

## ARE CROSS-BORDER WORKER PROTECTIONS UNDER CHALLENGE? INSIGHTS FROM A COMPARATIVE PERSPECTIVE BETWEEN ITALY AND THE NETHERLANDS \*

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### *1. Introductory remarks on the aims, objectives, and methodology of this research.*

Freedom of movement for workers has always been one of the founding principles of the European Union (EU)<sup>1</sup>. Although it is clearly established<sup>2</sup> and is based on the principle of non-discrimination on the grounds of nationality<sup>3</sup>, in practice not all workers are treated the same way. This is the case of cross-border workers, i.e. workers – both, employees and self-employed workers – who exercise their right of free movement to work in one EU Member State while remaining resident in another<sup>4</sup>. Indeed, the differential treatment of cross-border workers compared to domestic ones may occur when accessing work and social security and tax benefits<sup>5</sup>, as attested by numerous studies on the matter<sup>6</sup>, which report excessive working

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<sup>1</sup> See Regulation no. 1612/68 and Council Directive no. 68/360, which have been updated several times. See the first article of the Community Charter of the fundamental social rights of workers, which deals precisely with freedom of movement. The principles therein shaped the European social model in the following decades and are further developed in the Charter of Fundamental Rights of the EU, which was laid down in Nice on December 18, 2000 and became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009. In particular, see art. 15 (2), of the EU Charter of fundamental rights, which establishes for every EU citizen «the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State».

<sup>2</sup> See art. 45 (1) TFEU: «Freedom of movement for workers shall be secured within the Union».

<sup>3</sup> According to art. 18 TFEU, «any discrimination on grounds of nationality shall be prohibited». Moreover, art. 45 (2) TFEU establishes that «such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment».

<sup>4</sup> This definition can be found at the following link: [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/cross-border-worker\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/cross-border-worker_en). It is essential that cross-border workers retain their normal place of residence outside the State of employment. If they move to the State of employment, they become migrant workers. The term «normal» place of residence does not exclude the possibility that the cross-border worker, for practical reasons, also has temporary accommodation in the State of employment: K. Distler, G. Essers, *Guide for mobile European workers*, ETUC, 2011, 65.

<sup>5</sup> See K. Distler, G. Essers, *Guide for mobile European workers*, ETUC, 2011, 8.

<sup>6</sup> European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, Luxembourg, 2015; International Organization for Migration,

hours, lower salary, hazardous working conditions, and non-compliance with occupational health and safety standards.

In light of the above, this contribution aims to identify the most insidious challenges faced by cross-border workers in order to find the most effective remedies to guarantee the principle of equal treatment and non-discrimination on the basis of nationality. Therefore, the research focuses on three relevant issues: checking the correct transposition and effective compliance with the EU regulatory provisions, evaluating the real impact of cross-border workers in terms of number and relevance, and analysing some of the most significant critical issues, such as double taxation, accessing social benefits, and the risk of undeclared work.

Since the topic is broad and complex, some preliminary clarifications are necessary to circumscribe the action range of the research to obtain the most reliable results.

Firstly, it is useful to briefly outline the relevant EU regulatory framework on the matter and the very definition and extent of cross-border workers.

Next, it may be interesting to verify how the EU regulatory framework on cross-border commuters works in individual countries and whether it is enough to avoid all kinds of discrimination based on nationality. Therefore, this research is based not only on analytical methodology – i.e., examining the regulatory provisions and the data on the matter – but also on comparative methodology, bringing into focus suggestive similarities and contrasts between two Member States.

Finally, the main challenges faced by cross-border workers are pinpointed and possible future solutions are outlined.

**2. Brief overview of the free movement of workers in the EU legal framework.** Even though the free movement of workers is already evident in art. 3 of the Consolidated version of the Treaty on the EU (i.e. «the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured»<sup>7</sup>), the Treaty on the Functioning of the EU (TFEU) clarifies and defines this right in more detail. It ensures the free movement of goods, persons, services, and capital within the internal EU market<sup>8</sup> and art. 45 TFEU states that «freedom of movement for workers shall be secured within the Union»<sup>9</sup>. There are two important consequences of this declaration. Firstly, it abolishes discrimination based on member state nationality for employment, remuneration and other work conditions<sup>10</sup>. Secondly, it allows workers the right to move

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*Mapping risks to migrant workers in supply chains in Europe: Case studies and best practices from the agriculture, food-processing, manufacturing and hospitality sectors*, Geneva, 2022.

<sup>7</sup> Art. 3 (2) TEU.

<sup>8</sup> See art. 26 (2), TFEU.

<sup>9</sup> Art. 45 (1) TFEU. For an in-depth analysis, see E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context*, Milan, 2007; S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'Unione Europea. Principi e tendenze*, Bologna, 2007; E. Spaventa, *The free movement of workers in the Twenty-first century*, in D. Chalmers, A. Arnall (edited by), *The Oxford Handbook of European Union Law*, Oxford, 2015, 456; N. Girelli, A. Montanari, *Libera circolazione dei lavoratori*, in F. Carinci, A. Pizzoferrato, *Diritto del lavoro dell'Unione Europea*, Turin, 2021, 129; M. Aimò, D. Izzi, M. Roccella, T. Treu, *Diritto del lavoro dell'Unione Europea*, Milan, 2023, 95; D. Diverio, *L'autosufficienza delle libertà economiche di circolazione e lo status (un po' meno) fondamentale del cittadino dell'Unione nel mercato interno*, in A. Di Stasi, M. C. Baruffi, L. Panella, *Cittadinanza europea e cittadinanza nazionale. Sviluppi normativi e approdi giurisprudenziali*, Naples, 2023, 241; N. N. Shuibhne (edited by), *Revisiting the fundamentals of the free movement of persons in EU Law*, Oxford, 2023.

<sup>10</sup> Art. 45 (2), TFEU.

freely between the Member States for work purposes, limiting it only for justified reasons<sup>11</sup>, such as public policy, public security, or public health<sup>12</sup>.

The Dir. 2004/38/CE of 29 April 2004<sup>13</sup> and the Regulation EU no. 492/2011 of the European Parliament and of the Council of April 5<sup>th</sup>, 2011, confirm that the freedom of movement constitutes a fundamental right of workers and their families and provide for equal treatment of employment within the EU. Indeed, within the EU, labour mobility is one of the most relevant ways to give workers the opportunity to improve their living and working conditions and to promote social advancement<sup>14</sup>.

Free movement of workers entails all aspects of the employment relationship, from hiring to termination, with particular attention to the social security system. Regulations exist that entitle all workers in the EU to social security benefits, regardless of the place where the activity is carried out<sup>15</sup>, as long as it does not prejudice the autonomy of each Member State to determine the types of social benefits and services<sup>16</sup>. This coordination of social security rules within the EU exemplifies how EU countries harmonise their social services. The EU did not create a single social security system; rather it established links among the various and distinct social security systems already present in each Member State.

The phenomenon of labour mobility within the EU is also significant in numerical terms. According to the Annual Report on intra-EU Labour Mobility 2023<sup>17</sup>, the number of working-age EU citizens<sup>18</sup> living in an EU country other than that of their citizenship remained stable in 2022, at 9.9 million, despite the slowdown caused by the Covid-19 pandemic. The share of mobile EU citizens varies greatly between Member States, ranging from 0.8% for Germany to 18.6% for Romania.

The potential impact of these data should not be overlooked, and their relation to the possible discriminatory treatment of mobile EU citizens in the workplace should be examined attentively. Therefore, on July 31, 2019, the European Labour Authority (ELA) was established precisely to guarantee that freedom of movement works in practice and provides fair mobility to individuals and companies<sup>19</sup>.

