, carried out at the request of the European Commission, must however be taken with caution, as the statistics are based solely on postings that are notified to the national authorities.²² With regard to the construction sector, in which several Member States have reported a high proportion of posted workers, in 2019, the statistical study confirms the impression given by the litigation before the Court of Justice.²³

However, the demand is not limited to the construction sector. The food industry is also one of the sectors where the demand for posted workers is significant, in some Member States. In particular, posted workers represented a high proportion of workers in the German meat processing industry, until changes took place, in recent years.²⁴ Important decisions by the Court of Justice concern workers posted from Hungary to Austrian slaughterhouses.²⁵ Working conditions in slaughterhouses and the very high turnover in this sector suggest that the demand for posted workers is stimulated at least as much by the prospect of a reduction in labour costs as by the difficulty of finding workers. In this sector, where the subcontracting model has been identified as the cause of social rights violations, subcontracting is reportedly more widespread than in any other economic sector.²⁶ Some recent articles have reported on the proliferation of recruitment agencies, whether subcontractors, multiservice agencies, or cooperatives, to meet the sector's growing need for flexible, low-paid staff.²⁷ However, labour costs in Germany are significantly lower than in other major European meat-producing countries such as France, Belgium, the

²⁰See also, for example, the activity of Atlanco, a temporary employment company established in Ireland and having a subsidiary in Cyprus as well as an office in Poland, involved in the *Bouygues travaux public* case which gave rise to a decision of the Court of Justice of May 14, 2020 (Case C-17/19 *Bouygues travaux public* ECLI:EU:C:2020:379) and to another decision by the social chamber of the French Court of Cassation on 4 November 2020 (Case no 991 FS-P+B+R+I ECLI:FR:CCASS:2020:SO00991).

²¹On this distribution by sector, see Wispelaere et al (n 14).

²²*Ibid.*

²³See recently, *Bouygues* (n 20) and among the landmark cases C-113/89 *Rush Portuguesa* ECLI:EU:C:1990:142 and C-341/05 *Laval* ECLI:EU:C:2007:809.

²⁴Four workers out of ten would be concerned, according to B Wagner et A Hassel, 'Posting, Subcontracting and Low-Wage Employment in the German Meat Industry' 21 (2016) *Transfer: European Review of Labour and Research* 201.

²⁵Cases C-586/13 *Martin Meat* ECLI:EU:C:2015:405 and C-527/16 *Alpenrind* ECLI:EU:C:2018:669.

²⁶According to J Ritchie, Assistant General Secretary of the International Union of Food Workers, quoted by VE McSweeney and H Young, 'Ausbeutung der Armut' 43 (2021) *Der Freitag* di Wochenzeitung <<https://www.freitag.de/autoren/the-guardian/ausbeutung-der-armut>> accessed 11 October 2022.

²⁷*Ibid.*

Netherlands or Denmark.²⁸ Almost all companies in this sector have made extensive use of workers hired by specialised service companies that often recruit directly from Eastern Europe.²⁹ Although no official figures are available, it is estimated that 90 per cent of workers employed in slaughterhouses and meat packing are involved.³⁰ Only a small core of workers are employed directly, the majority of the others, employed by subcontractors, benefit from much less favorable conditions.³¹

As for the agricultural sector, the demand for posted workers is significant in certain countries such as France.³² The proportions remain modest, however, if one considers the number of notifications of posting, which is used to measure the phenomenon. However, as in other fields, the justification for calling on posting, in this sector, in particular the need for workforce and the working conditions of the workers concerned, must also be taken into account: these factors could lead to an increase in demand, if nothing is done to prevent it.

All in all, the posting of workers for which there is the greatest demand concerns the essential but most vulnerable workers that the Covid-19 crisis has made more visible.³³ In the agricultural sector, seasonal workers, whose situation was deemed particularly worrying during the crisis, are, in part, posted workers.³⁴ The *Terra Fecundis* case threw light on the unacceptable situation of agricultural workers at the intersection of two particularly vulnerable categories of farm workers: seasonal workers, and posted workers, who meet the demand of certain companies in the farming industry. Indeed, it is not so simple to derive the undignified working conditions, in this case, from the fact that these workers were posted workers. Determining whether these workers faced worst working (and accommodation) conditions than other local and/or migrant workers in the agricultural sector would require a in-depth comparative analysis. But even if the conclusion must be nuanced, it cannot be ignored that the particularly precarious situation of posted workers, which are dependent on temporary placements by a service provider, and have no direct relationship with the user of their services, who is not their formal employer, can contribute, together with their migrant status, to their exploitation.

