

## **Comparative Working Paper**

# **Implementing the Posting of Workers Directive in the Western Balkans: An Institutional Analysis**

**Sonila Danaj, Eszter Zólyomi, Mojca Vah Jevšnik & Sanja Cukut Krilić**

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## Abstract

This paper contributes to the debate on the implementation of the Posting of Workers Directive and the mechanisms for the protection of posted workers through the study of the process of transposition and implementation of the Directive in the four candidate countries of the Western Balkans: Albania, Montenegro, North Macedonia and Serbia. The paper is based on the review of the existing academic and grey literature on migration and labour mobility, the review of each country's legislative and institutional framework, as well as 44 semi-structured interviews with representatives of policymakers, implementing and enforcement state agencies, social partners and other relevant experts in all four countries. We found that the WB countries have concentrated their efforts predominantly on the design stage of the policy cycle establishing the legal framework and structures, although some form of posting is already happening. We argue that the process of transposing and implementing the Directive is driven by the EU integration process but constrained by the current candidate status of these countries which leads to insufficient mechanisms and capacities for implementation. The transposition and the implementation of the Posting of Workers Directive reveals the contradiction in the EU integration process, as potential Member States are stuck in a transitional phase where they are asked to set up the legal and institutional framework prior to membership, although their prospects of membership remain uncertain. These contradictions have a direct impact on the working lives and level of protection provided to workers from these countries, as the timeframe of EU regulation applicability is challenged by labour market actors who are already taking advantage of the gaps and tensions between national and transnational regulation.

# 1. Introduction

Since the Posting of Workers Directive (96/71/EC) was passed in 1996, academic and policy-oriented research has paid substantial attention to the way it has been implemented in the Member States of the European Union (EU MS). Legal scholars have extensively discussed the process of transposition and interpretation of the Posting of Workers Directive (PWD) at the national level as well as the interplay between national regulations and EU law (e.g. Evju and Novitz, 2012; Houwerzijl, 2014; Novitz, 2010, Rocca, 2014; Van Hoek and Houwerzijl, 2011). Their main concern shared with industrial relations scholars (e.g. Berntsen and Lillie, 2015; Cremers, 2011; Lillie and Greer, 2007) has been on the impact that the tension between national and transnational regulation and structures has on the protection of cross-border temporary workers. Others have also pinpointed to the challenge of enforcing transnational regulations and provide protection for all workers at the national level (Wagner and Berntsen, 2016). As EU regulation, the PWD has been studied only in the context of the EU countries. However, more recently some evidence is emerging that posting from third countries is also happening (see e.g. Danaj and Zólyomi, 2018), in particular from the EU neighbouring countries that are in the process of joining the Union.

Thus, this paper contributes to the debate on the implementation of the PWD and the mechanisms for the protection of posted workers through the study of the process of its transposition and implementation in the candidate countries of the Western Balkans (WB). While current literature has concentrated on the EU countries, there has been no study on the simultaneous processes of EU integration and the adoption of this EU policy. In other words, there is currently no study on how these countries are transposing and implementing the Directive, a gap which the paper at hand seeks to address. And we do so by cross-fertilizing legal-institutional literature with industrial relations and enlargement literature focusing on the Western Balkans.

We conduct a comparative analysis of the state of affairs of the transposition and implementation of the Posting of Workers Directive in the candidate countries of the Western Balkans from an incremental policy cycle perspective at its three stages of design, implementation and monitoring and review, applied to six interdependent institutional capacity domains: legal framework, institutional arrangement, inter-agency cooperation, human resources, stakeholder engagement, and public governance. The research questions for this study are: What are the current national institutional capacities for implementing the Posting of Workers Directive? What challenges and institutional needs should be addressed in order to support the implementation of the Directive? The paper is based on a two-stage analysis that started with four country case studies in Albania, Montenegro, North Macedonia and Serbia followed by a comparative needs assessment. The empirical data were collected during 2018 through the review of the existing academic and grey literature on migration and labour mobility, the review of each country's legislative and institutional framework, as well as a total of 44 semi-structured interviews with representatives of policymakers, implementing and enforcement state agencies, social partners and other relevant experts in the four countries.

Our findings indicate that the transposition of the Posting of Workers Directive in the Western Balkans is driven by their ambition towards EU integration and the process of their national legislation as regards the *Acquis Communautaire* in preparation for membership. As the PWD should come into force once the countries become full EU Member States, we found that the policy cycle is not complete in any of the WB countries, who have concentrated their efforts predominantly on the design stage of establishing the legal framework and structures. Despite the fact that the PWD should come into force once the WB countries become EU Member States, the passing of the laws and other regulation on posting, as well as the signing of bilateral agreements on the coordination of the social protection systems with EU countries as well as additional bilateral agreements on posting signed by Serbia and North Macedonia, provide the legal framework for implementing posting in these countries. Although exact comparable figures are difficult to have also due to different categorizations and definitions of posting, the available data indicate that temporary cross-border service provision from the WB to the EU and vice-versa is already happening. These findings transform posting into a current policy issue for the candidate countries, which makes our analysis of the institutional capacities of the WB countries to transpose and implement the PWD timely and relevant for policy and academic debates.

Based on these findings, we argue that the process of transposing and implementing this cross-border labour mobility policy is driven by the EU integration process but constrained by the current candidate status of these countries which leads to insufficient mechanisms and capacities for implementation. While most of the candidate countries of the Western Balkans have already transposed the Directive, their institutional capacities are still incomplete due to a hesitation of the institutions to proceed in preparing the necessary structures and human resources for the full implementation of a Directive that should come into force after they join the EU, when the prospect of the latter is unclear. However, as Serbia and to a smaller degree North Macedonia are already acting as sending countries, hence posting workers to certain EU Member States, they are faced with the need for institutional structures and capacities to monitor posting and protect their own posted nationals. The transposition and the implementation of the Posting of Workers Directive reveals the contradiction in the EU integration process, as potential Member States are stuck in a transitional phase where they are asked to set up the legal and institutional framework prior to membership, although their prospects of membership remain uncertain and the full application of the new framework is tied to the date of full membership. These contradictions have a direct impact on the working lives and level of protection provided to workers from these countries, where the timeframe of EU regulation applicability is challenged by labour market actors, who are already taking advantage of the gaps and tensions between national and transnational regulation.

The paper is structured as follows: after the introduction, a literature review of the posting of workers within the European labour market and the EU conditionality and policy development in the Western Balkans are presented. We then proceed to explain the methodology and analytical framework of the study. The findings are discussed in the fifth part of the paper, divided in three main subsections, i.e. legal and institutional framework, stakeholders' engagement and public governance, before presenting our conclusions and policy implications of the research.

## 2. The posting of workers within the European labour market

The Posting of Workers Directive (96/71/EC) is one of the policies implemented by the European Union to regulate the demand for temporary services among the Member States. Although the Directive has been in place since 1996, this form of cross-border labour mobility became significant with the enlargement of the European Union to include their Eastern European members in 2004 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) and in 2007 (Romania and Bulgaria). In more recent years, posting has been used increasingly, rising from 1 million postings reported by the Member States in 2010 to 2.8 million in 2017 (De Wispelaere and Pacolet, 2018)<sup>1</sup>.

