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Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic

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Key points

- The COVID-19 pandemic has shown that highly mobile workers who frequently move either within or in and out of the European Union (EU) are irreplaceable during a public health crisis. Nevertheless, they often remain the least protected and most vulnerable.
- Measures introduced to protect workers in standard employment relationships during a public health crisis might not reach certain groups of highly mobile workers. As a result, they may become even more marginalised during a crisis.
- This is further exacerbated by such workers often being foreigners in their host countries. Both host and home countries fail to protect them adequately, and this can be even more pronounced for workers from third countries, outside of the EU.
- During the COVID-19 pandemic, pre-existing EU law has failed to protect highly mobile workers and, so far, the guidance and policy actions taken by the European Commission have failed them too.
- To enhance protection for highly mobile workers in the long term, a significant (upwards) convergence of social and labour law standards between countries and for different groups of workers is needed. In the medium term, a pan-European social safety net for crisis situations should be created, with the needs of highly mobile workers in mind. And in the short term, targeted emergency measures including both support and protective standards for this group of workers should be adopted, ideally at the EU level or, if not possible, at the national level.

Introduction

Since the EU and Member States have recently shifted towards lifting restrictions associated with COVID-19 (European Commission 2020), the time is ripe to reflect on what this still on-going crisis has taught us about the treatment of workers.

This policy brief will focus specifically on 'highly mobile workers', namely those workers whose place of employment is not a single Member State: they either regularly cross borders due to the nature of their work, work in multiple Member States, or cross a border every day in order to work in a Member State other than the one where they permanently reside (De Wispelaere and Rocca 2020). The following groups of workers are of interest here:

- international transport workers (drivers, seafarers and air crew members);
- seasonal workers;
- frontier workers, who travel to a country other than their own for work on a regular basis;
- and other types of highly mobile workers.¹

While a more detailed list could be imagined, these groups are the ones that have come under the spotlight during the COVID-19 crisis. International transport workers and seafarers have ensured that goods reach supermarkets, and medical supplies reach hospitals. Yet at the same time, many seafarers have been stranded at sea for months. Road transport drivers, prioritised by the EU and Member States as essential, have continued to work without protective equipment or warm meals and beyond their usual working time due to exemptions created by Member States and encouraged by the European Commission. The shortage of seasonal workers has hit the headlines in many countries. And finally, it has turned out that many healthcare and care workers, indispensable during the pandemic, are in fact frontier workers who were among the first affected by borders being partially closed.

¹ I have not distinguished posted workers as a separate category because this is a legal status that can cut across the groups identified above (with the exception of frontier workers).

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It is generally difficult to assess how many highly mobile workers belonging to the groups identified above are currently in the EU, since no comprehensive data, especially concerning short-term mobility, is available. However, the numbers that are available can give us some indication of the situation: in 2018, there were 1.5 million cross-border workers and 3 million intra-EU postings (of employed and self-employed workers). The two dominant sectors for the posting of workers are construction and road transport (De Wispelaere *et al.* 2019). Of the workers that move within the EU, more than 8% work in healthcare and social work, more than 7% in transportation services, and more than 10% in the accommodation and food industries (European Commission 2020e).

1. Current challenges for highly mobile workers

In general, during this pandemic, highly mobile workers who already often found themselves on the margins of the labour market have been forced to bear the brunt of the crisis in multiple sectors. They have been deemed 'essential' and 'irreplaceable' by their host countries without, however, receiving adequate protection.

With or without realising it, many EU countries have come to rely on 'foreign' workforces for many essential jobs. Those who carry out these jobs are often highly mobile workers, working on temporary and precarious contracts. An exception among the groups identified in the introduction are perhaps frontier workers, whose working situation depends on the free movement of workers rather than the freedom to provide services, and who generally enjoy equal treatment with the host country's workforce. However, when the borders are partially closed, their needs might become more like those of other highly mobile workers, including the ability to reach their workplace, the need for adequate temporary accommodation in the host country, and the accessibility of warm meals.

