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The revision of the Posted Workers Directive

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WORKING PAPER

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THE REVISION OF THE POSTED WORKERS DIRECTIVE

How obstacles to market-correcting EU policy have been overcome

Daniel Seikel

SUMMARY

In 2018, after years of political struggle, the European Parliament and the European Council agreed on a revision of the Posted Workers Directive from 1996. Given the fundamental differences of interest among EU member states on the topic of posted workers, this event must come as a surprise considering the high procedural hurdles of European decision-making. At first glance, the revision of the Posted Workers Directive challenges the political economic integration literature. Therefore, this article explores how and why the proponents of the revision were able to prevail. To this end, the article conducts a theory-testing process tracing analysis to reveal the mechanisms that enabled the success of the proponents of the revision. The analysis shows that the revision can be explained by consensus-facilitating mechanisms that are in line with the theoretical expectations of the political economic integration literature. In addition, the proponents of the revision benefited from extraordinary historical circumstances and coincidental events. This points to the historic contingency of the circumstances under which the revision became feasible. Thus, the revision of the Posted Workers Directive confirms the explanatory power of political economic perspectives on European integration. The findings allow to draw conclusions about whether, how and under which circumstances the obstacles of market-correcting measures at the European level can be overcome.

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1 Introduction

The posting of workers refers to companies sending their employees to another member state for a limited period of time to provide services there. There has always been a conflict over the question of how the working conditions of posted workers should be regulated. After the European Court of Justice (ECJ) banned some national practices in regulating the working conditions of posted workers in the late 2000s (Höpner 2021, pp. 20ff.), political actors fought for a revision of the posting rules. It took ten years for the EU member states and the European Parliament (EP) to agree on a revision of the 1996 Posting of Workers Directive¹ in 2018. The revision² expands the possibilities of member states to regulate the working conditions of posted workers and, thus, to curb wage competition.

Some of the reactions to the revision were exuberant. French President *Macron*, for example, announced that the revision was “a vital step to recreate confidence in Europe”.³ According to the French Minister for European Affairs *Loiseau*, the revision would allow “the European Union to return to the path of economic and social convergence [...] for the benefit of all Europeans”.⁴ According to *Jongerius* (PvdA), rapporteur for the revision dossier of the S&D Group in the EP, the revision is “an important step towards creating a social Europe that protects workers and prevents companies from fuelling a race to the bottom – a Europe that [...] takes care of ordinary working people”.⁵ Representatives of various political parties in the EP praised the revision as a “giant step towards a fairer European labour market” (*Jens Geier*, SPD)⁶, “milestone for a social Europe” (*Evelyn Regner*, SPÖ)⁷, “breakthrough for a social Europe” (*Terry Reintke*, Bündnis 90/Die Grünen)⁸ and “paradigm shift in EU social policy” (*Thomas Mann*, CDU)⁹. MEP *Barley* (SPD) expressed her conviction on *Twitter* that Brexit would not have happened if there had already been a revision at the time.¹⁰ The German Minister

¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. OJ L 18, 21.1.1997, pp. 1–6.

² 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. OJ L 173, 9.7.2018, pp. 16–24.

³ France24, 24.10.2017: “Macron cements first stage of EU reform agenda”, <https://www.france24.com/en/20171024-macron-cements-first-stage-eu-reform-agenda> (accessed: 25.01.2022).

⁴ Euractiv, 25.10.2017: “Posted workers: Macron's first victory in reforming the EU”, <https://www.euractiv.com/section/economy-jobs/news/posted-workers-macrons-first-victory-in-reforming-the-eu> (accessed: 25.01.2022).

⁵ <https://www.europarl.europa.eu/news/de/press-room/20180524IPR04230/entsenderichtlinie-gleicher-lohn-fur-gleiche-arbeit-am-gleichen-ort> (accessed: 25.01.2022).

⁶ ZEIT from 29.05.2018: “EU Parliament adopts rule against wage dumping”, <https://www.zeit.de/wirtschaft/2018-05/europaeische-union-entsenderichtlinie-lohndumping-reform> (accessed: 25.01.2022).

⁷ https://twitter.com/Evelyn_Regner/status/1001412964585558016 (accessed: 25.01.2022).

⁸ <https://terryreintke.eu/wp-content/uploads/2018-05-24-Briefing-Entsendung.pdf> (accessed: 25.01.2022).

⁹ Frankfurter Rundschau from 01.03.2018: “Posting of workers directive: New rules against wage dumping”, <https://www.fr.de/wirtschaft/neue-regeln-gegen-lohndumping-10975967.html> (accessed: 25.01.2022).

¹⁰ <https://twitter.com/spdbt/status/1116606980515221504> (accessed: 25.01.2022).

of State for Europe at the Federal Foreign Office, *Roth* (SPD), even assigned the revision an overarching European policy significance; it was proof that "a more social Europe [...] is possible".¹¹ Positive assessments were also heard from the scientific community. According to them, the revision is the result of a "social policy offensive" by the Commission (Syrovatka 2022), an impressive radical change in the regulation of posting (Picard und Pochet 2018) and an important step towards the "resocialisation" of the internal market (Jacqueson 2020, p. 418). Höpner (2018) describes the revision as a great success in view of the political and economic heterogeneity of the EU, which makes comprehensive social policy legislation at European level unlikely. Rocca (2020, p. 180) also sees the revision as a surprise; under Commission President *Barroso*, a revision of the posting rules was unthinkable. Bogoeski (2021) sees the reform process as a counter-movement in the sense of Polanyi (1977) to the commodification of work in Europe, through which labour relations would once again be embedded in society.

Indeed, in view of the fundamental conflicts of interest between sending and receiving countries, the division along national interests, including across the political groups in the EP, the legal restrictions resulting from the case law of the ECJ and the high majority requirements of European decision-making processes, the revision is an event that requires explanation. The reform of the posting provisions is therefore also interesting from a theoretical perspective: particularly, it challenges political economy perspectives on European integration, which see the potential of European policy as structurally limited, especially when it comes to market-correcting measures. But is the revision really as revolutionary as the reactions listed above suggest? Can the reform even be seen as proof that the EU's ability to solve problems in the area of labour market and social policy is greater than assumed by the political-economic integration literature? In order to answer these questions, this article examines the following research question: how and why did the agreement to revise the Posting of Workers Directive come about?

To answer this question, in this article I conduct a theory-testing process tracing analysis (Beach und Pedersen 2013) to reconstruct the legislative process. The analysis reveals the circumstances under which the reform of the posting rules could be achieved. The findings show that the agreement can be explained by the use of "consensus-facilitating" mechanisms, which are in line with the theoretical expectations of political economy perspectives on integration. The achievement of an agreement in the Council can be attributed to the effects of the supranational-hierarchical decision-making mode as well as to a linkage between the revision of the Posting of Workers Directive and the mobility package for the road transport sector. The Commission utilised these mechanisms in a strategically skilful manner. There were also a number of other favourable circumstances without which the revision would probably have failed. The success of the proponents of the revision can therefore also be attributed to historically contingent framework conditions. On the basis of the present case, it is therefore not possible to provide counterevidence to the core finding of the political economy integration literature that supranational politics has a structurally limited problem-

¹¹ https://twitter.com/MiRo_SPD/status/1001519039640997888 (accessed: 25.01.2022). All quotes translated by the author.

solving capacity in the field of European social policy. On the contrary, its theoretical foundations are confirmed.

The article is structured as follows: the next section sets out the methodological approach. Section 3 introduces the political economy literature on integration and formulates hypotheses. Section 4 provides an overview of posting activities in the EU and summarises the content of the revision. Section 5 reconstructs the legislative process. In section 6, I identify the factors that enabled a compromise in the Council and test the hypotheses formulated earlier. Section 7 discusses the significance of the findings with regard to the scientifically and politically relevant question of whether, how and under what circumstances European policy is capable of regulating markets.