The implementation and enforcement of the Directive has been widely discussed in the literature. One of the main points of scrutiny has been the interpretation of the terms and conditions of the Directive and its inclusion into the national legal framework by the Member States (e.g. Cremers, 2010; 2016; Novitz, 2010; Rocca, 2014; Van Hoek & Houwerzijl, 2011). The factors that influence the implementation and the enforcement of the PWD as discussed in the literature can be divided in two categories: structures and resources.

The structures that have influenced the transposition and eventually the implementation of the PWD include national industrial relations institutions and protection instruments, which also influence the type of protection provided, i.e. minimum or broad, as well as the choice of coverage of the PWD to all or select industries. Therefore, when transposing the PWD, Member States could make three choices: apply either minimum or broader protection; implement protection either through legal instruments or through autonomous collective bargaining; and cover all sectors or only a selected few. Except for Cyprus, Germany, Ireland and Luxemburg, the other Member States have applied posting to all sectors. There is a more even division when it comes to the first question, which is influenced by the type of national industrial relations structures and institutions: Member States with binding collective agreements and nationwide agreements have chosen broader protection, whereas those with minimum statutory wage systems have opted for minimum protection. And in terms of instruments, most Member States implement protection through both legislation and the collective agreements, except Latvia, Poland and the UK that use only legislation (Voss et al., 2016).

The main implication of these choices has been whether the implementation of the Directive has protected posted workers by providing equal treatment based on its reported objective or whether it has encouraged the application of unequal terms and conditions for workers based on their form of recruitment, i.e. locally-hired versus posted from across the border, to preserve their competitive advantage (Cremers, 2006). Countries that opted for minimum protection, such as the UK, have transposed the PWD simply by extending their labour law to include posted workers without any additional amendments (Novitz, 2010). The decision was based on the understanding that British labour regulation was strong enough already to prevent any undercuts to national standards (Evju

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<sup>1</sup> There are no exact numbers for postings. However, the European Commission draws estimates from the portable documents A1 forms submitted by companies or the self-employed to the public authorities in their home country which serve as a certificate indicating the national social security legislation that applies to a person and confirms that this person has no obligations to pay contributions in another Member State while they are pursuing their employment activity on a temporary basis in this other Member State. For more see De Wispelaere and Pacolet (2018: 8-9).

and Novitz, 2012). Some countries, such as Austria or Germany, however, introduced a number of amendments as a way to address the loopholes between national legislation and the EU Directive and increase the level of protection, which after having been considered as insufficient were eventually followed up by anti-dumping laws (Schlachter, 2010; Hollan and Danaj, 2018). Other countries passed laws on posting (e.g. Denmark) or cross-border labour mobility more broadly where terms and conditions for posted workers were included (e.g. Netherlands) (Houwerzijl, 2010; Lind, 2010). Collective agreements and trade unions were also considered a fundamental part of the mechanisms for the fight against social dumping and the protection of national labour standards (Evju and Novitz, 2012).

Despite national efforts, the implementation of the PWD has not been without points of contention. Various scholars have already discussed the gaps between transnational and national labour market regulatory frameworks as well as the unequal treatment of posted workers triggered by differences across national and sectoral labour market regulations (e.g. Arnholtz and Hansen, 2013; Arnholtz and Lillie, 2020; Houwerzijl, 2014; Lillie and Greer, 2007; Wagner, 2018). There is already evidence in the literature that some employers take advantage of these differences among national regulations and the ambiguity surrounding the interpretation and therefore the implementation of the Directive in different national settings (Cremers, 2011; Berntsen and Lillie, 2015). The possibility to go ‘regime shopping’ has given the opportunity to some companies to circumvent national laws that have also at times led to labour right violations and abuse of the posted workforce (Berntsen and Lillie, 2015; Cremers, 2011; Houwerzijl, 2014). Nonetheless, employers do not necessarily all opt for unequal terms, especially in terms of wages. As Afonso (2012) found out by comparing Austria, Switzerland and Ireland, the decision of the employers to use posting to boost their profit is dependable on the type of sector and industrial relations institutions in their country. So, employers in non-tradable sectors confronted with strong trade unions support the regulation of wage standards in order to prevent foreign competitors from using lower wages as a competitive advantage.

The tension between national regulations and the supranational ones has also been addressed by the European Court of Justice in several cases<sup>2</sup> that have been discussed considerably in the literature on posting. The interpretation of the protection stipulated in the PWD as a ceiling of rights by the Court has allowed for differences in terms and conditions between posted workers and local workers (Barnard, 2009; Kilpatrick, 2009; Sack, 2012). They have thus effectively ruled that the free movement of services, freedom of establishment, and free competition within the European common market are more important than equality of social rights and treatment (Dølvik and Visser, 2009).

However, the persistence of unfair competition and social dumping practices have been repeatedly denounced by trade unions and researchers (e.g. ETUC, 2014; Cremers, 2016). A considerable amount of pressure to revise the rules for posting was also posed nationally to political leaders in a number of EU countries, which eventually led to the approval of a revised version of the Directive in 2018 to include the principle of equal pay between posted and locally-hired workers as well as

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<sup>2</sup> Often referred to in the literature as the *Laval Quartet*, the four most important cases on posting are: Case C-341/05, *Laval un Partneri Ltd*, ECR 2007, I-11767; Case C-438/05 *Viking*, ECR 2007, I-10779; Case C-346/06 *Rüffert*, ECR 2008, I-1989; Case C-319/06, *Commission v. Luxembourg*, ECR 2008, I-4323.

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the further reduction of the posting period from two years to one year (see Directive [EU] 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services). The revised regulation that will enter in force in 2020 is expected to guarantee equal pay for all workers based on rules set by national law or universally applicable collective agreements (European Commission, 2019).

The complexity and ambiguity of the regulatory framework of a multi-level enforcement system that has led to the need for more stringent rules and better structures, account for one aspect of the challenges to implement the PWD. Other challenges have been found in the deficiencies of the multi-level enforcement system (Wagner and Berntsen, 2016). A growing number of studies (Arnholtz and Lillie, 2020; Čaněk et al., 2018; Danaj and Zólyomi, 2018; Iannuzzi and Sacchetto, 2020; Wagner and Berntsen, 2016) find that posting is a challenge for enforcement state agencies in terms of sorting issues of jurisdiction and which laws are applicable to posted workers and which not. There is also evidence of insufficient capacities of national institutions to monitor and sanction enterprises that violate the labour rights of mobile EU workers (Thörnqvist and Bernhardsson, 2015; Wagner and Berntsen, 2016). Wagner and Berntsen (2016) argue that public institutions as well as social partners have not managed to transform and train themselves sufficiently to meet the challenges of a unified European labour market, in particular in terms of the enforcement of labour rights and the protection of posted workers. Insufficient training about the PWD has been found in the comparative analysis conducted by Danaj and Zólyomi (2018) on posting and occupational safety and health in nine EU countries. Additionally, mechanisms of transnational cooperation have not been sufficient. In the case of the Internal Market Information system available to labour inspectors across countries to exchange information on posting companies and employment agencies, they have not been able to respond to questions and requests from colleagues across the border effectively and in a timely manner (Čaněk et al., 2018). In the case of cross-border cooperation, sustainability has been a challenge either because initiatives have had limited scope (e.g. bilateral) or because they have been project-based and therefore with limited duration (Danaj and Zólyomi, 2018).

