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Book

Posting of workers before national courts

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Edited by

Zane Rasnača and Magdalena Bernaciak

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European Trade Union Institute (ETUI)

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Posting of workers in the EU: where do we stand?

Zane Rasnača and Magdalena Bernaciak

Introduction

The right to provide services on a cross-border basis is one of the fundamental economic freedoms enjoyed by companies in the EU. To fulfil their contractual obligations, companies are allowed to temporarily send – or post – their employees to other EU Member States. The status of these employees is set out in EU law and national-level regulations, as well as industrial relations practices, in particular collective agreements, and local traditions.

Relative to EU Member States' working populations, the number of posted workers is still quite modest. Its limited scope notwithstanding, employee posting has become one of the most debated matters in the EU. Numerous court cases before the Court of Justice of the European Union (CJEU) as well as successful and less successful attempts to change the legal framework regulating posting at the EU level suggest that there are many unresolved issues arising from the clash of competences, loopholes and shortcomings in the legal framework, breaches and/or circumvention of workers' rights and weak enforcement.

To date, academic studies have focused mainly on the strengths and weaknesses of EU legal framework concerning posting,[1] posting flows[2] and the examination of rule-circumventing practices and working conditions in specific market segments.[3] Scholars have also studied the interaction between EU rules on posting and national

1. See among others: Kilpatrick C. (2012) Internal market architecture and the accommodation of labour rights. As good as it gets?, European Journal of Social Law, 2 (1), 4-29; Malmberg J. (2010) Posting post Laval. International and national responses, Uppsala Center for Labor Studies Working Paper Series 2010:5, Uppsala, Uppsala University, 6. http://econpapers.repec.org/paper/hhsuulswp/2010_5f005.htm; Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, European Constitutional Law Review, 14 (1), 131-153.
2. De Wispelaere F. and Pacolet J. (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission; Pacolet J. and De Wispelaere F. (2017) The size and impact of intra-EU posting on the Belgian economy, Leuven, Research Institute for Work and Society (HIVA), KU Leuven; Mussche N., Corluy V. and Marx I. (2016) The rise of the free movements: how posting shapes a hybrid Single European Labour Market, IZA Discussion Paper no. 10365, Bonn, Institute of Labor Economics.
3. Wagner I. (2018) Workers without borders: posted work and precarity in the EU, Ithaca, NY, ILR Press; Vah Jevšnik M. and Rogelja N. (2018) Occupational safety and health in transnational workplaces: the case of posted workers, Dvedomovini / Two Homelands, 48, 23-36; Alberti A. and Danaj S. (2017) Posting and agency work in British construction and hospitality: the role of regulation in differentiating the experiences of migrants, International Journal of Human Resource Management, 28 (21), 3059-3082; Berntsen L. and Lillie N. (2015) Breaking the law? Varieties of social dumping in a pan-European labour market, in Bernaciak M. (ed.) Market expansion and social dumping in Europe, London, Routledge, 43-60.

rule enforcement systems, both from legal and sociological perspectives,[4] with a strong emphasis on the analysis of posting-related cases before the CJEU.[5] However, there are virtually no accounts how posting legislation is applied by courts in the disputes at the national level. The available studies on the implementation of the Posted Workers Directive[6] are rather outdated and do not involve a comprehensive analysis of the existing national case law.

This book aims to fill this gap by examining posting-related case law in 11 European countries: Bulgaria, Denmark, Finland, France, Germany, Ireland, Latvia, the Netherlands, Poland, Portugal, and Slovenia. These countries constitute a diverse sample in terms of geographical location and the number of workers posted to and from the territory. They also vary with respect to their political-economic and legal systems and their approaches to both individual and collective labour law. The book identifies problems related to the application of the posting regulations for workers and posting companies in different legal, political, economic and industrial relations settings. It also outlines major legal and public debates on cross-border service mobility and examines whether the issues brought to courts are also subject to nation-wide discussions in the respective countries.

Empirically, the book draws on country reports prepared by national legal experts within the framework of the research project 'Posting Before National Courts: An Interdisciplinary Study', co-ordinated by the book's editors. The court cases analysed relate to posted workers and their social and labour law protection, as well as other issues brought to court by companies and collective actors. The book focuses on litigation before civil, administrative and criminal courts; some reports additionally discuss out-of-court dispute settlement mechanisms and the activities of national labour inspectorates.

The Introduction provides an overview of the legal framework on posting, with comparative data on the extent of cross-border worker flows and posting in the EU, and how this is analysed.

1. Key aspects of legal framework concerning posting

There is a certain level of regulatory complexity when it comes to posting situations. Typically, posting is a triangular situation where an employer sends a worker to carry out services abroad (to a service recipient). These services can be received by one 'user

4. See e.g. Barnard C. (2009) British jobs for British workers: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU Market, Industrial Law Journal, 38 (3), 245-277; Wagner I. and Berntsen L. (2016) Restricted rights: obstacles in enforcing the labour rights of mobile EU workers in the German and Dutch construction sector, Transfer, 22 (2), 193–206.
5. Asteriti A. (2012) Social dialogue, Laval style, European Journal of legal Studies, 5 (2), 69-99; Hos N. (2010) The principle of proportionality in Viking and Laval: an appropriate standard of judicial review, European Labour Law Journal, 1 (2), 236-253.
6. van Hoek A. and Houwerzijl M. (2011) Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Amsterdam, University of Amsterdam. http://ec.europa.eu/social/BlobServlet?docId=7510&langId=en

undertaking' or by multiple undertakings, or even by private individuals (for example, a painter sent to paint walls in a private apartment). To come under the umbrella of the EU law, there needs to be a cross-border element and an element of temporality. First, the posted worker should be sent from one EU Member State to another. If the posting situation is entirely internal (restricted to one country only), then it remains a matter for national law and EU law typically does not apply.[7] Second, the worker should be posted 'temporarily' – s/he needs to carry out work for a certain (limited) period in a member state different from the one in which s/he normally works.

The rights of both posted workers and the companies that post them are protected by multiple layers of regulation enshrined in EU law, the home country's law and the law of the host country. By contrast, the 'user undertaking' or service recipient is not bound by such a complex set of rules. The only time it bears some responsibility towards the posted worker is in cases where EU Member States have chosen to implement the subcontracting liability concerning, for example, wages.

In certain cases, it can be difficult to determine the exact rights of the posted worker and obligations of the company, especially in cases of multiple postings to multiple countries within a short time span. It is even more complex for the posted workers to assert and enforce their rights.[8] Knowledge of one's rights and also access to suitable enforcement mechanisms (be they judicial or administrative) are therefore decisive for posted workers.

There are at least three EU legal instruments that should be mentioned when it comes to the rights of posted of workers: 1) the Posted Workers Directive[9]; 2) the Enforcement Directive[10], and 3) the Regulation on co-ordination of social security systems[11] (Social Security Regulation).

The Posted Workers Directive which was recently amended[12] sets out the nucleus of mandatory rules that must be observed by posting companies in line with the host country's law. These include: the maximum work and minimum rest periods; minimum paid annual holidays; minimum rates of pay (after amendments – remuneration); the conditions of hiring-out workers (in particular by temporary agencies); health and safety at work; protective measures for pregnant women, women who have recently given birth, children and young people; and equality of treatment between men and

7. An exception is where EU Member States during the implementation process of the Posted Workers Directive have decided to extend these rules to internal posting situations. We are not aware of such an example, but it is theoreticaly possible.
8. Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in EU28, Background Analysis 2019.01, Brussels, ETUI, 6.
9. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997, 1–6.
10. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28 May 2014, 11–31.
11. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30 April 2004, 1–123.
12. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC, OJ L 173, 9 July 2018, 16–24.

women and 'other provisions on non-discrimination' (Article 3(1) Posted Workers Directive). Otherwise, the Posted Workers Directive refers to the country where the worker habitually works as the country whose law will generally apply to the employment relationship.[13] In standard posting situations the law of the posted worker's 'home country' will still regulate several important matters, including, for example, the conclusion and termination of the employment relationship.

Initially, it was thought that the host states could potentially adopt more protective rules than the ones set out by the Posted Workers Directive, and attribute other elements of their national law besides the nucleus set out in Article 3(1) Posted Workers Directive to such workers. However, such interpretation was denied by the CJEU, and therefore, in a way, Article 3(1) Posted Workers Directive is a maximum harmonisation provision in a minimum harmonisation measure. It means that while the Posted Workers Directive allows the Member States to adopt more protective measures, they are not allowed to attribute other aspects of their employment law (for example, rules on dismissal, more specifc working-time rules beyond maximum work and minimum rest periods) to posted workers. Hence the host country's law applies only with regard to the specific labour law aspects laid down in the Posted Workers Directive.

The Posted Workers Directive also states that the 'home country' is the country where the worker habitually works. Hence, if it follows from the particular case that the worker 'habitually works' in a country other than the country he has been initially posted from, one could argue that the law of this 'other' country should apply. This complicates the situation, especially for courts, who need to carry out a careful assessment in relation to each particular posting situation. As shown by the Chapters in this volume, this is not always an easy task.

However, the real difficulty in this setting, at least when it comes to the judicial enforcement, emerges when national courts have to apply foreign law. Namely, if a posted worker goes to court in the host country, then, beyond the nucleus, the host country's court will have to apply the law of the home country. In turn, if the posted worker's rights are litigated in his or her home country, then when it comes to the nucleus, the court will have to apply the host country's (foreign) law. This is complicated further by the favourability principle laid down in Article 3(7) Posted Workers Directive. The courts have to have the information necessary to make a value assessment in terms of which particular set of rules is more favourable for the worker. This can be a rather difficult task since different sets of laws may be favourable in multiple ways.

While not applicable *ratione temporis* to the court cases analysed in this book, it is still relevant to mention the revision of the Posted Workers Directive. After much fraught political bickering, the revised version of the Posted Workers Directive has brought some changes which have to be implemented by EU Member States by 30 July 2020. The most relevant changes were the repalcement of 'minimum wage' with 'remuneration' among the nucleus rules, and the introduction of the 12 months' period (that may be prolonged to 18 months) after which the law of the host country applies

13. Recital 8 Posted Workers Directive.

concerning employment relationships.[14] The revision also expanded the possibility to apply collective agreements declared universally applicable in the host country to posted workers in sectors beyond construction. In addition, Article 3(7) Posted Workers Directive now states that the employer shall reimburse expenditure incurred on account of posting (such as travel, board and lodging) in accordance with the national law and/or practice applicable to the employment relationship.[15]

The Enforcement Directive attempts to ease the work of the national courts by offering some indicators for identifying 'genuine posting', including the place where the undertaking has its registered office and administration, where it performs substantial business activity, the place of recruitment of posted workers, and where contracts with them are concluded, as well as the number of contracts performed and size of turnover in the EU Member State of establishment (Article 4(2)(a) to (e)). Furthermore, it lays down a non-exaustive list of elements which should be considered in assessing whether a worker is a genuine posted worker, including, for example, the nature of activities, travel, board and lodging costs being reimbursed and whether the worker is expected to return and to work in the 'home Member State' (Article 4(3)(a) to (g)). The Enforcement Directive further introduced rules on improving access to information. The information on what rules apply to the posted workers and their content has to be published on a single website (Article 5). This should help the national courts in applying 'foreign law' to the posting-related disputes. Further rules on closer administrative co-operation (Articles 6 and 7), unfortunately, are not meant to be used in judicial enforcement; hence there is no quick and reliable process in which a court of one EU Member State could request information related to posting circumstances or applicable rules in another EU Member State.

Finally, the Social Security Regulation[16] has to be mentioned as an instrument which, albeit more indirectly, also to an extent determines EU level rules on posting. Concerning posting, Article 12 determines that an employed person posted by an employer to work in another EU Member State remains subject to home state legislation, provided that the anticipated duration of such work does not exceed twenty-four months and that she or he is not sent to replace another person. This sets an upper limit for the period of posting, at least for the purposes of social security rules. In rare situations Article 13 could also potentially apply to posted workers - namely, if in line with Article 13(1)(b) the worker normally carries out work in two or more EU Member States, but still happens to have only one employer. In such a case, the legislation of the state in which the registered office or the place of business of the employer is situated will apply (this will then be the 'home state').

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14. Article 1 of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9 July 2018, 16–24.

15. For more analysis regarding aspects of the revision most relevant for practice of the national courts, see the Conclusion.

16. See also the implementing Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30 October 2009, 1–42.

2. Intra-EU worker posting: trends and numbers

Comparative data on the number and the distribution of posted workers in the EU is not readily available. In a report compiled for the European Commission (EC) in 2018 by De Wispelaere and Pacolet,[17] intra-EU posting flows based on national data on A1 certificates are traced. Home-country social security authorities issue these to workers and self-employed persons who are temporarily active in other EU Member States, in accordance with Regulation 883/2004 on the co-ordination of social security systems in the EU (Social Security Regulation).

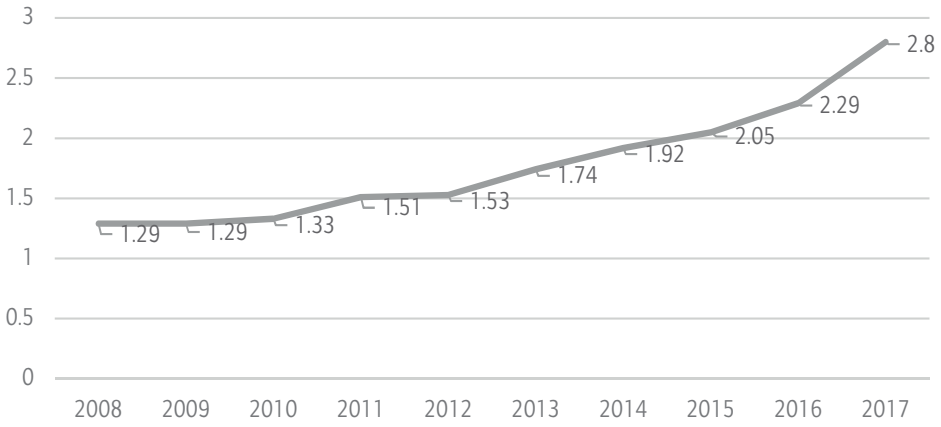
The authors acknowledge that it could be misleading to estimate the number of posted individuals on the basis of A1 data. First, the certificates are issued per trip, and not per worker, which means that the same person deployed abroad multiple times in the course of a single year will receive several A1 certificates. Second, some companies fail to procure A1 certificates for their workers, which could result in the under-reporting of posting numbers. Third, the two legislative acts regulating the employment conditions and social security status of cross-border workers – the Posted Workers Directive and the Social Security Regulation– differ in scope significantly. Specifically, some categories of workers covered by the Social Security Regulation – and, consequently, the recipients of A1 certificates – are not posted workers in the meaning of the Posted Workers Directive.

In accordance with the Regulation, A1 certificates are issued to three groups of workers temporarily active in another EU Member State: 1) employees that are sent by employers to provide services in another EU Member State (Article 12(1)); 2) self-employed individuals based in one country who temporarily move to another EU Member State to provide services there (Article 12(2)); and 3) self-employed and employed persons active in two or more EU Member States (Article 13). While the first category of workers constitutes posted workers *par excellence*, the second category is excluded from the scope of the Posted Workers Directive. The third includes both self-employed workers, who do not fall under the scope of the Posted Workers Directive, and employees posted within its meaning. However, the latter will likely constitute only a fraction of the overall number under the third category since only when work is done in two or more countries, but always for one employer, will workers constitute 'posted workers' in line with the criteria of the Directive.

All in all, the data suggests that the extent of cross-border mobility exercised by these three categories of persons is still relatively modest: in 2017, their activities accounted for 0.8% of employment in the EU. That being said, it is notable that the number of A1 certificates issued to transnationally mobile workers have increased nearly threefold in the past decade (see Figure 1). In 2017, Poland and Germany issued the highest number of A1 documents (573,358 and 399,745 respectively).

17. De Wispelaere F. and Pacolet J. (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission.

Figure 1 **A1 social security certificates issued by EU Member States (in millions), 2008-2017**



Nb: the E101 certificates that preceded A1 certificates were still in use in 2009 and 2010
Source: De Wispelaere and Pacolet (2018)

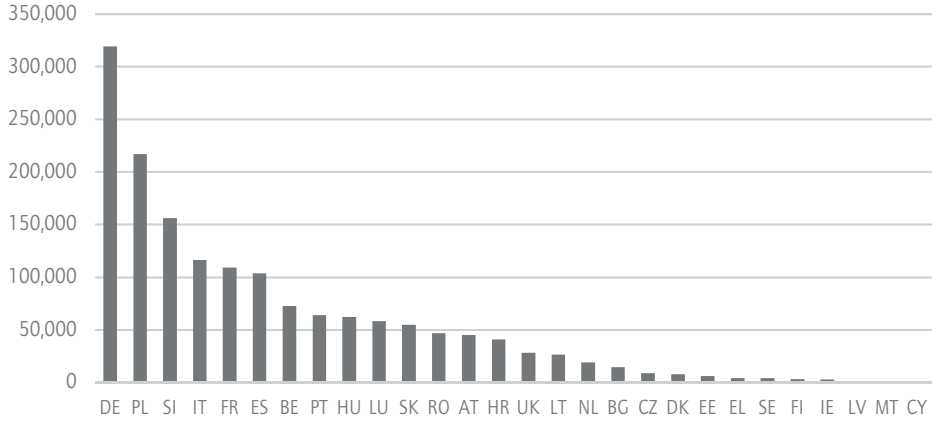
Figure 1 shows that temporary cross-border worker mobility was to a large degree 'crisis-proof' - while the issuance of A1 certificates stagnated in the early years of the downturn, their numbers soon began to grow again and have been on the increase ever since. Another interesting conclusion from the data is that temporary cross-border worker flows have not come to an end with the lifting of the transitory arrangements that had limited access to western European labour markets for central and eastern European (CEE) employees after their countries' EU accession. According to Mussche et al.,[18] this suggests that temporary cross-border worker flows, and posting in particular, should not be viewed as a substitute for regular migration, but rather as a separate, complementary form of labour mobility. In the authors' view, the popularity of posting rests in the fact that it can offer 'the best of both worlds'; so while it enables EU citizens to seize opportunities opened up by employment abroad, it saves them the challenges of a permanent move to another EU Member State, such as the language barrier, the administrative hurdles related to foreign residence registration or transferring social security entitlements from one country to another, and the psychological discomfort of living away from one's family and country of origin. Due to these reasons, the growth of both intra-EU and third-country posting will likely continue in the foreseeable future. As the country reports included in this book show, there are still situations that entail difficulties and abuses due to the complexity and poor enforcement of posted workers' rights. However, if posting rules are duly obeyed, the arrangement can indeed be considered appealing for both workers and employers.

18. Mussche N., Corluy V. and Marx I. (2016) The rise of the free movements: how posting shapes a hybrid Single European Labour Market, IZA Discussion Paper no. 10365, Bonn, Institute of Labor Economics.

Within the broad category of cross-border workers, let us now have a closer look at posted workers *par excellence,* that is, those employed in their country of origin and temporarily sent abroad on behalf of their employers (Article 12(1) of the social security co-ordination Regulation). In 2017, their numbers in the EU reached 1.73 million, which equated to 0.4% of total EU employment. In absolute terms, Germany was the largest 'exporter' of this category of workers (319,332 of A1 certificates issued), followed by Poland (217,154) and Slovenia (156,347). Country positions change somewhat when the proportions of posted workers relative to countries' working populations are taken into account. In absolute terms Slovenia leads the net sending countries' ranking, with nearly 5% of its economically active population posted to another EU Member State.

It is notable that, according to the data, over a half of all A1 certificates in the examined category granted in 2017 were issued by EU15[19]. Mussche et al's[20] analysis of data from the Belgian national register Limosa for 2012 reveals an even higher proportion of inbound posted workers originating from high-wage countries. These results indicate that posting is popular both among high-wage and low-wage actors, which runs counter to the popular perceptions of this form of mobility as an 'entrance ticket' to the EU internal market for 'cheap' service providers and workers.

Figure 2 **A1 certificates issued to employed persons temporarily sent by their employers to another EU Member State (Article 12(1) of Regulation 883/2004, 2017)**



Source: De Wispelaere and Pacolet (2018)

As far as receiving states are concerned, in 2017 Germany hosted the highest number of mobile workers falling under Article 12 of the Social Security Regulation; France, the Netherlands and Belgium followed suit (please see Figure 3 below). All in all, EU15 Member States received more than two-thirds of all workers posted within the EU in

19. BE, DE, IT, FR, LUX, NE, DK, IE, UK, ES, SE, FI, PT, AT, GR (Pacolet J. and De Wispelaere F. (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission).

20. Mussche N., Corluy V. and Marx I. (2016) The rise of the free movements: how posting shapes a hybrid Single European Labour Market, IZA Discussion Paper no. 10365, Bonn, Institute of Labor Economics.

2017, with most flows taking place from high to high and from medium to high-income countries.[21] This suggests that the 'west European posting skew' identified in relation to outbound posting is discernible in relation to inbound posting as well.

Finally, the examination of sectoral data indicates that cross-border activities pursuant to Article 12 of the Social Security Regulation have tended to be concentrated in construction (47% of all A1 documents issued in 2017); services (including health and social care services); and other industrial sectors. In some countries, these sectoral trends have been particularly pronounced: for instance, a staggering 33% of workers active in the Belgian construction sector in 2015 were posted workers.[22]

The sectoral disaggregation of posting data is important because the labour market dynamics in individual market segments could differ from those in the economy as a whole. Specifically, even if the overall impact of posting is negligible, a large number of workers temporarily deployed to a given sector and subject to a separate set of regulations could exert competitive pressure on the wages and working conditions of domestic employees, and/or even displace the latter. As argued by the authors of the ECORYS (2009) study, these negative effects might be particularly pronounced in low and middle-skilled occupations. Indeed, for Belgium, De Wispelaere and Pacolet[23] point to the threat of job displacement in relation to several sub-sectors of the construction industry. They also show that between 2010 and 2014, the number of domestic employees decreased, whereas the number of posted and self-employed workers was on the rise. Unfortunately, to the editors' knowledge, no similar studies are available for other EU countries. As a result, it is not possible to provide a comparative assessment of the impact of posting on national labour markets and their specific sub-segments.

3. Analytical framework of the study

This book examines national-level case law related to posting of workers in the EU. Each Chapter focuses on one EU Member State and analyses the judicial enforcement of posted workers' rights and duties of posting companies. The country studies primarily cover issues of labour law and social security disputes; they also analyse posting-related cases before administrative and even criminal courts.

Country cases selected for analysis display variation on a number of characteristics. Individual Chapters in the book cover the founding EU Member States as well as newcomers from different enlargement waves, including those from northern, southern, central and eastern European states. Our sample encompasses countries that predominantly send posted workers as well as those who stand out as receivers.

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21. Pacolet J. and De Wispelaere's F. (2018) high-wage country category includes countries with above-EU average wage in 2012: DK, LU, SE, FI, BE, NL, DE, FR, AT, IT, IE, UK, IS, LI, NO and CH. Medium-wage countries are those around EU average in 2012: CY, ES, EL, MT, SI, PT. The remaining EU Member States are classified as low-wage countries.

22. Pacolet J. and De Wispelaere F. (2017) The size and impact of intra-EU posting on the Belgian economy, Leuven, Research Institute for Work and Society (HIVA), KU Leuven.

23. Ibid.

As illustrated by Table 1, some countries in our sample, most notably Germany and France and to an extent Denmark and Ireland, do not easily fit these categories, as they are both important senders and recipients of posted workers. In addition, the examined countries differ significantly in terms of their relative wealth and political-economic setup. We analyse high-wage co-ordinated market economies of continental and northern Europe (Germany, the Netherlands, and Denmark), France, traditionally marked by a significant level of state's involvement in the management of the economy, and a liberal market economy (Ireland); we also look at low-wage southern and central and eastern European economies.[24] Last but not least, the analysed EU Member States display significant variation in regard to their legal systems; while most examined EU Member States belong to the continental legal tradition, we also include Ireland, whose legal system is mainly based on the common law, and Denmark, which hosts an extensive out-of-court dispute settlement system.

Table 1 The number and net balance between A1 certificates issued according to Article 12(1) of the Regulation 883/2004, 2017 in the EU Member States analysed in this book

Country	A1 certificates received	A1 certificates issued	Net balance of received and issued A1certificates
Germany	390,136	319,332	70,804
France	228,673	109,155	119,518
Netherlands	107,048	19,231	87,817
Finland	21,266	3,295	17,971
Denmark	14,524	8,081	6,443
Ireland	5,841	3,016	2,825
Poland	19,644	217,154	-197,510
Slovenia	6,135	156,347	-150,212
Portugal	21,605	64,200	-42,595
Bulgaria	3,277	14,713	-11,436
Latvia	1,306	1,529	-223

Source: De Wispelaere and Pacolet (2018)

24. For different models of capitalism in Western Europe, see e.g. Hall P.A. and Soskice D. (2001) Varieties of capitalism: the institutional foundations of comparative advantage, Oxford, Oxford University Press; For Central-Eastern Europe varieties of capitalist systems, see Bohle D. and Greskovits B. (2012) Capitalist diversity on Europe's periphery, Cornell, Cornell University Press.

In order to ensure the comparability of country-level information, each chapter includes the following elements:

- an overview of the legal framework on posting of workers at the national level with an emphasis on the access and typology of courts and/or other dispute settlement bodies;
- key national legal debates on posting and how they relate to judicial enforcement at national level;
- an overview and evaluation of the national case law on posting with identification of the key legal issues that frequently come before the national courts;
- relation (if any) between the findings and the EU level debate.

During the writing process, the authors analysed a number of general elements that allowed crosscutting comparative analysis. When analysing the case law, all Chapters focussed on who brings the cases, before what type (and level) courts, what aspects of posting were (or were not) central in the judgment, whether the national court explicitly recognised the situation as posting, what the outcome was, and who 'won' the case. The Chapters also identify the elements of both EU and national legal framework that are most litigated. All these aspects fed into the comparative analysis of national-level discourses and case law on posting, which we present in the Conclusion. At the same time, each Member State has its own specific approach to regulating posted work and also to enforcing posted workers' rights; therefore, where necessary and justified, the individual chapters diverge from the overall structural guidelines.

References

Alberti A. and Danaj S. (2017) Posting and agency work in British construction and hospitality: the role of regulation in differentiating the experiences of migrants, International Journal of Human Resource Management, 28 (21), 3065-3088.

Asteriti A. (2012) Social dialogue, Laval style, European Journal of legal Studies, 5 (2), 69-99.

Barnard C. (2009) British jobs for British workers: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU Market, Industrial Law Journal, 38 (3), 245-277.

Berntsen L. and Lillie N. (2015) Breaking the law? Varieties of social dumping in a pan-European labour market, in Bernaciak M. (ed.) Market expansion and social dumping in Europe, London, Routledge, 43-60.

Bohle D. and Greskovits B. (2012) Capitalist diversity on Europe's periphery, Cornell, Cornell University Press.

Hall P.A. and Soskice D. (2001) Varieties of capitalism: the institutional foundations of comparative advantage, Oxford, Oxford University Press.

Hos N. (2010) The principle of proportionality in Viking and Laval: an appropriate standard of judicial review, European Labour Law Journal, 1 (2), 236-253.

Kilpatrick C. (2012) Internal market architecture and the accommodation of labour rights. As good as it gets?, European Journal of Social Law, 2 (1), 4-29.

Malmberg J. (2010) Posting post Laval. International and national responses, Uppsala Center for Labor Studies Working Paper Series 2010:5, Uppsala, Uppsala University, 6. http://econpapers.repec.org/paper/hhsuulswp/2010_5f005.htm

Mussche N., Corluy V. and Marx I. (2016) The rise of the free movements: how posting shapes a hybrid Single European Labour Market, IZA Discussion Paper no. 10365, Bonn, Institute of Labor Economics.

Pacolet J. and De Wispelaere F. (2017) The size and impact of intra-EU posting on the Belgian economy, Leuven, Research Institute for Work and Society (HIVA), KU Leuven.

Pacolet J. and De Wispelaere F. (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission.

Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, European Constitutional Law Review, 14 (1), 131-153.

Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in EU28, Background Analysis 2019.01, Brussels, ETUI.

Vah Jevšnik M. and Rogelja N. (2018) Occupational safety and health in transnational workplaces: the case of posted workers, Dvedomovini / Two Homelands, 48, 23-36.

van Hoek A. and Houwerzijl M. (2011) Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Amsterdam, University of Amsterdam. http://ec.europa.eu/social/BlobServlet?docId=7510&langId=en

Wagner I. (2018) Workers without borders: posted work and precarity in the EU, Ithaca, NY, ILR Press.

Wagner I. and Berntsen L. (2016) Restricted rights: obstacles in enforcing the labour rights of mobile EU workers in the German and Dutch construction sector, Transfer, 22 (2), 193–206.

Chapter 1
Posting of workers before Bulgarian courts

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Introduction

In Bulgaria, Directive 96/71/EC, which lays down the rules governing posted workers, was transposed in two takes by adopting rules in inbound posting in 2007 and on outbound posting in 2010. I have identified 136 judgments related to the posting of workers issued by courts from 2007 until June 2018. These include: 48 judgments in disputes between outbound posted workers and their employers; 69 judgments in administrative lawsuits dealing with fines and other coercive measures imposed by the Labour Inspection on employers posting workers (both inbound and outbound); and 19 administrative lawsuits between the National Revenue Agency (NRA) and employers concerning the calculation of basic earnings for the purposes of payment of social security contributions in the case of outbound posted workers. The three substantive parts of this chapter mirror these three main types of lawsuits. The analysis is based on two questions: (a) which are the most common infringements of posting rules on the part of employers and why do these occur? and (b) are efficient remedies available to posted workers? Overall, the analysis of the Bulgarian situation reveals a number of typical and country-specific issues.

1. Legislative context and structure of the judicial system

Labour disputes and lawsuits in respect of administrative penalties and fines are brought before courts on the basis of Article 121(3) to (5) of the Labour Code (LC). These provisions governed outbound posted workers from August 2010 until December 2016, when they were repealed and replaced by Article 121a of the Labour Code, 'Posting and sending of workers in the framework of provision of services'. However, the judgments delivered under this new provision fall outside of the scope of this chapter since they have only very recently started to be decided by the courts. In principle, the new Article reiterates the former rules of Article 121(3) and (4) with only one difference – where before, posting rules applied only to postings longer than 30 days, this minimum time requirement has now been abandoned. Article 121(3) LC creates an additional obligation for employers posting workers to another EU Member State to agree in advance, for the entire period of the posting, the terms and conditions of employment that are at minimum the same, within the meaning of Directive 96/71/EC, as those for the same or similar work in the EU Member State where the work is carried out. Article 121(4) LC expanded the same rule to temporary agencies posting workers to undertakings using

their services in another Member State. Until December 2016 this obligation to agree in advance was applicable only where posting exceeded 30 days and for shorter postings, only Bulgarian wages and labour rules were applicable. Since the amendments, the actual duration of posting is no longer important, and the additional contract (setting out employment terms and conditions for the period of posting) has to be concluded in each case of posting.

Article 121(5) stipulates that the travel, accommodation and subsistence (TAS) allowance payable under national law is excluded from the salary of the posted worker in the host country. The national courts found themselves repeatedly dealing with the interpretation of this provision. This prompted the legislator to seek a certain compromise in the form of subsequent amendments (Article 215(2) LC introduced from 30 December 2016 in place of Article 121(5)). As a result, posted workers within the meaning of Directive 96/71/EC are currently entitled to a travel allowance alone, and not to accommodation and subsistence allowance, unlike workers on a business trip/mission. That creates a supplementary differentiation between posting to EU and third countries. When posted to another EU country, the worker will have a right to the host country's minimum wage and travel allowance. However, when posted to a third country, she or he will have a right only to the Bulgarian salary, but on top of that, a right to coverage of travel and accommodation costs, as well as daily allowance.

The social insurance contributions of workers posted to another Member State are governed by a special provision: Article 6a of the Social Insurance Code (SIC). When calculating the basic earnings for the purpose of payment of social security during the period of the posting, the minimum rate of pay in the country to which the worker is posted may, in certain circumstances, function as a minimum income for social security purposes.

When it comes to posting-related disputes, those relating to salaries and other working conditions are heard by the general courts competent to settle civil matters. Disputes are adjudicated at first instance and on appeal. Further cassation appeals before the Supreme Court of Cassation (VKS) are admissible only if they satisfy a set of requirements laid down by law. Judicial review by the Supreme Court is always inadmissible if the salary or compensation claim filed under the Labour Code is below Bulgarian Lev (BGN) 5000. Fines and coercive administrative measures imposed on employers by the Labour Inspection may be appealed before the competent regional court. Appeals are filed with the administrative courts. The decisions of the NRA requiring employers to pay additional social insurance contributions can be contested before administrative courts and appealed in cassation before the Supreme Administrative Court.

The lawsuits adjudicated at the first instance and on appeal (second instance) provide more objective information about the standing case law. They also allow a comparison to determine whether judges in courts of first instance encounter greater difficulties in the interpretation and application of the provisions on posted workers.

2. Political and social context

Overall, there has been no national debate on the posting of workers. Legislative proposals concerning posting of workers prior to adoption were brought for consultation with the social partners in the framework of the Tripartite Cooperation Council, the country's key social dialogue institution. They were further deliberated by the Parliament, and all MEPs who spoke at the time of their adoption supported the introduction of the provisions on posted workers in the Labour Code and the SIC. It was specifically emphasised that Bulgaria had not encountered any problems with inbound or outbound posted workers and the transposition into national law of Directive 96/71/EC was cited as a priority.

Likewise, there have been no academic debates on posting of workers in the EU. The rules in question concern a very small number of workers in Bulgaria, hence the general lack of interest. For example, in 2015 a total of 15,830 Bulgarian workers or 0.5% of Bulgaria's workforce were posted to other EU Member States. The rules on inbound posted workers applied to only 3,300 citizens of other EU Member States.

In 2018, just one unfortunate incident that received broad media coverage drew public attention to posted workers. An investigation by Bulgarian, Belgian and Dutch journalists uncovered longstanding abusive practices in the posting of Bulgarian nationals to Belgium to work as social assistants. Two managing directors of recruitment agencies had used threats and mistreated these workers. They concealed their identity as employers that routinely violated the law by repeatedly changing the names of the recruitment agencies and engaging in other criminal acts. Nevertheless, the Bulgarian institutions responded adequately when some of the victims chose to seek protection.

Bulgaria participated actively in the discussions of the European Commission (EC) proposal to amend Directive 96/71/EC. The Bulgarian position received support from all political parties represented in Parliament and from the public. There were strong concerns that the introduction of new requirements (equal pay for posted and local workers) would limit the competitive (cost) advantages of service providers from economically less-developed EU Member States, and, as a result, limit their access to the single market.

Further, in connection to the EC's proposals to reform the EU road transport rules (Mobility Package 1), Bulgaria has made efforts to protect the interests of Bulgarian hauliers and drivers with a view to ensuring that they remain active on the EU road freight transport market. The topic was raised in discussions between the Bulgarian Prime Minister and the Bulgarian President with the French President during his visit to Bulgaria in August 2017. Bulgarian MEPs in the European Parliament also opposed the measures in the Mobility Package that were seen as unacceptable to Bulgarian hauliers. Efforts were also made to achieve progress in the context of the Bulgarian Presidency of the Council of the European Union in 2018. The Bulgarian Hauliers Association (SMP), the country's biggest organisation of transport companies, has also tried to attract the attention of the EU leaders by staging a protest. In response to a letter by the SMP, the Minister of Labour and Social Policy reiterated that transport workers

should be excluded from provision on posted work except for cabotage operations. All public institutions and political parties united to protect the interests of Bulgarian road hauliers and drivers performing international transport operations. However, as the analysis of national case law demonstrates, Bulgarian courts do not fully concur with this position.

3. Salaries, other labour rights and TAS allowance for outbound posted workers

3.1. Salaries

The cases concerning the payment of salaries between outbound posted workers and their employers are classified depending on the type of the infringement that resulted in non-payment or incorrect calculation of the wages.

First, there are three cases in which workers filed lawsuits on account of non-payment of salaries, despite an agreement being reached in advance between them and their employers that the terms and conditions of employment would at minimum be the same as those for the same or similar work to be undertaken. The first case concerns a manifest infringement and is therefore a rare occurrence. In the case at hand, the employers were temporary work agencies that provided temporary employment at user undertakings situated in other EU Member States. The temporary work agencies are subject to a requirement for prior registration with the Bulgarian Employment Agency. Even though the employers had formally complied with the registration requirement and had also correctly included an annex in the employment contract determining the respective obligations of the employer, this still did not prevent the breach, that is, the non-payment of salaries due. In one of the lawsuits, for example, it even became clear that the French undertaking using the services provided was obliged by the local labour inspection service to return the workers to the employer because the latter had failed to comply with local statutory requirements for the posting of temporary workers.

The second group of judgments was delivered in cases where the plaintiffs claimed that they had received less money than the remuneration agreed. The temporary work agencies sent social assistants and farmworkers to Belgium and France and subsequently deducted from their salaries significant amounts for utilities or accommodation, which they had allegedly paid on behalf of the workers. In this group of lawsuits, the court applied the mandatory provision of the Labour Code, which exhaustively lists all the types of direct deductions that an employer is entitled to make. No deductions for 'utility/accommodation charges' are allowed. The court ruled in favour of the plaintiffs. These cases reveal a more refined form of abuse on the part of the employers posting workers. Few solutions to this problem have been found. Posted workers in agriculture and workers providing care services to private individuals are probably frequently affected by abuse in the form of partial payment of their agreed earnings on account of deductions for accommodation. It can be reasonably assumed that most put up with the deductions when they are not excessive or when the living conditions are not completely intolerable.

The third group of judgments concerns the payment of the difference between the salary agreed and the remuneration to be paid for the period of the posting by law. The undercutting of workers' pay is the result of the failure of employers to agree in advance on the minimum terms and conditions of work for the period of posting, taking into account the minimum pay rates applicable in that EU Member State. These cases require the court to first of all establish, on the basis of the evidence presented by plaintiffs, whether the worker had in fact been posted to another country, and second, to determine whether the length of the posting exceeded 30 calendar days. Third, the court has to determine the actual salary due to the worker. All courts uphold the claims filed by workers up to the amounts for which the latter can furnish evidence. In three cases, the court requested expert witness input from the accountants to ascertain the difference between the Bulgarian salaries paid and those due on the basis of the number of hours worked in line with the applicable Belgian hourly rate for the occupation in question. In two other cases, the court found that instead of the gross salary increase required under the Labour Code for the time of the posting, the employer lumped together the Bulgarian salary with the TAS allowance. This meant that the court had to interpret Article 121(5) LC. It held that the TAS expenses should be excluded when determining whether the salary agreed corresponds to the minimum payment rate in the host Member State.

In one of the judgments, the court noted that according to Judgment C-396/13 *Sähköalojen ammattiliitto* of the CJEU, subsistence expenses are part of the remuneration due in the host Member State within the meaning of the Directive. However, Directive 96/71/EC does not prohibit the court from applying the provisions laid down in national law, if they are more favourable to the posted worker. The court held that a more favourable rule could be found in Article 121(5) LC. This interpretation is correct. However, national courts do not apply the rule consistently in favour of plaintiffs. In three other lawsuits, the respondent objected that the Bulgarian salary and subsistence allowance were not below the minimum wage in Portugal. These judgments illustrate a body of case law fraught with controversy. The judgment of the regional court in a larger city (Varna) awarded the full amount demanded, excluding the amount of the subsistence allowance. In contrast, the regional court in a smaller town (Veliko Tarnovo), deducted the TAS allowance from the amount of the 'Portuguese' salaries claimed. In both cases, the plaintiffs obtained a decent amount of money from their respective employers. However, the cases reveal a certain inconsistency in interpretation by courts.

The small number of lawsuits filed by Bulgarian workers seeking remuneration that is at least equal to the minimum rates paid in the host countries confirms a conclusion set out in one of the annual reports by the Labour Inspection, notably that the Bulgarian posted workers are generally satisfied when they have an opportunity to earn more money than they would for equivalent work in Bulgaria. The salaries earned in most occupations in Bulgaria are significantly lower than those in nearly all other EU Member States. Therefore, even when Bulgarians are paid at rates significantly lower than the minimum applicable in their respective host countries, they invariably receive more than their colleagues in Bulgaria. When accepting a salary for the period of the posting, the workers consider the standard of living in Bulgaria, as opposed to the one in the host country where they will reside temporarily without their families. This makes them less

sensitive to the legal problem of how the employer calculates their remuneration for the time of the posting to the specific country. Posted workers themselves are rarely aware of the way in which their remuneration is determined and whether it complies with the applicable law.

The fourth group of lawsuits shows that the national courts are not fully supportive of the efforts to overcome this attitude. Eight judgments delivered by Sofia Regional Court in 2014 concern outbound posting to Poland. A Bulgarian undertaking posted different categories of personnel for welding and installation works to be provided to a Polish undertaking constructing a gas pipeline. The plaintiffs filed lawsuits seeking restitution of unpaid salaries and TAS allowance. They submitted sufficient evidence and the claims were well founded. The salaries agreed were higher than the average wage in Bulgaria, and the plaintiffs themselves did not argue that their salaries had been determined in line with the minimum hourly rates for the same or similar work applicable in Poland. The problem was that the Court failed to explore this issue of its own motion. It did not request an opinion from the expert witnesses on whether the salaries were in line with the minimum Polish pay rates for the work in question, which would have allowed it to compare these rates to the salaries indicated in the plaintiffs' employment contracts.

The obligation to fix the period of the posting in the framework of the provision of services in another EU Member State in advance, and a salary that is equal to at least the minimum rates payable for the same or similar work in the host country, is imperative. Agreeing to a salary that is lower than the local minimum even by one cent invalidates the agreement. The Court has a duty to ensure that employment agreements are valid on an *ex officio* basis and, where a clause is found to be invalid or unenforceable, replace it by one that is valid and enforceable. The judgments delivered in the cases at hand show that the Court failed in its duty. This is not a random omission but a systemic deficiency of national case law in legal disputes related to posting. In none of the judgments in question did the Court seek to obtain, of its own motion, information about the minimum pay rates in the host countries in order to compare these to the salaries agreed between the posted workers and their employers.

The fifth group of judgments concerns cases of non-payment and non-fulfilment of the obligation to agree on the amount of the salary to be paid during the period of the posting as provided for in Article 121(3) LC. It is unclear whether this is the result of ignorance or reluctance to pay a higher salary to posted workers. The situations was further complicated by the fact that after the return of posted workers, employers disappeared without paying. As the respondents could not be summoned, the judgments were delivered *in absentia*. The claims were adjudicated in favour of the plaintiffs up to the amounts proven, based on the employment contracts submitted, without the Court making enquiries to ascertain the minimum rates of pay in the host country.

3.2. Other labour rights

Seven individual lawsuits were filed against the same respondent, which hired fruit and vegetable pickers under permanent contracts, specifying that the workers would

be paid the minimum Bulgarian wage. The workers were then posted to farms in Portugal. For the duration of their postings none of the workers used their paid annual leave. Following their dismissal, they returned to Bulgaria and filed lawsuits seeking compensation for the unused paid annual leave.

In this case, a problem arises from the very nature of industrial relations in the case of posting within the framework of the provision of services. Posted workers have the same right to leave as all other workers. However, there is no practice in the outbound posting to interrupt the posting period with paid annual leave. Providing paid leave is not necessarily feasible for the employer posting the worker, and posted workers are also very often reluctant to use paid leave because, unless the posting period is longer than one year, they have to cover the cost of a return ticket to Bulgaria out of their own pocket.

Judgments also clearly indicate that the most serious problems occur in the case of workers posted by the temporary work agencies. They are unable to ensure that the workers use the paid leave they are entitled to in practical terms because the workers provide services in another country. There are no barriers that prevent them from negotiating the terms and conditions for the use of paid leave by posted workers with the enterprises using their services; however, this is not done in practice. Clients typically need workers for a fixed period. It is not in their interest to continue to pay workers on holiday. The only redress available in this situation is the paid leave compensation the workers may claim after the contract period has elapsed.

The matter of calculating compensation for unused annual leave has come before Bulgarian courts several times. In this group of cases the court had correctly determined the compensation due in line with the amount of the minimum wage in the host country – the salary received by the worker in the month preceding the termination of the employment contract.

Neither did the court raise the question nor enquire of its own motion whether minimum rates for the work performed by fruit and vegetable pickers in agriculture apply in Portugal. The reference used was the general minimum wage in the host country. But Article 121(4) LC obliges the employer to propose for the duration of the posting the terms and conditions of employment, including the remuneration, that are at minimum the same as those for the same or similar work in the EU Member State where the work is carried out.

Another judgment was delivered in a case in which a worker sought compensation for a work-related accident suffered during a posting. In the lawsuit, no evidence was presented that substantiated the claim that the worker had been posted. The plaintiff was injured in Estonia. The Estonian enterprise reported the accident at work in accordance with local regulations. It used to pay a salary directly to the worker, and his social insurance directly to the Estonian social insurance system. The plaintiff's only evidence regarding the existence of a posting relationship was a contract concluded with a Bulgarian employer prior to the posting. The employer in question (respondent) was not a temporary work agency and it did not have a commercial relationship with the

Estonian undertaking. The Bulgarian court, therefore, correctly established that the case did not involve posting and rejected the worker's claim. The purpose of the employment contract concluded in Bulgaria remained unclear. While the court handled the dispute in line with the Posted Workers Directive, what is striking is the near absence of such cases. There are many disputes concerning accidents at work in Bulgaria, but a near total absence of lawsuits concerning accidents at work suffered in other EU Member States during periods of posting. One could assume that posted workers also suffer in accidents at work; however, there are apparently hidden barriers that dissuade them from asserting their rights against the posting employer.

3.3. TAS allowance

In three of the lawsuits, which concern disputes concerning salaries between temporary employment agencies and farmworkers posted to France, the claims were expanded to include claims regarding unpaid TAS allowances. The court had correctly distinguished between the TAS allowance, payable under national law for the entire period of the posting, and the salary due. The court found that the allowance must be paid on top of the salary. The employer was sentenced to pay the TAS allowance due.

In another lawsuit, however, the court dismissed a claim for the separate payment of a TAS allowance on top of the salary, giving a different interpretation to Article 121(5) LC. According to the court, the fact that the allowance is not expressly included in the minimum conditions of payment in the host country, which employers have an obligation to negotiate prior to the posting, means that no obligation arises for the employer to pay a TAS allowance if the worker is posted to another Member State in the framework of the provision of services.

Thus, the payment of allowances has triggered an incoherent and controversial set of case law. It is not clear, at least among some judges, whether the rules introduced with a view to transposing Directive 96/71/EC complement the general rules on ordinary business trips within Bulgaria or create a new set of rules on posting within the meaning of the Directive. The latter would mean that posting is governed only by the special provisions laid down in the Labour Code. However, the settled case law in labour disputes rejects this. The judges do not see Article 121(5) LC as excluding the payment of a TAS allowance; according to them, posting is a type of business trip/mission and is governed by the general rules applicable to both, as supplemented by Directive 96/71/EC. However, being practitioners, judges tend to be swayed by fine legal distinctions in interpretation and by their own beliefs. In applying the regulations regarding posted workers' pay laid down in the Labour Code and Directive 96/71/EC, judges are aware that the requirement to abide by host countries' minima benefits the Bulgarian worker, and, in a way comes at the expense of the employer as it is more costly to him or her than paying the worker according to the Bulgarian standards.

This logic gave rise to the idea that it is correct for salaries to be based on the higher rates of pay in the countries of posting, and in these situations, there is no obligation for the employer to pay the TAS allowance for the period of the posting, despite the absence of

an explicit rule to this effect. To those judges it appeared that posted workers were 'being paid twice for the same thing': both a salary and a TAS allowance. This interpretation was contrary to the law. This prompted the lawmaker to seek a certain compromise in the subsequent amendments to the rules on outgoing posted workers (Article 215(2) LC (as discussed in the Introduction) As a result, posted workers within the meaning of Directive 96/71/EC are currently entitled to a travel allowance alone, but not to accommodation and subsistence allowance, unlike workers on a business trip/mission.

3.4. Salaries and TAS allowances for drivers performing international transport services by road in the EU

Fourteen judgments in the transport sector can be seen as examples of contradictory case law; these reveal the only real difficulty that the Bulgarian courts and legal practitioners have with the Posted Workers Directive and national regulations transposing it. First, in nine lawsuits, drivers performing international road transport operations sought payment for the salary owing to them for the time during which they had been engaged in transit transport operations within the EU (from Bulgaria to other EU Member States). The salaries had been paid according to Bulgarian rather than 'host countries'' rates. Some of the plaintiffs also sought compensation for overtime and paid annual leave that had not been used. The applicants referred to posting in their application; however, they failed to submit proof that their 'ordered missions' were in fact posting. Instead, the set of documents submitted to the court contained a 'mission order'. This is not an order on posting the worker to another country *per se*. The order is issued as an element of the statutory procedure for providing an additional sum of money payable to all kinds of travelling staff, including aircraft, seagoing and railway personnel, track and bus drivers and so forth.

Applicants, however, attempted to rely on the similarity in meaning between the words 'business trip' and 'posting', arguing that if business trip orders had been issued to the drivers they had effectively been posted. The situation is not consistent with either a business trip/mission or posting. The specific 'business trip orders' issued in the case of transit haulage operations do not create an obligation for the driver to temporarily change their place of work to another EU Member State, but specify a route and a place of unloading. For these orders to be treated as equal to posting workers within the framework of the provision of services in another EU Member State, the drivers must first of all know which EU Member State they are being posted to. The applications, however, were entirely unclear on this key issue.

The courts had to tackle the question of whether the specific situation of drivers should be regarded as posting. This is the only case that warrants the application of Article 121(3) LC, which drivers providing international haulage services argued conferred rights on them. To make this determination, the court had to consider whether the drivers were permanently travelling, whether they were sent on a business trip abroad to perform work for their employer, or whether they should be placed in the category of posted workers within the meaning of Directive 96/71/EC. This proved to be challenging for most judges.

The court most often refrained from providing a reasoned opinion on the status of drivers performing international transport operations, as their employment contracts clearly specify that the nature of their work is to perform transit transport operations. The average judge clung on to the first correct legal argument, allowing them to admit or dismiss the particular claim and to refrain from engaging in additional consideration of the term 'posting'. When the plaintiffs, in two of the cases, filed claims seeking unpaid amounts based on the 'Bulgarian' salary agreed in the contract, without requesting the application of the minimum rates applicable in another EU Member State (designated as host country as provided for in Article 121(3) LC), the court also refrained from altering the legal grounds for the claim to one seeking compensation in the situation of a posting. It would be reasonable to assume, therefore, that the court did not consider the work of drivers performing international transport operations to constitute posting.

In six judgments, the claim for higher remuneration on the basis of Article 121(3) LC was dismissed. The judgments are correct in terms of their final outcome but they do not include a consideration of the general applicability of Article 121(3) to the dispute at hand. They are based on other motives, which, although correct, are highly formalistic. The plaintiffs argued that they were posted to another EU Member State, but were unable to prove that they met the requirements laid down in Article 121(3), that is, that their assignment abroad lasted for more than 30 days and/or that the host countries established minimum pay rates for truck drivers. In contrast, however, in two other cases the employer was sentenced to pay the higher amounts to the drivers for the transport operations performed.

There are only three cases in which the court held categorically that the provisions of Article 121(3) LC on posting do not apply to international transit transport operations by road and hence dismissed the claims on the grounds that the situation did not constitute posting. It reasoned that the employer did not have any obligation to negotiate a higher pay with the drivers, taking into account the minimum rates applicable in the country of destination, before assigning the transport operation to the driver. The judgments contain an in-depth analysis of posting arrangements by the judges as well as knowledge of the key elements of the current debate at EU level during the revision of Directive 96/71/EC. This being said, the lawsuits filed by drivers pursuant to Article 121(3) LC were part of a 'wave' that soon gathered momentum across Bulgaria. This is the reason the three judgments in question failed to become settled case law. It was hoped that the VKS would settle the matter after one of the judgments was appealed and found to be admissible by the Court. The question that the VKS was asked in the appeal and that it found admissible is important to case law. It concerned one of the additional prerequisites for the application of Article 121(3) and not posting *per se*. The appellant in cassation asked the VKS to answer the question as to whether the requirement for the length of the posting could be considered to exceed 30 calendar days if a transit transport operation to another EU Member State with a length of more than one month is performed through several countries, including countries outside of the EU. Regrettably, the VKS answered in the affirmative without providing convincing arguments. The conclusion is that the legal requirement for the length of posting to another EU Member State to exceed 30 calendar days would be achieved only if the worker did not return to Bulgaria within a period of 30 days or less.

In the end, however, the VKS judgment in question does not have any practical implications because it was issued after Article LC, which specified the minimum period for posting, had already been repealed. According to the rules of the actual Article 121a(4) LC, the period of the posting is irrelevant. Importantly, however, the VKS held that drivers engaged in performing international transport operations must be considered posted workers. The main conclusion is that Directive 96/71/EC excludes from its scope of application seagoing personnel and not travelling staff in principle. This is indeed the case, but it does not negate the fact that posting within the meaning of Directive 96/71/EC requires, as do ordinary business trips/missions, solely a temporary change of the place of work from one EU Member State to another. Temporary work agencies are the only undertakings that may hire workers explicitly for the purpose of posting them to work in another EU Member State. The approach taken by the VKS to the case with the payment due to the drivers engaged in international transport operations by road can be described as surprising. The legal arguments are not sufficiently convincing; at the same time, the judgment is in stark contrast to the efforts of the government and the road haulage sector to defend Bulgaria's position and preserve the country's competitiveness in the intra-EU transport services market.

Concerning the question of whether the special sum of money paid as an allowance to travelling personnel is owed for the time of the trip, all claims were satisfied. These disputes are irrelevant to the issue of posting within the meaning of Directive 96/71/EC. Only in one of the judgments was it held that the TAS allowance should be considered part of the remuneration in the context of the appraisal of whether the remuneration paid to the driver was lower than the minimum rate payable in the country of unloading. In another judgment it was established that the plaintiff's lawyer had failed to differentiate between the allowance payable and the remuneration agreed. In response, the court held that the French legislation governing minimum pay rates is inapplicable to the issue of the TAS allowance owed to Bulgarian drivers performing international transport operations. This case adds to the general picture of confusion that has emerged in recent years with regard to the payment for the work performed by drivers engaged in international transport operations by road within the EU.

4. Fines and coercive administrative measures imposed for infringements of posting rules within the framework of the provision of services

In the court stage of the administrative penal procedure, the court verifies whether the sanctions for administrative infringements have been lawfully imposed. In such cases the courts assess whether proper form was observed and whether any procedural violations occurred. The next step is to assess whether the penalty had been imposed for an actual breach**.** The judgments analysed in this section show how the courts determined whether the Labour Inspection applied, either correctly or incorrectly, the provisions on posting laid down in Article 121(3) LC on imposing penalties on the employers of posted workers. They also shed light on the most prevalent types of infringements by employers. Most lawsuits concern disputes relating to outbound posted workers. The number of cases concerning inbound posted workers from other Member States is small.

4.1. Outbound posted workers

Several groups of infringements can be identified. The most commonly encountered infringement (and most often penalised by the Labour Inspection) is the lack of an agreement signed before the posting providing for working conditions, including payment rates in line with the host country's minimum rates. In some cases, although a formal agreement had been concluded, the Labour Inspection established that the rate of pay had been incorrectly negotiated and/or paid during the period of the posting. Very often in such cases, mandatory instructions were given to the employer about the type of contracts to conclude with posted workers in the future. The prevailing presumption is that the infringement occurred because of the employer's poor knowledge of the legal obligations arising in the context of posting workers.

Mandatory instructions advising compliance with Article 121(4) LC were issued to one temporary work agency. In addition, mandatory instructions in respect of other aspects deriving from Article 121(3) LC, such as the failure to issue posting orders, regardless of the agreement concluded pursuant to Article 121(3) LC, or remedy deficiencies in the content of issued posting orders, have been issued. In other cases, mandatory instructions have been issued in respect of the obligation to apply the locally applicable minimum rate of pay in the host country. In one case, a Bulgarian employer was advised to apply the Bulgarian provision on obtaining mandatory insurance in the case of business trips, although under the legislation of the host Member State the employer was explicitly required to obtain another type of insurance. The employers to whom the mandatory instructions were addressed contested them before the competent administrative courts, refusing to comply with them voluntarily.

The failure to comply with mandatory instructions received from the Labour Inspection in connection with a conducted inspection, mostly concerning non-compliance with Article 121(3) LC, gave rise to a second group of infringements for which penalties that can be described as 'secondary' were imposed. They clearly demonstrate that there are employers who systematically and continually - that is, intentionally - refuse to comply with their obligation to pay their workers a remuneration that is higher than that which they would have received in Bulgaria during the period of the posting, or comply with other rules applicable to posting. This means that they clearly prefer to bear the cost of a lawsuit and the risk of having to pay fines as opposed to paying the higher rates to posted workers.

The Labour Inspection has also encountered other unlawful practices related to posting which can be classified as the third group of irregularities. One example is the failure to obtain the worker's prior written consent to a posting for a period that exceeds 30 calendar days. Other infringements include unpaid night shifts at the host undertaking or overtime work performed by the worker but unreported to the Labour Inspection. Overall, gathering sufficient evidence, qualifying the infringement and imposing a penalty on unlawful employer practices applied to posted workers during the course of performing the work in the host country is generally more difficult for Bulgarian labour inspectors compared to the simple documentary checks conducted to verify whether the employer and the worker have concluded a contract before the

commencement of the posting period. This is the likely reason for the relatively small number of lawsuits.

Regarding the court judgments delivered in lawsuits contesting penalties imposed on employers (the first group of disputes), the highly formalistic approach by courts is prevalent. The judicial examination is limited to whether the Labour Inspection ascertained and proved that the period of posting to another EU Member State exceeds 30 calendar days; whether the worker gave consent to the posting; and whether a written agreement has been concluded providing for more favourable minimum working conditions in accordance with the legislation of the host country. This is even more evident in the judgments concerning disputes over employers' failure to comply with the mandatory instructions received in respect of posting. In these cases, the court looked solely at whether the parties complied with the instructions within the time periods specified. The grounds for issuing this type of mandatory instruction are beyond the scope of judicial review in the administrative proceedings in question. This means that the question of whether the violation alleged and contested in the administrative proceedings actually resulted in a loss for the worker of the salary paid and other terms and conditions of employment during the period of the posting, and hence the lawfulness of the penalty imposed, are not examined.