Highly mobile workers were among the first to experience some of the negative consequences of the COVID-19 breakout. Some issues they faced had roots in their pre-existing situation, while others were new. They mainly faced challenges related to: 1) (partial) closure of borders; 2) loss of job or job prospects; 3) ineligibility for benefits/social assistance or support; 4) the health and safety situation at the workplace, and 5) living circumstances.

a) Border closures

Since highly mobile workers often cross borders to reach their work or as part of their daily tasks (transport workers), border closures immediately affected them. The situation was the most challenging at the beginning of the crisis when borders were closed but solutions to ensure some (necessary) movement were not yet in place. Frontier workers were immediately affected. For example, Austria and Slovenia introduced an entry ban on arrivals from the south without a medical certificate that immediately affected some 60-70,000 commuters. Italy, meanwhile, since it relies on workers from eastern Europe to help staff hospitals, care homes and supermarkets, faced a potential shortage of workers, and, in turn, these workers faced the potential loss of their livelihoods (Martin 2020). Austria's care and healthcare sectors were also in

a similar situation (Euractiv 2020). Many workers faced a choice of either commuting – with big delays and at potential risk to their health – or losing their (often only) income.

For international transport workers, the closure of borders, at least initially, meant a disruption in their ability to work or return home. They had to wait at closed borders, sometimes for more than 20 hours (Graupner 2020). The situation of seafarers was even graver: globally, over 100,000 seafarers have been 'stuck at sea' because the shutdowns prevented them from entering or travelling through countries, or finding flights to return home (Lloyd's Report 2020). Their contracts have been extended against their will, and in some instances Member States have even prohibited the discharge of crew members with serious health conditions (Lloyd's Report 2020a).

b) Loss of job or job prospects

The jobs and assignments of highly mobile workers, such as those posted between EU countries or from third countries, often were and continue to be on the front lines of the COVID-19 crisis. Some workers were dismissed, while others legitimately feared exposure to the virus and either did not depart for the host country or immediately returned to their country of origin. Others, though, found themselves 'stuck' somewhere in Europe at times, without the means of travelling due to the border closures.

For example, around 200,000 workers from Morocco, Tunisia and Spain whose labour usually meets the demand for seasonal fruit and vegetable harvests were unable to travel to France (Barbière 2020). In the Netherlands, temporary migrant workers were losing both their jobs and their (temporary) homes while being excluded from the government support schemes (Bos-Karczewska 2020). In the same country, workers in construction, the care sector and the food industry are often hired on temporary contracts, for just one week or on a zero-hours contract. When the pandemic hit, those contracts were terminated first. The temporary agencies that hire these workers typically also arrange housing (for a price), but when the workers lost their wages, they could no longer afford to pay for housing, effectively making them homeless (Bos-Karczewska 2020).

Another group of highly mobile workers, who due to their qualifications and specialisation cannot easily find alternative jobs but who were among the first to face dismissals, are airline workers. Several national flag carriers announced plans for mass dismissals, including Lufthansa (Germany), SAS (Denmark, Norway and Sweden), Norwegian (Norway), AirBaltic (Latvia), and Brussels Airlines (Belgium) (Archeta 2020).

c) Ineligibility for benefits/social assistance or support

For highly mobile workers, access to social protection and assistance, including COVID-19-related support schemes, can at times be significantly limited.

For example, according to a report from the Polish umbrella organisation for temporary employment companies, more than

75,000 temporary agency workers risk losing their jobs; however, the so-called 'Anti-Crisis Shield' law enacted to offer financial support for companies and workers has de facto excluded such workers from its scope. The companies hiring such workers are only eligible for support concerning their own direct employees, and temporary work agencies cannot demonstrate cessation of activity as required by law because the cessation actually takes place in the user undertakings (Planet Labor 2020). Second, the ETUC has reported that in some Member States, the state aid schemes do not reach employers employing posted workers, and these workers remain without support in both their host and home countries. In addition, workers may struggle to access unemployment benefits without physically being in the country of origin (ETUC 2020a).

In Germany, seasonal workers are in an unenviable situation. Most work on short-term contracts, often shorter than 70 days, directly concluded with the employer (for example, on an agricultural farm). German employers, however, are exempt from having to make social security contributions for 70 days, and during the pandemic this exemption period was extended to 115 days. Accordingly, these seasonal workers are now staying longer in order to limit any additional movement that would contaminate the locals, but without receiving any additional welfare benefits for this extended stay (Bejan 2020).

d) Situation at the workplace

Workers in the food supply chain – from agricultural labourers, to workers in food factories, to warehouse and logistics workers, supermarket employees, waste collectors, and cleaners – as well as healthcare and care workers, are suddenly called 'essential' workers (Bergfeld and Farris 2020). At the same time, these essential workers are facing increasingly dangerous working circumstances: they are not teleworking and are risking infection due to often insufficient health and safety measures at their workplaces.