The market of international posting, which has developed over the last 30 years, thus allows for the meeting of a supply, the provision of workers, whether EU nationals or not, with varying qualifications, and a demand, in sectors where there is a labour shortage and, above all, where organisations seek reduction labour costs. The growth and dynamism of this market suggest that it should not remain concentrated in certain sectors, which is reflected in the relative diversity of Team Power Europe's fields of activity. By expanding into new areas, the market of international posting can lead, as the meat sector illustrates, to a transformation of forms of employment, and a sharp decline in the social rights and working conditions of the workers concerned. EU regulation concerning posting of workers has indeed taken into account this risk of infringement on social rights, including, in Directive 2018/957, by referring to the right to equal treatment of

²⁸On this topic, see namely Ş Erol and T Schulten 'An End to Wage-Dumping in the German Meat Industry?' (2021) Social Europe <<https://socialeurope.eu/an-end-to-wage-dumping-in-the-german-meat-industry>> accessed 11 October 2022. The contrast with Denmark – where annual labour costs per employee are more than double the German level – is particularly striking. Labour costs are also more than 65 per cent higher in Belgium and the Netherlands, and 50 per cent higher in France.

²⁹Ibid.

³⁰Ibid.

³¹Ibid.

³²According to Wispelaere et al (n 14), around 22,500 workers were posted in this sector in 2019, which amount to 9 per cent of the total number of posted workers. Posted seasonal workers represented 6 per cent of the group of workers employed in the farming industry in Luxembourg and 3 per cent in France and Belgium.

³³On these essential but vulnerable workers, see: Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 2020/C 102 I/03, 30 March 2020.

³⁴Communication from the Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak, 2020/C 235 I/01 et la European Parliament resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis, 2020/2664(RSP).

posted workers. However, it did not envisage putting an end to the market of international posting, which leads to extreme forms of exploitation of workers.

3. When posting becomes a system of exploitation of workers

Diversion of the freedom to provide services, circumvention of the law, or fraud: in the economic model of international posting of workers, ‘the law plays against the law’, as Pierre Rodière elegantly puts it.³⁵ Fraud, at least, should be countered. But, for the Court of Justice, fraud must meet strict conditions.³⁶ Even in the most worrying cases, it is difficult to establish, and the legality of the operation is not always questionable, from the point of view of Union law. In particular, fraud resulting from the exploitation of differences between social protection systems appears, if not impossible, at least excessively difficult to combat.³⁷

But perhaps this situation results from the refusal to see that the market of international posting, as described above, which can lead to extreme forms of exploitation, rests on the possibility to legally make use of the differences between social protection systems, a possibility that stimulates activity on this market. To be convinced that EU law must change, the exploitation of differences in the cost of social protection must be considered in the context of the development of the market of posting, which allows for the appearance of new forms of modern slavery, whereas this exploitation of differences is mostly considered a problem of coordination and competition between social security systems.

A. Two facets of the exploitation of differences in social protection costs

More than a question of worker protection, the exploitation of differences in the cost of social protection raises, in the first place, the question of resources of national social security systems, and of their survival, when placed in competition with each other. It is mainly from this angle that the most recent cases before the Court of Justice were presented.³⁸ The *Vueling* case, which concerns airline personnel, is very enlightening, in this respect.

In this case, the company was accused of having fraudulently affiliated one of its employees to the Spanish social security system, whereas affiliation to the French system was required.³⁹ The Court of Justice accepted that the French institutions and courts could reasonably consider that the posting certificate issued by the Spanish institution had been obtained or invoked fraudulently. However, even if the elements (objective and subjective) allowing characterisation of a fraud were met, the Court of Justice did not allow national courts to set aside this certificate, specifying that the procedure provided for by the coordination rules, applicable in such a case, must be implemented, in the first place.⁴⁰ Before the Court of Justice, the question raised was one of coordination of social security systems: protection of workers was not central. This explains the importance given by the Court to the principles on which this coordination is based: loyal cooperation, mutual trust between national authorities and the need for one single legislation to apply. The question raised did not concern working conditions, which posting would have deteriorated, even if, as the

³⁵P Rodière ‘Le droit européen du détachement de travailleurs : fraude ou inapplicabilité ?’ 7 (2016) *Droit Social* 598.