The pressure that the presence of temporary EU workers has put on national regulatory institutions has pushed national worker organizations to respond in a variety of ways ranging from exclusion to acceptance (see e.g. Marino et al., 2017). National trade unions have played a key role in the fight against social dumping via posting, whether in protection of national standards or the rights to equal terms for posted workers. They have been among the main critics of the way the PWD as well as the Enforcement Directive (2014/67/EU) have been implemented and they have been among the first drivers for the improvement of the posting regulations at the transnational level. Nonetheless, in a recent article on the position of trade unions towards the Enforcement Directive, Seeliger and Wagner (2018) found out that unions did not manage to provide a unified position and identified cleavages between different vertical levels of the system of European labour relations, in particular the sectoral and interprofessional levels. National trade unions have also taken labour right violations of posted workers to court, demanding equal terms and conditions for posted workers according to their national standards and collective agreements (e.g. the *Laval Quartet* cases). However, as already discussed above, while the European Court has mostly decided in favour of preserving the competitiveness of the free European market, in a more recent

decision taken in 2015, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, the Court decided in favour of Finnish Unions' claim of equal pay, including overtime and holiday payments, for posted workers based on their skill category, if such rates were included in the national collective agreements (Cremers, 2016; Lillie & Wagner, 2015).

Whether through equal treatment or particularistic approaches (Alberti et al., 2013), extensive efforts and resources have also been put in increasing union membership and engagement among temporary migrant workers, including posted workers (Arnholtz and Refslund, 2019; Berntsen and Lillie, 2016; Danaj and Sippola, 2015; Eldring et al., 2012; Sippola and Lillie 2011). Although trade unions have employed recruitment and organizing strategies and tactics similar to those on other types of labour migrants (Lillie et al., 2020), their efforts, however, have had limited results in most cases (see e.g. Berntsen and Lillie, 2016; Danaj and Sippola, 2015; Lillie and Sippola, 2011; Wagner and Lillie, 2014), with the exception of the Copenhagen metro construction project, where Danish trade unions concentrated extensive resources (Arnholtz and Refslund, 2019). Despite the challenges, trade unions remain a fundamental actor in the protection of labour rights for posted workers either through pressure to reform policy or direct action.

### **3. EU conditionality and policy development in the Western Balkans**

The European Union (EU) has played a major role in the post-regime change and post-conflict reconstruction of the countries of the Western Balkans. The EU's politically driven dual strategy of state-building and European integration (Bieber, 2011) has manifested itself through the prism of Europeanisation of the WB countries and the promise of their eventual accession to the EU. Accession negotiations commenced with North Macedonia (2005), Montenegro (2012), Serbia (2014) and Albania (2014), while Bosnia and Herzegovina and Kosovo became potential candidates that were promised the prospect of joining when ready. None of the candidate countries achieved sufficient progress to be offered membership by 2019, but the European Council reaffirmed its "unequivocal support" for the enlargement, welcomed the progress made by the countries and stressed the EU's commitment to support them in conducting EU-oriented reforms and projects (European Commission, 2018a). In the coming years, the candidate countries are expected to significantly strengthen the rule of law and fight against organised crime and corruption, solve major bilateral disputes in the region, improve the economy and engage in pro-European rhetoric in order to sustain the support for accession by their own and EU citizens. In the field of the economy and labour market functioning, more effort is needed to increase competitiveness, create more business opportunities, decrease the level of unemployment and attenuate the brain drain (ibid.). However, rapid structural changes of this scope, underpinned with the pressure of adoption of multiplicity of EU Directives across sectors and played out amidst an unstable political atmosphere and conflicting interests, poses an unprecedented challenge. Formulation of rational policy in a context where administrations are politicised and "state capture by big business interests is common" (Bartlett, 2013: 451) is undoubtedly a difficult endeavour. In most Western Balkans countries, Bartlett (2013) notes, there is no permanent civil service that could carry lessons from one administration to the next, as high-level bureaucrats are often



replaced with every new government. High turnover of civil servants, also due to poor pay and conditions, further disrupts implementation of policies and reduces the effectiveness of the public administration. This makes the policymaking process vulnerable to pressures exerted by external advisers and donor agencies.<sup>3</sup>

Improvement of policy development and coordination practices in the candidate countries has been a requirement set out in the public administration reform pillar of the European Union's conditionality for the Western Balkans (Lazarević and Stratulat, 2018). The EU asks the candidates to engage in evidence-based policymaking, actively involve the public and civil society in the policymaking process and ensure transparency and openness in the governments' decision-making and reporting. However, the countries have overall produced poor results in this reform area so far. Lazarević and Stratulat (2018) note that monitoring<sup>4</sup> suggests that the region's governments currently display a low level of preparedness in the sphere of policymaking and coordination. All governments score low regarding the standards related to policy planning, monitoring, reporting, the use of evidence in the design of policies and public consultation. The regions' average results in these fields are low, ranging from 1 to 2 on a scale from 0 to 5 (ibid.). The few positive examples are observed in the countries where political priority was assigned to these reforms and the EU's assistance was generous, such as in Kosovo, Montenegro and Serbia, but the area of policy development in general stands out as one of the weakest points. Most often, governments tend not to publicly report on their priorities and strategies, and their decision-making process is not sufficiently transparent. Civil society institutions are often excluded from active participation in policymaking and that hinders trust in democratic institutions. Their exclusion from providing evidence and opinion means that they are also not able to enhance their skills to carry out quality research and analysis, gain experience and build capacities. It is the EU's requirement that ministries design their policies inclusive of the society and enable participation of the civil society institutions, as such standards of policymaking and skills will be needed by the candidate countries when they eventually become part of the supranational arena of policymaking (Lazarević and Stratulat, 2018).

The complex challenges underpinning the accession processes in the WB countries have been extensively documented in grey and academic literature (see e.g. Zhelyazkova et al., 2018; Esch and Remme, 2017; Thomas and Bojicic-Dzelilovic, 2014; Bartlett, 2013; Phinnemore, 2013; Nechev et. al., 2013; Bieber, 2011). A growing body of literature explores the enlargement process from different standpoints, taking under scrutiny a myriad of political and economic agendas of the involved actors, focusing on country-specific challenges concerning governance and rule of law, security, sector-specific policymaking and adoption of fundamental EU values. Much attention has been attributed to the principle and process of EU conditionality, which is a key tool

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<sup>3</sup> Bartlett provides a practical example of hindered policymaking in the field of skills policies. He notes that the main challenges to the development of skills policies in the candidate countries are weak capacities of government institutions, including public employment agencies, lack of training services provided by the state, insufficient certification and accreditation of skills, slow reforms of the vocational education and training systems, and a low-level of in-house training by employers. He points out that conflicting advice received by external actors produces inconsistent policy formulas (Bartlett, 2013).