2 Research design and methods

In this paper, I conduct a theory-testing process tracing analysis following Beach and Pedersen (2013). Process tracing analyses are designed to uncover causal mechanisms in "in-depth" case studies that have led to a particular outcome in need of explanation. Mechanisms are understood as causal links between independent and dependent variables. They describe how a certain input generates a certain outcome under certain conditions (Beach und Pedersen 2013, pp. 1f.; Bennet 2010; George und Bennet 2005; Hall 2008; Hedström und Swedberg 1996, p. 299; Mayntz 2004, p. 241). For this purpose, first, case-specific hypotheses are derived from the literature under trial. The hypotheses indicate which empirical observations are required to confirm the mechanisms – and thus also the underlying theory (see section 3). In the subsequent process tracing analysis, I check whether the causal mechanisms were present in the case at hand and whether they worked as expected by the theory (Beach und Pedersen 2013, p. 3, p. 15).

According to Beach and Pedersen (2013, p. 153), least-likely cases are particularly suitable for a theory testing. If causal mechanisms are confirmed in an actually unfavourable setting, this increases the confidence that the causal mechanisms can also be found in a larger population of cases (Beach und Pedersen 2013, p. 152). As will be explained in the next section, the revision of the Posting of Workers Directive can be seen as a least-likely case for political economy approaches to integration.

In order to reconstruct the decision-making situation in the Council, I draw on spatial voting models (see Section 6), which have proven helpful in the past for analysing European decision-making processes (Hörl et al. 2005; Scharpf 2000; Schmidt 2001; Schneider 2008; Sullivan und Selck 2007; Tsebelis und Garrett 2000; Zimmer et al. 2005). These formal models are helpful to determine the effects of the empirically identified explanatory factors on the strategic interactions between the actors. The focus here is primarily on the effects on the default position in the event of non-agreement. The default position refers to the situation that persists when member states are unable to agree on a legislative proposal. It is the central point of reference for member states' strategic calculations: since the Commission has a monopolised right of initiative in the ordinary legislative procedure, governments must choose

between the proposed legislation and the default position (cf. Ostrom 2005, 182, 205; Romer und Rosenthal 1978, pp. 27f.).

The empirical data material is based on 18 semi-structured expert interviews with actors involved in the process from the EP, the European Commission, the Committee of Permanent Representatives of the member states of the European Union (Coreper), employers' associations and trade unions. Data collection and software-supported evaluation follow the method developed by Gläser and Laudel (2009) for qualitative content analysis of expert interviews, which is specifically tailored to process tracing analyses. The interview data is supplemented by official documents, statements and press reports.

3 The revision of the Posting of Workers Directive as a test case for political-economic integration theories?

Political economy perspectives on European integration assume that the EU's problem-solving capacity is limited by divergences of interest between member states, which can be traced back to structural socio-economic and institutional differences. According to Moravcsik (1993, 1998), governments aggregate the interests of national, mainly economic interest groups and represent them at European level. Joint decisions are only reached if the member states' preferences converge (Moravcsik 1998, p. 4). Member states that unilaterally produce negative external effects or benefit from the positive external effects of other countries have no incentive to agree to policy coordination (Moravcsik 1993, p. 486). This complicates agreement on common social standards beyond the lowest common denominator (Moravcsik 1993, p. 504). Héritier (1996) and Héritier et al. (1996) show that member states strive to protect and generalise their national regulatory models at EU level in order to keep the costs of adapting to European requirements low and to create competitive advantages for domestic industries. Zimmer et al. (2005) and Bailer et al. (2015) identify economic distributive conflicts between (poorer) net beneficiaries and (richer) net contributors to the EU budget as the main line of conflict, which also leads to divisions on issues of market regulation and liberalisation. Voting behaviour in the Council therefore reflects comparatively fixed economic interests and not flexible, party-dependent preferences (Bailer et al. 2015, p. 438, p. 440; Zimmer et al. 2005, p. 418; see also Târlea et al. 2019). Finding a compromise is made even more difficult by the fact that national preferences are issue-specific; conflicts of interest arise between different countries depending on the policy area (Zimmer et al. 2005, p. 418). The political economy integration literature (Höpner 2013, 2015; Höpner und Schäfer 2008; Scharpf 1988, 1999, 2006, 2010) operating on the basis of actor-centred institutionalism (Mayntz und Scharpf 1995; Scharpf 2000), presents a particularly sceptical assessment of the problem-solving capacity of European politics. Its core message is that the problem-solving capacity of European policy is structurally limited by the combination of socio-economic and institutional heterogeneity between the member states and the high majority requirements of European decision-making processes. Under these conditions, negotiations between self-

interested member states tend to produce sub-optimal policy outcomes or inefficient compromises at the level of the lowest possible common denominator. The imbalance between the blockade-prone political decision-making mode on the one hand, and the dynamically progressing legal integration mode, on the other hand, due to the market-making thrust of EU internal market law, is the reason why the social potential of European integration is structurally limited.

From the point of view of the political-economic integration literature, at first sight, the revision of the Posting of Workers Directive must therefore appear to be an unlikely event that requires explanation. In the political system of the EU, characterised by Scharpf (2000, p. 130, p. 247) as a “compulsory negotiation system”¹², the political capacity to act is at its greatest when member states’ interests are aligned. This is particularly the case when the decision-making situation corresponds to a “coordination game” in game-theoretical terms, in which all parties benefit most if they agree on a common strategy (Scharpf 2000, p. 130, p. 247). In areas where there is a high potential for conflict, on the other hand, it is low (Scharpf 2000, pp. 346f.). The latter applies in particular to social, labour market and collective bargaining policy, to which posting also belongs. The situation here is as follows: in the EU internal market, there is a risk of undercutting competition for countries with high levels of social protection and wages. Therefore, they favour high common standards for the posting of workers, which in turn can nullify the competitive advantages of countries with lower wage levels. In this constellation, it is particularly difficult to reach agreements on common regulations under the conditions of European decision-making rules (unanimity or qualified majority). Since the competitive advantage of countries with low wage levels is based on the fact that there are different wage levels, even low common standards are less attractive to them than no common standards at all (cf. Scharpf 2000, pp. 144ff., 2011, p. 225). This constellation formally corresponds to a “conflict game” in which one party wins what the other loses (Scharpf 2000, p. 130). Moreover, since the EU’s eastward enlargement, socio-economic and institutional differences and the resulting differences in interests between governments have increased significantly. At first glance, it therefore seems reasonable to assume that the revision of the Posting of Workers Directive is a critical test case for the political-economic integration literature.

However, political economy approaches do not postulate an “impossibility theorem” for European decision-making, but rather state that the difficulty of reaching consensus increases with the degree of conflict of interest between member states (Scharpf 2011, p. 225). The literature reviewed assumes rationally acting, self-interested governments that agree to legislative proposals if this puts them in a better position than the *status quo*. The literature has identified causal mechanisms through which the *status quo* or the default position can be shifted in such a way that decision blockades can be overcome. Thus, before the revision can be used to reject the political economy perspective of the integration process, it must first be empirically verified whether these exit mechanisms were applied and whether they worked in the expected way. In the following, I therefore present those mechanisms

¹² Scharpf (2000, p. 224) defines a “compulsory negotiation system” as a constellation in which no party can achieve its goals by acting unilaterally. Joint action is only possible if all parties involved reach a consensus.

that can be considered for resolving decision blockades when the subject of the decision is highly politicised and member states' preferences are polarised. Mechanisms that do not work under this condition (e.g. solidary/technocratic problem-solving orientation, cognitive change of norms and perceptions; Falkner 2011, p. 12; Héritier et al. 1996, pp. 15f.; Scharpf 1988, p. 261, 2006, p. 849) are omitted because of space limitations. For each mechanism, a case-specific hypothesis is formulated. It is important to mention that the theory does not presuppose that all mechanisms must be utilised in order to overcome decision blockades. Theoretically, one exit mechanism is sufficient.