³⁶See namely Cases C-370/17 *Vueling Airlines* ECLI:EU:C:2020:260 and *Vueling Airlines* ECLI:EU:C:2020:260.

³⁷*Ibid.*

³⁸See in particular *Vueling* (n 36), *Bouygues travaux publics* (n 23), and Case C-784/19 *Team Power Europe* ECLI:EU:C:2021:427.

³⁹The A1 certificate of a pilot, at the origin of the action, should have been issued under Art 14(2)(a)(i) of Regulation of 14 June 1971 (OJ L 149, 5 July 1971, p 2) concerning, inter alia, workers who, as members of the flying personnel of an undertaking engaged in international passenger transport, carry out their activities in the territory of two or more Member States. But it had been issued by the Spanish institution on the basis of Art 14(1)(a) of Regulation 1408/71 on the posting of workers.

⁴⁰*Vueling Airlines* (n 36), para 79.

Court of Justice later recognised, ‘downward pressure on the social security systems of the Member States may result in a reduction in the level of protection offered by them.’⁴¹

Criticisms of this decision have focused on the difficulty faced by judges in dealing with cases of fraudulent application of a foreign social security system. Indeed, there is no doubt fraud is likely to cause significant damage to the social security system evicted, and the method imposed by the Court of Justice to remedy the situation does considerably hamper the action of the authorities and courts, when they try to combat such fraud.

In the *Vueling* case, the question of the level of protection provided to employees by the French and Spanish systems did not arise, nor was it at the origin of the pilot’s action before French courts. Although the purpose of the action was to bring the situation under French law, the objective was to apply French labour law and to obtain, in particular, the benefit of compensation for undeclared work and the right to paid leave.

It is thus quite clear that the Court of Justice has no intention to facilitate the fight against fraudulent affiliation of workers to a less costly social security system. Neither the protection of the social security systems themselves, nor the risk that affiliation to one or the other of the national systems would result in less protection for workers, seem to be sufficiently pressing to call into question the solutions in force. Other objectives (coordination, mutual trust) take precedence. But EU law might be obliged to evolve, in order to avoid manoeuvres designed to take advantage of differences between social protection systems, when it appears that these operations foster extreme forms of exploitation. In other words, EU law evolution could derive from the need to put an end, not to situations similar to those in the *Vueling* case, but to situations closer to the *Alpenrind* case, in which the different factors that encourage posting of workers combine to create a system of exploitation that can be considered as a form of modern slavery. What EU law must take into account, and combat, is the link between law shopping in the domain of social security, and the most serious forms of exploitation of workers.

B. Fighting against extreme forms of exploitation of human labour through posting

There are very different conceptions of slavery. One insists on the possession or control exercised over the body of others, the other on the act of de-socialisation and exclusion, the ‘social death’ that slavery entails.⁴² In all cases, the power exercised over others and the exclusion from social life aim at economic, or sometimes sexual, exploitation of victims.⁴³ Even when it is temporary and based on a contract, ‘the radical alteration, stigmatisation and banishment from the dominant forms of social life distinguishes slavery from other forms of dependence.’⁴⁴ If slavery can be recognised, not by invariant criteria, likely to allow for a unique, universal definition, but rather by a cluster of elements, a multiplicity of features, whose kinship, from one society to another, signals the presence of institutionalised slavery, could it be that, in some of its current forms, the market of international posting constitutes institutionalised slavery?

In the *Terra Fecundis* case, for example, the affiliation of seasonal agricultural workers employed in France to the Spanish social security system was coupled with working conditions contrary to human dignity. From 2012 to 2015, more than 26,000 employees of this company, the majority of them from South America (mainly Ecuador) were driven to their workplace and put to work on French farms, where they were forced to work up to 70 hours a week, for some, without overtime pay, without paid vacation allowances, without access to medical care. Conditions of accommodation, attributable to the farmers who benefited from the provision of services, were considered contrary to human dignity. The judgement delivered by the Marseilles Judicial

⁴¹ *Team Power Europe* (n 38), cited above, para 64.