<sup>4</sup> The authors refer to the monitoring conducted by SIGMA/OECD, which follows the implementation of requirements laid out in the Principles of Public Administration, developed specifically for the EU candidate countries and potential candidates in 2014. SIGMA/OECD monitors the process on behalf of the European Commission and since 2017 also by the civil society through the WeBER project.

for the EU to encourage and ensure compliance of candidate countries with EU policies and norms (Zhelyazkova et al., 2018). The conditionality approach utilized by the EU in the accession process has been documented by a growing body of literature stemming from Europeanisation research (Zhelyazkova et al., 2018: 16; Grabbe, 2002; Schimmelfennig and Sedelmeier, 2005; Sedelheimer, 2011; Balfour and Stratulat, 2011). Conditionality refers to the conditions for membership and criteria that the candidate countries must meet in order to join the EU, which are referred to as the Copenhagen criteria.<sup>5</sup> Apart from these criteria, the countries of the Western Balkans are expected to meet additional conditions, mostly relating to regional cooperation and good neighbourly relations (European Neighbourhood Policy and Enlargement Negotiations). The conditionality process in principle refers to the adoption of the EU *Acquis Communautaire* and rule adoption in a variety of policy areas but has wider structural implications.

The process of Europeanisation through conditionality has been previously experienced by the Central and Eastern European countries, which became Member States in 2004 and 2007. However, it is often argued that the theoretical approaches used during that enlargement period may not be as successful when it comes to the countries of the Western Balkans. The reasons are manifold. First, compared to the CEE candidate countries, the criteria for accession of WB countries are more stringent. Second, they are confronted with lack of public support for enlargement in the Member States and, in addition, lack of focus on the enlargement process. This latter is attributed mainly to that fact that the EU has been confronted with a variety of internal and external challenges, ranging from the Euro crisis, the Brexit negotiations and the refugee crisis. As regards public opinion of EU citizens about the enlargement, the support for accepting new members is decreasing and some Member States have even announced to put accession treaties to a referendum. This negative public sentiment, Zhelyazkova et al. argue, reduces the credibility of the EU's accession promise, which in turn means that current governments are "unlikely to be the beneficiaries of their efforts and therefore unwilling to tackle costly and unpopular reforms" (2018: 27). Third, the WB countries started their way towards the EU from a more difficult position as they had less experience with democracy and lower governance capacity. Finally, the countries continue to face problems linked to the aftermath of the civil war, including unresolved ethnic conflicts and contested statehood (ibid.). Bartlett (2013) also stresses the fact that the EU enlargement countries have been heavily affected by the economic crisis, which has decreased generosity of development funds to support EU friendly reforms.

Zhelyazkova et al. (2018) state that compliance in the Western Balkans is impacted by four sets of factors, ranging from the determinacy of EU conditions, the credibility of the membership perspective, the capacity of candidate countries to implement accession requirements and the adoption costs of transferring the EU rules and regulation in national law and practice. The effectiveness of governance, they argue, is mostly limited by lack of financial and administrative resources, uneven distribution of institutional reforms, political tensions and legacies, rather ineffective enforcement of laws and high levels of corruption. There are, of course, differences

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<sup>5</sup> The Copenhagen criteria state that countries which want to join the EU must have stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU; and the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union (European Neighbourhood Policy And Enlargement Negotiations).

among countries in terms of their domestic capacity and commitment to adopt and implement reforms in specific policy areas, but the overall progress remains slow.<sup>6</sup> This has prompted argumentation that the conditionality approach as adopted by the EU is not an effective path for the Western Balkans on their way to democracy. Böhmelt and Freyburg (2018), for example, argue that although the accession countries display partial compliance, profound political reforms continue to remain elusive, and that means that it is unlikely that any of the countries will fully meet the requirements in the near future. In a similar tone, Richter and Wunsch (2019) point out to decoupling between gradual improvements in formal compliance with the accession criteria and simultaneous stagnation, if not decline, of democratic performance in the accession countries. They question the EU's conditionality approach and argue that in the Western Balkans it may even have a detrimental effect.

## 4. Methodology

### 4.1. *Analytical framework*

The analytical framework adopted for the mapping and assessment of institutional capacities and needs is structured on an incremental approach to capacity needs assessment. The starting point in this approach is to assess capacities that are already in place and, building on these, identify what capacities are necessary to achieve the goal. The incremental approach has several advantages over other approaches, such as gap analysis. Namely, it allows to take existing capacities as well as relevant enabling factors into account which helps to define needs as realistic starting points and first steps towards moving in the desired direction. It recognises strengths in institutional capacity instead of focusing solely on gaps. It also supports involving stakeholders in the form of participatory self-assessment and provides them more flexibility to define and reflect on what they consider to be important for the context including their role and importance in the analysis (FAO, 2012; UNDP, 1998).

In line with this approach the study aimed to answer the following research questions:

- What are the current national institutional capacities for implementing the Posting of Workers Directive?
- What challenges and institutional needs should be addressed in order to support the implementation of the Directive?

The research concentrated on the identification of challenges and capacity needs for the implementation of a single policy, the Posting of Workers Directive. Institutional capacities were analysed in view of the full policy cycle that includes, in addition to the implementation phase, also assessment and design and monitoring and evaluation (OECD, 2010). Thus, we recognise the

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<sup>6</sup> Lazarević and Stratulat (2018) note, for example, that the Commission has engaged intensively with the governments of Kosovo, Montenegro and Serbia on the matter of effective policymaking and provided financial support to develop their capacities. However, since in Kosovo the issue was given higher political priority status than in the other two countries, the Kosovar government reached similar to better results than the two accession frontrunners.

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ultimately transformative and interdependent nature of the policy process in which capacities in each stage of the policy cycle influence, and are influenced by, the performance in others (OECD, 2010). Furthermore, our framework is based on the understanding that implementation of any policy is complex and involves processes and interactions at different organisational levels and of various institutional dimensions. Institutional capacities and needs should therefore be analysed across multiple capacity domains while also acknowledging their interdependence. Drawing on previous frameworks from the policy literature (OECD, 2003; UNDP, 2008, 2009; EuropeAid, 2005, 2010), the present study identified six capacity domains for the focus of analysis: legal framework, institutional arrangement, inter-agency cooperation, stakeholder engagement and public governance. Within each capacity domain, issue-specific, issue-relevant and country-specific developments were examined. Issue-specific capacity aspects were those directly related to the transposition of the Posting of Workers Directive. Capacities that were deemed to be relevant for the implementation of the Directive were considered issue-relevant. Because existing institutional capacities are highly dependent on and specific to context, we further distinguished country-specific capacities and needs (UNDP, 2008, 2009; OECD, 2003).