Many EU countries have relaxed the limits on working time. The limits to the driving time in road transport have been significantly increased, or the rest times reduced, in the vast majority of EU countries: in Slovenia, Portugal, Czechia, Belgium, Spain, Latvia, Finland, Denmark, France, the Netherlands, Hungary, Greece, Austria, Croatia, Norway, Slovakia, Malta, Germany, Luxembourg, Poland, Ireland, Bulgaria, Romania, and Sweden (Politico, 2020). Moreover, truckers face a patchwork of rules and precautions, and reduced access to roadside restaurants, shops and rest stops. Some warehouses have even started to ban truck drivers from their facilities (Politico 2020a).

In the maritime sector, a Danish company called Maersk, the world's largest container shipping line, initially banned any crew changes until 14 April, which was then prolonged until 12 May, to prevent seafarers from contracting the virus and to keep its vessels running (Lloyd's Report 2020b). Overall, an 'estimated 150,000 crew members with expired work contracts have been forced into continued labour aboard commercial ships worldwide to meet the demands of governments that have closed their borders and yet still want fuel, food and supplies' (Apuzzo and Gebrekidan 2020). This can hardly be considered justifiable from the perspective of protecting these workers.

Finally, seasonal agricultural workers are facing increasing demands and difficult, even dangerous, working circumstances. The German initiative '*Faire Mobilität*' has highlighted numerous cases of exploitation faced by Romanian seasonal workers, including wages below the legal minimum, illegal deductions from pay, exaggerated cost of meals or accommodation, lack of health insurance, and poor living conditions (for example, a dozen workers sleeping in a single shack). Before the pandemic, these seasonal workers could have risked losing pay by flying home to Romania, but now, due to the lack of available flights, they have no choice but to accept the conditions imposed by their employers (Bejan 2020). Seasonal workers receive very little information about working conditions prior to their arrival in the host countries, and the limited possibilities to leave exacerbate the potential for abuse. In addition, the guidelines on social distancing and hygiene precautions in workplaces often cannot be adequately observed since targets and working methods are not adjusted accordingly (ETUC 2020b).

e) Living circumstances

Since highly mobile workers often spend extensive periods 'on the road' or temporarily stay in a country other than their permanent residence, living circumstances play a significant role in determining their wellbeing.

First, truckers have reported that the precautions have meant self-isolation for hours, if not days, on end (Politico 2020a). Second, in Germany, agricultural seasonal workers are expected to stay in 'de facto on-the-job quarantine'. They work in fields, often in teams of around 40 people in close proximity, then take crowded buses to and from the fields, eat in cramped canteens, and afterwards share accommodation with up to a dozen workers – this is clearly not an acceptable set-up during a pandemic (Weisskircher *et al.* 2020), (see also ETUC 2020b: 1). In one tragic case, on 11 April, a 57-year-old Romanian agricultural worker who had gotten infected with COVID-19 while harvesting asparagus was found dead in his accommodation in the German state of Baden-Württemberg (Weisskircher *et al.* 2020).

The concept of 'unfree labour', developed in sociology studies to describe migrant workers who are not free to circulate in the labour markets of host countries (Bassok 2002; Miles 1987), has lately reached new levels of significance. To take one example, seasonal workers are facing circumstances that could be described as borderline forced labour, without any option to leave their 'compound' and/or return to their country of origin.

Finally, frontier workers, especially those who commute daily, might have a temporary need for proper accommodation in the country where they work in order to avoid having to cross a border every day and exposing themselves to the COVID-19 risk unnecessarily. Furthermore, the lack of access to warm meals (for example, due to closed canteens) might affect frontier workers more than the locals since the former often cannot easily bring food from home.

2. EU Legal Framework

Has the EU social and labour law *acquis* been of any help? The short answer is 'not really'. The COVID-19 breakout has in fact revealed its inadequacies, at least when it comes to protecting highly mobile workers.

To an extent, this unpreparedness is understandable because public health policy is a shared competence where, for the most part, the EU merely seeks to complement national policies (Article 168(1) TFEU). At the same time, the EU does have the competence to adopt incentive measures that aim at combatting major cross-border health scourges such as COVID-19 (Article 168(5) TFEU). Moreover, it still has the broad competence to adopt rules to ensure the smooth functioning of the free movement of workers (Article 48 TFEU) and measures to regulate workers' health and safety, working conditions, social security and social protection, along with conditions regarding the employment of third-country nationals (TCNs) (Article 153(1) TFEU). In fact, in situations involving cross-border movement, one could have legitimately expected the EU *acquis* to at least provide some relief.