The ELA has four principal aims. The first is to ensure better implementation of EU rules on labour mobility and social security coordination. The second is to provide support services for mobile workers and employers. The third is to sustain cooperation between

<sup>11</sup> Art. 45 (3), TFEU.

<sup>12</sup> Consider the restrictions on freedom of movement during the Covid-19 pandemic in the years 2020-2021. According to measures introduced to contain the spread of the contagion, border controls were reintroduced: see Council Recommendation EU 2020/1475 in a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic.

<sup>13</sup> It is a tool for harmonising entry and residence requirements (even permanent) of a Union citizen and their family members in a Member State other than that of their origin or provenance.

<sup>14</sup> C. Raucea, *Quo vadis? La libera circolazione come chiave di volta del godimento reale ed effettivo dei diritti del cittadino dell'Unione*, in *I Quaderni Europei*, 2014, 62.

<sup>15</sup> J. Paju, *The European Union and Social Security Law*, London, 2017.

<sup>16</sup> Regulation no. 883/2004 on the coordination of social security systems. See also regulation no. 987/2009, laying down the procedure for implementing Regulation no. 883/2004. Obviously, the worker must be a citizen of a Member State.

<sup>17</sup> Published by the EU Commission on March 12, 2024.

<sup>18</sup> Between 20 and 64 years.

<sup>19</sup> On the ELA see P. van Nuffel, *The European Labour Authority; Missing Link in the Cross-Border Enforcement of EU Labour Law*, in Z. Rasnača, A. Koukiadaki, N. Bruun, K. Lörcher (edited by), *Effective Enforcement of EU Labour Law*, London, 2022, 385.

Member States in cross-border enforcement, including joint inspections<sup>20</sup> to tackle undeclared work<sup>21</sup>. Finally, it provides mediation to resolve possible disputes and to promote collaboration between Member States to ensure that EU rules on labour mobility are enforced in a fair and effective way.

**3. The risky position of cross-border workers within the European Union.** An important part of the discussion of securing freedom of movement and fair labour mobility are the cross-border workers themselves.

The concept of cross-border workers covers different circumstances, and the definition may vary from one field to another<sup>22</sup>, thus creating confusion and uncertainties in its application. Often «cross-border workers» and «frontier workers» are considered synonyms. However, cross-border commuters are distinct from frontier workers to the extent that they do not necessarily work in the frontier zone of the host country. Indeed, frontier workers – as the word itself indicates – are workers who are employed in the frontier zone of an EU Member State but who return each day or at least once a week to the frontier zone of a neighboring country in which they reside and of which they are citizens.

However, sometimes, these terms overlap. The reason is that bilateral tax agreements – which determine the tax arrangements applicable to cross-border workers<sup>23</sup> – use restrictive definitions and additionally impose a spatial criterion<sup>24</sup>.

Furthermore, there are a number of other terms whose meanings overlap or coincide with the definition of «cross-border worker». One example is the term «posted workers»<sup>25</sup>. These are employees who are sent by their employer to carry out a service in another EU Member State on a temporary basis<sup>26</sup>. Such situation may happen in the context of a contract of

<sup>20</sup> Joint inspections are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States, and supported, where appropriate, by the staff of the Authority. They are different from concerted inspections, that are carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority: art. 8 (2) of the EU Regulation 2019/1149, establishing the ELA.

<sup>21</sup> See ELA Consolidated Annual Activity Report 2022.

<sup>22</sup> For instance, tax law, right of residence, welfare entitlements.

<sup>23</sup> In order to avoid double taxation.

<sup>24</sup> I.e. living and working in a frontier zone.

<sup>25</sup> See EU Directive 2018/957 concerning the posting of workers in the framework of the provision of services. For further information see, *ex multis*, M. Fuchs, *Distacco – Il quadro normativo di diritto europeo del lavoro e della sicurezza sociale*, in *Rivista Italiana di Diritto del Lavoro*, 2018, I, 3; B. Rombouts, M. Houwerzijl, *Promoting or controlling cross-border temporary agency work*, in J. Pichrt, K. Koldinská (edited by), *Labour law and social protection in a globalized world: changing realities in selected areas of law and policy*, Alphen, 2018, 127; A. Allamprese, S. Borelli, G. Orlandini, *La nuova direttiva sul distacco transnazionale dei lavoratori*, in *Rivista Giuridica del Lavoro*, 2019, I, 133; M. Houwerzijl, L. Berntsen, *Posting of workers: From a blurred notion associated with 'cheap labour' to a tool for 'fair labour mobility'?*, in J. Arnholtz, N. Lillie (edited by), *Posted work in the European Union, the political economy of free movement*, London, 2020, 147; M. Corti, *Il distacco transnazionale dei lavoratori nell'U.E.: dal dumping sociale alle nuove prospettive del diritto del lavoro europeo*, in *Variazioni su Temi di Diritto del Lavoro*, 2021, 47.

<sup>26</sup> Even though the definition, the scope, the terms, and the conditions of posted work have been identified by the Directive (at that time, Directive 96/71/CE), some authors highlight that it is not enough to prevent possible abuse and to distinguish it clearly from other types of labour mobility: M. Houwerzijl, A. A. H. van Hoek, *'Posting' and 'posted' workers: the need for clear definitions of two key concepts of the posting of workers directive*, in C. Barnard, M. Gehring, I. Solanke (edited by), *Cambridge yearbook of European legal studies*, Oxford, 2012, 419.

services, an intra-group posting, or hiring through a temporary agency<sup>27</sup>. Another example is the term «seasonal workers». These include EU and third-country nationals travelling to a Member State to temporarily live and carry out an activity dependent on the passing of the seasons<sup>28</sup>.

It is possible to say that the expression «cross-border work» is the «genus», which includes different species, represented by frontier work, posted work and seasonal work. It is worth specifying that, for the purpose of this research, the expression «cross-border workers» is used in its broadest sense, including its various facets.

It should be stressed that most cross-border workers carry out essential activities in key economic sectors, such as agriculture and food production, transport, logistics, construction, social services (including care homes, social work, healthcare, etc.), tourism, food processing and packaging, research, IT and pharmaceutical industries, critical infrastructure industries, etc.<sup>29</sup>. The health emergency caused by the Covid-19 infection and its mobility restrictions shed light on the strategic role played by cross-border commuters, as the European Parliament pointed out<sup>30</sup>.

Even though no EU-wide systematic data-gathering or digital tracking system currently exists to provide adequate data on the total numbers of cross-border workers, their presence in the EU and EFTA<sup>31</sup> countries is estimated at approximately 1.7 million. It is a remarkable number and deserves significant attention, especially because European labour inspectorates repeatedly reported violations of the labour rights of cross-border workers<sup>32</sup>. For instance, in 2017, more than 700,000 people may have been engaged in some form of undeclared cross-border work. This figure could increase with rising labour mobility and the growth of new forms of work<sup>33</sup>. Furthermore, the consequences of the pandemic crisis may exacerbate existing problems in their treatment<sup>34</sup>, increasing risks of social dumping and law shopping<sup>35</sup>.

<sup>27</sup> «Despite the more favourable position of ‘recruited’ transnational temporary agency workers on paper, the gap with ‘posted’ temporary agency workers is not so wide in reality»: M. Houwerzijl, *The working conditions of cross-border temporary agency workers on paper and in reality*, in *European Labour Law Journal*, 2024, 1.

<sup>28</sup> See the final report written in March 2021 by the European Commission on *Intra-EU mobility of seasonal workers. Trends and challenges*, in <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&>.

<sup>29</sup> Just think about mobile workers engaged in interoperable cross-border services in the railway sector: see dir. 2005/47/CE.