One judgment delivered by the court of first instance is an isolated example of the judge attempting to consider all the facts and circumstances pertaining to the posting arrangement. A labour inspector found that a Bulgarian citizen was posted by his employer to Germany with an agreement that he would receive payment of the minimum Bulgarian wage plus EUR 52 in daily TAS allowance. According to the Labour Inspection this constitutes an infringement of Article 121(3) LC that demands agreement of a salary that is at least equal to the minimum pay rate for the 'waste management' sector (EUR 8.33 per hour). The judge blatantly disregarded these mandatory provisions, ruling in line with his own understanding of fairness in labour relations. He ignored the fact that the allowance is not an element of the salary, nor is it a substitute payment. He considered that the total amount of the allowance, added to the Bulgarian minimum wage, was higher than the salary that the worker should have been paid according to the labour inspector. In the judgment, he held that there was no breach by arguing that the worker was satisfied with the financial terms of the posting as they were and neither needed nor wanted the Labour Inspection to become involved in his relationship with the employer. This arbitrary judgment was overturned on appeal.

The lack of in-depth understanding – evident from most judgments – of whether the situation which the labour inspector qualified as a posting within the framework of the provision of services in the EU is indeed a clearly identifiable pattern. This is the reason almost all penalties imposed on the employers of drivers performing international transport operations have been confirmed by the courts, unless affected by serious procedural flaws.

In order to defend themselves, employers often contested the opinions of the Labour Inspection on applicable minimum pay rates. The key issue here is the accessibility of official information on applicable minimum pay rates in the different EU Member

States. In several cases, at least at first instance, the court gave credence to the opinion of the Labour Inspection without conducting an independent enquiry. For example, in several judgments the court dismissed the objections raised by employers made on the basis of the information published on the website of the German customs service. However, in a judgment delivered on appeal, the court, in contrast, dismissed the opinion of the Labour Migration Directorate, according to which the website www.zoll.de was a reliable source of information.

In any case, the nature of the proceedings does not require the court to exercise any effort to ascertain the minimum rates of pay and working conditions in the host country. The judge's sole obligation is to make sure that the Labour Inspection provided the information by way of furnishing evidence substantiating the alleged infringement on the part of the employer who posted workers.

The situation is similar in the case of appeals against a coercive administrative measure that requires the employer to agree or pay to the posted worker remuneration that is in line with the minimum pay rates in the host country. A measure imposed on an employer who posted a domestic assistant to Germany was cancelled because the court failed to take into account the pay rates published in English on the website www.zoll.de. The judge decided to rely directly on the German law by introducing a general minimum wage. For this reason, he declared the measure, which required the employer to agree and pay a higher rate for the position in line with the information published on the website of the German customs service (as opposed to the lower general minimum hourly rate applicable in Germany) unlawful, further invalidating the mandatory instructions issued to the employer in question. In another case the judge conducted a check on the Eurostat website and concluded that there is no hourly minimum wage in Denmark. It was further noted in its judgment that the Labour Inspection should have indicated which of Denmark's many sectoral collective agreements it had relied on for the purpose of issuing the instructions. The ascertainment and substantiation of minimum pay rates in the individual EU Member States pose yet another challenge for both the Labour Inspection and Bulgarian administrative judges.

The national courts categorically refrain from exploring in any meaningful detail the applicable labour standards in other EU Member States. This is well illustrated by a lawsuit filed in respect of a penalty imposed on an employer, which according to the Labour Inspection caused a posted worker to sustain a loss through a violation of the mandatory requirement laid down in Bulgarian law for workers to enjoy periods of daily rest. The court did not consider it necessary to ascertain the German minimum standards for rest periods, arguing that they apply solely if more favourable than those to be observed in Bulgaria. In another judgment from the same group, the labour inspector noted that the worker was due additional payment on account of having worked overtime on the basis of rosters drawn up in German by the host undertaking. The court invalidated this decision by arguing that it had not been accompanied by a translation that made it evident which national rules and regulations applied to working hours and overtime.

In some judgments, the court reduced the penalties imposed by the Labour Inspection. A frequently cited argument is that this was the first infringement of the undertaking

and that no evidence had been presented that warranted the imposition of a heavier penalty.

The most disconcerting finding in this part of case law on posted workers arises from a legal issue raised in some employers' defence statements as to whether the provision laid down in Article 121(3) LC may be interpreted as 'non-compliance with a mandatory provision laid down in labour law'. In order to discharge the employer from administrative and penal liability in cases of proven failure to conclude an agreement, some judges concurred with the argument put forth by the respondents that Article 121(3) LC is vague and non-specific. More specifically, the employers argued that Article 121(3) failed to clarify the matters to be agreed with the worker before the posting, which was the reason why they were unable to comply with the provision in question and could not therefore be held liable for an infringement. In some cases, the court therefore found that Article 121(3) of the Labour Code is vague and non-specific, allegedly on account of its failure to specify the exact minimum working conditions in the host country the employer has an obligation to negotiate before the posting. However, there are other judgments that deserve commendation, where the courts have argued that Article 121(3) LC creates an obligation to take positive action, notably to conclude an agreement. It is highly regrettable that the inconsistent case law on this matter has enabled certain employers to evade any administrative sanction.

Unlike civil judges, those sitting on the bench in administrative courts cannot be said to be well versed and capable of correctly interpreting Article 121(3) LC. One judge held that the labour inspector had failed to provide evidence of posting for more than 30 calendar days because the posted worker had in practice provided services for a period of less than one month, disregarding the fact that a non-time-limited employment contract had been concluded for the worker posting to the German undertaking to which services were to be provided, and that the contract was terminated during the probationary period. The judge failed to accord proper significance to the fact that an agreement setting out the minimum terms and conditions must be concluded before posting, and that the length of the posting for which the agreement is concluded (more than 30 calendar days) and not the actual time worked is essential for the appraisal of compliance under Article 121(3) LC. Two other judgments revoking the penalty for the non-conclusion of an agreement pursuant to Article 121(3) LC were delivered with the argument that the Labour Inspection failed to take into account a verbal agreement for payment at the minimum rates applicable in the host country. The court went even further by accepting a contract concluded between a Bulgarian employer and German companies to which workers were posted as evidence of compliance of the obligation provided for in Article 121(3) LC, despite the provision expressly requiring that an agreement be signed between the employer and the posted worker!

4.2. Inbound posted workers

There are two judgments in disputes arising from penalties imposed on two Bulgarian undertakings that hosted workers posted by a service provider from another EU Member State.

In the first case, the Labour Inspection imposed a penalty on a Bulgarian undertaking for failing to declare 96 posted workers from Romania to the Bulgarian Employment Agency. In its judgment, the court emphasised that in view of the nature of the work (geodesic surveying), the number of posted workers and the degree to which the posting arrangements presented a threat to regulated relations, the infringement constituted a serious violation of the public interest. However, the penalty was revoked because of serious violations of procedural law in the issuing of the penalty, notably the failure to specify the date on which the infringement occurred and a discrepancy between the description of the infringement and its legal classification. This indirectly shows that the controls performed by regional labour inspection services very rarely deal with cases of incoming posted workers. The serious error in the legal classification of the infringement of a mandatory provision of the Employment Promotion Act occurred on account of the labour inspector not having sufficient knowledge and practical experience in handling cases of incoming posted workers. The correct classification should have been an infringement of the rules addressed to the undertakings that accept posted workers from another EU Member state. But the labour inspector classified this infringement as a breach of the rules about the registration of the temporary work agencies instead.

The second case involved a Bulgarian undertaking owned by a Czech parent company, which did not submit the requisite notification to the employment agency in respect of a worker posted by the parent company. The court upheld the penalty.

5. Social contributions in the case of outbound posted workers

In this group of lawsuits under administrative law, the employers of outbound posted workers contested penalties issued by the National Revenue Agency.

The decisions in question concern social security contributions to be paid for the period during which the worker was posted. The employers had paid less than the real amount due because they had based their calculation on the wrong income base. The substantive issue in the lawsuits in question is the calculated income of posted workers for the purpose of paying social security contributions**.**

To what extent did administrative judges specialising in tax and social insurance matters grasp the specificities of the posting procedure and the payment of posted workers? With regard to posting employers acting in the capacity of insurers, the judgments do not contain any surprises. In most cases, employers attempted to avoid paying the social security contributions due and some directly violated Article 6a of the Social Security Code (SSC). For example, in the case of seasonal Bulgarian forestry workers posted to Sweden, the social insurance contributions had been calculated and paid on the basis of the insurance threshold for this type of work payable in Bulgaria. The employer did not take into account that until the end of 2011 Article 6a SSC expressly prohibited this and subsequently only allowed it when no corresponding minimum pay rates for the work in question exist in the host country. This type of infringement shows that the obligation to agree the payment of at least the minimum pay rate to the posted workers for the period of posting in the host state was probably also infringed.

Other employers attempted to circumvent Article 6a SSC. For the period of a worker's posting, they issued a series of individual posting orders, each for a period of less than 30 calendar days and bearing a date following the date of expiry of the previous order by a day or two. The aim was to create an impression, for the benefit of Bulgarian control authorities, of a short-term posting, which would have allowed the payment and social insurance not to be aligned to the minimum payment rates due in the host country. The NRA and the Bulgarian courts exposed this fraudulent scheme. Most judges relied on the rationale of the Decision of the Administrative Commission for the Coordination of Social Security Systems, dated 12 June 2009, concerning the interpretation of Article 12 of Regulation (EC) No 883/2004, and more specifically the argument set out in Paragraph 3(b) according to which brief interruption of the worker's activities with the undertaking in the state of employment, whatever the reason, shall not constitute an interruption of the posting period. Consecutive postings of this nature should be treated as constituting one single extended posting within the meaning of Article 121(3) LC. Other courts relied on factual evidence for the duration of the posting. They did this by ascertaining whether the posted worker returned to Bulgaria on the dates between the consecutive posting orders.

In addition to establishing the actual length of the posting, in this group of judgments the administrative court was not required to interpret the concept of outbound posted workers. The actual labour relations at the heart of the social insurance disputes arose out of the concept of unambiguous posting of workers within the framework of the provision of services in another EU Member State. In one isolated case the judge did not fully grasp the concept as envisaged in the LC and offered his own interpretation of Directive 96/71/EC. Referring to Article 3(1), second indent, of the Directive, the judge concluded that posting within the framework of the provision of services is solely possible in construction activities. The judgment was overturned on appeal.

The court encountered greater difficulties in interpreting Article 6a SSC. There was no uniform understanding among judges of the provision according to which social insurance contributions are payable on an income that cannot be lower than the minimum pay rates applicable in the host country. There were conflicting opinions on the reference figure to be used when no minimum pay rate for the type of work performed by the posted worker existed in the host country. Thus, according to a judgment, the NRA had correctly applied the lowest hourly pay rate applicable in Germany during the period of the posting. It applied to laundry services and was chosen because the national authorities could not establish a minimum hourly pay rate for the posted construction workers. In other judgments delivered in cases of worker postings to Germany (in periods before the introduction of a general minimum wage in the country) it is noted that in the absence of a minimum local pay rate for a specific occupation, other minimum local pay rates for labour that requires lower skill should be disregarded. This controversial case law is largely because the terminology used in Article 6a SSC differs from the wording of Article 121(3) LC, which articulates more clearly the requirement set forth on the basis of the transposition of Directive 96/71/EC to ensure that posted workers receive a payment that is not less than that payable to workers directly hired in the host country to do the same work.

All decisions issued by the NRA were upheld in the lawsuits brought against them before the competent administrative courts. One single decision was revoked because of a breach of procedural law. This is an excellent testament to the standard of work of the NRA and the qualifications of its staff, including in areas such as the payment of social insurance contributions for posted workers.

Conclusion

The overview of case law reveals three common infringements on the part of Bulgarian employers posting workers**.** The first is the failure to comply with the obligation to conclude before the posting an agreement with the posted worker setting out the minimum terms and conditions of employment and a pay rate that is at least as favourable as that applicable to the workers executing the same or similar work in the host EU Member State. The second is the non-payment or partial payment of the salary due for the period of the posting. The third group of infringements involves cases of non-compliance with the rules for the calculation of the basic earnings for the purpose of paying social security contributions.

Overall, the judgments issued by judges in civil and administrative lawsuits contributed to the sanctioning of these infringements and the rectifying of their unlawful consequences. Labour Inspection controls are carried out well but are primarily focused on the remuneration. There have been very few cases of accidents at work and abuse of other labour rights of posted workers. Various unlawful practices, which posted Bulgarian workers may become the victim of in host countries, and accidents at work that occurred in those countries, are probably easier to conceal, including through exerting pressure on the victims. However, certain aspects of the application of posting rules have given rise to a body of case law that is fraught with controversy.

The assumption that first instance judges encounter greater difficulties compared to judges from superior courts does not hold true. The amendments to applicable legislation that entered into force on 30 December 2016 have rendered the contradictory case law on the length of the posting period (30 calendar days) irrelevant. With the adoption of the new Article 215(2) LC, the lack of clarity as to whether TAS allowance is due in the case of posting has also been addressed. The inconsistent case law revealing a poor understanding of Directive 96/71/EC, which is expected to be addressed soon, is the result of the approach taken by some administrative judges to revoke penalties imposed by the Labour Inspection by arguing that Article 121 (3) LC did not specify which minimum standards for employment laid down in the national law of the host EU Member State employers were to be taken into account.

The greatest emphasis should be placed on the need to overcome the reluctance of most judges to initiate enquiries in order to establish the minimum pay rates and other terms and conditions of work for the occupation in question applicable in host EU Member States, and apply them in settling the disputes before them. In some cases, a lack of clarity has been ascertained in identifying the relevant international source of information. Less frequently, the court has been asked to interpret the concept of

posting workers. However, where such interpretations were given, judges generally did not encounter difficulties either with the characteristics of posting within the meaning of Directive 96/71/EC or with identifying the cases of incoming and outgoing posting of workers.

The few cases of inbound posted workers from other EU Member States created a measure of difficulty for Bulgarian labour inspectors on account of their lack of experience due to the insignificant number of the incoming posted workers.

Finally, the only problem identified that is specific to Bulgaria is the dispute arising from Directive 96/71/EC as to whether the Directive applies to the drivers engaged in performing international transit transport operations by road within the EU.

References

Iliev M (2016) Komentar na promenite v rejima na komandirovane I izprachtane na rabotnizi I slujiteli v ramkite na predostavianeto na uslugi, vavadeni sas zakona za izmenenie I dopalnenie na Kodeksa na truda obn DV, br.105 ot 30.12.2016. www.tita.bg/page/468

Iliev M. (2017) Novata pravna uredba na komandirovaneto I izprashtaneto na rabotnizi I slujiteli v ramkite na predostaviane na uslugi, Trud I parvo, 2, 1-32.

Mrachkov V. (2014) Social security law, 6th ed., Sofia, Sibi.

Mrachkov V. (2018) Labour law, 10th ed., Sofia, Sibi.

Mrachkov V., Sredkova K. and Vasilev A. (2016) Komantar na Kodeksa na Truda, 12th ed., Sofia, Sibi.

Salchev N. (2017) Komandirovane v ramkite na predostaviane na uslugi ot balgarski rabotodateli, Norma, 3, 25-55. www.norma.bg

Chapter 2
Posting of workers before Danish courts[1]

Natalie Videbaek Munkholm

Introduction

Denmark is a Scandinavian country of 5.8 million inhabitants. It is a constitutional monarchy, and state powers are in the Constitution of Denmark, 'Grundloven', Section 3, divided between the parliament (legislative), government (executive), and the courts (judiciary). The rule of law is a fundamental principle in the Danish legal system (World Justice Project 2019). Denmark is one of the richest countries in the world, and presumably also among the happiest (World Happiness Report 2018).

Denmark receives an increasing number of posted workers.[2] In 2011, 14,278 posted workers from the EU/EEC were registered in the Danish Register of Foreign Service Providers (RUT); by 2018 the number had risen to 26,780 from the 31 EU/EEC countries (Jobindsats.dk). According to 2018 data, most posted workers are from Poland (6,926), Germany (4,681), Lithuania (2,419), Romania (1,538), Italy (1,475), Slovakia (997) and Great Britain (928). LLLarge proportions of posted workers from neighbouring countries live in their home country while working in Denmark (DA 2018: 14).

The main political debate regarding posting of workers concerns posting to Denmark, and in particular the protection of the Danish method of negotiating pay and working conditions by way of negotiating collective agreements supported by industrial action. The courts support this by testing the lawfulness of conflicts towards posting entities under the Danish legal framework on the lawfulness of collective action, and since 2008, according to principles developed by the Court of Justice of the European Union (CJEU) in the *Laval* and *Viking* cases on collective action as a restriction on the free movement of services and right of establishment.

The political debate has also been concerned with how to combat social dumping (see below) by ensuring Danish pay and working conditions, including a safe working environment, for workers performing work in Denmark. These political aims have to a large extent been reflected in case law. Issues brought before the courts have included: the duty for posting entities to register in Denmark by way of a simple declaration in the RUT; assessment of whether the situation constitutes a genuine posting situation,

2. The statistics count posted workers per se as well as posted self-employed workers. Posted self-employed workers are companies that are providing services without posting employees, so they are not posted workers in the understanding of the Posted Workers Directive.

to counteract circumvention of collective agreements in force at the receiving entity by constructing fake posting situations; and breaches of provisions of the occupational health and safety regulations for workers. The majority of cases before national courts relate to breach of collective agreement by underpayment of posted workers by the posting entities. These types of cases align closely with the political debate on counteracting social dumping by control and enforcement.

No cases have been referred to the CJEU for a preliminary ruling, as the courts have found the EU law sufficiently clear on the issues reviewed.

The Danish case law on posted workers is relatively limited compared to that of other Member States.

1. Legal framework on posting of workers and key political debates in Denmark

1.1. Danish legal framework for pay and working conditions for employees

Pay and working conditions in Denmark are determined primarily by way of negotiated collective agreements. Denmark has a unionisation rate of 67.7% (Ibsen et al. 2014) and a collective agreement coverage of 83%, 74% in the private sector and 100% in the public sector (Ravn 2018). Collective agreements are binding (Hasselbalch 2012: 44)[3] for signatories and their members (Due et al. 2010: 81). Legislation is passed sparingly to supplement the agreements, mainly in relation to certain groups of workers, in the area of social security, when negotiation and conflict have been exhausted, or to implement EU Directives. The industrial relations system of negotiating pay and working conditions by way of binding collective agreements, supported by a strong system of enforcement, is an essential element in the Danish socioeconomic set up[4] (Hasselbalch 2012: 23, Bruun 1992: 464, Hasselbalch 2002, Fahlbeck 2002, Kristiansen 2015b). Supplementing legislation is provided in order to implement rights and obligations in EU Directives. Parliament supports the model *inter alia* by instituting tripartite negotiations before passing legislation in any area affecting the labour market.[5]

In Denmark, industrial relations, collective agreements and trade union activities are to a large extent self-regulating. The rules regulating relations between trade unions have their legal basis in collective agreements and case law. Most notably the principles promoted in the General Agreement between FH - the Danish Trade Union Confederation (formerly LO) and DA - the Danish Employers' Confederation. These principles, which are reflected also in other General Agreements, along with the case law developed by the Labour Court and industrial arbitration, are key regulators of industrial relations in Denmark. A system for dialogue-based dispute resolution is set

3. Provisions can only be amended at plant level agreements by a mandate to do so in the collective agreement or to the benefit of the worker.
4. That is, the Danish or Nordic model.
5. Dialogue is current and continuous, and recent results are agreements on continued training and on apprenticeships (Ministry of Employment press releases).

out in Normen – Rules for Handling Industrial Disputes, agreed to by DA and LO (now FH) (LO and DA 2006). If a dispute is not settled by way of dialogue and negotiation involving the social partners at various levels of negotiation, in the end it is settled by judicial review by the Labour Court or industrial arbitration, as set out in the Act on a Labour Court and Industrial Arbitration, (*Lov om arbejdsretten og faglig voldgift)*, Section 9. The Labour Court is a specialised court with judges appointed among the Supreme Court Judges. Industrial arbitration is a judicial procedure by arbitration headed by appointed Supreme Court Judges or similar experts, assisted by appointed lay judges. The Labour Court Act furthermore in Section 12 provides a legal basis for the Labour Court to issue penalties for breach of agreement, including breach of principles developed by case law.

Statutory legislation does not oblige employers to be covered by collective agreements, and there is no system for making agreements universally binding. Collective agreements are binding only on the signatories and their members. An employer is bound by a collective agreement *either* by way of membership of an employer's association that is signatory to a collective agreement covering the work performed, *or* by way of concluding a collective agreement directly with a trade union. Coverage is therefore left entirely to the social partners by initiating negotiation with and industrial action against employers. When covered by a collective agreement, the employer becomes part of the general industrial relations system, where disputes must be settled by way of the procedures agreed to, and in the end by judicial review.

While pay and working conditions are settled by collective agreement, statutory acts regulate occupational health and safety, the Act on Occupational Health and Safety, (*Arbejdsmiljøloven*), the Act on Annual Leave, (*Ferieloven*), and the Act on Working Time, (*Arbejdstidsloven*), as well as issues relating to equal treatment and non-discrimination, the Act on Equal Treatment between Men and Women in Employment, (*Ligebehandlingsloven*), the Act on Equal Pay between Men and Women, (*Ligelønsloven*) and the Act on Non-Discrimination in Employment, (*Forskelsbehandlingsloven*). The general rules on occupational health and safety are enforced by the Danish Working Environment Authority (DWEA), whereas certain rules on working time, the right to annual leave, as well as the rules on equal treatment on non-discrimination, are enforced by the individual worker against the employer and reviewed by the ordinary courts.

1.2. Danish legal framework for posted workers

The statutory framework for posted workers is the Posting of Workers Act, (*Udstationeringsloven*), which implemented the Posted Workers Directive in 1999, with later amendments.[6] The Posting of Workers Act is supplemented by more detailed regulation in a number of Executive Orders, primarily providing the framework for controlling, monitoring and enforcing the rules on posting to Denmark.

6. The Act was amended many times, last time in 2016 to implement the Enforcement Directive.

Section 5 in the Posting of Workers Act stipulates that the following statutory acts apply to posted workers:

a) Statutory Act on Occupational Health and Safety
b) Statutory Act on Equal Treatment of Men and Women
c) Statutory Act on Equal Pay between Men and Women
d) Statutory Act on White Collar Workers, (*Funktionærloven*), Section 7 regarding paid maternity leave
e) Statutory Act on Non-discrimination
f) Statutory Act on Working Time
g) Statutory Act on Temporary Agency Workers, (*Vikarloven*), regardless of regulation in the home country.

Furthermore, Section 6 stipulates that in situations where the home country's legislation on annual paid leave is less favourable for the employee, the posting entity must provide the rights in:

h) Statutory Act on Holidays Sections 7, 23 and 24[7] on accrual of holiday pay for up to five weeks per year.

Remuneration, including overtime payment, special payment for leaves of absence or days off, supplementing occupational pensions, additional paid holiday days, is settled by way of collective agreement.

In Denmark, industrial action with a view to force a party to sign a collective agreement is lawful, subject to certain formal and material requirements. Industrial action can be activated by workers and employers alike as part of the negotiation process. The voluntary system of pursuing collective agreement by social partners and not by statutory act applies to any employer, domestic and posting entities alike. The formal and material lawfulness of the industrial action is assessed by the Labour Court, and based on legal principles developed by case law over a century. Specifically in the situation of posting, according to Section 6a of the Posted Workers Act, industrial action is only lawful in support of collective agreements which have been concluded by the most representative employers' and worker's associations at national level and which are applied throughout national territory. This provision is a result of the CJEU ruling, C-341-05 *Laval and Partnerei.*

According to the Posting of Workers Act Section 13, the posting entity can have complaints regarding the lawfulness of collective action, or disputes concerning collective agreements assessed by the Labour Court or industrial arbitration.

7. This will be Sections 5 and 16-19 in the new Statutory Act on Holidays, in force from 1 September 2020. Only the section numbers change, the content referred to is the same.

The proportion of (all) foreign workers performing work in Denmark covered by a collective agreement is almost as high as the proportion of Danish workers covered by a collective agreement (DA Report 2018: 18), that is 67% of non-Danish workers versus 74% of all workers in private employment in Denmark.

1.2.1. Social dumping

The most significant public debate in Denmark regarding the free movement of services and workers concerns the issue of social dumping (*Finansudvalget* 2012). There is no universal or even official definition of the term. A report from the 2012 governmental tripartite committee on social dumping explains (*Finansudvalget* 2012: 14) that it often refers to situations where posted workers in Denmark are provided with pay and working conditions below Danish standards, meaning standards commonly provided by collective agreements. Also, the term often refers to situations where foreign entities carry out work in Denmark without adhering to Danish legislation, for example where taxes, occupational health and safety, social security and residency and working permits are concerned (*Finansudvalget* 2012: 15). These phenomena are viewed as potentially undermining the Danish labour market. Aspects of social dumping can arise among domestic or foreign employers, for example domestic employers and undeclared work. In relation to posting, the issue can concern pay and working conditions for the posted workers. Additionally, this potentially creates unfair competition terms for Danish companies if competing against posting entities who are not providing pay and working conditions at the same level as the Danish companies. These elements impose a certain level of costs on Danish companies, and it is considered unfair competition if the posting entities are able to sidestep Danish legislation and/or avoid being covered by collective agreements.

The 1999 Posting of Workers Act had the sole purpose of implementing the Posted Workers Directive. The pre-existing system of collective bargaining with posting entities was upheld as the preferred mechanism to ensure pay and working conditions to posted workers. The main challenge quickly became how to ensure that posting entities operating in Denmark could be met by a demand of agreement and controlled by the authorities for adhering to Danish legislation. Another important issue was that of enforcing provisions in collective agreements in cases of breach.

1.2.2. First judicial review of a posting of workers situation under the Posting of Workers Act

In 2000, the first significant case regarding posted workers to Denmark assessed the lawfulness of a conflict aimed at German train personnel working on trains while in Denmark (AR2000.455). The Labour Court in the ruling confirmed that the lawfulness of industrial action against posting entities in Denmark would be assessed according to the general principles for lawfulness of conflicts developed in Danish labour law.

1.2.3. Laval ruling – access to negotiations on pay and working conditions

The CJEU ruling of *Laval*[8] set out certain criteria for collective action not to constitute a barrier to the free movement of services within the EU. After the ruling of *Laval*, the debate became about how to ensure that collective action against posting entities to Denmark could continue to be lawful under EU law in light of the new criteria.

The government established a tripartite committee to look into amending the Posting of Workers Act. The committee suggested establishing three criteria for lawful action against posting entities, the new Section 6a(1) and (2):

1) the posting entity must be provided in advance with full access to the relevant provisions on pay that are the subject of negotiation and conflict;
2) those provisions must be sufficiently clear; and
3) the provisions must be part of a collective agreement applicable in all of Denmark and concluded by the most representative social partners in Denmark.

The Posting of Workers Act was amended in order to align the Danish requirements for lawful action against posting entities with the CJEU ruling. The amendment was the result of tripartite negotiations involving the social partners, and the response from the majority of the social partners was positive.[9] The Labour Court was made responsible for assessing whether the conditions in Section 6a for lawful collective action against posting entities have been met.

1.2.4. Controlling posting entities

At the same time in 2008, a separate significant issue emerged in the public discourse about how to control posting entities that provide services in Denmark. This debate had its origin in the enlargement of the EU to include central and eastern European (CEE) countries in 2004. Before 2008, the authorities had no reliable information on posting entities and their employees. The authorities could not efficiently control the posting entities' compliance with Danish regulation on occupational health and safety at workplaces or payment of taxes. Further, Denmark could not comply with the obligation to ensure that posted workers are provided with conditions for pay and work as stated in the Posted Workers Directive Article 3(1), and that appropriate means are available to employees and their representatives in the case of non-compliance as set out in Article 5.

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8. A Riga-based construction company, Laval, provided services in Sweden and was met with demands to sign a collective agreement for the posted workers, followed by industrial action. The CJEU ruled that the right to engage in industrial action is a fundamental right. Industrial action can be a restriction to the free movement of services. The restriction was not justified in the Laval case because the salaries were negotiated at the place of work on a case-by-case basis and minimum rates of pay were not determined in advance, giving uncertainty for posting entities.

9. The Employment Committee, Consultation report concerning amendment to the Posting of Workers Act, *Arbejdsmarkedsudvalget, L 36 – Bilag 1, Offentligt, Notat, Høringsnotat ang. Lovforslag om ændring af udstationeringsloven,* J.nr. 2008-000705, 6 October 2008.

The debate resulted in a political agreement to strengthen the supervision and control of posting entities. The agreement resulted in development of the Posting of Workers Act to actively ensure control of foreign service providers and offer additional protection against social dumping. In 2009 the Register of Foreign Service Providers (RUT) was introduced in an amendment to the Posted Workers Act and a new Executive Order.[10] A foreign service provider posting workers to Denmark in the framework of posting must register a list of information electronically by way of simple declaration with the RUT. Incorrect or lack of registration is sanctioned by a fine. The registration enables the DWEA to control foreign companies performing work in Denmark with regards to adherence to applicable rules on occupational health and safety and tax. Social partners have access to certain information about the posting entities, the posted workers and their place of performing work as a basis for initiating negotiations of salary and working conditions for the posted workers.

In 2011, Parliament again focused on controlling posting entities in order to counteract social dumping. A ministerial working group to counteract social dumping was commissioned and tasked with proposing new initiatives to combat social dumping. Within the limits of Danish and EU law, this induces foreign entities posting workers to Denmark to provide Danish pay and working conditions. The work resulted in a 200-page report (*Finansudvalget* 2012). The duty to register was further strengthened, and information about RUT registration must be provided to the Danish receiving entity. The receiving entity, company or private contractor, must report to the DWEA if a posting entity has not provided documentation for registration. Basic registered information is public, and trade unions, which have a collective agreement at the receiving entity, can access further information (Amendment Act No. 509 2010).

The duty to register was also extended to self-employed workers providing services in Denmark. Parliament viewed the purpose of ensuring the occupational health and safety of the self-employed workers to be a consideration of public health, and thus fall under the requirements of Article 16(3) of Directive 2006/123, the Services Directive (L509 2010). And this was considered in line with the CJEU ruling C-557/10 *Commission v Belgium* (Ekman et al 2014: 220).

In 2016, the duty to register was extended to all foreign entities providing services in Denmark by performing work but not fulfilling the definition of posting workers. This category was introduced as a consequence of the clarification of the definition of a posted worker in the Enforcement Directive, and the amendments to the Posting of Workers Act implementing the Enforcement Directive. Foreign entities providing services by performing work in Denmark, who are not a genuine establishment in the country of establishment, must also register. The duty of foreign companies to register is fulfilled when the information has been supplied. There are no special formal or material requirements for registering. The duty to register now applies to all types of foreign entities providing services in Denmark, divided into three categories in Section 1(1), (2) and (4):

10. The Executive Order has since been amended a few times, most recently in June 2019.

1) entities posting workers to Denmark as defined in Section 4, which is in accordance with the Posted Workers Directive and the Enforcement Directive;
2) entities providing services in Denmark, but without fulfilling the conditions for posting workers in Section 4; and
3) where a service is provided by performing work in Denmark by a foreign self-employed company, which does not post workers to Denmark.

The duty to register varies for each category of foreign company. The rest of this chapter concerns only entities posting workers to Denmark, fulfilling the definition of posting in accordance with the Posted Workers Directive and the Enforcement Directive, as in 1) above.

Fines can be imposed if the posting entity fails to give holidays including pay, fails to register or gives wrongful or inadequate information upon registration, or fails to provide documentation to the receiving entity.[11] Fines are imposed on the receiving entity for failing to report to the DWEA, if a subcontracting posting entity has not provided proof of registration.

A number of Executive Orders have been issued concerning the RUT (Ministry of Employment 2019, 2017 (several) and 2013). The supervising entities (DWEA, the Police, and the Ministry of Taxation) co-ordinate and co-operate with regards to control of posting entities' adherence to national regulation, and the duties to register.

1.2.5. Transposition of the Enforcement Directive

The Enforcement Directive was implemented in July 2016 *inter alia* by launching a new webpage workplacedenmark.dk. This gives foreign service providers and posted workers easy access to information on the Danish labour market and the system of negotiating pay and working conditions. Provisions relating to working conditions, occupational health and safety, taxes and VAT, and regulations on posting were also amended. In the Posting of Workers Act the provisions concerning genuine establishment of the posting entity in the home country was clarified, and a system of co-operation between the supervising entities in Denmark and the home countries of posting entities was introduced (Amendment Act 626 2016). Before this, the authorities did not test the genuine establishment of the posting entity in the home country. Instead the court tested the reality of the posting contract based on the contract and the reality of the working situation in Denmark. If a contract was in reality not a posting contract, the situation did not constitute posting but was instead hiring-in workers to the receiving entity.

11. Fines have so far been DKK 10,000 (EUR 1,333) for breach of these duties.

2. Overview and evaluation of the national case law on posting (since 2004)

The survey is based on case law found via searches in a number of databases: the research database on labour law '*Arbejdsretsportalen*' (Arbejdsretsportalen.dk); the database on published rulings from ordinary courts (Karnov.dk); the Labour Court webpage publishing rulings from the Labour Court and industrial arbitration (Arbejdsretten.dk); and the DWEA appeals board database '*Arbejdsmiljøklagenævnet*' (ast.dk). The search revealed that disputes concerning collective agreements and industrial action have been subject to judicial review in 14 published rulings from the Labour Court (between 2000 and 2019), and 34 published industrial arbitration rulings (available only between 2010 and 2019). Some uncertainty exists as to whether some industrial arbitration rulings concern posting, as some rulings are not very specific on the factual circumstances. The survey includes only rulings where the wording, the factual circumstances or the parties indicate that this is a situation of posting. From the ordinary courts the survey includes three illustrative examples of disputes heard concerning occupational health and safety, as by far most cases are resolved in the administrative appeals process for domestic as well as for posting entities. Finally, one ordinary court case assesses the lawfulness of the RUT in light of EU law. The overview will be organised under the following thematic headings:

1. Lawfulness of collective action and choice of law (6)
2. General issues of validity and binding nature of agreement (5)
3. Genuine posting situation, liability for receiving entity (9)
4. Breach of agreement: remuneration and wages including questions on underpayment of non-unionised workers, calculations of estimated number of workers and working hours, documentation for and classification of pension payments in the country of origin (26)
5. Breach of agreement: procedural (2)
6. Occupational health and safety (3)
7. Formal requirements – registration in the RUT (3) (and changed Executive Order in June 2019 not giving public access to place of delivering service).

Most of the situations concern workers in the construction industry and groundwork, and a few concern the transportation sector (road, rail and air) and the agricultural and plant nurseries sector. The cases in the construction sector are primarily to do with building construction and include painting, general construction, bricklaying, electric installations and roofing. Some cases concern a high numbers of workers, such as the *Solesi* ruling (AR2015.0254), which resulted in a fine for underpayment of an estimated 130 posted workers. The cases concern posting entities from all across the EU, with the majority originating in eastern Europe.

No cases have been referred to the CJEU for a preliminary ruling. Requests have been promoted, but the Danish courts have so far found that EU law is sufficiently clear or that the specific circumstances are not of a nature that challenges the application of EU law (AR2015.0254, AR2015.0083).

The relatively limited number of rulings should not be interpreted as an indication of the lack of disputes. Disputes are often settled by way of dialogue and negotiations before they are settled by judicial review.

2.1. Lawfulness of collective action and choice of law (6)

Choice of (Danish) law is an important precondition for the Danish collective bargaining system to be upheld. The question surfaces in connection with the lawfulness of the Danish collective bargaining system and has only appeared twice in case law. Choice of law issues have not been part of the national debate. The Rome II Regulation, Regulation No. 864/2007, is not applicable in Denmark. Choice of law issues are settled with reference to general principles of international private law, which correspond with the provisions in Rome II.

Collective actions against posting entities have been assessed according to the Danish legal framework for the lawfulness of collective actions, as well as against the supplementing criteria in the Posting of Workers Act. This has given rise to a question of applicable law for collective actions. In the 2015 *Ryanair* case (AR2015.0083), the main legal question concerned the lawfulness of the notice of conflict, and as part of this, the applicable choice of law for industrial action against Ryanair. The view of the Labour Court was that the lawfulness of the conflict should be settled according to Danish law because the collective action would be initiated in Denmark, would primarily be aimed at Ryanair's activities in Denmark, the actions would have their immediate effect here, and the purpose would be to ensure that pilots and cabin crew at Ryanair's bases in Denmark are covered by Danish collective agreements. This choice of law assessment corresponds with Article 9 in the Rome II Regulation, and with the later CJEU ruling on choice of law for Ryanair's personnel on the base in Belgium (CJEU ruling C-168/16 and C-169/16 *Nogueira et al* v *Crewlink v Ryanair*).

The Labour Court has developed the Danish criteria for lawful collective action over the past century. The criteria include formal as well as material requirements for a collective action to be lawful. The Labour Court is the competent judiciary assessing the lawfulness of collective actions, Section 9 of the Act on a Labour Court. In the context of posting, the material requirements for conflicts to be lawful have been the most disputed. The material requirements are that:

1) the purpose of the conflict must be to conclude a collective agreement;
2) the type of work performed for the employer must fall within the area of work usually covered by the social partner; and
3) the social partners must have a sufficiently strong and current interest in concluding an agreement for the work concerned, that is, there must be a certain amount of work performed in Denmark. It is not a requirement that current members of the trade unions perform the work.

In particular, requirement 3, concerning the amount of work performed in Denmark in order to establish 'a strong and current interest' for the trade unions, has been under judicial review. In the *Mitropa* case from 2000 (AR2000.0455), the question concerned German employees on trains travelling in Denmark as part of an overall international transportation of passengers. The Labour Court stated that when only a small part of an international transportation takes place in Denmark, and it is a natural and insignificant part of the overall transportation, special circumstances would be required in order to establish a sufficiently strong and current interest of the trade union regarding this limited work performed in Denmark. The ruling set a standard for the assessment of the amount and character of work performed temporarily in Denmark with a view to fulfil the requirement of a sufficiently strong and current interest of trade unions in concluding a collective agreement for the work performed. The same assessment was applied in the Labour Court ruling AR2013.0468 *Hekabe*, where 20% of the work performed by Polish housepainters fell under the scope of the collective agreement for painters. The conflict was found lawful because the amount of work was deemed of a volume that constituted a sufficiently strong and current interest of the trade unions. In the ruling AR2014.0028 *Kim Johanson OÜ*, which concerned international transportation of goods by road, the truck drivers also carried out work in Denmark, but this amounted to less than 3% of the total work performed. The conflicts were found unlawful on the basis that this diminutive amount of work did not constitute an interest of sufficient strength. In the *Ryanair* case (AR2015.0083), a certain amount of the work of the airline personnel must be performed in Denmark. The airline personnel started and ended their working day in Denmark, and the base included facilities for working on the ground. The work performed on the airplane while on the ground in Denmark and in Danish air territory was performed in Denmark, cf Section 1, 16 and 17 in the Chicago Convention. The work performed on the airplanes outside Danish air territory does not have a stronger real and factual connection to a specific territory of any other country. After work the crew return to the home base and go to their private domicile, which is their natural social point of connection for work and free time. On this basis, the Court in its overall assessment found that the work performed has a connection to Denmark that constitutes a sufficiently strong and current interest of the trade unions to cover the work with a collective agreement.

Lawfulness of secondary action is likewise assessed under Danish law. The main conflict must be lawful, the secondary action must be an appropriate means to influence the main conflict, and the pressure of the combined conflict must be proportional to the aim of obtaining the collective agreement. In AR2005.839, the Labour Court found that a number of notices of secondary actions against Danish employers were lawful under Danish law in order to apply pressure on a main conflict against posting companies from Latvia, Poland and Lithuania. The pending secondary actions were suitable to influence the main conflict, and the actions were found to not be disproportionate compared to the strong interest in concluding agreements with the posted workers.

The lawfulness of industrial action against posting entities must additionally fulfil the requirements in Sections 6a(1) and (2) of the Posting of Workers Act. In AR2013.0468 *Hekabe*, the Labour Court ruled that the provisions on pay which had been provided to the posting entity were sufficiently clear and accessible, as all elements of pay were

defined and presented in an annex to the agreement, and the conflict was found lawful under the Posting of Workers Act. This was also the case in the *Ryanair* ruling, where the Labour Court stated that the main conflict and secondary action did not go further than necessary in order to obtain a collective agreement with Ryanair, and the conflicts fulfilled the criteria in the Posting of Workers Act Section 6a(1) and (2) and the general criteria laid out by the CJEU.

In summary, the lawfulness of industrial action is assessed first according to Danish criteria for formal and material requirements for lawful action. Also, when applicable, the lawfulness is assessed according to the EU principles for collective action being a justified restriction of the free movement of services, as implemented in the Posting of Workers Act Section 6a.

2.2. General issues of validity and binding nature of agreement (2)

When signing a collective agreement or joining an employers' association, a posting entity becomes an actor on the Danish labour market and party to the Danish industrial relations system. As such, posting entities become subject to rules and principles governing industrial relations.

In the *Gal-Met* case from 2008 (AR2008.0132), Gal-Met, a Polish posting entity, had joined the Danish Construction Association (*Dansk Byggeri*). The Danish association entered a settlement on behalf of Gal-Met, including penalties for underpayment of the posted workers. Gal-Met had the effects of the penalties reversed by the Polish courts, by claiming refund of the additional payments from the Polish workers when returning to Poland. The company argued that outside the territory of Denmark Polish law can be used to demand repayment from the workers, once they returned to Poland. The Danish Labour Court stated that it is a fundamental principle in Danish collective labour law that settlements reached as a result of the industrial dispute resolution system are binding on their members. A member can sue the association for damages if the association has not properly looked after the interests of the member. This applies regardless of the legislation in the country, where the legal proceedings are taking place. It was a severe breach of agreement to seek to avoid the economic consequences of the binding nature of a settlement, and the Polish entity was fined for breach of agreement. In a 2017 Labour Court ruling *Solesi* AR2015.0154, the Italian posting entity Solesi questioned the validity of the collective agreement entered into, on the basis that it was not voluntary but signed under the threat of industrial action. The Labour Court assessed that notifications of industrial action, in order to apply force on an employer to sign a collective agreement, are in line with both Danish and EU law, and do not question the validity of the agreement entered into. The Court fined Solesi Danish krone (DKK) 14 million (approximately EUR 2 million) for underpayment of the posted workers under the agreement.

As with the *Gal-Met* case, Solesi then filed a claim with the Municipal Court of Syracuse to not enforce the Danish ruling. The claim is based on the argument that the Danish labour law ruling is against *Ordre Public*, Article 45 of the Brussels Regulation,

Regulation 1215/2012, for not observing the principle of legality under the law of Italy, the EU, the Charter of Fundamental Rights of the European Union (EUCFR), and the European Convention on Human Rights (ECHR), for not providing access to an appeal of criminal sanctions in breach of ECHR Protocol 7 Article 2, and for lack of referral to the CJEU for judicial review. The Municipal Court of Syracuse in December 2018 ruled that the Danish ruling was contrary to *Ordre Public* as the Italian court assessed, that the Danish fine for breach of agreement was a fine of criminal character rather than a penalty of private contractual character as promoted in the Danish system (RG n. 577/2018). Lack of access to a second judicial review was thus in breach of the principle of legality and contrary to *Ordre Public*, and the Labour Court ruling was not recognised or enforced in Italy. The Syracuse ruling has been appealed by the Danish trade union, and is pending as of November 2019.

The claim for lack of recognition in Italy of a fine issued against a posting entity for underpayment of their workers has attracted attention from the media as well as the social partners and labour law lawyers. The legal implication of refusal to recognise Danish rulings in the Member State of establishment, when posting entities have been fined for breach of agreement by the Danish Labour Court, is of course significant. The system of free movement of services across borders relies on a strong mutual recognition of judicial rulings, and it would not be in line with the rules on jurisdiction and choice of law to allow an established ruling in one jurisdiction to be challenged in another jurisdiction entirely based on the same facts and legal questions.

In summary, both the validity and the binding nature of agreements have been raised by posting entities as well as by the Danish trade union. The Danish system of 'voluntary' agreements based on negotiation and collective action, and the strict system of enforcement of breach of the provisions, may be unfamiliar to foreign entities with a different tradition and framework for industrial relations, but unfamiliarity with the binding nature of agreements does not excuse breach of agreement, as long as the system is in line with EU law.

Validity of agreements has not been part of the political debate but has clearly been presupposed in the legislative efforts to support the position of the social partners and the Labour Court in relation to posting entities.

2.3. Genuine posting situation and liability for receiving entity

With the implementation of the Enforcement Directive in 2016 adding Sections 4a-4e to the Posting of Workers Act, the competencies of the DWEA were expanded to not only control registration but also to assess the reality of the undertaking's genuine business activities in the Member State of establishment. Earlier, the Danish authorities did not assess the genuine business activities of the posting entity in the country of origin, but assessed the character of the contract between the posting entity and the receiving entity as either a genuine contract of posting or in reality a situation of hired workers.

Assessing the contract as real or *pro forma* is essential for the question of liability of the receiving entity. In Denmark, joint liability or chain liability between private entities is not the norm and is not generally established by law or collective agreement concerning the issue of wages.[12] The Working Environment Act establishes that the posting entity as well as the receiving entity is liable for the working environment at the receiving entity. The implementation of the Enforcement Directive with regards to joint liability for the receiving entity has been by way of establishing the Labour Market Fund for Posted Workers, which is financed by all companies registered in Denmark, including foreign companies. Joint liability for breach of workers' rights by subcontractors is not the norm and requires specific legal basis.

The judicial review takes into consideration the contract as well as the reality of the relationship between the posted workers and the receiving entity. This includes assessing who has the instruction and control of the posted workers. The Labour Court takes into consideration all the particularities of the relationship between the parties, including inspections and interviews of the workers by the DWEA.

Underpayment can take place with regards to *a collective agreement in force at the receiving entity*. If the posting situation is real, the receiving entity is not liable for underpayment of the workers under its own collective agreement. On the other hand, if a situation is assessed as in reality one of hiring-in workers, the receiving entity becomes liable for underpayment of the foreign workers under its collective agreement. In a number of cases, judicial review has revealed that posting contracts were in fact *pro forma*. This is considered abuse of the posting system and undermining of the collective agreement in force at the receiving entity. In FV2010.0139 Lithuanian temporary agency workers were posted to work at Danish plant nurseries, where they worked alongside domestic workers and under the instruction of the receiving entity. The Court found that the significant risk of abuse and circumvention by using temporary agency workers in this field of work weighs more heavily than the consideration for the employment contract of the temporary work agency. The hired Lithuanian workers had the right to be remunerated under the Danish collective agreement in force at the user entity. Likewise, in FV2012.0180 Lithuanian workers were subject to the instruction and supervision of the receiving Danish entity, which was fined DKK 100,000 (EUR 13,333) for attempting to circumvent the collective agreement and for underpayment of wages to the Lithuanian workers. Similarly, in FV2017.0202, Polish painters were considered hired workers, and the Danish entity was fined DKK 2 million (EUR 266,667), the outstanding salaries for the workers, for circumvention and breach of agreement by underpayment. In FV2016.0202, Polish workers were in reality under the instruction and control of the receiving entity, which was evidenced with explanations provided by the Polish painters and by the daily manager of the receiving entity before the Court as well as to the DWEA during a control visit. The receiving entity was ordered to pay a penalty of DKK 2.5 million (EUR 333,000). In FV2017.0114, also concerning underpayment, the control

12. The arrangement provided to comply with the Enforcement Directive likewise does not establish direct joint liability for the receiving entity, but instead establishes a Labour Market Fund for Posted Workers, which pays out any outstanding salaries to posted workers. The Fund is financed by contributions from all employers, domestic as well as those registered in the RUT (Statutory Act on a Labour Market Fund).

visit indicated that the workers were under the instruction of the receiving entity, and as the Polish posting entity could not produce the subcontractor agreements, the workers were viewed as hired by the receiving entity. The penalty for breach of agreement and underpayments was DKK 300,000 (EUR 40,000). And in FV2017.0097, the fine to the receiving entities was calculated on the basis of the outstanding salaries to the workers at DKK 500,000 (EUR 75,000).

Underpayment can also take place with regards to *the collective agreement of the posting entity*. The lack of joint liability is, as mentioned, well established in case law and was reiterated by the industrial arbitrator in the case FV2013.014. The arbitrator found no legal basis in the collective agreement to establish liability for a Danish receiving entity for underpayment of posted workers. This was in line with (then) Article 3 of the Posted Workers Directive, as establishing liability for the receiving entity was viewed as establishing a barrier for the principle of free movement in the Treaty on the Functioning of the European Union (TFEU) Article 56. In AR2011.352, where Czech painters were working on a Danish hotel renovation, the contractual relationship was assessed as a genuine situation of posting, although the workers were posted via a number of interconnected subcontractors, some self-employed. Each subcontractor agreement was presented as real, and the receiving entity did not manage the workers during the work in Denmark, even though the workers wore the logo of the receiving entity on their work clothes. Likewise, in the ruling FV2013.0157, the contractor had agreed to take on the entire roof-thatching enterprise at a set price, which implied that it was a subcontracting agreement in a genuine business relationship. The relationship with the receiving entity did not resemble temporary agency work, and there was no legal basis for establishing liability for the receiving entity for underpayment of the workers.

To sum up, the issue of circumvention of collective agreements by 'fake' or bogus constructions of posting contracts is part of the debate on social dumping. In order to uphold Danish working conditions, the court assesses the contract as well as all other available information, including the relationship at the workplace, in order to classify the situation as a genuine posting or as hired-in workers.

2.4. Breach of agreement: remuneration and wages

The issue of breach of agreement in particular by underpayment has been assessed by the judiciary several times. This constitutes by far the majority of cases. Lack of payment is considered a severe breach of agreement. The penalty is calculated at the discretion of the consideration of the court and includes outstanding payments as well as a penal fine for the breach, which for posting entities are calculated as the estimated outstanding payments when possible.

The following cases illustrate this: in FV2014.0141, a posting entity from Poland was fined DKK 1 million (EUR 133,333) for breach of agreement for not paying their posted bricklayers according to the collective agreement; in FV2016.0137 a posting entity from Bulgaria was fined for breach of agreement by underpaying posted Bulgarian carpenters,

and the parties settled for a penalty of DKK 600,000 (EUR 80,000); in FV2014.171 the Portuguese posting entity produced fake payslips with constructed working hours to cover up the fact that the real working hours and payments were underpayments in breach of the agreement. As a result, 39 workers were entitled to outstanding payments and the entity was fined in total DKK 22 million (EUR 2,933,333).

More specific aspects relating to remuneration are also assessed. These can be divided into three topics: the type of payments perceived as part of the remuneration, for example payments in relation to relocation and accommodation; the lawfulness of pension contributions and holiday pay in Denmark (in light of payments in the home state); and principles for calculation of penalties for underpayment of unionised and non-unionised workers.

2.4.1. Payments counting towards remuneration

In Labour Court ruling AR2008.464 from 2011, the Court stated that as payments had been made without deduction of taxes and social security contributions, the payments were presumed to be reimbursements and not remuneration. The starting point was the same in the Labour Court ruling AR2012.0618, but here the posting entity provided documentation that payments had constituted remuneration. In FV2009.0093 the arbitrator found that social pensions paid in Germany could be calculated as part of the salaries paid to the posted workers, as they were covered by the term in the collective agreement of deductions for 'supplementing occupational pensions'.

2.4.2. Pension contributions and holiday pay

The question is the lawfulness of requiring posting entities to pay supplementing occupational pension contributions in Denmark as part of the total remuneration required in the collective agreement, and whether deductions for payments in the home country can be counted. The issue of Danish provisions on pension payments in collective agreements for posted workers was the subject of an investigative report on the lawfulness of the Danish provisions under the EU Pensions Directive, Directive 98/49 (Kristiansen 2015a). The report stated that certain Danish provisions in collective agreements were most likely not in line with the EU Pensions Directive. The agreements were then adjusted accordingly (AR2017.9787: 14).

Under the earlier provisions, the question surfaced a few times as a question of correct remuneration under the agreement. In the *Solesi* ruling in 2017 (AR2015.0254), an Italian posting entity was in breach of agreement by not paying outstanding salaries. This included outstanding deposits of holiday payments and pension contributions. Solesi claimed that these requirements as well as the demand that Solesi provide evidence of payments to occupational pension funds in Italy were in breach of EU law. The requirement of depositing holiday payments in Denmark was seen as a restriction of the free movement of services. The requirement could be justified, as the purpose was to ensure workers' social rights. As the posting entity would have the deposits refunded upon documenting holiday payments in the home country, the requirement did not go beyond what is necessary. Regarding the lawfulness of the requirement

of pension contributions in Denmark, Solesi had not provided documentation for pension payments for the workers in Italy, and for this reason the payment of pension contributions in Denmark was not *in casu* a breach of EU law. The Court did not assess the character of pension contributions in Italy or the lawfulness of the provision in the Danish agreements under the EU Directive 98/49 on supplementing occupational pension rights. The *Solesi* ruling ended with an overall penalty of DKK 14 million, as mentioned above. The ruling did not resolve the question of the lawfulness of the Danish provisions, and the status of pension payments in the country of origin.

These questions have surfaced again. As mentioned above, in FV2009.0093 the arbitrator found that mandatory payments to a German social security and pension fund were considered 'supplementing occupational pensions' and could count towards the salary payments under the collective agreement. Similarly, in the later ruling FV2018.0060 the posting entity had provided documentation for the pension agreements and for individual deposits to a Czech pension fund, and the pension fund was sufficiently documented as a supplementing occupational pension. As the Czech pension payments were higher than the Danish pension payments, there was no duty to pay any contributions in Denmark. Finally, in FV2018.0075 a disagreement on the understanding of the term 'occupational pension fund' resulted in a ruling that all social security payments in the country of origin, as they also covered supplementing occupational pensions, could count towards the Danish pension contributions, regardless of whether this duty followed from statutory acts or collective agreements. This assessment is more in line with EU law, and the amendment of the agreements from 2017-2020 is expected to decrease the number of cases on the lawfulness of pension contributions.

2.4.3. Calculation of penalties for underpayment

In the ruling FV2014.0156 *Daniterm*, the question *inter alia* concerned how to calculate penalties for underpayment of unionised as well as non-unionised workers. According to well-established case law, the trade union is entitled to claim repayment on behalf of all unionised workers. With regard to a claim for penalties for non-unionised workers, case law has also established that a claim should be calculated on the basis of the amount the company has saved by underpaying these employees compared to the correct level in the collective agreement (the difference principle). The accumulated claim for additional payment/penalties concerning three unionised and non-unionised employees were set at DKK 600,000 (EUR 80,000). This difference principle has been used to calculate penalties for underpayments of posted non-unionised workers in the rulings AR2015.0254 *Solesi* penalty of DKK 14 million (EUR 1,866,667), FV2016.0191 penalty of DKK 7 million (EUR 900,000), and FV2017.0107 and FV2018.0064. For the unionised workers in FV2014.0090 *Solesi*, a penalty of DKK 400,000 (EUR 55,000) was calculated on the basis of outstanding payments to the workers.

The *Solesi* ruling also assessed the question of the lawfulness of payment of penalties to the trade union for claims calculated on the basis of underpayment of non-unionised workers. The Court stated that such penalties are not in breach of either the ECHR Article 11 or the EUCFR Article 12. The penalties are not viewed as enrichment of the

trade unions on behalf of non-unionised workers. The non-unionised workers have chosen not to be members of this union, but this does not affect the principle that the posting entity is obliged to pay a penalty for breach of the agreement. The penalty is payable to the signatory to the agreement, the trade union, and the penalty is calculated on the basis of the accumulated savings of the posting entity by breach of the agreement. The purpose of counteracting social dumping would be illusory if the employer was not obliged to pay a penalty of at least the saved amount of money.

In situations where there is no certain basis to calculate the actual savings of the posting entity (the difference principle), the arbitrator will set a discretionary amount based on the claims and the evidence of the case. This is also seen several times, for example in FV2017.0168 with a penalty set at DKK 100,00 (EUR 13,333), and in FV1017.0027 where it was uncertain how many workers were present at the building site in the period, and for this reason the arbitrator awarded a discretionary amount of DKK 450,000 (EUR 60,000) rather than the full claimed amount of DKK 666,000 (88,800). In FV2014.0065, as it was impossible to calculate an exact claim, the penalty was set at a discretionary DKK 500,000 (EUR 66,667).

The general question of review of breach of agreement by underpayment, therefore, is well known in Denmark, and the strict assessment and enforcement that is central to the Danish model of negotiating pay and working conditions functions efficiently for domestic as well as foreign employers. Fake payslips are sanctioned as attempts to circumvent the collective agreement. The judicial review has settled a method for calculating the penalty for underpayment of posted non-unionised workers, based on the savings of the posting entity by breaching the agreement (the difference principle), which is upheld in later case law.

2.5. Breach of agreement: procedural

Refusal to adhere to procedural provisions in collective agreements, such as participating in negotiation meetings in case of dispute about the agreement, are also considered breach of agreement. This is the case for Danish companies as well as for posting entities covered by a collective agreement. In FV2016.0137 a Bulgarian company was fined for breach of agreement in part due to its refusal to participate in dispute resolution procedures. In AR2014.0659 the Danish trade union was charged for breach of agreement by performing control visits to a place of work outside the customary controls. The court found that control visits must be carried out under a mutual duty of trust and respect, and that after only a short time additional control visits required objective reasons. The trade union did not breach the procedural regulation because such reasons were present and the request for an additional control visit had followed the agreed procedure.

Breach of procedural provisions of the collective agreement are pursued and sanctioned as well as breach of material provisions. The procedural duties form an essential part of the dispute resolution system and as such can be enforced and sanctioned.

2.6. Occupational health and safety

The Danish Statutory Act on Occupational Health and Safety applies to posting entities in the same way as to domestic employers. In the cases regarding liability for ensuring a safe working environment, posting entities are subject to control and fines in the same way as other companies for whom work is performed in Denmark.

The DWEA makes control visits to the workplaces of posting entities. Posting entities receive fines as other companies. The fines are issued by the DWEA, and can be assessed by the administrative board of appeal for sanctions by the DWEA. The employer can challenge the administrative ruling before the ordinary courts. There is an abundance of rulings concerning health and safety of posted workers as well as domestic workers. The legal basis and the assessment of the situations do not differ, as the rules are equally applicable. Administrative case law of the administrative board of appeal for the working environment is publicly accessible (ast.dk).

The survey includes three illustrative examples of High Court rulings on challenges on fines issued for not adhering to the safety regulations for work performed at height. Fines were confirmed in the rulings to the amounts of DKK 40,000 (EUR 5,333) (Western High Court 2014), DKK 25,000 (EUR 3,333) (Western High Court 2007) and DKK 50,000 (EUR 6,667) (Eastern High Court 2007).

2.7. Formal requirements: RUT registration (3)

The RUT was debated more intensely as part of the control and enforcement packages in 2010, 2011 and 2016. Since 2010, the DWEA has been the authority controlling whether foreign service providers register correctly in the RUT, Section 7e.