The relevant EU measures for highly mobile workers can be approximately clustered into three groups. First, there are the measures that apply specifically to the TCNs. Second, some measures apply to EU citizens and those TCNs that have been, for example, either 'posted' within the EU or hold a permanent residence card in the EU. Such measures can also be applicable to the TCNs, but not always. Finally, the occupational safety and health (OSH) *acquis* is usually applicable to all workers (and at times self-employed workers) who work on the EU territory, including the TCNs – therefore, it makes sense to distinguish it separately.

a) *Acquis* protecting third-country nationals

While 'free movement' (internal mobility) is a cornerstone of the EU regime, Member States have persistently and successfully claimed sovereignty when it comes to labour migration from outside the EU (Paul 2013: 122). However, for highly mobile workers, three pieces of EU legislation – the Seasonal Work Directive, the Single Permit Directive and the Directive prohibiting the employment of illegally staying TCNs – create exceptions to such sovereignty. Unfortunately, none of these instruments offer much help during a global pandemic.

The Seasonal Work Directive (2014/36/EU) contains a few relevant elements. First, the admission application for seasonal workers has to contain a valid work contract specifying, *inter alia*, the place and duration of work, as well as the remuneration and working hours per week or month, the amount of paid leave (Article 5(1)(a), 6(1)(a)), evidence of sickness insurance covering all the risks normally covered for local workers (Article 5(1)(b), 6(1)(a)), and evidence that the seasonal worker will have *adequate* accommodation ((Article 5(1)(c), 6(1)(c)). The minimum level of these standards is unfortunately not set by the directive; however, it at least gives the possibility for national authorities to make sure that these working conditions are *adequate* and suitable for the current situation. Indeed, in line with the directive, the Member States must make sure that the elements identified comply with their own applicable law, collective agreements and practice (Article 5(2)).

At the same time, the directive states that seasonal workers have no recourse to the host country's social assistance system (Article 5(3) and 6(3)). That prevents them from seeking assistance when they are, for example, 'stuck' in the country. The equal treatment requirement embodied in the directive does include social security coverage, but with an unfortunate disclaimer that the Member States may exclude unemployment benefits (Article 23(1)(d) and (2)(i)), even where workers or employers have paid contributions (Verschueren 2016: 389). This might be detrimental to those TCNs who have lost or finished their seasonal jobs but cannot find another job or leave the country.

Finally, Article 3(b) of the directive states that seasonal workers must maintain their principal place of residence in the third country. Despite the equal treatment regarding social security, this might deprive them of the entitlement to those social benefits, including healthcare, which under national legislation are typically available only to residents (Verschueren 2016: 390). Importantly, during a public health crisis, no disability or survivor's pension is available to seasonal workers (Verschueren 2016: 390).

The Single Permit Directive (2011/98/EU) does not offer protection relevant for the current times apart from that concerning health and safety at the workplace (Article 12(1)(a)) and coverage by social security (Article 12(1)(e)). The latter can be limited by the Member States for workers who are dismissed and have not been in employment for more than six months (Article 12(2)(b)). Such a limit will likely cover highly mobile workers from third countries who are usually employed on short, temporary contracts.

Neither of these two directives cover posted workers from third countries. Posted workers entering an EU Member State and not being posted on to another remain completely under the authority of the Member State they entered. EU law does not affect them directly.

Finally, the Directive prohibiting the employment of illegally staying TCNs (2009/52/EC) obliges Member States to sanction employers who employ illegally staying TCNs. The employer, if found guilty, must cover the return costs for the workers (Article 1(2)(b)) and has to pay any outstanding remuneration and cover any taxes and social security contributions due (Article 6(1)(a) and (b)). During a public health emergency and border closures, however, this status of illegality and sanctions may inadvertently lead to illegally staying TCNs being stuck without any social support and any way to legally earn a living.

b) Intra-EU mobility *acquis*

While EU law protects several groups of workers, the *acquis* applying to highly mobile workers, instead of those who move for a long time and change their residence to the host country, is very limited.

One privileged group in this regard are frontier workers. They, in line with EU law, must be treated the same as national workers including regarding dismissal and reinstatement or re-employment, and they enjoy the same social and tax advantages as national workers (Regulation (EU) No 492/2011, Article 7(1) and (2)). In addition, they are entitled to medical treatment in both countries (where they live and work).

Other workers (for example, seasonal or often workers in care or healthcare services) who enter into another EU Member State to work will typically have fixed-term and often very short contracts. During the time they are working, they will be protected by the equal treatment principle and their working conditions will be the same as for the local workforce. Measures such as the Temporary Agency Work Directive, Fixed-Term Work Directive or Part-Time Work Directive might play some role in protecting such workers because they contain prohibitions to discriminate them in comparison to 'typical' workers. However, they do not set explicit protective standards and the necessity to find a 'comparable' worker is often a significant limit when a whole sector (like practically all agricultural seasonal work in Germany) is staffed by 'atypical' foreign workers. In addition, the Written Statement Directive in the form in which it is currently in force offers some information obligations for employers which might help (for example) intra-EU seasonal workers. However, it will become more meaningful only when the revised version will be ((EU) 2019/1152)) implemented by the Member States.