## **4.2. *Research design and case studies***

The research was implemented in two stages. First, individual case studies were conducted in each of the four countries (see Agolli and Deliu, 2018; Cukut Krilić and Vah Jevšnik, 2018; Djuric and Todorovic, 2018; Ilijevski and Iloska, 2018). For the case studies, we used case study methodology (Yin, 2003) which is particularly appropriate to gather in-depth understanding of real-life phenomena where context plays an important role and where it is possible to draw on multiple sources of evidence. The country case studies aimed to build a strong evidence basis by collection of primary data through interviews and gathering information from secondary data sources. In the second stage, the comparative needs assessment was carried out bringing together the four case studies (Danaj and Zólyomi, 2019). The methodology adopted followed the comparative case study analysis, a method which is widely used across various disciplines and areas of research (Goodrick, 2014; Bartlett and Vavrus, 2017). At the core of this methodology lies the possibility to compare similarities and differences in patterns of change across contexts that are characterized by high variability. For our analysis, this method allowed to compare the policy cycle of the same Directive across different national contexts (Hantrais and Mangen, 1996; Yin, 2003).

The country case studies, i.e. Albania, North Macedonia, Montenegro and Serbia, were selected since they are candidate countries of the European Union, which means they are in the process of approximation of their national legislation to the EU legal and policy framework. All four countries have experienced robust economic growth in the last few years. Between 2016 and 2017, GDP growth increased the most in Montenegro from 2.6% to 4.7%, followed by Albania with 3.8% and Serbia with 2.0%, while North Macedonia experienced only a modest growth of 0.2%. Employment levels also continued to grow, especially in Montenegro and Albania (both 3.3%) while North Macedonia and Serbia recorded modest increases (2.1% and 0.2%, respectively). Despite a general fall in unemployment in all four countries, it is still considerably higher than in EU countries. In 2017, the unemployment rate ranged from 13.5% in Serbia to 22.4% in North Macedonia. High youth unemployment and informal employment remain among the key labour

market challenges in the four countries. High unemployment and lack of job opportunities in the region have been the main drivers for out-migration since the early 1990s, especially among youth and the highly educated, resulting in significant brain-drain for instance in Albania and North Macedonia. Apart from emigration, these countries are also experiencing immigration. The size of the immigrant population relative to the total population is highest in Montenegro with 11% and lowest in Albania (around 2%) whereas Serbia is the leading country in terms of the absolute number of immigrants (802 thousand) (UN DESA, 2017).<sup>7</sup>

### **4.3. Data collection**

The analysis is based on data gathered through a review of academic and grey literature and legislation and from key informant interviews in the four countries. The literature review covered publications on migration and labour mobility and allowed to inform on the policy context and to link recent policy developments on labour mobility and posting to the broader EU integration process. In addition, an extensive review and analysis of national and EU level legislation and regulations pertaining to labour mobility and posting was carried out. It also mapped the main institutional mechanisms and actors involved in the implementation process in the four countries and helped to identify the appropriate stakeholders for the interviews. The purpose of the interviews was to gain insights into the main implementation challenges and institutional capacity needs from the perspective of different stakeholders based on their experience and first-hand knowledge. The semi-structured interviews were conducted in each country during April-September 2018 with key stakeholders that included national policymakers and/or experts at the ministerial level; representatives of the state agencies responsible for the monitoring and control of employment and labour migration, and potentially posting in the future; representatives of national worker and employer organizations; national health insurance agencies; labour market intermediaries; and experts on the intersection between the EU integration process, employment and labour mobility at the national level. Altogether, 44 interviews were conducted (12 in Albania, 14 in Montenegro, 7 in North Macedonia, 11 in Serbia). Furthermore, the analysis incorporates information from the inputs and discussions at the national workshops with representatives of the state institutions, social partners and employment agencies organised in Podgorica, Tirana, Belgrade and Skopje in 2018.

## **5. The transposition of the Posting of Workers Directive in the Western Balkans**

The transposition of the regulation on posting in the Western Balkans is part of the EU integration process these countries are undergoing through the approximation of their national legislation to the *Acquis Communautaire*. The analysis of the legal framework in each of the candidate countries of the Western Balkans shows that the PWD has been partially transposed, whereas its Enforcement Directive has not. What distinguishes the four WB countries from the EU Member States is that they have regulated both the posting of foreign nationals to their country as well as

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<sup>7</sup> The figures refer to international migrants including all foreign-born residents in the country regardless of when they entered the country (UN DESA, 2017).



the posting of their own nationals abroad. The choice to regulate ingoing and outgoing posting is explained by the substantial scales of emigration all of these countries have experienced, either through the *Gastarbeiter* scheme during the time of the Socialist Federal Republic of Yugoslavia (ME, NM and RS) but also immediately after the political transition (AL) and the dissolution of the Federation in the 1990s (ME, NM and RS), as well as by the anticipation of their position as suppliers of temporary service provision to the EU.

In more detail, the Law on Foreigners and other related legal mechanisms in each country regulate the employment of foreign workers in general. Laws on foreigners have recently been revised in all four countries to include, among other amendments, the posting of EU workers to these countries. In North Macedonia and Montenegro, the legal adjustments also include mainstreaming the issuing of permits in one-stop shops, which means that the working and residence permits are processed and issued as a single document. In Albania, EU citizens do not need work permits, but there is a specific permit for posted workers (known as A/P type, granted based on the CMD no. 84 dt.2014), whereas Serbia has amended the law on the employment of foreigners (“Official Gazette of the RS”, Nos. 128/14, 113/17 and 50/2018) in order to further simplify procedures for issuing work permits. The sending of nationals to other countries in the frame of temporary service provision is regulated through other national laws. In the process of legislation approximation to the *Acquis*, Albania and Serbia have reformed their national labour codes and included an article on the posting of their nationals abroad. Montenegro is still in the process of regulating it with a draft law prepared and sent for review to the EU. North Macedonia, on the other hand, already has a specific law on posting that entered in force in 2012; however, the law is sectoral and covers only the construction sector. Each of these laws on the sending of own nationals to temporary provide services in another country, include the text of the PWD, in particular Article 3 on terms and conditions for posted workers.

However, there are differences in the way the PWD has been transposed in all four countries. A detailed analysis of the legislation in force indicates that the definition of posting as described in the PWD is fully included in the Albanian and Serbian legislation, but only partially in the other two countries. There exists also some terminological confusion because posted workers are often referred to as detached workers, as observed in the Albanian and Montenegrin cases. Additionally, length of stay and pay are regulated in the Albanian and Serbian legislation, but only partially in the North Macedonian. In Montenegrin legislation pay is not regulated and length of stay only partially. Travel, board and lodging are not included in the Albanian and Macedonian legislation, but they are in the Serbian one and only partially in the Montenegrin one. Allowances are included in the Albanian and Macedonian legislation but not in the Montenegrin and Serbian one.