The duty to register is sanctioned separately with a fine. The issue of the lawfulness of the RUT surfaced for the first time in 2018 as a separate claim. Until then, fines for breach of registration were not challenged separately but as part of an overall fine for breach of the applicable Danish legislation. In the Western High Court Ruling (2014), the posting entity was fined DKK 10,000 (EUR 1,333) for failing to register at the RUT. Earlier, posted workers in Denmark were required to carry a work permit, which is no longer the case according to the Act on Foreigners, (*Udlændingeloven*). Breach of the (then) duty was included in the dispute concerning breach of occupational health and safety regulation heard by the Eastern High Court in 2007. The entity was fined a total of DKK 50,000 (EUR 6,667).

The lawfulness of the RUT was in 2018 challenged by a Polish posting entity, and in May 2019, the Western High Court delivered their ruling (Western High Court 2019). The duty to register as provided in the Posting of Workers Act Section 7a(1) does not go beyond what is necessary and corresponds to the Enforcement Directive list of information. The Court found, however, that the option to give public access to certain information, in particular, information about the place of delivery of service, went beyond what is necessary. This information could be used by the competitors to

monitor the market and analyse competitors, as the information makes it possible to identify customer relationships and projects of foreign service providers. Public access to this information goes beyond what is necessary and is in breach of Article 56 TFEU. The Court acquitted the defendant for the fines for lack of correct registration. The Ministry of Employment has responded swiftly and issued a revised *Executive Order in June 2019, where the general public can no longer obtain access to information about the place of delivery of service.*

To sum up, the system of registration and control of foreign service providers receives strong political attention. The duty to register was subject to judicial review in 2019, and the authorities responded with an amendment to the legal basis, in order to ensure that the system corresponds with EU law and that fines are lawful. In the few earlier disputes on fines, the courts have supported that they were lawful. Formal requirements of registration play an essential role in ensuring that work is performed under Danish pay and working conditions and applicable Danish law.

Conclusions

In Denmark, the national debate has focused on upholding the system of social partners' negotiation on pay and working conditions for workers in Denmark, including for posted workers. The case law clearly reflects the political intention to uphold collective bargaining as a workable means for establishing pay and working conditions for posted workers, and to uphold the strong enforcement mechanisms of industrial dispute resolution in the Labour Court and industrial arbitration. Most of the cases concern issues related to collective agreements and in particular the binding nature and the strong enforcement mechanisms in the Danish industrial relations system.

Registration and control of posting entities is viewed as a necessary means for ensuring adherence to national statutory regulation protecting the posted workers, and as a means to initiate negotiations in order to obtain a collective agreement for the pay and working conditions of the posted workers. The lawfulness of the system has not yet been subject to legal dispute in Denmark or by the CJEU.

The question of the use of collective action against posting entities as lawful under Danish law has been subject to legal review. The use of collective action is viewed as being in line with EU law as long as the social partners adhere to the requirements in the Posting of Workers Act Section 6a(2).

When posting entities have entered an agreement or have become a member of a Danish employer association, the legal disputes concern the validity of the agreement, breach of agreement, and sanctions for breach of agreement. The enforcement system is strict and efficient, which has also proven necessary against posting entities. The Labour Court conducts the judicial review according to the same rules and principles as are applied to domestic employers.

The Enforcement Directive, which was implemented in Denmark in 2016, expands the duty of the country where the work is performed to test for genuine establishment in home countries. This increased attention on counteracting 'fake' posting entities with a view to counteract abuse of the posting system aligns with the review of the Danish Labour Court and industrial arbitration assessing whether the contracts of posting were real and genuine. The question in Denmark concerned whether the workers were in reality hired workers. If the workers are genuinely hired workers and not posted workers, the receiving entity is liable for underpayment of the workers according to their collective agreement. This system has illuminated the necessity of requiring collective agreements for the posting entity, as the receiving entity is not jointly liable for breach of any agreement. If the posting entity is not covered by a collective agreement, the posted workers can be paid any level of salary, and this is not in breach of Danish law.

Domestic courts of the posting entity's home country may have difficulties understanding the Danish system, in particular the binding nature of agreements regarding salaries, procedural obligations of the parties, and that the agreements oblige employers to adhere to the provisions for unionised and non-unionised workers alike. These elements are central to the smooth and efficient working of the Danish system, but may be foreign to posting entities coming from different traditions in the workplace.

The low number of complaints before the courts – industrial or ordinary – is a finding in itself. This could be explained by many phenomena: that the social partners are adjusting their procedures accordingly; that posting entities and their Danish consultants are gaining the necessary knowledge about the interplay between the collective bargaining system and posting of workers; or that the relevant legal and labour market actors fundamentally agree on the basic purposes and the legal remedies available. The legal and political actors involved could support the functioning of the system to the benefit of the posted workers as well as for the purpose of equalising the competitiveness between national companies and posting entities.

References

Ankestyrelsen (continuous) Arbejdsmiljøklagenævnet Offentliggjorte afgørelser. https://ast.dk/naevn/arbejdsmiljoklagenaevnet/nyhedsbreve-fra-arbejdsmiljoklagenaevnet

Arbejdsretten (continuous), Arbejdsretlige afgørelser. http://www.arbejdsretten.dk/generelt/arbejdsretlige-afgoerelser.aspx

Bruun N., Flodgren B., Halvorsen M., Hydén H. and Nielsen R. (1992) The Nordic labour relations model, Dartmouth, Ashgate.

CO-industri and Dansk Industri (2017) Industriens Overenskomst 2017-2020, bilag 8. https://di.dk/shop/overenskomster/produktside/pages/produktside.aspx?productId=6549

DA (2018) Udenlandsk Arbejdskraft på det danske marked, December 2018, København, Dansk Arbejdsgiverforening https://www.da.dk/globalassets/besk%C3%A6ftigelse/rapport-udenlandsk-arbejdskraft-p%C3%A5-det-danske-arbejdsmarked-2018.pdf

DA and LO (1993) Hovedaftale mellem LO og DA af 31. oktober 1973 med ændringer pr. 1 januar 1993. http://www.arbejdsretten.dk/arbejdsretten/regler/hovedaftalen.aspx

DA and LO (2006) Normen. Regler for behandling af faglig strid, København den 27. oktober 2006. http://www.arbejdsretten.dk/arbejdsretten/regler/normen.aspx

Danish agency for labour market and recruitment (continuous) Jobindsats data om arbejdsmarkedet. https://www.jobindsats.dk/jobindsats/db/DatabankViewer/ChooseMeasure?BenefitGroupId=Y24

Due J., Madsen J.S. and Pihl M.P. (2010) Udviklingen i den faglige organisering: årsager og konsekvenser for den danske model, LO-dokumentation nr. 1/2010, København, Landsorganisationen i Danmark. https://fho.dk/blog/2017/05/23/lo-dokumentation-udviklingen-i-den-faglige-organisering-aarsager-og-konsekvenser-for-den-danske-model/

Ekman H. and Hansen Nørgaard S. (2014) § 7a, in Mølgaard C. (ed.) Udstationeringsloven, København, DJØF, 205-226.

Fahlbeck R. (2002) Industrial relations and collective labour law: characteristics, principles and basic features, Scandinavian Studies in Law, 43, 87–133.

Finansudvalget (2012) Udvalget om modvirkning af social dumping, Rapport fra Udvalget om modvirkning af social dumping, 22 October 2012. http://www.ft.dk/samling/20121/almdel/fiu/spm/14/svar/921241/1181555.pdf

Hasselbalch O. (continuous) Arbejdsretsportalen. http://arbejdsreteu.lovportaler.dk

Hasselbalch O. (2002) The roots – The history of Nordic labour law, Scandinavian Studies in Law, 43, 11–35.

Hasselbalch O. (2012) Labour law in Denmark, 3rd ed., København, DJØF Wolters Kluwer.

Ibsen C.L., Due J. and Madsen J.S. (2014) Fald i organisationsgraden igen, København, FAOS, Department of Sociology, Københavns Universitet. https://faos.ku.dk/pdf/artikler/ovrige_artikler/2014/fald_i_organisationsgraden_igen_2.pdf

Karnov, Ugeskrift for Retsvæsen (continous) https://pro.karnovgroup.dk/journals/ufr

Kristiansen J. (2015a) Notat om pensionsdirektivets betydning for udenlandske serviceyderes og udstationerede medarbejderes stilling i forhold til en pensionsordning i parternes overenskomster, section 4, cited in AR2017.0787, 13-14. http://www.arbejdsretten.dk/media/1228567/dom%20ar2017.0787.pdf

Kristiansen J. (2015b) The growing conflict between European uniformity and national flexibility: the case of Danish flexicurity and European harmonization of working conditions, Copenhagen, DJØF.

Ministry of Employment (2011) Styrket indsats overfor social dumping, https://bm.dk/arbejdsomraader/politiske-aftaler-reformer/politiske-aftaler/2011/styrket-indsats-over-for-social-dumping/

Ministry of Employment (2017) Trepartsaftale på plads. Danskernes kompetencer skal styrkes gennem hele livet. https://bm.dk/nyheder-presse/pressemeddelelser/2017/10/trepartsaftale-paa-plads-danskernes-kompetencer-skal-styrkes-gennem-hele-livet/

Ministry of Employment (2016) Trepartsaftale sikrer unge praktikpladser og virksomheder tilstrækkelig og kvalificeret arbejdskraft. https://bm.dk/nyheder-presse/pressemeddelelser/2016/08/trepartaftale-sikrer-unge-praktikpladser-og-virksomheder-tilstraekkelig-og-kvalificeret-arbejdskraft/

Ministry of Employment (continuous) Danish Agency for labour market and recruitment, Work in Denmark. http://workindenmark.dk

Ravn L.K. (2018) I Danmark er de fleste dækket af overenskomst, 9. October 2018, DA Analyse. https://www.da.dk/politik-og-analyser/overenskomst-og-arbejdsret/2018/hoej-overenskomstdaekning-i-danmark/

The World Justice Project Rule of Law (2019) WJP Rule of Law Index. http://data.worldjusticeproject.org/
United Nations Sustainable Development Solutions Network (2019) The World happiness report 2018. https://worldhappiness.report/ed/2018/

Danish caselaw

For the list of cases please refer to Annex I.

Italian caselaw

Ruling of Municipal Court of Syracuse, RG n. 577/2018.

EU caselaw

CJEU ruling of 18 December 2007 in Case C-341/05 Laval un partneri v Svenska Byggnadsarbetareförbundet, ECLI:EU:C:2007:809.
CJEU ruling of 14 September 2017 in Joined cases C-168/16 and C-169/16 Nogueira et al v Crewlink v Ryanair, ECLI:EU:C:2017:688.

Chapter 3
Posting of workers before Finnish courts

Juha Tuovinen

Introduction

Traditionally, Finland has not received a large number of migrant workers, posted or otherwise. After World War II, Finland was a rather closed nation with a restrictive policy on inward migration and foreign investment in the economy in general. The language, which was perceived as difficult, and the cold climate were also considered to be factors that kept migration low. Those who did come were usually partners of Finns or those employed in particular fields, such as musicians.[1] But over the years since the accession to the EU and the Schengen Agreement in 1995 and 1996 respectively, and the eastern enlargement in 2004, the level and type of migration has changed.

The most active sectors from the point of view of posting of workers are construction and metalwork. Nearly half of all foreign workers work in the construction sector, which is also where around half of all migrants are employed.[2] However, it should be noted that the information on foreign workers is unreliable as there is no central authority collecting or compiling data. The accuracy of the data that has been collected is therefore questionable.[3] Construction and metalwork are also the sectors with the most occurrences of litigation in Finland, especially the former. However, in general, litigation about the rights of posted workers has been minimal, with only a handful of reported cases in the Labour Court.

This chapter examines the case law of the Finnish courts as available on legal databases. Section 1 sets the scene by surveying the legal framework on posted workers. Section 2 discusses the two connected debates surrounding posted workers in Finland: the circumvention of the legal framework for taxation on the one hand, and the lack of respect for the rights of workers on the other. The subsequent case law analysis builds on these themes in two ways. In the first place, the litigation about the Olkiluoto nuclear power plant is a landmark case demonstrating how the legal framework is undermined in a myriad of different ways. The second, and related, case, and a small number of other cases, demonstrates the lack of oversight and protection that the legal system is able to provide. The final part briefly elaborates and reflects on these topics.

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1. Korpela M. et al. (2014) Temporary Migration in Finland, at 67-8.
2. Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset, Helsinki, Työterveylaitos.
3. Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset, Helsinki, Työterveylaitos.

1. Overview of the legal framework on posted workers

The conditions of employment in Finland are protected through various laws that regulate the terms of employment in general, while specific laws apply to certain types of workers, such as posted workers. The law relating to posted workers (447/2016) defines which parts of Finnish law apply to posted workers.[4] The Law on Employing Young Workers, Occupational Health and Safety and the Occupational Health Care Act (*Työterveyshuoltolaki*) a pply in full. In addition to these, most workers in most industries are covered by collective sectoral agreements.

The Employment Contracts Act (*Työsopimauslaki*, 55/2001) is the general piece of legislation that regulates the beginning and end of a contract of employment as well as the respective duties between employer and employee. The Occupational Health and Safety Law (*Työturvallisuuslaki*) regulates workplace safety. The Collective Agreements Act (*Työehtosopimuslaki*) regulates collective bargaining agreements.

The central piece of legislation regulating the use of posted workers is the Posting of Workers Act, 1999 (*Lakilähetetyistätyöntekijöistä* 1146/1999). The Act reproduces the Posted Workers Directive (96/71/EC) quite closely. There are certain notable exceptions, however. In the first place, the law also applies to those workers who come from outside the EU, and it extends the scheme of the Directive to third-country nationals. The law also allows the application of the labour laws of the country of origin to the employment relationship, where these are more favorable than the Finnish law. However, the Finnish law sets the minimum standard for workers' rights in line with Article 3(1) of the Posted Workers Directive.

The law was amended in 2005 (1198/2005). Many of the changes were intended to enhance the supervision, and the law added provisions requiring a company to have a representative in Finland, and mandating an employer to keep records of the salaries paid to posted workers. To this end the law created requirements for companies sending posted workers to have representatives in Finland, where they did not have a place of business in the country. The law also contains the requirement that records are kept and made easily available to the labour law authorities.

Furthermore, the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006) (*Lakitilaajanselvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä*, short Contractor's Law, *Tilaajavastuulaki*) serves a double purpose in so far as it aims to prevent the formation of a grey economy and ensure fair competition between companies. To this end it requires that the contractor requests, and that the subcontractor provides, certain forms of information, including registration with the relevant tax authorities, a copy of the trade register, proof of pension insurance for the employees and proof of payment of the fees, a declaration of the applicable collective agreement, a declaration of the way in which healthcare will be provided for, and in the case of the construction industry, a declaration of the manner

4. The old Act 1147/1999 regulated this prior to the coming into force of the new law.

in which accident insurance has been organised. The law applies to all situations where labour is contracted out, whether or not they involve posted workers.

The working conditions of posted workers are covered by the sectoral collective agreements, which lay down the level of salaries, holidays, permissible absences and more. The sectors that are covered can be quite specific; the construction industry, for example, has eight different industries, ranging from painting to asphalting. These agreements contain detailed sets of rules applicable to all those employees within a sector whether they are members of the labour union or not. Importantly, they set out the wages to be paid for each type of work undertaken. Only the agreements that would be declared generally applicable would apply to inbound posted workers. The coverage of the outbound posted workers by these agreements remains an open question and depends on the particular agreement. Several agreements set out special provisions (for example, on travel expenses and allowances) that apply to assignments abroad.

From an institutional point of view, working conditions are enforced by the Labour Protection Directorate (*Työsuojeluvirasto*) and the labour unions. The Labour Protection Directorate performs investigations into compliance with various labour laws, either of its own accord or by employer's or employee's request. Labour unions provide assistance to their members, including legal assistance where they feel their rights have not been respected. There are of course doubts as to what extent posted workers become members of the union. For example, research shows that labour union membership was much lower at Olkiluoto 3, which has a higher level of posted and migrant labour than other construction sites where the source of labour was domestic.[5] Compliance with the Contractor's Law is supervised by the Southern Finland Regional State Administrative Agency, which is responsible for the entire country.

2. National legal debates on posting

The use of posted workers has increased exponentially as well as being the source of the vast majority of problems associated with foreign labour.[6] While reliable figures are difficult to come by, the number of registered posted workers has grown from 4,400 in 2006, to 16,800 in 2008, and to 23,500 in 2010.[7] The political debates were frequently framed around the government's desire to increase the foreign workforce, which was a cause of concern to those worried about the effect this would have on the domestic employment situation, in particular the high degree of unemployment already prevalent in the country.[8] Other concerns fed into these broader concerns, especially the ability of companies to hire labour while circumventing relevant labour laws and minimum wages, and in doing so, circumvent taxes.

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5. Nathan L. and Sippola M. (2011) National unions and transnationalworkers: the case of Olkiluoto 3, Finland, Work, employment and society, 25 (2), 292-308.

6. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 4.

7. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 62.

8. Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset, Helsinki, Työterveylaitos, 4-5.

The legal debates on posted workers broadly mirror two categories: tax avoidance and the working conditions of the workers.

2.1. Tax avoidance

In terms of tax avoidance, it has been noted that 'posted workers and those who employ them operate largely outside of the reach of the authorities'.[9] In 2010, there were approximately 31,000 posted workers employed in Finland. The tax authorities had no record of 24,000 of them.[10] It is estimated that there are hundreds of foreign enterprises operating in Finland that the tax authorities do not know about.

The situation at the Olkiluoto power plant is emblematic. No official records exist of around 300 foreign companies that have been involved in the work. The construction of the power plant is by now almost a decade overdue and has cost many times over the estimate. An inspection into the construction site found numerous violations, including not being allowed onto the site at a convenient time as well as a significant disregard for the documentation requirements.[11]

Even where the registration with local officials is in order, it does not guarantee that the reporting regulations are being observed. Of the registered companies, only approximately one third filed the required periodical reports or paid employer contributions.[12] As tax avoidance has been the subject of a number of government reviews and legislative initiatives in general, often in various ministries with overlapping competences, this has led to a regulatory framework that is difficult to enforce.[13]

2.2. Working conditions and their enforcement

The second common theme of debate relates to the habitual mistreatment of posted workers and non-compliance with working conditions. In a comprehensive report on the functioning of the legal scheme in relation to foreign workers, the rapporteur concluded that 'in spite of the letter of the law, the rights of migrant workers are routinely trampled on'.[14] News stories about the working conditions of migrant workers are often coupled with a narrative of how this in turn affects Finnish workers. They are also often focused on particular legislative initiatives meant to improve working conditions.

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9. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 4.

10. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus, at 6.

11. Juntunen M. (2011) Tilaajavastuulaki ja senvalvonta – ongelmat erityisesti työehtosopimuksen noudattamisen valvonnasa. https://www.theseus.fi/bitstream/handle/10024/25320/Marjo%20Juntunen%20-%20Julkaisu.pdf?sequence=1

12. Hirvonen M. (2012) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus.

13. The government has issued research reports and convened working groups: Hirvonen M., Lith P. and Walden R. (2010) "Suomenkansainvälistyväharmaatalous." Eduskunnantar kastusvaliokunnanj ulkaisu 1; Hirvonen M. (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta.

14. Hirvonen M. (2011) Raportt iulkomaisen työvoimansääntelyn toimivuudesta, at 5.

Every year, the labour protection authority is unable to verify compliance with labour rights from several hundred operating companies because they do not keep appropriate or up-to-date information. With foreign employees overall, the labour protection authority was able to ascertain that the working conditions were in order in roughly one third of cases. A report commissioned into the treatment of foreign workers noted that in general the rights of posted workers were systematically being disregarded.[15]

The same report concludes that the labour protection agency is only able to deal with the most outrageous cases of mistreatment. In general, the protection of labour rights is left to the employee. It is unlikely that those employees, relatively satisfied with wages that are significantly higher than in their home countries, unorganised and dependent on the employer, would take these matters to court. All in all, it is most likely that posted workers suffer significantly from the disregard of their labour rights.

3. Overview of national case law

The Finnish court system is made up of general courts and specialised courts. Civil claims would be brought in the district courts (*käräjäoikeus*). Specialised courts deal with claims arising in terms of specialised legal regimes. The Labour Court is one such court that is particularly important for the present study, as it is where the issues raised in labour relations would most likely end up.

There are only four relevant cases before the Labour Courts (*työoikeus*). However, this excludes district court (*käräjäoikeus*) judgments, as these are unavailable except in hard copy at the respective courts. Nevertheless, there is reason to believe that such case law would be relatively limited (see section 3 below on case law).

The central theme running through the cases is that they relate to the question of the applicable collective agreement. Additionally, there has been a preliminary reference to the Court of Justice of the European Union (CJEU) from the Satakunta District Court in relation to questions about workers at the Olkiluoto 3 nuclear power plant construction site.

3.1. Cases involving the interpretation of collective agreements – applicable wages

The Olkiluoto 3 nuclear power plant represents a unique chapter in the employment of posted workers in Finland. Not only have the numbers of workers employed on the project, and the media attention it has sustained, been far greater than other similar

15. Hirvonen M. (2012) Ulkomaistat yövoimaa koskevan sääntely ntoimivuus: Poliisihallituksen toimiannosta tehty tutkimus.

projects, but in terms of litigation it has also resulted in a referral to the CJEU on a matter related to posted workers from Finland.[16]

The litigation began in the district courts by the Electrical Workers' Union (*Sähköalojenammattiliitto*) against Elektrobudowa SA (L 11/9634 and L12/100). The case was brought by the Electrical Workers' Union and was already unusual in being brought at all. In general, posted workers do not join domestic labour unions in Finland and labour unions never take cases to the courts.[17] As such, the case is probably unique in the country in that over 100 Polish electricians had joined the Electrical Workers' Union.

The case concerned 186 Polish electricians who had been hired to work on the construction of the power plant. In total they represent a small minority of migrant workers at a worksite on which around 3,400 workers, or 30%, were Finnish, with the rest coming from over 50 different states.[18] The Construction Union had struggled to gain control over the worksite and did not have the necessary membership on the site to organise a boycott. Additionally, the employer consortium was unwilling to co-operate, in one instance not allowing union representatives access to the site by arguing that this violated nuclear safety. How the union ultimately came to represent the Polish workers is a long-winded story where both the union and the workers were struggling to find a way of co-operating. Ultimately, the efforts of the union to organise the labour force at the construction site led to the self-organising and frustrated Polish workers to join the union, which then took over their claim.[19]

Once filed, the claim was for EUR 7.6 million and EUR 6.6 million for work done between January 2009 and June 2015. They had contracts under Polish law and had been posted to work in Finland. The workers maintained that they were not being paid what they were owed under the terms of the collective agreement applicable to employees in Finland.

The case considered whether the collective agreement applied to the workers in question. In interpreting the agreements, the court felt that it needed to take into account the Posted Workers' Directive in order to select the applicable agreement. So, the district court referred six questions to the CJEU on this and related issues. The first five dealt with the legal standing of the labour union to bring a claim such as the present one in a Finnish court. The court rejected the argument and went on to consider the substantive challenge. Here the court had to consider whether the Posted Workers' Directive permitted the calculation of a minimum wage based on the categorisation of workers into pay groups and whether various employment benefits should be considered part of the minimum wage.

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16. *Sähköalojenammattiliittory v Elektrobudowa Spółka Akcyjna* Case C-396/13 Judgment of 12 February 2015 (hereinafter *Sähköalojenammattiliitto*).

17. Hirvonen M. (2011) Raportti ulkomaisen työvoimansääntelyn toimivuudesta, at 108.

18. Lillie N. and Sippola M. (2011) National unions and transnational workers: the case of Olkiluoto 3, Finland, Work, Employment and Society, 25 (2), 292-308 at 299.

19. The story is told in detail up to 2011 at Lillie N. and Sippola M. (2011) National unions and transnational workers: the case of Olkiluoto 3, Finland, Work, Employment and Society, 25 (2), 292-308.

Regarding the calculation of the minimum wage, the district court had asked whether the Posted Workers' Directive precluded the categorisation of workers into pay groups, as provided by the relevant collective agreement. The court answered this question by stating that the relevant provision of the Directive is 'quite clear' that the calculation of the minimum wage is a matter for national law.[20] The court adds that these rules must be universal and transparent and must not be left to the choice of the employer.

The court also finally considered the various benefits and whether they would be included as constituent elements of the minimum wage. Here, the court had to decide whether it was the national laws and customs or the wording of the Directive that would be decisive. In this respect the court could rely on its pre-existing case law to determine which benefits could be considered part of the minimum wage.[21]

The case then reverted to the national district court, which approached the Labour Court for its opinion on which of the collective bargaining agreements was to be applied. In its judgment (TT: 2016-107), the court decided that the applicable agreement was the collective agreement for the electrical installation sector of the building industry, and from 2010 onwards, the electrical sector's collective agreement. In the course of the argument, however, it became apparent that a number of companies applied the main collective agreement for the technology industry. There was no reference to this collective agreement in the district court, nor did either of the parties rely on it in their submissions, so the Labour Court could not produce a finding on the matter.

Back in the district court, Elektrobudowa amended its argument to claim that the workers were covered by the main collective agreement for the technology industry. This argument was based on the fact that in substance the work carried out by the employees of Elektrobudowa was installation work, rather than the electrical work claimed by the labour union, and therefore covered by the main collective agreement for the technological industry. The Electrical Workers' Union continued to argue that the work done by the employees fell within the collective agreement for electrical work. The fact that another agreement could plausibly also apply did not change this. The labour union also pointed out that Elektrobudowa had, in its contracts with the contractor, bound itself to apply the Blue Book. The district court asked the Labour Court to clarify whether the main collective agreement for the technological industry was to be applied to the workers at Olkiluoto 3.

The Labour Court, taking a number of stakeholders' viewpoints, arrived at the conclusion that it should be the collective agreement for the electrical installation industry in the building automation sector, thus siding with the Electrical Workers' Union.

The case is telling in a number of ways. First, it represents a rare case brought by a union on behalf of posted workers, and one that was successful, where the workers prevailed in their claim and were compensated for the lost wages. Second, and more generally, it displays the complexity of litigating labour rights in the Finnish system.

20. *Sähköalojenammattiliitto* at paragraph 39.
21. *Sähköalojenammattiliitto* at paragraph 36.

While the dispute is sizeable in terms of the litigants and sums of money involved, the district court has also seen it as necessary to refer to specialist courts on three different occasions, which then had to involve a number of other parties. These steps have taken years to complete and have involved significant costs for everyone involved.

Two more cases raise questions about the payment of the correct level of wages. The first (TT: 2006-63) regarded a dispute between the Heating, Ventilation and Air Conditioning (HVAC) Installers' Union (as it had changed its name from the House Builders' Union) and the Builders' Union. Thus, it was the Builders' Union that brought the case, asking the Labour Court to confirm that posted workers would be placed in a particular wage category. The judgment was relatively brief and focused on the terms of the agreement. The labour union claimed that the provision would be applied to those workers who were already in Finland when the agreement was signed and to those who had commenced employment. The respondent Employers' Union argued that only those employees who commenced employment after the agreement was signed would be covered by it. Its arguments rested on both the wording of the agreement as well as the fact that before it was signed there was no control over the experience of the posted workers. The Court sided with the industry association, resting its arguments on the wording of the agreement.

3.2. Disputes regarding the nature of the employment

Three cases question the proper classification of employees. The first of the cases dealt with the lawfulness of hiring employees through particular types of temporary contracts. The first case in 2009 took place within the context of aviation (TT: 2009-90). Finnish airline Finnair had entered into a so-called wet lease agreement (an agreement between airlines for the provision of an airplane and crew) with a Spanish airline. The labour union for flight attendants (*Suomenlentoemäntä- ja stuerttiyhdistys*) brought the case, alleging that Finnair had acted against the collective agreement by not applying the required collective agreement to the leased workers, and that the industry association (*palvelualojentoimialaliitto*) had neglected its duty to supervise the conditions of the agreement, and that both the company and the association had done so knowingly, requesting the court to impose a punitive fine on both.

The case dealt with the flights between Helsinki and Phuket in the winter of 2008-2009. The labour union and the company could not reach an agreement as to the working conditions for these flights. Accordingly, the union claimed this represented a violation of the collective agreement. The airline denied this on the grounds that wet lease agreements pertained to the entire aircraft including its staff and would not as such fall within the relevant provision of the collective agreement. At this point the Court asked an interim question about the applicability of the Posted Workers Directive and whether it would affect its decision.

The Court found that the company was not under the obligation to apply the collective agreement to those employees that fell within the wet lease. While the Court found that the collective agreement itself had not been intended to exclude those employees, it had

to be read within the framework of free movement of labour in the EU. The Court argued that in its jurisprudence, the CJEU has held that the Directive sets out exhaustively those working conditions that are to be applied to posted workers and that anything above this could be considered a restriction on the free movement of labour. The Court also made the point that it would reach this decision even without the regulations of the Posted Workers Directive in light of Article 49 of the Treaty on the European Union. As such, the airline and industry association won the case.

The second aviation case before the Labour Court that resulted in a request for a preliminary ruling from the Labour Court to the CJEU was a matter between the transport union and a private company.[22] The case concerned the lawfulness of hiring temporary workers for certain jobs related to transporting fuel to various airports in Finland. The labour union brought an action in the Labour Court to impose a punitive fine in terms of the law on collective agreements. The defendant argued that its use of temporary workers was justified because they were replacing workers on sick leave or supplementing staff shortages during particularly busy times.

The Labour Court referred the case to the CJEU for clarification on the scope of Article 4(1) of the Posted Workers Directive. That provision requires that 'prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented'. The domestic court asked whether this implied that the Finnish scheme was contrary to the Directive in that it allowed the use of temporary workers outside of the exceptions explicitly listed in Article 4(1). The CJEU's response was that, while the Article restricted the scope of the legislative framework to be adopted, it did not require any particular singular framework to be adopted. At the time of writing the case was pending before the Labour Court.

In the third and final judgment in this category, the court also handed down a judgment in a dispute between the industry association for the car and road transportation and the labour union in the same sector (TT: 2009-41). The case was a referral from the district court and related to a case of non-payment of wages. An Estonian company had been contracted by a Finnish company to deliver certain goods in a number of central European countries. The Estonian company argued that it was due to be paid wages in terms of the collective agreements in place in Finland for professional road traffic. It rested its argument in part on laws regulating posted workers. The Finnish industry association argued that the workers were not posted workers at all within the meaning of the legislation, which the court accepted, as the workers had not been posted to Finland in the way that the implementing legislation required. The case, then, does not deal with a case of posting as such, but rather arguments about posting that were made in a case involving migrant workers.

22. *Auto- ja Kuljetusalan Työntekijäliitto AKT ry* v *Öljytuotery, Shell Aviation Finland Oy* Case C-533/13, Judgment of 17 March 2015.

3.3. Lawfulness of strike action

Finally, we find a case (TT: 2002-67) that deals with the lawfulness and consequent damages of a strike and, although the case involved posted workers, the law regarding posted workers was relevant only tangentially. The case was brought by the industry association for housebuilders (*talotekniikkaliitto*) for a breach of industrial peace by the Builders' Union in terms of the collective bargaining agreement. The trade union had announced various forms of industrial action as a protest over the lack of certainty about the working conditions of workers from Estonia. The case was won by the industry association because the industrial actions were in breach of the collective bargaining agreement. One judge dissented on the grounds that, from the report filed by the Employers' Union, the wages paid were below what would have been due in terms of the legislation for posted workers, and as such the strike action would have been directed at a legitimate target and not the contents of the collective agreement. The case, then, while directly related to the interpretation of the collective bargaining agreement, dealt with posted workers to the extent that they set the context for the facts of the case.

Discussion

As anticipated, the case law regarding posted workers in Finland is relatively limited. Broadly speaking, all of the cases related to the application of the collective agreement in one way or another. *Sähköalojenammattiliitto* is a landmark case dealing with a large-scale and problematic building site, and as such it stands out in almost all respects. One case dealt with the interpretation of the collective agreement. Three cases dealt with the proper classification of workers hired by Finnish companies. Each of these cases was brought by the labour union, in what can be considered as an effort to protect their members' working conditions from being undermined by cheaper foreign and/or temporary workers.

A number of points may be made regarding the case law considered above. In the first place, the relatively low number of cases is notable. The cases considered, of course, excludes first instance cases in the district courts. Nevertheless, some factors could indicate that even there the number of cases would be on the low side of the spectrum. First of all, if there were a high number of cases, some would be appealed or referred to the Labour Court and we would find more case law from the superior courts. At the moment that is not the case and the two referrals from the district courts to the CJEU are the sole examples. Second, using the Finnish court system is often a slow and costly way of enforcing your rights. This is especially true if the supervisory mechanisms – such as the inspectorate – are able to function properly. While there are serious concerns as to whether this is in fact the case, the existence of such a system, even one that does not function, would further discourage faith in the formal system. Third, there are also good reasons to believe that posted workers would not want to rely on the judicial system because of the nature of their position within the Finnish labour market. The position of these workers is already often precarious, as they can be easily dismissed and they may often be unaware of their rights. The lack of litigation may then align with the

impression of the state struggling to protect the rights of migrant workers in general and posted workers in particular.[23]

The second set of points relates to the cases that have been brought. The first point relates to who has brought the case. In all but those cases where the issues of posted workers were secondary, the case was brought by a labour union. These cases were all attempts to prevent employers from employing cheaper labour, either by trying to ensure that the posted workers were placed in the appropriate category within the labour agreement, or that the labour agreements were not circumvented by hiring temporary staff. It could be said, then, that these cases have been brought not only to solve the dispute, as it exists, but also to prevent employers from adopting general practices that would be disadvantageous to the employees. Similarly, the motivation for bringing a claim is often to protect the interests of the Finnish members of the labour union as much as those of the immigrant workers. In many ways the interests of labour unions and posted workers coincide, as Finnish employees benefit from not having to compete with employees accepting lower wages.

The subject matter of the cases is the second point. The largest number of posted workers is employed in the construction sector, and this is also where most cases emanate from. The explanation for these cases may lie in the structure of the aviation industry, where, as a transnational transportation industry, cases of migrant labour may be more common.

The third point is that although the major case regarding the Polish employees at Olkiluoto 3 is still not resolved, most of the other cases brought by the labour unions have prevailed in their claims and been won by the labour union. This would indicate that labour rights are being breached and while not all cases reach the courts, the cases that do may be indicative of broader employment law trends.

Finally, the Olkiluoto 3 litigation stands out as an attempt to litigate the rights of posted workers. It is the only claim where unpaid wages are pursued through the courts, and is both long and complex. Given that the potential gain in terms of unpaid wages is relatively high, it may be that in this case the litigation is worth it. However, given the uniquely huge size of the building site within the Finnish context, and the number of workers involved in it, it is unlikely that another similar attempt to litigate rights would be made.

Conclusion

In a report about the functioning of the regulation of foreign labour in Finland, it was noted that although some cases dealing with immigrant workers had been taken to court, the number of these cases was marginal.[24] A representative of a labour union has

23. Hirvonen M. (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta; Eskola K. and Alvesalo A. (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset, Helsinki, Työterveylaitos.
24. Hirvonen (2011) Raportti ulkomaisen työvoiman sääntelyn toimivuudesta.

mentioned that they do not see litigation as an option for enforcing the rights of posted workers because of the long and expensive nature of the Finnish legal system. It has also been frequently noted that posted workers who are dependent on their employers, sometimes satisfied with their working conditions and who usually find it easy to return to their home country, are unlikely to protest too much.

This chapter has analysed the reported cases decided in Finnish courts that dealt with issues involving posted workers. The case law is sparse, which might be indicative of the lack of litigation in general. It may also be indicative of the labour unions not being able to adequately protect the rights of posted workers, as has been discussed in the academic literature. These are the actors who can bring cases to the courts, and while they have done so at times, the lack of case law may indicate that the courts do not offer a viable option for the protection of labour rights.

References

Eskola K. and Alvesalo A (2010) Ulkomaiseen työvoimaan liittyvät väärinkäytökset – Poliisin tutkimat tapaukset. [Abuses of foreign labour – Cases investigated by the police] http://www.julkari.fi/bitstream/handle/10024/134976/Ulkomainen_tyovoima_2010.pdf?sequence=1

Hirvonen M. (2011) Ulkomaista työvoimaa koskevan sääntelyn toimivuus: Poliisihallituksen toimiannosta tehty tutkimus. https://www.poliisi.fi/tietoa_poliisista/julkaisut/prime101/prime231_fi.aspx?docID=25796

Hirvonen M., Lith P. and Walden R. (2010) Suomen kansainvälistyvä harmaa talous Eduskunnantarkastusvaliokunnan julkaisu. 1 https://www.eduskunta.fi/FI/tietoaeduskunnasta/julkaisut/Documents/trvj_1+2010.pdf

Juntunen M (2011) Tilaajavastuulaki ja sen valvonta – ongelma terityisesti työehtosopimuksennoudattamisen valvonnassa. . https://www.theseus.fi/bitstream/handle/10024/25320/Marjo%20Juntunen%20-%20Julkaisu.pdf?sequence=1

Korpela M., Rantanen P., Hyytiä J., Pitkänen P., and Raunio. M. (2014) Temporary migration in Finland, in Carrera S. and Pitkänen P. (eds.) Transnational migration in transition: state of the art report on temporary migration, Tampere, University of Tampere, 81-113.

Lillie N. and Sippola M. (2011) National unions and transnationalworkers: the case of Olkiluoto 3, Finland, Work, employment and society, 25 (2), 292-308.

List of cases

Court of Justice of European Union, Sähköalojenammattiliittory v Elektrobudowa Spółka Akcyjna Case C-396/13 Judgment of 12 February 2015.

Court of Justice of the European Union, Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry, Shell Aviation Finland Oy Case C-533/13, Judgment of 17 March 2015.

Labour Court, TT: 2002-67.

Labour Court, TT: 2006-63, Judgment of 22 June 2006. (https://www.finlex.fi/fi/oikeus/tt/2006/20060063?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202006-63).

Labour Court, TT: 2009-41, Judgment of 11 May 2009, (https://www.finlex.fi/fi/oikeus/tt/2009/20090041?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202009-41%20).

Labour Court, TT: 2009-90, Judgment of 9 October 2009, (https://www.finlex.fi/fi/oikeus/tt/2009/20090090?search%5Btype%5D=pika&search%5Bpika%5D=%20TT%3A%202009-90).

Labour Court, TT: 2016-107, Judgment of 4 November 2016, (https://www.finlex.fi/fi/oikeus/tt/2016/20160107?search%5Btype%5D=pika&search%5Bpika%5D=TT%3A%202016-107%2C%20).

Chapter 4
Posting of workers before French courts[1]

Barbara Palli

Introduction

France is one of the leading EU economies, where workers enjoy a relatively high minimum wage of EUR 1,521.22 per month for a 35-hour week, and comparatively protective social legislation. The French workforce is sometimes perceived, therefore, as vulnerable to potentially unfair competition.

The importance of France as a receiving country for posted workers is undoubted[2] (along with Germany and Belgium), but it is also an important sending country (along with Germany and Poland).[3] In 2017, 515,101 workers were posted to France (an increase of 46% on 2016). Among them, 74,000 were posted from Portugal, 61,000 from Poland, 45,000 from Germany and 44,000 from Romania.[4] Temporary work agencies made up 24% of these postings.[5]

In the light of these figures, the French authorities (including the labour and transport ministries, Labour Inspection, social security and tax public services) seem to be at best suspicious and at worst unambiguously hostile to inbound posting. Trade unions are generally opposed to posting as well. While they denounce fraudulent recourse to posting, they are not particularly supportive of posted workers. Neither do employers and employers' organisations openly support posting, even though they benefit from it. Given that posting is generally seen in France as synonymous with social dumping and unfair competition, public opinion is also rather unsympathetic.

Neither do French courts mitigate this unfavourable climate. Despite the profusion of legislation, litigation is limited, with French courts for the most part embracing the public policy they are mandated to implement, such as battling illegal work, eliminating social and tax fraud, and protecting local businesses and workforces against unfair

2. The Ministry of Labour accounts for 81,420 posting declarations in 2015, corresponding to 286,025 posted workers. Analyses des déclarations de détachement des entreprises prestataires des services en France en 2015, http://travail-emploi.gouv.fr/IMG/pdf/prestations_de_services_internationales_2015_-_valide.pdf

3. In 2015, France issued 139,040 portable A1 documents. French workers are mostly posted to Belgium (37,200), Germany (17,300), Spain (12,400), UK (11,900) and Italy (11,500): http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes

4. In 2017, Germany made 37,507 posting declarations; Spain 25,691; Portugal 20,997; and Belgium 14,624.

5. 37,000 of the posted workers were French nationals being posted to France through the intermediary of neighbour countries, most notably Luxembourg. *Liais. soc. actu.* 7/02/2018, No. 17505.

competition. There is very little litigation with respect to the application of the core rights of the Posted Workers Directive. Even more surprising, litigation is scarce with regard to joint liability of the client, even though France has played an important role in the adoption of the duty of vigilance and client liability in cases of failure to comply with that duty.

Criminal sanctions against foreign service providers are rather rigorous, while sentences against local operators, general contractors and clients are relatively modest. Joint liability of local clients is rare, but sanctions against them, such as temporary suspension orders, are swiftly applied. Local employers are also often found liable for the recovery of social security contributions.

The two constituent parts of the French Supreme Court do not adopt the same position with regard to the European Court of Justice (CJEU). The Supreme Civil Court has recently established a solid dialogue with the CJEU (see section 3). By contrast, the Supreme Administrative Court still has a rather sovereign approach (see section 4).

I will examine national legislation, political debate and current developments on posting below (section 1), before analysing the national case law on posting (section 2).

1. Legislative protectionism, monitoring, and political debate on posting in France

Posting has been a controversial issue in France ever since the third European enlargement in 1986, when Spain and Portugal joined the European Community. The famous CJEU *Rush Portuguesa* case[6] perfectly illustrates French fears about the enlargement. Spanish, and, as in that case, Portuguese businesses with lower labour standards were likely to be more competitive than their French counterparts and therefore more likely to win tenders for the provision of services within the French internal market. This reality was a shock for the French public opinion and it created a lot of discontent (Rodière 1990).

1.1. Legislative protectionism

Under these conditions, the Posted Workers Directive, or Directive 96/71/CE, was implemented rather reluctantly by Statute No. 2005-882, on 2 August 2005,[7] just a few months after the French referendum on the Constitutional Treaty for Europe (29 April 2005), which had been rejected by 54.6%[8] of French citizens. The reason for this rejection was not only the unfavourable local political climate but also the fears aroused by the draft Services Directive (also known as the Bolkestein Directive) and the fictitious figure of the 'Polish plumber' (Marchand 2006). Indeed, the EU enlargement

6. CJEU C-113/89, 27 March 1990, *Rush Portuguesa* v *National Immigration Office*.
7. In force since 1 January 2007.
8. 69.37% of French citizens voted.

towards central and eastern European (CEE) countries provoked fears that during the transitional period the French construction market would be overwhelmed by eastern businesses (self-employed workers and/or posted workers).

By contrast, Directive 67/2014/EU on the enforcement of the Posted Workers Directive was rapidly and more enthusiastically implemented into national law by Statute No. 2014-790, 10 July 2014, the reason being that France played an active part in the adoption of chain liability at EU level (Lyon-Caen 2014). The French Statute implementing Directive 67/2014/EU (also known as Loi Savary) recognises joint liability of the local client and/or general contractor and extends it to all relevant sectors besides construction.[9]

A year later, Statute 2015-990, 6 August 2015 relative to 'economic growth, activity and equality of chances' (also known as Loi Macron), introduced among others (Article L8291-1 of the Labour Code (LC)) a professional identification card within the construction sector. This card has been compulsory for all construction workers operating within the French territory since 30 September 2017.[10] In order to monitor compliance, certain documents (such as contract of employment and payslips) must be translated into French (L1263-7).

Statute No. 2015-990, 6 August 2015 further enhances joint and several liability of local clients and general contractors by extending it to pay obligations. At first glance, liability seems far-reaching as it extends not only to direct but also to indirect subcontractors (chain liability). However, the local clients and general contractors can avoid liability if they immediately terminate the contract for the provision of services with the infringing employer (L1262-4-3 LC). As a result, local operators are comparatively safe under current legislation.

In cases of violation of one of the core minimum conditions of work, employers and local clients are subject to the temporary suspension of the execution of the contract for services for up to one month (Article L1263-4 LC) and to an administrative fine of up to a maximum of EUR 500,000 (Article L1264-3 LC). Local clients can also face temporary closure of the worksite (Article L8272-2 LC) or the temporary exclusion from public procurement (Article L8272-4 LC), but only where there is sufficient evidence of unlawful recourse to posting, equivalent to undeclared work.

Decree No. 2016-418, 7 April 2016, adapted labour law provisions relating to posting to international road transport, and now imposes on foreign hauliers the principle of equal pay (in comparison to the local workforce), an obligation to keep on board a posting certificate – valid for a period of six months maximum – and the requirement to designate a representative who is able to provide certificates of posting, payslips and so on during posting and for 18 months afterwards (R1331-5 Transport Code). Given the

9. Employers and, in case of default, local clients are subject to administrative fines of a minimum EUR 2,000 per worker and a maximum of EUR 500,000. See also Decree 2015-364, 30 March 2015 fighting against fraud in posting operations and illegal work.

10. Decree No. 2016-175, 22 February 2016.

protectionist nature of these measures, especially equality of treatment, the European Commission (EC) initiated an infringement procedure against France on 16 June 2016.[11]

Less than a year later, Statute No. 2016-1088, 8 August 2016, on 'social dialogue modernisation and securisation of professional paths' (also known as Loi El Khomri), imposed on local clients and/or general contractors a duty of vigilance with regard to posting declarations. If the foreign employer does not declare posted workers, the client and/or general contractors are compelled to declare posted workers in place of the employer, otherwise they are subject to an administrative fine (Article L1262-4-1).

Statute No. 2016-1088, August 2016 also stated that foreign service providers declaring posted workers should be paying a maximum flat fee of EUR 50 per posted worker to cover dematerialised posting declaration-related costs. Although the precise sum of the contribution - EUR 40 per posted worker - was fixed by Decree No. 2017-751 on 3 May 2017, the whole mechanism was retroactively repealed as from 1 January 2018 by Decree No. 2018-82, 9 February 2018 without further explanation.

It goes without saying that these successive reforms have a common protectionist goal. They make provision of services based on employee posting less appealing both for foreign operators and local clients. According to the Labour Inspection, the duty of vigilance, joint liability and sanctions such as suspension of works should have a positive effect in monitoring compliance. This is discussed in further detail below.

1.2. Monitoring of the national legislation

These measures were accompanied by monitoring procedures. During 2015 and 2016 the French Labour Ministry (DGT 2016) launched a vigorous campaign against fraud, particularly within posting operations. From July 2015 to March 2016 control authorities (most notably Labour Inspection) established more than 934 criminal offences related to posting. Among them, two-thirds were related to fraudulent recourse to posting and therefore to different forms of illegal work. Throughout the same period, the competent authorities (préfecture) have issued 20 orders for the closing down of the relevant worksites and six suspensions of international contracts for the provision of services. In just nine months, 291 fines were imposed in relation to a total of 1,382 workers corresponding to a total sum of EUR 1,489,880. Sixty per cent of these fines were imposed on foreign services providers, with 64% of them related to the construction sector and 71% motivated by a declaration default. In 2017, there were 1,034 fines, equating to EUR 5,900,000, three closing-down orders and 11 orders for the suspension of international contracts for the provision of services.[12] There is substantial progress in the recovery of fines. This was just 37% in 2016 but went up to 53.46% in 2017 (CNILTI 2018).

11. http://europa.eu/rapid/press-release_MEMO-16-1452_en.htm
12. *Liais. Soc. Actu.* 7/02/2018, No. 17505.

1.3. Public debate during and subsequent to elections

During the May 2017 presidential elections, candidate Macron made it clear that if he were to be elected, he would seek the hardening of posting conditions during the ongoing revision of the Posted Workers Directive. This is why, as soon as he was elected, he rejected, in June 2017, the EC's proposal (COM (2016) 128 final, 8/3/2016) and initiated, at the end of August 2017, a campaign[13] in favour of more protective measures, including equal pay and a maximum duration of posting. The Council of Ministers' agreement, on 22 October 2017, followed by the vote in the EU Parliament on 29 May 2018, upheld the equal wage principle and the maximum duration extendable of 12 months. The French government is still fighting, however, for the application of the Posted Workers Directive to international road transport.[14]

1.4. Current developments

Statute 2018-771, 5 September 2018 (the so-called 'Freedom of choice of one's professional future') seeks on the one hand to free certain transnational service provisions by exempting them from declaration duties, and on the other, toughens sanctions against unlawful posting. It is the first time in a long time that French legislation seeks to loosen control in respect of some specific posting operations.

In effect, according to the Statute in question, an international agreement between France and a neighbouring country may provide that posting declarations and monitoring provisions do not apply when posting operations take place in an area (to be determined by the agreement) close to the border. The reason for this exemption seems to be that there is regular posting activity between France and close neighbour countries such as Germany and Luxembourg. However, given the absence of any substantial pay gap between these neighbouring countries, this activity is considered to be profitable to both sides and therefore doesn't need to be controlled and discouraged as there is no risk of social dumping. The same Statute contains another exemption concerning activities of short duration or linked to one-off events (Article L1262-6). This exemption will apply to artistes, football players, trainers, journalists and other professions enumerated by decree. It is worth mentioning that neither exemption will apply to temporary work agencies, which are expressly excluded.

By contrast, sanctions against unlawful recourse to posting have been raised. Administrative fines for illegal recourse to posting (declaration default) have been increased. Minimum fines are increased to EUR 4,000 per worker (from EUR 2,000) and maximum fines per worker to EUR 8,000 (from EUR 4,000). Reiteration of an

13. On 23 August 2017, the newly elected President visited Austria, Romania and Bulgaria in order to gain support for the revision of the Posted Workers Directive. See among others, Les travailleurs détachés au cœur de la visite Macron en Europe de l'Est, Les échos, 23 August 2017.

14. For the French position towards the application of the revised Posted Workers Directive to road transport, see *Liais. Soc. Quot*. No. 17582, 4/06/2018. Thirty-nine per cent of all cabotage operations in Europe involve Germany and 29% France. Source, *Rapport de la Commission au Parlement Européen et au Conseil sur l'état du marché du transport routier dans l'Union européenne*, publié le 14 avril 2014.

infringement (declaration default, or core conditions of work violations) are no longer appreciated within one year but two years (Article L1264-3) and if the foreign operator does not comply with a previous conviction (administrative fine) then the provision of service may be suspended for two months. Additionally, a suspension order may be renewed. Last but not least, criminal sanctions for abusive or fraudulent recourse to posting may be published according to the 'blame and shame' principle.

2. General trends of posting case law

The court system in France is divided into two jurisdictions: the civil courts, headed by the Supreme Civil Court (*Cour de Cassation*); and the administrative courts, headed by the Supreme Administrative Court (*Conseil d'Etat*). Civil courts are further divided into chambers, among which the most relevant for the purposes of the present research are: the criminal chambers that deal with undeclared work; the social chambers dealing with workers' claims on the infringement of their core rights; and social security (contribution recovery issues). Posted workers are expected to bring their claims before employment tribunals *(Conseil des Prud'hommes)* composed of workers and employer representatives (non-professional judges). Social security issues are dealt with by a special jurisdiction called the Tribunal for social security affairs *(Tribunal des affaires de sécurité sociale)*. On second instance, appeals come before the social/criminal chambers of one of the 30 courts of appeal. Litigation before administrative courts is scarcer and concerns control of secondary legislation (regulations), public procurement, or administrative sanctions such as suspension of works and fines.

Generally, litigation in relation to posting is inversely proportionate to the legislative profusion and the intensity of public debate of posting in France. Given the bulk of legislation and monitoring activity, one would expect there to be a vast amount of court decisions relative to posting. The reality is far different, however, and there are plenty of reasons for this.

First, very few workers posted to France introduce court actions before French employment tribunals, the reason supposedly being that posted workers are unfamiliar with French law, language and judicial system. Nevertheless, this argument does not explain why posted workers from France hardly ever bring any claims before French jurisdictions either. Trade unions have a right to lodge complaints on behalf of posted workers in respect of the violation of posting legislation,[15] but they rarely do so in practice because posted workers, both inbound and outbound, are hardly ever unionised. Labour Inspection and social security officials make targeted controls in relevant workplaces - meaning where there are posting declarations - and therefore refer to the public prosecutor in those cases where there is substantial proof of unlawful posting and therefore of undeclared work. This is the reason why there is much more litigation before criminal courts. Litigation before administrative courts remains scarce at the moment, though the numbers have been rising rapidly since prefectural officials have been able to issue suspension of activity orders.

15. Article L1265-1 French Labour Code.

More precisely, I have found 36 relevant decisions deriving from Courts of Appeal, *Cour de Cassation* (Supreme Civil Court) and *Conseil d'Etat* (Supreme Administrative Court). Still, I am not sure whether I have had access to the entirety of Court of Appeal decisions, because the publication of second instance decisions depends on the discretion of the Court itself. In addition, the first instance judgments remain unavailable.

The majority of cases are concentrated in the construction industry (8), temporary work agencies (7), civil aviation (8), road transport (4), agriculture (2), information technology (2), finance (1), law firms (1) and telecoms (1). The nationalities involved are: Polish (9), British (6), Luxembourgish (4), Italian (4), Portuguese (3), Spanish (3), Bulgarian (2), German (2), Romanian (2), Canadian (1), Hungarian (1), and Ukrainian (1).

Section 3 discusses litigation before civil courts, and section 4 examines the rise in litigation before administrative courts.

3. Posting before civil courts

As mentioned, Labour Inspection and social security authorities are responsible for the enforcement of posting legislation. As a result, these authorities make targeted controls in worksites on the basis of posting declarations or when trade unions or workers denounce unfair posting practices. When there is enough proof that there is no genuine posting but more likely undeclared work, they initiate prosecution before criminal courts (see 3.1. below).

Where there is strong proof that the operation does not qualify as posting, public prosecution may be prompted against the employer and/or the client, or the general contractors for undeclared work. In the latter case, the national social security authority (URSSAF) may also issue an order for the recovery of social security contributions. These orders are also challenged before civil courts. Of course, during prosecution, employers often claim they have A1 (previously E101) documents. However, if posting is not genuine, then the employer must pay contributions to French social security. This is why there is a lot of litigation as to whether A1 documents have a binding effect on French control authorities and tribunals (see 3.2. below).

Last but not least, individual posted workers sometimes bring claims before employment tribunals, either claiming the application of the Posted Workers Directive core rights or as a result of a prosecution for undeclared work (see 3.4. below).

3.1. The criminal offence of undeclared work

When an operation does not qualify as posting under Article L1262-1 of the French Labour Code, then it is considered undeclared work (a criminal offence) and prosecuted as such. This is the case when foreign service providers have a permanent establishment within the French territory, or in the case of local operators who engage in the creation of foreign subsidiaries that have no substantial activity in the country of origin other

than the accomplishment of simple administrative tasks (Article L1262-3 and Directive 67/2014/EU).

3.1.1. Duty of establishment

There are two landmark criminal cases dating back to 11 March 2014 that need to be mentioned. Both concern foreign airline companies that claimed they were posting crew and technical personnel to the French territory.

In the first case, of *Vueling*,[16] the Court of Appeal (Paris Court of Appeal, criminal chamber, 31 January 2012) took the view that the crew and technical staff of Vueling were not posted workers. In effect, according to Article R. 330-2-1 of the Civil Aviation Code, (Decree 2006-1425, 21 November 2006)[17] 'an operating base is a set of premises or infrastructures from which a company regularly, habitually and continuously carries out an air transport activity with employees who have the effective center of their professional activity there. For the purposes of the foregoing provisions, the center of an employee's professional activity is the place where he habitually works or where he takes up his service and returns after the completion of his mission'.

As a result, the Court of Appeal found that Vueling had a permanent operating base and did not exercise a temporary activity, contrary to Article L1263-2 of the Labour Code. The criminal chamber of the Supreme Court agreed with the appeal judges. The offence of illegal (undeclared) work was established and Vueling was subject to a EUR 100,000 fine for the violation of Article L. 8221-3, 2° of the Labour Code.

The case of *easyJet*[18] is almost identical except that easyJet, prosecuted for the period from 1 June 2003 to 13 December 2006, had not registered any permanent subsidiary in France, nor did it seem to invoke valid E101 documents on behalf of the supposedly posted workers, who were for the most part French nationals permanently residing within the French territory. The criminal chamber of the Supreme Court agreed with the findings of the Court of Appeal (Paris Court of Appeal, criminal chamber, 8 November 2011) that the activity of easyJet was subject to the duty of establishment and not to the freedom for the provision of services because of the habitual, stable and continuous nature of the activity within the French territory. As a result, transnational posting was once again excluded. Therefore, easyJet was found guilty of violation of Articles L1262-3 (posting), L8221-3 (undeclared work), L8224-5 (illegal supply of workers[19]) of the Labour Code, and sentenced to a EUR 100,000 fine.

It is obvious that these fines are exemplary and intended to deter foreign service providers from abuse of the Posted Worker Directive principles.

16. Sup. crim. ch.. 11 March 2014, No. 12-81461.
17. See *infra* Section IV for the judicial challenge of the aforementioned Decree.
18. Sup. crim. ch. 11 March 2014, No. 11-88420.
19. Meaning an operation causing prejudice to the workers, because of the violation of their legal rights.

3.1.2. Letterbox companies

Letterbox companies frequently involve French nationals or established French companies that engage in illegal operations for profit-making purposes. Although monitoring and control shed light on this kind of operation, criminal prosecution seems less prompt by comparison to the abuse of the freedom of establishment.

The following cases are relevant to the constitution of letterbox companies in the transport sector. 'A' was the manager of three different transport companies (CL Alsace, CL Jura, CL Nord) established in France.[20] He also held 90% of the capital of a Polish transport subsidiary called JPV Polska. The French companies hired out lorries to the Polish subsidiary and the Polish subsidiary hired back the same vehicles equipped with lorry drivers. During a control operation, the workers provided rental agreements (hire out/hire in) and Polish employment contracts, but at no time did they invoke either posting or E101 certificates. According to the Court (Douai Court of Appeal, criminal chamber, 3 March 2015) the hire out/hire in operation had no other purpose than procuring a low-pay workforce for the French hauliers that was outside the scope of the temporary work agency legislation.[21] Moreover, the activity of the Polish company within the French territory, although not permanent, was at least frequent. Some of the lorry drivers testified to being employed within the French territory for three to five years. Additionally, during the relevant period the French companies' turnover increased while the aggregate payroll diminished. When JPV Polska finally provided E101 certificates on behalf of the lorry drivers, the Court of Appeal found they were inconsistent, meaning that they were obtained at a later date and did not determine the identity of the user. As a result of this, the manager and the three companies established in France were sentenced to a fine of EUR 12,500 each on the basis of L8221-5 of the Labour Code (undeclared work), L8231-1 and L8241-1 (profit-making illegal procurement of work). The Supreme Court confirmed the ruling.[22]

By contrast, on 26 May 2016 the Valence criminal tribunal (first instance criminal justice) acquitted a French haulier for facts that amounted to profit-making illegal procurement of work.[23] The French haulier was supposed to have established three subsidiaries in Poland, Romania and Portugal for the sole purpose of recruiting lorry drivers under lower working conditions, especially salaries. Once they were recruited, the French haulier subcontracted transport operations to the three subsidiaries. In this instance, 300 lorry drivers sued the French haulier for damages. According to the press release, acquittal was due to the first instance judge declaring 80% of the evidence inadmissible. However, given the drivers' testimonies, the public prosecutor decided to appeal against the first instance judgment.