External shocks and crises can trigger such shocks that historical windows of opportunity for reforms open up (Falkner 2011, p. 12), as was recently observable during the euro crisis or the coronavirus pandemic. The hypothesis to be derived from this (H1) is that *a shock/crisis has opened a window of opportunity for proponents of the revision to launch a reform of the Posting of Workers Directive*.

Decision blockades can also be broken by supranational-hierarchical ECJ rulings (Scharpf 2006, pp. 851ff.). ECJ judgements can shift the default position in the event of non-agreement: if governments fail to agree on a common policy in an area in which the Court has issued case law, the member states do not fall back to the legal *status quo ante* (e.g. national jurisdiction), but to ECJ case law (e.g. principle of mutual recognition). This can change the preferences of member states and shift the majority ratios in the Council. As the ECJ usually interprets economic freedom rights expansively, the negotiating position of governments with an interest in market liberalisation is usually strengthened. Decision blockades are thus lifted in favour of market-liberal legislation. If, on the other hand, the ECJ *confirms* market-correcting national practices, this strengthens member states with a preference for high regulatory standards, as they can now set their standards unilaterally. The resulting risk of a progressive, disintegrative fragmentation of the internal market can encourage other governments to agree to a higher but standardised level of regulation than they originally intended. However, this rarely happens. The effectiveness of this mechanism is reinforced by the fact that member states have a general preference for legal certainty. Since European judge-made law is always case-specific but at the same time generally applicable, it creates legal uncertainty. The need for legal certainty can thus contribute to decision blockades being abandoned in favour of a uniform codification of case law (Schmidt 2011, pp. 39ff.). The Commission can take advantage of these effects. It can use case law strategically to circumvent blockades in the Council. One example of this is the mechanism of "choosing the lesser evil": In her analysis of the liberalisation of the electricity sector, Schmidt (1998, 2001) shows that targeted infringement proceedings or threats of legal action led member states that originally rejected uniform regulations to give up their initial resistance since they preferred a politically controlled liberalisation as the "lesser evil" over further, uncontrolled, judicial market-making. If the supranational-hierarchical exit mechanism came to fruition, the following hypothesis (H2) must be confirmed: *ECJ case law shifted the default position in the event of non-agreement in such a way that even some previously recalcitrant member states agreed to the revision*.

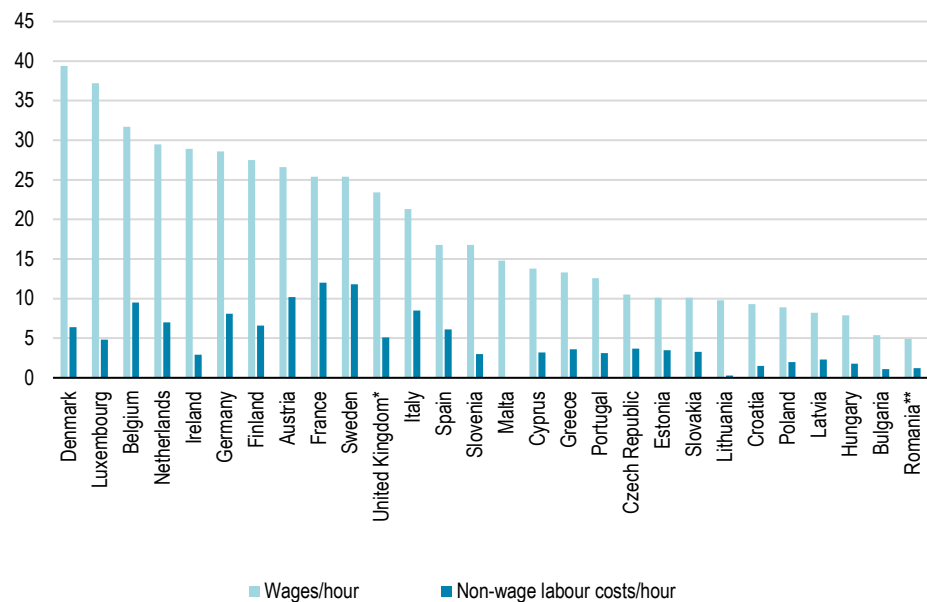
In addition, compromises can be "bought" through package deals between different thematic areas or through compensation payments - i.e. through political exchange (Aksoy 2012; Falkner 2011, p. 12; Héritier 1996, p. 156; König und Junge Dirk 2009; Scharpf 1988, p. 264, 1993, pp. 9f., 2006, p. 851). Package deals are demanding: member states must have different but complementary preferences in two or more areas. In such cases, member states (A) can make concessions across thematic areas at relatively low cost to them, which are particularly important for other countries (B), in order to obtain the agreement of (B) to a project that is of high importance for (A). In this way, several legislative acts that would have been rejected if they had been voted on separately can be adopted as a combined package (Moravcsik 1993, pp. 504f.; Scharpf 2000, pp. 216ff.). The following hypothesis (H3) can be derived from this: *through political exchange between different legislative proposals, governments with a strong preference for a reform of the Posting of Workers Directive have obtained the consent to the revision of member states with a weaker preference for stricter posting rules.*

Finally, thanks to its central position in the European institutional system and its monopolised right of initiative, the Commission can facilitate consensus in the Council (for a brief overview of the Commission's means to exert influence, see Seikel 2013, pp. 296ff.). It can reduce the high transaction costs of complex intergovernmental negotiations and, as an "honest broker", explore win-win compromises between the member states (Scharpf 2006, p. 850, 2011, p. 230). Furthermore, as mentioned above, it can strategically utilise the effects of the supranational-hierarchical decision-making mode to advance initiatives. The corresponding hypothesis (H4) is: *the Commission has enabled the realisation of a Council compromise on the basis of its agenda-setting capacities.*

4 Overview of the revision of the Posting of Workers Directive

The posting of workers is subject to the freedom to provide services (Art. 56 TFEU) and not the free movement of workers (Art. 45 TFEU). This means that the working conditions of posted workers are governed by the provisions of the posting country and not those of the receiving country. This sets off the territoriality principle of national labour law and creates "islands" in the labour market in which the national labour law no longer applies but the respective foreign labour law of the posting companies' countries of origin (cf. Arnholtz und Lillie 2020, p. 4). In an economic area with such different wage and regulation levels as the EU, this becomes a problem for labour market regulation (Figure 1).

Figure 1: Average wages and non-wage labour costs in euro/hour (2020)



*Values for 2019

**Values for 2017

Source: Eurostat (Variable lc_lci_lev).

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Posting and client companies exploit wage differences to gain competitive advantages based on low labour costs. This creates wage competition between domestic and posted workers and companies (cf. Hassel et al. 2016; Hassel und Wagner 2018). In some member states, posted workers receive between 20 and 50 per cent less pay than domestic workers. In countries with high wage levels, this displaces low-skilled domestic workers in particular (European Commission 2016, p. 36, p. 41).

In order to estimate the scope of posting activities, the issued A1 certificates are used as a makeshift solution. The A1 certificate documents that workers working temporarily abroad are covered by social security in their home countries. However, this data source only provides an inaccurate picture and probably underestimates the actual posting activity (European Commission 2016, p. 57; de Wispelaere et al. 2020). The number of postings has risen significantly in recent years. While 1.5 million A1 certificates were issued in 2012, this figure doubled to 3 million in 2018. This corresponds to 1.2 per cent of employees in the EU. Of these, 1.6 million A1 certificates were issued in the EU-15 countries and 1.3 million in the EU-13 countries. The main sending countries were Poland (606,000), Germany (475,000) and Spain (249,000). The main recipient countries were Germany (429,000) and France (262,000), followed by Belgium (156,695), the Netherlands (126,000) and Austria (120,000). Most postings take place in the construction sector, followed by the service sector, industry and the road transport sector (de Wispelaere et al. 2020).