<sup>30</sup> European Parliament resolution of June 19, 2020, on European protection of cross-border and seasonal workers in the context of the Covid-19 crisis.

<sup>31</sup> European Free Trade Association, which is an intergovernmental organisation set up for the promotion of free trade and cooperation between the Member States (Iceland, Liechtenstein, Norway, and Switzerland).

<sup>32</sup> The last ELA Activity Report shows that, during the 37 concerted and joint inspections organised in 2022, more than 350 infringements were identified. Most irregularities concerned violations related to posted workers, undeclared work, driving and resting times, low wages and possible bogus self-employment: ELA, *Consolidated Annual Activity Report 2022*, 2023, 11.

<sup>33</sup> R. Stefanov, D. Mineva, L. Schönenberg, P. Vanden Broeck, *Cross-border sanctions in the area of undeclared work*, European Platform Tackling Undeclared Work, 2020, 2.

<sup>34</sup> «Rights for all seasons» was the slogan of the campaign promoted by ELA in the autumn 2021 to inform cross-border workers about their rights and duties, to raise awareness of the employers about the benefits connected to compliance with the rules, and to draw attention to specific safety-measures: <https://www.lavoro.gov.it/priorita/Documents/ELA-national-communication-plan-2021.pdf>.

<sup>35</sup> For instance, the above-mentioned final EU report 2021 on intra-EU seasonal workers highlights that the most alarming critical issues are represented by the lack of access to information about their rights, inadequate social protection, poor accommodation, low pay, and challenging working conditions. These challenges were aggravated during the COVID-19 pandemic, since many seasonal workers could not carry out their work, but, at the same time, they were trapped in their countries of work and could not return home.



**4. Reasons for the gaps between theory and practice.** It is clear that the protection of cross-border workers is guaranteed – in theory – by general rules on the right to freedom of movement within the EU. This is constitutionalised in the Treaties and progressively interpreted by the EU Court of Justice. Nevertheless, in practice, there are still many challenges to be overcome.

The reasons for the gaps between theory and practice are numerous. Firstly, from a political viewpoint, the last two decades have seen increased labour mobility become more heterogeneous<sup>36</sup>. Much of this is due to Eastern enlargements<sup>37</sup> that have led to migration flows from East to West<sup>38</sup>.

Secondly, from a sociological perspective, an obstacle to full integration may be due to public perception of cross-border workers. Studies on the issue show that less educated persons consider the free movement of workers as a threat to their jobs<sup>39</sup>.

Moreover, from a legal viewpoint, the complexity of harmonising national legislations cannot be underestimated, above all in the field of social security, which has remained a national competence.

In addition, the labour market position of cross-border workers is often weakened by their lack of host country context specific knowledge, including language<sup>40</sup>.

**5. Italian and Dutch situations compared.** In order to verify whether and how the EU regulatory framework on cross-border commuters works in an effective way, it may be useful to examine its implementation in some individual Member States.

The countries selected for this comparative survey are Italy and the Netherlands: the first is located in the Southern Europe, the second in the Northwestern Europe. They are different not only from a geographical point of view but also from a socioeconomic context. As most of Italy's national territory borders the Mediterranean Sea<sup>41</sup>, only the northern Italian regions border other European countries<sup>42</sup>. This geographical formation makes the presence of cross-border workers<sup>43</sup> particularly difficult because they can only easily reach the limited territories along the northern border<sup>44</sup>. Conversely, the Netherlands is more than half surrounded by Belgium and Germany and most of the country can be accessed effortlessly<sup>45</sup>. Furthermore, from a socioeconomic perspective, according to the data from 2022<sup>46</sup>, the gross domestic product per capita in Italy is slightly below the European average, whereas the Netherlands is at the fifth highest position on the list. Moreover, Eurostat data for the third

<sup>36</sup> For instance, regarding wage levels and working conditions.

<sup>37</sup> Poland, Hungary, Slovenia, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Cyprus, and Malta joined the EU in 2004. In 2007 Bulgaria and Romania were added. The last entry was Croatia in 2013.

<sup>38</sup> C. Roos, *The (de-) Politicization of EU Freedom of Movement: Political Parties, Opportunities, and Policy Framing in Germany and the UK*, in *Comparative European Politics*, 2019, 5, 631.

<sup>39</sup> D. Toshkov, E. Kortenska, *Does Immigration Undermine Public Support for Integration in the European Union?*, in *Journal of Common Market Studies*, 2015, no. 4, 910; S. Vasilopoulou, L. Talving, *Opportunity or Threat? Public Attitudes Towards EU Freedom of Movement*, in *Journal of European Public Policy*, 2019, 6, 805.

<sup>40</sup> N. Lillie, K. Karkkainen, Q. Ndomo, *Posting, short term labour migration, and social rights access: How to rework an alienating system?*, in *Policy Brief*, 2022, 10, 9.

<sup>41</sup> Bordering the Ligurian Sea, the Tyrrhenian Sea, the Ionian Sea and the Adriatic Sea.

<sup>42</sup> Specifically, France, Switzerland, Austria, and Slovenia.

<sup>43</sup> Especially frontier workers.

<sup>44</sup> However, Italy's geographical position attracts many third-country nationals, especially from the African continent.

<sup>45</sup> While the remaining part borders the North Sea.

<sup>46</sup> See <https://tradingeconomics.com/>.

quarter of 2022 show that the unemployment rate in Italy<sup>47</sup> is among the highest in the EU<sup>48</sup>, while the Dutch unemployment rate is among the lowest<sup>49</sup>.

These differences may represent an interesting starting point for comparison of the safeguards of cross-border workers, also considering that «the main purpose of comparative law is a better understanding of one's labour law system»<sup>50</sup>.

**6. Implementation of EU provisions on the matter.** Even though there are some differences in the formulation of the regulatory provisions, the Constitutions of Italy<sup>51</sup> and the Netherlands<sup>52</sup> both recognise protections for all workers, regardless of nationality. Indeed, work is one of the pillars of the Italian Constitution since, in the first paragraph of the first article<sup>53</sup> and in several other provisions, workers<sup>54</sup> are highly protected<sup>55</sup>. Furthermore, the second paragraph of art. 35 «promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights».

Although the Dutch Constitution devotes less space to specific provisions on work, leaving it to ordinary law<sup>56</sup>, it recognises the legal status and protection of «working persons», without any distinctions. Moreover, the Dutch Constitution opens with a fundamental right, which can easily be defined in its working dimension: «all persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted».

The Italian Constitution contains a similar provision<sup>57</sup>, but it is only aimed at citizens<sup>58</sup>. This divergence is likely a result of the different periods in which these two constitutional provisions were issued. The Italian one has been the same since 1947, while the Dutch one was modified in 1983. Obviously, at that time anti-discrimination sensitivity was more mature and European legislation was already extensive.

However, in other articles, the constitutional text ensures that «the Italian legal system conforms to the generally recognised rules of international law. The legal status of foreigners

<sup>47</sup> 8.3%.

<sup>48</sup> About 2.2% higher than the European average (6.1%).

<sup>49</sup> 3.7%.

<sup>50</sup> B. Weiss, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, in *Comparative Labor Law & Policy Journal*, 2003, 169. See also R. Blanpain, *Comparativism in Labor Law and Industrial Relations*, in R. Blanpain (edited by), *Comparative Labour Law and Industrial Relations in Industrialized Economies*, Alphen, 2010, 3.

<sup>51</sup> The Italian Constitution was approved by the Parliament in December 1947 and came into effect on 1 January 1948. The English version adopted in this contribution is published in [https://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione\\_ENG.pdf](https://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf).