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20. Sup. crim. ch. 21 June 2016, No. 15-82651.
21. For another case of the same sort, see, Sup. crim. ch. 13 December 2016, No. 15-84813.
22 For another case of the same sort, see Sup. crim. ch. 27 June 2012, No. 11-86683.
23. http://www.wk-transport-logistique.fr/actualites/detail/93913/actualites-detail-officiel-transporteurs/affaire-norbert-dentressangle-le-tribunal-prononce-la-relaxe-generale.html?onglet=375&selectionnes=0&deplies=0

3.1.3. Illegal provision of work by temporary work agencies

Posting is subject to criminal sanctions when it takes place outside the legal framework of temporary agency work.

The Supreme Court criminal chamber[24] confirmed an exemplary sentence (one year's imprisonment and EUR 20,000 fine) pronounced by the Nimes Court of Appeal, (criminal chamber, 6 February 2015), against the manager of a temporary work agency registered in Bulgaria. The latter used to hire out the services of Bulgarian workers to local (French) construction companies without previous declaration and work authorisations.[25] The charges were undeclared work (Article L8221-3), work permit default (L8251-1), illegal provision of work for profit (L8241-1) and illegal prejudice to the workers (L8231-1). According to the findings of the Court, during the relevant period, the workers were being paid the equivalent of EUR 260 per month while according to French law temporary workers are entitled to equal pay (Articles L1262-2 and L1251-43 of the Labour Code). The Supreme Court maintained the sentence, taking into account the extent of the prejudice caused to the workers and the detriment caused to local competition. It is interesting to note, however, that the criminal sanction was taken only against the manager of the Bulgarian temporary work agency. Even though the Court established that the Bulgarian temporary agency hired out workers for the benefit of a specific French user company being the subcontractor of a second French company, the French companies were neither investigated nor convicted for the aforementioned offences.[26]

3.2. Liability of the general contractor/client

The legal provisions on the joint liability of the client or the ultimate beneficiary of the works have started to receive some tentative application.

Although it has been impossible to get hold of the decision itself, it is worth mentioning a criminal sentence against Bouygues (Caen Court of Appeal, criminal chamber, 20 March 2017). Bouygues is a well-known construction entrepreneur entrusted with, among other projects, the construction of a nuclear power station in Flamanville (known

24. Sup. crim. ch. 12 December 2017, No.16-87230. Commented, Dr. Soc. February 2018, p. 189; see also in the same sense, CJEU 6 October 2016, C-218/15, *Paoletti et al.*, according to which 'Article 6 TEU and Article 49 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the accession of a State to the European Union does not preclude another Member State imposing a criminal penalty on persons who committed, before the accession, the offence of facilitation of illegal immigration for nationals of the first State'.

25. In that sense, CJEU 10 February 2011, C-307/09, *Vicoplus*. 'Articles 56 TFEU and 57 TFEU do not preclude a Member State from making, during the transitional period provided for in Chapter 2, Paragraph 2, of Annex XII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the treaties on which the European Union is founded, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, on its territory, of workers who are Polish nationals subject to the obtaining of a work permit'.

26. Other case law of the same sort, Sup. crim. ch.17 October 2017, No. 15-80166; Sup. crim. ch. 28 March 2017, No. 15-84795; Sup. crim. ch. 3 November 2015, No. 13-80523.

as EPR) on behalf of the national electricity company EDF. On 20 March 2017, the Caen Court of Appeal confirmed against Bouygues a criminal conviction for having recourse to illegal (undeclared) work through Atlanco, a temporary work agency registered in Cyprus, which was hiring out 163 Polish workers to Bouygues without paying social security contributions to either Cyprus or Poland. Bouygues had been sentenced at first instance (Cherbourg Tribunal) to a fine of EUR 25,000. The Caen Court of Appeal confirmed the sentence but increased the fine to EUR 29,950. It seems that the reason why the appeal judges did not go beyond this amount was that Bouygues would have been excluded from public procurement tenders in future, according to Article L8272-4 of the Labour Code. However, considering the sums involved in the construction of a nuclear power station, the amount of the fine and the immediate consequences of the sentence seem ridiculous.[27] It is worth noting that although statutory law provides for the liability of the client under these circumstances (EDF in this case), it was not sought. However, this decision, which did not make the object of an appeal before the Supreme Court, was made public and casts a dark shadow on the general contractor involved. Things have slightly changed in that criminal convictions for unlawful recourse to posting both against the employer or the general contractor/client are nowadays subject to the additional sanction of being made public.

As mentioned, one of the main aims of the national policy is to fight against the abuse of posting. A further aim of public policy is to cut down the losses of the national social security scheme.

3.2.1. Recovery of social security contributions

When control authorities (URSSAF, Labour Inspection or the Police) establish that an operation presented as posting does not fulfil the conditions of this qualification, then URSSAF issues a recovery order against the infringing (local or foreign) service provider. According to a Senate report, 28 June 2017, (Sénat 2017), when small operators face an URSSAF recovery order they tend to 'disappear', while the more robust tend to challenge the order judicially. To avoid disappearance, the report concludes that the order should seek to establish liability of the principal (meaning the ordering customer) who will generally be a local French company.

This kind of litigation is illustrated by a decision of the Besançon Court of Appeal,[28] where a local company called Batival received a recovery order by the URSSAF of Franche-Comté for the payment of a total of EUR 285,697 on behalf of several Polish workers provided by a company (BCG Bâtiment) established in Poland. Instead of pursuing BCG Bâtiment, URSSAF invoked profit-making illicit provision of work against the local firm, Batival. The latter challenged the order before the URSSAF voluntary arbitration committee, which reduced the amount to EUR 195,697. The Court of Appeal confirmed the ruling.

On another occasion (CA de Bastia, 7 July 2017, No. 16/092) a French construction company (Corsica Bat), received a recovery order for a total amount of EUR 1,573,628

27. A suspension of works order would have been more efficient under these circumstances.
28. CA Besançon Soc. Ch. 28 April 2017, No. 16/00443.

for having had recourse to the services of a temporary work agency established in Poland outside the scope of temporary work legislation. The workers, most of them Polish nationals, did not have E101 certificates and there was no proof that the temporary work agency, which was registered as a demolition firm in Poland, had substantial activity in that country. The Tribunal of social affairs (18 January 2016), followed by the Bastia Court of Appeal, confirmed the recovery order.

Sometimes, however, liability of the local user company is not clearly established. This is the case in a recent decision of the Chambery Court of Appeal.[29] The Rhône Alpes URSSAF issued a recovery order for EUR 454,267 against a local construction firm for having recourse to Romanian temporary workers through a temporary work agency established in Romania outside the scope of the temporary work legislation. The local construction company challenged the order before the Social Affairs Tribunal (2 April 2013), but the latter dismissed the case. On appeal, the judgment of first instance was confirmed.[30]

It seems to follow from the previously mentioned case law, that unlike criminal courts, French jurisdictions do not hesitate to establish the liability of local clients in respect of the social security contributions. The obvious reason is that social security tribunals wish to make sure that URSSAF recovers unpaid social security contributions and at the same time wish to discourage local operators from ruining the French social security scheme by the abusive externalisation of manpower.

3.2.2. E101/A1 documents

When enforcement authorities, notably URSSAF, try to establish whether a specific situation qualifies as posting, the presence of E101 certificates, subsequently called A1 documents, plays a significant role. An E101/A1 document proves that the worker is considered as posted by the issuing authority of the country of origin and therefore remains subject to the social security scheme of that country for the duration of the posting and a maximum period of up to two years.[31] The question is of course whether E101/A1 documents have a binding effect on the enforcement authorities and the local tribunals of the receiving country.

The CJEU has decided on several occasions that as long as an E101 document has not been withdrawn or declared invalid by the issuing authority, it remains binding both for the relevant authority of the receiving country and for the jurisdictions of the State where the worker carries out his activities.[32]

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29. CA Chambery, Soc. ch. 11 October 2016, No. 15-02401.

30. There are many other cases of the same sort, for instance CA Toulouse, 3e ch., 17 December 2015, No. 15-02148 (recovery order for the payment of EUR 45,347); CA Versailles, 5e ch., 5 December 2013, No. 12/04925; CA Chambery, 5 July 2016, No. 15-01958.

31. Regulation (EC) No 883/2004 on the co-ordination of social security systems.

32. CJEU, 10 February 2000, C-202/97, *Fitzwilliam Executive search*; CJEU 30 March 2000, C-178/97, *Barry Bank*; ECJ 26 January 2006, C-2/05, *Herbosch Kiere*. This position has been recently clarified by CJEU 6 February 2018, C-356/16, *Altun*. Under certain conditions, national courts may disregard social security certificates issued to workers posted within the EU in cases of fraud.

Nonetheless, in the *Vueling* case, the Court of Appeal (Paris Court of Appeal, criminal chamber, 31 January 2012) took the view that E101 certificates were not binding proof of posting. The criminal chamber of the Supreme Court agreed with the appeal judges that when a situation does not qualify as posting, it is irrelevant whether the workers have a valid E101 certificate or not.[33] On that particular occasion the Supreme Court expressly rejected that there was a need to refer a preliminary question to the CJEU in order to clarify the binding effect of the E101.

On a different occasion, easyJet[34] challenged the competence of the French employment tribunals because it provided A1 documents on behalf of the allegedly illegal workers. The social chamber of the Supreme Court considered that the presence of A1 documents does not prevent the employment tribunal from applying Article 19, Regulation No. 44/2001, 22 December 2000 on jurisdiction.

Up until that date the French civil courts (especially the Supreme Civil Court), refrained from referring preliminary questions to the CJEU as to the binding effect of E101/A1 documents and decided, more or less autonomously, that E101/A1 documents were not binding as long as the situation did not qualify as posting in practice.

However, on 6 November 2015, the General Assembly of the French Supreme Court decided to refer the *A-Rosa Flussschiff* case[35] to the CJEU for a preliminary ruling.

A-Rosa, registered in Germany, operated two cruise ships sailing on the Rhône and the Saône in France. Employed on board, respectively, were 45 and 46 seasonal workers, who were nationals of Member States other than France who performed hotel-related activities. Both ships sailed exclusively on French inland waterways. However, A-Rosa had a branch in Switzerland that handled everything relating to the ships' activities, including employment contracts of the seasonal workers subjected to Swiss law.

Following an inspection, the URSSAF found irregularities concerning the insurance cover of the employees performing hotel-related activities. That finding gave rise to a recovery order, for EUR 2,024,123, in respect of social security contributions to the French social security system. During those inspections, A-Rosa provided a batch of E101 certificates, issued by the Swiss Social Insurance Office pursuant to Article 14(2)(a) of Regulation No 1408/71.

A-Rosa challenged the recovery order before the tribunal of social security affairs (Social Security Tribunal, Bas-Rhin, France). That action was dismissed as the tribunal considered that A-Rosa's activities 'were entirely geared towards the territory of France' and that those activities were carried out in France 'on a habitual, stable and continuous basis', so that A-Rosa could not rely on Article 14(1) of Regulation No. 1408/71.[36]

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33. This reasoning is far too loose, in comparison to a much more restrictive approach of the CJEU on 6 February 2018, C-359/16, *Altun et al.*

34. Sup. soc. ch. 10 June 2015, No. 13-27799…No. 13-27853.

35. Plen. civ. ch. 6 November 2015, No. 13-25467.

36. By letter of 27 May 2011, the URSSAF submitted a request for withdrawal of the E101 certificates to the Swiss Social Insurance Office. By letter of 18 August 2011, the Swiss Social Insurance Office responded to that request,

A-Rosa lodged an appeal against that judgment before the Colmar Court of Appeal but this was dismissed by judgment of 12 September 2013.[37] A-Rosa then appealed before the Supreme Court but the latter decided, in plenary, to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling: 'Is the effect of an E101 (…), binding, first, on the institutions and authorities of the host Member State and, secondly, on the courts of that Member State, "where it is found that the conditions under which the employee carries out his activities clearly do not fall within the material scope of the exceptions set out in Article 14(1) and (2) of Regulation No 1408/71?"'

The first chamber of the CJEU decided on 27 April 2016 that an E101 certificate issued by the institution designated by the competent authority of a Member State pursuant to Article 14(2)(a) of Regulation No 1408/71, (…) 'is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even where it is found by those courts that the conditions under which the worker concerned carries out his activities clearly do not fall within the material scope of that provision of Regulation No 1408/71'.

In the light of the preliminary ruling of the CJEU, the plenary of the French Supreme Court decided on 22 December 2017[38] to overrule the Court of Appeal decision in the *A-Rosa Flussschiff* case. According to this final decision, the URSSAF was not entitled to challenge the E101 document on the mere facts of the case. URSSAF should have first requested withdrawal of the E101 document from the Swiss issuing authorities, which it did, and then, in the case of disagreement, require the intervention of the administrative commission of migrant workers' social security.

Although the plenary of the French Supreme Court decided to follow the CJEU ruling, the controversy on the binding effect of E101/A1 documents is not over yet. On 10 January 2018, the social chamber of the French Supreme Court referred another two preliminary questions to the CJEU,[39] dealing with the hypothesis of fraudulently obtained A1 documents.

Following his dismissal, a Vueling pilot brought a claim before the employment tribunal for damages for, among other things, unlawful termination of employment

stating that it had required A-Rosa to deduct social security contributions in accordance with the law of that country for persons actually working in only one Member State of the European Union, and asking the URSSAF, in view of the fact that, as regards the year 2007, all the social security contributions for those persons had been paid in Switzerland, to abandon any retrospective correction making those persons subject to the French social security system.

37. Although that company claimed that it was relying on the E101 certificates it had produced, the Court of Appeal, having noted that those certificates had been issued not pursuant to Article 14(1)(a) of Regulation No 1408/71, on which A-Rosa claimed to be relying, but pursuant to Article 14(2)(a) of that regulation, and that the certificates had been provided by A-Rosa in two batches (the first during the inspection by the URSSAF and the second after the decision of the Tribunal of social affairs, found that the employees whose remuneration was the subject of the recovery notice 'worked solely in the territory of France', so that A-Rosa had not provided evidence of any exceptions, enabling it to avoid the principle of territoriality laid down in Article 13(2)(a) of Regulation No 1408/71.

38. Plen. civ. ch. 22 December 2017, No. 13-25467. Lhernould J-Ph. (2018) Portée des certificats A1: la Cour de Cassation se range à la doctrine de la Cour de Justice… en attendant le dernier set? JCP soc., n°1016.

39. Sup soc. ch. 10 January 2018, No. 16-16.713.

under circumstances related to illegal/undeclared work[40] (given that Vueling had been previously condemned, on 11 March 2014,[41] for illegal work by the Supreme Criminal Court). Vueling argued that the worker was not entitled to such damages while Vueling had a valid A1 certificate issued by the Spanish authorities on behalf of the worker.

The Supreme Court decided to stay the proceedings and refer two preliminary questions to the CJEU. According to the first one, which is also by far the most interesting,[42] the French Supreme Court asked the CJEU whether the *A-Rosa Flussschiff* ruling still applied where the E101 documents were issued under Article 14 Paragraph 1a) (posted workers), although the situation was more likely to be that of Article 14 Paragraph 2 a)(i) (branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business).[43] In other words, the question is to know whether A1 documents have a binding effect even when they are obtained fraudulently.[44]

Surprisingly, less than a month later, the CJEU decided in the *Altun* case[45] that 'a national court may', in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, 'disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud'.

Although the CJEU[46] recognises that fraud invalidates A1 certificates, at the same time it adopts a rather restrictive approach to fraud, defining it as 'any intentional act or intentional omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the law of the Member State(s) concerned, the basic Regulation, or this Regulation'. As for the revision proposal of Article 5 Regulation (EC) No. 987/2009, it still provides for a voluntary and time-consuming conciliation procedure in case of fraudulent or false A1 documents.[47] Even in case of fraud, withdrawal or invalidation is shielded with abundant procedural precautions that do not please the French Supreme Civil Court.

Nonetheless, thanks to the *A-Rosa* and *Vueling* cases, the French Supreme Court seems to have established a solid (though at times frustrating) dialogue with the CJEU.

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40. Indeed, according to French law, a worker is entitled to a lump sum of minimum six months' salary in case of termination of employment under undeclared work circumstances (L8223-1 Labour Code).
41. Sup. crim. ch. 11 March 2014, No. 12-81.461.
42. According to the second question: «2- 'In case of an affirmative reply, does the primacy of European law preclude national civil courts from drawing the necessary conclusions from a final criminal sentence by allocating damages to the worker on the basis of the criminal conviction?'
43. It is worth noting that the place of employment mentioned on the E101 document was Roissy Airport, therefore France.
44. See the conclusions of the general advocate on 11 July 2019, C-370/17 and 37/18.
45. CJEU, 6 February 2018, C-359/16, *Altun et al.*
46. With regard to the revision of Regulations on the co-ordination of social security (371/18, 21 June 2018).
47. Article 5 Sections 1-4.

3.3. Individual posted workers' claims

As mentioned, workers' claims regarding posting are not very frequent when it comes to workers posted to France, but neither are they for those posted from France. The latter group seems to refrain from engaging in litigation, probably because they are highly qualified and well paid in comparison to the local workforce. Lack of litigation regarding workers posted to France, although there has not been any exhaustive research on this issue can be explained in several ways (Belkacem and Pigeron-Piroth 2016). First, posted workers' presence within the French territory is usually quite brief. It is therefore difficult to engage in time-consuming procedures. Moreover, they are not well acquainted with the French judicial system and their claims do not necessarily gain support from the relevant trade unions. It seems, though, that when they do decide to call upon the courts, they act before the competent jurisdictions of the country of origin/residence.[48]

Existing case law deals with either the application of core rights, in the case of genuine recourse to posting (but less with the application of the minimum wage principle as one would expect), or in the case of disqualification of a particular situation as posting, with the application of national law.

In one case,[49] five manual workers posted during 2005 to France by a Portuguese construction firm brought a claim before the employment tribunal in order to obtain the recognition that the posting allowance was paid to them in reimbursement of expenses and therefore should not be taken into account for the calculation of their minimum wage according to the Posted Workers Directive. The Court of Appeal (Riom, social chamber, 9 April 2013) dismissed the appeal, having established that the employer took charge of accommodation, travel, and other expenses in addition to the posting allowance. Therefore, the latter was a supplementary advantage and was to be taken entirely into account for the calculation of the minimum wage principle. The Supreme Court (social chamber) confirmed the decision on the grounds of Article R1262-8 of the Labour Code, implementing Article 3 Section 7 of the 96/91/EC Directive (Posted Workers Directive) according to which allowances specific to the posting shall be considered to be part of the minimum wage unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.[50]

On another occasion,[51] a worker was hired out from 18 October 2004 to 18 September 2005 by a British temporary work agency to a French user company (Toulouse Airbus). Upon termination of the contract, the worker brought a compensation claim for the termination of employment before French courts, according to French legal provisions. The Court of Appeal (4 September 2009) found that the French law was applicable, but the Supreme Court (social chamber) overturned the decision on the grounds that the

48. See for instance the national report for Poland.
49. Sup. soc. ch. 13 November 2014, No. 13-19095 (Lhernould J-Ph. 2015).
50. See in that sense, CJEU 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry*.
51. Sup. soc. ch. 18 January 2011, No. 19-43190.

worker was posted. The Supreme Court reasoned as follows: given that the worker was posted, France was not the habitual place of work according to Article 6 Section 2a) of the Rome Convention, 19 June 1980. Yet, Article 3 of the Posted Workers Directive, (96/71/EC), does not include termination of employment within the minimum terms and conditions of the host country to which the posted worker is entitled during posting. As a result, the worker was not entitled to the application of the French compensation rules regarding termination of employment.

In another case, a worker posted to the French territory by the intermediary of a temporary work agency established in Luxembourg sued the French user company for violation of principles related to the recourse to temporary work. According to French law, if recourse to temporary work violates temporary work principles (limitation of valid reasons for the recourse) then the temporary worker may require damages from the user or the recognition of an indefinite contract of employment with the latter (Article L1251-40 Labour Code). The French user company objected, saying that the French tribunals had no jurisdiction. But the Metz Court of Appeal[52] applied Article D1265-1 of the Labour Code. Since the qualification of the worker was not an issue, Article D1265-1 provides that posted workers can bring claims related to posting before the jurisdictions of the hosting country, according to the Posted Workers Directive.

It is very difficult to draw any conclusions from this scarce case law as to the identity of the winners. It is obvious, however, that for reasons that need to be further investigated, posted workers do not bring claims for the application of Posted Workers Directive core rights before the French courts. As I have already pointed out, when a situation is disqualified and therefore not considered as posting, the courts may be also required to draw the necessary conclusions and allocate damages according to national law.

In a Court of Appeal decision,[53] two Bulgarian workers allegedly posted by a Polish construction firm to a French user company were given EUR 25,000 compensation on the grounds of undeclared work, EUR 15,000 for unfair termination of employment (Article L8223-1) and EUR 18,000 for unpaid salaries. The situation of the workers was presented as posting but the employer was sentenced, under Article L8221-5 (for disguised employment) as well as exploitation of vulnerable persons (225-4-1 of the Criminal Code) and accommodation under conditions contrary to human dignity and unfair remuneration.

On another occasion a Hungarian worker obtained at first instance (Paris Employment Tribunal, 31 January 2012), EUR 9,240 for unfair termination of employment in an undeclared work context and EUR 5,000 for degrading treatment. The circumstances of this case are worth mentioning because of the presence of a subcontracting chain, at one end of which was to be found the Hungarian employer and at the other a well-known French public works entrepreneur. The employer, Arcus Bau, a construction firm established in Hungary, was the subcontractor of IMZO Bat SARL, a French firm, itself a subcontractor of ATES, another French firm acting at the worksite of a hospital

52. CA Metz, 8 April 2014, No. 14/00294.
53. CA 14 January 2011, No. 10/01143.

in south Amiens, as a subcontractor of Bouygues, the public works entrepreneur and general contractor. Bouygues did not accept the subcontracting agreement between Arcus Bau and IMZO Bat SARL, which is rather rare in practice.[54] Nonetheless, IMZO Bat SARL sent the Hungarian workers to another worksite (flat repairs) without fulfilling employer obligations, such as declaration of employment or payment of salary. At first instance the employment tribunal found that the worker's employer was IMZO Bat SARL, the French firm, and took the view that IMZO's conduct constituted the offence of undeclared work. However, on appeal, the first judgment was partially overturned because the Paris Court of Appeal (12 May 2016) considered that the fraudulent intention of the French 'ordering customer' (Article L8221-6 II LC) was not established.[55] As a result, the worker was entitled to compensation for loss of salary but not to damages for unfair dismissal within an undeclared work context.

In a similar case, the Versailles Court of Appeal (9 May 2012)[56] overturned a first instance judgment (Employment Tribunal of Nanterre, 28 May 2010) which considered that recourse to temporary workers (Polish plumbers!) by a French firm, MQB, through the intermediary of an obscure temporary work agency established in Portugal (Atlanco) did not fulfil the legal conditions of recourse to temporary employment. The first instance judges had found that the workers were in reality the employees of the user company MQB. The Court of Appeal overturned the first instance judgment on the grounds of Article L1251-6 of the Labour Code; the user company provided valid proof that recourse to temporary agency work was justified by a legitimate purpose, in this case 'temporary increase of activity'. The workers claim was therefore dismissed, although control authorities had established numerous irregularities on behalf of Atlanco and had ordered Eiffage, the general contractor, to withhold payment of works done by MQB.

EasyJet pilots introduced claims for the execution of their employment contracts before French courts according to French Labour law, following the Supreme Court's decision (see above, criminal chamber, 11 March 2014, No. 11-88420), which denied the qualification of the workers as posted. It is worth mentioning that the national trade union for private airline pilots (SNPL) intervened in this instance on behalf of the pilots. EasyJet rejected the competence of the French courts but the Court of Appeal (17 October 2013), followed by the social chamber of the Supreme Court,[57] judged that the workers had their centre of professional activity in France. As a result, French jurisdictions were competent and French law was applicable.

Generally speaking, when judicial intervention disqualifies a situation that has been presented as posting, the courts tend to draw the necessary conclusions and order the payment of damages to the workers. However, they tend to be less willing to do so in cases of agency work when it is the local user company that is required to pay damages to the worker.

54. Bouygues probably had doubts about the real nature of the subcontracting agreement and therefore wanted to avoid liability in case of unlawful recourse to posting.
55. CA Paris, 12 May 2016, No. 14/2360.
56. CA Versailles, 15 Ch., 9 May 2012, No. 10/03844.
57. Sup. soc. ch. 10 June 2015, No. 13-27799 - 13-27853.

4. Posting before administrative courts

Normally, administrative courts should have nothing or little to do with the enforcement of posting legislation. However, statutes related to posting are frequently supplemented by decrees. The latter are subject to judicial challenge and have been challenged both by local clients and foreign service providers. Moreover, new legislation on undeclared work also seems to generate judicial unrest about the application of suspension orders in cases of disqualified posting before the administrative courts. Last but not least, administrative courts have recently validated discriminatory terms in public procurement contracts with respect to posted workers.

4.1. Judicial challenge of secondary legislation relating to posting

In French law, secondary legislation, such as law decrees, is needed for full application of statutes. However, decrees, in contrast to statutes, are subject to judicial challenge before the Supreme Administrative Court on grounds of *ultra vires* (abuse of authority).

In early summer 2007, Ryanair and easyJet sought the cancellation of Decree No. 2006-1425, 21 November 2006, taken for the application of Statute No. 2005-882, 2 August 2005. The Decree introduced the concept of 'exploitation basis' regarding foreign airline companies.[58] Article R330-2-1 of the Civil Aviation Code provided that, if an airline company regularly established in another Member State disposes within the French territory business premises and other infrastructure from where it exercises a stable, habitual and continuous transport activity, then the workers connected to that place are not to be considered as posted workers, according to Article L342-4 (ancient) of the Labour Code as it results from Statute No. 2005-882, 2 August 2005.[59]

It is obvious that the reason for this judicial challenge was that the airline companies used to have recourse to posting, providing their administrative, technical and crew staff with employment contracts under British and Irish law and E101 certificates for social security purposes. EasyJet and Ryanair suggested that the decree put a disproportionate burden on them and infringed their freedom under Articles 52 and 59. The Supreme Administrative Court rejected these arguments, stating that there is no such infringement because Statute No. 2005-882, 2 August 2005 and Decree No. 2006-1425, 21 November 2006, deal not with freedom of services but with freedom of establishment. Although the Decree modifies the airlines' situation it does not constitute discrimination based on nationality and does not infringe either legal certainty or legitimate confidence.

On another occasion, it was the Local Federation of Land Developers that sought the cancellation of Decree No. 2015-364 of 30 March 2015. This introduced measures against fraudulent posting and illegal work in order to implement Statute No. 2014-790, 10 July 2014 and Directive 2014/67/EU of 15 May 2014. One of these measures

58. Sup. Admin. Court, 11 July 2011, No. 299787.
59. On that that particular issue see recent ECJ case law, 14 September 2017, C-168/16, 169/16 *Moreno Osacar*.

dealt with client and general contractor liability in case of infringement of the duty of vigilance towards the posted workers of a direct or an indirect subcontractor. As mentioned in section 2, these measures put a legal obligation on the client and general contractor to verify certain facts, such as whether the employer has declared posting, offers suitable accommodation and complies with the minimum salary principle and minimum standards of work. If they fail to do so, clients and principal contractors could be found liable for the payment of unpaid salaries of the workers and could be required to pay an administrative fine.

The National Federation of Land Developers challenged the Decree because of its immediate application. In its decision, on 8 July 2016, the Supreme Administrative Court[60] recognised that the immediate application of the decree without transition made the Decree illegal. Given the legal consequences of the infringement, the Supreme Court decided that the Decree should not have entered into force without at least one month's notice. As a result, the coming into force of the new regulations was postponed to give clients the time to take the necessary steps to avoid liability.

The most interesting case, however, is that of a Polish professional association called Transport i Logistyka Polska asking the Supreme Administrative Court to cancel Decree No. 2016-418, 7 April 2016, which was concerned with adapting posting requirements to the transport sector, on the grounds of *ultra vires*.[61] The French Labour Ministry (Ministère du Travail),[62] as well as labour law specialists in France, consider that the Posted Workers Directive applies to international road transport as soon as a truck crosses French borders (with the exception of transit operations). Based on that assumption, the Ministry of Environment and Transport issued a decree which required every truck driver to keep a valid (for up to six months) posting certificate in the vehicle, and for the foreign transport operator to pay drivers the French sector-wide minimum pay as well as the sector-wide collective allowances, according to Article L1264-4 of the Labour Code, and to have a representative within the French territory for the exchange of information with control authorities for a period of up to 18 months following posting.

The claimants argued that these additional requirements represented an excessive burden on small and medium transport operators and obviously restricted their freedom to provide services within the French territory. The Court simply turned down the petition without any serious discussion of the petitioners' arguments. The Supreme Administrative Court asserts without any debate that there is no such restriction and that, therefore, the petitioners' plea should be dismissed. It is quite interesting to note that the previously mentioned decision has not been commented on at all by French legal scholars and other practitioners. It is also puzzling that the Court decided the case without referring a preliminary question to the CJEU, as the latter has already criticised national laws when they put disproportionate burden on foreign operators.[63]

60. Sup. Admin. Court, 8 July 2016, No. 389745.
61. Sup. Admin. Court, 9 June 2017, No. 400530.
62. https://www.ecologique-solidaire.gouv.fr/formalites-declaratives-applicables-au-detachement-dans-transport-routier.
63. CJEU 23 November 1999, C-369/96, *Arblade*; CJEU, 18 July 2007, *Commission* v *Germany*, C-490/04; CJEU 16 April 2013, C-202/11.

4.2. Suspension orders in cases of recourse to undeclared work instead of posting

According to Article L8272-2 of the French Labour Code (Statute 2016-1088, 8 August 2016), when the criminal offence of undeclared work is established, the prefect may order, for a maximum period of three months, the temporary closure of the worksite where the use of undeclared work took place. Of course, this provision applies as well in the case of disqualification of an operation as posting. For the past couple of years, suspension orders have been challenged before the Supreme Administrative Court.

SAPE, a French general contractor in the construction sector, successfully tendered for two public contracts, 'La Grande Halle' in Lyon and 'Fireworks' in Rillieux-la-Pape. Officially, SAPE subcontracted parts of the works to two Portuguese firms, Efficiency Ocean II and Polebile Internacional, but the local Labour Inspection alerted the ordering authorities to the suspicion that, behind the subcontracting agreement and posting of workers, there was illegal (and therefore undeclared) procurement of work. On 9 December 2016, the prefectural agent (préfet) ordered the temporary one-month closure, as an interim relief measure, of both worksites on the basis of Article L8272-2 of the Labour Code. SAPE contested the order before the administrative tribunal (interim relief judge) of Lyon, but the judge dismissed the case on 16 December 2016. SAPE appealed to the Supreme Administrative Court, claiming that the first judge's decision reasoning was insufficient and that the suspension of works on the worksite seriously and obviously injured its fundamental rights (entrepreneurial rights, according to Article L521-2 of the code of administrative justice). The Supreme Court[64] confirmed the first judgment, emphasising that SAPE did not bring any elements of proof relating to impairment of its fundamental rights.

On 30 August 2016, the Var regional prefect ordered the three months' temporary closure, as an interim relief measure, of a hotel. The measure was justified by a Labour Inspection control at the site on 13 June 2017, which found that three workers supposedly posted by an Italian temporary work agency were in reality undeclared workers. Although the facts were reiterated, the administrative tribunal of Toulon allowed the employer's petition and suspended the interim relief measure (2 September 2017). On appeal, the Supreme Administrative Court[65] overturned the decision of the first judge for the following reasons: the temporary closure was justified on the one hand by the reiteration of the illegal conduct and on the other because there was no violation of fundamental rights according to Article L521-2 of the code of administrative justice. The employer/hotel owner suffered no substantial detriment given that the closing-down period coincided more or less with the hotel's annual closure from the middle of October.

Last but not least, the Supreme Administrative Court[66] refused the suspension of an interim relief order pronouncing the temporary closing down of two worksites, as

64. Sup. Admin. Court, 22 December 2016, No. 406202.
65. Sup. Admin. Court, 2 October 2017, No. 414379.
66. Sup. Admin. Court, 21 April 2016, No. 398782.

well as the temporary exclusion of a construction company from public procurement tenders, for a period of two months. The firm, Goizuetako Estructuras SL, was registered in Spain, and had posted eight workers to the worksite in Hendaye and four more at the Saint-Jean-de-Luz worksite. Labour Inspection established that the company had for the past couple of years no real activity in Spain other than administrative. As a result, according to Article L1262-3 of the Labour Code, the company was not entitled to invoke posting on behalf of its workers. Reiteration of the facts was the reason why the regional prefect ordered not only the temporary closure but also the exclusion from public procurement. The administrative tribunal and the Supreme Administrative Court confirmed the decision.

It is interesting to note that the French Supreme Administrative Court fully embraces national public policy when it comes to fraudulent recourse to posting. When an operation presented as posting is in reality undeclared work, the Supreme Administrative Court does not hesitate to confirm the suspension order and even the exclusion from public procurement against local operators. It seems that this suspension order is an effective sanction. However, I have found no cases where such a sanction has been applied to foreign service providers where they infringe their declaration obligations or minimum core rights. Although Articles L1263-4 and L1263-4-1 (Statute No. 2015-990, 6 August 2015) provide for such sanctions against the employers, they do not so far seem to have been applied. The reason may be that suspension of the provision of services may seem less effective than administrative fines, or that suspension of the service will only be applied when the service provider has not paid a previous fine imposed for the same kind of facts (see section 1.4).

4.3. Discriminatory terms in public procurement contracts

In early spring 2016, some local authorities, including Angoulême, decided to add a condition to public procurement contracts obliging tenderers to certify the use of the French language within the relevant worksites under the pretext of guaranteeing safe working conditions (the 'Moliere Clause'). The real goal of this 'populist' drift was to favour local companies and workforces and therefore to curb access to the local market of foreign service providers with recourse to posting. The Ministry reacted forcefully with an interministerial order on 27 April 2017.[67] This document declared that any condition imposed on tenderers that obliged them to certify that they would have no recourse to posted workers would be discriminatory and contrary to EU law and the Posted Workers Directive. The interministerial order also invited prefectural agents to take legal action against the local authorities who would introduce this kind of condition in public procurement contracts.

Under these circumstances, the chair of the Pays de la Loire and Loire-Atlantique regions brought interlocutory proceedings before the administrative court of Nantes to obtain the cancellation of a bidding process and the removal from a public procurement contract of the term requiring tenderers to assume the costs of a qualified translator

67. http://circulaires.legifrance.gouv.fr/pdf/2017/05/cir_42125.pdf

whose function would be to make sure that non-French speaking workers during posting would be able to understand safety instructions as well as information about the applicable law (terms and conditions of employment) according to the Posted Workers Directive. On 7 July 2017[68] the administrative tribunal of Nantes rejected the claim and refused to cancel the bidding, considering that the term included in the public procurement contract was valid. The chair of the region (préfet) introduced an appeal before the French Supreme Administrative Court. In a greatly commented upon and vigorously criticised decision (Palli 2018), of 4 December 2017,[69] the Supreme Court rejected the appeal and confirmed the first instance judgment. The interpretation condition was found to be not only relevant to the object of the public procurement contract but also non-discriminatory, neither directly nor indirectly, and that although it might restrain the freedom of services for foreign operators, the restriction was neither unjustified - taking into account the workers' rights to fair and safe working conditions - nor disproportionate. It is worth mentioning, however, that on the one hand, the court applied a minimum proportionality test with no reference at all to the CJEU case law, and on the other, that the court ignored the judge-rapporteur, who clearly stated that the term included in the public procurement contract was discriminatory and that the restriction of the freedom of services, although justified, was disproportionate. Indeed, the French Labour Code already provides (Article L1262-4-5) that the terms and conditions of employment of posted workers should be displayed in one of the official languages of the country of origin of each posted worker at an appropriate place in the worksite. As a result, according to the judge-rapporteur, the term was at least disproportionate by comparison to other less restrictive measures.

On 13 December 2017[70] there was another interlocutory judgment from the Lyon administrative tribunal. This held that the condition in a public procurement contract requiring the use of the French language at the worksite was not for the sake of the workers' safety and security, but more likely to exclude posted workers from the local market, and intended to favour local companies, whereby it disregarded free access to public commission and equality of treatment between tenderers.

Although the Supreme Administrative Court did not refer a preliminary question to the CJEU as it ought (according to Article 267 TFEU), there is still hope that a lower administrative tribunal (see the first instance judgment) or that the Supreme Administrative Court, just like the Supreme Civil Court, will recognise, in the not-too-distant future, the authority of the CJEU regarding the interpretation of Directive 2014/24/EC, 26 February 2014, on public procurement. Nevertheless, there are good reasons to fear that unlike the Supreme Civil Court, the Supreme Administrative Court may uphold a rather sovereign approach because of its special nature and proximity to the exercise of public power.

68. Admin. tr. Nantes, 7 July 2017, No. 1704447.
69. Sup. Admin. Court, 4 December 2017, No. 413366.
70. Admin. tr. Lyon, 13 December 2017, No. 1704697.

Conclusions

In the light of the analysed case law we may draw certain conclusions. First, there is little litigation in France regarding posting operations, although there is legislative profusion on the same subject. This is already a surprising finding. In addition, although France is not only a receiving country but also one that sends out large numbers of posted workers, the latter do not bring any claims at all regarding the application of the Posted Workers Directive principles. The reason must reside in the fact that they are highly qualified in general and therefore well paid in principle. As a result, they do not need to bring claims for the application of minimum employment standards.

Second, the existing case law embraces for the most part public policy targets, notably, fighting against fraudulent recourse to posting. In effect, most of the relevant case law deals with disqualification of posting operations to undeclared work, criminal sanctions and recovery of social security contributions. By contrast, there is very little litigation concerning the application of core rights provided by the Posted Workers Directive. Local trade unions play an insignificant role in the promotion of posted workers' rights before French jurisdictions. However, once an employer is sentenced for undeclared work, workers are more likely to prosecute for the application of national law.

Criminal sanctions against foreign service providers are comparatively more rigorous (fines of up to EUR 100,000), than the administrative fines to which local operators are subjected (EUR 30,000 at most). The reason seems to be that the courts do not wish to discourage local operators or exclude them from public procurement. Nevertheless, sanctions such as temporary suspension of works seem to be popular even where they are imposed upon local operators in the context of undeclared work. By contrast I have found no case law concerning suspension orders against foreign service providers when the latter infringe declaration obligations or posted workers' core rights. Joint liability of the local clients and/or general contractors has also been given very little application so far. However, if the 'name and shame' principle becomes effective, it may make local operators more vigilant regarding the choice of their subcontractors.

Although the Supreme Civil Court had been reluctant at the beginning to refer preliminary questions to the CJEU, it has more recently established a solid dialogue with it, especially on the issue of the legal effect of E101/A1 documents. Even though at the time of writing there is still a preliminary question pending before the CJEU, the revision of regulations on the co-ordination of social security systems and the *Altun* case seem to have provided for a definite - though unsatisfactory - resolution of fraud-related cases.

By contrast, the Supreme Administrative Court seems to uphold a rather sovereign approach either by approving protectionist secondary legislation or by validating discriminatory terms (against posted workers) within public procurement contracts, without even contemplating referring the matter to the CJEU.

As a general conclusion, French case law reflects a relative hostility towards posting - likewise public policy - tainted as it is by both protectionism and populism.

References

Belkacem R. and Pigeron-Piroth I. (2016) L'intérim transfrontalier : les marges de l'emploi aux marges des territoires, Revue Française de Socio-Économie, 17, 43-63.

CNILTI (2018) Bilan et mesures du plan national de lutte contre le travail illégal, Paris, Ministère du Travail, Commission nationale interministérielle de Lutte contre le Travail illégal. http://travail-emploi.gouv.fr/IMG/pdf/dossier_de_presse_cnlti.pdf

Crespy A. (2012) Qui a peur de Bolkestein ? Conflits, résistances et démocratie dans l'Union européenne, Paris, Economica.

DGT (2016) L'action de l'inspection du travail contre les fraudes au détachement transnational (juillet 2015-mars 2016), Paris, Ministère du Travail, Direction Générale du Travail. http://travail-emploi.gouv.fr/IMG/pdf/rapport_psi-juillet2015-mars2016.pdf

Gareau P. (2014) Responsabilisation des maîtres d'ouvrage et donneurs d'ordre, Actualité Juridique Droit Immobilier, 10, 693-696.

Lhernould J.-Ph. (2014) Une compagnie aérienne peut-elle détacher des navigants en France ? L'étonnante leçon anti-européenne de la chambre criminelle à propos du formulaire E101, Revue de Jurisprudence Sociale, 307.

Lhernould J.-Ph. (2015) Détachement transnational vers la France : comment calculer le salaire minimal dû au salarié détaché ?, Droit Social, 1, 91-93.

Lyon-Caen A. (1991) Le droit, la mobilité et les relations du travail : quelques perspectives, Revue du Marché commun et de l'Union européenne, 108.

Lyon-Caen A. (2014) Concurrence sociale déloyale : une loi pour quels objectifs ?, Recueil Dalloz, 31, 1816.

Marchand S. (2006) L'affaire du plombier polonais, enquête sur le cauchemar social français, Paris, Fayard.

Palli B. (2018) Les clauses d'interprétariat dans les marchés publics : une pratique protectionniste sur fond de détachement, encouragée par le Conseil d'Etat, Revue de Droit du Travail, 1, 59-62.

Robin S. (1994) L'application du droit français aux entreprises prestataires de services établies à l'étranger, Droit Social, 2, 127.

Rodière P. (1990) De la libre circulation des travailleurs et de la libre prestation de services au cours d'une période transitoire d'adhésion, Revue Trimestrielle de Droit européen, 632.

Segonds S. (2014) Les limites à l'optimisation sociale par la loi n°2014-790 du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale, Revue de Science Criminelle et de Droit Pénal comparé, 828.

Sénat (2017) Lutter contre la fraude sociale, un impératif pour le juste droit, Paris. http://www.senat.fr/rap/r16-599/r16-5991.pdf

List of cases

CA 14 January 2011, No. 10/01143

Sup. soc. ch. 18 January 2011, No. 19-43190

Sup. Admin. Court, 11 July 2011, No. 299787

CA Versailles, 15 Ch., 9 May 2012, No. 10/03844

Sup. crim. ch. 27 June 2012, No. 11-86683

CA Versailles, 5e ch., 5 December 2013, No. 12/04925

Sup. crim. ch.. 11 March 2014, No. 12-81461
Sup. crim. ch. 11 March 2014, No. 11-88420
CA Metz, 8 April 2014, No. 14/00294
Sup. soc. ch. 13 November 2014, No. 13-19095
Sup. soc. ch. 10 June 2015, No. 13-27799...No. 13-27853
Sup. crim. ch. 3 November 2015, No. 13-80523
CA Toulouse, 3e ch., 17 December 2015, No. 15-02148
Sup. Admin. Court, 21 April 2016, No. 398782
CA Paris, 12 May 2016, No. 14/2360
Sup. crim. ch. 21 June 2016, No. 15-82651
CA Chambery, 5 July 2016, No. 15-01958
Sup. Admin. Court, 8 July 2016, No. 389745
CA Chambery, Soc. ch. 11 October 2016, No. 15-02401
Sup. crim. ch. 13 December 2016, No. 15-84813
Sup. Admin. Court, 22 December 2016, No. 406202
Sup. crim. ch. 28 March 2017, No. 15-84795
CA Besançon Soc. Ch. 28 April 2017, No. 16/00443
Sup. Admin. Court, 9 June 2017, No. 400530
Admin. tr. Nantes, 7 July 2017, No. 1704447
Sup. Admin. Court, 2 October 2017, No. 414379
Sup. crim. ch.17 October 2017, No. 15-80166
Sup. Admin. Court, 4 December 2017, No. 413366
Sup. crim. ch. 12 December 2017, No.16-87230
Admin. tr. Lyon, 13 December 2017, No. 1704697
Plen. civ. ch. 22 December 2017, No. 13-25467
Sup soc. ch. 10 January 2018, No. 16-16.713

Chapter 5
Posting of workers before German courts[1]

Heiner Fechner[2]

Introduction

Germany's economic and population size means that it not only receives the highest number of posted workers in the EU, it is also one of the largest sending countries. Nonetheless, discussions about legal aspects of posting primarily concern the incoming workforce, as do debates surrounding legislative reforms in this field. Furthermore, legal changes relating to posting generally do not affect only posted workers. Since the 1990s, decreasing collective bargaining coverage and a growing low-income sector has meant that legislation has prioritised the setting up of minimum labour conditions.

1. Posting-related legal set up and major public discussions in Germany

Germany does not have a concise Labour Code. Rather, labour law is regulated via a great number of special laws, regulations and jurisprudence. Special legislation concerning the posting of workers from Germany to other EU countries does not exist. In general, German employees posted abroad are subject to German labour law without distinctive rules. For incoming posted workers, the law on posting (*Arbeitnehmerentsendegesetz*) (AEntG[3]) is the primary norm of reference for posting issues, and the primary norm for implementation of the Posted Workers Directive. In terms of mandatory observation, the AEntG refers to several other laws including the general minimum wage law (*Mindestlohngesetz*[4]), the working time law (*Arbeitszeitgesetz*[5]), and the paid leave law *(Bundesurlaubsgesetz*[6]).

The law on posting and discussions on minimum wages have been very active since posting became an issue for public debate in the early 1990s. The AEntG is not only a co-ordinating law regulating the mandatory observation of other parliamentary laws. Its special importance lies in the regulation of mandatory compliance with certain collective

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3. First introduced by law of 26 February 1996, BGBl. I, p. 227; major restructuring on 20 April 2009, BGBl. I, p. 799; last large reform passed on 11 August 2014, BGBl. I p. 1348, 1356, as part of a package of laws on minimum wages.

4. Adopted 11 August 2014, BGBl. I 2014, p. 1348.

5. Adopted 6 June 1994, BGBl I 1994, 1170, 1171.

6. Adopted 8 January 1963, BGBl I 1963, 2.

agreements regulating Germany´s low-pay sector, because it guarantees the application of minimum labour conditions laid down there. This is reflected by jurisprudence in Labour Courts. In general, before Labour Courts, posting of workers and especially minimum labour conditions for posted workers in the low-income sector is hardly ever an issue. The main exceptions are disputes over the legality and interpretation of an overriding, mandatory collective agreement concerning the obligatory employers´ payments to the *Sozialkassen Bau* (SOKA-BAU, hereinafter SOKA), a joint fund set up by employer organisations and the construction industry trade union. The latter administers paid leave funds for construction workers, which also cover incoming posted workers and their employers. Since payments to this joint fund are based on workers´ wages, indirect control of minimum wages for the construction industry plays an important role here.

Public discussions on posting (cf Lakies 2016) have often focused on the abuse of posting in the context of EU eastern enlargement. The underlying problem was that the German labour system offers abundant space for precarious conditions. Nonetheless, two major debates can be identified that are not about posting as such, but do affect rules on posting:

1. the discussion on the introduction of a minimum wage regime, its form and shape, including institutional designs concerning the control of minimum wages; and
2. questions of outsourcing and employment of external staff (leased personnel, permanent or long-term contracts for works/services with external companies in areas belonging to the main business of the principal), since a growing number of companies use external staff in order to reduce costs and worker participation related to labour law, for example, payment of wages based on collective agreements, protection against dismissal, and installation and rights of labour councils (Obermeier and Sell 2016: 14).

Controversial issues in collective labour law also include a posting dimension. This is especially the case with 'matrix' structures in transnational corporations where employees fulfil functions on a cross-border scale, for example where they serve as foreign-based team leaders of working groups in Germany. Here, legal issues connected with physical border-crossing are seconded by collective issues related to transnational organisation of business units.

2. German case law on posted workers

In Juris, the major German database on case law, 725 cases that include the term 'posted workers' can be found.[7] Between 2004 and September 2017, a total of 316 of these cases show a transnational reference.[8] German courts decided 268 of these, and the rest were

7. https://www.juris.de (accessed 5 September 2017).

8. 115 of these cases had to be filtered for using posting only for illustration. To this end, the term *Ausland* (abroad) was used to filter the non-transnational cases. If one searches the term 'posting of workers' (*Arbeitnehmerentsendung*), figures are

decided by the European Court of Justice (CJEU). One hundred and twenty five of these decisions have been taken by Labour Courts, 46 by social courts, 84 by financial courts, 7 by administrative courts, 4 by criminal courts, 2 by civil courts and 1 by the constitutional court.

2.1. Labour Court decisions

Of the 39 Federal Labour Court cases with transnational implications, only six cases show participation of individual employees. In total 35 cases were brought in by or against SOKA, two of which were filed by incoming individual plaintiffs, the rest concerning cases between SOKA and companies.

Of the 83 decisions concerning posted workers and transnational implementation decided by regional labour courts (*Landesarbeitsgerichte*), 64 cases were brought in by or against SOKA. Only three first instance labour court decisions are reported in the register.

Individual claims of posted workers hardly take place in Germany. For instance, in the case of Bremen Labour Court, which has 12 chambers and about 4,500 cases per year, not a single case concerning incoming posted workers in the past few years could be remembered by the court´s judges when asked by the author.

Of the 125 cases in the area of labour law, 17 or roughly 15%, concern cases of posting abroad. From the remaining 108 cases of incoming posting, three have a collective dimension including a works council. Of the remaining 105 cases, all but one concern the construction industry.

2.1.1. Paid leave funds at the core of posting decisions

The register shows the outstanding importance of the paid leave fund (*Urlaubskasse*) as part of SOKA. Like the minimum wage in the construction industry, the fund is regulated in universally applicable overriding mandatory provisions in collective agreements[9] based on the AEntG.[10]

The paid leave fund was set up as part of SOKA by collective agreement in 1949 and has been of an overriding mandatory character ever since.[11] Next to the minimum wage collective agreement, the collective agreement on the social fund scheme SOKA in

smaller. Since 2004, 174 decisions have been covered, 105 of which were taken by labour courts, 11 by social courts, 4 by administrative courts, 30 by financial courts, 14 by penal courts, 9 by civil courts and 1 by the constitutional court.

9. This means that collective agreements are applicable to all labour relations irrespective of union affiliation, membership in the employer organisation and even applicability of regular German labour law.

10. First introduced by law of 26 February 1996, BGBl. I, p. 227; major restructuring on 20. April 2009, BGBl. I, p. 799; last larger reform passed on 11 August 2014, BGBl. I p. 1348, 1356, as part of a package of laws on minimum wages.

11. In 2017, after the Federal Labour Court had ruled that ministerial declarations concerning overriding mandatory character in the years between 2008 and 2014 were invalid (decisions of 21 September 2016 – 10 ABR 33/15 & 10 ABR 48/15 – and of 25 January 2017 – 10 ABR 34/15 & 10 ABR 43/15), the Bundestag passed a new law guaranteeing the validity of the overriding mandatory character of the collective agreement regardless of the exact number of companies and workers bound directly to it (*Sozialkassenverfahrensicherungsgesetz*) (SokaSiG) as of 16 May 2017, BGBl. I S. 1210).

quantitative and moreover qualitative terms has been the most important regulation concerning posting of workers to Germany by far.

SOKA´s main task is to provide for a fair and adequate paid leave regime in the construction branch with its culture of often changing short-time employment relations. To avoid injustices, the social fund scheme orders every employer in the construction industry to pay a certain percentage of gross wages (currently 14.5%) to SOKA. For every 12 days of work, workers gain one paid day of leave, which they can claim directly against SOKA or against their employer. Employers based in Germany can offset their payments to their employees with payments to SOKA.

Because 14.5% of gross wages is a substantial amount of money, questions concerning the applicability of the collective agreement and the calculation base for payments are highly disputed. The most fundamental domestic questions concerning German employers were resolved a long time ago. It is therefore no surprise that after the introduction of AEntG in 1996, with the aim of expanding application of SOKA rules to incoming posted workers, disputes focused on companies posting from abroad. These often tried to use comparatively lower wages and holiday payments to get access to the German construction market (Lakies 2016: 1538–1543; 1588-90). Special concerns arose from the problem that some mechanisms tried and tested in the German system concerning organisational and calculation aspects were not appropriate for transnational postings. Thus, German courts submitted preliminary reference questions several times to the CJEU in order to clarify how the applicable European law should be interpreted. Although the three major decisions were made in 2001 (*Finalarte*[12]), 2002 (*Portugaia*[13]) and 2004 (*Wolff & Müller*[14]), follow-up of this jurisprudence has been occupying German courts since.

SOKA is therefore the main actor for posting issues in construction and, more broadly, in labour law issues concerning posted workers. There is no central Labour Inspection in Germany supervising fulfilment of labour rules.[15] Public supervision of labour rules also applying to posted workers is performed by federal agents (minimum wages; black labour), by state (Länder) or communal agents (works security including working time, health issues and so on), and by statutory accident insurances organised by sectors. Nevertheless, the most important actors regarding minimum labour conditions for posted workers are the Financial Control of Undeclared Employment (FKS) and SOKA.

2.1.2. Finalarte and the basics of social funds in posting cases before German courts

The far-reaching CJEU *Finalarte* decision[16] of 2001 concerned the compatibility of the declaration of overriding mandatory validity of the social funds (SOKA)

12. CJEU decision of 25 October 2001, C-49/98 et al.
13. CJEU decision of 24 January 2002, C-164/99.
14. CJEU decision of 12 October 2004, C-60/03.
15. Recently, a discussion to introduce a Labour Inspection has been started by the German trade union movement in order to improve basic working conditions, especially in areas where unions are weak; position paper of the German section of Justitia & Pax and DGB, *Arbeitsinspektion in einer globalisierten Welt*, Bonn/Berlin March 2017.
16. CJEU decision of 25 October 2001, C-49/98 et al.

collective agreement with freedom of services. *Finalarte* covered the major issues of the new mechanism introduced by the AEntG and respective collective agreements on minimum wages and the paid leave fund in the construction industry. The CJEU found the German system to be basically justified under European law in terms of the freedom to provide services (Article 56 TFEU, formerly Articles 59, 60 EC). Two aspects of the decision had far-reaching consequences for legislation, social partners and German courts. The first aspect concerned the comparison of paid leave schemes. The CJEU had ruled that application of the SOKA scheme was only justified if the rules conferred a genuine benefit on the workers concerned, which significantly adds to their social protection, and if workers posted to Germany to carry out a specific task do, in practice, leave their employer to work for a business established in Germany.[17] Interpreting this judgment, first instance and the Hessian State Labour Court denied that posted workers frequently left their employer to work for a business established in Germany, arguing that only up to around 10% of construction workers did this.[18] Thus, the SOKA scheme would not contribute to workers' social security. Because it restricted employers, the Court considered the SOKA scheme to not be proportional, and especially not necessary, pointing out that direct state control would be more effective.[19] The Federal Labour Court did not approve of these arguments. Because of the relevant advantages for workers, specific numbers of workers finding new employers in Germany were not considered relevant. The Court pointed out that the SOKA scheme contributed especially to the reduction of the implementation gap, and that this could be expected if rules valid in Germany offered paid leave conditions significantly better than in the country of origin.[20] German Labour Courts have examined favourability in terms of CJEU jurisprudence[21] after 2004 concerning countries such as Portugal,[22] Switzerland,[23] Poland,[24] Luxembourg[25] and Austria.[26] In all cases, the SOKA paid leave scheme was found to be more favourable.

The second aspect affected differences of information required by German and posting companies, relating to differentiation with regard to the term of business or business unit in the context of mixed businesses, that is, business units that pursue more than one technical objective. In the case context, only part of the activities is associated with the construction industry, whereas other objectives concern other industries. This could be the case, for example, with a company producing metal objects for construction and later installing these objects on the construction site. While mixed businesses situated in Germany only had to participate in the SOKA scheme if more than half of the working time belonged to the construction industry, in the case of posting businesses, only working time of the posted workers was taken into consideration by SOKA, since

17. Paragraphs 42 and 46 of the judgment.
18. Hessian State Labour Court, 24 March 2003 – 16 Sa 874/02 –, par. 44
19. Hessian State Labour Court, 24 March 2003 – 16 Sa 874/02 –, par. 55 et seq.
20. Federal Labour Court, 20 July 2004 – 9 AZR 343/03, par. 51 et seq.
21. Shortly after the *Finalarte* decision, the Federal Labour Court applied the principle of favourability to Poland (25 June 2002 - 9 AZR 405/00), Slovak Republic (25 June 2002 - 9 AZR 439/01) and Romania (25 June 2002 - 9 AZR 406/00) – in all cases the German system was found to be more favourable to workers.
22. Federal Labour Court, 20 July 2004 – 9 AZR 343/03, and 20 July 2004 – 9 AZR 369/03.
23. Federal Labour Court, 3 May 2006 – 10 AZR 344/05.
24. Federal Labour Court, 14 August 2007 – 9 AZR 167/07.
25. Hessian State Labour Court, 19 March 2007 – 16 Sa 1297/06.
26. Hessian State Labour Court, 18 September 2015 – 10 Sa 1780/14.

the posted workers as a group were treated as a business. The CJEU ruled that it was discriminatory that the posting law and effectively the collective agreement treated mixed businesses differently, depending on whether they were situated in Germany or abroad. The legal provision thus could not be applied; it was erased in late 2003.

Since the collective agreement was also applicable if there were businesses or independent operations departments (*Betriebe*) in which construction works predominated, most decisions concerning posting companies and SOKA revolve around the question of applicability of the paid leave scheme in terms of working time employed in these businesses, and their definition in transnational contexts. From 2005[27] until at least 2015[28] this has been a predominant issue for the Federal Labour Court; indeed, the Hessian State Labour Court has been occupied with this issue since 2004 without major interruption.[29]

2.1.3. Portugaia and resultant German decisions

In *Portugaia*,[30] the CJEU found in 2002 that the German law on posting in its version in force until 1999 contained an error which, in theory, made it possible for German companies to undermine the minimum wage based on special collective agreements which could not be passed by companies based abroad. Until 1999, the Federal Labour Court consequently found that SOKA procedures did not apply to companies from EU Member States,[31] whereas they did apply to non-EU-based companies.[32]

2.1.4. Wolff & Müller and contractor liability

In *Wolff & Müller*,[33] the CJEU found guarantor liability established in the law on posting to be in line with European law and freedom to provide services. The decision was important in order to enable SOKA to claim payments against contractors as guarantors. It thus provided an incentive to contractors to have their subcontractors comply with collective agreements on minimum wages and the paid leave scheme.