In 1996, the EU member states adopted a directive regulating the working conditions of posted workers. Already at that time, the posting of workers led to a conflict between the sending countries in southern Europe and the receiving countries in northern Europe (Eichhorst 2000). More than twenty years later, in 2018, the EU member states agreed on a revision of the Posting of Workers Directive. The need for action arose due to the EU's eastward expansion and the case law of the ECJ. In the *Laval* judgement¹³, the ECJ reinterpreted the provisions of the Posting of Workers Directive from minimum standards, beyond which the member states could go, to maximum standards, thus restricting the member states' scope for regulating wage competition (Arnholtz und Lillie 2020, pp. 7f.; Blauburger 2012; Rödl 2009; Seikel 2015). The need to revise the Posting of Workers Directive resulted primarily from this change of the legal context.¹⁴ Furthermore, as already mentioned, the differences in wage levels between the member states have increased since 1996 as a result of the EU's eastward enlargement. Under these conditions, the freedom to provide services and the posting of workers put pressure on the social models of the old member states.¹⁵ In addition, posting practices also creates a need for regulation, such as the issue of offsetting travel and accommodation costs against the

¹³ Case C-341/05 of 18 December 2007 [2007] ECR I-11767.

¹⁴ Interviews Coreper, 08.10.2018; European trade unions, 18.09.2018; European trade unions, 29.11.2018; European Parliament, 11./12.09.2018; Swedish trade unions, 10.09.2018.

¹⁵ Interviews European trade unions, 04.09.2018; European Commission, 12.09.2018; European Commission, 18.02.2019.

wages of posted workers, chain postings¹⁶, "bogus postings"¹⁷ or the circumvention of posting regulations by temporary employment agencies.¹⁸ What are the most important changes of the revision? The changes are mainly gradual adjustments. The revision is intended to implement the principle of "equal pay for equal work in the same place". Firstly, the term "minimum rates of pay" used in the original directive has been replaced by "remuneration". This extends the mandatory wage components to be applied to posted workers to include all minimum wage components defined by the receiving country beyond minimum wages, such as daily allowances, holiday pay and supplements and allowances, for example for night and public holiday work. The wages of posted employees are therefore no longer limited to the nominal minimum wage rates stipulated by law or collective agreements. However, these changes represent a retrospective codification of the ECJ's *El-ektrobudowa* judgement from 2015 (see section 5.1).¹⁹ Secondly, the new Posting of Workers Directive allows collective agreements to be applied to posted workers. This option was previously only available to countries that had neither statutory minimum wages nor a system for declaring collective agreements universally applicable. In principle, all member states could now include entire collective agreements with complete wage scales, differentiated according to qualification, activity and professional experience, in their national posting acts. The social security of posted workers continues to be governed by the provisions of the country of origin. As the cost of social security differs from country to country, posting companies can still exploit these differences to gain a competitive advantage (Figure 1). The limitation of the maximum posting period to 12 months plus a six-month extension has attracted public attention. In fact, this is not a restriction on the posting period, but rather a limitation on the validity of the country-of-origin principle. Workers can also be posted beyond this period. However, at the end of this period, the national labour law of the receiving country applies. As the average posting period is four months and most postings last less than six months, the practical significance is limited. Furthermore, the revision puts an end to the practice of deducting travel, board and lodging costs from the worker's salary. This amendment is also based on the ECJ judgement mentioned above. The revision also clarifies that workers of temporary employment agencies who provide services in another country are posted workers. In addition, the loophole in the regulations for "bogus postings" has been closed. From now on, the provisions of the host country apply to workers who are not properly posted. In the case of chain postings, the temporary employment agency with which the posted worker has an employment relationship is responsible for complying with the posting regulations.

¹⁶ In the case of chain posting, workers are posted from a third country to an EU member state, from where they are hired out by a temporary employment agency to a user company in another country and posted by the user company to another member state. In these cases, it was previously unclear which company was responsible for compliance with the prescribed working conditions (interviews Coreper, 25.09.2018; European Commission, 05.10.2018).

¹⁷ Companies were able to exploit a loophole in the legal provisions by deliberately posting workers incorrectly. If this came to light during a labour inspection, the question of applicable labour and social law was determined in accordance with the Rome I Regulation. This involves checking which country the employee is more strongly bound to. If it was found to be the country of origin, the employer's calculation worked out, as this made it possible to circumvent both the posting rules and the host country's working conditions (interview European Parliament, 11./12.09.2018).

¹⁸ Interviews German trade unions, 24.10.2018; European Commission, 18.02.2019.

¹⁹ Case C-396/13 of 12 February 2015, <https://curia.europa.eu/juris/liste.jsf?language=de&num=C-396/13> (accessed: 14.03.2022).

The road transport sector was excluded from the revision until 2020, when the working conditions for this sector were regulated by a separate directive²⁰, a *lex specialis*. In the meantime, only the provisions of the original directive applied to long-distance lorry drivers, not those of the revision.

5 The path to the revision of the Posting of Workers Directive

After the 2014 European elections, the Social Democrats in the EP made their vote in favour of *Juncker's* election as the new Commission President conditional on a revision of the posting rules.²¹ In his inaugural speech in the EP, *Juncker* promised that the EU would receive a "social triple-A rating" in future. *Juncker* made this promise against the backdrop of the legitimacy crisis in which the EU finds itself following the euro crisis, which has led to the rise of Eurosceptic parties across Europe. For *Juncker*, the revision of the Posting of Workers Directive was a key project to strengthen the social dimension of the EU and restore lost acceptance.²²

The Commission launched the process in summer 2015 and pushed it forward with determination. It received support from a group of like-minded member states (Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden), who wrote a letter to the Commission advocating the implementation of the principle of "equal pay for equal work in the same place". A short time later, a group of Eastern European member states (Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Romania, Slovakia), also in a letter, turned against the revision (European Commission 2016, pp. 50ff.). The Commission finally presented a draft in March 2016. Parliamentary chambers from 11 member states (Bulgaria, Czech Republic, Denmark, Estonia, Croatia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia) issued a subsidiarity complaint, which delayed the process by several weeks. In July, the Commission rejected the so-called "yellow card" (Rocca 2020, p. 170).

5.1 The process in the Council

Afterwards, negotiations between the member states began in the Council. A qualified majority was required to approve the revision. For this, 55 per cent of the member states (equivalent to 16 votes in favour), which together represent at least 65 per cent of the EU population, must agree. The Eastern European member states alone did not have a blocking minority (Table 1). However, some Western European governments also took a critical view of the revision as a whole or parts of it. The positions of Great Britain, Ireland, Portugal and Spain were not unambiguous.

²⁰ Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012, OJ L 249, 31.7.2020, pp. 49-65.

²¹ Interviews European Parliament, 11./12.09.2018; European Parliament, 17.09. 2018.

²² Interviews European Parliament, 11./12.09.2018; European Parliament 11.10.2018; European Commission 12.09.2018.

Table 1: Votes and population shares

| | Votes | Per cent of EU population |
|--|-------|---------------------------|
| Eastern European countries | 11 | 20.03 |
| Western European countries | 17 | 79.97 |
| Western European countries without UK, IRL, PT, ES | 13 | 54.99 |

Source: Eurostat (variable: demo_pjan); own calculations.