The status of a 'worker' remains the key element to access any support in the host country. This status is maintained in case of temporary inability to work resulting from illness or accident, and in a situation of involuntary unemployment (Article 7(3)(a), (b) and (c) of the Citizens' Rights Directive, 2004/38/EC). However, during a pandemic, highly mobile workers might not be in the same situation as local workers and might have very different needs concerning, for example, housing support, meals, or assistance for travelling back to their country of origin because the facilities they temporarily live in might not be adequate. These are all issues that are not faced by local workers. Moreover, highly mobile workers often rely on the accommodation provided (or rented) by the employer due to work locations being remote or for the simple reason of convenience (language barrier, unwillingness to rent to non-residents, etcetera). This means that if they lose their job, they might immediately lose their accommodation. The EU acquis is of no help in such a situation.

For those workers who work in another Member State based on the freedom to provide services rather than the free movement of workers, the equal treatment principle does not apply to such an extent. Workers in most of the groups identified in the introduction (international transport workers, seasonal workers and workers in other sectors like healthcare and care services, construction and others) in the context of intra-EU mobility are often posted workers rather than migrant workers.

The Posted Workers Directive (96/71/EC) gives these workers the right to the minimum rate of pay, maximum work and minimum rest periods, as well as health, safety and hygiene at work, in line with the host country's standards (Article 3(1)(a), (c) and (e) PWD). In its revised version it requires pay and standards of accommodation to be equal with those of workers in the host country, but the implementation deadline for these improvements is only 30 July 2020. And in any case, when it comes to highly mobile workers, finding a comparable local worker might be difficult. As the seasonal work saga reveals, sometimes neither home nor host Member State sets adequate protection and accommodation standards for certain groups of workers.

The most significant part of the EU acquis for highly mobile workers is perhaps the rules on social security coordination. In principle, a worker is subject to the social security legislation of the country of employment (Article 11 Social Security Regulation (SSR), Regulation 883/2004) with the exception of posted workers who under certain conditions are covered by the social security scheme of the home country (Article 12(1) SSR). Thus, frontier workers, for example, will be covered in the country where they work, while those seasonal workers who have been posted by, say, a temporary employment agency will be covered in their home country. Workers working in multiple countries are subject to social security in their country of residence if they perform 'substantial' working activity there (at least 25% of their working time or remuneration) (Article 13(1) SSR). Finally, the situation with international transport workers can become very complex in practice, but typically they will be covered in the country where their employer is registered, if they do not perform 'substantial activity' in their country of residence (Cocquyt and Jasenocova 2020).

These comparatively clear rules, however, can be difficult to apply during a pandemic. Certain countries require coverage for a certain amount of time in order to be eligible for, for instance, unemployment benefits, in spite of the obligation to aggregate periods worked in other Member States (Article 6 SSR). For example, seasonal workers might actually rely only on seasonal work and thus not have worked a sufficient number of periods immediately prior to this work. Together with exemptions from social security contributions for employers such as the one existing for seasonal work in Germany, this might result in no coverage at all. Moreover, if workers are prevented from requesting benefits remotely, it might be very difficult, if not impossible, to receive social security when travelling is limited to an absolute minimum.

Finally, another issue is the distinction between social assistance and social protection. While the latter is covered by the EU coordination rules, the former often is not. Therefore, if the migrant does not have the status of 'worker' or 'unemployed' under EU law, then s/he might not be eligible for assistance in the host country. Further practical difficulties include not only formal eligibility but also language barriers and a lack of access to adequate information on the available support.

One area where intra-EU mobile workers are in a better situation than the TCNs is health insurance. The European Health Insurance Card gives access to medically necessary, state-provided healthcare during a temporary stay in all EU countries to all EU citizens and permanent residents. While it is not exactly an alternative to travel insurance and does not necessarily guarantee free services, it is a mechanism that might have been very useful for many highly mobile workers.

All in all, while intra-EU highly mobile workers generally enjoy a better standard of protection than TCNs, it is still insufficient.

c) OSH acquis

The OSH acquis immediately comes to mind in the current crisis. However, it does not seem to operate very effectively regarding highly mobile workers.

