

ENSURING ENFORCEMENT OF MOBILE WORKERS' RIGHTS IN THE EU-LABOUR MARKET THROUGH TRANSNATIONAL COOPERATION: AN EFFECTIVE MECHANISM?

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1. INTRODUCTION

Enforcing (EU) workers' rights is of increasing concern these days.¹ Within the EU, it particularly receives attention as a consequence of the 2004 and 2007 EU enlargements, in the context of fears that the new citizens may undercut wages or would take away jobs in the old Member States, resulting in what is generally known as 'social dumping'.² Although EU law has stipulated that geographically mobile workers across the EU are entitled to certain employment and social security rights, it fails to guarantee these rights in practice.

There is one main legal reason for such a failure: the EU's competence to enact procedures that facilitate law compliance and enforcement is limited. For instance, the EU cannot establish an EU-wide labour inspectorate. Actually, the enforcement of EU law is mainly dependent on the competence of the Member States. Due to the principle of national procedural autonomy, it is for each Member State to arrange the way workers' rights granted by EU law will be enforced. Although national authorities act 'as the bodies of a member state',³ which means they are not subject to any hierarchical power of the EU institutions, they must exert their competences in compliance with the cooperation and loyalty obligations laid down in the EU-treaties. Thereby, these national mechanisms must meet two minimum standards, developed in EU-case law: they must enforce violations of EU law not less favourably as violations of national law (principle of equivalence) and they must ensure that the rights are granted in practice (principle of effectiveness).⁴ If a Member State fails, the European Commission has several options to act. The infringement procedure, including the ultimate possibility to bring the Member State before the Court of Justice of the EU (hereinafter CJEU), is from a legal point of view its strongest weapon to combat non-compliance. However, the European Commission increasingly takes recourse to alternative tools to induce compliance of Member States with EU-law, also in the field of workers' rights in situations of cross-border mobility.

At national level, workers' rights are traditionally enforced by the courts and/or through labour inspectorates or similar authorities. Moreover, in most Member States, trade unions and/or 'social partners' together play a role in the enforcement of labour standards.⁵ To meet the two minimum requirements EU (case) law places on Member States, in several instruments of hard and soft law, requirements or instructions are laid down for national authorities to collaborate, such as Regulation (EC) No. 492/2011 on free movement of workers, Regulation (EC) No.

¹ See for the deficit in compliance to labour law in a global context Davidov & Kevin Kolben 2009.

² Donaghey & Teague 2006, pp. 656 ff.

³ See ECJ in Simmenthal case**

⁴ Two seminal cases that must be mentioned are: Case 33/76 *Reve (Saarland)* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR 2043.

⁵ Malmberg & van Peijpe 2003, pp. 59-65

987/2009 on social security and Directive 96/71 on the posting of workers ('PWD'). Moreover, there are some (soft law) duties in the context of health & safety directives.

Recently, in light of persistent problems to guarantee (the exercise of) rights of the increasingly mobile workforce of the EU, the European Commission has been active in launching new initiatives such as networks and information exchange systems to close the gap between rights on paper and the exercise of rights in practice. The idea is that networks fulfil a particular role in providing a platform for national authorities and other stakeholders like social partners to exchange information on how monitoring and enforcement is arranged in their country and provide mutual assistance in making control mechanisms more effective *vis-à-vis* transnational businesses employing migrant and/or posted workers across EU Member States. To ensure enforcement effectiveness, national stakeholders also have duties to provide information about their laws and regulations to the general public, in order to increase awareness amongst employers and workers of their rights and obligations under EU-law and to give them easy access to fast dispute resolution mechanisms.

These proposals reveal a strategy to strengthen and broaden the role of transnational networks and the practical (predominantly non-legal) governance tools at their disposal in the field of labour law. Such (formal or informal) transnational networks and alternative governance mechanisms have already proven useful in other fields of EU-regulation. If used and implemented well, they may serve as non-formal alternatives to improve compliance and enforcement of workers' rights as a supplement to the judicial tools such as infringement procedures before the CJEU.

In this paper, we map and examine the recent initiatives to increase the role of networks and alternative governance tools for compliance in the field of workers' rights in cross-border situations and the legal framework on which they are based. Our goal is two-fold. Firstly, we aim to provide an overview of the emerging transnational 'patchwork' of monitoring and enforcement facilitative networks in the field of EU labour and social security law. The second, more ambitious aim of this paper is to explore whether networks may really improve the enforcement effectiveness of EU law for the benefit of the mobile EU-workforce on the labour markets of the Member States. However, it is premature to draw conclusions about the latter purely on the basis of the recent proposals to develop or elaborate networks in the field of worker's rights. On the other hand it is out of the scope of this paper to make a thorough analysis of networks in other policy areas with the help of the vast and well-developed literature in law, political science and public administration. Therefore, we decided to take a 'middle way': we make an excursion to some of the other areas of regulation where networks and alternative compliance tools were elaborated and/or innovated earlier. From these examples lessons may be learned for the use of these tools to enhance enforcement in the field of workers' rights.