Even before the CJEU´s decision, the Federal Labour Court made it clear that guarantor liability was valid in relation to non-EU countries. A decision in 2004[34] ruled that a German construction undertaking subcontracting a Croatian construction company was liable for payment of net wages based on the law on posting and the overriding mandatory collective agreement on minimum wage in construction. Based on the CJEU decision, the Federal Labour Court decided in 2005[35] in the *Wolff & Müller* case brought before CJEU that guarantor liability was also valid in relation to EU-based subcontractors.

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27. Federal Labour Court, 25 January 2005 – 9 AZR 44/04 et al.
28. Federal Labour Court, 17 June 2015 – 10 AZR 257/14; 7 July 2015 – 10 AZR 548/14.
29. Hessian State Labour Court, 2 February 2004 – 16 Sa 47/03; 9 February 2004 – 16 Sa 393/00; 22 November 2004 – 16 Sa 81/04 up to 18 September 2015 – 10 Sa 1780/14.
30. CJEU decision of 24 January 2002, C-164/99.
31. Federal Labour Court, 20 January 2004 – 9 AZR 343/03 and 9 AZR 369/03.
32. Federal Labour Court, 3 May 2006 – 10 AZR 344/05.
33. CJEU decision of 12 October 2004, C-60/03.
34. Federal Labour Court 20 July 2004 – 9 AZR 345/03.
35. Federal Labour Court 12 January 2005 – 5 AZR 617/01.

In the following years, only a few cases concerning contractor guarantor liability reached appeal or cassation instance. Issues discussed involved the right to plead ignorance on part of the guarantor[36] as well as limitations to the position of a contractor´s liability as a guarantor. This is not to be applied to companies that subcontract undertakings for the construction of company buildings.[37] One decision concerned the (non) existence of an autonomous operations area on the part of the primarily responsible company,[38] a necessity raised in context of the CJEU's decision in *Finalarte*. Another case involved procedural questions, and questions of validity of the power of attorney given by a Romanian posted worker, and questions of proof including the pleading of ignorance on part of the guarantor concerning hours worked by the plaintiff, among other factors.[39]

In a 2007 decision, difficulties that workers had in claiming their rights against SOKA in the context of guarantor liability reached the Federal Labour Court.[40] The plaintiff, a construction worker, claimed damages for non-payment of leave remuneration for employment as a posted worker in 2001. SOKA had sued the Polish employer and the German contractor and guarantor, achieving payment (without lawsuit) by the guarantor in 2002 and further payment by the employer based on decisions in 2003 and 2004. Since SOKA had tried to acquire the personal data of the employees from the employer without success, SOKA did not notify the plaintiff about his rights to annual leave allowance or damages. The court found that this did not interrupt or suspend limitation of the claims. Leave remuneration for 2001 could therefore be asked by the end of 2002, and damages by the end of 2003. The claim filed in 2004 was outlawed.

In a 2005 judgment,[41] the regional labour court for Rhineland-Palatinate ruled that subcontractors in the middle of the subcontracting chain could also be held liable for minimum wages if the subcontractor did not pay.

In a remarkable decision of 2007,[42] Hessian State Labour Court had to decide over claims against a German contractor filed by SOKA. Not only had the main debtor, a construction company posting workers to Germany, gone bankrupt, but the workers it employed were also considered self-employed under British labour law. The Court ruled that in terms of the minimum wage collective agreement valid under the AEntG, the German notion of labour contract had to be employed, thus finding the self-employed workers to be employees. Furthermore, bankruptcy and thus the impossibility for the guarantor to retrieve money paid to the workers was found not be an obstacle to liability.

2.1.5. Further SOKA cases

Many of the cases decided on cassation level, but also on appeal level, concerned doubts over the differentiation between the construction and other industries, and therefore

36. Federal Labour Court 2 August 2006 – 10 AZR 348/05 and 10 AZR 688/05.
37. Federal Labour Court 28 March 2007 – 10 AZR 76/06.
38. Federal Labour Court 19 November 2008 – 10 AZR 864/07.
39. Federal Labour Court 17 August 2011 – 5 AZR 490/10.
40. Federal Labour Court 14 August 2007 – 9 AZR 167/07.
41. Labour State Court Rhineland-Palatinate 3 August 2005 – 9 Sa 1330/02.
42. Hessian State Labour Court 29 October 2007 – 16 Sa 2012/06.

the applicability of the collective agreement concerning the paid leave fund procedure for the construction industry. This concerned the difficulties in differentiating between construction and steel-based storehouse assemblage,[43] carpenter works,[44] mining activities in the context of tunnel construction[45] and pipeline engineering,[46] and plumbing and heating engineer activities,[47] to name only cassation cases.

Some cases deserve to be named individually because of the special transnational issues concerning posting of workers. One case concerned outbound posting of workers to France.[48] The German company suing SOKA had paid social benefits (winter leave) to construction workers posted temporarily to France, but who could not work owing to bad weather. SOKA, on the basis of a collective agreement, was responsible for the administration of funds for workers who could not work in bad weather conditions during winter months. If a worker was paid winter leave by the employer, the employer had the right to claim the money paid to the worker from SOKA. SOKA paid the employer and reclaimed payments from the Federal Labour Office. The Federal Labour Office did not pay in cases of outbound posting, since the legal provisions did not provide for these cases. SOKA objected to being left with an extra burden in the case of posting out and withheld the plaintiff's overpayments. The Federal Labour Court ruled that the collective agreement did not provide a derogation for posting-out cases, and therefore SOKA had to pay.

In an important decision concerning payments for holidays and sick days, the Federal Labour Court ruled in 2012[49] that posting companies were neither obliged to participate in the SOKA paid leave procedure concerning sick days leave, if they were covered by social insurance in the posting country, nor concerning (German) holidays. Legal provisions were not considered overriding mandatory provisions in either case.

Another interesting posting-out case concerned participation in the SOKA procedure of a Polish company (a temporary work agency) leasing workers to a German company in terms of illegal (unauthorised) transnational temporary work.[50] Among other things, the plaintiff pleaded not to be obliged to participate in the SOKA procedure, arguing that the law should not cover cases of illegal leasing of workers. The Federal Labour Court found the opposite, that in fact the law was designed to stop companies undermining minimum labour conditions by using transnational leasing of personnel. The law did not differentiate between legal and illegal temporary work, therefore covering illegal cases even if workers had further rights.

A rather odd case concerned a construction company from Lithuania, which had built the Lithuanian pavilion for Expo 2000 in Hanover.[51] Since it did not want to participate

43. Federal Labour Court 18 October 2006 – 10 AZR 301/06.
44. Federal Labour Court 20 June 2007 – 10 AZR 302/06.
45. Federal Labour Court 26 September 2007 – 10 AZR 415/06.
46. Federal Labour Court 21 January 2009 – 10 AZR 325/08; 21.01.2015 – 10 AZR 55/14.
47. Federal Labour Court 21 October 2009 – 10 AZR 73/09.
48. Federal Labour Court 20 January 2010 – 10 AZR 927/08.
49. Federal Labour Court 18 April 2012 – 10 AZR 200/11.
50. Federal Labour Court 17 April 2013 – 10 AZR 185/12.
51. Federal Labour Court 15 February 2012 – 10 AZR 711/10.

in the SOKA paid leave procedure, it pleaded for an exemption for diplomatic (construction) work and for exemption for short-time works. None of this was granted by the Federal Labour Court.

2.1.6. Individual labour law decisions

Some cassation and appeal decisions also deserve to be mentioned. In a 2004 decision,[52] the Federal Labour Court ruled that workers posted to Germany are entitled to overtime surcharges even though sector minimum wages and overtime surcharges are laid down in different overruling mandatory collective agreements. Transparency of rules thus did not necessarily mean rules being laid down in one document.

An interesting 2011 Federal Labour Court[53] decision dealt with the salary issues of a construction worker posted to Denmark. Parties had not negotiated wage issues for the time of posting; the employer´s argument that there was an oral agreement on 'net payment of just about EUR 1,100' did not convince the Court. The plaintiff thus had a right to the usual sectoral salary (Article 612 Civil Code). Nonetheless, he was found to not be entitled to claim wages based on Danish collective agreements. As there was no statutory minimum wage or universally applicable collective agreement in Denmark at the time, the standard to be applied was the salary generally paid to construction workers posted to Denmark. Since the plaintiff did not provide the necessary facts, he was found to only be entitled to German minimum wages for construction workers based on the respective collective agreement.

In a 2012 decision,[54] the Federal Labour Court had to deal with general terms and conditions of a posting agreement. The employer had obliged an employee posted to the US to engage a specific tax consultant for his time abroad, promising to cover the costs. The contractual term was found to be inappropriately disadvantageous and thus invalid.

Another case concerning terms and conditions of posting was decided by a regional court[55] in 2014. The employer had prescribed that a departure allowance granted for long-term posting was to be paid back if the employment ended prematurely, meaning less than six months after departure. The court found that terms and conditions regarding repayment were invalid because of the lack of differentiation between the employer´s and employee´s spheres of responsibility that could possibly lead to an ending of the contract prior to six months abroad. The employer´s claim was thus found to be wrongful.

Various regional court decisions dealt with payment of travelling allowances for outbound posted workers. Two 2004 cases[56] dealt with payment of such allowances for family visits of workers posted to Spain. The plaintiffs claimed to be entitled to payment

52. Federal Labour Court 19 May 2004 – 5 AZR 449/03.
53. Federal Labour Court 20 April 2011 – 5 AZR 171/10.
54. Federal Labour Court 23 August 2012 – 8 AZR 804/11.
55. Hessian State Labour Court 18 July 2014 – 10 Sa 187/13.
56. Labour State Court Rhineland-Palatinate 7 October 2004 – 6 Sa 770/03 and 6 Sa 827/03.

of normal salary for travelling days based on a collective rule valid in the company. The court found that this rule only entitled them to absence from work on travelling days, whereas travelling home was considered a private issue.

A 2017 case[57] treated the right to payment and overtime payment for travelling times to and from China based on the collective agreement for the construction industry. Contrary to the defendant´s argument, it found the collective agreement to be applicable to travelling times abroad in a case where the rule did not explicitly contemplate transnational employment. The court found that payment of a regular hourly-based salary for travelling times to construction sites is not restricted to domestic travels, whereas the collective agreement explicitly did not foresee overtime surcharge. It was found to be of no influence for salary claims whether an extra agreement between parties concerning posting was necessary, or if contract and collective agreement was allowed for posting abroad.

Two southern German cases had to do with SOKA´s Swiss counterpart. The local labour court of Lörrach[58] had to decide about proportionality of administrative costs imposed on a company for the revision of minimum labour conditions which were to be paid in case of infringement. Here, administrative costs of Swiss Francs (CHF) 875 for control of the site were found not to be proportional for being imposed in case of an underpayment of CHF 57,66.

The second case,[59] concerning a Swiss joint organisation of social partners, dealt with contractual penalties in a Swiss overruling mandatory collective agreement. The collective agreement ordered employers who infringed it to pay a contractual penalty and administrative costs to the joint organisation. The local labour court in Ulm found that German law was to be applied because employment was centred in Germany, whereas posting to Switzerland covered a period of only three weeks. The court found that German law does not 'know' contractual penalties that grant rights to third parties and did not give a base for the payments claimed. Swiss rules for contractual penalties were found not to be mandatory for application by German courts since individual workers have the right to claim higher salaries based on Swiss overruling mandatory collective agreements in (German) courts, and no predominant interest worthy of protection was found to implement contractual penalties by German courts on German employment relationships.

The two decisions concerning the Swiss joint organisation in the construction industry illustrate that German courts are not used to strong positions of collective institutions taking care of compliance and enforcement of minimum labour conditions. In a 2005 decision,[60] the State Labour Court of Baden-Wuerttemberg had to decide about the deductibility of a French 'cadre' pension from a German company pension granted to an employee who had worked for a France-based company for more than 10 years.

57. Labour State Court Rhineland-Palatinate 13 July 2017 – 2 Sa 468/16.
58. Labour Court Lörrach 3 May 2012 – 1 Ca 31/11.
59. Labour Court Ulm 29 July 2009 – 2 Ca 571/08.
60. Labour State Court Baden-Wuerttemberg 21 November 2005 – 15 Sa 95/05.

The contract concerning the company pension said that 'private old-age provisions payment' could be deducted from company pensions. The French cadre pension was a compulsory pension financed by contributions from both employee and employer but organised in the form of a private pension fund. The court interpreted the term 'private old-age provisions payment' in the light of the German Act on company pensions. This covered only voluntary pension systems and not compulsory pensions, therefore favouring the employee, and so the cadre pension could not be deducted.

In another 2005[61] decision, the Stuttgart local labour court had to decide about a public research entity´s right to relocate an employee from France to Germany 18 months before reaching the legal pension age. The employee had been working in Grenoble as a (formally) posted worker for more than 30 years. The court found that the place of work had contractually become Grenoble.

Overall, with the exception of SOKA cases, individual labour law jurisprudence does not allow for the systematic critique of posting problems, but rather shows random issues. Statistically, in the analysed labour cases, no party can be seen to be winning more frequently than others. Cases involving SOKA show a slight majority of cases in the second and third instance won by SOKA, with the ratio of four to three. In the other individual and collective labour law cases, numbers are too small to show a clear tendency.

2.1.7. Collective cases – matrix and more

Collective labour law decisions concerning posting of workers are rare; nonetheless, the few decisions available reflect vibrant discussions on works council participation in matrix organisations.

Matrix phenomena can be described as forms of labour organisation that depart from traditional vertical business units and their division in terms of tasks and place of employment. This can take place in a company where, for example, workers are integrated into several departments and involve cross-functional units and/or cross-business group working. New communication and information technologies have increased links across geographical borders. Now the matrix has added a new dimension to domestic and international business with the introduction of 'virtual cross-border posting'.

Matrix organisations pose particular legal challenges, however. Individual labour aspects such as constant availability and accessibility of mobile employees everywhere and anytime, the ubiquity of workplaces (home office, mobile office), shared and unclear responsibilities, cross-company and cross-corporate contracts are all partly new and partly specific, and also more complex in matrix organisations. Consequently, they need more regulation via law, collective agreements and individual contracts.

Matrix organisations pose special issues for the German model of works councils and workers' participation rights in social, personnel and economic affairs. Works councils

61. Labour Court Stuttgart 15 June 2005 – 30 Ca 1422/05.

(*Betriebsräte*) are elected by workers and are responsible for the affairs of independent operations departments (*Betriebe*). These are units where an entrepreneur pursues work-related objectives, but they do not necessarily imply that work happens in the same place, which can be relevant in posting contexts.

Two 2009[62] and one 2010[63] regional court decisions show the complexity of the issue – and the court´s shortcomings. In the 2009 decision, the works council of the Goethe Institute´s central business unit claimed participation rights before labour courts such as those in comparative domestic cases concerning employment of new language teachers posted to units abroad. The works council argued that questions covered by its right of co-determination were decided in Munich, whereas the authority to give instructions was in the hands of local managers in the business units abroad.

In the 2010 case, the works council asked for the right to organise partial business unit meetings abroad with posted workers. It argued that it was responsible for posted language professors since decisions such as posting, changes of contract, relocations, personnel development and other issues affecting them were decided on the level of the German headquarters.

The court ruled that the works council was not competent, since business units abroad formed independent operations departments. It argued that posted language teachers did not form part of the Munich business since they did not show sufficient relationship to the headquarters´ unit.

The decisions show that some matrix elements are more complex than classic short- or long-term posting. Certain issues co-determined by the works council are centralised, affecting all employees posted abroad – including domestic workers in other countries. If the subsidiaries had been in Germany, if there was any doubt, employees in local units would have been entitled to form works councils of their own. They would have found practically the same level of protection, since they could have established a local works council in case the court didn´t consider them to be part of the headquarters´ business unit. Notwithstanding, for the principle of territoriality, the law on works councils does not apply abroad if workers are not considered to be part of business units in Germany.

Since all major areas of co-determination were decided in Germany, it would have been natural to consider teachers as forming part of this business unit. Several legal provisions allow for this interpretation, which would make it easier for all parties affected to take posting and matrix issues seriously. Labour relations, especially in the case of temporary postings and periodic changes of workplace, revolve around the headquarters, with certain responsibilities being decided locally. Nonetheless, the court was too timid to apply the law in transnational labour relations based on ambiguous jurisprudence of the Federal Labour Court.

62. Labour State Court Munich 8 July 2009 – 11 TaBV 114/08.
63. Labour State Court Munich 7 July 2010 – 5 TaBV 18/09.

In a 2005 decision, the Federal Labour Court had to decide about the validity of elections in which posted workers had been considered qualified to vote. The Court found that employees posted to other companies of the same corporation inside Germany and abroad should be part of the electorate and therefore co-determine the size of the works council because they were employees of the company itself. The norms of the Temporary Works Act regarding works councils had to be applied analogously to companies posting to other corporate subsidiaries which did not act as for-profit personnel leasing companies (and thus not applying other norms of the law), resulting in the right of posted workers to vote.

In a 2016 decision,[64] a regional court found that workers temporarily posted abroad were entitled to participate in works council elections. The workers here were posted for one to three years to China, for example, with posting contracts limited in time but prolonged in several cases. The court saw sufficient relationship to the posting business unit.

In another 2016 decision,[65] the Federal Labour Court had to decide whether the local works council was entitled to participate in aspects of training of workers posted to Germany from Slovakia. The works council feared that after the training, the business unit´s activities would be relocated through knowledge transfer, and therefore looked for possibilities to intervene. The Court here found that participation rights exist only with regards to in-company vocational training and instruction. The posted worker was not considered to be part of the workforce of the business, and therefore their instruction and training was not subject to participation of the works council.

In a decision[66] concerning flight crew, a regional court had to decide about the works council´s right to a risk analysis and co-decision regarding 'stand-by rules' for pilots abroad between flights and a 'crew hotel' in Palma de Mallorca. The court found that the collective agreement in discussion was restricted to Germany, therefore not covering the crew hotel in Mallorca. It alleged that the collective agreement barred the right to risk analysis regarding stand-by rules since it did not establish such rights, and that the law on works councils, which establishes this right, did not apply to this special works council.

The cases show that posting implies collective labour disputes with a new set of problems. While borders generally do not cause individual labour law difficulties, since workers do not fall outside the safety net of rights national labour legislation offers, legislation for works councils generally does not pass beyond Germany´s borders. The cases cited offer only a slight glimpse of the problems that growing transnational links pose to Germany´s system of worker participation. Where workers, especially superiors, work in transnational contexts, business units can cross borders as well. Postings in the form of the physical crossing of borders are often just the tip of the iceberg. 'Virtual' or 'cyber'

64. State Labour Court North Rhine-Westphalia 13 January 2016 – 12 TaBV 67/14; see also Saarland State Labour Court 7 December 2016 – 2 TaBV 6/15.
65. Federal Labour Court 26 April 2016 – 1 ABR 21/14.
66. State Labour Court Berlin Brandenburg 16 July 2010 – 13 TaBV 1324/10, 13 TaBV 1348/10.

postings are the extensive and sustained new structural phenomenon in cross-border corporations that are not, however, covered by the posting directive. Participation rights do not stop at the border, but far too often they are unknown by workers, and hardly recognised in literature and courts.

2.2. Social court decisions

In terms of numbers, the second most important branch of jurisprudence was found within the social court system. Four of the social court decisions considered here were made by the Federal Social Court, 37 by regional social courts and five by local social courts. About half of the cases were cases of inbound and outbound posting respectively.

About one third of the social court decisions concern child allowance and parental allowance cases. Further cases involving currently or formerly posted employees include pension claims, insolvency substitutes, unemployment benefits, health-related claims against the statutory accident insurance and short-time allowances, among others. In total, cases filed by employees quantitatively prevailed.

2.2.1. Right to child allowances and parental allowances

Child allowance and parental allowance cases mostly related to employees posted to non-EU countries. Typical cases revolve around the question of residence in case of long-term posting abroad.[67] In cases where apartments or houses were kept in Germany, but in legal terms the domicile was not maintained because of a long-term (more than a year) stay abroad, allowance was not to be paid. Other cases related to the different treatment of civil servants and private employees, where employees, such as a development helper posted to Vietnam,[68] a party foundation´s employee posted to Thailand,[69] and a missionary of a non-public church posted to Peru,[70] unsuccessfully claimed child allowance which in cases of long-term stays abroad is paid to public servants such as diplomats.

2.2.2. Right to unemployment benefits

Several cases relate to the right to unemployment benefits of workers posted abroad to or from non-EU countries. Two cases concerning posting to the US dealt with the question of whether the plaintiffs were still integrated into the German unemployment security systems when sent to work in other companies in a corporate context. In both cases, the lack of integration into the posting business unit and the payment of salaries by other

67. State Social Court North Rhine-Westphalia 21 January 2005 – L 13 KG 13/04; Bavarian State Social Court 13 July 2006 – L 14 KG 8/03; State Social Court Baden Wuerttemberg 22 January 2013 – L 11 EG 3335/12; Hessian State Social Court 27 November 2013 – L 6 EG 4/11; State Social Court Baden Wuerttemberg 24 March 2015 – L 11 EG 272/14; State Social Court Baden Wuerttemberg 23 February 2016 – L 11 EG 2920/15; Bavarian State Social Court 26 October 2016 – L 12 EG 13/16.

68. Bavarian State Social Court 19 July 2007 – L 14 KG 13/04.

69. Bavarian State Social Court 19 July 2007 – L 14 KG 6/07.

70. Federal Social Court 26 March 2014 – B 10 KG 1/13 R.

entities were found to be decisive in denying unemployment benefits.[71] Further cases involved Japanese employees who had been exempted from social security payments to German institutions, based on the German-Japanese social security conventions. They were found to be not entitled to unemployment benefits.[72]

In two parallel cases,[73] two construction workers posted from Turkey claimed the right to insolvency substitute benefits in the context of a works contract with a third company when the German subsidiary of their employer became insolvent. The court decided that since the workers were posted and thus employees of a Turkish company, they were not entitled to insolvency substitute payments for employees of the bankrupt German company.

2.2.3. Pension rights

Some cases filed by formerly posted workers concerned different forms of pension claims. One case was filed by a former Polish citizen who had adopted German nationality and claimed pension rights for the times he was posted from Poland to Germany, and for times when he was posted to Poland as an employee of a German company.[74] To be eligible for pensions by the German pension system based on the German-Polish social security convention, the plaintiff had to prove residence in Germany without interruption since 1991. The action was dismissed because evidence showed that his (principal) residence for large amounts of time was in Poland.

Another similar case concerned the right to disability pensions claimed by a Polish citizen posted to and later permanently living in Germany.[75] The claimant applied to the disability rules valid when he was still posted and last exposed to the conditions causing his disability, but without success. The court found that the law valid at the start of his occupational disability, which offered worse conditions, was applicable.

In yet another disability pension case, parties disputed how times of posted work in contrast to working times as free movers were recognised, and which law applied if German and Croatian law differed when determining the beginning of occupational disability.[76] The court found German law to be applicable, resulting in a later start to the occupational disability. The pension paid was thus based on the lower salaries the plaintiff had earned as a refugee fleeing the war in Croatia.

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71. Hessian State Social Court 18 November 2005 – L 7/10 AL 465/03; Hessian State Social Court 1 October 2010 – L 7 AL 73/07 ZVW.
72. Hessian State Social Court 11 November 2010 – L 7 AL 108/10 B ER; Hessian State Social Court 6 December 2013 – L 7 AL 117/12.
73. Bavarian State Social Court 29 March 2004 – L 11 AL 95/03 and L 11 AL 138/03.
74. Bavarian State Social Court 18 May 2005 – L 13 R 4046/02.
75. State Social Court North Rhine-Westphalia 20 March 2008 – L 2 KN 139/07 U.
76. Bavarian State Social Court 18 September 2008 – L 14 R 178/07.

2.2.4. Right to statutory accident insurance

Two cases filed by employees related to claims against statutory accident insurance. In the first case,[77] a worker posted to an HIV-affected area of Nigeria could not prove his HIV-infection resulted from his work, which involved first-aid treatment of wounds. In the second case,[78] parties disputed the applicability of the statutory accident insurance for posting cases without former or later planned employment in Germany. The plaintiff´s husband, who died as a result of the working conditions, was found to be uninsured since he was not considered to be posted in terms of the law.

2.2.5. Right to exemption from social security payments

Cases filed by employers related mostly to the right of exemption from social security payments. Several cases discuss the binding effects of posting certificates especially before, but also after, posting countries joined the EU. Problems include social security agencies doubting the posting status of employees and demanding social security payments from employers despite existing posting certificates. Various cases concern meat companies from Hungary and Poland, where, for example, workers had never worked for the company in their country of origin and the supposed posting company did not have the facilities to employ workers in Hungary[79] or Poland[80] respectively. In one case, a former authorised representative and managing director of a Hungarian company, which was effectively a recruiting bureau,[81] was found liable for the company´s debts. Since the company did not have a legal establishment (seat) in Germany, the authorised representative was held to be jointly liable with the company, which had terminated activities in Germany.

Nonetheless, in several cases, the courts made it clear that posting certificates could be ignored by social security agencies only if it was obvious that there was no posting of employees.

A case decided in 2007 in second instance discussed the right of German social security agencies to reconsider and ignore an untested but valid posting certificate. The court found that German state officials and courts were not entitled to question decisions about the determination of the prerequisites of foreign posting law if they were done according to the law of the posting country. The E101 certificate (now A1), which concerns the continued application of the posting country´s social security norms, binds the receiving country´s authorities until withdrawn by the issuing authority.[82]

Another case had to discuss whether there was a contract for work by the German receiving company with the posting company, or whether it was effectively a case of temporary work of posted workers because the workers were integrated into the

77. State Social Court Baden Wuerttemberg 28 April 2005 – L 6 U 1974/01.
78. Hessian Social Court 5 December 2011 – L 3 U 174/10.
79. State Social Court Rhineland-Palatinate 26 October 2009 – L 2 U 46/09.
80. State Social Court Rhineland-Palatinate 10 August 2009 – L 2 U 136/07.
81. State Social Court North Rhine-Westphalia 3 July 2013 – L 17 U 235/08.
82. State Social Court Berlin Brandenburg 7 December 2007 – L 1 KR 235/07.

receiving company.[83] The posting certificates were found to be binding for German social security institutions, which meant that workers - and in effect companies - were exempt from paying social security in Germany because they had made payments in Poland. The Polish-German convention on social security therefore had primacy to simple German law which would have led to fictitious labour contracts and payment of social security. Interpretation was consistent with Regulation 1408/71, where the posting country´s social security authorities are responsible for verifying whether it is posting or a temporary works situation. In uncertain cases, the German authorities would have to contact the Polish authorities. An exemption was to be made only if the certification was obviously wrong.

The general line taken in non-EU cases can be seen in two cases concerning Japanese employees working in Germany. These highlighted the duty to pay social security in corporate contexts. In both cases, criteria for being considered posted in a corporate context were discussed, evaluating the relevance of legal and factual relations in order to discern an employment relationship distinct from posting. Integration into the posting or receiving business unit was seen as a decisive factor, next to the responsible entity for the payment of salaries. In the first decision,[84] the German subsidiary was found to be liable for social security payments since the Japanese employees were completely integrated into the German company´s business activities. Integration (*Eingliederung*) was considered to mean which company benefitted economically from the employment. The court also assumed that the German company paid the salaries. As the German company was found to benefit, the Japanese employees posted were found *not* to be considered posted (*Einstrahlung*) in the sense of the Social Security Code. In the second decision,[85] the court decided that since the Japanese company paid two-thirds of the salaries of the Japanese employees that it had temporarily posted, the German company receiving them was considered not to be liable for social security payments in Germany.

2.2.6. Other cases

A very recent case decided by the Federal Social Court brings clarification in the European context. The Court decided that there was effectively no posting in a case of temporary work without permit on the part of a temporary employment agency based in Luxembourg.[86] The contractor had to pay social security for personnel deployed even though the contractor had already paid social security for them in the country of origin. This is based on the legal fiction (legal assumption) of a contract between the temporary worker and the company deploying them under the Temporary Employment Act. Since the employee had been posted for seven years, Regulation (EEC) 1408/71 did not have to be applied. The Court considered the case to be essentially a domestic issue not influenced by European law, and held the German employer liable as guarantor for the social security payments of its contractor.

83. Bavarian State Social Court 27 February 2007 – L 5 KR 32/04.
84. State Social Court Berlin Brandenburg 11 December 2006 – L 9 KR 73/03.
85. Hessian State Social Court 15 February 2007 – L 8 KR 122/06.
86. Federal Social Court 29 June 2016 – B 12 R 8/14 R.

An interesting case[87] concerned a German subsidiary of an Austrian company that was posting workers from Germany to Austria. Lack of work in the German branch meant hours were reduced, and this brought up the question of whether workers had the right to short-time allowance. Parties discussed the applicability of the norms for short-time allowance when posting workers abroad. The Court found EU law to be applicable, with the result that for short-time posting, the social security rules of the posting country had to be applied. Short-time allowance rules were considered part of these. Thus, the company was entitled to short-time allowance for its workers abroad.

A case recently decided by the Federal Social Court[88] concerned the entitlement to reimbursement of winter pay to workers employed by a German subsidiary but posted to the Netherlands. The Court decided that additional winter pay expenses (grants paid for the heavier burdens of winter work - currently EUR 1 per worked hour between 15 December and 28 February) is only reimbursed to manual workers deployed in Germany and not to workers posted to construction sites abroad, since the employer does not have to pay levies for winter pay for times they are posted abroad.

2.2.7. Conclusion

Plaintiffs have a hard time winning cases before social courts. Little more than 10% of cases against public agencies ended with positive results for plaintiffs. Nevertheless, this neither means that public agencies always act according to the law from the outset, nor that courts necessarily opt for public agencies. The figures could result from other factors that are difficult to measure empirically. First, if a court advises a public agency that it is acting against the law, in most cases it will try to avoid a court decision and simply yield to the court´s verbally announced assessment of the legal situation, or seek an understanding with the private adversary. Of 355,297 cases in 2017, for example, little more than 10% were resolved by judgment, whereas more than 20% resulted in court or external settlement, more than 15% by acknowledgements and almost 50% by withdrawals of the action (Statistisches Bundesamt 2017: 20). Since the private individual plaintiff does not pay court fees before social courts, it is probable that a large proportion of withdrawals result from public agencies´ drawbacks.

In terms of content, several decisions reflect the discrepancies between EU and non-EU cases, and especially the relative progress of EU legislation concerning access to social benefits. Almost all cases involving private individuals from EU countries concern problems deriving from before eastern European countries joined the EU. In these cases, many problems resulted from the differences in income and the need to access social transfers in a country with high costs of living.

Cases involving employers in particular demonstrate the problems concerning potential abuse of A1 certificates and their predecessors in the context of large salary differences. The introduction of sectoral, but especially general, minimum wage, makes a big difference here, since incentives to abuse have radically decreased. Nonetheless,

87. Bavarian State Social Court 1 July 2009 – L 9 AL 109/09 B ER.
88. Federal Social Court 17 March 2016 – B 11 AL 3/15 R.

differences in social security contributions still contain incentives to use fake posting from countries with low contributions, for example in labour-intensive, low-skilled sectors.

2.3. Financial court decisions

Of the 84 financial court cases listed in the collection, 23 were handled by the Federal Financial Court and 61 by ordinary financial courts.[89]

Financial court cases often treat similar issues to social courts. Nineteen of the 23 cases listed for the Federal Financial Court cover questions of child allowance in posting cases. Of the 61 first instance financial court decisions, 44 deal with questions of child allowance.

Ten cases before the Federal Financial Court were not decided by the Court, but rather settled on the basis of CJEU decisions C-611/10 and C-612/10. The CJEU ruled that regulation 1408/71 does not preclude a Member State - that is not designated under those provisions as being the competent State - from granting child benefits in accordance with its national law to a migrant worker who is working temporarily within its territory. The cases were thus settled on the basis of national law: authorities finally paid child allowance without final judgment from the Court.[90] In further cases with the same content, the Court nonetheless had to decide, with the same result: child allowance had to be paid.[91] Further cases on child allowance for posted-in workers dealt with long-time posting and the question of whether (or when) the duration exceeding two years had been foreseen.[92]

In the outbound cases concerning child allowance, the Federal Financial Court dealt with questions of residence in Germany while posted out for a long period.[93]

Two Federal Financial Court decisions concern double taxation agreements with Singapore[94] and Spain[95] respectively, where German employees posted out were held responsible for tax payments on incomes for their work abroad. In the posting out to Singapore, the Court of Cassation remitted the case because taxability was unclear. It had not been clarified whether payments received by the posted employee from his employer in Germany when abroad had been treated by authorities in Singapore as (tax-free) remittances or (taxable) income. In the case concerning posting to Spain, the Court declared board salaries of the Spanish subsidiary to be taxable in Germany since payments were higher than those of local board members in Spain, thus making them attributable to employment in the (German) mother corporation.

89. There are only two instances in tax law/financial law in Germany.
90. Federal Financial Court 19 April 2013 – V R 63/10 et al.
91. Federal Financial Court 5 February 2015 – III R 29/14; 20.03.2014 – V R 45/11.
92. Federal Financial Court 15 March 2012 – III R 51/08 and III R 52/08.
93. Federal Financial Court 17 May 2013 – III B 121/12; 05.01.2012 – III B 42/11.
94. Federal Financial Court 22 February 2006 – I R 14/05.
95. Federal Financial Court 23 February 2005 – I R 46/03.

Further Federal Financial Court decisions concern the taxability of tax consultancy costs that are covered by the receiving employer as taxable income,[96] and the (denied) duty of the receiving company against its parent company to pay income taxes on behalf of posted-in employees who were entitled to the payment of shares and other gratuities for being posted.[97]

2.4. Administrative court decisions

Administrative court decisions cover three regional administrative court cases, and four decisions by local administrative courts. One particular decision was about the validity of the legislative decree of granting overruling mandatory character to a collective agreement on minimum wages.[98] The central question concerned the applicability of the collective agreement to employers and employees bound to other collective agreements covering the same area, and the right to verify the validity of the legislative decree for employer organisations and individual employers. The applicable law here involved the law on posting, the overruling mandatory collective agreement on postal services' minimum wages, and constitutional rights such as freedom of coalitions, occupational freedom and the rule of law in terms of effective legal protection invoked by the suing employer organisation. First instance had ruled here that the legislative decree infringed the rights of individual employers as well as the organisation bound to another collective agreement. Second instance found that the overruling of competing collective agreements via legislative decree was not legal, since it was considered neither to be covered by the law nor the procedural rules to be respected, whereas claims of individual employers not bound by collective agreements were found to be not justified for inadmissibility – validity of the legislative decree in this respect had to be contested before Labour Courts. The decision resulted, among other things, in a change of responsibilities in cases that were moved from administrative to Labour Courts, and in a change of the law on posting.

2.5. Penal court decisions

In one case about illegal temporary employment, a Court of Appeal[99] discussed the relevance of an A1 posting certificate. The first instance court had dismissed the fines imposed on a Polish company by the public authorities for illegal personnel leasing (EUR 2,000 against the managing director and EUR 20,000 against the company). The argument was that a valid posting certificate disallowed the authorities from treating an employment situation as illegal. The Court of Appeal ruled that there was an error in legal interpretation in first instance because posting certificates covered only employment and social security coverage in the posting country and not questions of personnel leasing. An employer posting his workers legally to Germany did not have

96. Federal Financial Court 21 January 2010 – VI R 2/08.
97. Federal Financial Court 4 April 2006 – VI R 11/03.
98. Higher Administrative Court of Berlin-Brandenburg 18 December 2008 – OVG 1 B 13.08.
99. Higher Regional Court Bamberg 9 August 2016 – 3 Ss OWi 494/16.

the right to lease the posted workers to other companies without the necessary permit. The case was thus remitted since the first instance court had not collected the relevant evidence.

In a 2006 decision,[100] the Federal Supreme Court discussed the binding character of a posting certificate (E101) in the context of the right to impose penal sanctions where social security payments had been withheld. According to instance findings, the defendants had created fictitious postings from Portugal to avoid social security payments to German schemes. Portuguese companies without an economic relationship to Germany had applied for and received certificates, which effectively enabled the German employing company to employ cheaper personnel (free movers) from Portugal. The Federal Supreme Court found that since posting certificates were still valid - notwithstanding the facts - the German company could not be condemned for the fictitious posting, because, as long as certificates were not invalidated, social security payments had to be made in Portugal.

Conclusion

Posting cases cover a wide variety of issues. Nonetheless, some aspects in terms of their sheer quantity are highly relevant, such as SOKA cases concerning paid leave fund payments in the construction industry with its strong organisation securing workers´ rights, or issues of child and family allowance. Not surprisingly, improvements in European legislation (fewer social security and allowance issues thanks to the harmonising of laws, for example) and jurisprudence (especially in terms of SOKA but also in child allowance and other cases), can be read through the development of case law.

Case law further highlights the importance of independent institutions controlling minimum labour conditions, while also reflecting the absence of a general Labour Inspection as well as deficits in the context of social security control. If the number and quality of SOKA cases indicate the extent of abuse and the need for effective control to impose the rule of law, the very low number of social security cases in the EU context suggests that control of abuse in this context is not well regulated. Despite the costs of control being considerably higher than in domestic cases, incentives seem extremely insufficient. Furthermore, making the policing of minimum labour conditions more efficient by enlarging customs (FKS), rather than introducing a general Labour Inspection, is also questionable. The necessity of a general Labour Inspection shown by the trade unions (DGB and Deutsche Kommission Justitia et Pax 2017) must therefore be re-emphasised.

The introduction of minimum wages, including the differentiation between sectoral and general ones, underlines fundamental developments in the posting context. Without sectoral minimum wages for construction workers being contained in the law on posting, SOKA would not be allowed to control the minimum working conditions of posted

100. Federal Supreme Court 24 October 2006 – 1 StR 44/06.

employees. The lack of comparable institutions means that case law does not show any comparable data for general minimum wages; nonetheless available information shows that, at least on paper, general minimum wages are being paid in a generalised manner (Fechner and Kocher 2018). Wage dumping in low-income sectors by means of posting thus seems to have been reduced considerably. However, case law does not reflect this development; minimum wage actions filed by posted workers are virtually non-existent before German courts. This underlines the strong need for effective control of minimum wages by the introduction of a coherently organised Labour Inspection on the one side, and a co-ordinated international collaboration of Labour Inspections and social security agencies on the other.

EU and non-EU cases are not the only posting narratives in Germany; there is a third one too. Transnational business units employing virtual or cyber-posting are developing rapidly in the context of globally interconnected production and services. In terms of collective labour law, these matrix cases show the need for further research and development of solutions if the participation mechanisms by cross-border employment is not to be destroyed. They also show the potential development and strengthening of cross-border networking and organisation of trade unions and works councils in an increasingly interconnected world. At the same time, they also demonstrate that the national orientation of law, as well as the perspective on posting reduced to physical movements of people, opens up blank spots which can undermine valid protective labour legislation, especially in the collective, democratic and participative dimension. Much has to be done if the EU is to be seen as an opportunity rather than a risk to participation and co-decision.

References

DGB and Deutsche Kommission Justitia et Pax (2017) Labour inspection in a globalised world Berlin, Deutscher Gewerkschaftsbund. https://en.dgb.de/++co++957f0dc6-3c6a-11e7-84e2-525400e5a74a

Fechner H. and Kocher E. (2018) Stellungnahme „Rechtspraxis und Anpassungsbedarf beim gesetzlichen Mindestlohn", in Mindestlohnkommission (ed.) Stellungnahmen aus der schriftlichen Anhörung. Ergänzungsband zum Zweiten Bericht der Mindestlohnkommission an die Bundesregierung nach § 9 Abs. 4 Mindestlohngesetz, Berlin, 121–137.

Lakies T. (2016) § 5 TVG Anhang 2 (AEntG), in Däubler W. (ed.) Tarifvertragsgesetz. Mit Arbeitnehmer-Entsendegesetz, 4th ed., Baden-Baden, Nomos.

Obermeier T. and Sell S. (2016) Werkverträge entlang der Wertschöpfungskette. Zwischen unproblematischer Normalität und problematischer Instrumentalisierung, Düsseldorf, Hans Böckler Stiftung.

Statistisches Bundesamt (2017) Rechtspflege - Sozialgerichte. Fachserie 10 Reihe 2.7. Wiesbaden. https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/sozialgerichte-2100270177004.pdf?__blob=publicationFile

For the list of cases please refer to Annex III.

Chapter 6
Posting of workers before Irish courts[1]

Michael Doherty

Introduction

This chapter considers how the rights of posted workers have been addressed in cases before Irish courts and tribunals. As will become quickly apparent, the issue of posting rarely features in reported decisions. The various reasons for this include the relatively low numbers of workers posted to, and the destinations for workers posted from, Ireland (section 1); the manner in which the Posted Workers Directive was transposed in Ireland, particularly as it relates to the construction sector (section 1); and the nature of dispute resolution in Ireland in the employment sphere, which sees litigation as a 'last resort' (section 2).

Ireland presents an interesting case, as labour migration to the country, of any kind, is a relatively recent phenomenon. The approach taken to the regulation of posted workers' rights has very much been to insist on equal treatment for *all* workers, regardless of origin or worker status. Crucial to this has been the *erga omnes* (binding) extension of sectoral rights, agreed by the social partners, particularly in the construction sector. The chapter will argue that, while this approach has been relatively successful in protecting the rights of posted workers, the threat to sectoral standard-setting, both in the national and EU context, could significantly affect this in the future.

The chapter begins by looking at the legal context for posting in Ireland, before examining the (limited) case law, and concludes by considering possible future challengers for regulation in this sphere.

1. The legal framework for posted work and national debates on posting

1.1. The transposition of the Directive

The Posted Workers Directive was transposed into Irish law by Section 20 of the Protection of Employees (Part-Time Work) Act, 2001 (hereinafter referred to as 'the 2001 Act'), which simply extended *all* Irish employment protection measures to posted workers. Section 20 (2) extends all relevant 'enactments' to:

(a) a posted worker (within the meaning of the Directive); and

(b) a person, irrespective of his or her nationality or place of residence, who:

(i) has entered into a contract of employment that provides for his or her being employed in the State;

(ii) works in the State under a contract of employment; or

(iii) where the employment has ceased, entered into a contract of employment referred to in sub-paragraph (i) or worked in the State under a contract of employment,

in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee.

Therefore, workers posted to Ireland from outside the EU have the same labour rights as workers posted from another Member State. In the main, the word 'enactments' refers to employment legislation. In Ireland, collective agreements are not legally binding; they are voluntary agreements between representatives of employees, and representatives of one or more employers (with the exception of sectoral collective agreements, as discussed below).

The implementing measure is silent on a range of issues, including the definition of a posted worker (it simply refers to the Directive); the duration or temporary nature of the posting; the activities of the undertaking in the home state; the nature of services provided by the employer; or the fact that an employment relationship must be maintained with the home state employer. The protection offered to posted workers is not made dependent on the length of stay, but, in limited situations, the Irish legislation will require the employee to satisfy service requirements before protection kicks in. Most importantly, an employee must have one year's continuous service with the employer before the Unfair Dismissals Acts 1977-2015 apply. No specific exemptions relating to initial assembly, postings of short duration, or non-significant work (under Article 3 of the Directive) have been applied.

The Irish legislation, therefore, could be said to both over- and under-transpose the Directive. By entitling a posted worker to *all* of the protections offered by Irish labour legislation, the 2001 Act would appear to provide a greater level of protection than that envisaged by the Directive. Back in 2003, the Commission warned that the Directive in no way permits Member States to extend all their legislative provisions and/or collective agreements governing terms and conditions of employment to workers posted on their territory, and that the application of such rules must be in compliance with the EU treaties, in particular Article 56 of the Treaty on the Functioning of the European Union (TFEU).[2] The Commission also censured Ireland, however, for not clearly defining the posting situations covered, and the rights deriving from the provisions of the Directive, and for not implementing the jurisdiction clause contained in Article 6 of the Directive.[3]

2. The Implementation of Directive 96/71/EC in the Member States COM (2003) 458 final.
3. Ibid.

1.2. National debates on posting

At the time the Directive was passed, the social partners seemed to believe that it would not have a huge impact in the Irish context (EIRO, 1999). However, the Construction Industry Federation (CIF), representing large construction employers, welcomed the Directive on the basis that it would help to facilitate a level playing field in construction by reinforcing the universal applicability of the Registered Employment Agreement (REA) for the industry. The Building and Allied Trades Union (BATU) also anticipated few problems with the Directive, given that relatively few construction workers were posted to Ireland by overseas employers. A follow-up European Observatory on Industrial Relations (EIRO, 2003) suggested that postings may be relatively common for Irish employees of multinationals based elsewhere. These would typically refer to relatively high-skilled and high-paid workers (many working in financial services, for example).

Until 2013, the Directive was not seen by labour relations actors as hugely significant in the Irish situation (although there was a small number of high-profile disputes involving posted workers, discussed in the next section).

This was due, to some extent, to Ireland's island status (workers can move more easily where land borders are shared), and to the relatively small numbers of workers covered. Figures from the Commission regarding A1 forms (which certify the applicable social security legislation for those whose work means they have connections to more than one Member State) indicate that between 2,000 and 3,600 Irish workers were posted abroad annually between 2011 and 2015 (this represents less than 0.1% of the population) and approximately 4,000 workers were posted to Ireland in 2015 (down from 6,000 in 2009). Most workers were posted from a country in the 'old' EU15. The vast majority of Irish workers posted abroad go to the UK, Germany, the Netherlands and France; more than 95% of postings from Ireland are to the EU15. This probably explains why there is no discussion, or case law, in Ireland concerning *outgoing* workers and their rights, as posted workers from Ireland tend to go to relatively high-wage destinations, which are geographically close, and, as English speakers, would generally not face many of the linguistic and cultural difficulties encountered by workers from other countries.

In the period since the Directive was transposed into Irish law, the economy, and especially the construction sector, saw an unprecedented boom in output and employment levels, then a subsequent collapse, and is currently experiencing a significant revival. One of the consequences of the boom was that the historical tradition of Irish construction workers travelling abroad was inverted, as more workers from other parts of Europe arrived in Ireland. Many of these, however, were *not* posted workers but workers who migrated to Ireland in search of employment opportunities. This was particularly the case following the accession of 10 new Member States (EU10) to the EU in 2004, and, to a much lesser extent, Bulgaria and Romania in 2007.

Most crucially, however, posted workers in Ireland (other than in high-pay occupations

such as financial services) were overwhelmingly located in the construction sector, and, in this sector, a legally binding collective agreement covered all workers. It is to this issue we now turn.

1.3. Collective agreements and posting of workers

As noted above, collective agreements in Ireland generally do not have legally binding status. However, for the purposes of this chapter, an important exception exists which has been the focus of most of the (limited) case law on posting of workers. Until 2013, under Part III of the Industrial Relations Act, 1946,[4] collective agreements made between unions and employer(s) that were registered with the Labour Court[5] were legally binding. While many of these were company agreements, they could be applied to *all* employers and employees working in a particular sector or industry, so long as the parties to such agreements were 'substantially representative' of workers and employers in that sector.[6] The most important of these REAs were undoubtedly the REA for the construction industry and the separate but related REA for the electrical contracting industry. These set minimum levels of pay (which far exceeded the national minimum wage) and other terms and conditions for workers in these industries. Therefore, the legally binding REAs applied to all workers working in Ireland irrespective of nationality or status. This included agency workers (although, for this category of workers, this was not a universally accepted legal view).[7]

In 2013, the legislation underpinning the sectoral *erga omnes* extension of these REAs in construction and electrical contracting was declared unconstitutional by the Irish Supreme Court in *McGowan* v *Labour Court*.[8] This led to widespread concern about the possibility of 'social dumping', where construction workers based in Ireland could be displaced by workers coming from low-wage destinations. This was because construction workers employed by firms based in Ireland would likely have their REA terms and conditions protected by contract law (the REA terms would likely be deemed 'incorporated' into the individual contract of employment),[9] whereas firms, or temporary agencies, posting construction workers to Ireland would be legally bound only by the (lower) national minimum wage. Furthermore, certain aspects of the REA, notably the right to sick pay and pension rights, are not rights guaranteed by Irish employment legislation (but rather matters for negotiation between workers and employers).

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4. All Irish statues can be found on the Irish Statute Book website (www.irishstatutebook.ie).

5. Despite its name, the Irish Labour Court is not a court of law and is not part of the regular court system. It is a statutory employment tribunal. Its members are not judges (there is no requirement for members to have a legal qualification, although some do). The Labour Court sits in divisions of three - a worker member, an employer member, and an independent Chair. The Labour Court deals with a mix of cases; some are employment rights cases (since 2015 the Labour Court hears only appeals from the employment tribunals), and some are industrial relations cases. Depending on the nature of the dispute before it, the Court may grant legally binding 'determinations' (employment rights cases) or 'recommendations' (industrial relations cases), which are not legally binding.

6. Industrial Relations Act 1946, s 27.

7. *Construction Industry Federation* v *Irish Congress of Trade Unions* (LCR 19847/2010). All decisions of the WRC and the Labour Court can be found at www.workplacerelations.ie

8. [2013] IESC 21.

9. This legal opinion was never tested before the courts or tribunals, but would be the predominant view among legal practitioners and academics (including the author).

Ironically, the deep economic crisis in Ireland from 2008 to 2014, when virtually no large-scale construction projects were being undertaken, meant that these debates remained largely academic. It was notable that, in 2013, the then-Minister for Education and Skills introduced random audits on school building and third level education building projects funded by the Department of Education and Skills. All public works contracts included a clause specifying the payment of the appropriate REA rate. The insistence of the public works contracts to compel contractors to pay the REA rate was most likely in breach of the Court of Justice of the European Union (CJEU) decision in *Rüffert*,[10] but no court challenges were taken.[11]

Moreover, the government moved relatively quickly to reinstate the *erga omnes* system. The Industrial Relations (Amendment) Act 2015 provides for a new model of universally applicable sectoral terms and conditions in the form of Sectoral Employment Orders (SEOs). Applications to establish an SEO may be made by a trade union (alone, or jointly with an employer organisation) where the union is 'substantially representative of the workers of the particular class, type or group in the economic sector' concerned, and the employer organisation concerned is 'substantially representative of the employers of the workers of the particular class, type or group in the economic sector' concerned. The application is made to the Labour Court, which makes a recommendation to the Minister. The Minister must sign the SEO into law, with parliamentary approval. SEOs set legally binding minimum wages, and conditions of employment, for all workers in the sectors covered; any contractual term purporting to offer terms and conditions below those stipulated in the SEO will not be enforceable, and the terms of the SEO will be inserted by law into the contract. A new SEO for the construction sector was approved in November 2017, and updated in 2019, and a new SEO for the electrical contracting sector was approved in June 2019.

1.4. Enforcement of employment rights in Ireland

Directive 2014/67 (the Enforcement Directive) was transposed into Irish law by the EU (Posted Workers) Regulations 2016 (SI No 412/2016). Overall, the debate in Ireland has fundamentally focused on the enforcement of sectoral standards for *all* construction workers (be they Irish citizens, migrant workers, or posted workers). In this regard, the Enforcement Directive has been largely welcomed, although employers are concerned about the provisions on subcontracting liability (IRN 2016).

Claims for breaches of employment legislation, or legally binding SEOs, may be made to the Workplace Relations Commission (WRC) adjudication service.[12] Appeals are heard

10. Case C-346/06 *Rüffert* v *Land Niedersachsen* ECLI:EU:C:2008:189.

11. As a result of the audits, five projects were referred to the Revenue Commissioners, one to the Department of Social Protection, and one to the Labour Inspectorate. These figures show the difficulty about compliance with employment regulations within the industry. No written decisions as regards the outcomes are available, and it is not known whether the cases involved posted workers.

12. The Workplace Relations Commission (WRC) is the statutory agency responsible for the oversight of employment relations in Ireland. It adjudicates on all statutory employment rights claims at first instance. The WRC also has a statutory duty to 'promote the improvement of workplace relations, and maintenance of good

by the Labour Court. The WRC's Labour Inspectorate section has the power to impose fines on employers who breach employment legislation; these orders may be enforced through the 'regular' courts, notably, the regional district courts.

Claims for breach of contract may also be made to the 'regular' civil courts, but this is rare. The vast majority of employment law claims are heard by the WRC, at first instance, and the Labour Court, on appeal. This means that claims by posted workers can be made to the employment tribunals, rather than the regular courts, which is considerably faster, and less costly; there is no requirement to have legal representation before the tribunals, there are no fees charged for making a claim, and no costs are awarded.

Claims are generally brought by individual workers (there are no class actions and unions cannot bring claims in the names of members); trade unions do have a role in bringing cases in relation to the operation, enforcement, or interpretation of REAs and SEOs.

2. Case law

Very few cases regarding posted workers have been reported in Ireland. This chapter cites 13 reported decisions, many of which touch only tangentially on posted workers and their rights (there are, however, multiple decisions regarding two disputes involving Turkish company Gama and Portuguese/Irish consortium RAC). Therefore, what is discussed in this section are three categories of cases, all of which involve workers posted to Ireland, but some of which were never the subject of a court or tribunal decision.

2.1. Terms of employment

Disputes involving terms and conditions of employment involve multiple issues including underpayment of wages and social security contributions, difficulties with subcontracting arrangements, breaches of working time legislation, and inadequate record keeping.

In 2006, a dispute arose at a site for a refurbished power station at Moneypoint owned by the Electricity Supply Board (ESB), a semi-state company. The principal contractor, a German company called Lentjes, engaged a Polish subcontractor, ZRE Katowice. It was alleged that the latter was significantly underpaying 66 Polish workers and making them work a 52-hour week with no overtime *premia*. The workers received one trip home every six months, but this consisted of a flight to the UK, and a bus from there to Poland. They were all members of an Irish union, the Technical, Electrical and Engineering

workplace relations'. The WRC may provide such advice as it considers appropriate on any matter relating to workplace relations. The WRC provides advice and assistance for employers and employees in all areas of employment relations, including collective bargaining. In practice, the WRC often intervenes to help mediate, and conciliate, in collective and individual disputes. The WRC is also the 'competent authority' for the purposes of the Enforcement Directive (Directive 2014/67).

Union (TEEU). ZRE had previously worked on another project with the ESB, where allegations of underpayment had been published on an independent media website (indymedia.ie).[13] The contract for ZRE Katowice Ireland was ultimately terminated by Lentjes, and the Irish subsidiary of the Polish company went into liquidation.

A dispute also arose between the ESB, the TEEU and an Irish main contractor, Laing O' Rourke Utilities, on another site over claims by the union that Serbian workers employed by a Belgrade-based subcontractor were being underpaid. After concerns were raised by the TEEU, a joint company/union audit was carried out, and a new agreement was signed in 2005 under which the workers received the correct rates of pay.

However, the most prominent case in Ireland to involve posted workers was that of a parent Turkish company (Gama Endustri Tesisleri Imalat Montaj A.S.) posting Turkish workers to its Irish subsidiary (Gama Construction Ireland Ltd.). In February 2005, it came to light that Gama was paying the Turkish workers, who had come to Ireland to work on a number of public projects, rates far below the REA minimum rate and, indeed, below the national minimum wage. These workers were accommodated offsite by their employers and spoke little or no English. Although the majority of the workers were members of Irish trade unions, it was Socialist Party Member of Parliament (TD) Joe Higgins who brought the issue to public attention. Following Higgins' claims the Department of Jobs, Enterprise and Innovation (DJEI) began an immediate investigation. The inspection uncovered a complex tale of destroyed work records and workers' money being paid, in some cases without their knowledge, into Irish, Turkish, and Dutch bank accounts. The inspectors found that Gama did pay workers less than the minimum construction rate, that workers not covered by the REA (caterers, for example) were paid less than the national minimum wage, and that while work records appeared to have been compiled on an informal basis, they had been destroyed. It also came to light that Gama had benefited substantially from a scheme whereby exemption from payment of social insurance for a period not exceeding 52 weeks can be granted in respect of the temporary employment of people who are not ordinarily resident in the state. Gama had employed 1,324 of the 1,867 workers covered by the scheme since it began in 2003. The company took legal action to restrain the publication of the DJEI's report.[14] The Supreme Court held that the powers under which the inspectors had operated did not permit them to produce a general report, which could be circulated or published generally, but that a private and limited circulation of the inspector's report to the relevant statutory authorities (with a prosecutorial function in relation to the matters identified) was permissible.[15] As a result, the report has never been made public and the information available has come from media or trade union sources.

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13. http://www.indymedia.ie/article/70811?search_text=pa&&condense_comments=false

14. *Gama Construction & Gama Endustri* v *Minister for Enterprise, Trade and Employment* [2005] IEHC 210 (High Court); [2009] IESC 37 (Supreme Court).

15. Various bodies were named, including the Director of Corporate Enforcement, the Garda (Irish Police) Fraud Squad, the National Immigration Bureau, and the Revenue Commissioners.

A remarkable feature of the *Gama* case was the fact that the company had a fully unionised workforce, and was a member of the CIF. The unions became actively and visibly involved in the dispute as the facts came to light, particularly the State's largest union, the Services, Industrial, Professional and Technical Union (SIPTU), which adopted a fuller role in representation and negotiation on behalf of the 600 workers involved. The workers also took industrial action in pursuit of their outstanding monies. The *Gama* dispute, which eventually involved three trade unions and a protracted series of unofficial, and official, industrial action, was finally resolved in August 2005 through the intervention of the Labour Relations Commission (LRC), the State's third-party mediation and conciliation service,[16] and the Labour Court. At this point, almost all of the original 600 workers had returned to Turkey, with only 83 left in Ireland. Following a Labour Court Recommendation,[17] Gama agreed to pay these employees EUR 8,000 per year of service to cover overtime worked. The Turkish employees received the monies from the Dutch bank accounts and were also compensated for underpayments. In February 2011, the Irish High Court (applying the Brussels Regulations 44/2001) ruled that a claim against Gama Ireland on behalf of a further 491 named Turkish workers for EUR 40.3 million in unpaid wages should be heard in Ireland rather than Turkey, as the company had contended. Despite an appeal by Gama to the Court of Appeal, the High Court decision that the claim should be brought in Ireland was upheld.[18]

A second key dispute, known as the *RAC* dispute, has not yet been fully resolved. RAC Eire was made up of three Portuguese companies trading in Ireland as a partnership. RAC Eire also traded as a contractor or subcontractor to a consortium known as Bóthar Hibernian, itself comprised of one Portuguese and two Irish companies. In November 2006, Bóthar Hibernian was awarded a public works contract to design and build a new road. The workers, most of whom did not speak English, signed contracts in English stating that they would be paid in accordance with REA rates, and that working time and overtime would be in accordance with the REA in place. The contract also provided for deductions from pay for accommodation, meals, and laundry services. It seems the workers were not members of an Irish trade union, but a complaint was made nevertheless to the Labour Inspectorate by SIPTU in 2008, which led to inspections of the worksite and accommodation. In echoes of the *Gama* dispute, it seems work diaries and other employment records were falsified, the workers were significantly underpaid, and worked hours significantly in excess of their contractual hours. Their accommodation was found to be extremely substandard and to pose a health risk to inhabitants.[19]

16. The LRC has now been subsumed into the Workplace Relations Commission (WRC).

17. *Gama Endustri* v *SIPTU* (LCR 18214/2005).