First, the working time rules play a significant role; however, they seem to be among the first from which the Member States have been derogating during this pandemic. The Working Time Directive (2003/88/EC) continues to apply, but seafarers, for instance, are exempt from its scope. It also contains a series of possible derogations regarding transport workers, workers whose place of work is distant from their place of residence, dock and airport workers, and workers in sectors like agriculture and healthcare (Articles 1(3), 17(3)). While there are some special working time measures in, for example, road transport (Regulation (EC) No 561/2006), the limits they set are also rather lax. All in all, it turns out that the EU working time acquis might not cover highly mobile workers effectively.

Second, the general OSH Framework Directive requires that employers ensure the safety and health of workers in every aspect related to work (Article 5(1) 89/391/EEC). Every employer should take measures to avoid risks, develop a coherent overall prevention policy, and give collective protective measures priority over individual ones (Article 6(2)(a), (g) and (h)). Atypical workers must also receive the same level of protection as regards safety and health at work as that of other workers in the user undertaking and/or establishment (Article 2(1) Directive 91/383/EEC). While these rules are promising, they are also very general and might be difficult to apply. The directive is based on the general duty to ensure health and safety by employers and via specific structural mechanisms (such as preventive services, health and safety representatives, or workers' health surveillance). Taking advantage of its full potential is very difficult in the case of highly mobile workers because they will not be adequately covered by the second level of protection. There are some good practices (developed, for instance, by Sweden) in the form of regional safety representatives who have responsibility for a specific branch at a territorial level. Italy and Spain have also devised similar approaches. However, such good practices are certainly not present across the whole of Europe.

There are also some sectoral rules. In the civil aviation sector, mobile staff are entitled to free health assessments before and after their assignment (Clause 4(1)(a) 2000/79/EC), and have a right to safety and health protection appropriate to the nature of their work (Clause 5(1) and (2)). In the maritime sector, the Directive on the minimum safety and health requirements for improved medical treatment on board vessels (92/29/EEC) sets some standards concerning medical supplies and equipment (Article 2(1)) and requires that vessels of a certain size or employing a certain number of staff have a sickbay or even a doctor on board (Article 2(3), (4)).

Third, following lengthy discussions on whether to classify COVID19 as a biological agent belonging to Group 3 (agents causing severe human diseases, of serious hazard to workers, and that present a risk of spreading to the community, but for which effective treatment is usually available) or Group 4 (the same but for which there is usually no effective treatment available) (Directive 2000/54/EC), it has been classified as belonging to the former. While the inclusion in Group 4 would have provided some enhanced protection for certain specific jobs (ETUC 2020b), it would have had no impact on highly mobile workers. In fact, since the directive was developed before previous global outbreaks (such as SARS, MERS and H1N1) and was never modified on the basis of those experiences, it does

not provide an adequate framework for responding to a pandemic situation.

Finally, despite strong demands from trade unions (ETUC, EAEA, EFBWW *et al.* 2020), COVID19 has not been recognised as an occupational disease. If it were, it would give anyone who resides or stays in a Member State other than the Member State in which they are entitled to social security a right to benefits covering accidents at work and occupational diseases – this would be provided by the institution of the place of residence or stay, as though the worker were insured there (Article 36(2) SSR). This should have been an element employed immediately by the EU to protect highly mobile workers, but it was not.

In sum, the various bits and pieces of EU law, including the OSH acquis, do not contain any significant protection for highly mobile workers during a pandemic. While workers working on standard employment contracts seem to be protected fairly well due to the equal treatment obligation, the various exemptions and exceptions aimed at groups of highly mobile workers, in terms of scope, coverage or rights afforded, have led to a situation where they are at the mercy of individual Member States. At the same time, these Member States are more interested in keeping their services and economies running and ensuring protection for their core workforce than in protecting foreign workers.

3. Immediate EU policy response

The EU and Member State responses took place in parallel and it is rather difficult to untangle which parts of the national responses were triggered by the EU. Here, I will review the EU response as far as it affects highly mobile workers and sketch only a few central characteristics of the national-level responses.

a) EU response

The European Commission issued a series of guidelines aimed at alleviating some effects of the measures immediately taken by the EU Member States, many of which have been questionable in relation to free movement rules or other aspects of EU law. Importantly, however, the guidelines are not legally binding and are only recommendatory in nature. No stricter or more binding instruments beyond financial help to provide Member States and workers with support during the crisis have been discussed.

The one common thread to the EU response has been the focus on (partly) re-opening borders and keeping the flow of workers going, without, however, offering any meaningful protection for these workers. The overall focus has been on the provision of safe services to citizens and consumers rather than worker protection.