Below, we will first give some key definitions and sketch the general legal framework. Then we survey emerging network-initiatives as alternative governance tools in the field of workers' rights (section 2). Subsequently, the requirements for collaboration and mutual assistance between Member States regarding social security law, free movement of workers and posting of workers as well as health & safety obligations in several pieces of EU law are (briefly) dealt with. Then, we move to other areas of EU-law where networks have already proved useful, namely in the fields of environmental and consumer protection and internal market. Also we look at two tools that are used to support compliance to internal market regulation in general (section 3). Finally, by way of conclusion, we will tentatively assess whether networks as alternative governance tools can contribute to the protection of workers' rights, and look ahead to the future challenges in this area (section 4).

2. DUTIES TO COOPERATE UNDER EU LAW IN THE FIELD OF WORKERS' RIGHTS AND THE NETWORKS EMERGING FROM IT

Before discussing the emerging 'patchwork' of networks to improve the enforcement of workers' rights in cross-border situations, we first need to define at a general level what we mean with 'enforcement' and 'networks' and give a short account of the relevant legal framework.

2.1 *Relevant definitions*

For the purposes of this paper, we adopt the definition of Pelkmans and Correia de Brito, that:

'enforcement' comprises all activities, public and private, at EU and Member State level, to ensure the proper transposition of EU law into national law, proper implementation and the best possible application of EU law.⁶

In this paper, we focus on the role of networks. All networks in different regulatory areas of the EU have in common that they are a result of difficulties existing in relation to the proper implementation and enforcement of EU law. Following Polak, a network can be described as consisting of a horizontal and non-hierarchical structure, in which mutuality, permanent relationships and continuous interactions between actors that aim to achieve certain common goals are central.⁷

Below, we take a brief look at the legal framework on which a network could be established in the field of workers' rights protection. Firstly the relevant Treaty provisions are highlighted (2.2) and secondly the relevant provisions in secondary EU law (2.3). In the latter subsection, this is followed by a short description of the relevant developments on administrative cooperation, networks and new governance tools.

2.2 *Relevant Treaty Provisions*

Transnational administrative cooperation between national authorities and stakeholders to facilitate and induce the enforcement of EU-law, is an acknowledged mechanism in the Treaties. Such administrative cooperation may consist of (a) the exchange of information, which includes the transmission of information, the establishment and use of (electronic) databases, and alert systems, as well as (b) administrative assistance, meaning mutual assistance, and the setting up of joint administrative teams and joint operations.⁸ Lottini differentiates the same two types of cooperation, stating that the exchange of information simply facilitates the activity of the administration of another Member State or European institution, while administrative assistance refers to the distinct administrative tasks of the public administrations that are inter-dependent.⁹

The following Treaty provisions do either refer to both or to one of the two. Based on Article 4(3) TEU (ex Article 10 TEC),

'[...] [t]he Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

Article 4(3) TEU clearly refers to cooperation in a vertical (i.e. between the Commission and the Member States) and in a horizontal (i.e. between Member States themselves) ways. According to Article 6 TEU, the EU is competent in the area of administrative cooperation.

⁶ Definition borrowed from Pelkmans & Correia de Brito 2012, p. 5.

⁷ Polak 2011, p. 105.

⁸ See for the distinction used: Lafarge 2010, pp. 611-615.

⁹ Lottini 2012, pp. 132-133.

As regards the implementation of EU law, Article 197(2) TFEU as introduced with the Lisbon Treaty constitutionalizes the principle of administrative cooperation.¹⁰ It stipulates that the EU may support the Member States to improve their administrative capacity, which includes facilitating the exchange of information and of civil servants. This provision serves also as a basis for the principle of ‘*effet utile*’, based on which national enforcement methods and instruments must at least comply with two cumulative – though vague – minimum requirements: equivalence and effectiveness. These ‘instrumental requirements’¹¹ are used to check the overall effectiveness of the procedural rule or enforcement activity. The basic framework for this two-tier test is to be found in the early cases *Reve (Saarland)* and *Comet*.¹²

Regarding the enforcement of the rights of migrant workers and posted workers, it is important to note that administrative cooperation may be considered under Article 114 TFEU. The latter provision determines that the EU may adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market.