<sup>52</sup> The Dutch Constitution dates from 1814. The version of the Constitution currently in force dates from 1983. The English translation adopted in this essay is published in <https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands>.

<sup>53</sup> «Italy is a Democratic Republic, founded on work».

<sup>54</sup> Without any kind of distinctions.

<sup>55</sup> Regarding the fair pay (art. 36 (1)), the maximum working hours and the weekly and annual paid vacation (art. 36 (2, 3)), protection of women and of minors on the job (art. 37), social insurance for old age, illness, invalidity, industrial diseases, and accidents (art. 38), freedom of association (art. 39) and right to strike (art. 40).

<sup>56</sup> See art. 19 (2).

<sup>57</sup> See art. 3 of the Italian Constitution.

<sup>58</sup> «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions».

is regulated by law in conformity with international provisions and treaties»<sup>59</sup> and «Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations [and] promotes and encourages international organisations having such ends»<sup>60</sup>.

Moreover, both countries' safeguards against discrimination have been ensured in more detail at the ordinary level of legislation.

In Italy, the Workers' Statute<sup>61</sup> (WS) bans any kind of discrimination<sup>62</sup> for the following reasons: sex, race, language, religion, political or trade union or personal opinion, age, handicap, sexual orientation, and nationality<sup>63</sup>.

The Equal Treatment Act (ETA), enacted on September 1, 1994, in the Netherlands, introduced the general principle of equality in ordinary legislation<sup>64</sup>. It protects all individuals from direct and indirect unequal treatment based on religion or belief, political orientation, race, gender, nationality, sexual orientation, and marital status<sup>65</sup>.

The formulation of Italian and Dutch regulatory provisions is very similar. Both incorporate inputs from the Constitutional Charter, which, as seen, presents strong similarities on this point, and from international and European anti-discrimination legislation.

Nevertheless, there are some interesting differences. Firstly, the Italian WS is expressly and exclusively devoted to workers, whereas the Dutch ETA is aimed at everyone, and only in section five it regulates the prohibition of discrimination in employment<sup>66</sup>. Secondly, the ETA does not use the term «discrimination», but rather the word «differentiation». This is not merely a question of semantics. In fact, even in the absence of an intention to discriminate, differential treatment can be unlawful. Under Dutch criminal law, however, the intention to discriminate must be proven. Thirdly, regarding employment, the ETA provides some specific exceptions to the rule of equal treatment. For instance, in cases where nationality is deemed a deciding factor, such as athletes who wish to play for the national team or when casting an actor to fit the role of a defined character, corresponding citizenship may be required<sup>67</sup>. Finally, art. 15 of the WS sanctions discriminatory acts and pacts with

<sup>59</sup> Art. 10 (1, 2).

<sup>60</sup> Art. 11 (2, 3). The European Union is one of the international organisations that ensure peace and justice among the Nations.

<sup>61</sup> Law 20 May 1970, no. 300. It is one of the most relevant Italian regulatory provisions regarding labour and worker protection.

<sup>62</sup> The sanction is the nullity of any agreement or action of the employer.

<sup>63</sup> Art. 15 Law no. 300/1970. More recently, see the legislative decree 9 July 2003, no. 216, issued in implementation of the European directive no. 2000/78/CE and updated in light of the directive no. 2014/54/EU. In doctrine, see, *ex multis*, M. Barbera, *Discriminazioni ed eguaglianza nel rapporto di lavoro*, Milan, 1991; M. Barbera, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario*, in *Diritto delle Relazioni Industriali*, 2003, 401; D. Izzì, *Eguaglianza e differenze nei rapporti di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Naples, 2005; M. Barbera, *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Milan, 2007.

<sup>64</sup> Before then, special civil law only protected discrimination on the grounds of sex. See J. R. Dierx, P. R. Rodrigues, *The Dutch Equal Treatment Act in theory and practice*, in <http://www.errc.org/roma-rights-journal/the-dutch-equal-treatment-act-in-theory-and-practice>, 2003.

<sup>65</sup> R. Ben-Israel, P. Foubert, *Equality and Prohibition of Discrimination in Employment*, in R. Blanpain (edited by), *Comparative Labour Law and Industrial Relations in Industrialised Countries*, Alphen, 2004.

<sup>66</sup> In Italy, general anti-discrimination provisions based on the race and ethnic background for all individuals are included the legislative decree 9 July 2003, no. 215, issued in implementation of the European directive no. 2000/43/CE.

<sup>67</sup> While art. 15 of the WS does not provide exceptions, art. 3 (2), of the legislative decrees no. 215/2003 and no. 216/2003 introduces a regime of exceptions to general discrimination rule, according to art. 4 (1), of the



nullity, while the ETA establishes invalidity only in the case of discriminatory dismissals<sup>68</sup>, while in other cases of a breach of the equal treatment law compensation is the only available remedy.

Therefore, free movement of workers and protection against discrimination based on nationality are guaranteed in both countries. This is true despite the inevitable practical difficulties in complying with legislation<sup>69</sup>, especially regarding the state of play in the implementation of the EU regulatory provisions on cross-border workers.

Both Member States attempt to implement the EU directives on the matter. However, occasionally, there are critical issues and delays, *a fortiori* because this field is particularly complex and involves many aspects and interests<sup>70</sup>.

Regarding one of the latest directives on the matter, no. 2020/1057<sup>71</sup>, ruling the posting of lorry drivers, Italy approved the implementing decree on February 23, 2023, just one year after the deadline expired<sup>72</sup>. However, on 19 April 2023, the European Commission decided to refer the Netherlands to the Court of Justice for failing to transpose that directive into their national legislation<sup>73</sup>. Meanwhile, the Dutch legislation to implement EU Directive 2020/1057 entered into force<sup>74</sup>. Even though this EU directive is essential not only to ensure social protection for drivers and to improve their working conditions, but also to guarantee fair competition between operators by eradicating illicit employment and business practices, 22 out of 27 EU Member States have implemented it late or have not yet implemented it. Despite the good-will among the parties, it appears that the time is not yet ripe for effective implementation of non-discriminatory and consistent enforcement of road transport social rules across the EU.

**7. Incoming and outgoing cross-border workers.** In 2022, foreigners resided in 27 countries of the EU and accounted for 37.8 million, or 8.5% of the total population. According to the Ministry of Labour and Social Policies' Annual Report of 2023 regarding

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European directive no. 2000/78: «Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Art. 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate».

<sup>68</sup> Actually, invalidity of discriminatory dismissal is rarely invoked: see J. R. Dierx, P. R. Rodrigues, *The Dutch Equal Treatment Act in theory and practice*, in <https://www.errc.org/>.

<sup>69</sup> For instance, H. G. Wells, *The limits of tolerance: the Equal Treatment Act and discrimination in the Netherlands*, in *Young Historians Conference*, 2015, 8: «Known for legalized marijuana and prostitution, acceptance of same-sex relationships, and tolerance of medical processes like euthanasia and abortion, at first glance the country appears to be an idyllic haven for open-mindedness. However, when analyzing the cultural traditions, politics, education, and other aspects of everyday life in the country, a long-lasting history of racism and prejudice is revealed. Those of minority religions or of certain origins different than that of the typical Dutch citizen (often stereotyped as tall, white, and blonde) face a challenging life in the country» (1).

<sup>70</sup> See M. Houwerzijl, *The analysis of the posting of workers directive(s) with a specific focus on EU cross-border road transport*, in B. Zwanenburg, A. Bednarowicz (edited by), *Cross-border employment and social rights in the EU road transport sector*, The Hague, 2019, 71.