The first guidelines were issued on 16 March and dealt with protecting health and keeping goods and essential services available. They did not touch upon protective measures aimed at workers, except for asking the Member States to permit and facilitate the crossing of frontier workers who work in 'essential' services (such as the food processing, healthcare and care sectors) (European Commission 2020a: para 23).

Further guidance on the implementation of so-called 'green lanes' on the borders expanded further on the issue of free movement, and in contrast to other EU guidance documents that did not undermine working conditions, actually advocated for restrictions in this regard (European Commission 2020b). According to the guidance, the border crossing for transport workers should not take more than 15 minutes; weekend bans, night bans and sectoral bans (etcetera) for road transport should be immediately suspended; transport workers, irrespective of their nationality and place of residence, should be allowed to cross internal borders; and restrictions such as mandatory quarantine should be waived, as should any requirements to carry a medical certificate. All these principles should also apply to the TCNs where they are essential to providing free movement of goods in the EU.

While such a response might indeed alleviate one of the key problems that emerged at the onset of the crisis – the fact that many highly mobile workers simply could not cross borders – what is striking about these initial measures is the complete lack of concern for the health and safety of workers or other difficulties that transport workers might face, such as a lack of warm meals or of adequate accommodation due to the closure of motels and hotels. This could lead to tired drivers and dangerous situations on the road.

The guidance on facilitating air cargo operations during the COVID-19 outbreak, issued on 23 March (European Commission 2020c), contains scarcely any worker-oriented elements. Similarly to the guidelines applying to road transport it suggests temporarily removing, or applying flexibly, night curfews or slot restrictions for cargo operations. Furthermore, asymptomatic transport personnel should be exempted from travel restrictions, and air crew members, cargo personnel and airport personnel working on the ramp should be exempted from containment measures, if adequate health protocols are in place. In contrast to the previous documents, this communication at least requires that staff be provided with guidance on health precautions and given appropriate supplies of hygiene products.

On 30 March, this document was followed by the Commission's Communication on the exercise of the free movement of workers during the COVID-19 outbreak (European Commission 2020d). It specifically acknowledged that frontier workers, posted workers and seasonal workers were crucial for the host Member States in providing essential services or ensuring the supply of goods. According to the guidance, Member States should allow workers in certain professions to enter their territory, including health professionals, care workers, transport workers, and workers involved in the supply of goods, engineering, food manufacturing and processing. Moreover, the health screening of these workers should not be increased in comparison to that of nationals. While this emphasis on equal treatment is interesting, it might not be particularly relevant since, in many aspects, highly mobile workers do not usually find themselves in a similar situation to the local workforce, especially when it comes to accommodation, access to meals, or use of transport.

In comparison to previous guidance, this one did contain some protective measures, such as access to appropriate healthcare for

those with a fever under the same conditions as applied to nationals. The social security coverage should remain unchanged, however, leaving possible problems with access unresolved. Seasonal workers were distinguished as being particularly important for the agricultural sector, and according to the guidance, the Member States should communicate to employers the necessity of providing adequate health and safety protection for these workers.

Next came the guidance on the free movement of health professionals and minimum harmonisation of training in relation to COVID-19, issued on 7 May. This basically allowed and encouraged the Member States to liberalise the recognition of qualifications for health professionals. For temporary and occasional service provision it encouraged the process of a simple declaration, without the need to wait for a decision by the host Member State's authorities. It did not require any extra protective measures (like adequate accommodation) for such professionals. It also failed to consider that during the pandemic, healthcare workers are in very high demand across the EU, and thus facilitating their movement further (most likely from low-wage to high-wage countries) might be detrimental to the health systems of their countries of origin.

The final Communication on restoring freedom of movement (13 May) did not add much that was new. It merely reiterated the need to ensure the smooth functioning of free movement and referred to the on-going revision of the EU acquis on coordinating social protection systems.

b) Trends in Member State responses

At the national level, a large amount of measures have been adopted, many of which aim to support workers. The most popular have been the so-called short-time work schemes that essentially provide some income support for workers during either reduced activity or complete downtime (Müller and Schulten 2020). This support can also be applicable to highly mobile workers, if their social security contributions have been paid for a sufficiently long period of time and if there are no additional criteria (such as having to have worked on the state territory). In addition, a further three trends can be identified as relevant for highly mobile workers.