A provision of interest in the context of EU social policy is Article 153 TFEU. Accordingly, the European Parliament and the Council may adopt measures that are designed to encourage cooperation between Member States. Cooperation could be aimed at improving knowledge, developing exchange of information and best practices, promoting innovative approaches, and evaluating experiences. EU social policy includes the protection of health and safety of workers in their working environment, working conditions, social security and social protection of workers.

2.3 Provisions on Cooperation and Information Exchange in the Field of Social Security, Free movement of workers, Posting of Workers and Health & Safety

Specific provisions on (transnational) administrative cooperation in the field of workers’ rights can be found in the following sources of secondary EU-law:

- (A) Regulation (EC) No. 993/2004 and No. 987/2009 on social security coordination;
- (B) Regulation (EC) No. 492/2011 on the free movement of workers as well as the very recently proposed Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers;¹³
- (C) The posting of workers directive (EC) 96/71 (hereinafter PWD) as well as the proposed Enforcement Directive¹⁴; and,
- (D) Health & Safety Directives.

We will give a brief overview of the current state of affairs for each of these subsets of rules in the field of workers’ rights:

(A). Social security coordination

Cooperation between social security authorities is regulated under Regulation (EC) No. 987/2009, a regulation meant to implement Regulation (EC) No. 883/2004 on the coordination of social security systems social security. The Reg. 987/2009 is said to be a key factor in allowing persons covered by Reg. 883/2004 to access their rights as quickly as possible, under optimum conditions (recital 2 Preamble). In order to determine the place of residence of persons falling under the Regulation, Member States should cooperate. Thereby, the authorities must

¹⁰ Lottini 2012, p. 131.

¹¹ Jans et al. 2007, pp. 206 ff.

¹² Case 33/76 *Reve (Saarland)* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR 2043.

¹³ COM(2013) 236 final.

¹⁴ COM(2012) 131 final.

take into account the following principles: of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly (Article 2(1) Regulation (EC) No. 987/2009).

In this context, the Administrative Commission for the Coordination of Social Security Schemes (Admin. Comm.) is a specialised body composed of social security experts within national administrations. The Administrative Commission supports coordination of social security schemes, promotes dialogue, reconciliation and the exchange of best practices, collects statistics and reviews coordination provision. Its objective is to clarify EU regulations and administrative practices relating to social security issues as well as clarify questions of interpretation, which it receives via the European Commission.

In the near future, information exchange between all authorities involved shall in principle only take place electronically, according to structured electronic documents. Based on the principle of mutual recognition, the host Member State shall accept as valid the documents issued in the home Member State, until the documents have been withdrawn by that state (Articles 5 in conjunction with 11 Regulation (EC) No. 987/2009). To exchange documents and information electronically, the Electronic Exchange of Social Security Information (EESSI)¹⁵, an IT system hosted by the Commission, shall be implemented (Article 95 Regulation (EC) No. 987/2009). Several advantages are ascribed to EESSI: for the worker it means that claims are not only handled faster but also the calculation of the payments of benefits. Also for public administrations the exchange of information is eased by the introduction of standardised flows of information, better multilingual communication due to common structured documents and an optimised verification and collection of data. EESSI was initially planned to operate fully as of 1 January 2014 but due to technical problems its launching had to be postponed.

(B). Free movement of workers

Here a short description is planned of relevant provisions in Regulation (EU) No. 492/2011 and in particular the plans in the very recent COM(2013) 124 proposal to improve compliance to migrant workers' rights of access to the labour market in another Member State and equal treatment as regards wages and other labour standards. Interesting is the plan to update and elaborate EURES to THE matching tool of demand and supply in the EU labour markets.¹⁶

(C). Posting of workers in the framework of the free provision of services

In the PWD, there is only one provision on cooperation on information exchange. Under Article 4 PWD, Member States must designate a so-called liaison office, dealing with reasoned requests from host Member States.

This provision will be broadened by Article 6 ff. of the proposed Directive to improve the enforcement of the PWD.¹⁷ Accordingly, Member States shall reply to reasoned requests for information and to carry out checks, inspections and investigations from competent authorities with respect to the three situations of posting (Article 1(3) PWD), including investigation of any abuses of applicable rules on the posting of workers or possible cases of unlawful transnational activities. In order to be able to cooperate, the proposed Directive obliges the home Member State to establish laws according to which their authorities are well-equipped to provide the requesting authority in the host country with information requested. In case of urgency, it is proposed that a specific urgency mechanism should be installed in which information is provided within 24 hours.