<sup>71</sup> This directive modifies the former no. 2006/22/CE. It institutes new posting rules specifically addressing international road transport drivers and the companies that employ them. For further information, see ELA, *Cooperation obligations and practices in the enforcement of EU rules on International Road Transport in the EU*, 2023, ELA publications, 8 ff.

<sup>72</sup> The deadline was 2 February 2022.

<sup>73</sup> See <https://ec.europa.eu/commission/presscorner/>.

<sup>74</sup> On 1 June 2023.

foreigners in the Italian labour market<sup>75</sup>, over 70% of foreigners resided in four countries: Germany<sup>76</sup>, Spain<sup>77</sup>, France<sup>78</sup> and Italy. In Italy there were 5 million resident foreigners, of which 2.3 million were employed<sup>79</sup>. Even though the presence of foreign workers in Italy is varied and a significant number of them comes from non EU-countries, the report shows that citizens from eastern EU countries, especially those from Romania<sup>80</sup>, Poland, and Bulgaria, form a considerable portion. A large number of cross-border workers come from Slovenia and Croatia, which is reasonable given the geographical proximity to Italy<sup>81</sup>.

Although occupations vary in terms of tasks performed and skills required, the sectors with the highest incidence of foreign workers are agriculture, construction, catering, tourism, road transport, and domestic work<sup>82</sup>.

However, besides the high number of incoming cross-border workers<sup>83</sup>, there are also outgoing frontier commuters from Italy, especially towards Switzerland<sup>84</sup>.

In contrast, the incoming and outgoing labour flows in the Netherlands are quite different to Italy's. According to data from the Dutch Statistics Office<sup>85</sup>, there are more incoming workers – especially from Belgium – than outgoing ones. In fact, frontier workers make up a significant part of the workforce in the Netherlands, ranging from 15% to about 40%, especially for companies located near the border. In 2019, cross-border workers accounted for at least 1% in many regions, with significant peaks in Zuid-Limburg<sup>86</sup>, Zeeuws-Vlaanderen<sup>87</sup>, Noord-Limburg<sup>88</sup>, Midden-Limburg<sup>89</sup>, and Zuidoost-Noord-Brabant<sup>90</sup>. For certain sectors, border locations are often the best places to settle in Dutch regions. For multinational companies, locations on the border are advantageous for recruiting international and multilingual staff with the best skills.

In almost all sectors of the Dutch labour market, qualified foreign personnel are needed because of the insufficiency of the native Dutch workforce. According to statistical data, in the Netherlands there are 133 vacancies for every 100 unemployed people<sup>91</sup>. The

<sup>75</sup> See <https://www.lavoro.gov.it/temi-e-priorita-immigrazione/focus/xiii-rapporto-mdl-stranieri-2023>.

<sup>76</sup> 10.9 million.

<sup>77</sup> 5.4 million.

<sup>78</sup> 5.3 million.

<sup>79</sup> Which is 10% of the total number of employees in Italy.

<sup>80</sup> With an increase of 0.7% compared to the previous year.

<sup>81</sup> For an analysis of the situation in the border region of Friuli-Venezia Giulia, see R. Nunin, *Legalità e regolarità nel lavoro transfrontaliero*, in M. Brollo, C. Cester, L. Menghini (edited by), *Legalità e rapporti di lavoro. Incentivi e sanzioni*, Trieste, 2016, 259.

<sup>82</sup> See also European Commission, 2017 *Annual Report on Intra-EU Labour Mobility*, in [https://ec.europa.eu/futurium/en/system/files/ged/2017\\_report\\_on\\_intra-eu\\_labour\\_mobility.pdf](https://ec.europa.eu/futurium/en/system/files/ged/2017_report_on_intra-eu_labour_mobility.pdf).

<sup>83</sup> In the absence of a structured system for tracking cross-border workers, the estimated number, based on detection of passages at the Transalpina station and foreign mobile telephone users, varies between 15,000 and 18,000 cross-border workers per day: see Regione Friuli Venezia Giulia, *Mobilità transfrontaliera del Friuli Venezia Giulia. Italia-Slovenia e Italia-Austria*, 2020, in [www.regione.fvg.it](http://www.regione.fvg.it). See also the most recent data published in <https://www.rainews.it/tgr/fvg/video/2022/10/gorizia-transalpina-confronto-lavoro-transfrontaliero-dede4f1c-e1be-47a1-ba05-baa918a6f397.html>.

<sup>84</sup> Data published in <https://www.bfs.admin.ch/news/it/2023-0507>. See M. Bigotta, C. Pellegrin, *Oltre le frontiere statistiche. Il mercato del lavoro transfrontaliero*, in *ExtraDati*, gennaio 2021, 1.

<sup>85</sup> <https://www.cbs.nl/en-gb>.

<sup>86</sup> 5.5%.

<sup>87</sup> 4.1%.

<sup>88</sup> 4.6%.

<sup>89</sup> 3.7%.

<sup>90</sup> 2.2%.

<sup>91</sup> <https://www.dutchnews.nl/2022/05/shortage-of-staff-begins-to-bite-133-vacancies-for-every-100-unemployed/>.

overabundance of open positions compared to the labour force is a driving reason for the lower-than-average unemployment rate.

**8. Challenges in equal treatment between cross-border and domestic workers.** Despite the differences in geographical and socio-economic factors, the challenges for cross-border workers in Italy and the Netherlands are similar. For example, both countries have problems with social dumping, or the practice of sourcing foreign employees who work for a lower salary or poorer working conditions compared to domestic ones.

Although this is a recurring term in debates related to worker mobility and security, social dumping does not have a generally accepted definition. It is often considered as a «vague concept» and it is also argued that «legal experts, economists, social scientists all have their own conception»<sup>92</sup>. Even though there are different perspectives on the term, there is a common agreement that it has a «negative connotation». The phenomenon also signifies the exploitation of mobile workers and unfair competition between companies. It is a set of practices carried out on an international, national, or inter-corporate level. It aims to gain an advantage over competitors due to the application of different wages and social protection rules to different categories of workers<sup>93</sup>. In some cases, it might consist of differential or discriminatory treatment based on nationality. As such it contributes to the vulnerability of cross-border workers<sup>94</sup>.

For cross-border workers, the issue of social dumping is linked to other critical problems with higher taxation, difficulties in accessing social benefits and adequate working arrangements, and their risk for engaging in undeclared work.

**9. The insidiousness of double taxation.** Due to the lack of a regulatory framework, cross-border workers risk double taxation. In fact, their income from work could be taxed both in their country of residence and in the country where the work is carried out. Not only is it an economic burden on workers, but it also is an obstacle to free movement within the EU. The European Court of Justice has intervened several times<sup>95</sup> on the taxation of cross-border workers<sup>96</sup>, since «the risk of penalties from a fiscal point of view could constitute a brake on these forms of mobility, effectively creating a form of discrimination»<sup>97</sup>.

<sup>92</sup> Y. Jorens, *Cross-border EU employment and its enforcement. Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions*, Berlin, 2022, 375.

<sup>93</sup> M. Bernaciak (edited by), *Market expansion and social dumping in Europe*, London, 2015; J. Buelens, M. Rigaux (edited by), *From Social Competition to Social Dumping*, Intersentia, 2016; M. Kiss, *Understanding Social Dumping in the European Union*, European Parliament Research Service, 2017.

<sup>94</sup> A clear example may concern companies who engage cheaper and more vulnerable agency workers or relocate production to lower wage and less regulated locations. Social dumping may take different forms in different sectors.