Other mechanisms, such as the liaison office, the provision of information to posted workers, and the national website on posting specified in the Enforcement Directive, have not been included in any of the current legislations or other regulations in any of the countries, except for a partial mention of the provision of information in the Serbian law. Reference to the Directive is also not included in any of the countries, apart from mentioning it in the Albanian Law on Foreigners. Similarly, none of the changes of the Revised Directive of 2018 have been addressed by WB policymakers, except for Montenegro where the actual passing of the law is in process and it might still include the revisions in its final form. There are currently no measures in place in the event of



failure to comply with the Directive in Albania and Montenegro and only partial ones in North Macedonia and Serbia. The Macedonian Law on working relations (Article 265) foresees a penalty of 2,000-3,000 EUR in cases when the employer is posting a worker abroad under different terms and conditions than the ones stipulated by the Law. The Serbian Labour Law also contains general provisions imposing penalties and suspension of business activities for a certain period in cases of illegal employment. The Ministry of Labour, Employment, Veterans and Social Affairs (MOLEVSA) can also revoke or suspend the employment license of private agencies due to irregularities as regards their job offers.

The input from the national policymakers interviewed suggests that the process of the transposition in all four countries is not complete. While the laws have been reformed, the by-laws and other accompanying regulation and administrative provisions are still not in place. What is missing in the legal framework of each country is expected to be included in the by-laws and other national legal mechanisms such as administrative provisions (Agolli and Deliu, 2018). The process is also influenced by the fact that the Directive should enter in force once the countries become Member States, and while this is still not happening, public officials in these four countries report that there is time to address what is missing in the legal framework until the countries join the EU.

In terms of issue-relevant regulations, such as the coordination of the social security systems, all countries have already signed bilateral agreements with several EU Member States and neighbouring countries (as well as other countries where a considerable number of nationals have migrated to), but not with all. In Albania, bilateral agreements on social insurance exist with 7 EU MS. Montenegro has signed bilateral agreements on social security with 17 EU MS. North Macedonia has signed bilateral agreements on posting with Germany and on social security with 11 EU MS. Serbia has several bilateral agreements with respect to social security (with 19 EU MS), temporary work for its citizens abroad (with Slovakia and Slovenia), and on posting (with Germany). In addition, it also has agreements on the European Social Insurance Card signed with 9 EU MS. As a result of these agreements, Serbia and North Macedonia have also been posting their nationals to these various EU countries. Agreements on health insurance have not been pursued in Albania, whereas the other three countries have already signed agreements with several EU countries and are in the process of negotiating others. Nonetheless, there has been no progress in the use of the European Health Insurance Card in any of these countries (European Commission, 2018b, c, d, e). Furthermore, the issue of double taxation is a strong deterrent factor for the posting of own nationals in the case of Albania, where lack of agreements to avoid double taxation and/or the complicated bureaucratic procedures to achieve that, has resulted in companies only rarely using posting as a form of cross-border labour mobility.

Despite the fact that technically the PWD should come into force once the WB countries become EU Member States, the passing of the laws and regulations on posting, the signing of bilateral agreements on the coordination of the social protection systems among WB and EU countries, as well as the additional bilateral agreements on posting signed by Serbia and North Macedonia with Germany provide the legal framework for posting to occur already, especially from the WB towards EU countries. Although exact comparable figures are difficult to obtain, also due to different categorizations and definitions of posting, the available data indicate that temporary cross-border service provision from the WB to the EU and vice-versa is already happening. During

our fieldwork, 75 cases of foreign workers employed in Albania under posting arrangements were reported by public authorities, while the number of Albanians posted abroad is unknown. According to the register from the Ministry of Labour and Social Policies in North Macedonia, during 2017, there were 570 workers posted to Germany, mostly in construction. The Ministry of the Interior of Montenegro has recently reported that the number of workers posted to Montenegro (defined as providing contracted services and movement of individuals within a foreign company) has been: 1,616 in 2016, 3,029 in 2017, 4,371 in 2018 and 2,393 in 2019, while no official data were made available on the number of posted workers from Montenegro. Serbia is the country that is experiencing the largest scale of outgoing posting. For the year 2016/2017, the number of detached workers from Serbia was 2,156 and the percentage of quota utilisation was 77.8%. In the first 7 months of 2018, there were 2,391 detached workers with a quota utilisation of 86.3%.

These reported findings transform posting into a current policy issue for the candidate countries, which means that the policy cycle for this policy area is not only at the design phase but also at the implementation phase, at least partially, which makes our analysis of the institutional capacities of the WB countries to transpose and implement the PWD relevant for national policy.

## **6. Posting structures, human resources, and public governance in the WB**

Despite its emerging contemporary relevance, as already discussed above, the legal framework is only partially in place. A direct implication of the incomplete legal framework is that the institutional structures that should manage posting to and from these countries are also not completely established. There are no designated liaison offices (Article 4 on Cooperation on Information of the Posting of Workers Directive and Article 3 of the Enforcement Directive) in any of the four candidate countries. Public authorities and state agencies are tasked with employment and migration policymaking in general, which in principle includes posting as a form of temporary cross-border labour mobility. When it comes to monitoring, control and enforcement of the Directive, however, only Albania has already assigned a focal state agency with the task of implementing the Directive: The Directorate of Labour and Migration, Ministry of Finance and Economy. Different departments in other institutions are responsible for issuing permits and registering posted workers to Albania (Directorate of Border Control and Migration, State Police, The Ministry of Interior Affairs) and from Albania (Consular Services, The Ministry of Foreign Affairs). Likewise, different state agencies or departments in various ministries are responsible for the issuing of permits and other related implementation and enforcement measures in the other three countries. In North Macedonia, the State Labour Inspectorate is partially responsible for posting through the inspection of posting companies once a year. Similarly, the Labour Inspectorate in Serbia monitors employment agencies that post workers abroad, but no state agency has been assigned any of these tasks in Montenegro. The main concern of the interviewed policymakers and representatives of enforcement agencies in all four countries is the lack of a clear mandate on posting and clearly assigned and described responsibilities for each institution involved.

The lack of regulation and therefore establishment of designated liaison offices or a competent national authority in each of the WB countries has a direct influence on the third policy domain: inter-agency cooperation on posting-related issues, both nationally and internationally. While there are some protocols for international communication and information exchange in general, with respect to posting they are not yet in place in Albania, Montenegro and North Macedonia and only partially exist in Serbia. As reported in Albania and Montenegro, there is a general lack of knowledge and awareness among responsible agencies of procedures pertaining to cooperation and coordination with partner authorities in other countries. The need for clear protocols that provide guidelines on administrative procedures both for external and internal cooperation purposes was emphasised by representatives from the national agencies involved in the implementation of the Directive in all four countries.

Another related issue is the available infrastructure for data and information sharing among local authorities. Serbia has created a single database, the Central Register of Obligatory Social Insurance (CROSI), which is used for information exchange between different national agencies involved in the implementation of PWD. It also recently introduced an online platform (E-inspector) which, if further developed, could contribute to more efficient information sharing between various inspectorates and other enforcement authorities. In Albania and North Macedonia, different institutions have established their own databases or registers. While they are not linked, information is regularly shared with other agencies that have access to these registers. However, Albania is already working on this by integrating all various datasets into a national portal, e-Albania, where documents and information become available to businesses and individuals on different matters, such as social and health insurance, pensions and so on. There appears to be no systematic and regular data and information sharing/exchange between authorities in Montenegro. Legislation on the protection of exchanged data and information that safeguards the rights of affected persons is in effect in Albania and Serbia. It is only partially enacted in North Macedonia while Montenegro has no legislation on this.