Together with the Commission, the Member States are to take measures to develop, facilitate and promote the exchange between officials that are in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring compliance with and

¹⁵ <http://ec.europa.eu/social/main.jsp?catId=869>.

¹⁶ This subsection will be elaborated in a future draft of this paper.

¹⁷ COM(2012) 131 final.

enforcement of the applicable rules (Article 8). The Commission shall assess whether financial support will be granted. Such support may be used to improve administrative cooperation and to increase mutual trust through e.g. projects related to promoting exchange of officials as well as training. The Commission may also financially support developing, facilitating and promoting best practice initiatives, including those of the social partners at EU level. Such best practices may concern developing and updating databases or joint websites containing general and/or sector-specific information on the applicable terms and conditions of employment.

Moreover, the mandate of the so-called Expert Committee on Posting of Workers which was installed as a network chaired by the Commission and composed of national experts from the Member States administrations,¹⁸ will be adapted in order to establish clearly its role in examining the feasibility of developing more uniform, standardised templates for the social documents accepted by the Court as being compatible with EU law (such as time sheets, payslips, etc.). According to the proposed Enforcement Directive, administrative cooperation and mutual assistance between the competent Member States' authorities shall (also) be implemented through the Internal Market Information System ('IMI'), as regulated by Regulation (EU) No. 1024/2012 ('the IMI Regulation') (Article 17)¹⁹ (for more on IMI, see section 3 below).

(D). *Health & Safety of cross-border workers*

Also in the field of health and safety, EU level initiatives were taken to increase cooperation to make workplaces in Europe safer and to reduce work-related accidents. The reasons why cooperation and mutual assistance in the field of OSH is necessary are twofold: in the first place, inspectors dealing with OSH should enforce rules in an equivalent manner (Article 4(3) TEU, Article 4(2) Framework Directive 89/391/EEC and the Community strategy 2007-2012 on health and safety at work) and in the second place, the inspectors should contribute to the proper functioning of the EU's internal market (Article 28 TFEU and Article 56 TFEU).

Already in 1982, the Senior Labour Inspectorates Committee ('SLIC'²⁰) was established. SLIC was established to assist the Commission in monitoring the enforcement of EU legislation at the national level. As of 1995, it has received a formal status.²¹ SLIC consists of representatives of Member States' labour inspectorates. Within SLIC, the labour inspectorates, *inter alia*, develop exchanges of their experiences in monitoring the enforcement of EU Directives on health and safety, so as to ensure that the Health & Safety Directives are consistently enforced across the Member States (Article 3 Commission Decision 95/319/EC).

Next to the SLIC, in 1994, the European Agency for Health and Safety at Work (EU-OSHA) has been established.²² Its main aim is to provide the EU bodies, the Member States, the social partners and those involved in the field with the technical, scientific and economic information of use in the field of safety and health at work (Article 2 EU-OSHA Regulation). Among other things, the EU-OSHA collects, analyses and disseminates technical, scientific and economic information in the Member States. It also promotes the exchange and cooperation of information and experience amongst Member States (Article 3 EU-OSHA Regulation). As of 2008, the EU-OSHA may attend meetings of the SLIC, but only as observers.²³

Both, SLIC and the EU-OSHA, within the means at their disposal, contribute to the Community Strategy 2007-2012. In this Strategy, the Commission set an overall objective of reducing the total incidence rate of accidents at work per 100.000 workers in the EU27 Member

¹⁸ Commission Decision 2009/17/EC setting up the Committee of Experts on Posting of Workers.

¹⁹ An appropriate legal basis is also provided in Article 18 for the use of the separate and specific application of the Internal Market Information System ('IMI') as the electronic information exchange system to facilitate administrative cooperation on the posting of workers.

²⁰ <http://ec.europa.eu/social/main.jsp?catId=148&langId=en&intPageId=685>.

²¹ Commission Decision 95/319/EC setting up a Committee of Senior Labour Inspectors.

²² Regulation (EC) No. 2062/94 establishing a European Agency for Safety and Health at Work ('EU-OSHA Regulation').

²³ Commission Decision amending Decision 95/319/EC setting up a Committee of Senior Labour Inspectors.

States by 25 per cent. To achieve this ambitious goal, it, *inter alia*, must be ensured that EU legislation in the field of health and safety is properly implemented and applied, to promote national health and safety strategies, to finalise methods for identifying and evaluating new potential risks as well as to promote health and safety at international level.²⁴

Quite recently in 2010/11, a new initiative to establish a network in the field of enforcing occupational health and safety regulations has been taken. The network, referred to as CIBELES (Convergence of Inspectorates Building a European Level Enforcement System), is mainly aimed at monitoring and enforcing organisational health and safety (“OSH”) by Labour Inspectorates. OSH is a field in which all national labour inspectorates are competent. So far, nine Member States participate in the CIBELES project: Austria, Belgium, France, Germany, Hungary, Italy, Malta, Portugal and Spain.