18. *Abama & Others* v *Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS* [2011] IEHC 308 (High Court); [2015] IECA179 (Court of Appeal).

19. As Hogan J noted in the Court of Appeal: 'The issues presented in this appeal all have a distinctly Victorian feel to them and, indeed, the factual sub-stratum of the case – allegations of illegal deductions made by the employers of foreign and generally poorly educated construction workers – would have seemed familiar to late 19th century judges in different jurisdictions'; *Da Silva & ors* v *Rosas Construtores S.A. & ors t/a RAC Contractors* (No.1) [2017] IECA 252, at para 2.

The Portuguese employers were convicted, under the Organisation of Working Time Act 1997, of the criminal offence of supplying misleading records. The conviction was in the District Court and this was upheld on appeal in the Circuit Court.[20] Upon conviction, the employers were fined EUR 1,000 and the costs of the prosecution.

In 2012, proceedings were initiated in the High Court for breach of contract in respect of 27 Portuguese workers (26 construction workers and one cleaner). In 2016, the High Court found that the workers had been significantly underpaid in breach of their contracts, that no deductions from the plaintiffs' wages for the provision of the accommodation or for the laundry services were justified, and that the workers were entitled to recover these amounts in full.[21] On appeal in 2017, the Court of Appeal found that the employers *had* been entitled to charge for deductions in respect of accommodation. However, the Court also found that the workers were entitled to sue for damages for inconvenience, distress, and upset by reason of the substandard accommodation.[22] In 2018, the matter returned to the High Court for assessment of damages, and 23 new plaintiffs also took claims for breach of contract.[23] Ultimately, the court awarded approximately EUR 1 million in damages to the workers, with individual awards ranging from EUR 3,500 to over EUR 60,000. Another hearing will be required before the precise terms of the final order can be made against the employers.

One reported case relates to unfair dismissal.[24] Here, the employer was a UK company, and the worker a UK national. The Employment Appeals Tribunal rejected the employer's argument that Section 20 of the 2001 Act was intended to deal only with the narrow range of issues referred to in Article 3 of the Posted Workers Directive, and intended further to specifically exclude Acts such as the Unfair Dismissals legislation. The Tribunal concluded that the Unfair Dismissals Act was applicable to posted workers.

2.2. The legal basis and sectoral standards

Posted workers have featured as an issue in the ongoing, and contentious, debate in Ireland about the desirability, and legality, of extending *erga omnes* sectoral standards to all employers and workers in construction and electrical engineering. There is no need to detail this debate in full (Doherty 2016; 2012), but some brief points can be highlighted. In 2009, a loose alignment of employers in the electrical contracting sector sought the cancellation of the REA for the sector.[25] The TEEU (the main union in the sector) and the main employer bodies argued that, in the absence of an REA, contractors from other EU States, where wage rates were significantly lower than in Ireland, would enjoy a considerable competitive advantage over Irish contractors. They argued that a major advantage of the REA was that it preserved a level playing field among contractors tendering for work. The Labour Court confirmed that the terms of

20. These are regional courts; the lower courts in the Irish legal system. Decisions of these courts are not reported.
21. *Da Silva & ors* v *Rosas Construtores S.A. & ors t/a RAC Contractors* [2016] IEHC 152.
22. *Da Silva & ors* v *Rosas Construtores S.A. & ors t/a RAC Contractors* (No.1) [2017] IECA 252.
23. *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* [2018] IEHC 732.
24. *Taylor* v *Daniel Lloyd Leisure* (UD2366/2009).
25. REP091/2009 (Labour Court).

the REA were applicable to, and could be enforced against, contractors based outside the State, and that nothing in the decision of the Court of Justice in *Laval (Case C-341/05)* would call into question the compatibility of Section 20 of the 2001 Act, which renders the terms of the REA universally applicable in domestic law, with any provision of EU law. The Court also found that it was reasonable to conclude that, in the absence of an REA, contractors from other Member States could exercise their freedom to provide services in Ireland at the same rates and conditions of employment as apply in their country of origin.[26] Depending on the country of origin, this could seriously undermine the competitive position of Irish contractors.[27]

The case was appealed on a point of law to the Irish High Court. In *McGowan & Ors* v *Labour Court & Ors*,[28] the Court upheld the validity of the REA and specifically noted that the REA system was compatible with the *Laval* judgment. The Court reiterated that, in light of the existence in Ireland of universally applicable collective agreements, such as the REA, posted workers in Ireland in the electrical industry would enjoy the same terms and conditions as those to which domestic workers were entitled, meaning that foreign contractors from low wage economies could not undercut Irish contractors. The Court concluded that the cancellation of the REA would remove the protection for domestic contractors against being undercut by posted workers from low wage countries. The case was appealed again to the Supreme Court.[29] Here, the REA system was declared unconstitutional; however, the Court decided the matter on principles of Irish constitutional law, and there was no reference at all to posted workers.[30]

2.3. When are workers 'posted workers'?

There are only two other reported decisions on posted workers. The first also related to the REA. In *Gor Don Construction*[31] the company argued that it had been advised by the Construction Workers Pension Scheme (CWPS) that the employees in question were posted workers, and therefore did not need to be entered into the REA pension scheme. The Labour Court found that, although they were resident in Northern Ireland, the workers were not posted workers because they were employed by an Irish company and carried out work in Ireland, and that the REA applied to them based on Section 20(2)(b) of the 2001 Act. This is interesting, as, strictly speaking, the CWPS should apply, and contributions should be made for the duration of posting, unless it can be shown workers are covered by an alternative scheme with equivalent benefits.

26. This, of course, is questionable; such operators would be subject to minimum wage laws in Ireland.
27. This argument was made again, and again accepted by the Labour Court in LCR19847/2010 (included in the Annex).
28. [2010] IEHC 501.
29. [2013] IESC 21.
30. For this reason, I have not included the decision in the table of cases below (Annex IV). For an analysis of the decision see Doherty (2012).
31. REA1294/2012.

3. Analysis and conclusions

What this chapter has clearly demonstrated is that claims by posted workers before Irish courts and tribunals are very rare indeed. In this section, we can consider some possible reasons for this.

First, the phenomenon of workers being posted to Ireland (or indeed migrating to Ireland for work) is very recent, and the numbers of workers involved is very low. Large-scale labour migration to Ireland, and much more limited levels of posting, only began around 2004, in the context of an economic boom, and the accession of 10 new Member States to the EU. Most workers came from the countries that joined the EU in 2004, and, in particular, Poland and Lithuania. Outside of high-skill, high-pay sectors, the vast majority of workers posted to Ireland worked, and work, in construction. The boom dramatically ended in 2008, and posting has not been an issue of debate in the Irish labour relations arena since then. However, since 2015, the economy has been growing rapidly, unemployment has decreased dramatically, and the construction sector is experiencing a significant uplift. Therefore, we may soon see another increase in posting to Ireland.

Secondly, the nature of dispute resolution in Ireland, in the labour relations sphere, heavily reflects the 'voluntarist' tradition inherited from the UK. Even in cases such as *Gama*, where workers eventually did go to the courts and tribunals to enforce their rights, it was only after a multiplicity of attempts to settle the matter by industrial action, accompanied by negotiation and conciliation. This involved the unions, but, crucially, also the state dispute resolution agencies, now the WRC, and the Labour Court. There is a long tradition in Ireland of these bodies intervening in large-scale disputes (and posting situations will normally involve a group of workers), and their role and status is seen as very significant by the social partners, and Irish governments. Similarly, the Labour Inspectorate (now also part of the WRC) and other bodies, such as the Health and Safety Authority (HSA), have traditionally laid much more emphasis on employer compliance than on prosecutions and/or litigation. Thus, these agencies always seek to engage with employers on a non-litigation basis in the first instance in order to get employers to comply with labour regulations. Litigation is seen as a last resort.

Thirdly, trade unions have traditionally been relatively well organised in the construction sector. Thus, workers have recourse to trade union protection (the various disputes described in section 2 mostly resulted in some form of industrial action being taken), rather than needing to take claims to courts and tribunals. Even in the RAC dispute, where workers were not members of trade unions, it was a trade union, SIPTU, that made a complaint to the Labour Inspectorate about the working conditions.

Fourthly, a key theme of the chapter has been the strong commitment of trade unions, larger employers, and the state to sectoral regulation of labour standards in the construction sector. As we have seen, the social partners have continuously argued that such regulation is vital to prevent social dumping, and undercutting of (relatively high cost) Irish employers by (relatively low cost) employers from other jurisdictions. Although the REA system was struck down by the Supreme Court, a new system of

sectoral regulation has been quickly established (the SEO system). Sectoral standard-setting is seen as key to protection of both Irish employers and posted workers; the simplicity of a system where 'one size fits all' makes for easier monitoring of, and compliance with, labour standards. Somewhat controversially, as we have seen, the Irish transposition of the Posted Workers Directive has extended *all* protections of Irish labour law (not just the Article 3 protections) to posted workers, from inside, and outside, the EU, a position which has been consistently upheld by the courts and tribunals in Ireland.[32]

However, challenges and dangers abound in all these areas. It is not clear to what extent the landscape awaiting workers to be posted from lower-cost jurisdictions to Ireland from now on has changed. Ireland is again experiencing rapid economic and employment growth, but in a context where Brexit looms. During the boom of the 2000s, posted workers had many employment opportunities, but there was also documented exploitation. The impact of the Enforcement Directive remains to be assessed.

Voluntarist solutions may work well in some scenarios, but more than a decade after the *Gama* and *RAC* disputes came to light, it is still unclear whether the workers in question have actually achieved a just outcome. Clearly, attempts to 'cajole' Gama into meeting its obligations did not work. Some of the workers sought to enforce their rights in the Turkish courts, with very limited success. In the Irish High Court, it was noted that the Turkish courts had demonstrated an inability to apply Irish law, an unwillingness to apply the rates under the REA, and had also failed to take into account the public policy concerns of the Irish authorities (regarding the extreme exploitation of workers). This was in addition to more pragmatic concerns about the translation of documentation into Turkish, and the availability of witnesses. Turkey, of course, is not a member of the EU, but the *Gama* case illustrates the difficulties for posted workers of enforcing rights before home state courts.

The *RAC* case (details of which first emerged in 2008) has not yet been brought to a conclusion. Some workers were denied recompense because they were unable to supply direct evidence to the Irish courts (in person or via video link), as Ireland does not permit class actions. Also, the judges in the case noted the obvious attempts by RAC to frustrate proceedings (at least five different legal teams were engaged by the defendants at various stages).

In both cases, the issues have been pursued as breach of contract cases. Given the vast sums of money involved this has meant both have had to be pursued in the Irish superior courts, with the inevitable costs and delays this involves, rather than as labour relations cases before employment tribunals.

32. '...[the requirement to comply with REAs] seems to me to reflect the legitimate public policy that, while proper competition on price and quality in the provision of public works services, subject to the principles of non-discrimination, transparency and equality enshrined in the TEU and TFEU Treaties, is both necessary and appropriate; it cannot be allowed to operate in an untrammelled way so as to diminish the employment law rights of workers. There should be no 'race to the bottom' where the rights and conditions of workers are concerned'; per Keane J in *Da Silva & ors* v *Rosas Construtores S.A. & ors t/a RAC Contractors* [2016] IEHC 152, at para 126.

Unfortunately, the long-running sagas of both *Gama* and *RAC* also demonstrate the difficulties of pursuing a claim against the home state employer in the host state courts. Again, the effects of the Enforcement Directive remain to be assessed.

While Irish trade unions provided some protection to the posted workers in dispute in the cases outlined, ultimately, once the workers return home, the protection Irish unions can offer is limited indeed. Here, the development of more cross-national union co-operation is vital; but prospects for this do not appear particularly bright.

The importance of legally binding sectoral standards cannot be underestimated. There is admirable social partner and political commitment to these in Ireland. However, the system has come increasingly under threat from 'rogue' employers, generally smaller operators who are intensely anti-union, and see the system as unduly paternalistic, and, indeed, anachronistic (*McGowan*).[33]

Furthermore, in its country-specific recommendations (CSRs), the Commission has been targeting measures of standard-setting that go beyond minimum legislative standards, particularly where these are arrived at by collective bargaining (Doherty, 2014). It is also arguable that Ireland has gone too far in extending all employment protections to posted workers.

Naturally, I will end by suggesting further research. The dearth of claims taken to the Irish courts and tribunals probably can be best explained by undertaking more qualitative research to get at the 'reality' behind the case law reports.

References

Doherty M. (2012) Battered and fried? Regulation of working conditions and wage setting after the John Grace decision, Dublin University Law Journal, 35, 97-121.

Doherty M. (2014) Back to the future of EU labour law, Kings Law Journal, 25 (3), 467-475.

Doherty M. (2016) New morning? Irish labour law post-austerity, Dublin University Law Journal, 39 (1), 62-82.

EIRO (1999) Posted workers and the implementation of the Directive. https://www.eurofound.europa.eu/publications/report/1999/posted-workers-and-the-implementation-of-the-directive

EIRO (2003) Thematic feature- Posted workers http://www.eurofound.europa.eu/eiro/2003/06/tfeature/ie0306202t.htm

European Commission (2017) Posting of workers: Report on A1 portable documents issued in 2015. http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes

IRN (2016) Deadline missed for Posted Workers Enforcement Directive, Industrial Relations News, 26, 10-11.

33. Indeed, the Irish Supreme Court, in *McGowan*, stated (at Paragraph 8) that the (REA system) appears 'somewhat anomalous' today and gives rise to the 'prospect of burdensome restraints on competition for prospective employers and intrusive paternalism for prospective employees'.

List of cases

Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS [2011] IEHC 308 (High Court); [2015] IECA179 (Court of Appeal).

Construction Industry Federation v Irish Congress of Trade Unions (LCR 19847/2010).

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors [2018] IEHC 732.

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors (No.1) [2017] IECA 252.

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors [2016] IEHC 152.

Gama Construction & Gama Endustri v Minister for Enterprise, Trade and Employment [2005] IEHC 210 (High Court); [2009] IESC 37 (Supreme Court).

Gama Endustri v SIPTU (LCR 18214/2005).

Gor Don Construction (REA1294/2012).

Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet ECLI:EU:C:2007:809.

McGowan v Labour Court [2013] IESC 21 (Supreme Court); [2010] IEHC 501 (High Court).

National Electrical Contractors of Ireland and others - and- TEEU/ Electrical Contractors Association and others (REP091/2009).

Taylor v Daniel Lloyd Leisure (UD2366/2009).

Chapter 7
Posting of workers before Latvian courts

Zane Rasnača

Introduction[1]

In Latvia the posting of workers is not so much discussed as it is litigated, a fact that distinguishes this case study from most of the other chapters in this volume. In so far as there is discussion, there is little congruence between the prevailing discourse and judicial reality. While, politically, the discourse on posting is driven by the emphasis on 'competitive advantage' (at the EU level) and shortage of workforce (at the national level), the judicial reality reveals that workers use courts to achieve, first, clarity on what labour law standards apply to them, and second, actual enforcement of their labour rights. The focus in litigation is always on the financial aspects of the employment relationship. The posted workers demand their salaries and benefits afforded under the Latvian law during posting; employers, in turn, try to minimise the costs and avoid payment of taxes, social contributions, and the posting-related benefits due to workers.

The Latvian situation is somewhat unique, because the posted workers themselves (as opposed to, for example, trade unions or institutions such as the Labour Inspectorate) seem to actively use the courts for exercising their voice.[2] Earlier research that included Latvia in the sample failed to identify the prevalence of litigation on posting-related matters.[3] The intensity of litigation also distinguishes this case study from the findings in other research projects, where authors have emphasised that posted workers exercise their voice (exclusively) by exiting the employment relationship. In this regard Nathan Lillie has found that 'hypermobility' characterises posted work.[4] While the Latvian case law indeed reveals that posted workers tend to terminate their employment relationship if they are unhappy with the extent to which employers fulfil their obligations, the significant volume of case law focusing on individual judicial enforcement of posted workers' rights demonstrates that Latvian posted workers often exercise their voice via judicial means.

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1. Please refer to Annex V for an overview of the cases analysed in this chapter.
2. Within this volume, only in the Bulgarian chapter do we find a similar trend. At the same time, in the cases analysed in this chapter, it cannot be excluded that there is some prior consultation by workers with trade unions or the Labour Inspectorate, although judgments themselves do not explicitly reveal that.
3. For a different description of the Latvian situation, see van Hoek A. and Houwerzijl M. (2011) Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Amsterdam, University of Amsterdam. http://ec.europa.eu/social/BlobServlet?docId=7510&langId=en
4. See Lillie N. (2016) The right not to have rights: posted worker acquiescence and the European Union labor rights framework, Theoretical Inquiries in Law, 17 (1), 39-62.

Money, and more specifically salary and daily allowances, with all the related issues on taxes and working time, are the two key matters litigated before Latvian courts. Although, as shown below, other issues come across in the case law as well, money remains the key focus for both companies and workers. This aligns with the information from the Latvian Trade Union Confederation, which regularly receives questions on employers' financial obligations in situations of posting.[5] The posting companies, however, litigate mostly to challenge the decisions taken by the State Revenue Service, State Social Insurance Agency, and Labour Inspectorate, among others. Finally, the posting of third-country (non-EU) nationals has recently become more of an issue for the Latvian courts.

At the same time, one must keep in mind that the available judgments reveal only a partial picture. First, not all judgments issued by the Latvian courts are publicly available (not all are published). Second, the available data on posted workers, and also national debates, reveal that both inbound and outbound posting is highly relevant in the Latvian context, though the case law almost exclusively concerns outbound posted workers. This means that the workers posted to Latvian territory do not exercise their voice in the same way as Latvian posted workers (that is, via courts); although, of course they could be going to the court in their home countries, like the Latvian workers are doing.

This chapter unfolds as follows: section 1 engages with the main debates on posting; section 2 explains the key elements of national legal framework necessary for understanding domestic case law; and the third and final section analyses the national case law and brings out the major trends identifiable in the available judgments.

1. Debate on posting

Posting of workers is a relatively small phenomenon in Latvia and posted workers (whether inbound or outbound) do not constitute a significant part of the workforce.

To give an overall picture, in 2017 the population in Latvia was 1.95 million,[6] with approximately half the population economically active.[7] According to data from the same year, the Latvian authorities issued 1,529 A1 certificates[8] to workers sent by their employer to (temporarily) work abroad.[9] The majority of A1 certificates for posted workers were issued in the construction sector (43%), followed by transport (24%) and industrial work (17%).[10] In return, 1,629 A1 certificates were issued to workers coming

5. Mickeviča N. (2012) Darbinieku pārrobežu norīkošanas regulējums Latvijā, Riga, Latvijas Brīvo Arodbiedrību Savienība, 3.
6. Data available under: https://www.worldometers.info/world-population/latvia-population/
7. EURES (2018) Īss pārskats par darba tirgu. https://ec.europa.eu/eures/printLMIText.jsp?lmiLang=lv&regionId=GR0&catId=2776
8. Article 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123.
9. Presentation, MoveS Seminar Latvia. Posting of workers in the context of free movement and coordination of social security, Riga, 26 October 2018. https://ec.europa.eu/social/BlobServlet?docId=20280&langId=en
10. Ibid.

to Latvia.[11] Positioned against the whole workforce, these numbers are low, especially since multiple A1 certificates can be issued for the same worker. However, they do show that Latvia both 'sends' and 'receives' workers in equal measure, and in this regard, its profile is closer to Germany's, for example, than Poland's.

In contrast to some other EU member states where posting has figured intensively in the discussion at the national level,[12] the debate in Latvia is scarce and scattered, even though some key messages can still be identified.

First, at the EU level, Latvia opposed the recent revision of the Posted Workers Directive.[13] The Latvian Parliament was among those who objected to the revision during the yellow card procedure. In a letter to the European Commission (EC), the Latvian Parliament criticised the initiative on subsidiarity-related grounds.[14] However, the letter also disclosed a deeper concern about the potentially adverse effect of the changes proposed by the Commission on the functioning of the EU internal market,[15] and declared the proposal a threat to 'low-wage countries' and competition in the internal market.[16] The Latvian government also voted against the revision in the Council.[17] Surprisingly, this stance was not much debated at the societal level; at least, there is no publicly available information about any such discussion.

This shows that in Latvia, posting is primarily seen from the perspective of a 'sending' country, providing an opportunity for the Latvian companies to access the foreign markets by offering their services abroad, at least at the governmental level. This is in stark contrast to the data revealing that Latvia is a country that both sends and receives.

Second, the posting of third-country nationals has gradually become a more important part of the general debate on labour mobility. Latvia, at least as argued by employers, is going through an extreme workforce shortage, especially in specific sectors such as construction and fisheries.[18] The relaxing of immigration rules and also the posting of workers from either EU or third countries (often countries with much lower wages, for example, Ukraine and Belarus) is seen as one of the ways to respond to the lack of available workers. This, however, is a complex debate. There are objections that such

11. De Wispelaere F. and Pacolet J. (2018) Posting of workers. Report on A1 portable documents issued in 2017, Brussels, European Commission, 24.

12. See, e.g. chapter 4 on France.

13. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9 July 2018, 16–24.

14. Opinion of the European Affairs Committee of the Saeima, 5 May 2016. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf

15. Replacing 'minimum wage' by 'remuneration' and limiting the period of posting to 24 months.

16. Opinion of the European Affairs Committee of the Saeima, 5 May 2016. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf

17. Tani C. (2017) EU overcomes divisions on posted workers, EUObserver, 24 October 2017. https://euobserver.com/social/139599

18. Ambote S. (2019) Dažādu nozaru uzņēmumos drabinieku trūkums aizvien ir liela problēma, LSM, 16 January 2019. https://www.lsm.lv/raksts/zinas/ekonomika/dazadu-nozaru-uznemumos-darbinieku-trukums-arvien-ir-liela-problema.a306189/; Pauniņš A. (2011) Celtniecībā trūkst darbinieku, TVNet, 20 April 2011. https://www.tvnet.lv/5421798/celtnieciba-trukst-darbinieku

'import of workers' would be unfair to the local workforce and, instead of importing workers, employers should pay higher wages to local workers.[19] In this regard, in order not to crowd the labour market with third-country nationals, the Latvian law demands that these receive at least the average wage multiplied by one and a half times, and may be hired only if workers cannot be found locally. Their employer also needs to arrange their accommodation and residence permits.[20] In spite of these stringent rules, the number of work permits for third-country nationals has doubled over the past three years (reaching 6,000).[21] There are also temporary work agencies offering workers from third countries to companies for shorter periods of time. However, it seems that this applies only to skilled workforces because these companies argue that the immigration rules are too strict and costly to provide the local companies with low-skilled workers.[22] The lobby to ease labour market entrance for third-country nationals in 2018 resulted in the Cabinet of Ministers adopting a list of professions in which workforce shortages are predicted and in which foreign workers may be invited, based on less stringent rules.[23]

More recently, however, posting is increasingly being used to circumvent immigration rules. Under such arrangements the workers are hired by employers, for example, in Poland, where the immigration rules are less strict. Then, by relying on EU posting rules, workers are posted to work in Latvia.[24] This allows employers to circumvent the rule that the workers have to receive at least one and a half times the average wage, the requirement to ensure accommodation and so on; instead they can be hired for the minimum wage of either home or host country (whichever is higher). For an illustration of how significant this difference is, suffice it to say that the average gross wage in Latvia in 2018 was EUR 1,004, while the minimum wage was EUR 430. The minimum wage in Poland is slightly higher than the Latvian one but still amounts to only slightly above EUR 500.

According to information from the State Labour Inspectorate, there are currently multiple open cases regarding Polish companies who do not fulfil all the rules that apply to workers posted to Latvia.[25]

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19. While employers are obliged to pay at least the average wage in the sector to workers from abroad, they are allowed to pay the Latvian minimum wage to local workers and this is seen as unfair practice.

20. Miteniece A. (2018) Jelgavas uzņēmumi jau nodarbina viesstrādniekus', Jelgavas Vēstnesis, 16 September 2018. https://www.jelgavasvestnesis.lv/pilseta/jelgavas-uznemumi-jau-nodarbina-viesstradniekus

21. Lazdiņš A. (2017) Viesstrādnieki uz Latviju labprāt brauc peļņā, aizpildot brīvās darba vietas, SKATIES, 4 February 2017. https://skaties.lv/zinas/latvija/viesstradnieki-no-arvalstim-labprat-uz-latviju-brauc-pelna-aizpildot-brivas-darbavietas/

22. Miteniece A. (2018) Jelgavas uzņēmumi jau nodarbina viesstrādniekus', Jelgavas Vēstnesis, 16 September 2018. https://www.jelgavasvestnesis.lv/pilseta/jelgavas-uznemumi-jau-nodarbina-viesstradniekus.

23. The professions include researchers and scientists, ICT specialists, manufacturing industry professionals, specialists in electrical technology and electrical engineering and construction, fishing vessel management specialists, and aircraft pilots and maintenance specialists. Cabinet of Ministers' Regulations No 108 'Specialitātes (profesijas), kurās prognozē būtisku darbaspēka trūkumu un kurās darbā Latvijas Republikā var uzaicināt ārzemniekus'. Available under: https://likumi.lv/ta/id/297537-specialitates-profesijas-kuras-prognoze-butisku-darbaspeka-trukumu-un-kuras-darba-latvijas-republika-var-uzaicinat-arzemniekus.

24. LSM (2019) "Aizliegtais paņēmiens" uziet shēmas noteikumu apiešanai viesstrādniekiem, LSM, 18 February 2019. https://www.lsm.lv/raksts/zinas/zinu-analize/aizliegtais-panemiens-uziet-shemas-noteikumu-apiesanai-viesstradniekiem.a309717/

25. Ibid.

All in all, the posting of workers is not the central aspect discussed in Latvia in the context of labour mobility. At the same time, it is increasingly playing a role in this debate and is often discussed as one of the more problematic aspects of the picture. There is a sharp difference between the Latvian government's position at EU level, where posting is seen as a mechanism for accessing markets and exercising 'competitive advantage' of 'low-wage' countries, and the national level discussion in the media outlets where posting is discussed as part of the larger phenomenon of labour mobility (both intra-EU and beyond). Here, it is framed either as a way of bringing in a 'cheaper workforce' to circumvent the problems companies are facing locally, or as a threat or even replacement for local (Latvian) workers. As we will see, the case law does not seem particularly congruent with these debates, although the posting of third-country nationals has in fact come before the Latvian courts.

2. The relevant legal framework

Latvian law regulating posting is largely based on EU law. The provisions on posted work can be found in labour law, and, for the most part, simply replicate the requirements found in the Posted Workers Directive and the Enforcement Directive.[26]

Labour law focuses primarily on the inbound posted workers since it is presumed that the general labour law framework applies to the workers posted abroad by Latvian companies. Every employer that posts workers to Latvia has to inform the Labour Inspectorate about each posted worker (name, place of work, contact details of the representative, type of service and details of service recipient) and also keep all the related documentation, including the employment contract, payslips, timesheets, proof of payment of wages and so on, for at least two years after posting has finished, and if needed, to provide their translation in Latvian.[27] Specifically for the third-country nationals posted to Latvia, the employer has to submit a confirmation that the worker is lawfully working for an employer in another EU or European Economic Area (EEA) Member State (14^1(2) labour law). These rules also apply to intra-company transfer (14^1(7) labour law). Only crews of trade ships are explicitly exempt from all these rules (Article 14(3) labour law).

For workers posted abroad, the labour law determines that the same core provisions laid down in Article 3(1) of the Posted Workers Directive will apply in line with the standards set by the host country's law or universally applicable collective agreements. More recently, and specifically in reaction to the now-settled case law by the Supreme Court, the legislator has specified that the rules on so-called assignments (missions and business trips) apply to posted workers, including rules on the daily allowances and

26. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28 May 2014, 11–31.

27. Samlaja I. (2016) Latvia: new reporting requirements and compliance measures introduced for employees posted to work in Latvia, Taylor Vinters, 16 November 2016. https://www.taylorvinters.com/news/latvia-new-reporting-requirements-compliance-measures-introduced-employees-posted-work-latvia

the obligation to reimburse assignment-related expenses. The daily allowance can be treated as part of the minimum wage only if the host country's law so requires (Article 14^2(3) labour law). This attribution of the assignment rules to posting situations also means that pregnant workers, workers one year after giving birth, and breastfeeding workers may not be posted without their explicit agreement (Article 53(3) labour law).

Assignment-related benefits and reimbursements are regulated by the Cabinet of Ministers' Regulations No. 969.[28] The Regulations give posted workers the right to daily allowance and reimbursement of several types of expenses (transport, accommodation expenses, luggage transportation, parking, currency exchanges, related bank fees, travelling within the host country, public transport and health insurance).[29] Importantly, the daily allowance (if paid in line with the amounts determined in the Regulations) is not taxable under Latvian law. The amount of daily allowance changes for different countries, but is currently, for example, EUR 40 per day for Belgium, and EUR 46 for the Netherlands, Finland and Germany. In Latvia where the average net wage for 2018 was EUR 746, this is a significant bonus for posted workers. The daily allowances may, however, be reduced by 70% if the cost of three meals per day and accommodation is covered by the employer.[30] Interestingly, there is not much information on how daily allowances fit with Article 3(7) of the Posted Workers Directive, which states that allowances should be part of the minimum wage unless paid in reimbursement of expenditure actually incurred. Some aspects have been clarified by courts, but largely it seems that the daily allowance, at least in line with Latvian assignment rules that also apply to posting, must be paid in addition to the minimum wage and reimbursement of the actual expenses.

Finally, following the suggestion of the Enforcement Directive, Latvia introduced subcontracting liability in relation to posted workers in the construction sector. Posted workers can demand wage payment from the contractor (one level above the employer) if their direct employer refuses to pay (Article 75^2(1) labour law). The Article suggests that it applies to employers in other EU Member States as well (not just general contractors in Latvia), since the posted worker is given the right to the minimum wage in the host country (second sentence of the same Article). This aspect has not yet been litigated but is potentially interesting for judicial enforcement of posted workers' rights in the future.

3. Litigating on posting: to pay or not to pay?

Unsurprisingly, the central question in posting cases before Latvian courts is money. The litigation concerns mainly the obligation to pay salaries and daily allowances as well as taxes and social contributions together with various ways of how they should or could be calculated. This section is an overview of the key matters litigated and the patterns and characteristics of Latvian case law.

28. Cabinet of Ministers' Regulations No 969, 'Kārtība, kādā atlīdzināmi ar komandējumiem saistītie izdevumi'. Available under: https://likumi.lv/doc.php?id=220013 [accessed 9 August 2019].
29. Ibid., point 8.
30. Ibid.

First, however, a disclaimer: not all judgments issued by Latvian courts can be found in the publicly available database. The courts are encouraged to publish judgments after anonymisation in a united database.[31] However, that is not yet mandatory, and thus potentially gives an uneven picture. This means that the data set for my analysis is not complete. Nevertheless, the number of judgments available that concern posting (and their variety in terms of both courts and subject matter) is encouraging, and therefore, one can hope that the analysis below presents a fairly accurate picture of the overall situation.

For this study I analysed 95 available judgments adopted between 2008 and 2019. Latvia does not have specialised labour law courts. Labour disputes typically are tried before the general civil courts. An important role concerning posting is also played by the administrative courts, since the decisions of Latvian authorities (for example, Labour Inspectorate, State Revenue Service, Office of Citizenship and Migration) may be challenged only before them. This means that the cases brought by posted workers or by companies against posted workers will typically be brought before the civil courts, while cases brought by either workers or posting companies against the decisions of public authorities are heard before the administrative courts. In my sample of 95, 36 judgments were made by the administrative courts and 59 by the civil courts. Sixty-five judgments were from the first instance, and 31 were from second (appellate) or third (cassation) instance. If most of the available judgments were initially (between 2010 and 2013) issued by the administrative courts, more recently the civil courts dominate the litigation scene. This means that the focus of litigation has shifted from administrative fines and taxes to the individual employment relationship and labour law.

The vast majority of judgments (80) concern outbound posting and hence deal with Latvian posted workers or Latvian companies posting workers rather than workers posted to Latvia, even though Latvia sends and receives posted workers in equal numbers and therefore one could have expected the picture to be more even. Only three cases concern workers posted to Latvia, with 12 concerning workers (third-country nationals) immigrating to Latvia and then being posted to other countries in the EU. There were no cases brought by trade unions on behalf of workers, even though in six judgments (belonging to one larger case) it was found that the workers had, prior to bringing the case, consulted a trade union.[32]

The case law suggests that the main countries of origin for workers posted to or through Latvia are Ukraine and Poland, while the most popular destination countries for the workers posted from Latvia are Germany, Norway, and Sweden, and to a lesser extent, France, Belgium and Lithuania. Overall, the geographical proximity seems to matter. Sectors where the posted workers work, as evidenced by the case law, are diverse. Not all judgments explicitly identify the sector, but from the ones that do, it follows that the two most popular for posted work are construction (32 judgments) and transport (27 judgments). Other cases emanated from the cleaning/domestic services, meat processing, IT, telecommunications and advertising sectors. While most cases concern

31. The database is available under: https://manas.tiesas.lv/eTiesasMvc/nolemumi
32. For an example see judgment by Kuldīgas District Court, 2017, C19040317.

'low-skilled' work, there are several cases involving highly qualified posted workers such as engineers, managers and consultants.

If we look at the 'winners' and 'losers' in the cases analysed, then before civil courts, the vast majority of cases are won by workers (43 out of 59); while before the administrative courts, cases are typically won by public authorities (24 out of 36). Hence, at least statistically, the posting companies typically seem to lose.

Typically, Latvian judges do not (explicitly) identify that the case concerns the posting of workers. This seems at times to be because there is a lack of awareness that the situation constitutes posting (especially evidenced by cases where the national court does not recognise a worker's right to receive at least the host country's minimum wage). At other times, the courts use the Latvian term '*komandējums*' (assignment), which, according to the standing case law, is a broader term comprising *inter alia* all instances of posting. Both circumstances are discussed in more detail below.

Finally, the key issues litigated directly and indirectly are payment of salary or daily allowances and their calculation by the employer on the one side, and the fines, taxes and social security costs imposed upon the undertaking by the Latvian authorities on the other. Overall, the main questions litigated concern: salaries and daily allowances (44 judgments); working-time calculations (16 judgments); immigration and work permits for third-country nationals (15 judgments); deduction from salaries and reimbursement of expenses (15 judgments); taxes and social security-related disputes (13 judgments); and distinctions between posting/business trip/mission and assignment (13 judgments). Individual cases cover some other labour law aspects such as the concretisation of employment relationships, public procurement rules, freedom to provide services, administrative fines for breaches of labour and social security law, insolvency rules and customs payments.

3.1. Posting, assignment or business trip?

The first big debate before Latvian courts was about how the EU level concept of posting fits together with the domestic labour law structures and arrangements.

Under Latvian law workers can be sent on an assignment (mission) or on a work trip. An assignment is carried out on the basis of the employer's written order to send the worker to either carry out work or obtain additional qualifications or education within Latvia or abroad for a specific period of time.[33] A work (or business) trip is when work, according to the employment contract, is carried out 'on the road' (for example, in the transport sector) or is intrinsically linked to regular traveling (construction or forestry sectors are mentioned as examples).[34]

33. Cabinet of Ministers' Regulations No 969, 'Kārtība, kādā atlīdzināmi ar komandējumiem saistītie izdevumi'. Available under: https://likumi.lv/doc.php?id=220013_[accessed 9 August 2019], points 2.1 and 2.2.
34. Ibid., point 3.

Workers sent on an assignment or work trip have a right to a daily allowance and reimbursement of their expenses (including travel, board and lodging, but also bank fees and so on).[35] Therefore, the question of how posting fits in the context of assignments and work trips became relevant shortly after Latvia joined the EU and the EU rules on posting started to matter. Labour law provided no insight,[36] and initially the case law was very unclear and casuistic. In several practically identical cases, the Latvian courts came to different conclusions. In some, where workers had been sent to work abroad for a short period of time, the courts held that it is an assignment and not a posting,[37] while in others, that it is posting and not an assignment.[38] In one case, the administrative regional court even devised a test according to which a situation should be deemed to constitute posting if the habitual place of work was abroad.[39] This seems problematic in the light of the definition of (genuine) posting, which is temporary work abroad, and also in the light of Rome I requirements.[40] In another case, a first instance court argued that an assignment is when a worker is sent to work elsewhere in Latvia, while posting is always abroad.[41]

After this initial confusion, the Supreme Court clarified that the posting of workers is a type of assignment.[42] Therefore, posted workers always have the right to the daily allowance and reimbursement of travel and accommodation costs, as well as several other[43] expenses. In 2016, the Latvian legislator codified this approach, and now Article 14^{2}(3) explicitly specifies that the rules on assignments are applicable to posted workers.

Transport is now the only sector where the national courts still do not consider the situation to constitute posting. In judgments by Latvian courts, (international) transport workers are not considered to be posted workers. Instead, they are seen to be on a 'work trip', which means that they have the right to daily allowances and reimbursement for expenses, but not to the host country's minimum wage.[44]

3.2. Salaries, daily allowances and reimbursements

The focus of almost all cases brought by posted workers is the payment (or non-payment) of wages, daily allowances and reimbursements for posting-related expenses. Typically, cases are brought by workers before civil courts to demand payment of wages due.[45]

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35. Ibid., point 8.
36. The original definition of posting in the labour law did not make a distinction between a posting, a mission or a business trip (Article 14(1) labour law in the version prior to 1 January 2016).
37. Administrative regional court, 31 May 2012, Case No. 142199411, para. 11; administrative regional court, 26 April 2012, Case No. A420695110.
38. Administrative regional court, 22 March 2013, Case No. 142246511; Riga Regional Court, 12 November 2013, Case No. C30606012.
39. Administrative regional court, 12 September 2013, Case No. A420290113.
40. Rome I (Article 8) provides that parties can choose which law is applied to employment relationships but that this choice cannot deprive the worker of the rights afforded by the law of the country where he or she habitually works or from where he or she carried out the work.
41. Administrative district court, 2013, A420290113, A42-02901-13.
42. Supreme Court, civil department, 2014, judgment in case No. SKC-2425/2014.
43. E.g. parking, luggage, travel documents, banking fees, travel expenses within the host country, travel insurance, vaccination expenses (point 8 MK).
44. See e.g. Rīgas Latgales priekšpilsētas tiesa, 2017, C29514916.
45. E.g. 2015, Riga Zemgales priekšpilsētas tiesa, C31403413, C-0985-15/9; 2017, Rīgas pilsētas Latgales priekšpilsētas tiesa, C-3707-17/29.

The first problem that comes starkly across in Latvian case law is the right of the posted workers - from the perspective of EU law - to receive at least the minimum wage of the host country. In the early years (2008 – 2014) following Latvia's accession to the EU, this right was practically never recognised (or discussed) by the Latvian courts. The situation seems to be gradually changing, and in some cases the Court now recognises this right and calculates the salary rate in line with the host country's standards.[46] However, such cases are not the norm. It becomes clear from some judgments that neither the applicants nor the judges are aware of the possibility of requesting that the host country's minimum wage is applied.[47] This seems even more puzzling because labour law explicitly demands that the employer ensures that the worker is paid the minimum wage in line with the host country's law (Article $14^{2}(1)$). At the same time, there is some institutional awareness of this right because there are other examples of cases, for example, where the State Revenue Office fined a company for not paying the posted worker a salary in line with the German minimum wage.[48]

A deeper explanation could be that the Latvian courts focus almost solely on the domestic structures and standards of labour law. This is especially characteristic of transport sector cases: not in a single analysed case could I find any reference at all to the host country's standards for wages. Instead, all the wage rate-related claims were decided by the courts solely in line with Latvian law. In fact, transport cases were never identified or even discussed as potentially representing a situation of 'posting'. Information from the Latvian trade unions likewise suggests that the Labour Inspectorate in Latvia does not recognise transport services as posting of workers.[49] A similar pattern of not recognising transportation services as potentially constituting posting are also present in, for example, Bulgaria and Poland (see the respective chapters in this volume).

In contrast to the ignorance of EU-based rights to the minimum wage (Article 3(1)(c) Posted Workers Directive), both Latvian posted workers and judges are well aware of the right (in Latvian law) to receive daily allowances during posting. This is the most common (and indeed financially significant) issue litigated by posted workers. Posted workers are typically successful in demanding payment of daily allowances before courts.[50] While this clearly has positive implications for the worker's immediate income, there could be potentially negative implications from these payments. If a large part of the overall remuneration is constituted by allowances, the level of future social benefits the worker might be entitled to (for example, unemployment) could be affected because daily allowances are not taxed.

Importantly, the Latvian legislator does not distinguish between posting and assignment to EU and EEA countries on the one side, and third countries on the other.

46. E.g. Riga District Court, 2013, C33487312, C-2212-13/3; 2014, Supreme Court, SKC-2425/2014.
47. 2014, Vidzeme Regional Court, C21044413, CA0202-14/12; Liepājas District Court, 2017, 20271316.
48. 2014, Administrative district court, A420422314, A42-01341-15/44.
49. Information received from Nataļja Preisa, LBAS on 07 August 2019.
50. E.g. 2016, Ventspils Court, C40172915, C-0457-16/17; 2017, Liepāja District Court, 20271316; Liepājas rajona tiesa, 2017, C20271116; 2017, R'igas rajona tiesas Jūrmalas tiesu nams, C33640816, No 3972-17/29; 2017, Liepājas tiesa, C-1684-17/6; 2017, Liepājas tiesa C20166517; 2017, Rīgas pilsētas Latgales priekšpilsetas tiesa, C-3707-17/29; 2018, Rīgas pilsētas Vidzemes priekšpilsētas tiesa, C-1948-18/18; 2018, Rīgas rajona tiesa, C-3249-18/1; 2018, Zemgales rajona tiesa, C15255316.

Therefore, posted workers to countries such as Russia, for example, also have the same rights and are successful in demanding wages and daily allowances due, as well as full reimbursement of expenses.[51] Since the posting rules do not differentiate between countries, the right to the host country's minimum wage also applies to posting outside of the EU and the EEA.

Over the years, the litigation on wages and daily allowances has remained at the top of the Latvian courts' agenda. A case decided by the Supreme Court (civil department) in 2015 concerned a health sector worker who was paid two different salaries: one when working in Latvia, and another (four times higher and with a number of supplements) when working abroad during posting. This was a way in which the company complied with the obligation to pay at least the minimum wage of the host country for the work abroad. The worker demanded some of the unpaid wages and daily allowances, and that the daily allowance should be paid on top of the (increased) salary in the host country rather than as part of it. The Court reasoned that an increase in salary for the time of posting could be an adequate means of compensating the extra expenses during posting. The Court distinguished that the daily allowance exceeding the factual expenses should be part of the salary, and therefore taxable.[52] The judgment of the lower courts was repealed and the case sent for re-evaluation to determine whether the wage rate with the allowance included as a constituent element of the salary is compatible with Articles 14 and 76 of the labour law.[53] So far this is the only case I have found that implicitly engages with the rule in the Posted Workers' Directive stating that allowances beyond reimbursement of factual expenses should be considered as part of the salary. Nonetheless, the Court did not explicitly refer to this EU level provision (Article 3(7) Posted Workers Directive). Following this judgment, the legislator amended Article 14 labour law in 2016 to state that the daily allowance is part of the minimum wage if the host country's law so demands.[54]

Finally, in some posting situations, employers had deducted expenses and losses 'related to posting' from workers' wages. In one such case concerning posting to Germany, the Labour Inspectorate had imposed a fine on the company for unlawful deductions from the worker's salary.[55] This was unsuccessfully challenged by the company before the Latvian court, which found that the worker had not in fact received the due wage, daily allowances or reimbursement of her posting-related expenses.[56]

In some cases, the companies had challenged fines imposed by the State Revenue Service with an argument that the payments to workers were not salary (taxable income) but rather a simple payment of daily allowances or reimbursement of posting-

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51. 2018, Rīgas apgabaltiesas Civillietu tieaas kolēģija, CA-0486-18/37; 2018 Jēkabpils rajona tiesa, C16102316, No C-0056-18/5.
52. Supreme Court, 2015, SKC-952/2015, C37108212.
53. Supreme Court, 2015, SKC-952/2015, C37108212.
54. Amendments to the labour law, 12 May 2016. Available under: https://www.vestnesis.lv/op/2016/101.1 [accessed 9 August 2019]. Please see a further discussion of this matter in Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, European Constitutional Law Review, 14 (1), 131-153.
55. 2012, Administrative district court, 142270311, 1-1831-12/1.
56. Ibid.

related expenses. In one such case the Court ruled that in so far as an amount classed as daily allowances goes, the company does not need to pay taxes and social contributions; however, no proof was submitted that some transfers were made to cover actual work-related expenses, hence the taxes and contributions concerning those transfers were duly imposed by the State Revenue Service.[57]

Advance payments to workers are especially characteristic of the transport sector. In some cases, employers demand that workers repay the 'overpayment' if the worker fails to submit proof of using the advance payment to cover assignment-related expenses. The courts take a case-by-case approach and such claims have been rejected in some cases,[58] while satisfied in others.[59] The situation often unfolds when the worker submits a claim for the failure to pay the agreed salary and daily allowances, and the employer then follows up with a counterclaim, arguing that the worker has failed to submit reports for assignments and proof of how advance payments meant for covering assignment-related expenses have been spent.[60]

Finally, an undertaking that breaches labour law may be fined. Article 41 of the Latvian Administrative Violations Code even specifies that employers may be fined for breaches of posting-related rules. There are several cases where this has been the case, and the companies have been fined by the Labour Inspectorate. Such cases are also helpful for posted workers because they may submit their individual claims before civil courts on the basis of, for example, wages and daily allowances needing to be paid.

All in all, this failure to pay the agreed salary, and especially the failure to pay the daily allowance due to the worker, is the most litigated issue related to posting situations, and there are many similar judgments. Latvian posted workers seem to exercise their voice in financial matters by using litigation opportunities. When set against the overall numbers on posting, the number of such cases reveal the significance of judicial enforcement for posted workers. However, such enforcement seems to take place exclusively in relation to outbound posted workers. At the same time, Latvian case law is problematic in some respects. First, the right to the host country's minimum wage is not always recognised, the Latvian courts seem much more comfortable to remain within 'Latvian law'. Second, the transport sector falls outside the posting rules, at least according to the Latvian courts. Third, the case law shows that the relationship between EU level rules on allowances and Latvian law in this regard is somewhat unclear.

3.3. Taxes and social security contributions

Most cases concerning taxes and social contributions challenge decisions by the State Revenue Service to recover unpaid taxes, which are then challenged by the applicant

57. 2012, Administrative district court, 142199411, 1-1157-12/26.
58. 2017, Liepājas tiesa, District Court, C20250416, Nr C-0497-17/6.
59. 2017, C1516361617, Jelgavas tiesa, district court; 2017, Jelgavas tiesa, District Court, C15174217; Dauvgavpils tiesa, 2017, C12391716, No C-1194-17/11.
60. E.g. 2017, Vidzemes rajona tiesa, C21030217, No C-1275-18/16; 2018, Vidzemes rajona tiesa, C-1285-18/16; See e.g. 2018, Rīgas apgabaltiesa, CA-0159-18/24.

(typically – an undertaking that posts workers). In addition, matters of double taxation and the deduction of posting-related expenses from taxes are more recently being brought to the attention of Latvian courts.

First, in a number of such cases where decisions by the State Revenue Service have been challenged, the companies attempted to argue that the payments to workers were not salary but rather reimbursement of work trip-related expenses (advance reimbursement).[61] For example, in 2010, the administrative regional court rejected one such appeal by reasoning that the additional income tax and social contributions should be duly imposed on the company since the employer who tried to rely on the rules on assignment-related expenses and allowances was not able to prove that certain payments to the worker were in fact daily allowances (it was not indicated in the payment orders and other documentation), and thus the court found that this had been simply an attempt to circumvent the taxation rules concerning part of the worker's salary.[62]

Second, in one of the rare cases brought concerning inbound rather than outbound posted workers, the company that had posted workers to Latvia wished to deduct the expenses for furnishing an apartment used as accommodation for the said workers from its income tax. The State Revenue Service did not allow this deduction and this decision was then challenged before the administrative court. The court argued that the provision of employees with accommodation could not be considered 'essential' for the economic activity of the applicant and ruled in favour of the Revenue Service.[63]

In one case, the worker demanded repayment of unfairly deducted social contributions (employee's part) because, according to him, social contributions had been deducted in both Norway and Latvia. The Latvian company had operated in the construction sector in Norway, and the local tax authority had imposed upon the company an obligation to pay social contributions in Norway (the company had paid only in Latvia). The worker's claim was rejected because no proof of payment of social contributions in Latvia was found.[64] Interestingly, the court did not analyse whether this was a situation of exercising the freedom to provide services (posting of workers) at all, merely arguing that if contributions were paid in Norway, they were not due in Latvia. In this specific case, the employer in question had first declared all its income in Latvia and paid contributions in Latvia, but afterwards had corrected this and indicated that the worker in question had no income in Latvia. This correction was used to cover other of the company's tax debts (in Latvia).[65]

In a similar case, the court argued that while the employer in question had declared taxes in Norway, he has not yet paid them. Therefore, there is no double taxation and the worker in question has no subjective right to submit and request the Latvian tax

61. 2010, Administrative district court A42775909, A04978-10/44.
62. 2011, Administrative regional court, A42775909, AA43-0589-11/2.
63. Administrative district court, 2008 A42457707, A2298-08/10.
64. 2017, Administrative regional court, A420228715, AA43-0481-17/3.
65. Ibid.

authority to recover deductions, and no right to intervene in the relationship between the company and the state revenue authority.[66]

The question never discussed by the courts, however, is what this break in contributions means for the social insurance of the worker under consideration. A break in social contributions in Latvia and a very short time period when contributions are paid in Norway might mean that the worker ends up falling through the cracks of the social protection systems of both states and not being covered against some risks at certain moments. In Latvia, for example, the right to unemployment benefits arises only if several conditions are fulfilled. One of these conditions is the payment of social contributions for at least 12 months during the reference period of the previous 16 months. Most of the Member States have similar eligibility criteria. This could lead to a situation where breaks in work patterns and social contributions end up with the worker being ineligible for unemployment benefits (or other social benefits) even though he has, in fact, worked (just very short term and in multiple countries).

3.4. Working time

In some cases, the posted workers have demanded compensation for the so-called 'idle time' - time during which they should have worked, but did not, because no tasks were allocated by the employer. In this context, the courts are often requested to award compensation for the time not worked, which they do.[67] For example, a telecommunications field technician was posted to Germany immediately after the conclusion of his employment contract. However, no work was given to him in Germany and he returned to Latvia, where he was also assigned no work. The worker demanded the payment of salary and daily allowance and his claim was satisfied by the court.[68]

Sometimes workers claim that they have worked significantly more hours than they have been paid for. A good example of this is a group of cases (eight very similar claims by eight different workers).[69] The workers were posted to Norway to work in construction and claimed that they had worked more than 40 hours per week and also worked on Saturdays, but had not been paid daily allowances for these days. The court satisfied the claims of both the actual working time and the daily allowances.[70] This was an interesting group of cases because the workers had received the minimum wage in line with Norwegian standards, but with some help in terms of information from the trade unions, they demanded the recognition of their actual working time and the payment of allowances (extra rights that are based solely on Latvian law). In terms of the working time, the court looked at the evidence. In this group of cases witnesses were

66. 2017, A420524713, AA43-0122-17/3, Administrative regional court.
67. 2014, Vidzemes Regional Court, C21044413, CA0202-14/12.
68. Rīgas priekšpilsētas tiesa, District Court, 2017, C30415417, No C-4154-17/4.
69. 2017, Kuldīgas rajona tiesa, C19040517; 2017, Kuldīgas rajona tiesa, C19040317; 2017 Kuldīgas rajona tiesa, C19040417; and Kuldīgas rajona tiesa 2017 C19040717; 2017, Kuldīgas rajona tiesa C19040917; 2017 Kuldīgas rajona tiesa C-0410-17/2; 2017 Kuldīgas rajona tiesa C0406-17/2, No C19040617; 2017 Kuldīgas rajona tiesa C29746312, No CA-0977-17/17.
70. 2017, Kuldīgas rajona tiesa, C19040517.

enough. However, in another case where the worker failed to prove that he had worked three extra days in Germany, the claim was rejected.[71]

Overall, working time has been among the issues litigated but typically as an accessory to the matter of calculating workers' salaries and daily allowances.

3.5. Employment relationship

Some cases have dealt with the establishment and termination of employment relationships. Posting usually complicates the situation because there are often numerous contracts (one for Latvia, one for the posting period, and so on) or other unusual circumstances.

However, a preliminary issue when it comes to posted workers is the dilemma over the applicable law. Within my sample, there was only one case where the national court analysed this. Some workers had concluded an employment contract in Latvia (with minimum wage) but were told that the 'real' contract would be in Norway for the Norwegian minimum wage. Once in Norway, they signed one (initial) employment contract to work in Norway for three months, then another contract to work in another place in Norway was signed.[72] The workers submitting the claim argued that the Latvian rather than Norwegian law was applicable and that they should be paid both the wages agreed in the initial contract and its 'supplements', as well as the daily allowances in line with Latvian law. The court reasoned that the initial employment relationship continued, and the company was obliged to pay the workers the Norwegian minimum wage, and in addition, the daily allowances and reimbursement of all expenses related to posting. The argument that the reduction of daily allowances by 70% should then apply was also rejected because there was no evidence that the travel, accommodation costs and three meals per day had been covered by the employer.

This was an interesting case from the perspective of the choice of law, especially because Norway had been the sole place of employment. No A1 forms had been issued for the workers in Latvia, and the workers had in fact never worked in Latvia for this employer. The court nevertheless did not analyse the issue of the applicable law in detail; it merely cited the rules of Rome I without deeper analysis and decided to apply the Latvian law. Interestingly enough, it was more financially profitable for the workers to rely on the Latvian rather than the Norwegian law, and something they successfully did.[73]

In another interesting case, a transport worker had been on assignments in France, Spain, Sweden and Finland, and then returned to Latvia. He did not receive any new tasks and went to court to demand salary and compensation. The court satisfied the

71. 2017, Daugavpils tiesa, C12135417, No 1354-17.
72. 2018, Rīgas rajona tiesa, C33475217, NoC-2562-18/27.
73. Ibid.

worker's claim in full, presuming that since no termination was requested from either side and no dismissal had taken place, the employment relationship continued.[74]

Another case concerned the start of a working relationship. A worker posted to Tallinn, Estonia requested unpaid wages, and the court demanded proof that he had in fact started an employment relationship with the employer. The court did not accept the hotel receipts as proof and stated instead that evidence that would prove that the worker had in fact started the employment relationship was needed. The worker had failed to do that, and since the employer had not registered him as (a posted) employee with the Estonian authorities either, the court rejected the worker's claim. Other reasons that would explain his stay in Tallinn were not really discussed.[75]

Another case belonging to this group concerned the termination of an employment relationship. The worker had been posted abroad but decided to stop work and return to Latvia because of unforeseen circumstances at home (sickness of a family member). She demanded the termination of the employment contract and unpaid wages. The employer, in a counterclaim, claimed that he had suffered the loss of EUR 2,000 due to the worker unexpectedly leaving. The court satisfied the worker's claim and rejected the counterclaim by the employer.[76]

The establishment and termination of employment relationship has been comparatively frequently analysed by the Latvian courts in relation to posting of workers. It seems that in most cases the court has tended to side with continuity of the employment relationship and the application of Latvian law. All in all, these matters have also come before the courts within the context of demands for unpaid salaries and allowances and the enforcement of their payment through the courts.

3.6. Posting of third-country nationals

An increasingly relevant aspect of case law related to the posting of workers is the posting of third-country (non-EU) nationals. The posting of third-country nationals might also be present in other situations, but since the names and other identifiable information about the workers involved in cases are anonymised, posting of third-country nationals is a clearly identifiable issue only in cases dealing with work permits and immigration. There are two groups of such cases.

In the first group, a Latvian company had challenged a series of refusals by the Office of Citizenship and Migration Affairs to grant residence and/or work permits to workers that the company had brought to Latvia to work in shipbuilding. Even though the company had indicated that their habitual place of work will be in Latvia, the Office of Citizenship and Migration Affairs had established that it will not be the case since the

74. Ogres rajona tiesa, 2017, C24071317.
75. 2017, Rīgas pilsētas Latgales priekšpilsētas tiesa, C29687316, No C-3065-17/28.
76. 2017, Ventspils tiesa, C40092617.

company did not carry out any commercial activity in the country.[77] This group of cases concerned 70 individual instances of such refusals to Ukrainian workers.[78] There was no proof of any economic activity in Latvia by the company concerned.[79]

The results of litigation of these individual challenges, while mixed in the first two instances,[80] were favourable to the company in the end. At first, the courts considered that since these workers were not in fact working in Latvia, and were instead simply sent on assignments abroad, the residence permits could not be granted.[81] However, in the third instance (cassation), the Supreme Court overturned the judgments of the first two instances and argued that first, the fact that the company had indicated that the workers would work in Latvia, whereas in fact they worked abroad but formally still for the Latvian shipbuilder, is not enough to refuse the residence permits.[82] Second, at this instance the company began to rely on the freedom to provide services, and rather surprisingly, the court held that such refusals created an unjustified restriction of their freedom to provide services and that the residence permits should have been granted.[83] The Supreme Court of Latvia interpreted the judgments in *Vander Elst*,[84] *Commission* v *Luxembourg*,[85] *Commission* v *Germany*[86] and *Rush Portuguesa*[87] in a way that the rules on free movement of services should be applicable to a situation potentially involving letterbox companies that import workers from third countries with the intention of posting them to other EU countries.[88] This case law has been upheld in further cases.[89]

The second group of cases concerns workers challenging the decisions by the State Border Guard to deport workers found working without a work permit. In several cases, Ukrainian workers had been posted to Latvia by a Lithuanian company. There was a contract between a Latvian company and some Lithuanian construction companies for the supply of workers specialising in metal constructions. The workers challenged the decision by the State Border Guard and won. The court found that, because the Ukrainian workers were permitted to work in Lithuania and that they were in fact merely posted to Latvia, they could work there too. These particular workers had work visas in Lithuania, and they had a right to work in and hence could not be expelled from Latvia.[90] Importantly, under this arrangement it was permissible to pay the Latvian minimum wage to these workers instead of the average wage in the sector.