WSI

The supporters of the revision therefore had to win over more countries. The Commission wanted to ensure this with a tactical move. In the draft directive, it announced that it would specify the posting rules for the road transport sector in a sectoral directive. In doing so, it linked the revision of the Posting of Workers Directive with the so-called mobility package. In some countries, such as Estonia, Slovakia, but also Spain and Portugal, the transport industry is of great economic importance. It is important for these countries to maintain their access to foreign markets.²³ One of the decisive factors here is the question of from how many days of stay in a country and for which type of transport (cabotage, bilateral or international transport) the posting rules for lorry drivers apply. The longer lorry journeys are exempt from the posting regulations, the longer cost advantages can be exploited due to low labour costs in the countries of origin. Rumours were circulating about a deal between the Commission and some posting countries regarding a concession by the Commission on the mobility package in return for approval of the revision.²⁴

In the second half of 2016, a majority emerged in the Council in favour of the principle of "equal pay for equal work in the same place". Technically, this was to be implemented by replacing the term "minimum rates of pay" with "remuneration" (see section 4).²⁵ Why was this proposal not more hotly contested? The background is the *Elektrobudowa* judgement from 2015 mentioned in section 4 (see Rocca 2020, pp. 175f.). In this case brought by a Finnish court, the ECJ ruled that additional wage components (e.g. daily allowances, travel time allowances, holiday pay) must be regarded as part of the minimum wage rates if the host country so determines. In addition, accommodation costs and meal vouchers may not be deducted from the wages of posted workers. The Commission's proposal to replace the term "minimum rates of pay" with "remuneration" therefore subsequently codified ECJ case law that applied to all member states anyway.²⁶

²³ Interviews European employers' association, 09.10.2018; European Parliament, 17.09.2018; European Commission, 05.10.2018.

²⁴ Interview European Parliament, 17.09.2018.

²⁵ Interviews Coreper, 25.09.2018; German employers' association, 13.09.2018; European trade unions, 18.09.2018.

²⁶ Interviews European Commission, 12.09.2018; European Commission, 05.10.2018. See Höpner (2021, p. 23).

In view of this development, some Eastern European governments also gave up their resistance in return for concessions on other points, such as the two-year blocking period until the revision could be implemented in national law.²⁷ However, this compromise was fragile. It was based on the unity of the Western Europeans, which was soon to crumble and cause the compromise to falter.

This was due to three events. Firstly, the British signalled that they would abstain despite initial statements to the contrary and that their voting weight would therefore be lost to the revision supporters. This strengthened the negotiating position of the Spanish and Portuguese, whose agreement was now all the more urgently needed.²⁸ Secondly, the Commission presented a draft mobility package in May 2017. It included a proposal for the announced sector-specific directive for the road transport sector, which was to regulate the working conditions for long-distance lorry drivers working across borders. Eastern Europeans, Portuguese and Spaniards were dissatisfied with the draft.²⁹ They threatened to block the revision if there were no concessions in the road transport sector.³⁰ Thirdly, the election of *Macron* as French President in May 2017 changed the situation. After his election, *Macron* made the revision a high political priority. He publicly called for the maximum duration of postings to be limited to 12 months. The Commission's draft envisaged a limit of 24 months. *Macron's* demand was counterproductive for two reasons. Firstly, as already mentioned, the average posting period is four months, with the majority of postings lasting less than six months.³¹ Secondly, the aim of the revision was to harmonise the working conditions of posted workers as closely as possible with the working conditions of the respective receiving country during the posting period. The closer the revision came to this goal, the less relevant the maximum duration of the posting would become. *Macron's* initiative was therefore primarily symbolic but called the state of negotiations into question.³² Paradoxically, the subordinate issue of the maximum duration of posting opened up the possibility of finding a compromise in the Council. No matter how unimportant the issue of limiting the posting period was, it became indispensable for *Macron*, as he had invested too much political capital to give up the demand. In order to push through the shorter maximum posting period, he was forced to make concessions.

The discussions surrounding the road transport sector and the limitation of the maximum posting period to 12 months demanded by *Macron* threatened to break up the negotiations. The Council vote originally scheduled for June 2017 had to be postponed to October.³³

²⁷ Interview Coreper, 25.09.2018.

²⁸ Interview Coreper, 25.09.2018.

²⁹ The draft stipulated that the national minimum wage would be paid after three days in a country (an earlier version stipulated five days) and that employers would have to bear the costs of accommodation. This would have reduced the period during which transport companies could exploit cost advantages (Euractiv, 31.05.2017: "Controversial EU labour rules tackle truck drivers' pay and working conditions", <https://www.euractiv.com/section/road-safety/news/controversial-eu-labour-rules-tackle-truck-drivers-pay-and-working-conditions/>, accessed: 11.08.2021).

³⁰ Interviews Coreper, 25.09.2018; European Parliament, 11./12.09.2018; European Commission, 12.09.2018; European Commission, 05.10.2018.

³¹ Interview German trade unions, 24.10.2018.

³² Interviews European Parliament, 11./12.09.2018; European Parliament, 17.09.2018.

³³ Interviews European Commission, 12.09.2018; European Commission, 05.10.2018.

During the summer of 2017, France and Spain agreed to exclude the road transport sector from the scope of the revision. In return, the Spanish were prepared to agree to the revision – and the restriction of the maximum duration of posting.³⁴ This resulted in a narrow majority in favour of the revision.

The Commission played an important role in brokering a compromise at the Council meeting in October 2017. Negotiating packages were formed and exchanged for each other. For example, the shortened maximum posting time was exchanged for general contractor liability (see below). The sticking point was the road transport sector.³⁵ The Commission proposed the inclusion of a synchronisation clause that would suspend the application of the revision to the road transport sector until a sector-specific directive defined the posting rules for long-distance drivers. Until then, only the provisions of the old Posting of Workers Directive should apply to the transport sector.³⁶ The synchronisation clause was crucial to reaching an agreement in the Council³⁷ since the conflict over the posting rules for road transport could be kept out of the further negotiations on the revision.³⁸

For countries with a strong economic interest in the transport sector, the synchronisation clause was attractive not only because it removed the road transport sector from the scope of the revision, but also because it provided an incentive to adopt a *lex specialis* for the road transport sector in the first place. Excluding the sector is different from announcing a sector-specific directive that may never materialise while the new posting rules fully apply. The synchronisation clause also made a sector-specific regulation desirable for the receiving countries, as this was the only way to extend the new posting rules to the road transport sector (see section 6).

A compromise was also reached on the limitation of the posting period. The Commission proposed a limit of 12 months, but with the possibility of an extension of a further six months, which the receiving country can reject. As the majority was in favour of the revision, the Czech Republic and Romania gave up their resistance in exchange for a few more concessions.³⁹ The Romanians obtained an *automatic* extension of six months upon application.⁴⁰ The Czechs obtained clarifications in the calculation of pay in relation to allowances for travelling and accommodation costs. Poland, Hungary, Lithuania and Latvia voted against the revision. The UK, Ireland and Croatia abstained (Lubow und Schmidt 2020, p. 11).

³⁴ Interviews European Parliament, 11./12.09. 2018; European Parliament, 17.09. 2018; European Commission, 05.10.2018.

³⁵ Interview European Parliament, 11./12.09. 2018.

³⁶ Interviews Coreper, 25.09.2018; European trade unions, 18.09.2018; European Parliament, 11./12.09.2018; European Commission, 05.10.2018.

³⁷ Interviews Coreper, 08.10. 2018; European Parliament, 11./12.09. 2018; European Parliament, 11.10.2018; European Commission, 12.09.2018; European Commission, 05.10.2018.

³⁸ Interviews European Parliament, 17.09.2018; European Parliament, 11.10.2018; European Commission, 05.10.2018.

³⁹ Interview European Commission, 05.10.2018.

⁴⁰ Interview European Commission, 12.09.2018.

5.2 The process in the EP

Negotiations in the EP ran parallel to the Council. Social Democrats and Conservatives decided to share the reporting on the dossier. This tactical move was decisive in securing a parliamentary majority in favour of the revision.