The CIBELES project aims at improving the manner in which information is exchanged between national Labour Inspectorates in order to ensure enhanced cross-border enforcement and mutual assistance in inspection and sanctioning proceedings, and to make proposals to the SLIC²⁵ and the European Commission with a view to further initiatives, programmes and regulations on OSH.²⁶ In this context, the CIBELES report proposes an integrated information system on posting of workers to design inspection actions. The report notes that communication and information on posting can be improved.

At the moment, different procedures for service providers exist: a posting declaration A101/A1-form in the field of social security coordination (pursuant to Reg. 987/2009), notification and registering as a company in 18 of the 27 member States in their capacity as a host state.²⁷ In the CIBELES report it is argued that the various procedures should be integrated into one single procedure at EU level and the current information networks should be interconnected (through Article 114 or 197 TFEU). Accidents and professional diseases of posted workers should be communicated through an EU level communication system. It seems that quite frequently, employers must not only notify the competent social security institution in their home state, but also in the host country.²⁸ In order to ease the identification of posted workers, it is proposed to introduce an EU identification card for posted workers that can be shown to the inspectors. Moreover, the project proposes to regulate mutual assistance related to the investigation of violations. To exchange information among labour inspectors, a measure should be instated (Articles 114 and 197 TFEU). Exchange should include the reply to reasoned requests (within the meaning of Article 4 PWD), spontaneous information, and technical cooperation. Also physical and actual cooperation should be regulated. On top of that, a European Network of Inspectorates on OSH, a European Network for Enforcement, should be established. A particular problem addressed by the project is the cross-border enforcement of fines and financial penalties.²⁹

3. EXISTING ADMINISTRATIVE NETWORKS AND GOVERNANCE TOOLS IN TWO OTHER AREAS OF EU LAW

This part examines in what way networks and alternative governance tools in the context of monitoring and enforcement have so far developed in some other legal areas. Thereby, we will first refer to networks established in the fields of environmental law (3.1) and consumer law (3.2). Then, we consider two IT-based networks in the field of internal market law.

²⁴ See for more information on the strategy: COM(2007) 62 final.

²⁵ <http://ec.europa.eu/social/main.jsp?catId=148&langId=en&intPageId=685>.

²⁶ Report Project CIBELES.

²⁷ Van Hoek & Houwerzijl 2012.

²⁸ Report Project CIBELES, p. 19.

²⁹ Ibid, pp. 17-21.

3.1 European Union Network for the Implementation and Enforcement of Environmental Law: IMPEL

In the field of environmental policy, one major reason for introducing networks was a lack of compliance with environmental regulations. In 1991, the Dutch Presidency of the EU commissioned a comparative study of EU environmental agencies against a background of a concern that the growth of environmental legislation was not matched by improvements in the quality of the environment.³⁰ One main conclusion of that report was that an environmental network should be established. So, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), also known as the Chester network, was established, with the aim of exchanging information and experience on all technical and legal aspects of the enforcement of environmental law.³¹ As compliance with environmental regulations did not improve, the Commission started to use the network as a ‘dialogue group’, in which information is exchanged and provided to national authorities.³² Later on, the dialogue group was used to set up requirements for environmental investigations done by national authorities.³³ The Commission became co-chair in 1994.³⁴

IMPEL moreover is aimed at recording inspection acts. They are non-binding, but nevertheless may have impact via voluntary audits conducted by IMPEL. Via these audits, the enforcement activities of Member States can be monitored. Based on the outcome of these audits, improvements are formulated and serve as a starting point for minimum inspection requirements.³⁵ As a result of these recordings, more detailed enforcement guidelines were included in recommendations, which have later also been ‘codified’ in EU secondary legislation, e.g. that at least once a year certain establishments should be monitored, as required by Seveso-III Directive 2012/18/EU. In the meantime, IMPEL has been decoupled from the Commission and has been transformed from an informal network into an association as of 2008.³⁶ The cooperation of the Commission and IMPEL went on based on the 2009 Memorandum of Understanding (MoU).³⁷ The Memorandum of Understanding includes a promise of the Commission to make available funds.