⁴² Ismard et al, ‘Introduction’ (n 1).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

Court on 8 July 2021 speaks for itself: the implementation of a fraud scheme as a business model is based on the use of an uprooted and docile workforce, for whom serious violations of local labour laws appears to be a very small sacrifice compared to the major economic advantage that a European salary represents.

In this case, the exploitation of the differences in cost of the social security systems and the exploitation of the workers were cumulative. The Judicial Court of Marseille resolved the first difficulty by cancelling the posting certificates, after a dialogue with the Spanish social security authority that had issued them: the activity of Terra Fecundis in France was considered as ‘permanent and without foreseeable term’ as well as the employment of workers in France. Penalties were imposed for undeclared work. French social security institutions demanded payment of unpaid contributions and obtained unprecedented compensation before the Judicial Court of Marseille.⁴⁵ As for workers, compensating for their loss seems more complicated. Indeed, workers are not in the best position to make their voices heard and claim the benefit of their rights, especially when facts date back several years. Although heavy sanctions eventually applied, the case illustrates the complexity of the mechanisms involved, and the difficulties in controlling and putting an end to the worst forms of worker exploitation.

Drawing general lessons from this single case would be contestable. However, this case can be considered representative of the larger problem resulting from the existence of a market of international posting, which goes beyond this case alone, and the farming sector. The pattern of exploiting the shortage of labour, for the hardest and lowest paid jobs, together with the vulnerability of posted workers, especially when they are third country nationals, can be found in a number of other cases, for example in the meat industry, in Germany and Austria, or in the construction sector, in France.⁴⁶

Faced with these extreme situations, the law is not totally powerless. In France, the prosecution of Terra Fecundis was facilitated by the criminalisation of the situation in which a person uses posting of workers irregularly (when the activity is, in fact, carried out on national territory, on a regular, stable, and continuous basis): such a situation falls within the category of undeclared work, potentially leading to criminal sanctions.⁴⁷ This solution is in line with the requirement of a genuine activity of the company in the Member State where it is established, a condition for the exercise of the freedom to provide services, which was included in directive 2014/67 on the enforcement of directive 96/71 concerning the posting of workers.⁴⁸

In terms of social security, the solutions adopted by EU law are also based on the principle that posting can only be carried out by a company with a real, ‘substantial’ activity on the territory of the State in which it is established. More precisely, in order to maintain the affiliation of workers to the social security system of the country in which the employer is established, it is necessary that the employer ‘ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established’.⁴⁹ In the *Team Power Europe* case,⁵⁰ the Court of Justice was therefore able to consider that EU law precludes the provision of cross-border temporary employment services with the application of the social security system of the country in which the temporary employment company is established, if this company does not carry out a significant part of the staffing in the country of its establishment. The

⁴⁵On 10 June 2022, the Court decided that the Company had to pay 80 million euros to the French social security institution, in compensation for unpaid contributions.

⁴⁶On the sectors concerned, and related cases see above, Section 3B, which describes the “supply side”.

⁴⁷Loi n° 2018-771 of 5 Sept. 2018, modifying Art L. 8221-3-3° of the labour code, concerning criminal sanctions applicable to companies convicted for “undeclared work”.

⁴⁸Directive 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, OJ L 159/11, Art 4.

⁴⁹Art 14 of Regulation 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284/1.

⁵⁰n 38.

solution was not self-evident: the Court could have considered that the activities of managing the provision of personnel (selection, recruitment and social security affiliation of temporary workers) were substantial activities for a temporary employment agency, which would have favored the development of the market of international posting. On the contrary, it chose to avoid creating an incentive for companies ‘to choose the Member State in which they wish to establish themselves on the basis of the latter’s social security legislation with the sole aim of benefiting from the legislation which is most favourable to them in that field, and thus to allow “forum shopping”’.⁵¹

However, the *Team Power Europe* case, as well as that of *Terra Fecundis*, illustrate that, if the exclusion from the scope of legal posting of purely international posting activities can be sanctioned, especially when it leads to extreme forms of exploitation, proving the absence of substantial activity in the State of establishment of the company is far from simple, and the protection of workers, who are victims of exploitation not guaranteed, in the current legal framework.