Transnationally, data and information exchange are still done through diplomatic or bilaterally agreed channels. The candidate countries are not eligible to participate in the networks and tools established at EU level for information sharing and cooperation in the field of employment and social security, such as the Internal Market Information System (IMI), the Senior Labour Inspectors' Committee (SLIC), the European Platform tackling undeclared work, the Administrative Commission for the Coordination of Social Security Systems (CACSSS), or the Electronic Exchange of Social Security Information (EESSI). Only Member States are eligible for participation, which means that while candidate countries need to cooperate with their colleagues in the EU Member States, they cannot make use of the existing mechanisms prior to their countries' EU membership. The imbalance between the preparation required from candidate countries in their pre-accession phase and their limited access to the mechanisms that would facilitate the implementation of the Directive could also hinder efforts to fight social dumping and the exploitation of workers posted from these countries towards the EU Member States.

The lack of a comprehensive regulatory framework and clear structures is also reflected in the human resources that could be deployed to cover posting issues. The assessment of the existing capacities in the countries with available information shows that there is a clear need for

improvement and for further policy action in this area. Only in North Macedonia, and partially in Serbia, did policymakers report to have received training and information on the PWD and its implementation. No such specific training has been reported for labour inspectorates and employment mediators in Montenegro and Albania. Health/disability/pension insurance fund personnel has participated in training on posting in North Macedonia and Serbia. However, in the latter country, training on posting tends to be offered sporadically, mainly in coordination with other institutions. No information was available on training received by personnel in the above-mentioned institutions in Albania. Unfortunately, information on the scope and content of these trainings that could reveal the degree of expertise and knowledge people in the competent authorities have on the PWD, could not be attained during the fieldwork.

Because of the transnational nature of posting, our study also considered the relevance of additional skills, such as inter-cultural communication skills or language skills, and if any such skills training was organised for public authorities and enforcement agencies dealing with labour migration and posting. In Serbia, knowledge of English or another foreign language is a requirement for civil servants including labour inspectors who carry out field inspections, and for public authority officials in charge of inter-agency cooperation. In North Macedonia and Albania, this is not a requirement, and neither is language training for labour inspectors provided (although some training is available for public officials in Albania). Interpretation services to facilitate communication with non-local workers are lacking in both Serbia and Albania. No information on this is available for the other two countries. Training to enhance the inter-cultural communication skills and expertise of labour inspectors on EU labour and mobility-related topics is available on a limited basis in Albania and Serbia. Additionally, a lack of administrative capacity at labour inspectorates was mentioned both in the Serbian and Montenegrin context.

Structures and human resources are also directly linked to good public governance, which is considered fundamental for policies to be effective. When the regulatory framework is weak and public authorities, and the public sector in general, cannot fulfil their core functions effectively, this will have major implications on developing capacity for any particular policy context. Public governance areas that are most relevant for institutional capacity include the rule of law, the quality of public administrations as well as political stability (OECD, 2010; Kaufmann et al., 2010); World Bank, 2018). Good governance also means transparency and accountability of political institutions and that citizens and stakeholders have trust in the public system and can participate in decision-making and monitor the government's actions. In the case of the four candidate countries, good governance is also a key benchmark along with rule of law and fundamental rights against which their prospects for EU membership are evaluated (EC, 2018a). Despite significant progress in these areas, public governance remains a pressing issue in the candidate countries of the Western Balkans. According to the latest progress reports published by the European Commission as part of the Annual Enlargement Package, Albania has made improvements especially regarding regulatory quality, law enforcement as well as effectiveness of its public administration (EC, 2018b, 2019a). Further actions will be needed, however, for these achievements to remain stable. In North Macedonia, important steps have been taken to strengthen the rule of law, address corruption, and improve consultations with stakeholders in recent years (EC, 2018c, 2019b). Governance areas where capacities should be increased and prioritised concern the accountability and transparency of public administration and control of corruption. While both Montenegro and

Serbia perform particularly well when it comes to regulatory quality, policy design and effective implementation, public governance aspects pertaining to control of corruption, constructive political dialogue, and public administration capacity are areas that require special attention (EC, 2018d, 2019c; EC, 2018e 2019d). Perhaps the most important challenge in all four countries is maintaining political stability and increasing public trust in political and public institutions. Addressing these public governance aspects is key to the overall effectiveness of the public system and for the implementation of sound and coherent policies.

## **7. The engagement of social partners and other stakeholders**

The findings of our research indicate that to-date, social partners have not played a significant role in the process of transposition and implementation of the PWD in the Western Balkans, which is a result of the modest role they play in the industrial relations in these countries. Kohl (2009) notes that trade unions in the Western Balkan countries, unlike those in Central Europe, have not played a decisive role in the restructuring of the society in the early transition period due to an emphasis on the “national question”, rather than on economic and social concerns. Consequently, there was a delay in the process of adapting and reshaping industrial relations and labour law. Since, similarly to other countries that have undergone regime transition, there were initially no employer associations, the national tripartite bodies – economic and social councils with the participation of social partners – were established with some delay and have generally not managed to acquire much political influence. Additionally, despite the long tradition of workers councils in the self-management system in former Yugoslavia, such councils no longer play any significant role in the countries of the Western Balkans (Kohl, 2009).

Social dialogue in the Western Balkans is generally not well developed. Its character is rather formal with institutionalized consultative tripartite bodies established at the policy level, dominated by national governments in the decision-making process, and weak collective bargaining mechanisms. In addition, there is a general lack of political will for partnership, poor economic performance, high corruption and political instability in the region, which has led to a lack of trust in the state as coordinator of the social dialogue (EZA, 2018, 2019; ILO, 2017). According to Kohl (2009), the relations between the social partners are additionally distorted by the fact that trade unions are generally poorly represented in SMEs while, on the other hand, employer organisations recruit the majority of their members from these companies.