Next to IMPEL, the European Environment Agency (EEA) was established around the same time as IMPEL.³⁸ The agency’s aims are similar to those of IMPEL, namely to further the cooperation, information exchange, awareness-raising and harmonisation of policy and enforcement mechanisms. Within this framework Eionet, the European Environment Information and Observation Network, operates.³⁹ Eionet is a cooperation of national environment agencies and ministries in the field of data collection and information exchange.⁴⁰ Eionet is, based on the available data, able to make recommendations on improving the enforcement. As such, it was made possible to lay down more concrete enforcement mechanisms and sanctions in directives.⁴¹ One major difference between IMPEL and EEA is that the latter’s Management Board consists of two members of the Commission and the European Parliament each.⁴²

³⁰ See: <http://impel.eu/about/history/#history>.

³¹ Moor-van Vugt 2011, p. 95.

³² Ibid, p. 95.

³³ See <http://impel.eu/about/history/#history> and Moor-van Vugt 2011, p. 95.

³⁴ See <http://impel.eu/about/history/#history>.

³⁵ Moor-van Vugt 2011, pp. 95-96.

³⁶ Ibid, p. 96.

³⁷ See <http://impel.eu/about/history/#history>.

³⁸ <http://www.eea.europa.eu/>.

³⁹ See <http://www.eionet.europa.eu/>.

⁴⁰ Moor-van Vugt 2011, p. 96.

⁴¹ Moor-van Vugt 2011, p. 97. See e.g. Directive 2008/99/EC.

⁴² www.eea.europa.eu/about-us/governance.

3.2 Product Safety Enforcement Forum of Europe: Prosafe

Prosafe is one of the instruments established to advance the implementation and enforcement of Directive 2001/95/EC on general product safety by the Member States. It seemed that, although the directive has been implemented by national legislation, it was hardly implemented in practice. This led to the introduction of certain instruments that should stimulate the implementation and enforcement. Examples of such alternative governance tools for compliance are, *inter alia*, RAPEX (EU rapid alert system for dangerous consumer products); the possibility for the Commission to consult the so-called GPSD Committee, within the meaning of the General Product Safety Directive ('GPSD'), consisting of Member State authorities and organisations⁴³; the establishment of the Consumer Safety Network ('CSN'), a network forming a consultative experts group chaired by the Commission and composed of national experts from the Member States administrations;⁴⁴ and the increased cross-border cooperation at regional level (e.g. Baltic Sea Network).⁴⁵

Although Prosafe is not the only instrument aimed at the implementation and enforcement of the General Product Safety Directive, it seems to be the only one dealing with the actual, *ie* practical, monitoring and enforcement of product safety and therefore bringing together enforcement authorities of more than 20 Member States.⁴⁶ With regard to the CSN, it is said that, although formally established by Directive 2001/95/EC as a network to further administrative cooperation, it seems to have become a dead letter.⁴⁷ The CSN is indicated as a 'talking shop'. This seems to be supported by the fact that the Commission consults Prosafe when promoting the implementation and enforcement of the General Product Safety Directive.⁴⁸

Prosafe is aimed at providing a forum for participating Member States authorities to exchange information, either in the general meetings or via the Rapid Advice Forum and a Knowledge Base. In addition, Prosafe does coordinate transnational projects. During general meetings, the participating authorities can mention their preferences as regards future projects, which Prosafe can pass on to the Commission. The latter can decide then for what projects it provides subsidy.⁴⁹ Prosafe is seen as a hybrid network: it is a formal partner of the Commission when it comes to cooperation between the Member States, although it has no formal status in EU legislation. National authorities that participate in Prosafe are not responsible for what they have said and done within Prosafe.⁵⁰

3.3 The Internal Market Information mechanism (IMI)

In September 2009 the Commission and the Member States agreed to develop the IMI system of inter-member-states' administrative cooperation in the context of the internal market. IMI is an IT-based information network provided and managed by the Commission (Article 5 of the proposed IMI Regulation),⁵¹ linking authorities in all 30 EEA countries, with a multilingual search function helping competent authorities find their counterpart in other EU-countries, prepared questions and answers in 23 languages as well as automatic translation for other queries. It is aimed at facilitating administrative cooperation between the competent Member States' authori-

⁴³ See for the authorities and institutions: http://ec.europa.eu/consumers/tenders/information/grants/docs/annexI_contact_points_ms_2012_en.pdf.

⁴⁴ <http://ec.europa.eu/consumers/safety/committees/#csn>. This network is comparable to the PWD expert committee, installed by Commission Decision 2009/17/EC, p. 26.

⁴⁵ Polak 2011, p. 106.

⁴⁶ *Ibid*, p. 106.

⁴⁷ *Ibid*, p. 106-107.

⁴⁸ *Ibid*, p. 107.

⁴⁹ *Ibid*, p. 103. See also the Prosafe Charter, paragraph 2.