The report on the revision was adopted by the Employment Committee on 16 October. The Employment Committee's report was in favour of the revision, but called for improvements to the Commission's draft⁴¹ :

- Extension of the legal basis to the EU's social policy competences (Art. 153 (1) TFEU)
- General contractor liability for the remuneration of posted workers
- The national law of the receiving country should apply to "bogus" posted workers
- Possibility of applying representative collective agreements
- Limitation of the posting duration to 24 months with the possibility of long-term posting after 24 months upon request
- Extension of the applicable terms and conditions of employment to include costs incurred for travelling, board and lodging
- Extension of the scope of the posting provisions to temporary workers
- Better regulation of chain postings

The mandate to start trilogue negotiations was not contested. This played into the hands of the proponents of the revision, as it prevented the report from being watered down in plenary. This allowed the EP's negotiations with the Council and the Commission to begin – on the basis of a parliamentary position that was favourable to the proponents of the revision.⁴²

5.3 The trilogue: give and take

The trilogue negotiations between the Council and the EP took place between November 2017 and March 2018. During the negotiations, the EP was unable to push through its demand for a dual legal basis. The legal basis of the original directive is the freedom to provide services (Art. 56 TFEU). This was the gateway for the ECJ to interpret the directive as a maximum standard. During the inter-institutional negotiations, the EP intended to base the Directive on a second legal basis in addition to the freedom to provide services, namely the EU's social policy competences (Art. 151 and Art. 153). This should have identified the directive as a minimum standard and shield it from contrary interpretations by the ECJ (see Lubow und Schmidt 2020). The Council's position also prevailed in terms of duration. Moreover, the Council insisted on the special regulation for the road transport sector. General contractor liability could not be enforced.⁴³ By contrast, the EP was successful in extending the applicable working and employment conditions to

⁴¹ Interviews Coreper, 25.09.2018; European Parliament, 17.09.2019; European Parliament, 11./12.09.2018.

⁴² Interview European Parliament, 11./12.09.2018.

⁴³ Interview European trade unions, 18.09.2018.

include costs incurred for travel, board and lodging, closing the regulatory gap for "bogus postings", clarifying responsibilities for chain postings and extending the regulatory toolkit to include representative collective agreements.⁴⁴

5.4 Decision in the Council

The Estonian and Bulgarian presidencies had made considerable concessions to the EP during the trilogue. Would the results of the trilogue now also be accepted by the member states? In spring 2018, the compromise was put to test at ambassador level in the Coreper. The revision was adopted, but only by a razor-thin majority. The UK, Slovakia, Latvia, Lithuania, Ireland, Poland, Hungary, the Czech Republic, Portugal, Romania and Croatia voted against the revision or abstained.⁴⁵ Through their Council presidency during the decisive phase of the negotiations, Estonia and Bulgaria were informally urged to behave constructively and vote in favour of the revision (cf. Bailer et al. 2015, p. 449; Elgström 2003, pp. 39f.; Tallberg 2004, p. 1006) – although both countries had co-signed the opposing letter to the Commission and also issued a subsidiarity complaint (see section 5.1). Therefore, if Western European member states had held the Council Presidency instead of both Eastern European countries (due to the lack of votes in favour), or if a member state from the camp of the proponents of the revision had held the Council Presidency instead of Bulgaria (due to the low population share), the vote would probably have been lost.

Why did the group of rejecting countries grow compared to the vote at the 2017 Council summit? It can be assumed that Slovenia, Slovakia, the Czech Republic, Portugal and Romania did not support the concessions made to the EP in the trilogue. However, once a sufficient majority of member states had signed off on the revision at ambassador level, any further resistance was pointless. In the final vote in the Council⁴⁶ on 21 June 2018, some of the previously resistant governments (Slovenia, Slovakia, Czech Republic, Portugal, Romania) therefore voted in favour of⁴⁷ or abstained (Croatia, Lithuania, Latvia, UK).⁴⁸ Hungary and Poland voted against the compromise.

⁴⁴ Interview European Parliament, 11./12.09.2018.

⁴⁵ This information is based on an anonymous source. It should be noted that *Agence Europe* – according to the source – incorrectly reports a different voting result (see <https://agenceurope.eu/en/bulletin/article/11999/29>; accessed: 12.08.2021).

⁴⁶ See <https://www.consilium.europa.eu/de/general-secretariat/corporate-policies/transparency/open-data/voting-results/?meeting=3625> (accessed: 12.08.2021).

⁴⁷ For reasons to join an existing majority despite a negative position, see Novak (2013, pp. 1100ff.).

⁴⁸ Interview Coreper, 08.10.2018.

6 Analysis of the explanatory factors for the realisation of the revision

In this section, I examine the factors that explain the success of the proponents of the revision. I focus mainly on the processes in the Council. In addition, I examine whether the exit mechanisms identified in section 3 can be proven in this case and whether they worked as expected. A total of five factors can be identified.

Firstly, the historical context has changed as a result of the euro crisis. Following the social and political upheavals during the euro crisis, the EU has fallen into a crisis of legitimacy. Against this backdrop, many political actors realised that after years of anti-social crisis policies, the social dimension of European integration needed to be strengthened in order to counteract the legitimacy crisis. A window of opportunity opened up for market-correcting initiatives, increasing the chances of success for the proponents of the revision. The revision should increase the support of workers and trade unions for the European integration process. This confirms hypothesis H1.

Secondly, the *Elektrobudowa* judgement (see section 5.1) had changed the initial legal situation. The early majority in the Council in favour of the proposal to replace the concept of "minimum rates of pay" with the concept of "remuneration" was primarily due to this. As already mentioned, this change is largely a retrospective codification of ECJ case law that already applied throughout the EU. The changed legal situation shifted the preferences of some opponents of the revision. Although the revision was still poorly received, it provided legal certainty and prevented further, uncontrolled re-regulation of posting by the ECJ or unilateral national measures⁴⁹:

„[W]hen the court came with such a [...] progressive ruling, in fact it showed the member states that [...] this notion [*minimum rate of pay*] could even allow the court to extend it further than what the Commission is proposing now. And in any case, we could also, when it was needed to justify it in certain member states, we could even say: ‘Look, let’s be frank, between what the court said in the Finnish case, what we are proposing now, the difference is not that big.’ Of course, without that case, it would have been more difficult to commission such a proposal because then it would be seen by those opposing the directive as a sort of radical change to the current situation. Having this as a point of comparison helps very much in the discussion.” (Interview European Commission, 05.10.2018)

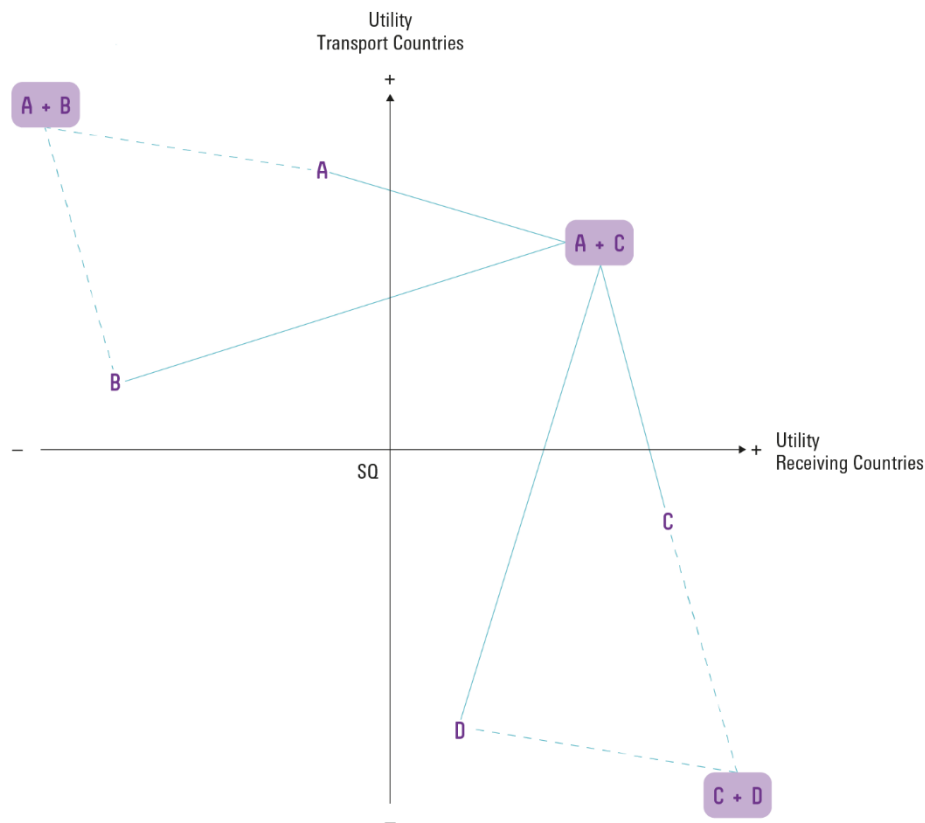
⁴⁹ France and Italy had already incorporated the possibilities expanded by the Finnish case into their national posting regulations (Rocca, 2020, p. 178).