Other, more vigorous actions seem necessary. In Germany, for example, poor working conditions in the meat sector led to the adoption of a statute, in 2020, to improve workers’ protection.⁵² The law prohibits self-employment and temporary work in the meat industry. As of 1 January 2021, no self-employed workers shall work in the entire processing chain of the meat industry (slaughter, cutting, and processing of meat), and as of 1 April 2021, no temporary workers shall be made available in this sector.

If one agrees that the international posting of workers is a condition for the existence of a market that can lead to extreme forms of exploitation, the rather radical path followed by Germany is probably the best. As the Court of Justice has pointed out, the purpose of the posting regime, is ‘to guarantee that the right to free movement of persons can be exercised effectively and, thereby, to contribute towards improving the standard of living and conditions of employment of persons who move within the European Union’.⁵³ When it turns out that it does not allow such an improvement but leads to a very severe deterioration of working conditions in the Union, these rules lose their *raison d’être* and should be abolished.

As a result, the way forward would be to prohibit the provision of workers by foreign temporary employment agencies or by companies whose sole activity is the provision of personnel, either in certain sectors (where problems are particularly severe and systemic) or across the board. Such a drastic limit to free provision of services could indeed be legally challenged on the basis that it constitutes a discrimination on nationality, and an excessive restriction to a fundamental freedom enshrined in the TFEU. To resist this critic, EU regulation would have to be justified by sufficiently pressing public interest needs, in order to pass the proportionality test. This is why it seems so important to throw light on the extreme forms of exploitation that can result from posting: only the particularly undignified working conditions that posting makes possible, and fosters, can justify a prohibition that indeed strongly limits free provision of services.

So far, such a direction has not been taken. When Directive 96/71 was revised, in 2018, the preamble of the new Directive 2018/957 stated that ‘experience shows that workers who have been hired out by a temporary employment undertaking or placement agency to a user undertaking are sometimes sent to the territory of another Member State in the framework of the transnational provision of services’ and that ‘the protection of such workers should be ensured’.⁵⁴ Thus, the text does not ignore the existence of a complex organisation of posting, on the scale of the Union, which goes through the intermediary of temporary work agencies or placement agencies located where the affiliation of workers to the social security system makes it possible to reduce labour costs. It does not ignore either that these operations risk affecting the protection of workers. However, in order to deal with this situation, the new directive merely provides for an obligation

⁵¹*Team Power Europe* (n 38), para 62.

⁵²Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz of 22 December 2020 (ASKG).

⁵³CJUE, *Team Power Europe* (n 38), cited above, para 58.

⁵⁴Recital 13.

to provide information.⁵⁵ This solution seems highly insufficient. It is indeed out of the question to abolish economic freedoms, and, in particular, freedom to provide services, which are a core element of EU integration. But EU law must find ways to put an end to misuses of this freedom that favor extreme forms of labour exploitation.

4. Conclusion

Uncovering severe forms of exploitation of workers, based on the use of international posting, must lead to questioning the idea that the posting of workers is, in all cases, a necessary modality of the freedom to provide services. EU law must accept, as the Court of Justice now seems ready to do, that certain forms of posting cannot be justified in the name of freedoms that the internal market is made of. Just as it was necessary to highlight the forms of exploitation on which the functioning of global production chains is based in order to give rise to the idea of the responsibility of international companies at the origin of this organisation of production, it must be recognised that the international posting of workers is, in part, an organisation based on the exploitation of a particularly vulnerable workforce, approaching, in certain extreme cases, a system of slavery. But it is perhaps easier for the European Union and its Member States to target some ‘exceptional’ cases of abuse, slavery or forced labour, of which workers at the end of production chains, in less developed countries, are victims,⁵⁶ than to fight, within the Union itself, against those who profit from the most violent forms of exploitation of so-called free labour.⁵⁷

Competing interests. The author has no conflicts of interest to declare.

⁵⁵As recital 13 indicates, ‘the user undertaking informs the temporary employment undertaking or placement agency about the posted workers who are temporarily working in the territory of a Member State other than the Member State in which they normally work for the temporary employment undertaking or placement agency or for the user undertaking, in order to allow the employer to apply, as appropriate, the terms and conditions of employment that are more favourable to the posted worker’.

⁵⁶As a recent proposal by the European Commission suggests: Proposal for a regulation on prohibiting products made with forced labour on the Union market, COM(2022) 453, 14 September 2022.

⁵⁷On this critique, see Bunting and Quirk (n 7).