⁵⁰ *Ibid*, pp. 103-104.

⁵¹ Software application accessible via internet, COM(2011) 522 final, p. 10 (Preamble recital 2).

ties and between the Member States' authorities and the Commission. Administrative cooperation within the IMI Regulation is defined (in Article 5(b)) as:

'the working in collaboration or competent authorities of the Member States or competent authorities of the Member States and the Commission, by exchanging and processing information, including through notifications and alerts, or by providing mutual assistance, including for the resolution of problems, for the purpose of better application of Union law'.

IMI is seen as a promising governance tool. Developed in the context of the Services Directive 2006/123, to enhance the functioning of the internal market, IMI has the additional advantage that it has now become normal for national or regional administrations to work together with counterparts in other Member States. In February 2012, no less than 11,000 authorities were registered in IMI. Its use is rapidly increasing, although currently it is only applied for (a) the services Directive and (b) the 2005 Directive on recognition of professional qualifications.⁵²

The administrative cooperation system for SOLVIT,⁵³ has also been implemented by IMI (see Annex of the IMI Regulation). As such, IMI supports the work of SOLVIT. In order to continue the functioning of SOLVIT, certain tasks of national IMI coordinators can be assigned to national SOLVIT centres, within the remit of their tasks (recital 18 of the Preamble of the IMI Regulation).

3.4 The Internal Market Problem Solving Network (SOLVIT)

Created in July 2002, SOLVIT is an on-line problem-solving network, with national SOLVIT centres, in which EU Member States work together to solve without legal proceedings problems caused by the misapplication of internal market law by Member State authorities. At the same time SOLVIT functions as an online alternative dispute resolution mechanism (ODR) and as a cooperation network between national administrations. The European Commission is generally not directly involved in this alternative informal dispute settlement system, but coordinates the network; it provides, manages and controls the database (which connects the national SOLVIT Centres) and, when needed, helps speed up the resolution of problems. The Commission is also responsible for ensuring that "all proposed solutions should be in full conformity with Community law".⁵⁴

The national SOLVIT centres handle complaints from both citizens and businesses. However, it is important to note that the SOLVIT system only offers help in cases concerning problems of a cross-border nature involving a public authority, but not B2B (business to business) or B2C (business to consumer) disputes or disputes where judicial procedures are already underway.⁵⁵ SOLVIT is a success story since it has proven to be a resolution mechanism with easy access, a high success rate and considerable speed, while costing very little.⁵⁶ SOLVIT intervention is particularly significant in specific areas of the internal market, where quick and/or cost-effective solutions are needed. In 2011, as in 2010, social security issues related to migrants generated the largest number of cases (39% in 2011, 34% in 2010).

However, especially since centres generally remain understaffed, an obstacle to its effectiveness is the amount of cases submitted to the SOLVIT centres that are outside their competence. Since all of these cases need to be examined in order to determine where they should be handled, this adds significantly to SOLVIT's workload. The cases are usually directed to sources

⁵² See Pelkmans & Correio de Brito 2012, Ch. 5.

⁵³ See for more information: http://ec.europa.eu/solvit/site/about/index_en.htm and Commission Recommendation on principles for using 'SOLVIT', p. 79.

⁵⁴ See Commission, Evaluation of SOLVIT, Final Report, November 2011; Pelkmans and Correio de Brito 2012, p. 15**(nt 20); also **

⁵⁵ Lottini 2010.

⁵⁶ Pelkmans and Correio de Brito, 2012, p. 32.

such as ‘Your Europe Advice (YEA), EURES (European Employment Services Network) and the European Consumer Centres.⁵⁷ A possible solution, considered for the persistent understaffing of almost half of the national centres, may be that the European Commission imposes minimum staffing requirements. Another acknowledged challenge to the SOLVIT network is how to enhance its capacity for dealing with complex social security cases. Since they lack legal expertise strengthening synergies between SOLVIT and the Administrative Commission for the Coordination of the Social Security Schemes could be a solution. SOLVIT centres can be directly contacted by workers and business on cross-border problems related to social security issues whereas the Administrative Commission can only be approached by the European Commission and national authorities.⁵⁸

4. ESTABLISHING A NETWORK: NETWORK AND GOVERNANCE BASED ENFORCEMENT IN THE FIELD OF WORKER’S RIGHTS

From the overview in section 2, we could clearly see an emerging patchwork of networks in the field of the protection of workers’ rights with a focus on cross-border workers. In section 3, we turned to four examples of (sometimes IT-based) networks in other legal areas. By way of conclusion, in this section, we try to draw from these examples some tentative answers about the conditions under which a network can indeed contribute to the protection of workers’ rights.