“Also I think that it made people understand that there is a bonus in sometimes clarifying principles and legislation rather than having to try out every little aspect again through lengthy court procedures. I mean, in this Finnish case it was about compensation for travelling time and travelling distances, but do you then have to do a similar case to check whether bad weather compensation or risk premium apply? You can of course clarify things step by step, but at some point I think it's better to make the legislative change.” (Interview European Commission, 12.09.2018)

This effect resembles Schmidt's (2001, pp. 180ff.) mechanism of "choosing the lesser evil" (see section 3) – albeit with reversed political-economic signs: in the present case, the aim was not to pre-empt uncontrolled market-making but *market-correcting* re-regulation by the ECJ or member states (as a new default position in the event of non-agreement) by the comparatively "lesser evil" of a directive limited to subsequent codification. This provides evidence also of the exit mechanism of "supranational-hierarchical decision-making mode" and thus confirms hypothesis H2: the ECJ shifted the default position; as a result, some previously resistant member states agreed to the revision.

The third factor is the package deal between the revision and the road transport sector. The effects of the package deal on the situation in the Council need to be analysed in greater depth. For this purpose, in the following, I use spatial voting models (see section 2). The linking of the revision with the mobility package through the synchronisation clause has led some countries out of the camp of the opponents of the revision. Figure 2 schematically illustrates the effect of the package deal. The figure is modelled following Scharpf (2000, p. 219). It depicts the benefits of the different options for transporting and receiving countries. The total benefit of the various possible combinations of individual options (A+B, A+C, C+D) is represented by vectors resulting from the addition or subtraction of the combined individual benefits. The preferences of transport and receiving countries with regard to stricter posting rules vary in intensity but are fundamentally compatible. For the transport countries, the transport industry was more important than the posting business in other economic sectors. Therefore, the benefit of rules tailored to their needs for the road transport sector was greater for them than weaker general posting rules ($A > B$). The package deal between the revision and the road transport sector (A+C) meant a tightening of the general posting rules (C), but at the same time promised more favourable rules for the road transport sector (A) for the transport countries compared to the *status quo*. The reverse was true for the receiving countries. In the case of package deals, member states for which a legislative proposal has a particularly high priority are particularly willing to make concessions (Moravcsik 1993, pp. 504f.; Scharpf 2000, pp. 216ff.). This holds for the receiving countries, especially France. For them, therefore, the benefits of strict general rules on posting outweighed the benefits of applying the posting rules to the transport sector ($C > D$). The transport countries were therefore prepared to trade adapted rules for the road transport sector (A) for their agreement to the revision (C).

Figure 2: Effects of the package deal



A: no application of posting rules to transportation, B: weak posting rules, C: strict posting rules,
D: application of posting rules to transportation
Source: own illustration.

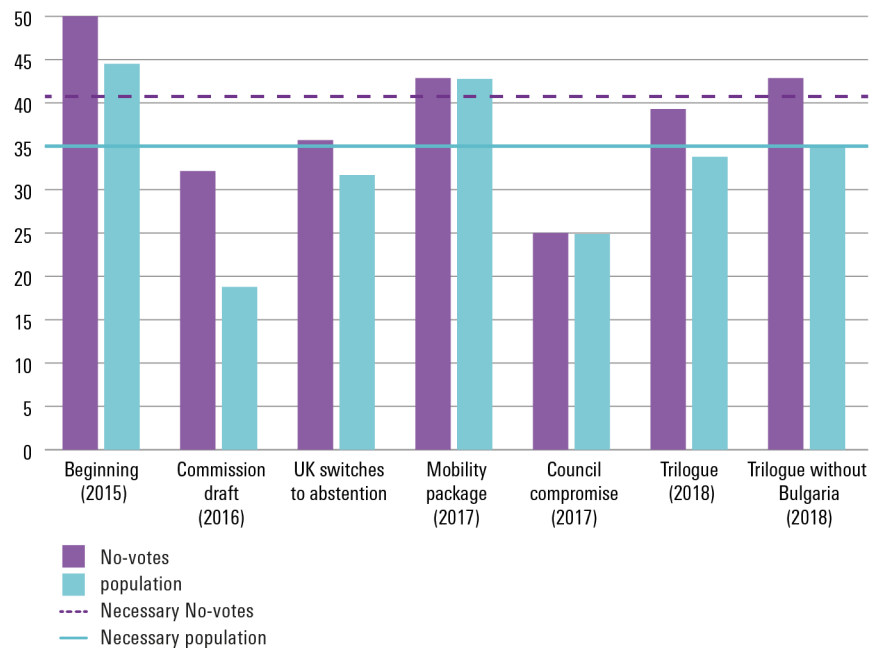
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Although this compromise (A+C) had a lower benefit for both countries than the respective maximum positions (A+B, C+D), it still had a greater benefit than the initial situation (SQ).

The following figures illustrate the extent to which the package deal influenced the dynamics in the Council. Figure 3 reconstructs the changes in majority ratios in the Council over time.⁵⁰ As Novak (2013, pp. 1095f.) shows, preventing blocking minorities is crucial for the Council Presidency when it comes to votes in the Council (see also Hayes-Renshaw et al. 2006, 184–185; van Aken 2012, p. 26). As soon as it is clear that there is no blocking minority, the Council Presidency puts the proposal to the vote. The aim is not to get more governments on board than necessary. Figure 3 illustrates the votes and population shares of the countries that were in the camp of the *opponents* of the revision over time. The horizontal lines show the threshold values that must be exceeded to achieve a blocking minority in a qualified majority decision: the dashed line for the required no votes (>45 per cent), the solid line for the required population share (>35 per cent).

⁵⁰ The voting ratios were calculated on the basis of interview data and other sources using the European Council's voting calculator (<https://www.consilium.europa.eu/de/council-eu/voting-system/voting-calculator/>).