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77. Administrative district court, 2010, A420536110, A5361-10/35.
78. Administrative regional court, 2013, A4205212210, AA43-2287-13/7.
79. Administrative regional court, 2013, A4205212210, AA43-2287-13/7.
80. See e.g. administrative district court in 2010 in A420521110/A05211-10/36; 2012, A420536110, AA43-0112-12/15; administrative regional court, 2012 A420521210, AA43-0244-12/15.
81. Administrative regional court, 2012 A420521210, AA43-0244-12/15.
82. Supreme Court administrative department, 2012, A42051110, SKA-673/2012.
83. Supreme Court, 10 December 2012, Case No. A420521210; Supreme Court, 28 December 2012, Case No. A420536110; Supreme Court, 14 December 2012, Case No. A420521110.
84. CJEU, 9 August 1994, Case C-43/93, *Vander Elst*.
85. CJEU, 21 October 2004, Case C-445/03, *Commission* v *Luxembourg*.
86. CJEU, 19 January 2006, Case C-244/04, *Commission* v *Germany*.
87. CJEU, 27 March 1990, Case C-113/89, *Rush Portuguesa*.
88. See Supreme Court, 10 December 2012, Case No. A420521210; Supreme Court, 28 December 2012, Case No. A420536110; Supreme Court, 14 December 2012, Case No. A420521110.
89. Administrative regional court, 2013, A420536110, AA43-2375-13/7.
90. 2018, Kurzemes rajona tiesa, 1A-0103-18/2; 2019, Kurzemes rajona tiesa, 1A69010118/11.

These two groups of cases reveal that the posting of third-country nationals is becoming an increasingly more important phenomenon in Latvia, featuring in political and national discussions and as part of the labour migration debate. The cases show that such debates are not just theoretical, that third-country nationals are sometimes arriving in Latvia for the sole purpose of being posted abroad, and that the EU posting rules are being used to circumvent Latvian immigration law for workers from third countries.

Conclusion

The analysis of Latvian judgments on posting of workers offers extremely interesting insights into aspects of regime competition, on one side, and the reality of posted workers' enforcement opportunities on another. It also adds some new elements and assumptions for the research on posting in general.

Even though Latvia in theory belongs to the 'low wage' group of countries and would therefore be one of those blamed for 'social dumping',[91] its legal framework is unusually generous to posted workers. As a result of the case law bringing posting within the larger umbrella of 'assignment', the Latvian courts have contributed to the creation of a relatively protective system for these workers, apart from those in the transportation sector. This is also evidenced indirectly by workers demanding before Latvian courts the application of Latvian law (rather than, for example, Norwegian law) to their employment relationships and their consideration as posted workers.

Most importantly, the Latvian case law reveals that it is not always in the interests of posted workers to apply the host country's laws because it could offer less financial advantage and also pose a threat to the continuity of social security coverage. In the general posting debate, the interests of the host countries are often found to conflict with the interests (or 'competitive advantage') of the home countries and the posting companies, while the workers' interests are not adequately taken into account.[92]

In this sense, the Latvian case study shows that the labour law regimes are placed in direct competition with each other.[93] However, they compete on a set of factors broader than salary. To an extent we can talk about 'regime competition' in the sense proposed by Deakin,[94] but it is not as clear-cut as trying to access the application of the legislation of the 'least regulative' state.[95] The interests of the companies (not to pay social contributions in the host country and not to operate within the unfamiliar host country's system of labour law and social security) and of posted workers (to receive daily allowances and not to have their social contributions moved to the host country) could coincide here. Imposing the host country's labour and social security

91. Defossez A. (2014) Le dépassement de la question du dumping social : une condition nécessaire à une meilleure application de la directive détachement, Revue de Droit Social, 1, 100.
92. Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, European Constitutional Law Review, 14 (1), 131-153.
93. Deakin S. (2007) Regulatory competition after Laval, Cambridge Yearbook of European Legal Studies, 10 (1), 582.
94. Ibid.
95. Ibid.

standards in the name of preventing 'social dumping' could even worsen the situation of posted workers, at least from their perspective, and so might not be welcomed by those workers. The Latvian legal framework offers 'extra' benefits, such as daily allowances and generous reimbursement of expenses the worker incurs abroad, which may not be available when working on the 'local contract'. At the same time it also offers the possibility for the employer to pay lower wages and thus remain 'competitive', while retaining access to the foreign market.

It is not clear, however, that Latvian standards can necessarily be considered 'higher'. The picture is more complex than that. In some respects, the standards indeed could be higher (especially from the point of view of a worker's short-term financial perspective). However, non-payment of higher social contributions (allowances are not taxed) could have negative long-term consequences. Also, this does not say anything about other aspects of labour law in the host country (for example, dismissal protection and working time) and how they would 'compare' with Latvian standards.

With implementation of the revised Posted Workers Directive, and especially the requirement to pay the host country's 'remuneration' rather than the minimum wage, the whole picture will soon change. It will be interesting to see how this affects the case law of Latvian courts, which already have huge difficulties in applying foreign law as such, and the much clearer concept of the host country's minimum wage, and whether in the longer term there will be some deregulatory effect on the Latvian assignment rules.

To sum up, the Latvian experience seems to show that Latvian laws at least do not seem to easily yield to simple 'optimisation' for firms posting workers,[96] and instead of reduced costs, they have to cover salaries, assignment-related expenses, and daily allowances. At the same time, the Latvian situation also reveals that from the perspective of a posting company calculating which regime will be more cost efficient, it could be more complex than a mere comparison of wages. The considerations also include social contribution rates for specific wages and assignment-related expenses including bonuses such as daily allowances. From the perspective of the posted workers, the continuity (and not just volume) of social contributions might also play a more significant role than expected.

In addition, the Latvian case law reveals that, in contrast to other EU Member States analysed in this volume, most notably Portugal, the posted workers that are in a vulnerable position owing to poor knowledge of the local language, lack of connections and information in the host country, and are mistreated by their employer,[97] do in fact come back to Latvia and assert their rights through the courts. They not only exercise their voice by breaking the employment relationship, but also, and strongly so, via courts in their home country.

96. Maslauskaite K. (2014) Posted workers in the EU: state of play and regulatory evolution, Notre Europe, Jacques Delors institute, 24 March 2014, 3.
97. Ibid., 4.

Finally, probably the most troublesome finding is that the Latvian courts are not familiar enough with the EU level regulatory framework on posting. They often seem unaware of the obligation regarding several matters to rely on the host country's standards in line with the Posted Workers Directive. The Latvian courts seem much more comfortable relying solely on Latvian law and Latvian standards, despite the Posted Workers Directive being (seemingly) duly implemented in the domestic legal system.

References

Ambote S. (2019) Dažādu nozaru uzņēmumos drabinieku trūkums aizvien ir liela problēma, LSM, 16 January 2019. https://www.lsm.lv/raksts/zinas/ekonomika/dazadu-nozaru-uznemumos-darbinieku-trukums-arvien-ir-liela-problema.a306189/

Deakin S. (2007) Regulatory competition after Laval, Cambridge Yearbook of European Legal Studies, 10 (1), 581-610.

Defossez A. (2014) Le dépassement de la question du dumping social : une condition nécessaire à une meilleure application de la directive détachement, Revue de Droit Social, 1, 89-131.

De Wispelaere F. and Pacolet J. (2018) Posting of workers. Report on A1 portable documents issued in 2017, Brussels, European Commission.

EURES (2018) Īss pārskats par darba tirgu. https://ec.europa.eu/eures/printLMIText.jsp?lmiLang=lv&regionId=GR0&catId=2776

European Commission (2016) Opinion of the European Affairs Committee of the Saeima, 5 May 2016. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf

Lazdiņš A. (2017) Viesstrādnieki uz Latviju labprāt brauc peļņā, aizpildot brīvās darba vietas, SKATIES, 4 February 2017. https://skaties.lv/zinas/latvija/viesstradnieki-no-arvalstim-labprat-uz-latviju-brauc-pelna-aizpildot-brivas-darbavietas/

Lillie N. (2016) The right not to have rights: posted worker acquiescence and the European Union labor rights framework, Theoretical Inquiries in Law, 17 (1), 39-62.

LSM (2019) "Aizliegtais paņēmiens" uziet shēmas noteikumu apiešanai viesstrādniekiem, LSM, 18 February 2019. https://www.lsm.lv/raksts/zinas/zinu-analize/aizliegtais-panemiens-uziet-shemas-noteikumu-apiesanai-viesstradniekiem.a309717/

Maslauskaite K. (2014) Posted workers in the EU: state of play and regulatory evolution, Notre Europe, Jacques Delors institute, 24 March 2014.

Mickeviča N. (2012) Darbinieku pārrobežu norīkošanas regulējums Latvijā, Riga, Latvijas Brīvo Arodbiedrību Savienība.

Miteniece A. (2018) Jelgavas uzņēmumi jau nodarbina viesstrādniekus', Jelgavas Vēstnesis, 16 September 2018. https://www.jelgavasvestnesis.lv/pilseta/jelgavas-uznemumi-jau-nodarbina-viesstradniekus

Pauniņš A. (2011) Celtniecībā trūkst darbinieku, TVNet, 20 April 2011. https://www.tvnet.lv/5421798/celtnieciba-trukst-darbinieku

Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, European Constitutional Law Review, 14 (1), 131-153.

Samlaja I. (2016) Latvia: new reporting requirements and compliance measures introduced for employees posted to work in Latvia, Taylor Vinters, 16 November 2016. https://www.taylorvinters.com/news/latvia-new-reporting-requirements-compliance-measures-introduced-employees-posted-work-latvia

Scicluna M. (2018) Posting of workers in the context of free movement and coordination of social security, paper presented at MoveS seminar Latvia, 26 October 2018, Riga. https://ec.europa.eu/social/BlobServlet?docId=20280&langId=en

Tani C. (2017) EU overcomes divisions on posted workers, EUObserver, 24 October 2017. https://euobserver.com/social/139599

van Hoek A. and Houwerzijl M. (2011) Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Amsterdam, University of Amsterdam. http://ec.europa.eu/social/BlobServlet?docId=7510&langId=en

For the list of cases please refer to Annex IV.

Chapter 8
Posting of workers before Dutch courts[1]

Zef Even

Introduction[2]

Transnational labour mobility increasingly receives attention in the Netherlands. Dutch newspaper *De Telegraaf* headed a news story in 2014: Cheap foreign workers get Dutch people's jobs.[3] This was hardly a unique occurrence; the media regularly focus on 'cheap workers' in the Netherlands (generally from central and eastern and southern European EU Member States), and on the problems that they are supposedly causing.[4] Quite often this media coverage concerns employees who are posted to the Netherlands. The negative sentiment seems to be lacking when Dutch workers are posted abroad. There was some media coverage a few years ago when many Dutch construction workers worked in Belgium during the financial and economic crisis in the Netherlands,[5] but this cannot really be compared with the attention 'inbound' posted workers receive.

It is not only the media that has concerns about labour migration. The Social and Economic Council of the Netherlands (SER), an advisory body in which employers, employees and independent experts (Crown-appointed members) work together to reach agreement on key social and economic issues, expressed concerns as well. The SER published its *Labour Migration* report in December 2014.[6] This report observed that the Dutch people do not fully support the EU internal market when it comes to labour migration. It cited several circumstances for this, including the belief that:

1. Insufficient enforcement of (minimum) wage policies and terms of employment, and the exploitation of migrant workers, causes native workers to be displaced and is considered unfavourable to the workers involved, as well as to bona fide companies; and
2. Labour mobility due to the free movement of services will increase at the expense of labour mobility due to the free movement of workers. The SER

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2. Some parts of this text derive from my inaugural lecture, Even J.H. (2018) Balanceren met detacheren, Den Haag, Boom juridisch. Some parts derive from papers of SENSE, the project on transnational mobility in the road transport sector. http://www.project-sense.eu. The content of this chapter was finalised in May 2019.

3. See *De Telegraaf*, 21 November 2014.

4. See for instance the 'Nederlandse scheepswerven buiten Roemenen uit' story on NOS' website, 5 March 2016, which even resulted in questions being asked in the Lower House. See *Parliamentary Papers II* 2015/16, 2161.

5. See for instance the 'Nederlanders zijn de "Polen" van de Belgische bouw' story on NOS' website, 30 March 2015.

6. The Social and Economic Council of the Netherlands' recommendation *Arbeidsmigratie*, 10 December 2014, recommendation no. 14/09.

> believes this will result in further cross-border temporary agency work and triangular relationships designed to evade terms of employment and social security obligations, which in turn will result in businesses trying to outcompete each other with regards to terms of employment. This is perceived to be unfair, since it results in an unlevel playing field for businesses and increasingly disadvantageous terms of employment and social security protection.

According to the SER, these trends feed into nationalistic and xenophobic sentiments that are becoming increasingly widespread, causing people to reject further European integration.

In view of all this, it is not surprising, therefore, that transnational posting to (rather than from) the Netherlands has been on the radar of the national legislator for some time, particularly where it applies to sham or bogus employment arrangements. Examples of this include transnational posting through so-called letterbox companies, or entering into employment contracts on the basis of which employees must work excessive hours but only receive pay at minimum wage level. These bogus employment arrangements are the core of the issue,[7] according to Lodewijk Asscher, the former Minister for Social Affairs and Employment, because they may cause problems in the labour market, which in turn may result in the displacement of native workers.[8] Asscher clearly advocated 'equal pay for equal work in the same place' to minimise the negative impact on the Dutch labour market when it concerns international posting of employees, and the national legislation has been altered in recent years to implement the actions undertaken in this regard. The Dutch legal framework on transnational posting is set out in section 1 below.

Section 2 brings the national case law on the topic of transnational posting to the Netherlands into focus. Although still modest in volume, we can see that the number of cases has increased over recent years. The cases concern inbound posted workers and are mostly about the alleged abuse of cheap foreign labour in the Netherlands. Some of these cases were high profile. As well as seeming to fuel the political debate to some extent, they also triggered changes in legislation. In response to one particular case, the legislator prohibited almost all the wage deductions when the actual wage paid to the employee dropped below the minimum wage level. Another case showed the difficulty of pinpointing exactly which components of a collective labour agreement made universally applicable constitute the minimum wage. The legislator also stepped in here to introduce a statutory provision setting out all these components in detail. Recent litigation takes place up to the highest national level. Prejudicial questions referred to the European Court of Justice (ECJ) on transnational posting situations are pending in two cases.

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7. Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872, p1.

8. The Cabinet's response to the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 16 June 2015, 151449, pp. 5-6.

1. Posting in the Netherlands: trends and legal framework

Before analysing the legal framework of transnational posting to the Netherlands, let me first address the question of how serious the impact of labour migration on the Dutch labour market is. Given the above, one would expect that the Dutch labour market suffers from (the abuse of) transnational posting to the Netherlands. Research, however, shows that the Dutch labour market as a whole has not been significantly affected by labour migration to the Netherlands. Labour migration does not result in the displacement of native workers in the overall economy. However, it may affect certain groups of employees, in particular those competing with migrant workers, who are mostly working in the lower echelons of the market.[9] At the same time, the importance of migrant workers in the Netherlands is notably increasing. Of the total growth of the number of employees in the Netherlands between 2005 and 2015, over 60% has a nationality other than Dutch. Most of this increase of foreign labour derives from central and eastern European (CEE) countries.[10]

Cross-border labour mobility exists in every sector of the job market.[11] Sectors that are traditionally mentioned as having difficulties coping with migrant workers include construction, transportation, agriculture, horticulture and temporary agency work. Although there is no accurate information on the exact number of employees posted from and to the Netherlands, we can make an educated guess by looking at the number of A1 certificates issued to posted workers.[12] According to the figures of the Social Insurance Bank (*Sociale Verzekeringsbank*) (SVB), the Dutch Social Security Administration, 106,500 workers left the Netherlands for another EU Member State using an A1 certificate in 2016, while approximately 132,000 workers entered the Netherlands using an A1 certificate. The 2017 figures show that approximately 97,000 workers left the Netherlands, versus approximately 180,000 incoming workers.[13] General information from 2015 shows that most migrant workers were from Poland (31%), followed by Germany (18%), Belgium (9%) and the United Kingdom (7%).[14]

As for the legal framework for posting of workers, the Posted Workers Directive (96/71/EC) was originally implemented by the Terms of Employment Cross-Border Employment Act (Waga), which came into force on 24 December 1999. At first the Waga focused solely on the construction sector, where terms deriving from collective labour agreements made universally applicable were concerned. After December 2005, however, the Waga applied to collective labour agreements made universally applicable in all industrial sectors.[15] The reason for this change was that the Dutch legislator wanted

9. Centraal Planbureau (2018) Verdringing op de arbeidsmarkt, Beschrijving en beleving, Economische beleidsanalyse, 31 October 2018.
10. See Centraal planbureau: https://www.cpb.nl/sites/default/files/omnidownload/MEV2019-kader-pag-44.pdf
11. See the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 10 December 2014, recommendation no. 14/09, p31.
12. There may be a discrepancy between the actual number of posted workers and the number of A1 certificates issued. For more information on this, see the Commission Staff Working Document: Executive Summary of the Impact Assessment, SWD (2012) 64 final, 21 March 2012, 5.
13. See SUWI's annual report 2016, p38, and SUWI's annual report 2017, p52 (open access).
14. These data are based on a combination of Statistics Netherlands' 'Migrant Monitor' and *Parliamentary Papers II* 2017/18, 29407, 209.
15. Bulletin of Acts and Decrees 2005, 626.

to introduce as level a playing field as possible, bearing in mind the future accession of CEE countries. The legislator was concerned that posted workers could displace native workers and illegal employment constructions affect the labour market.[16]

This concern about the possible use of illegal posting constructions has dominated legal debates in recent years. On 11 April 2013 Asscher announced a plan to combat bogus employment arrangements, defined as arrangements in which 'the actual situation differs from the situation as presented…for the purpose of evading laws and regulations'.[17] Although bogus arrangements are not necessarily an international phenomenon, Asscher observed a clear connection.[18]

One of the legislative measures deriving from this plan was the Act on Combating Bogus Arrangements (*Wet aanpak schijnconstructies*) (WAS), which has been implemented in phases from 1 July 2015. Based on the Enforcement Directive (2014/67/EU), the WAS has, *inter alia*, introduced a chain of liability in every sector of the industry and not just in the construction sector. The WAS furthermore allows the Labour Inspectorate (Inspectorate of Social Affairs and Employment) (*Inspectie SZW*) to easily request information from the party that is deemed to be employer of the employees concerned, and introduces a naming and shaming procedure for those who violate it. The WAS prohibits deducting most of the costs that the employee may owe the employer, with the obligation incumbent on the employer to pay the minimum wage.

The introduction of the Act on Employment Conditions of Posted Workers in the European Union (*Wet Arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*) (WagwEU) was a further step in combating abuse and implementing the Enforcement Directive. The WagwEU became effective on 18 June 2016, simultaneously withdrawing the Waga. The WagwEU is therefore also the Dutch implementation Act of the Posted Workers Directive.

Although the primary purpose of the WagwEU is to implement the Enforcement Directive and the Posted Workers Directive, the Dutch legislator paid a lot of attention to the purpose of the Act and its context. It noted that the aims of the Posted Workers Directive, including the protection of the posted workers and the prevention of social dumping, were achieved in the past. After the enlargement of the European Union, however, the economic freedoms were increasingly abused in order to obtain cost advantages by applying bogus employment arrangements. The goal of the WagwEU is to facilitate the enforcement of the Posted Workers Directive. Although the WagwEU applies to both outbound and inbound posted workers, most attention is given to the latter group. The legislator noted that the WagwEU fits well with the aim of the Dutch government to promote equal pay for equal work in the same workplace. The Act is

16. *Parliamentary Papers II* 2004/2005, 29 983, no. 3.

17. Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872, p1.

18. See the Action Plan for the Combating of Bogus Employment Arrangements, p17, in the Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872.

also expected to improve the oversight of foreign service providers, the exchange of information with authorities and inspections in other EU Member States, and the collection of fines abroad. It thus contributes to restoring the balance between employee protection and the free movement of services.

As set out in section 2, national case law by and large focuses on situations involving inbound service providers. Employers are by law obliged to assign certain minimum terms of employment to the personnel that come to the Netherlands to temporarily perform work. This core of terms of employment consists of specific elements of Dutch labour law. Moreover, when a foreign employer starts work in a sector in which a universally applicable collective agreement applies, it is also important that the core terms of employment from this collective agreement also apply. In all situations, the principle of favourability applies, that is, the Dutch core terms do not have to be observed if the original employment conditions of the posted workers are more favourable.[19] Hereinafter, I will focus both on core terms of employment deriving from Dutch labour laws as on those terms deriving from universally applicable collective agreements.

1.1. Core terms of employment from Dutch labour laws

The core terms of employment comprise the following Dutch labour law Acts:[20]

(i) Minimum Wage and Minimum Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*) (WML)
(ii) Working Hours Act (*Arbeidstijdenwet*)
(iii) Working Conditions Act (*Arbeidsomstandighedenwet*)
(iv) Placement of Personnel by Intermediaries Act (*Wet Allocatie Arbeidskrachten door Intermediairs*) (WAADI)
(v) Equal Treatment Act (*Wet gelijke behandeling*).

The WML and the WAADI receive most attention in case law.

The WML contains certain minimum wage levels and minimum holiday allowances, which are normally adjusted each year. In January 2019 the minimum full-time wage was EUR 1,615.80 per month, EUR 372.90 per week and EUR 74.58 per day for an adult worker. Minimum wages cannot be paid in cash but must be transferred into the bank account of the employees involved. Save for a limited number of statutory exceptions, setting off or compensating costs to the detriment of the employee, where the actual salary payment to that employee drops below the minimum wage level, is prohibited. Employees are also entitled to a minimum of 8% holiday allowance (paid once a year). The salary payslips of the employees posted to the Netherlands need to be clear and transparent.

19. This last has not been included in the WagwEU itself, but rather follows from the parliamentary documents. See for instance *Parliamentary Papers II* 2015/16, 344 08, no. 3, p31 (explanatory memorandum).
20. These Acts are not mentioned in the WagwEU as they are considered to be of a 'special mandatory character' in the meaning of Article 9 Rome I.

Conditions for hiring out workers, in particular where temporary employment agencies provide workers, are laid down in the WAADI. The most important provision of the WAADI relevant for the WagwEU is Article 8: unless a (universally applicable) collective agreement provides otherwise, temporary workers are entitled to the same wage and other allowances as comparable workers in the industry where the worker is temporarily carrying out his or her work. Since 1 July 2012, Article 7a WAADI obliges every service provider that hires out employees to companies in the Netherlands, national or otherwise, to register its entity and activity in the commercial register of the Chamber of Commerce. This is aimed at preventing illegal staffing practices and worker exploitation.

1.2. Core terms of employment from universally applicable collective agreements

Moreover, it is important that when a foreign employer is working in a sector in which a universally applicable collective labour agreement applies, the core terms of employment deriving from this collective agreement also apply. Whether a universally applicable collective agreement applies can be verified on a website publishing all universally applicable collective labour agreements,[21] although, unfortunately, the information is only available in Dutch.[22] When applicable, the posted workers are entitled to, pursuant to Article 2(6) of the Act on Declaring Collective Labour Agreements Universally Applicable (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*) (WAVV), the provisions of the universally applicable collective agreement which deal with:

a) maximum working hours and minimum rest hours
b) minimum number of days holiday, during which the obligation of the employer exists to pay a wage and extra holiday allowances
c) minimum wage
d) conditions for making employees available
e) health, security and hygiene at work
f) protecting measures with regards to the terms of employment and working conditions of children, youths, pregnant employees or employees who recently gave birth
g) equal treatment of men and women, as well as other provisions regarding non-discrimination.

Article 2(6) WAVV, as amended on 18 June 2016, together with the introduction of the WagwEU, details which elements deriving from a universally applicable collective labour agreement should be taken into account when determining the minimum wage. These are:

21. http://cao.minszw.nl
22. This Dutch-language website does provide a link to an English-language explanation featuring five universally binding collective agreements translated into English, but only one of these agreements is still in force.

(i) the applicable periodic wage on the pay scale
(ii) the applicable reduction in working hours per week/month/year/period
(iii) surcharges for overtime, shift hours, irregular hours including public holiday allowance and shift allowance
(iv) interim pay rise
(v) expenses allowance including travel expenses and travel time allowance, board and lodging costs and other costs necessary to perform the work
(vi) increments
(vii) end-of-year bonuses
(viii) extra holiday allowances.

This minimum wage pursuant Article 2(6) does not include entitlements to additional occupational pension schemes, to social security exceeding the statutory minimum, or to fees above the wage for expenses to be incurred by employees in connection with the posting for travelling, housing or food.

1.3. Specific administrative measures concerning posting

The WagwEU includes several measures to ensure that the core terms of employment can be enforced more adequately. For example, inspection services from EU Member States can exchange information with each other and imposed fines can be collected on a cross-border scale. In addition, there are four administrative statutory obligations for companies intending to perform temporary work in the Netherlands as foreign service providers. They must:

1. provide information, if requested, to the *Inspectie SZW* that is required to enforce the WagwEU
2. have certain documents such as payslips and summaries of working hours available at the workplace (or have them immediately digitally available)
3. report in advance where, when, and with which employees work will be performed in the Netherlands. (The service recipient in the Netherlands has to check whether the report has been made and whether it is correct)[23]
4. appoint someone as a point of contact and who can be contacted by the *Inspectie SZW*.

1.4. Enforcement, in particular the role of social partners

When obligations in the labour laws are not observed, the *Inspectie SZW* may impose a fine. If the core provisions from the universally applicable collective agreement are not observed, employees and/or social partners may institute an action against the employer. Social partners and, in particular, trade unions play an important role in

23. The duty to report will become effective at a later time when a digital system is ready to submit the report. This means that at this time no reports have to be submitted by the service provider and verified by the service recipient.

enforcing (applicable) collective labour agreements in practice. This is also the case when it involves posted workers.

A trade union is entitled to establish the nullity of a provision in the individual employment agreement that deviates from a collective labour agreement to which it is a party, even without having to establish its interest in such an action. The trade union may demand specific performance and/or payment of damages. The Supreme Court even allows a trade union that was not a party to the collective labour agreement to demand specific performance (but not payment of damages) from the employer who breached the normative provisions of the collective labour agreement. The trade union is allowed legal standing in Court on the basis of a specific article in the Dutch Civil Code (DCC) - Article 3:305a DCC - which entitles associations to serve the interests of a group of persons, provided that their articles of association so stipulate.[24] According to the legislator in the parliamentary history of the Waga, this Article allows trade unions to also demand specific performance when posted workers are involved.[25] In practice, both this Article and the WAVV in general are used to justify a legal action from the trade unions against companies who, according to the trade unions, fail to comply with the collective labour agreements declared universally applicable when posting workers from another Member State to the Netherlands.[26]

It is also worth mentioning that social partners are entitled to grant powers to a specific foundation under private law in charge of ensuring that a generally applicable collective labour agreement is abided by. Typically, that foundation is entitled to impose a civil penalty to employers who are in violation of the collective labour agreement at stake, and may, like social partners, also start litigation against companies posting employees.

Although the enforcement of universally applicable collective labour agreements is by and large a private matter, resulting in civil proceedings when breached, there is an exception to this rule. Should one of the social partners who requested the extension of the collective labour agreement, or any foundation that has been put into place to monitor the compliance of the universally applicable collective labour agreement, have reasonable suspicion that a company does not comply with that universally applicable collective labour agreement, and should it consider bringing the matter to court, it can request that the Minister of Social Affairs investigates said company on such a compliance. This can assist the party's furnishing of proof. The *Inspectie SZW* performs the actual investigation.

The same kind of co-operation between social partners and a foundation on the one hand, and the *Inspectie SZW* on the other, applies to the compliance with employment conditions of the Netherlands with regards to the posting of workers to the Netherlands. Information derived from the *Inspectie SZW* can be passed on to these social partners and/or foundation. Although not yet in force, in the future the Minister of Social

24. Hoge Raad 27 March 1998, JAR 1998/99.
25. See *Parliamentary Papers II* 1998/1999, 26 254, no. 3, p6 (explanatory memorandum).
26. See for instance the District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234 (FNV/Remak).

Affairs will furthermore be able to tip off the social partners or foundation with regard to information obtained through the notification obligation incumbent on the service provider. This enables the social partners and/or foundation to assess whether that service provider is compliant in regards to its obligations under the WagwEU.

1.5. Court system

Pursuant to Article 6 DCC procedure (*Wetboek van Burgerlijke Rechtsvordering*), which implements Article 6 of the Posted Workers Directive, the Dutch court is competent in cases concerning the core terms of employment of employees who temporarily perform their work in the Netherlands. The Netherlands is divided into 11 district courts (*rechtbanken*), four courts of appeal (*gerechtshoven*) and one Supreme Court (*Hoge Raad*) when it concerns civil proceedings. There are no specialised labour courts in the Netherlands, only ordinary courts. When administrative proceedings are concerned, more often in particular cases concerning social security, the highest court is the Central Appeals Tribunal (*Centrale Raad van Beroep*) or, in other administrative cases, the Council of State (*Raad van State*). Cases are as a rule public and many (but certainly not all) rulings are published in professional law magazines and/or online.

2. Case law

There is some case law concerning the WagwEU and in particular its predecessor the Waga. Although they are not great in number, some of these cases were high profile and received a lot of media attention. Annex VI of this book lists all (civil) cases published online by the courts involving posting of workers. These cases are made available on the online tool *AR-updates* (that started in 2008) and the most frequently used magazine *Jurisprudentie Arbeidsrecht* (that started prior to the introduction of the Waga).

The cases by and large concern inbound rather than outbound posted workers.[27] Typically, the claimant tends to be either a trade union or a foundation under private law established by the social partners in the sector concerned, sometimes combined with a number of posted workers. Most cases focus on remuneration deriving from a universally applicable collective labour agreement. In some of these cases litigation deals with the possibility of deducting costs from the wages and/or who has to pay for the accommodation of the inbound posted workers. In a number of cases the question arose as to whether or not a posting situation was in place and if so, which form of posting (either in the context of a contract of services or through a temporary agency). A topic that may receive further attention in future case law is whether mandatory additional occupational pension schemes are part of the remuneration package of

27. In 2003 there was a case brought before court in which the Waga actually should have been applied to an outbound employee. The court, however, did not apply the Waga (leading to the applicability of German health and safety laws) and applied Dutch law. The court ruled in favour of the employee. Reference is made to Kantonrechter Heerlen, 24 September 2003, JAR 2003/268. In the case of the District Court 's-Hertogenbosch, 9 September 2008, ECLI:NL:RBSHE:2008:BF0793, the court noted that an intergroup company outbound posting situation would fall within the ambit of the Waga, but drew no further conclusions from that remark.

posted workers. In recent years the international road transport sector has been over-represented in the case law. Topics that received most attention in court were the applicability of the Waga/WagwEU, including the question of which form of posting is concerned, and remuneration/minimum wage. These two topics are discussed below, as is social security, as some of these cases have been brought to the ECJ.

2.1. The applicability of the Waga/WagwEU and the form of posting

There has been a fair amount of litigation on the applicability of the Waga/WagwEU. Often that litigation concerns the question of whether the employees concerned habitually work in the Netherlands or are posted to the Netherlands on a temporary basis. In the first situation, Dutch law should normally apply in full (save the exception in Article 8(4) Regulation 593/2008; Rome I), whereas the Waga/WagwEU lacks applicability.

In the high profile case between Portuguese and English subsidiaries of the Atlanco Rimec Group on the one hand and the Dutch parties to the collective labour agreement in the construction industry on the other, the 'posted' workers involved were, according to their employment contracts, explicitly and solely hired for a specific construction project in the Netherlands. Therefore, according to the Dutch courts, their 'habitual' country of work under the contract was the Netherlands. Consequently, Dutch law was deemed to be objectively applicable to the employment contracts of the workers pursuant to Article 8(2) Rome I. The Waga lacked applicability.[28]

The same type of question is often raised in relation to the international transport sector. In many of these cases, a Dutch company retains the services of a group company situated in another EU Member State in order to perform international transport work. In other words, the Dutch company uses truck drivers employed by a foreign sister or daughter company. Usually, the Dutch company organises that work for the subsidiary and its employees. The Dutch transport collective labour agreement is a complicating factor in this regard. This collective labour agreement is often declared universally applicable, and contains a charter clause. According to this clause, the Dutch employer is obliged to stipulate in subcontracting agreements, executed in or from the employer's company located in the Netherlands, and entered into with independent contractors who act as employers, that their employees are granted the same basic working and employment conditions of this transport collective labour agreement, *if* this results from the Posted Workers Directive, even if the law of a country other than the Netherlands is chosen. The collective labour agreement itself therefore makes the obligation to apply the basic working and employment conditions of this transport collective labour agreement to the employees hired in from another company contingent on the applicability of Dutch law on the basis of the Posted Workers Directive. Cases on these topics resulted in different outcomes:

28. Rechtbank Midden Nederland 22 July 2015, ECLI:NL:RBMNE:2015:5393 and in appeal Gerechtshof Arnhem-Leeuwarden, 27 February 2018, ECLI:NL:GHARL:2018:1942.

- The Court of Appeal Den Bosch held that the Dutch international transport company Mooy BV needed to ensure that the Polish group company, whose services it retained, applied the Dutch law to the employment agreements entered into between that Polish group company and its employees concerned. Although it is permissible to set up a group company in Poland in order to be able to compete on wages, Dutch law applied to the employment agreements of the Polish employees owing to the fact that these employees habitually work from the Netherlands. Strangely enough, the Court of Appeal ruled that the applicability of Dutch law also resulted in the applicability of the Waga.[29]

- The Court of Appeal Arnhem-Leeuwarden had to rule on the applicability of the charter clause to international transport company Vos. The trade union argued that Vos's employees in the service of its Romanian and Lithuanian group companies, from which Vos retained the services, should fall under the Dutch transport collective labour agreement. The Court of Appeal, however, ruled that there was insufficient evidence presented in the proceedings to show that the contract concluded with these group companies was executed in or from the Netherlands, or that the Posted Workers Directive and its Enforcement Directive should be applied to the case. The trade union, in the view of the Court of Appeal, had not provided enough evidence that the foreign subsidiaries were not operating independently from the Dutch office, so that the allegation of posting had not been sufficiently substantiated.[30]

- The Court of Appeal Den Bosch had to rule on the applicability of the charter clause as well in a case against international transport company Farm Trans. The trade union argued that Farm Trans retained the services of its Polish group company, which resulted in the applicability of the basic working and employment conditions of this transport collective labour agreement. As Farm Trans did not dispute the statements of the trade union, the Court of Appeal ruled in favour of the trade union.[31] This also means that, according to the Court, the Posted Workers Directive applies.

- The Court of Appeal Arnhem-Leeuwarden also ruled on the applicability of the charter clause in a case where the Dutch international transport company Brinkman Trans Holland worked so closely with its group companies in Poland and Moldova, that, according to the Court, it can be concluded that their employees are assigned to the Dutch territory. The charter clause applied. The fact that most of the transport in reality takes place outside the Netherlands does not affect that conclusion.[32]

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29. Gerechtshof Den Bosch, 28 May 2013, ECLI:NL:GHSHE:2013:CA1457.

30. Gerechtshof Arnhem-Leeuwarden, 17 May 2016, ECLI:NL:GHARL:2016:3792. On the same matter, the Dutch Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*) carried out a parallel review of Vos Transport's use of Romanian and Lithuanian drivers. This resulted in a different outcome. A part of the matter was handed to the Public Prosecution Service. The public prosecutor had accused Vos Transport of using much cheaper, often foreign drivers enabling them to operate at a much lower cost. A fine was imposed on Vos Transport BV. Cases hereon are still pending.

31. Gerechtshof Den Bosch, 24 May 2016, ECLI:NL:GHSHE:2016:2011.

32. Gerechtshof Arnhem-Leeuwarden, 31 July 2018, ECLI:NL:GHARL:2018:6962.

In December 2018, a similar case resulted in the Dutch Supreme Court putting preliminary questions to the ECJ. This case concerned the international transport company Van den Bosch, which retains the services of two of its sister companies in Germany and Hungary. The Netherlands Trade Union Confederation (FNV) claimed the applicability of the charter clause. The Court of Appeal ruled that no situation exists in which the Posted Workers Directive applies.[33] It held that the Posted Workers Directive could only apply in a situation in which the work is performed *in* the Netherlands, but not *from* the Netherlands, and that the latter situation was the case in this particular matter. Although that last criterion may apply when establishing the applicable law under the Rome I Regulation, it does not apply to the Posted Workers Directive. In this case, the Supreme Court referred prejudicial questions to the ECJ.[34]

The Supreme Court *inter alia* asked whether the Posted Workers Directive applies to an employee working as an international truck driver and, if so, whether the Posted Workers Directive arranges for the applicability of the national implementation Act in a situation in which that driver works *from* the Netherlands as opposed to *in* the Netherlands. In a parallel case involving the same situation, but where ten individual truck drivers were claimants and which mainly concerned Rome I, the Supreme Court referred the case back to the Court of Appeal in order to establish which law applies to the employment agreements of the truck drivers involved. The Supreme Court held that the previous ruling of the Court of Appeal was either wrong or insufficiently substantiated. In this case the Court of Appeal had determined that Hungary rather than the Netherlands was the country from which the work was performed, and that the Hungarian law was also more closely connected to the employment agreements than the Dutch law. Another Court of Appeal needs to reassess the matter.[35]

2.1.1. Form of posting

Another subject of debate is whether posted workers work in the context of a contract of services or through a temporary agency (in other words, in the context of either Article 1.3(a) or 1.3(c) of the Posted Workers Directive). This makes a difference when determining the wages due, as the temporary agency needs to abide by most employment conditions in place of the recipient of the employees (Article 8 WAADI), whereas the undertaking posting employees in the context of a contract of services only needs to abide by the core terms of employment. In two parallel cases the Council of State held that the difference between these two forms of posting needs to be assessed along the lines presented by the ECJ in the case of Martin Meat.[36] As the burden of proof in such cases lies with the Minister, who states that the companies involved violate the applicable rules, the companies are discharged when there is sufficient doubt as to whether that posting actually takes place through a temporary agency (which was not

33. Gerechtshof Den Bosch, 2 May 2017, ECLI:NL:GHSHE:2017:1873. See also Gerechtshof Den Bosch, 2 May 2017, ECLI:NL:GHSHE:2017:1874.
34. Hoge Raad 14 December 2018, ECLI:NL:HR:2018:2322.
35. Hoge Raad 23 November 2018, ECLI:NL:HR:2018:2165.
36. ECJ 18 June 2015, C-586/13.

allowed in the case at hand) rather than on the basis of a contract of services (which was allowed). In these cases, there was sufficient doubt. Therefore, no fines were due.[37]

The outcome may be different, however, when the trade union starts civil proceedings on the same type of question. In a case brought before the District Court of the Northern Netherlands, the trade union argued that the Dutch company retained the services from posted workers working through a temporary agency rather than from posted workers working in the context of a contract of services. The Court ruled that, in the light of the universally applicable collective labour agreement in the metal sector, the Dutch recipient of the services should prove that a contract of services was concluded. As the Dutch recipient failed to do so, although the work performed seemed to be performed under the management of the Dutch recipient, the Court regarded the work performed by the posted workers as work conducted through a temporary agency.[38]

2.2. Remuneration/minimum wage

In cases of posting to the Netherlands, at least the Dutch minimum wage should be paid. Calculating that minimum wage can be especially complex when a universally applicable collective labour agreement applies.

2.2.1. What is minimum wage?

In the 2012 case brought before the District Court Groningen by a trade union against the Polish subcontractor Remak, such a universally applicable collective labour agreement applied.[39] As a consequence, the court ordered that:

(i) the salary group and categorisation of position deriving from that collective labour agreement applies. The position level was set on the minimum 'o' because the trade union argued that it wanted to keep the claim uncomplicated. The wage paid in kind to the employees was not to be deducted from the minimum wage, the Court ruled, as this related to a contribution towards the expenses;
(ii) the holiday allowance of 8% of the wages was also part of the minimum wage Remak needed to observe;
(iii) the non-working days ('roster-free hours/ reduction in working hours'), as designated by the collective labour agreement were, according to the trade union, also part of the minimum wage, as wages needed to be paid over these days. The Court, however, ruled that such days were introduced in order to create employment, and were therefore not part of the minimum wage; and
(iv) the surcharge when working outside the regular hours was, according to the Court, part of the minimum wage.

37. Afdeling Bestuursrecht Raad van State 5 July 2017 inzake ECLI:NL:RVS:2017:1819 en ECLI:NL:RVS:2017:1818 .
38. Rechtbank Noord-Nederland, 4 March 2015, ECLI:NL:RBNNE:2015:1076.
39. District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234.

This case showed that it is not always easy to pinpoint which elements from the universally applicable collective labour agreement should be taken into account when determining the minimum wage. The SER called on the Dutch legislator to give further guidance. In response to this request, the Cabinet gave such guidance in 2015, listing the elements that should be qualified as minimum wage in a universally applicable collective labour agreement.[40] At present, this is clarified in Article 2(6) WAVV. (See 2.1).[41] There is yet room for debate, however, as to whether the wage elements of Article 2(6) WAVV include more elements than allowed under the Posted Workers Directive.[42]

2.2.2 Are set offs/deductions from the minimum wage allowed?

As mentioned above, the District Court Groningen ruled that contributions towards the expenses of employees do not count as part of the minimum wage. But is it allowed, if the minimum wage is paid, for certain costs to be deducted from that minimum wage by the employer? In practice, after all, some transnational service providers deduct certain costs from the wages paid to the posted workers, by setting off these costs against the wages. Pursuant to a 2011 enforcement policy of the Minister of Social Affairs, such deductions are permissible, provided they are limited to a maximum of (i) 20% of the gross minimum wage for housing costs and (ii) 10% of the gross minimum wage for health insurance premiums. In the case at hand, a Dutch temporary agency deducted more from the minimum wage payable to two of its Polish posted employees than was allowed under that policy. As a consequence, the *Inspectie SZW* fined the employer for this alleged violation of the WML. The employer opposed this fine and argued that Dutch law simply allows these set offs from the wage due, and that therefore the enforcement policy had no legal basis. The *Inspectie SZW* asserted that the employer did not pay the actual minimum wage because it deducted (set off) various costs against the wages due and was therefore in violation of the WML. The Court subscribed to the employer's point of view, holding that the WML makes no reference to set offs. As a consequence, the general rules of set offs should be applied. Set off is a method by which an obligation to pay money is satisfied other than by payment. The WML refers to an *entitlement* to a certain minimum wage, not to the actual *payment* of that minimum wage. An entitlement logically precedes set off. Because of the entitlement there is an obligation for the employer to pay, but this can be satisfied by the set off. The WML does not preclude set off and therefore the employer did not violate any rule of public law by this means. Consequently, there was no justification for the Inspectorate to impose a fine. The Council of State upheld this decision on appeal.[43] In response, the Dutch legislator changed the law. As of 1 January 2018, Article 13 WML prohibits (most[44]) set offs from the wage where the actual wage paid to the employee drops below the minimum wage level.

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40. The Cabinet's response to the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 16 June 2015.

41. Note that, in contrast to the District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234, the legislator deemed non-working days as part of the minimum wage.

42. Reference is made to Advocate General Drijber in the case Hoge Raad 14 December 2018, ECLI:NL:HR:2018:2322. He doubts whether Article 2(6) is allowable prior to the revised Posted Workers Directive coming into effect.

43. Raad van State, 12 November 2014, ECLI:NL:RVS:2014:4062.

44. There are certain statutory exceptions.

A similar question is whether the service provider should pay housing for the posted workers when this is arranged in general in a universally applicable collective labour agreement. The Supreme Court needed to answer this question regarding the universally applicable collective labour agreement in the construction sector. That collective labour agreement arranged, in short, that the employer should pay the temporary housing costs for the employee working on a construction site if it is so remote from his house that it cannot be reasonably expected that the employee commute between his house and the construction site. The question was whether this clause also applied to posted workers, who had to pay for their own temporary housing in the Netherlands.[45] The Supreme Court interpreted this clause using Dutch interpretation techniques. It ruled that the clause concerned does not apply to the *actual* house abroad of the posted workers, and that their *temporary* housing should be considered the house from which they commute as referred to in the collective labour agreement. As a result, the posted workers, who rented temporary dwellings near to the construction site, were not eligible to compensation for their temporary housing in the Netherlands.[46]

2.2.3. What about additional occupational pension schemes?

Another issue receiving some attention in Dutch case law is whether service providers should abide by the rules of the Act on additional occupational pension schemes 2000 (*Wet Bedrijfstakpensioenfondsen 2000*) (Bpf 2000). This Act arranges the possibility of a second pillar supplementary pension, which serves to top up the statutory basic pension granted by the State. The Act allows social partners to enter a sector-wide pension scheme through a sectoral pension fund, which applies in a mandatory fashion to all employers and employees active in that sector, provided that the Minister approves. Article 15 Bpf 2000 arranges that the Minister can exempt individuals who temporarily perform work in the Netherlands from the applicability of this Act. But that does not answer the question of whether, as a matter of principle, service providers and their posted workers can be obliged to participate in the mandatory occupational pension under Bpf 2000. Although this topic has been touched on in several cases, there is only one in which the question has been answered. In that case the District Court Leeuwarden ruled that the Bpf 2000 and the sectoral pension fund declared universally applicable are to be regarded as provisions of mandatory law as referred to in Article 9 Rome I.[47] The service provider who falls within the scope of the pension fund concerned is therefore obliged to pay pension contributions for the posted workers. It must be noted that this ruling is subject to legal debate.

2.3. Social security

The SVB is responsible for *inter alia* the issuance of A1 certificates and has issued its own guidelines in that respect (based on EU law). The SVB arranges that any posting

45. The discussed Atlanco Rimec case proves that this can be very expensive. In that case, Atlanco deducted almost EUR 1,000 a month per worker for a small room.
46. Hoge Raad 4 May 2018, ECLI:NL:HR:2018:678.
47. Rechtbank Noord-Nederland, 15 November 2016, ECLI:NL:RBNNE:2016:4935.

from the Netherlands under Article 12 Regulation 883/2004 is, as a general rule, only possible when the person involved is already insured under the Dutch social security law on a statutory basis. Employees should normally perform their work in the Netherlands in order to be eligible for an A1 certificate. The posted workers must also maintain a connection with the employer that posts them. The SVB will assess this on the basis of a number of criteria. In case of replacement or 'posting through', the SVB will usually not issue an A1 certificate.

There have been some questions on the A1 certificate involving the Dutch authorities. One of these questions led to a recent ruling of the CJEU in the case of Holiday on Ice.[48] The Holiday on Ice employees are third-country nationals who train for some weeks in the Netherlands for their shows. Some of these shows are performed in the Netherlands, but most are performed elsewhere in the EU. The employees used to be eligible for an A1 certificate from the SVB. The SVB, however, refused new applications. The question arose as to whether third-country nationals, such as those at issue in the main proceedings who temporarily reside and work in different EU Member States in the service of an employer established in the Netherlands, may rely on the co-ordination rules laid down by Regulations 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject. The CJEU ruled that these regulations indeed apply to such third-country nationals, provided they are legally staying and working in the territory of the Netherlands.

Another case on social security involving posted workers resulted in prejudicial questions being put to CJEU. This case concerns international truck drivers who live in the Netherlands. A company situated in Cyprus allegedly employs them. The employees are posted to Dutch companies. Some of the companies are the former employers of the employees involved. The employees do not perform most of their work in the Netherlands. The SVB regards this as a bogus employment arrangement and argues that Dutch social security law should apply. The employer states that the legal and factual arrangement is genuine. Cypriot social security law should therefore, according to the employer, govern the employees. The question therefore arises as to whether Dutch or Cypriot social security should apply in the case at hand. The Central Appeals Tribunal has referred prejudicial questions to the ECJ; at the time of writing (May 2019), the ruling on the case has not yet been issued.[49]

Summary and conclusions

The topic of transnational posting of workers receives a lot of attention in the Dutch media. The SER even warned that the fear of international labour among Dutch citizens might stoke nationalistic and xenophobic sentiments. It is therefore undoubtedly an important topic in the Netherlands. Still, research shows that the Dutch labour market has not as a whole been significantly affected by labour migration to the Netherlands; in

48. ECJ 24 January 2019, C-477/17.
49. Centrale Raad van Beroep, 20 September 2018, ECLI:NL:CRVB:2018:2878.

particular, labour migration and posting have to date not resulted in the displacement of native employees.

In relation to posting, the legislator focused in particular on bogus employment arrangements. In response to litigation results, rules prohibiting (most possibilities of) deductions from the wage to an extent that the actual wage paid to the employee drops below the minimum wage level were introduced. The legislator also introduced a statutory provision setting out in detail all components deriving from a collective labour agreement made universally applicable that constitute the minimum wage. Here, there is clearly a link between the case law and the legislative process. The high-profile cases, such as the discussed Rimec and Remak cases, also played a role in the political debate: they seemed to strengthen the determination of the politicians to counter the abuse of labour migration. The same kind of determination can be seen in the case law. Litigation tends to go 'all the way'. There are currently two cases in which prejudicial questions are referred to the ECJ.

In the meantime, it is likely that many cases never make it to court. According to the third monitoring report of the WAS, for instance, the trade unions noted that the chain of liability provisions have a strong preventive effect.[50] Simply threatening with starting litigation on chain liability often solves the matter. This, of course, is a more efficient way of enforcing rules than going to court.

References

Bulletin of Acts and Decrees 2005, 626.

Cabinet's response to the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 16 June 2015, 151449.

Centraal Planbureau (2018) Verdringing op de arbeidsmarkt, Beschrijving en beleving, Economische beleidsanalyse, 31 October 2018.

Centraal planbureau (2019) Belang buitenlandse arbeid neemt toe voor Nederland. https://www.cpb.nl/sites/default/files/omnidownload/MEV2019-kader-pag-44.pdf

European Commission (2012) Commission Staff Working Document: Executive summary of the impact assessment accompanying the document proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD (2012) 64 final, 21 March 2012.

Even J.H. (2018) Balanceren met detacheren, Den Haag, Boom juridisch.

Minister for Social Affairs and Employment (2013) L.F. Asscher, letter to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872.

Parliamentary Papers II 2017/18, 294 07, no. 209.

Parliamentary Papers II 2015/16, 344 08, no. 3.

Parliamentary Papers II 2004/2005, 29 983, no. 3.

50. This report was attached to the letter of the Minister of Social Affairs Koolmees to the Parliament of 28 December 2018.

Parliamentary Papers II 1998/1999, 26 254, no. 3.
SENSE, the project on transnational mobility in the road transport sector. http://www.project-sense.eu.
Social and Economic Council of the Netherlands (2014) Recommendation Arbeidsmigratie, 10 December 2014, recommendation no. 14/09.
Sociale Verzekeringsbank (2016) SUWI's annual report 2016 (open access).
Sociale Verzekeringsbank (2017) SUWI's annual report 2017 (open access).

For the list of cases please refer to Annex VI.

Chapter 9
Posting of workers before Polish courts

Marta Otto

Introduction

Poland has the highest number of workers posted to other European Union (EU) Member States. Between 2014 and 2016, Polish companies sent between 260,000 and 310,000 people to EU and European Free Trade Association (EFTA) countries. The largest number of Polish workers, mainly in industry and construction, are posted to Germany (56.9%), then France (11.9%), Belgium (8.8%) and the Netherlands (6.6%). Poland also has the largest negative net balance of posted workers; between 2014 and 2016, it hosted between 13,000 and 18,000 posted workers, mainly from Germany (6,124), France (2,714) and Spain (1,603).[1]

Poland's profile as a predominantly sending country, and with one of the lowest labour costs (EUR 9.40 per hour)[2] goes some way to explain the continuing lack of interest from both the social partners and the academic literature[3] in the issue of fair labour mobility in the EU. There is also a rather minimalist regulatory approach to the protection of rights of posted workers in Poland. In fact, it was not until the proposed revisions to the Posted Workers Directive were introduced at the EU level that the relevant actors shifted their focus from the prevailing issue of migrant workers (to and from Poland) to the relevance and consequences for national labour law and functioning of the labour market with respect to posted workers. At the time of writing, a clear split was discernible between the proponents of internal market-oriented rationale (government and employers' organisations) and employee organisations, who favour a broadening of the social dimension of the EU.

This chapter analyses the main aspects of posting of workers' cases brought before the Polish courts, including: the criteria of being subject to the Polish social security

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1. See e.g. Voss E, Faioli M, Lhernould J.-P. and Iudicone F. (2016) Posting of Workers Directive - current situation and challenges, Brussels, European Parliament.
2. http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs [accessed 16 June 2019].
3. To date the academic literature has been mainly concerned with the implications of posting of workers to social security systems; See e.g. Ślebzak K. (2017) O wymogu podlegania przed delegowaniem ustawodawstwu państwa członkowskiego, w którym siedzibę ma pracodawca, w rozumieniu przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, Praca i Zabezpieczenie Społeczne, 10; Ślebzak K. (2016) Delegowanie równoległe w świetle przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, Praca i Zabezpieczenie Społeczne, 8, 9-15, Potocka-Sionek N. (2016) Nielegalne delegowanie pracowników tymczasowych do pracy w Niemczech a moc wiążąca formularza A1, Praca i Zabezpieczenie Społeczne, 10, 25-32. For a more comprehensive analysis, see Szypniewski M. (2019) Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej, Warsaw, Wolters Kluwer.

system; the differentiation between business trips and the posting of workers for the purpose of calculation of social insurance contributions; and the remuneration of Polish workers posted abroad. Given the quantitative abundance on the one hand, and the *sui generis* homogeneity of the factual matrix and the limited substantive scope of the resulting judgments[4] on the other, the analysis is based largely on the relevant Supreme Court jurisprudence. This has proved to be an important benchmark, as can be seen by the regularity of reference to its judgments in the lower instances courts. The key factors shaping the relevant jurisprudence, including the legal framework of posting of workers, the key legal debates on posting in Poland, and the current situation of workers posted to and from Poland, are briefly outlined below.

1. Legal framework on posting of workers in Poland

In Poland, the regulation of posting of workers is based solely on legislation, which exemplifies the rather mechanical duplication of standards contained in the relevant EU Directives, and also the relatively minimalist and reactive regulatory approach to the protection of rights of posted workers, which for years were enshrined in a patchwork legal framework.

Legal provisions that transposed the Directive 96/71/EC in 2001 into the Polish legal order were originally included in Chapter IIa of the Labour Code (LC):[5] Working conditions of employees posted to Poland from an EU Member State, as well as the Act on the National Labour Inspectorate (*Państwowa Inspekcja Pracy*) (PIP)[6] and the Code of Civil Procedure.[7] Notably, the relevant minimum standard provisions were at first addressed to employees posted from Poland to other EU Member States. This was because the essence of the obligations of the EU Member States that resulted from the Posted Workers Directive had been misinterpreted. The regulation was amended accordingly, just before the Polish accession to the EU. Yet the legislator clearly reaffirmed that its purpose is to establish the minimum standards of entitlements of employees posted to the territory of Poland.

It was not until 18 June 2016 that new legislation came into force regarding the posting of workers within the framework of the provision of services (*o delegowaniu pracowników w ramach świadczenia usług*) (PWA).[8] This established a unified and comprehensive framework on key issues related to the posting of workers, and repealed the relevant provisions of the Labour Code. The new statutory rules stem directly from the obligation to transpose EU Directive 2014/67/EU on the enforcement of Directive 96/71/EC into the Polish legal order. Yet, the PWA also incorporates the solutions already implemented on the basis of Directive 96/71/EC.

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4. Within the 111 judgments concerning posting of workers in the framework of the provision of services published in Lex Online Legal System (probably the most opinion-forming source of the actual line of jurisprudence in Poland), 67 constituted the judgments of the Supreme Court, 22 the judgments of the district courts, 21 the judgments of the appellate courts, and 1 of the regional court.
5. Journal of Laws of 2014, item 1502, as amended.
6. Journal of Laws of 2015, item 640, as amended.
7. Journal of Laws of 2014, item 101, as amended.
8. Journal of Laws of 2016, item 868.

The material scope of the Act is broad and includes principles concerning posting of workers on the territory of the Republic of Poland in the framework of the provision of cross-border services, and protection of employees posted to and from Poland, or monitoring compliance with relevant provisions. It also elucidates relatively detailed rules concerning the principles of administrative co-operation between competent Polish authorities with other EU Member States, as well as imposition and execution of administrative pecuniary sanctions and fines.

As regards the personal scope, in accordance with the relevant EU law, the new regulations apply mainly to foreign employers posting their workers to Poland, and to some extent also to Polish enterprises that post their workers abroad to EU countries or to countries that have an agreement with the EU to implement Directives 96/71/EC and 2014/67/EU into their national legislation. Importantly, legal uncertainty concerning the terms 'posting employer' and 'posted worker' ('from the territory of Poland') was removed by referring *expressis verbis* in the relevant statutory definitions to the concept of employee within the meaning of the regulations of the Member State to which the employee is posted.[9] The provisions of the PWA, however, do not generally apply to merchant navy undertakings and international transport, excluding cabotage operations.[10]

In essence, the Act aims to guarantee an appropriate level of protection for posted workers to and from the territory of the Republic of Poland. In particular, the PWA explicitly reiterates the previously established Labour Code formula that employers who post workers to Poland must ensure working conditions that are no less favourable than those applicable under the Polish Labour Code and other relevant employment legislation (the favourability principle). The relevant 'protected terms' include: working-time standards and hours, as well as uninterrupted rest in 24-hour and weekly periods; the extent of holiday leave; minimum remuneration for work, overtime pay and overtime allowance; occupational safety and health; protection of pregnant employees and protection during their maternity leave; employment or hiring of juveniles; equal treatment in employment without discrimination; and performance of work according to the provisions for the employment of temporary workers.[11]

In addition, the PWA imposes a number of new obligations on foreign employers who post workers to Poland, stemming from administrative requirements and control measures included in Directive 2014/67/EU, such as the obligation to appoint a person residing in Poland responsible for liaising with the PIP, and for sending and receiving notifications and/or documents; the obligation to submit, by the date of commencement of the provision of services in Poland, a declaration to PIP containing the information necessary to conduct an audit of the state of affairs at the employee's place of work,[12]

9. PWA Article 3 (5) and (7).
10. PWA Article 2.
11. PWA Article 4.
12. In 2017, 1878 declarations from 748 foreign employers posting employees to Poland (representing 62 countries) were submitted to PIP. Employees most often posted to Poland came from enterprises operating within Germany (1,259 people), Ukraine (1,134 people), Czech Republic (642 people), and Italy (638 people). Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy z 2017 r., https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf, 123-24 [accessed 16 June 2019].

as well as the requirement to store and share, at PIP's request, during the posting (and within two years after the end of the posting) documents relating to the employment relationship of the posted worker.[13] Finally, in accordance with Article 12 of the Directive 2014/67/UE, the PWA introduces joint and several liability of a construction work or building structure maintenance (earthwork, renovation, or demolition) contractor and an employer who posts an employee to Poland as its subcontractor for obligations relating to unpaid remuneration (minimum statutory pay) and overtime pay, as well as the institution of due diligence, demonstration of which in principle releases the contractor from the liability.[14]

The task of monitoring compliance with the PWA is entrusted to PIP. The Act indicates the latter as the competent authority on the territory of the Republic of Poland and provides for its new powers to control whether the employee has the status of a posted worker and whether the terms and conditions of employment meet the requirements of Polish law.[15] As a general rule, PIP only examines complaints related to employment on the basis of employment contracts. Civil law contracts are controlled only with regard to irregularities in the field of health and safety regulations at work or the conclusion of bogus civil law contracts.