In fact, similar patterns can be detected in the briefings about the development of networks. It can be said that the building of these webs of networks is of particularly of interest for the EU, as the latter is characterised by a multi-level structure, *i.e.* supranational, national, regional, and local, in which EU law must be applied.⁵⁹ In all cases, the starting point was that hard law was not applied correctly or sometimes not at all. The seemingly quite successful cooperation networks were initiated or at least actively promoted by the European Commission. Often, they started informally and were later formalised and/or assigned more tasks. The networks also seem to fulfil a particular role in furthering mutual trust among national authorities and other stakeholders to exchange information and to provide mutual assistance in matters of enforcement. Especially, the IMI and SOLVIT are success stories in furthering that national administrations get used to cooperation with their equivalents in other Member States. Since the Commission started to actively use internet-based networks, disseminating and exchanging detailed information has made mutual assistance and cooperation a lot easier. Together with enhanced accessibility of EU laws via a range of Commission websites, an indirect effect on Member States’ administrations may also be a far better and directly available EU knowledge, which, in turn, raises the quality of local enforcement and reduces the probability of incorrect interpretations.

However, that the new network structures can also be vulnerable was shown in the SOLVIT case. Ironically, this network seems to suffer from the traditional problems labour inspectorates face: understaffing combined with a heavy workload. So, as Pelkmans and Correio de Brito point out, good enforcement can never be taken for granted, for the simple reason that it is demanding.⁶⁰ This is also true for the new non-legal governance tools such as networks. Another future challenge arises as a consequence of the proliferation of networks in the past ten, fifteen years. It creates a complex and non-transparent regulatory environment. Not only the formal

⁵⁷ In order to solve this problem, the Commission, in 2008, published an Action Plan including the setting up of a ‘single contact point’, where citizens will be referred to the entity that may best serve them (the Single Market Assistance Services (SMAS)). See Commission Staff Working Paper, “Action plan on an integrated approach for providing Single Market Assistance Services to citizens and businesses”, SEC(2008)188, of 8 May 2008.

⁵⁸ Recommendation on principles for using SOLVIT–The Internal Market Problem-Solving Network and Communication from the Commission, Effective Problem -Solving in the Internal Market (SOLVIT).

⁵⁹ Polak 2011, p. 104.

⁶⁰ Pelkmans & Correio de Brito 2012.

part but also the non-legal, informal part of enforcement in transnational situations is spread over a number of agencies, networks and other governance tools; the powers, interests and capacity of these actors may vary widely.

Apart from the similarities between the network building in the area of workers' rights and the other areas, i.e. difficulties to ensure correct application and enforcement of EU-law, there is one profound difference. In particular, the fact that traditionally, in labour law, not only public authorities are entrusted with the monitoring and enforcement of EU labour and social security law, but also social partners should be noted. Hence, it is necessary to take that aspect into account when considering the ideal way of cooperation through networks in the field of workers' rights. Member States may entrust social partners with the monitoring and enforcement of (collectively agreed) employment rights and conditions. Moreover, as of the Treaty of Maastricht there is a European Social Dialogue, based on which social partners (may) actively take part in the rule-making process at EU level (Articles 154 and 155 TFEU). Based on Article 154(1) TFEU, the Commission must not only consult the social partners before submitting proposals in the social policy field, but Article 155 TFEU allows them also to start dialogue at EU level, probably leading to 'contractual relations, including agreements'.⁶¹ Also the Posting of Workers Directive recognizes a role for the social partners, by allowing the core employment conditions to be laid down in collective agreements.

Although the Court in *Laval* ruled that trade unions could not rely on the public policy provision enshrined in Article 3(1) of the Posting of Workers Directive, as they are no 'bodies governed by public law',⁶² they are seen as self-regulatory bodies, able to hinder the (exercise of) free movement rights. It may be noted that Article 56 TFEU has, what Barnard calls, an 'extended vertical direct effect', as opposed to horizontal direct effect. In that sense, decisions or actions taken by professional regulatory bodies can be equated with state interventions.⁶³ Consequently, it can be assumed that the principle of *effet utile* also applies to social partners.

Therefore, in our opinion, a network structure failing to include the trade unions and/or employer organisations, will, in principle, not be able to ensure comprehensive compliance with and enforcement of EU law. Besides the public law institutions, also the social partners must be included.

⁶¹ See more extensively on the role of the social partners in the law-making at EU level: Barnard 2012, pp. 67-87.

⁶² Case C-341/05 *Laval* [2007] ECR I-11767, para 84.

⁶³ Barnard 2010, pp. 233-234.

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