Figure 3: Votes against in the Council over time

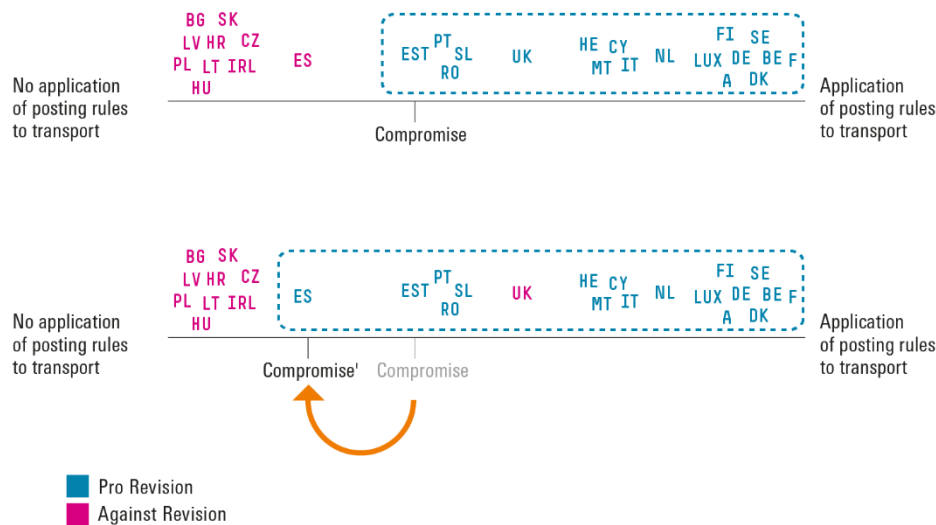


Source: own illustration.

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The figure illustrates how the announcement of a *lex specialis* caused the camp of the opponents of the revision to shrink (Figure 3, see "Beginning" and "Commission draft"). The UK's announcement to abstain increased the voting weights and thus the veto power of Portugal and Spain (Table 1). When the mobility package was published, they threatened to block the revision (see section 5.1). With the votes of Portugal and Spain, a blocking minority would have been achieved (Figure 3, "Mobility package"). Figure 4 illustrates the effect of the UK's change of direction. The positioning of the member states on the axis reflects the preference of the respective government for the application of the posting rules to the transport sector. Countries in pink colour are against the revision. The underlying assumption of the model is that the decisive actor for the realisation of a minimal winning coalition, in this case the country positioned furthest to the left of the winning coalition, can significantly influence the compromise. Due to the loss of the UK's vote, Spain had to be won over in order to form a minimal winning coalition for a qualified majority. The compromise therefore shifted further to the left on the axis in line with Spain's preferences ('Compromise').

Figure 4: Effects of UK's abstention on the composition of the minimal winning coalition

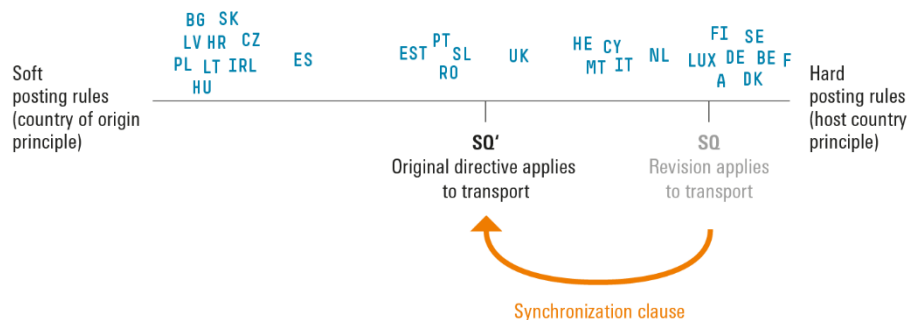


Source: own illustration.

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Why was the subsequently agreed synchronisation clause so attractive for transport countries? It caused a shift in the default position in the event of non-agreement in the negotiations on the *lex specialis* for the road transport sector (see Figure 5).

Figure 5: Shift in default position for the road transport sector due to synchronisation clause



Source: own illustration.

WSI

Before the compromise, the full application of the revision to the transport sector would have been the default position in the event of non-agreement (SQ). Due to the synchronisation clause, the weaker provisions of the original directive as compared to those of the revision now became the new default position (SQ'). This gave the transport countries a more favourable negotiating position. If the proponents of the revision wanted to extend the new posting rules to the road transport sector, they had to reach an agreement with the transport countries on sector-specific provisions that were acceptable to the latter. The subsequent Council compromise on the exclusion of the road

transport sector from the scope of the revision provided the proponents of the revision with a qualified majority again (Figure 3, "Council compromise").

The further tightening of the posting rules in the trilogue negotiations between the Council and the EP once again led to an increase of the camp of the opponents of the revision (Figure 3, "Trilogue"). If Bulgaria had not been bound by the Council Presidency and had voted against the revision, a blocking minority would have been just achieved (Figure 3, "Trilogue without Bulgaria", see sections 5.3 and 5.4).

The analysis therefore shows that the exit mechanism "package deal" was used and worked as expected. Hypothesis H3 can therefore also be confirmed.

The fourth explanatory factor is the supranational agency of the Commission. Thanks to its central position in the EU legislative process, it was able to successfully shape the process. It utilised the effects of the supranational-hierarchical decision-making mode and of package deals to bring about a compromise in the Council. Hypothesis H4 can therefore also be confirmed.

Fifthly, the neutralisation of Bulgaria and Estonia by the Council Presidencies ensured that there was no blocking minority in the Council. However, no systematic significance in the sense of a causal mechanism can be attributed to this coincidental circumstance.

7 Conclusion: Social Europe at the doorstep?

Despite massive differences of interest between the EU member states, the revision of the Posting of Workers Directive was adopted in 2018. At first glance, this challenges the political economy literature on integration, which sees the possibilities of market-correcting policies at the European level as structurally limited. Therefore, in this paper I have conducted a theory-testing process tracing analysis to test the explanatory power of political economy perspectives using the "least-likely case" of the revision of the Posting of Workers Directive. To this end, I analysed whether the mechanisms for overcoming decision blockades identified by the political-economic integration literature can be proven in the present case. As the analysis shows, these exit mechanisms were applied and worked as expected.

What conclusions can be drawn about the potential of market-correcting policies at EU level, with all due caution when generalising results from individual case studies? Can the case analysed here be taken as evidence that the social potential of European integration is greater than assumed by the political-economic integration literature reviewed in section 3? Can structural obstacles to market-correcting policies perhaps be overcome more easily than assumed by political economy perspectives? Can European policy balance the institutional asymmetry between negative market-creating integration and social regulation described by Scharpf (1999)? To put it bluntly, is social Europe just around the corner? This cannot be assumed. It is true that the scope for market-correcting policies at EU level may have been greater than expected in this case. However, almost the entire arsenal of consensus-facilitating mechanisms had to be deployed. It is worth remembering how

demanding the proven mechanisms are. For package deals, there must be political issues that are not only negotiated at the same time, but in which the member states also have asymmetrical but complementary interests. In order for decision-making deadlocks to be resolved by ECJ rulings, there must be suitable case law that influences voting behaviour in the Council in a specific way – here the rare case of a judicial confirmation of a national market-correcting practice that restricts fundamental freedoms. Finally, the Commission must be willing to initiate appropriate legislation. In addition, other exceptional, favourable, sometimes coincidental historical circumstances were also required: the EU's legitimacy crisis, the *Macron* effect and the neutralisation of some Eastern European countries through their Council Presidencies. All of this points to a historical contingency of the circumstances that made the revision possible, which should not be underestimated. The social progress of the revision should also be correctly assessed. Posting only became a regulatory problem in the first place due to the European legal regime of the freedom to provide services. The revision merely repairs parts of the damage caused by earlier ECJ judgements. Moreover, the reformed posting rules do not bring about a revolutionary change, but rather gradual improvements, a substantial part of which, furthermore, can be traced back to more recent ECJ case law. Thus, on closer inspection, the revision represents a partial re-regulation of a previous liberalisation brought about by negative integration. This means that overcoming the structural obstacles that stand in the way of projects of social market regulation at European level is not impossible, but is only feasible under favourable conditions – and even then perhaps only to a limited extent. Furthermore, these opportunities must be seized by political actors – first and foremost the Commission.

The political economy theory of integration should not be understood as postulating a general impossibility of political change at EU level, but that reform is only possible under certain conditions and only up to a certain degree of change. The revision of the Posting of Workers Directive confirms this.

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