First, many Member States either did not close their borders for certain categories of workers, or re-opened them shortly after closure. This was the case for, for example, healthcare professionals (Bulgaria, Czechia, Greece, Italy, Slovakia), (international) transport workers (Bulgaria, Czechia, Greece, Spain, Italy, Lithuania, Portugal, Slovakia), workers in care and social services (Czechia, Germany, Italy), temporary workers in the food industry (Germany), certain construction workers (Germany) and seasonal workers in agriculture (Germany). Regarding frontier workers, some countries like Spain, Croatia, Italy, Luxembourg and Portugal have continued to admit them throughout the crisis. Luxembourg can be mentioned as an example of good practice in increasing protection for frontier workers, because it offered free hotel rooms for those frontier workers who work in the health sector. Various, alternative approaches to open borders could be seen in other countries. Belgium, for example, on the one hand limited both entry and exit for frontier workers, but on the other, doubled the allowed period of work for the seasonal workers already on its territory (Muylle

2020). Finland, meanwhile, allowed TCNs to change employer or sector of work without applying for a new work permit. And Italy, following heated government discussions, adopted a stimulus package which aims to 'regularise' people with expired permits who work in agriculture or domestic work (Sundberg Diez *et al.* 2020).

Second, in spite of the legal framework on social security often requiring a shift of contributions from one Member State to another due to changes in the work patterns of the workers (such as cases of telework, or where the majority of work is carried out in a certain Member State), the common approach of the Member States has been to maintain for workers affiliation to their pre-COVID social security systems (a *de facto* derogation). German, French, Belgian and Dutch authorities have publicly clarified that for the frontier workers who work remotely, there will be no changes to the applicable social security legislation during the pandemic (Cocquyt and Jasenovcova 2020). And in Belgium, for example, for posted workers 'stuck' in the host country with expiring A1 certificates, or workers starting their assignment later than envisioned, no new certificate is required.

Finally, concerning seasonal agricultural workers, some Member States have adopted stricter standards to avoid COVID-19 infections. In Germany, seasonal workers have to undergo a health check upon arrival, for 14 days they have to undergo what the government calls 'de facto on-the-job quarantine', and the housing guidelines have become stricter. Denmark also requires that agricultural workers undergo a 14-day quarantine or have no contact with people from outside the workplace. In contrast, the Netherlands, in spite of admitting many new seasonal workers to its territory, has not introduced any special legal requirements (like quarantine or special health and safety measures) (ETUC 2020b).

Conclusion: some policy options

Despite the grave difficulties experienced by highly mobile workers and the recognition of them as 'essential' across the Union, neither the pre-existing EU legal framework nor the newly introduced policy actions have been of any meaningful help. Instead, at the EU level, the main trend has been to ensure free movement of workers independently, or at least without any due regard to their protection. At the national level, the tendency concerning highly mobile workers has been similar: opening of the border without any changes to the social security protection system. Where protective measures have been adopted for some groups (such as seasonal workers), they seem to aim more at protecting the local population from the spread of the virus rather than the workers themselves.

What could be done to remedy the existing situation and to ensure that it does not reoccur in the future?

In the long term, nothing less than a decent 'floor' of rights for highly mobile workers and upwards convergence in terms of remuneration and working conditions across the EU will solve the issue. Highly mobile workers should at the very least have adequate social protection coverage in place against all risks,

including sickness and unemployment. Their working and living conditions should be improved regardless of whether a new crisis hits or not. Finally, organising these workers is also extremely important because otherwise their voices are not heard enough in the policy discourse.

In the medium term, a decent plan for situations such as the COVID-19 crisis should be worked out while keeping the interests and protection of highly mobile workers in mind. At the very least, the ability to take paid sick leave in any host country should be arranged without workers having to fear the loss of their jobs. Some common standards for working and living conditions during exceptional situations across Europe should be adopted, so as to avoid a repeat of the dire circumstances under which highly mobile workers are often working right now. The European Labour Authority should play some role because it is responsible for overseeing compliance with the *acquis* on the free movement of workers and posted workers, which contains some rules on, for instance, health and safety. Accessibility and portability of benefits should also be ensured across borders. In this regard, the on-going revision of the social security *acquis* should not become a missed opportunity.

Finally, in the short term, some immediate protective measures are needed to address the most pertinent problems faced by highly mobile workers, beyond merely ensuring that they can move across borders. Member States are not necessarily interested in improving the situation of these workers, and so the EU, as the 'protector' of free movement and those moving, should immediately step in. It should start by setting adequate limits for working time, and decent and sufficiently precise standards for working, housing and living conditions (see also ETUC 2020a). For now, however, it seems that for large groups of highly mobile workers, instead of overthrowing the status quo, the COVID-19 pandemic has in fact entrenched the negative trends already set in motion before the outbreak of the virus.

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