<sup>95</sup> For an in-depth analysis of recent developments of the case law of the EU Court of Justice regarding the notion of «worker» and «mobility» in order to guarantee free movement within the EU, see E. ALES, *'Worker' (and) 'Mobility' in the Case Law of the Court of Justice EU on Free Movement: A Critical Appraisal*, in R. A. Müller, R. Rudolph, A. K. Schnyder, A. von Kaenel, B. Waas (edited by), *Festschrift für Wolfgang Portmann*, Schulthess Juristische Medien AG, 2020, 31.

<sup>96</sup> *Ex multis*, CJEU 14.02.1995, C-279/93 (Finanzamt Köln-Altstadt versus Roland Schumacker); CJEU 11.08.1995, C-80/94 (Wielockx / Inspecteur der directe belastingen); CJEU 12.06.2003, C- 234/01 (Gerritse); CJEU 9.11.2006, C- 520/04 (Turpeinen), in <https://curia.europa.eu>.

<sup>97</sup> R. Nunin, *Legalità e regolarità nel lavoro transfrontaliero*, cit., 259.

The only way to avoid double taxation and its consequences is through the signing of bilateral taxation agreements. Italy has just revised its agreement with Switzerland<sup>98</sup>. It contains the definitions<sup>99</sup> of «frontier area»<sup>100</sup> and «frontier workers»<sup>101</sup>, establishes the prohibition of double taxation<sup>102</sup>, and reaffirms the principle of non-discrimination<sup>103</sup>. Even the Netherlands has just updated its double taxation treaty with Belgium<sup>104</sup>. However, it still needs to be approved by both Parliaments to become effective<sup>105</sup>. The revision of the existing treaty concerns a simplification of applicable rules and aims at combating abuse. In essence, the treaty prevents workers from paying taxes in both countries. According to the new treaty, income from work must be taxed in the country where the work was carried out<sup>106</sup>.

All agreements on the matter have similar purposes, i.e. avoiding double taxation and preventing exploitation. However, the sheer number of existing treaties and different modalities of their discipline may create great confusion and uncertainty. Therefore, a multiplicity of bilateral agreements can be only a temporary solution.

**10. Struggling with social benefits and working arrangements.** Under no circumstances should access to social benefits be more difficult for cross-border workers than domestic ones. If so, it would be an obstacle to equal treatment and a failure of the principle of free movement within the EU. Even though rules have been established, sometimes they do not work in practice, as attested by the lively case law in both countries.

A recent episode concerning the accessing of social benefits can be found in foreign lecturers working in Italian universities. Although Italian law provides an acceptable framework for the so-called reconstruction of careers of foreign lecturers<sup>107</sup>, in practice, most universities do not adequately respect the EU rules on free movement and non-discrimination based on nationality. They do not provide for a correct reconstruction of foreign lecturers' careers, including the adjustment of their salary, seniority and corresponding social security benefits to those of a researcher with a part-time contract. Therefore, most foreign lecturers have not received the money and benefits to which they are entitled. Consequently, the European Commission decided to refer Italy to the Court of Justice of the European Union<sup>108</sup>. It claimed that Italy violated the principle of non-discrimination due to nationality in another EU Member State with regard to employment access and conditions of work<sup>109</sup>.

<sup>98</sup> Bilateral taxation agreement between Italy and Switzerland was ratified in Italy with law 13.06.2023, no. 83, and has been in force since July 1, 2023. There is also a bilateral agreement with Slovenia, in force since 2002.

<sup>99</sup> Art. 2 of the agreement.

<sup>100</sup> Regarding Italy, frontier areas are considered the Regions of Lombardy, Piedmont, Valle d'Aosta and the Autonomous Province of Bolzano.

<sup>101</sup> Frontier workers must be tax resident in a municipality whose territory is located, totally or partially, in the area 20 km from border with the other contracting State and should come back daily to its own principal domicile in the State of residence.

<sup>102</sup> Art. 3.

<sup>103</sup> Art. 4.

<sup>104</sup> On June 21, 2023, the relevant Ministers of the two Countries signed the new tax treaty. The previous treaty, still in force, was signed in 2001 and modified in 2009.

<sup>105</sup> This is not expected to be until 2025.

<sup>106</sup> Nevertheless, there are some exceptions in specific situation: for instance, working for government, working in education, working on board a ship or aircraft, etc...

<sup>107</sup> As recognised by the Court of Justice of the European Union in case C-119/04, settled on 18.07.2006, in <https://curia.europa.eu>.

<sup>108</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3480](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3480).

<sup>109</sup> Art. 45 TFEU and art. 7 of Regulation EU no. 492/2011.

This is not an isolated case. In one of the Italian regions with the greatest presence of cross-border workers, Friuli Venezia Giulia, a regional law breached the principle of equal treatment<sup>110</sup>. It reserved sick benefits only for those residents in Italy for at least ten years, of which five needed to be specifically in the Region. Restricting access to social benefits favors those who are native and most deeply rooted in the region. This constitutes indirect discrimination based on nationality<sup>111</sup>.

Similarly, on this issue, the EU Court of Justice ruled against the Netherlands for requiring foreign workers and their dependent family members to comply with residence conditions. In particular, this pertains to the «three out of six years» rule, which conflicts with obligations under art. 45 TFEU and art. 7(2) of Regulation no. 1612/68 on the freedom of movement for workers within the EU<sup>112</sup>.

Because of the lack of a single social security system valid throughout the EU area, case law plays a fundamental role in protecting cross-border rights and ensuring the principle of equal treatment in accessing social benefits, both at national and supranational levels<sup>113</sup>. As noted, the implementation of these rights «became a matter of jurisdiction rather than legislation»<sup>114</sup>. The number and variety of controversies on the matter are the clearest sign that the freedom of movement and its effects<sup>115</sup>, although generally transposed into national legislation, are not yet sufficiently internalised.

Digital transformation of the labour market, especially due to the Covid-19 pandemic and its impact on the increase in remote working, may also affect the working conditions of cross-border workers. Accessing remote work may be a bone of contention between cross-border and domestic workers. While national employees can easily take advantage of remote work<sup>116</sup>, frontier workers would be cut off from this possibility in order to comply with the strict provisions of bilateral agreements on the matter.

Art. 13 of Regulation no. 883/2004, which is applicable legislation for cross-border workers<sup>117</sup>, establishes that an employee who normally pursues an activity in two or more Member States shall be subject to the legislation of the Member State of residence if they pursue a substantial part of their work<sup>118</sup> in that Member State<sup>119</sup>. During the Covid-19

<sup>110</sup> According to art. 117 of the Italian Constitution, regional normative provisions must respect not only the Constitution itself, but also the constraints of the EU regulatory system.

<sup>111</sup> See Court of Udine 29.06.2010, in *D&L*, 2010, 874, which disapplied the regional law November 7, 2006. On a similar topic, see, recently, CJUE 29.07.2024, C-112/22 and C-223/22, CU and ND v. Procura della Repubblica presso il Tribunale di Napoli, Ministero dell'Economia e delle Finanze, INPS, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CJ0112>.

<sup>112</sup> See CJEU 14.06.2012, C-542/09, European Commission v. Kingdom of the Netherlands, in <https://eur-lex.europa.eu/>.

<sup>113</sup> It is appropriate to point out a recent CJEU ruling on the matter: 15.06.2023, C-411/2022, Thermalhotel Fontana Hotelbetriebsgesellschaft m.b.H. v. Bezirkshauptmannschaft Südoststeiermark, in <https://eur-lex.europa.eu/>.

<sup>114</sup> D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, 4, 467.

<sup>115</sup> I.e. equal treatment and non-discrimination on grounds of nationality.

<sup>116</sup> This modality of carrying out working performance may allow reduction in commuting time, better work-life balance, more flexibility in working time organisation, and higher productivity.