The findings from the case studies (Agolli and Deliu, 2018; Cukut Krilić and Vah Jevšnik, 2018; Djuric and Tiodorovic, 2018; Ilijevska and Iloska, 2018) corroborate the findings of previous research that social dialogue in the countries under observation is formal with no substantial impact to settle issues in the area of labour relations and disputes. The legal basis and the functioning of tripartite bodies is laid down in the Labour Code in Albania, through a special law in Serbia and Montenegro, and through a legal basis in labour law and a tripartite agreement among the government and workers’ and employers’ organisations, which have obtained their representativeness at the national level in North Macedonia (ILO, 2017). While tripartite consultative bodies in the form of economic and social councils that could help engage stakeholders in labour issues, have recently been formed in all four countries (National Council of



Labour in Albania; Economic and Social Council in North Macedonia, Social and Economic Council in Serbia; Social Council in Montenegro), their impact remains weak. Since economic and social councils in the Western Balkans were established with a delay, they also did not acquire much political influence and have a generally weak role in the social dialogue process. In the area of labour mobility and more specifically posting, which still seems a relatively unknown policy area in the countries under study, this finding seems even more pertinent. In Albania, for example, the consultation process through the tripartite bodies does not usually continue into the implementation stage of proposed legal changes (Agolli and Deliu, 2018). In Serbia, employers, workers' organisations and NGOs are participating in the consultation processes regarding labour mobility only during the final phases of legislation adoption, rather than from the beginning (Djuric and Todorovic, 2018). Cooperation between social partners is often project-based and not continuous, and there is a general consensus among stakeholders in all the countries that there exist possibilities for improved and strengthened cooperation among the social partners. Chambers of Commerce seem to be a stronger stakeholder in each of the four countries, which can be explained by the delayed emergence of employer organizations in these countries. However, their involvement in the process of transposition remains in a consultative capacity. Trade unions, on the other hand, have not been directly involved in the process of transposition and implementation of the PWD in any of the countries. A few trade unions in Serbia and North Macedonia, and to a lesser degree in Albania, have been involved in posting projects with external funding from the European Commission. However, the scope of these projects has been mainly to provide accessible information on posting to the local workforce.

This stands to some degree in contrast to the strong engagement of trade unions in the EU at national and transnational levels in the area of posting of workers and protection of workers' rights. The *Viking* and *Laval* cases, where the European Court of Justice recognised the legitimacy of collective action in order to combat the practice of social dumping, although limiting this right to justifiable cases (Zahn, 2008), as well as the *Sähköalojen ammattiliitto ry v. Elektrobudowa Spolka Akcyjna* (Case C-396/13, ECR 2015), where the Court ruled in favour of Finnish trade unions' claim of equal pay according to national collectively bargained rates, are an indication of the role that trade unions can play to protect transnationally mobile workers. Similarly, EU-level trade unions (such as the European Trade Union Confederation or the European Federation of Construction and Woodworkers) have played an important role in the passing of the Enforcement Directive and the subsequent revision of the PWD (Seeliger and Wagner, 2018). Counselling centres for mobile workers set up by the German Trade Union Confederation and NGOs close to trade unions within the Fair Mobility project are another good example of transnational cooperation to protect mobile workers, but non-EU partners from the countries of the Western Balkans are not participating in this project. However, trade unions from Montenegro, North Macedonia and Serbia, but not Albania, are already members of the European Trade Union Confederation (ETUC).

Despite the lack of strong union participation in the process of transposition and implementation of the Directive in the candidate countries, dispute settlement bodies in the form of public agencies that are to carry out compulsory arbitration as regards pay disputes have recently been introduced in all the countries under the EEPOW study, although their role is still rather weak (Kohl, 2009). Findings from all four case studies indicate that in case of grievances, both incoming and outgoing



posted workers can use existing national procedures and dispute resolution mechanisms. However, it is unclear to what extent, as there has been no grievance officially reported in any of the countries so far. In the case of Serbia, mediatized cases of poor working conditions and abuse of temporary agency workers employed in Slovakia have not been tried in court. However, they have recently led to changes in the legislation on private employment agencies. One new criterion is that employment agencies should have already hired a worker for three months prior to his/her posting assignment. Violations of the Labour Code and other related legislation also can now lead to the revocation or suspension of the license for abusive private employment agencies. Furthermore, there are a few NGOs in these countries dealing with violations of workers' rights nationally (e.g. the Centre for Labour Rights in Albania) or internationally (e.g. the Astra Anti-Trafficking Action in Serbia); however, the overall involvement of NGOs in the WB on issues concerning labour mobility remains limited.

In light of these findings, trade unions from the region need to legally reform their position in the social dialogue structures available and establish or improve collective bargaining institutions in order to strengthen their position to autonomously negotiate better wage and working conditions standards (cf. EZA, 2018). Even within the current competences, more could be done to broaden their scope on the economic, labour and social reform agenda and finally to include in their consultations also new topics such as economic development, migration and challenges related to emerging forms of employment and the future of work. Furthermore, regional cooperation among trade unions in the different WB countries as well as between them and their sister organizations in the EU, is also necessary.

## 8. Conclusions

In this paper we conducted a comparative analysis of the transposition and implementation of the Posting of Workers Directive in the candidate countries of the Western Balkans from an incremental policy cycle perspective by focusing on their current capacities, institutional challenges and needs. We found that the transposition of the Posting of Workers Directive in the Western Balkans is driven by their ambition towards EU integration and the process of approximation of the national legislations to the *Acquis Communautaire*. As a result, while these countries have been preparing the legal and institutional framework, the PWD should come into force once the countries become full EU Member States. These circumstances explain why the process of establishing the legal framework and the structures for its implementation and enforcement, although underway, are not completed. In other words, the WB countries have concentrated their efforts predominantly onto the design stage. The analysis of the six interconnected policy domains of legal framework, institutional arrangement, inter-agency cooperation, human resources, stakeholders' engagement and public governance, indicates that the legal framework is the most advanced domain but not complete. The other three domains of institutional arrangement, inter-agency cooperation, and human resources are directly linked and dependent on the completion of the first one as well as the overall level of public governance in each of the countries; therefore, their progress is limited. The engagement of social partners and other stakeholders in the process of the transposition of the PWD has also been limited and only

consultative in nature, which is a result of the general context of weak industrial relations structures in each of the four WB countries.

This paper contributes to the debate on the transposition and interpretation of the PWD and its interplay with national regulations (Berntsen and Lillie, 2015; Cremers, 2011; Evju and Novitz, 2012; Houwerzijl, 2014; Arnholtz and Lillie, 2020; Novitz, 2010) as well as to the literature on enforcement (Čaněk et al., 2018; Danaj and Zólyomi, 2018; Iannuzzi and Sacchetto, 2020; Wagner and Berntsen, 2016). We also contribute to the comparative literature on the enlargement process and EU conditionality in the Western Balkans (Bartlett, 2013; Bieber, 2011; Lazarević and Stratulat, 2018; Zhelyazkova et al., 2018).

We argue that the EU integration process not only drives the transposition of the PWD, it also constrains it. While most of the candidate countries of the Western Balkans have already transposed the Directive, their institutional capacities are still incomplete due to a hesitation to move forward with preparing for a Directive that should come into force after they join the EU. However, as Serbia and to a smaller degree North Macedonia, are already acting as sending countries and therefore posting workers to the EU, they are faced with the need for institutional structures and capacities to monitor posting and protect own posted nationals. The transposition and the implementation of the Posting of Workers Directive reveals the contradiction in the EU integration process, when potential Member States are stuck in a transitional phase where they are asked to set up the legal and institutional framework prior to membership, although their prospects of membership remain uncertain, especially after the last position France took in the 17-18 October 2019 Summit not to open accession negotiations with Albania and North Macedonia. This contradiction has a direct impact on the working lives and level of protection provided to workers from these countries, where the timeframe of EU regulation applicability is challenged by labour market actors who are already taking advantage of the gaps and tensions between national and transnational regulation.

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