<sup>117</sup> E. van Ooij, *Highly mobile workers challenging Regulation 883/2004: Pushing borders or opening Pandora's box?*, *Maastricht Journal of European and Comparative Law*, 2020, 5, 573.

<sup>118</sup> According to art. 14 (8) of the Implementation Regulation no. 987/2009, substantial part is more than 25% of the activity.

<sup>119</sup> So-called *lex loci domicilii*.



pandemic, a Guidance Note<sup>120</sup> clarified that telework in a Member State other than the usual Country of employment due to the health emergency should not change the applicable legislation, even when working from home exceeds 25% of the activity. Considering the changed post-pandemic social context, where telework has become a structural way of working for many employees, the greater difficulty in using remote work for cross-border employees would have represented an obstacle to free movement and equal treatment in employment. Therefore, a framework agreement for habitual cross-border telework has recently been promoted by the Administrative Commission for the coordination of social security systems<sup>121</sup>. It entered into force on July 1, 2023, in 18 Member States, included the Netherlands, while Italy signed the agreement on December 28, 2023, with effect as of 1<sup>st</sup> January 2024.

This agreement<sup>122</sup> – which implements art. 16 (1) of Regulation no. 883/2004<sup>123</sup> – only disciplines cross-border telework and constitutes an exception to art. 13.

Although the purpose of the framework agreement is to identify applicable legislation and simplify procedures, some critical issues are recognizable. Firstly, both the Member State of residence and of employment must have signed it<sup>124</sup>. Secondly, according to art. 3 of the agreement, cross-border telework should be carried out in the State of residence less than 50% of the total working time. Therefore, unlike with national workers, cross-border employees' flexibility is strongly constrained. Although «considered a reasonable compromise»<sup>125</sup>, this agreement is yet another demonstration of the urgency for a true harmonisation between national regulations<sup>126</sup>. Remote work presents opportunities as well as challenges for all employees, especially in the areas of occupational health and safety, including psychosocial issues related to hyperconnection, overwork, blurred boundaries between personal and professional life, etc... Challenges related to cyber security and data protection must also be addressed. In the case of cross-border workers these issues may be amplified due to the possible differences in various national regulatory provisions.

**11. The unknown of undeclared work.** As the movement of cross-border workers is frequently unmonitored, their risk of doing undeclared work is even more likely than national workers. Despite being a topic of great media interest, it is not easy to define irregular work according to traditional legal categories. It is a complex phenomenon<sup>127</sup>. Not only is it

<sup>120</sup> For the period between 1.02.2020 and 30.06.2022: see the revised version as of 25/11/2021 - AC 074/20REV3 in <https://ec.europa.eu/social/main.jsp?catId=868&langId=en>.

<sup>121</sup> For a comment on the agreement see F. Aceto, *Cross-border telework and social security: A new multilateral Framework Agreement*, in *Global Workplace Law & Policy*, Wolters Kluwer, 25.09.2023, in <https://global-workplace-law-and-policy.kluwerlawonline.com/2023/09/25/cross-border-telework-and-social-security-a-new-multilateral-framework-agreement>.

<sup>122</sup> Entered into force on 1.07.2023.

<sup>123</sup> Art. 16 (1) establishes the possibility that two or more Member States, or the competent authorities of these Member States or the bodies designated by these authorities may, by common agreement, provide for exceptions to conditions in artt. 11-15 of Regulation no. 883/2004, in the interest of certain persons or categories of persons.

<sup>124</sup> Art. 2 of Framework Agreement.

<sup>125</sup> F. Aceto, *Cross-border telework and social security*, cit.

<sup>126</sup> From a tax perspective, circular no. 25/E of 18.08.2023 issued by the Italian Tax Agency provided clarifications on use of remote working and consequent tax regulation for cross-border workers, also to counter abuse of fictitious residences abroad.

<sup>127</sup> A. Bellavista, *Il lavoro sommerso*, Turin, 2000, 2; M. Dell'Olio, *Il lavoro sommerso e la lotta per il diritto*, in *Argomenti di Diritto del Lavoro*, 2000, 1, 43; A. Viscomi, *Profili giuridici del lavoro sommerso*, in *Diritti Lavori Mercati*, 2000, 2, 379.

widespread but it is varied because «irregular work» as a genus presents numerous species. It can be difficult to distinguish what constitutes undocumented<sup>128</sup>, illegal<sup>129</sup>, and informal employment<sup>130</sup>.

Undeclared work is the definition adopted by the European Union for the first time in 1998<sup>131</sup>. It means «any paid activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States»<sup>132</sup>. Not all EU Member States have an express regulatory reference to undeclared work or even use the same term. Depending on regulatory provisions, Italy uses the term «irregular work»<sup>133</sup> to mean the employment relationship for which the obligations in civil, administrative, fiscal, social security and insurance matters have not been fulfilled, in whole or in part, or «black work»<sup>134</sup>, when the violation is total. Conversely, the Netherlands prefers the term «illegal employment» for all types of worker exploitation (i.e. dangerous and unhealthy working conditions, underpayment, working without income tax and social security registrations, etc...)<sup>135</sup>. This phenomenon is a challenge that negatively affects workers, companies, and governments across Europe, but in different ways<sup>136</sup>. It may have far-reaching consequences, including breaching workers' rights, unfair competition, and reduced tax revenues<sup>137</sup>.

At the EU level, the most effective measure towards reducing the negative effects of undeclared work was the creation of the European Platform. It made a permanent working group of the European Labour Authority to tackle undeclared work since May 26, 2021. At the national level, the fight against undeclared work relies primarily on the actions of labour inspectorates<sup>138</sup>. However, besides deterrent measures, preventive policies – such as tax incentives, amnesties, and awareness raising – may be helpful in decreasing the incidences of undeclared work and facilitating compliance with existing rules<sup>139</sup>.

Undeclared work is a serious issue both in Italy and in the Netherlands. Evidence of the problem can be seen in the annual reports on supervisory activity in labour and social security

<sup>128</sup> L. Calafà, *Undocumented work (by foreigners) and sanctions. The situation in Italy*, in WP C.S.D.L.E. Massimo D'Antona, 2017, 321.

<sup>129</sup> This expression generally refers to irregular work carried out by individuals illegally present on the national territory (European Commission, *Undeclared Work in the European Union*, Special Eurobarometer 402, 2011, 8) or to illegal activity in itself (A. VISCOMI, *Lavoro e legalità: 'settori a rischio' o 'rischio di settori'? Brevi note sulle strategie di contrasto al lavoro illegale (e non solo) nella recente legislazione*, in WP C.S.D.L.E. Massimo D'Antona, 2015, 253, 2).

<sup>130</sup> G. Vermeulen, *Informal employment in the European Union*, in *wiego.org*.

<sup>131</sup> European Commission, *Communication on Undeclared Work*, 7.04.1998.

<sup>132</sup> See opinion of the European Economic and Social Committee no. 2014/C - 177/02 on *A strategy to combat the black economy and undeclared work*, in *eur-lex.europa.eu*.

<sup>133</sup> Art. 1 of law 18.10.2001, no. 383.

<sup>134</sup> Art. 36-bis of decree-law 4.07.2006, no. 223, converted by law 4.08.2006, no. 248.

<sup>135</sup> See <https://www.nl labour authority.nl/topics/illegal-employment>. See also the factsheet on undeclared work in the Netherlands in [www.europa.eu](http://www.europa.eu).

<sup>136</sup> See characteristics of undeclared work across all 27 EU Countries, and the institutions and policy responses in <https://ec.europa.eu/social/main.jsp?catId=1322&langId=en>.

<sup>137</sup> On the topic, M. Russo, *Qualche riflessione sul lavoro irregolare*, in M. Confortini (edited by), *Giuseppe Santoro Passarelli Giurista della contemporaneità*, vol. II, Turin, 2018, 876.

<sup>138</sup> M. Esposito (edited by), *Il nuovo sistema ispettivo e il contrasto al lavoro irregolare dopo il Jobs Act*, Turin, 2017.

<sup>139</sup> On the topic, A. Bellavista, *Le politiche statali di emersione del lavoro nero: strumenti e tecniche*, in V. Pinto (edited by), *Le politiche pubbliche di contrasto al lavoro irregolare*, Bari, 2008, 20; A. Bellavista, A. Garilli, *Politiche pubbliche e lavoro sommerso: realtà e prospettive*, in *Rivista Giuridica del Lavoro*, 2012, 2, 274.

written by the Italian Labour Inspectorate<sup>140</sup> and the Dutch documents on the matter<sup>141</sup>. The data show that cross-border workers are one of the most vulnerable categories. Italy's latest reports highlight alarming incidences of illicit transnational posting in the northern Italian regions, especially in transport, construction, and health services<sup>142</sup>. Domestic work is another sector characterised by a high rate of irregularities<sup>143</sup>. However, since this area lacks good data, it is often overlooked by supervisory reports. In the Netherlands, the Dutch Labour Inspectorate carefully monitors compliance with the Posted Workers in the European Union Act (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*). It provides better protection for these workers and combats unfair competition based on employment conditions<sup>144</sup>, especially in the construction, maritime/shipbuilding and transportation industries<sup>145</sup>.

The sector-specific data provided for by a research project conducted by the University of Leuven revealed irregularities in the employment conditions of 60% of posted workers in 2019 in Italy, especially in the construction sector, while in the Netherlands, in 2020, 107 inspections related to the Posting of Workers Directive were carried out, with an infringement found in 27 cases (25%)<sup>146</sup>.

**12. Concluding remarks.** Ensuring fairness for companies and workers to operate on a level playing field across borders is essential to a well-functioning internal market and, therefore, is one of the core values of the EU. Nevertheless, the labour market position of the cross-border workers is rather challenging, as attested by the general overview from the EU perspective and, even more, by the outcomes of the comparative analysis between Italy and the Netherlands. Indeed, the large amount of data emerging from the comparison show that, despite the geographical and socioeconomic differences between the two countries, the critical issues on the matter are similar. This confirms that the complexity of the European legal framework on the matter affects its concrete implementation in the national provisions. Because of this contentious framework, it is no wonder that there were a significant number of infringement procedures initiated by the EU Commission against both the countries examined in this study<sup>147</sup>. Without going into detail, they concern both the late communication to the EU Commission about the measures chosen to implement the

<sup>140</sup> See <https://www.ispettorato.gov.it/attivita-studi-e-statistiche/monitoraggio-e-report/rapporti-annuali-sullattivita-di-vigilanza-in-materia-di-lavoro-e-previdenziale/>.

<sup>141</sup> See <https://www.cbs.nl/en-gb> and <https://www.nllabourauthority.nl/>.

<sup>142</sup> Ispettorato Nazionale del Lavoro, *Rapporto annuale delle attività di tutela e vigilanza in materia di lavoro e legislazione sociale – anno 2022*, in [www.ispettorato.gov.it](http://www.ispettorato.gov.it), 40.

<sup>143</sup> R. Nunin, *Legalità e regolarità nel lavoro transfrontaliero*, cit., 263.

<sup>144</sup> See <https://www.government.nl/topics/foreign-citizens-working-in-the-netherlands/employment-conditions-for-posted-workers-in-the-eu>. M. Houwerzijl, *Regulations (and practice) regarding wages and compensation for posted workers to the Netherlands: Country report*, in K. Alsos, A.M. Ødegård (edited by), *Reguleringer for utsendte arbeidstakere*, Oslo, 2018, 22.

<sup>145</sup> Road transportation is one of the riskiest sectors, as shown by the results of the joint and concerted inspections conducted by the ELA. During checks in March 2023 in Belgium, Luxembourg and the Netherlands, the three countries' inspection agencies found that almost half the trucks checked were in violation. Sixty trucks were checked of which 26 were found to be in breach. A total of 41 offences was detected. On the point see ELA, *Cooperation obligations and practices in the enforcement of EU rules on International Road Transport in the EU*, 2023, ELA publications, 132.

<sup>146</sup> F. De Wispelaere, L. De Smedt, *Posting.Stat: Cartographie de la mobilité intra-Européenne de la main-d'œuvre par le détachement*, in *Revue Belge de Sécurité Sociale*, 2023, 1, 123-124.

<sup>147</sup> In the first half of 2020, 22 infringement procedures against Italy and 5 against the Netherlands were promoted. See [www.openpolis.it](http://www.openpolis.it).

directives and the failure or the incorrect application of the EU regulatory provisions. Such procedures could involve the Court of Justice and lead to the decision to inflict economic penalties that, over time, could become a great cost to the State.

As no EU-wide systematic data-gathering or digital tracking system currently exists to provide adequate data on cross-border workers, it is tough to acquire reliable and up-to-date information on ingoing and outgoing flows. This adds to the difficulties in accessing information on terms and conditions of employment on official channels. This lack may be the reason why existing rules are not applied by service providers. Consequently, this grey area may become a risk of exploitation, as attested by the numerous violations reported by inspection bodies.

Since the free movement of workers cannot be taken for granted, what measures could be the most effective at strengthening it and protecting cross-border workers?

At the EU level, the first point to address should be the simplification of the relevant legislation to avoid confusion or exploitation. As cross-border workers are pioneers of European integration and effective compliance with the principle of equal treatment, the implementation of EU provisions in the national regulatory frameworks should be a priority. Moreover, it is vital to provide information on terms and conditions

of employment of cross-border workers in a clear, transparent, comprehensive, and easily accessible way. Member States should ensure that the information published on their single official national website is accurate and updated on a regular basis<sup>148</sup>.

Furthermore, greater cooperation on the parts of European and national authorities to supply proper information and verify rule compliance should be included in the agenda. In order to avoid the dangerous consequences of undeclared work and social dumping on cross-border employees, the most useful remedies may be implementing labour inspections both at national and EU levels and promoting a culture of integration and legality for more decent and safer work, regardless of borders and nationality.

Only with these essential tools will it be possible to guarantee the free movement of workers, which is the cornerstone of European citizenship.

**Abstract.** Is it possible to take the principle of the free movement of workers within the EU for granted? This paper aims to identify the most insidious challenges and the most effective remedies to guarantee the principle of equal treatment and non-discrimination on grounds of nationality. It does so by analysing regulatory frameworks, case law and data on cross-border workers from European and comparative perspectives, with special focus on Italy and the Netherlands.

**Abstract.** È possibile dare per scontato il principio della libera circolazione dei lavoratori nell'Unione Europea? Al fine di individuare le sfide più insidiose e i rimedi in grado di garantire la parità di trattamento e il divieto di discriminazione sulla base della nazionalità, questo saggio analizza il quadro normativo, la giurisprudenza e i dati sui lavoratori transfrontalieri da una prospettiva europea e comparata, con particolare attenzione all'Italia e ai Paesi Bassi.

**Parole chiave.** Free movement of workers – cross-border workers – equal treatment – non-discrimination based on nationality – comparison.

<sup>148</sup> F. De Wispelaere, L. De Smedt, *Access to information on the posting of workers: Are we blinded by the importance given by EU legislation to the single official national website?*, in *Policy Brief*, 2023, 5, 2.

**Key words.** Libera circolazione dei lavoratori – lavoratori transfrontalieri – parità di trattamento – divieto di discriminazione in base alla nazionalità – comparazione.