Failure to comply with relevant PWA obligations may trigger a fine of between Polish złoty (PLN) 1,000 (approximately EUR 250) and PLN 30,000 (approximately EUR 7,500). In principle, PIP does not have the authority to impose sanctions on Polish employers posting abroad who violate the law in the receiving country. Foreign institutions, however, can apply sanctions for such violations based on information and evidence provided by PIP. Notably, in accordance with Article 12 PWA, concerning the provision of the necessary information on the posting employees from the territory of Poland and carrying out controls in response to reasonable requests from competent authorities, failure to provide PIP with the information on the conditions of employment of workers posted abroad is also subject to the above-mentioned fine (of between EUR 234 and EUR 7,000).

As a general rule, lodging a complaint to PIP does not exclude claims before the Labour Code.[16] Pursuant to Article 11034 Section 2 Code of Civil Procedure, matters brought by an employee regarding the provision of employment conditions in accordance with PWA belong to national jurisdiction; also when an employee is or has been posted to work on the territory of the Republic of Poland by an employer established in one of the EU Member States.

13. PWA Chapter 5, Article 24-25.

14. PWA Chapter 3, Article 7-8. For a more detailed explanation of the relevant provisions see the PIP website created in accordance with Article 13 PWA: www.biznes.gov.pl/przedsiebiorcy/biznes-w-polsce/prowadze-firme/pracownicy/delegowanie-pracownikow-do-polski [accessed 7 January 2017].

15. PWA Chapter 4, Article 9-23.

16. In Poland, claims arising out of employment relationships are decided by Labour Courts that constitute separate organisational units of regional courts (*sądy rejonowe*), and labour and social insurance courts that constitute separate organisational units of district courts (*sądy okręgowe*). Proceedings before Polish courts take place in two instances and are conducted on the basis of the Code of Civil Procedure. As a general rule, claims arising from an employment relationship shall expire after three years from the date on which the claim became due (Article 281 LC).

Under Polish law, the action in matters of labour law can be brought by an employee, employer, public organisation or labour inspector either before the courts of general jurisdiction of the defendant (owing to the place of residence), the court in whose jurisdiction the work is, has been, or was to be performed, or the court in whose district the undertaking is operating. Pursuant to Article 6 of the PWA, posted workers bringing judicial or administrative proceedings shall be protected against any unfavourable treatment in employment.

2. Public debate on posting of workers: between the wage discrimination of Poles and competitive advantage rhetoric

In Poland, the issue of fair labour mobility in the EU was for years somewhat sidelined in the public and academic debate, which focused on the broadly understood migration problematic. In fact, it was not until the introduction of a new legislative framework both at national and EU level that the relevant actors started shifting their focus onto the relevance and consequences for national labour law and the functioning of the labour market, more often with recourse to posted workers.

In general, the introduction of the comprehensive/EU-compliant framework governing the posting of workers issue was met with a positive reception, as public consultation with the social partners proved.[17] Yet the exclusion of the international transport sector from the scope of application of the PWA was controversial. In the view of the Social Dialogue Council[18] in accordance with Article 1 of Directive 96/71/EC, its provisions shall not apply only to commercial navy companies with respect to ship personnel. Thus, in principle, international transport, including road haulage, should fall within the scope of the PWA.

The Ministry of Foreign Affairs, however, is not willing to share the same interpretation, stating that posting of workers is carried out under EU law provisions regulating the freedom to provide services, namely Articles 56-62 of the Treaty on the Functioning of the European Union (TFEU). Pursuant to Article 58 TFEU, the free movement of services in the field of transport is governed by the Treaty's provisions on transport, and not by Articles 56-62 TFEU. Thus it remains questionable as to whether secondary law, such as Directives 96/71/EC and 2014/67/EU that implement the provisions of the Treaty, may regulate matters not covered by it. Moreover, in the view of the Ministry, international transport does not essentially constitute posting within the meaning of Article 1 Point 3a) Directive 96/71/EC. The application of several national legal regimes to highly mobile transport workers would result in a lack of legal certainty and considerable difficulties for entrepreneurs who provide transport services in the EU context and, as a consequence, could result in violating the principle of proportionality. Accordingly, considering the obvious loophole in EU law and the disputes over the

17. https://legislacja.rcl.gov.pl/projekt/12279950/katalog/12327608#12327608 [accessed 16 June 2019].

18. A forum for co-operation of employees, employers and government representatives appointed by the President upon the request of authorised entities. See Act of 24 July 2015 on the Social Dialogue Council and other institutions for social dialogue (Journal of Laws of 2015, item 1240).

application of the provisions of Directive 96/71/EC to international transport that have been going on at EU level for many years, unambiguous compliance with EU law, in the view of the Ministry, will only be effective once the scope of Directive 96/71/EC is determined by the Court of Justice of the European Union (CJEU).[19]

In recent years, a lot of concern has been raised in Poland over the revision of the Posted Workers Directive. For Polish employers' federations, as well as some EU law experts, the new Directive goes too far in the wrong direction, limiting as it does the key principles of economic freedom. In their view, the envisaged principle of 'equal pay for equal work at the same place' is likely to result in 'unequal treatment of foreign service providers', and as such infringes the Treaty provisions related to the competences of the EU, in particular with regard to the application of the subsidiarity and proportionality principle.[20] As they explain, the pay rate differences existing among EU Member States do not constitute unfair competition and therefore should be no obstacle for service providers to profit from the relevant competitive advantage, which in practice derives from the generally weaker condition of the entire economy of new EU Member States. Moreover, since it is precisely the purpose of a rigidly defined minimum wage to ensure that there is no social exclusion of posted workers, it seems neither reasonable nor proportionate to introduce the requirement for equal remuneration in relation to locally employed and posted workers.[21] Finally, they view the validity of the revision of the Directive 96/71/EC as doubtful in light of the fairly recent deadline for transposition of the enforcement Directive 2014/67/EU, and therefore it is still not clear whether the problems related to the allegedly persistent unfair competition on the internal market could be solved by applying the Enforcement Directive. Thus, in principle, the policy focus should be shifted to fighting undeclared work, bogus self-employment and other illegal practices.[22] On 3 October 2018, Poland submitted a complaint to the CJEU regarding the protectionist character of the Posted Workers Directive, which 'impedes the realisation of the freedom of provision of services and the *freedom* of movement of workers.'[23]

In contrast, among the country's trade unions (NSZZ Solidarność, FZZ and OPZZ), the idea of 'equal pay for the same work in the same place' was met with a positive reception. In their opinion, every action that contributes to maintaining a wage growth consistent with at least increasing productivity should be supported. This is necessary from the

19. http://tlp.org.pl/dyskusja-o-zmianach-w-dyrektywie-o-delegowaniu-pracownikow-tym-razem-w-ramach-rady-dialogu-spolecznego/ [accessed 16 June 2019], NSZZ Solidarność does not preclude a complaint against Poland to the European Commission, see http://serwisy.gazetaprawna.pl/transport/artykuly/1105537,kierowcy-a-ustawa-o-delegowaniu-pracownikow.html?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3Bls4TfdicTL%2BeIGXfxkdMLg%3D%3D [accessed 16 June 2019].

20. See e.g. Kwasiborski P. (2016) Planowana rewizja dyrektywy 96/71/WE w świetle dotychczasowych uwarunkowań prawnych instytucji delegowania pracowników w Unii Europejskiej, Europejski Przegląd Sądowy, 6, 12-21.

21. See e.g. position of the Polish Confederation Lewiatan on the draft Directive amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final), available at www.konfederacjalewiatan.pl/legislacja/opinie/prawo-pracy-i-rynek pracy/3/_files/2016_03/reGB09_03_16_Stanowisko_konfederacji_Lewiatan_do_projktu_dyrektywy_zmieniaj_cej_dyrektyw_96-71-we_eng.pdf

22. Ibid.

23. https://praca.gazetaprawna.pl/artykuly/1288073,polska-zlozyla-wlasna-skarge-do-tsue-ws-dyrektywy-o-delegowaniu-pracownikow.html

point of view of the ability to overcome weak GDP growth in many EU countries. Trade unions are distancing themselves from the view expressed in the resolution of the Polish parliament, pursuant to which the amendments to the Posted Workers Directive violate the principle of subsidiarity. As they explain, 'the nature of the posting on a cross-border level indicates that action is required for all EU Member States with respect to this institution'.[24]

3. Posting of workers before the National Labour Inspectorate

In general, the system of collecting data on complaints submitted to the National Labour Inspectorate (PIP) does not allow it to be clearly determined whether the relevant complaint was submitted by the worker posted to Poland within the framework of the provision of services. The available statistical data only makes it possible to distinguish the central aspect of the complaint and whether it was reported by an employee or by an institution, office or co-operating body.

According to the information obtained from the Chief Labour Inspectorate, 28 complaints regarding the issue of posting of workers to Poland were filed with PIP in 2017. More than half of these concerned the failure to provide posted workers with terms of employment no less favorable than those resulting from the provisions of Polish law (in particular, 13 complaints related to daily and weekly rest periods, one regarded the amount of remuneration and allowance for overtime work, and one the principle of equal treatment and the prohibition of employment discrimination).[25] In contrast, irregularities revealed in the course of inspections carried out by PIP most often concerned statements on the posting of employees (lack of or late notification of the fact of posting, submitting an incomplete statement or lack of updates) and the failure to appoint a person responsible for liaising with the Labour Inspectorate.

Notably, PIP's report clearly states that not all solutions provided for in the Act are sufficiently precise and thus fully effective in practice. In this respect, PIP suggests introducing, *inter alia*, explicit regulation of the issue of medical examinations and occupational health and safety (OHS) training for employees posted to Poland to be carried out in accordance with the rules applicable to Polish employees. Currently, these issues cause significant controversy, especially in the case of employers relying on medical examinations or OHS training undertaken in the home country. Unambiguous regulations in this area would bring some clarity.[26]

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24. http://www.solidarnosc.org.pl/aktualnosci/wiadomosci/kraj/item/13295-strona-zwiazkowa-rds-o-delegowaniu-pracownikow?highlight=YTozOntpOjA7czoxMToiZGVsZWdvd2FuaWEiO2k6MTtzOjEyOiJwcmFjb3duaWvDs3ciO2k6MjtzOjIoOiJkZWxlZ293YW5pYSBwcmFjb3duaWvDs3ciO30

25. Response of the Chief Labour Inspectorate, Department of Employment Legality, 1 February 2018 r. GNL-434-5105-7-2/18. Notably, most of the complaints were brought either by employees or former employees, and only one by an external institution.

26. PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf, 110.

At the same time, as demonstrated in PIP's annual reports, foreign control authorities have been showing increasing interest in Polish employees posted abroad by Polish companies. During the first year the PWA was applied (2016), the number of relevant inquiries addressed to PIP had increased by 40% from 2015. As a result of applications from foreign institutions, in 2017 alone, labour inspectors conducted 177 inspections of Polish companies posting abroad,[27] with many of them revealing irregularities concerning minimum employment conditions. According to PIP, some Polish employers still pay posted employees less than the minimum wage in the receiving country. The reports also draw attention to attempts to bypass the provisions on the posting by Polish employers by having recourse to the generally more beneficial regulations on business trips (4.2),[28] as well as observing the increasing practice of posting third-country nationals (mainly from Ukraine) employed in Poland under civil law contracts for temporary work abroad.

The latter problem was signalled by the control institutions of the posting countries (including Czech Republic, Lithuania, Estonia and the Netherlands), which had some doubts as to the legitimacy of the relevant employment. Most posted workers were citizens of Ukraine who performed work on the basis of employers' statements about intention to entrust work registered at labour offices in Poland. In many cases they did not hold an A1 certificate (formerly E101); this was usually because they failed to meet the criteria to obtain it. In practice, the relevant posting companies do not usually conduct any business in Poland and are generally registered at the virtual office (the so-called letterbox companies), which *de facto* makes it impossible for public institutions to carry out inspections. As PIP explains, in most cases this type of enterprise only serves the purpose of registering a relevant statement from the employer in the district (*powiat*) labour office, which, as the basis for the legal work performed in Poland by a foreigner, enables him or her to work abroad.[29]

The practice of posting workers to Germany to provide 24/7 care for elderly or sick people in private flats appears similarly problematic from PIP's perspective. Typically, a civil law contract concluded with a Polish company constitutes the basis for performing such work. The latter is often accompanied by a second/parallel contract with the caregiver to undertake marketing work or promotion in Poland, which in reality is rarely carried out. This practice, however, allows the acquisition of A1 forms issued by the Social Insurance Institution (ZUS), which confirm their being subject to the Polish social security system. In practice, there are a number of barriers to co-operation with German control institutions in this respect, related *inter alia* to the limited possibility of controlling private homes (the latter in principle requires the court's warrant), as well as the fact that German regulations established for the care sector do not apply

27. In total, in 2017, labour inspectors carried out 243 controls regarding the issue of posting of workers from Poland. In total, 229 entities were examined, within which 40% carried out activities in the construction, 18% industrial processing, 18% administration services, 6% transport and storage.

28. PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf, 108-109.

29. PIP (2018) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy - 2017 , Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf, 120

to people who work 24/7. The resulting lack of information on the number of actual working hours prevents German institutions from making an assessment as to whether there has been a breach of the minimum pay provisions in Germany. In this situation, workers whose rights have been violated may bring claims only before the court.[30]

4. Posting of workers before Polish courts: a solely social security dilemma?

The jurisprudence of the Polish courts with respect to posting of workers within the framework of the provision of services is impressive in terms of its volume, yet considerably limited when it comes to the heterogeneity of the factual matrix[31] and the substantive scope of the judgments. In general, the available case law seems to reflect the statistical portrait of Poland as a predominantly sending country, and concerns posting out (most often to Germany, France, Belgium, Netherlands and Spain), typically within the broadly understood construction or care sector.[32]

By and large, neither identifying the situation as regards posting, nor reference to relevant national as well as EU law, including the CJEU case law, seem to have posed many difficulties for the Polish courts. The main aspects of posting the courts dealt with concerned the criterion of being subject to the Polish social security system, yet considerable interpretative dilemmas also induced the issue of differentiation between business trip and posting of workers for the purpose of calculating social insurance contributions. Finally, the remuneration of Polish workers posted abroad received some attention.

Given the quantitative abundance of the case law on the one hand, and on the other the *sui generis* homogeneity of the factual matrix and the resultant limited substantive scope of the judgments, the following analysis will be largely based on the relevant Supreme Court jurisprudence,[33] which although *de iure* binds other courts only in the case to which it relates, *de facto* constitutes an important benchmark for the lower instances courts, as the regularity of reference to its judgments proves.

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30. Ibid.

31. The Supreme Court heard several dozens of cases just between Company P (temporary work agency) and the social security institution (cf Supreme Court judgments: 18 November 2015, II UK 100/14, OSNP 2016/7/88; 12 April 2016, II UK 108/14, unpublished; 6 July 2016, II UK 49/15, unpublished).

32. The claims were brought individually or within the co-participation framework, either by posted worker versus posting company, or posting company versus social security institution with the participation of the interested parties. NB under the Code of Civil Procedure of 1964 the co-participation is not a collective action mechanism but rather a case management mechanism for a number of separate cases. Class actions procedure, in principle applies only to consumer law, product liability and tort liability (except for claims for the protection of personal interests).

33. The relevant analysis is based on 67 individual claims brought before the Supreme Court between 2004 and 2018. In most cases, the Court revoked the appealed judgments and remanded the case to the labour and social security court for reconsideration. NB, the substantive scope of the Supreme Court's judgments presented infra (see section 4) is generally representative of the overall dynamics of the judicial review in the lower courts.

4.1. Remuneration

Pursuant to the established line of judicial decisions in Poland, every worker who within a limited period of time performs work in the territory of a Member State other than the country in which he normally works has the status of a posted worker and is also entitled to the minimum remuneration and overtime pay in force in the territory of a Member State to which he or she was posted.[34]

While it is often still unclear as to which components of the wage should be regarded as constitutive elements of the minimum rates of pay in the host country, the Supreme Court in Poland firmly acknowledged that it is the duty of the Court, not the party, to take all actions, including obtaining access to the text and accepted interpretation of the foreign law, enabling proper orientation in the normative state which forms the basis for adjudication.[35] Thus, in principle, the Court *ex officio* determines and applies the applicable foreign law and in this context may ask the Minister of Justice to provide the text of this law and to clarify foreign court practice.

Notably, in the view of the Supreme Court, the provision of a contract of employment, which allows for Polish law to be applied to work performed abroad, is not an obstacle to the abovementioned interpretation. By virtue of Article 2 of private international law, in force at the time the relevant employment contracts were concluded,[36] parties can submit the employment relationship to the law of their choice if it remains related to this relationship. According to the Court, however, this provision could not be used in the case examined, as 'Article 3 Paragraph 1 of Directive 96/71/EC is a law enforcing its use, regardless of what law would be appropriate on a different basis'.[37]

Yet, according to the Supreme Court, it is permissible to stipulate in the company collective agreement in Poland that employees employed abroad are not covered by this agreement with respect to employment-related benefits and allowances (for example, retirement bonuses, holiday allowance, 14th salary or Jubilee Award). Employment abroad may therefore be a relevant criterion that justifies exclusion under Article 239 Section 1 LC.[38] As the Court explains, employment abroad is usually combined with the distinct situation of the employee in the factual and legal sphere, which *per se* may justify the non-inclusion in a company collective agreement.

In essence, work abroad is often associated with the change of not only the place of residence but also remuneration conditions. It results from the will of the employee and takes place after the employer assesses his or her fitness to work abroad. These basic conditions distinguish the situation of the employee employed abroad from that of

34. Judgment of the Supreme Court of 9 February 2010, I PK 157/09, OSNP 2011/15-16/200.
35. Judgment of the Supreme Court of 3 March 2011, II PK 208/10, LEX 817518 (Three former employees of G.H. LLC in 'O', brought an action for the payment of compensation for amounts due to the difference between the remuneration paid to them and the remuneration resulting from the minimum wage rate applicable in the Netherlands, an 8% holiday allowance, and also to award remuneration for overtime work).
36. Ustawa z dnia 12 listopada 1965 r. Prawo prywatne międzynarodowe, Dz.U. Nr 46, poz. 289 i 290 (repealed).
37. Judgment of the Supreme Court of 2 February 2012, III PK 49/11, LEX 1212058.
38. Article 239 Section 1, 'An agreement shall be concluded for all employees employed by the employers covered by an agreement, unless the parties thereto decide otherwise'.

workers employed in the country. Typically, conditions for remunerating an employee employed abroad would not have resulted, therefore, from the company's collective agreement. Of course, as the Supreme Court observes, one cannot exclude 'hybrid' solutions, in which, despite a separate agreement to work abroad on other terms of employment than in the country, the employee would not lose additional benefits from the collective agreement in force in a given company.

Still, as a general rule, employment abroad usually constitutes an important criterion which precludes the application of the provisions on unequal treatment in relation to employees employed in the country. Thus, the unequal treatment of the employee employed abroad does not mean that the company collective agreement is invalid on the basis of Article 9 Paragraph 4 LC.[39] In principle, the provision of a collective agreement which excludes a worker employed abroad from receiving certain employment-related benefits and allowances does not constitute a breach of the principle of equal treatment if his or her remuneration is higher than that of the person employed in the country.[40]

4.2. Business trip versus posting of workers

The Polish accession to the EU on 1 May 2004 opened up new markets for Polish goods and services in Western Europe. One of the largest beneficiaries of the EU regulations of the internal market were undoubtedly Polish entrepreneurs, who could start operations based on a cross-border model and freely provide services throughout the EU, *inter alia* by sending Polish employees to work in the area of other Member States. The latter, in practice, has usually been carried out within two legal frameworks: business trip and posting of workers abroad. After some time, however, this apparently neutral practice presented Polish courts with a considerable interpretative quandary.

One of the major issues in Poland, which in 2015, *nota bene*, also reached the Constitutional Tribunal,[41] appeared to be the determination of whether the work of the workers posted abroad may qualify as performed as part of a business trip, which is of considerable practical relevance when it comes to the calculation of social security contributions. In principle, the determination of the amount of contributions for social security, in accordance with Article 18 of the Act of the social security system,[42] is based on the income defined as 'revenues within the meaning of the provisions on personal income tax'. As a general rule, the daily subsistence allowance, as well as other payments

39. 'The provisions of collective labour agreements and other collective agreements, regulations and statutes based on the law and determining the rights and duties of the parties to an employment relationship, are not binding if they violate the principle of equal treatment in employment.'

40. Judgment of the Supreme Court of 11 September 2012, II PK 36/12, OSNP 2013/15-16/179.

41. In the judgment of 28 October 2015 (SK 9/14), the Constitutional Tribunal ruled on the incompatibility of Section 2 Paragraph 1 point 16 of the Regulation of 18 December 1998 on rules determining the basis for calculating contributions to pension insurance, with the Constitution, precisely to the extent to which it provided for a mechanism for increasing contributions due from the remuneration of a Polish employee employed abroad to the level of average wages, even if he earned much less.

42. Journal of Laws of 2007 No 11, item 74.

owing to a business trip, are not subject to income tax[43] and are also excluded from the basis for calculating contributions for pension insurance.[44]

The concept of a business trip is regulated in Article 77[5] LC, pursuant to which 'an employee who, at the employer's request, performs an official task outside the area where the employer has its registered office, or outside the regular workplace, is entitled to the reimbursement of any expenses incurred in relation to the business trip' (for example, daily subsistence allowance or reimbursement of local transport and accommodation costs). Pursuant to the established case law, a business trip takes place only when delegating or sending is imposed on the employee by way of an employer's command obliging him or her to undertake such a trip. Accordingly, a trip by a worker combined with the performance of specific work on the basis of an agreement concluded with employer in practice leads to a periodic change in the type of work agreed in the contract and place of performance,[45] and as such does not constitute a business trip within the meaning of Article 77[5] of the Labour Code.

Notably, as emphasised in the judgment of seven judges[46] of the Supreme Court of 19 November 2008,[47] differentiating between posting and a business trip hinges on determining whether the employee has to complete the task, which in the set of his duties is an unusual, occasional phenomenon, or whether he or she works for a short time in a different place (even abroad) from that agreed in the employment contract. In the view of the Court, one should differentiate between the performance of work for remuneration and a business trip, because the daily subsistence allowances and other benefits from this trip are not remuneration for work, but rather constitute other work-related benefits. Thus, in principle, the institution of a business trip should not be so freely applied, let alone instrumentally, for hiding salaries, working time, or to reduce taxes and other contributions.[48]

In the case of posting of workers abroad, pursuant to the established line of judicial decisions,[49] setting the basis for the calculation of social security contributions requires the exclusion of only the equivalent of daily subsistence allowances (but no longer the lump sum for accommodation). Notably, the relevant regulations allow the worker to deduct costs related to posting abroad only to the level of the aforementioned average remuneration. Thus, if the employee earns less abroad, he or she will pay contributions on the actual wage.[50]

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43. Article 21 Paragraph 1 point 16 of the Act of 26 July 1991 on personal income tax, Journal of Laws of 2016, item 2032.

44. Section 2 item 1 point 15 of the Regulation of 18 December 1998 on rules determining the basis for calculating contributions to pension insurance, Journal of Laws of 1998 No 161, item 1106, as amended.

45. Judgment of the Supreme Court of 8 November 2012, II UK 87/12, LEX 1341675.

46. See also Article 59 of the Act on the Supreme Court, Journal of Laws 2002 no 240 item 2052 'If the Supreme Court, recognising cassation or other measure of appeal, has serious doubts about the interpretation of the law, he may defer recognition of the case and present the legal issue to the composition of seven judges of this Court'.

47. See e.g. judgments of the Supreme Court of 20 February 2007, II PK 165/06, OSNP 2008/7-8/97; 4 March 2009, II PK 210/08, OSNP 2010/19-20/233; 11 January 2013, II UK 157/12, LEX 1555520.

48. Judgment of the Supreme Court of 17 February 2012, III UK 54/11, LEX 1157573.

49. NB only those whose income is higher than the average remuneration referred to in Article 19 Paragraph 1 of the Act on the social security system (approximately EUR 1,071).

50. Ibid. Section 2 Paragraph 1 point 16. See e.g. judgment of the Supreme Court of 8 March 2016, II UK 96/15, LEX 2007794; the resolution of the Supreme Court of 10 December 2015, III UZP 14/15, OSNP 2016/6/74;

Interestingly enough, in several judgments the Supreme Court also presented the position according to which the mere issuance by ZUS of A1 forms excludes the recognition that the person involved was on a business trip in the periods indicated therein. As a consequence, daily subsistence allowances and other payments due to business trips paid in the period certified by ZUS on form A1 will not be excluded from the basis for the calculation of social contributions. In other words, in the opinion of the Supreme Court, the issuance of the A1 form is allowed only in the case of the posting of workers. The Court does not indicate, however, which document confirming the application to a Polish employee of legislation in the field of social security would be appropriate during a business trip abroad.[51]

4.3. Temporary work agency and the criteria of being subject to the Polish social security system

The Polish Supreme Court has on numerous occasions pointed out that the primary link indicating the applicable social insurance law constitutes the place of work (*lex loci laboris*).[52] An exception that allows a Polish citizen to remain subject to Polish social security is short-term posting (less than 24 months) by a Polish employer (having a registered office in Poland or representation) under an existing employment contract, or posting to work on behalf of an entity related to the Polish employer. In the view of the Court, however, such an exception has its rational limits, delineated by the conditions set out in the Regulation No. 883/2004 on social security co-ordination. Determining whether a temporary work agency that delegates employees to work in other EU Member States 'normally carries out its activities' in Poland (within the meaning of Article 12 Paragraph 1 of Regulation No 883/2004), until recently, nonetheless, often raised considerable interpretative controversies.

In the judgment of 18 November 2015, *nota bene*, concerning the refusal to issue an A1 certificate to the applicant (employer),[53] the Supreme Court in the composition of seven judges, modified the presented hitherto line of judicial decisions. For years the relevant determination had been made dependent on achieving the 25% of the total required turnover in the posting Member State.[54] In the view of the Court, proper reasoning requires assuming that turnover at the level of 25% can at most create a factual presumption that the temporary work agency 'normally does business' on the territory of the sending state within the meaning of Article 12 Paragraph 1 of Regulation 883/2004. Thus, as a general rule, assessing whether the company is operating significant parts of the activity in the EU Member State of establishment requires analysing the case

judgment of the Supreme Court of October 30, 2013, II UK 112/13, LEX No. 1403878; 3 December 2013, I UK 156/13, OSNP 2015/2/25; 23 April 2013, I UK 600/12, OSNP 2014/2/28.

51. See e.g. judgments of the Supreme Court of 13 January 2015, II UK 205/13; 14 November 2013, II UK 204/13.

52. See e.g. judgments of the Supreme Court of 13 October 2016, II UK 336/15, LEX No. 2169488; 15 June 2016, II UK 232/14, LEX 2071115.

53. Judgment of 18 November 2015, II UK 100/14, OSNP 2016/7/88.

54. See e.g. judgments of the Supreme Court of 4 June 2014, II UK 550/13, LEX 1478710; 4 June 2014, II UK 565/13, LEX 1475235; 6 August 2014, II UK 31/14, LEX 1738485; 14 October 2014, II UK 32/14, LEX 1545034; 18 November 2014 r., II UK 46/14, LEX 1621341; 16 December 2014 r., II UK 93/14, LEX 177789.

by both the social security institution and the Court controlling its regularity in civil proceedings, all criteria characteristic to this activity.

As the Court explained, the turnover of a temporary work agency, in the form of global revenue from the sale of goods and services in a specific period, is worked out in both sending and host country. Yet in the country of its establishment, the temporary work agency in general does not achieve profit, mainly because of the free-of-charge character of the services.[55] In addition, in the country where it employs employees, the company bears significant administrative costs related to the conclusion of employment contracts, keeping records and fulfilling other employer's obligations, and above all, paying remuneration to temporary workers. Thus, in principle, the failure to achieve the relevant turnover requires an analysis of the circumstances of a specific case, taking other criteria into account.[56]

It is interesting that, pursuant to the view presented already in several Supreme Court judgments, the relevant set of applicable criteria should be tailored to the specificity of the given case.[57] Thus, for instance, it is self-evident that taking into account the relevant 'other criteria' in the case of a company with a structurally and administratively organised recruitment site, whose main activity concerns the recruitment of employees, it must be stated that the temporary work agency 'normally carries out its activity' in the country in which it mostly recruits employees.[58]

Similarly relevant to the valid application of the exception to the *lex loci laboris* rule remains the assessment of whether the posted worker, immediately before the start of his or her employment, was already subject to the legislation of the Member State in which his or her employer is established (within the meaning of Article 14 Paragraph 1 of Regulation No.987/09). In the view of the Supreme Court, the relevant wording implies any entitlement to insurance, including health insurance, even if at the same time a person was not subject to social insurance (for example, in the case of work provided under employment or civil contracts, or non-agricultural economic activity).

As a general rule, being subject to relevant insurance occurs *ipso iure* and is a consequence of the existence of the entitlement to this insurance. Thus, it is legally irrelevant whether

55. E.g. in Poland, pursuant to the Act on the promotion of employment and labour market institutions, it cannot collect amounts other than those related to the actual costs incurred in connection with referral to work abroad (*vide* Article 19d and Article 85 Section 2 point 7).

56. Notably, and not without significance for the view expressed in the relevant judgment of the Supreme Court, was also the fact that 'turnover of around 25% of the total turnover' as an indicator sufficient to establish the existence of a significant part of activities in the posting state, is only mentioned in the Practical Guide issued on the basis of authorisation included in point 7 of Decision No. A2. Given the fact that the latter is essentially a document introducing good administrative practices, the quantitative criterion indicated therein according to the Court is a non-normative criterion that cannot be treated as sufficient and decisive for relevant legislation in the field of social insurance.

57. See e.g. judgments of the Supreme Court of 19 April 2016, II UK 175/14, LEX 2290391; 20 June 2017, II UK 411/16, LEX 2321889; 14 June 2017, II UK 388/16, LEX 2326162; 15 November 2016, II UK 386/15, LEX 2178680; 15 November 2016, II UK 385/15, LEX 2178679; 14 June 2016, II UK 383/16, LEX 2326161, 14 June 2017, II UK 374/16, LEX 2321887; 11 October 2016, II UK 301/15, LEX 2159115.

58. See e.g. judgments of the Supreme Court of 5 April 2016, II UK 179/14, OSNP 2017/11/149; 14 June 2017, II UK 386/16, LEX 2321888; 13 October 2016, II UK 335/15, LEX 2169487; 12 October 2016, II UK 317/15, LEX 2162813; 13 April 2016, II UK 143/14, LEX 2290390.

insurance or payment of premiums for this insurance was applied for.[59] Likewise, a decision based primarily on the application of an additional criterion of being subject to relevant legislation for at least one month, resulting from the A2 decision,[60] without considering all others factors presented in the case, is incorrect.[61]

In essence, as expressed in several Supreme Court judgments, it should not be the case that the Polish social security authority takes away (without an adequate legal basis and justification) the national insurance entitlement in connection with their short-term work abroad from the Polish employees posted to work in other EU Member States, even if they were not reported and covered by the *lex loci laboris* legislation. The Polish social insurance institution does not have the 'anti-dumping' police authority and there is neither legal grounds nor justification for excluding workers posted to work in other EU Member States from the national social security system on the basis of an unverifiable assumption of the application of the social dumping practice. In the view of the Court, the contested practices of the Polish Social Security Institution not only weaken the competitiveness of Polish entrepreneurs, but also burden them with unnecessary and time-consuming applications for determining foreign social insurance entitlements that require extensive knowledge of foreign law.[62]

Conclusion

As the presented analysis reveals, the jurisprudence of the Polish courts on posting of workers within the framework of provision of services remains rather detached from the current national and European debates on posting. This is mainly down to the *sui generis* homogeneity of the factual matrix and the resultant limited substantive scope of the judgments. To date, the main aspects of posting out the courts dealt with concerned the criteria of being subject to the Polish social security system, yet considerable interpretative dilemmas also instigated the issue of differentiation between business trips and the posting of workers for the purpose of calculation of the social insurance contributions of Polish companies posting abroad. The remuneration of Polish workers posted abroad also received some attention.

The relevant lack of any posting-in case law in Poland may be to some extent attributable to the fact that Poland is a low-wage country, with a statutory minimum wage of PLN 2,250 (approximately EUR 516).[63] Thus, the typically most controversial component of minimum working conditions - wages - may not constitute an issue for the group of workers most often posted to Poland, that is, those from Germany or Italy. In practice,

59. See e.g. judgments of the Supreme Court of 6 August 2013, II UK 116/13, OSNP 2014/5/73; 12 October 2016, II UK 326/15, LEX 2165571.

60. Decision No. A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text of relevance to the EEA and to the EC/Switzerland Agreement), OJ C 106, 24.4.2010, p. 5–8.

61. Judgment of the Supreme Court of 3 March 2016, II UK 84/15, LEX 2015134.

62. See e.g. judgments of the Supreme Court of 13 October 2016, II UK 361/15, LEX 2169490; 13 October 2016, 337/15 LEX 2169489; 5 October 2016, 240/15, LEX 2155195 237/14; 13 April 2016, II UK 107/14, LEX 2290387.

63. Journal of Laws of 2018, item 2177, as amended.

however, as demonstrated in the PIP annual reports, some Polish employers still fail to provide posted workers with terms of employment no less favourable than those resulting from the provisions of Polish law, or try to bypass the provisions on the posting out by having recourse to financially more 'beneficial' regulations on business trips.[64]

At present, PIP is lacking real potential to sanction offences committed by posting employers. In this respect, PIP suggests initiation of legislative works aimed at sanctioning infringements of the Act in the course of administrative fines, and not – as is currently the case - in the course of proceedings concerning misdemeanours. In the view of PIP, the introduction to the PWA of a provision obliging employers to include employment conditions of posted workers in the content of employment contracts seems to be of equal importance to enforcement of the new legislative framework. This would allow labour inspectors to enforce obligations resulting not only from foreign legislation but also from a contract of employment. This constitutes an important source of mutual obligation on the parties to the employment relationship.[65]

References

Kwasiborski P. (2016) Planowana rewizja dyrektywy 96/71/WE w świetle dotychczasowych uwarunkowań prawnych instytucji delegowania pracowników w Unii Europejskiej, Europejski Przegląd Sądowy, 6, 12-21.

PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf

PIP (2018) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy - 2017 , Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf

Potocka-Sionek N. (2016) Nielegalne delegowanie pracowników tymczasowych do pracy w Niemczech a moc wiążąca formularza A1, Praca i Zabezpieczenie Społeczne, 10, 25-32.

Ślebzak K. (2017) O wymogu podlegania przed delegowaniem ustawodawstwu państwa członkowskiego, w którym siedzibę ma pracodawca, w rozumieniu przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, Praca i Zabezpieczenie Społeczne, 10, 10-17.

Ślebzak K. (2016) Delegowanie równoległe w świetle przepisów dotyczących koordynacji systemów zabezpieczenia społecznego, Praca i Zabezpieczenie Społeczne, 8, 9-15.

Szypniewski M. (2019) Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej, Warsaw, Wolters Kluwer.

Voss E, Faioli M, Lhernould J.-Ph. and Iudicone F. (2016) Posting of Workers Directive - current situation and challenges, Brussels, European Parliament.

64. PIP (2017) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy – 2016, Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/176401/Sprawozdanie%202016.pdf, 108-109.

65. PIP (2018) Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy - 2017, Warszawa, Panstwowa Inspekcja Pracy. https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf, 121.

List of cases

Constitutional Tribunal judgment, 28 October 2015, SK 9/14.

Supreme Court judgment, 12 April 2016, II UK 108/14, unpublished.

Supreme Court judgment, 6 July 2016, II UK 49/15, unpublished.

Supreme Court judgment, 9 February 2010, I PK 157/09, OSNP 2011/15-16/200.

Supreme Court judgment, 3 March 2011, II PK 208/10, LEX 817518.

Supreme Court judgment, 11 September 2012, II PK 36/12, OSNP 2013/15-16/179.

Supreme Court judgment, 2 February 2012, III PK 49/11, LEX 1212058.

Supreme Court judgment, 8 November 2012, II UK 87/12, LEX 1341675.

Supreme Court judgment, 20 February 2007, II PK 165/06, OSNP 2008/7-8/97.

Supreme Court judgment, 4 March 2009, II PK 210/08, OSNP 2010/19-20/233.

Supreme Court judgment, 11 January 2013, II UK 157/12, LEX 1555520.

Supreme Court judgment, 17 February 2012, III UK 54/11, LEX 1157573.

Supreme Court judgment, 8 March 2016, II UK 96/15, LEX 2007794.

Supreme Court judgment, October 30, 2013, II UK 112/13, LEX 1403878.

Supreme Court judgment, 3 December 2013, I UK 156/13, OSNP 2015/2/25.

Supreme Court judgment, 23 April 2013, I UK 600/12, OSNP 2014/2/28.

Supreme Court judgment 13 January 2015, II UK 205/13.

Supreme Court judgment, 14 November 2013, II UK 204/13.

Supreme Court judgment, 13 October 2016, II UK 336/15, LEX 2169488.

Supreme Court judgment, 15 June 2016, II UK 232/14, LEX 2071115.

Supreme Court judgment, 18 November 2015, II UK 100/14, OSNP 2016/7/88.

Supreme Court judgment, 4 June 2014, II UK 550/13, LEX 1478710.

Supreme Court judgment, 4 June 2014, II UK 565/13, LEX 1475235.

Supreme Court judgment, 6 August 2014, II UK 31/14, LEX 1738485.

Supreme Court judgment, 14 October 2014, II UK 32/14, LEX 1545034.

Supreme Court judgment, 18 November 2014 r., II UK 46/14, LEX 1621341.

Supreme Court judgment, 16 December 2014 r., II UK 93/14, LEX 177789.

Supreme Court judgment, 19 April 2016, II UK 175/14, LEX 2290391.

Supreme Court judgment, 20 June 2017, II UK 411/16, LEX 2321889.

Supreme Court judgment, 14 June 2017, II UK 388/16, LEX 2326162.

Supreme Court judgment, 15 November 2016, II UK 386/15, LEX 2178680.

Supreme Court judgment, 15 November 2016, II UK 385/15, LEX 2178679.

Supreme Court judgment, 14 June 2016, II UK 383/16, LEX 2326161.

Supreme Court judgment, 14 June 2017, II UK 374/16, LEX 2321887.

Supreme Court judgment, 11 October 2016, II UK 301/15, LEX 2159115.

Supreme Court judgment 5 April 2016, II UK 179/14, OSNP 2017/11/149.

Supreme Court judgment, 14 June 2017, II UK 386/16, LEX 2321888.
Supreme Court judgment, 13 October 2016, II UK 335/15, LEX 2169487.
Supreme Court judgment, 12 October 2016, II UK 317/15, LEX 2162813.
Supreme Court judgment, 13 April 2016, II UK 143/14, LEX 2290390.
Supreme Court judgment, 6 August 2013, II UK 116/13, OSNP 2014/5/73.
Supreme Court judgment, 12 October 2016, II UK 326/15, LEX 2165571.
Supreme Court judgment, 3 March 2016, II UK 84/15, LEX 2015134.
Supreme Court judgment, 13 October 2016, II UK 361/15, LEX 2169490.
Supreme Court judgment, 13 October 2016, 337/15 LEX 2169489.
Supreme Court judgment, 5 October 2016, 240/15, LEX 2155195 237/14.
Supreme Court judgment, 13 April 2016, II UK 107/14, LEX 2290387.
Supreme Court resolution, 10 December 2015, III UZP 14/15, OSNP 2016/6/74.

Chapter 10
Posting of workers before Portuguese courts[1]

Duarte Abrunhosa e Sousa

Introduction

Portugal is traditionally a country 'exporting' workers. The first Portuguese workers to provide their services outside the country were the navigators who explored the oceans by boat in the 15th century. In the following centuries, these navigators were present in Africa, Asia and South America. This could be considered the original movement of migration or 'posting' of workers from Portugal.

Four classic emigration flows from Portugal can be identified.[2] The first was directed mainly towards Brazil and lasted until World War Two (Padilla and Ortiz 2012: 161). The second, and probably the most important, was the movement concentrated in Europe between 1960 and 1974, which focused on France and Germany (Padilla and Ortiz 2012: 161). Third was the new European emigration trend started after Portugal joined the EU in 1986 (Padilla and Ortiz 2012: 161-162). Fourth and latest was the movement triggered by the 2008 economic crisis that forced the intervention of the Troika,[3] when almost 500,000 workers left the country,[4] sometimes temporarily, to work not only in other European countries but also in other Portuguese-speaking countries such as Brazil, Angola and Mozambique. In contrast to the other movements, the workers who left the country in this most recent migration were mostly highly skilled professionals, sometimes posted by their companies to countries where they had existing businesses.

This chapter presents an overview of the Portuguese case law on posting. Analysing case law regarding posting of workers in Portugal is, however, a difficult task. First, as will be seen, the number of judgments is very limited. Second, while access to the case law is easy concerning the high courts, it is more difficult when it comes to the first instance courts.[5] Nevertheless, it is possible to identify the relevant aspects of posting-related case law and conclude that most cases are disputes about outbound posting from Portugal, and that wages are usually the main issue.

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2. Beatriz Padilla and Alejandra Ortiz refer to four individual movements (Padilla and Ortiz 2012).

3. The Troika is the frequently used name of the team of representatives of the European Commission, International Monetary Fund and European Central Bank that negotiated the terms of the financial assistance to Portugal amidst the recent economic crisis.

4. An average of 80,000 workers left the country each year from 2007 to 2012 (source: Observatório da emigração - http://observatorioemigracao.pt/np4/3931.html).

5. Consulting first instance cases depends on personal knowledge or on researching all the labour disputes court by court. Moreover, as a civil law country, in Portugal, court decisions do not have a relevant impact, because judges are free to decide according to the law. Only superior court decisions have some effect because they are public and can have some influence on other judges.

To frame the national case law, Portugal's legal concept of posting of workers needs to be defined, and the numbers involved clarified.

1. Portuguese status quo on posting of workers

The flow of posting of workers in Portugal has a negative balance: the number of workers posted from the country is higher than posted workers received. In terms of their profile, the European Observatory of Working Life confirms the observations made by the General Confederation of Portuguese Workers (CGTP-IN) and the Labour Inspectorate that workers posted by national companies work mostly in construction, maintenance, logistics and agriculture,[6] while workers posted to Portugal by foreign companies are highly qualified technicians.[7]

There is no doubt that the research on posting of workers in Portugal is still at the beginning; even the European Observatory of Working Life admits in its Portuguese report that information about posted work in the country is scarce.[8] In 2015, the European Commission (EC) provided relevant numbers about the European environment regarding posting of workers. According to this data, Portugal had 64,970 workers posted from Portugal in 2015 under Article 12 of the EU Regulation on social security co-ordination.[9] In relative numbers, this makes Portugal the 10th highest EU country posting workers to another Member State. These numbers, however, represent just 3.2% of the overall number of workers posted inside the EU.[10] When it comes to posted workers received by Portugal, the country is only the 14th, which represents a mere 1% of all workers. Only 15,734 workers were posted in Portugal in 2015.[11] In 2017, according to the National Statistics Institute Employment Survey, the employed population was around 4.8 million.[12] The labour force posted from Portugal was therefore only 1.3% of the overall number of employed workers, while workers posted to the country accounted for just 0.3% from the workforce in 2017.

France is the main destination for posted workers from Portugal, receiving 44.4% of them,[13] an apparent continuation of the traditional emigration movement. More

6. Portuguese report of the European Observatory of Working Life. https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/portugal/portugal-posted-workers with data of 5 October 2010.

7. Workers from central and eastern Europe (CEE) posted to work in Portugal in agriculture are the exceptions.

8. The European Observatory of Working Life points out that one of the reasons for this lack of data is the absence of mandatory information for employers before 2009.

9. In the same year, the report on A1 portable documents issued in 2015, claims that 63,799 A1 portable documents were issued by Portugal for a 'posted employed person', while 211 were released for a 'posted self-employed person' (http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes).

10. The latest data provided by Instituto Nacional de Estatística (Statistics Portugal) points out that in the third quarter of 2018, the Portuguese employed population comprised 4.9 million (please see: https://ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0005555&contexto=bd&selTab=tab2&xlang=en).

11. The report on A1 portable documents issued in 2015 showed that posting of workers to Portugal did not change much between 2010 and 2015 – varying from 10,696 (2013) and 15,374 (2015).

12. More details can be found at https://ec.europa.eu/eures/main.jsp?catId=2645&countryId=PT&acro=lmi&lang=en&regionId=PT0&nuts2Code=%20&nuts3Code=&regionName=National%20Level

13. According to data provided by the EC from 2015, Spain receives 16% of workers posted from Portugal, and Belgium 15.7%. It is also relevant to point out the numbers from Germany and Netherlands: 7.6% and

than half of workers posted from Portugal work in the construction sector,[14] and are not usually highly qualified. However, the picture is different with workers posted to Portugal. In 2015, 56.2% of these workers were from Spain and 19.2% from France, with most working in industry,[15] business[16] or personal services.[17] Inbound posted workers are therefore likely to be more qualified.

The nature of posting in the years between 2010 and 2015 is striking. While the number of workers posted in Portugal was stable during these years, the number of workers posted by Portuguese companies to other EU countries fluctuated. The peak was 2013, when more than 80,000 Portuguese workers were temporarily deployed to another EU Member State. This is believed to be the result of the crisis, which had a critical impact on the Portuguese labour market.[18] Between 2013 and 2015, the number of outbound posted workers decreased steadily.[19] It is important to remember, though, that this data is only about workers posted in the EU. In the same period, and also induced by the economic and financial crisis, Portuguese workers were also posted to countries where many companies had business – including Angola, Brazil and Mozambique.[20] Thus, the impact of posting can be more significant than the numbers provided by the EC suggest. Posting inside the EU is only part of the Portuguese reality.

Even though the number of posted workers to and from Portugal is, at first sight, significant, the reality is that the country is not in a critical position as other countries are, such as Poland, that had a total of 463,174 workers posted to different Member States in 2015. This is due to a large extent to the difference in population size and workforce of the two countries. However, the number of posting of workers from Poland is almost six times higher than Portugal's, while the population and workforce is only three to four times higher.[21]

2. Portuguese legal framework on posting of workers

The Portuguese labour regulation is easy to gauge because the country has had a Labour Code containing all the key rules since 2003. The Labour Code of 2003 was,

6.2% respectively. The Portuguese report of 2015, available at: http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=PostWork&mode=advancedSubmit&langId=en&policyArea=&type=0&country=19&year=0.

14. The 2015 numbers show that 54.3% of workers posted from Portugal were working in construction. The second most representative is industry with 22.4%.

15. 36.6% according to 2015 data.

16. 23.3% in 2015.

17. 18.8% in 2015.

18. This impact was not only on the labour market but also in the legal framework. In fact, the Portuguese Labour Code was radically changed with effects and reactions from the unions. The CGTP-IN presented a complaint against the Portuguese government to the ILO's Committee of Freedom of Association (Abrunhosa e Sousa 2016).

19. According to a report on A1 portable documents issued in 2015 (http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes), 81,687 workers were posted just to Member State countries in 2013.

20. Since these countries have native Portuguese speakers, a significant number of Portuguese companies decided to develop their businesses there. This way there was a big movement of workers, mainly to Angola. Brazil was also a relevant destination for workers posted from Portugal, but the massive Brazilian crisis reduced this trend.

21. According to comparable data from the World Bank in 2017, Poland had a workforce of 18.3 million while Portugal had 5.1 million (please see https://data.worldbank.org/indicator/SL.TLF.TOTL.IN/). These numbers are slightly different from EC data.

however, replaced by the Labour Code of 2009. This is still in force, but with several important changes that took place during the intervention of the Troika and smaller reforms carried out by the succeeding government. Of course, Portugal allows collective bargaining, but by having a national regulation that brings all workers and employers together, it is easier for workers to access the legal rules. Likewise, for workers posted to Portugal, the access to an English version of the Labour Code could be enough to enable a worker to understand the essential regulations.

The present Labour Code regulates the posting of workers in Articles 6 to 8.[22] The Labour Code regulates workers posted from Portugal to both EU and third countries.[23] Article 6 describes posting to Portugal as the situation where an employer from a different country sends a worker to the country for one of the following reasons:

(i) as part of a service agreement with a national company
(ii) to work for a company of the same corporate group
(iii) to carry out a temporary agency contract.

This definition is also used also when posting from Portugal as stated in Article 8, which makes it the Portuguese general legal concept of posting. Also according to Article 8,[24] it seems that the posting of a foreign worker or a stateless person to Portugal depends on the existence a previous employment contract. If the worker has a previous service agreement with the company posting the worker to Portugal and not an employment contract, these rules are not applicable since the Labour Code only regulates traditional employment relations and not similar contracts. All conditions mentioned above are also used by the Portuguese lawmaker to determine the concept of workers posted from Portugal.[25] So posting of workers has the same grounds whether to or from the country.

Article 7 stipulates that posted workers have the right to a significant number of minimum conditions provided by law or collective bargaining. These include job security, maximum length of working time, minimum rest periods, vacations, minimum wage and overtime, transfer of workers from temporary work agencies, occasional transfer, health and safety at work, parental protection, protection on child labour and equality of treatment and non-discrimination.[26]

22. Posting of workers was first ruled in Portugal through Law 9/2000 that assured the transposition of Directive 96/71/CE in the country. Subsequently, in the Labour Code of 2003, posting of workers was regulated in Articles 7 to 9. According to Portuguese doctrine, while Article 6 delimits the posting of foreign workers or stateless people, Article 8 regulates the posting of workers hired by a Portuguese company that provides services in another country (Vaz Marecos 2012: 92).

23. Other authors underline that even though the Portuguese Law is a transposition of the Directive 96/71/CE, the rules are applicable to workers posted to countries beyond the EU (Romano Martinez 2013: 123).

24. In this way, D. Vaz Marecos goes further and argues that the employment contract could not be signed between the worker and the posting company, except in some cases, with a third party, such as temporary agency work (Vaz Marecos 2012: 93). Also, P. Romano Martinez states the same when explaining that posting assumes the existence of a previous employment contract, but not one signed with the work beneficiary (Romano Martinez 2013).

25. Article 8 of the Portuguese Labour Code.

26. In fact, most are similar to the ones provided by Article No. 3/1 of the Directive 96/71/CE.

According to Portuguese law, the definition of minimum wage for posting must include all allowances and grants paid to the worker because of the posting that are not the reimbursement of posting-related expenses, such as travel, accommodation and food. Vacations, minimum wage and overtime payment rules do not apply, however, in cases where a qualified worker is posted to provide the installation of goods by a company that is acting as a supplier.[27] The idea is to ensure the identical minimum conditions for workers posted in Portugal as all the other workers. Additionally, with this regulation, companies operating in the same market or within the same sector can compete fairly[28] (Vaz Marecos 2012) and avoid social dumping. Nevertheless, the Portuguese lawmaker decided to deviate a little from the Directive by adding job security, and parental and child labour protection as basic conditions. Where parental and child labour protection is a quite remarkable addition, it is not particularly clear what job security provision stands for in this context. In fact, by posting a worker from Portugal, job protection is always ensured upon his or her return. If the worker is posted to Portugal, however, the return to his or her own country will not add job security as provided in Portuguese standards onto his or her local set of rights. So, this effort by the Portuguese lawmaker seems to have no impact on inbound posted workers' rights.

Regarding posting from Portugal, Article 8 provides an exception to the rule that forbids an employer to supply a third party with a worker's labour (Vaz Marecos 2012).[29] This rule takes into consideration the workers posted by a Portuguese company to provide their services in a different country. Once again, the posted worker is protected by the minimum conditions considered as the decent basis for work.[30] For these workers, at least some Portuguese rules are always applied.

The legal framework on the posting of workers did not change with the replacement of the Labour Code in 2009, except in one respect. This obliged employers to inform the Labour Inspectorate of the identity of the posted worker, the recipient company, the workplace, and the predicted end and term of the posting.[31]

In 2017, Portugal finally adjusted the national regulation according to Directive 2014/67/EU.[32] This new regulation reformed the operation of the Labour Inspectorate on the posting of workers and reinforced its powers to control the Portuguese law on posting in Portugal.

When the posting rules are breached there are more ways to enforce the law. For example, administrative offences applied to a posting situation in Portugal can be demanded by the company of another EU Member State through a system of international co-

27. This exception is only acceptable if (i) the installation is essential for the product; (ii) there is a service agreement contract; and (iii) it does not last more than eight days in a year. Also, the exception does not include posting on activities related to construction activities.
28. P. Romano Martinez underlines the same idea, but points to the need to foster fair competition between companies in the EU by not distinguishing between different categories of workers (Romano Martinez 2013).
29. The other exceptions of the Portuguese law are temporary agency work and between group corporations.
30. Bernardo Lobo Xavier argued that the worker posted from Portugal has a minimum of protection ensured by national law (Lobo Xavier 2011: 867).
31. The breach of these conditions can result in the payment of an administrative fine.
32. Law No. 29/2017 of 30 May.

operation. However, it is important to point out that this adjustment went further than the Directive 2014/67/EU on the liability of all the employers involved in a particular posting.[33] In fact, according to Article 12 of Law No. 29/2017, when workers are posted in Portugal, the user company undertaking the work is severally liable to the employer for any minimum wage that was not paid to the worker. This way, national companies are discouraged from accepting the posting of workers from companies from other EU Member States that do not respect the basic wages rules.

Moreover, when a worker is posted from Portugal, there are some additional requirements that should be met regarding the duty of information. According to Article 108 of the Labour Code, a worker with an employment contract regulated by Portuguese law that is bound to work in another state for more than a month should be informed in writing before the departure about the following conditions:

(i) probable duration of the work to be done in a different country
(ii) currency and location where the payment will be fulfilled
(iii) repatriation conditions
(iv) access to healthcare.

This information is crucial for workers since it allows them to be aware of the effective conditions of work. Sometimes the most relevant information, more than the duration, when work is to be done outside the EU, is the currency of the payment and where it will be made.[34]

Furthermore, employing illegal workers is a crime in Portugal (2009/52/EC enforced by Law 29/2012). So the posting to Portugal should involve only workers who are permitted to live or work in the country, such as citizens of the European Economic Area or third-country workers with a regular visa.

3. Access to Portuguese courts on labour disputes

As well as having an adequate legal framework to protect labour rights, it is equally important to have instruments in court to make the legal framework enforceable.

Portugal has specialised Labour Courts that deal only with labour disputes. This specialisation improves the enforceability of labour law since the judges are keen to decide these kinds of conflicts. Additionally, these courts can be found in all major cities,[35]

33. The Portuguese lawmaker accepted the challenge given by Directive 2014/67/EU to take additional measures on a non–discriminatory and proportionate basis to ensure that in subcontracting chains the contractor of which the employer is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker (Article No. 12 of the Directive). Nevertheless, Portugal already has a general rule that makes liable the chain of contracts not only for administrative fines, but possibly also for labour credits (Article No. 551 of the Portuguese Labour Code).

34. A traditional problem in Portugal regards posting in Angola. The local currency has insignificant value, so it is quite difficult to pay into Portuguese banks. If the payment is made in Angola with the local currency, the worker would probably be in the worst working conditions during the posting period. If the posting is made inside the Eurozone this would not be a problem.

35. There are a total of 44 Labour Courts in Portugal according to Decree-Law No. 86/2016.

giving citizens a reasonable proximity to them. These courts can decide on disputes about employment contracts, labour credits, work-related accidents, professional illnesses, civil aspects related to the right to strike, and administrative offences regarding labour law and social security law, among other issues. If the decision is appealed, the case will go to the social section of Tribunal da Relação[36] and in some cases, to the Portuguese Supreme Court.

An additional, less extensive structure is provided by administrative courts. There are several city courts[37] and two appeal courts – one in the north of the country[38] and another in the south.[39] The final appeal can be made to the Supreme Administrative Court, which usually decides on cases about administrative law or taxes and sometimes on social security issues.

Almost all Portuguese cases decided by Courts of Appeal and Supreme Courts can be accessed for free through a website: www.dgsi.pt. So it is quite easy for anyone to read and analyse the Courts' decisions[40] if one understands Portuguese. Once again, this helps to make the law more accessible to all citizens.

4. Portuguese case law on posting

The case law on posting in Portugal is rather sparse, or rather, posting does not seem to be central to the judgments. Most of the cases reflect on posting as a side issue. From 2004 until 2018, the author found 16 cases in the following Portuguese courts:

- Labour jurisdiction:
  - Portuguese Supreme Court of Justice - 2 cases
  - Lisbon High Court (*Tribunal da Relação de Lisboa*) – 5 cases
  - Oporto High Court (*Tribunal da Relação do Porto*) –3 cases
  - Coimbra High Court (*Tribunal da Relação de Coimbra*) –2 cases
  - Évora High Court (*Tribunal da Relação de Évora*) – 2 cases.
- Administrative jurisdiction:
  - Administrative Supreme Court – 1 case
  - North High Administrative Court (*Tribunal Central Administrativo do Norte*) – 2 cases.

36. Presently there is a social section in all High Courts located in Lisbon, Oporto, Coimbra, Évora and Guimarães.
37. In Aveiro, Braga, Coimbra, Mirandela, Penafiel, Oporto and Viseu.
38. Located in Oporto.
39. Located in Lisbon.
40. The courts of first instance are not included on the website.

These cases can be divided into three groups depending on their subject matter:

(i) social security/taxes
(ii) labour law
(iii) where posting is a completely marginal subject.

These divisions show the kinds of subjects that are usually decided in the Portuguese courts.

4.1. Cases concerning social security/taxes

Social security and taxes were key themes in three cases decided in Portugal. The case decided in the Supreme Administrative Court[41] relates to an important formal condition of posting of workers. For a better understanding of this case, it's important to point out that according to Regulation No. 1408/71 on the application of social security schemes to employed persons and their families moving within the EU, there are some exceptions to the common rule. As a general rule, a worker to whom this Regulation applies shall be subject to the legislation of a single EU Member State only.[42] So a worker employed in the territory of one EU Member State shall be subject to the legislation of that State even if he resides in the territory of another EU Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another EU Member State.[43] An important exception to this rule will occur when a worker employed in the territory of an EU Member State by an undertaking to which he is typically attached, and who is posted by that undertaking to the territory of another EU Member State to perform work there for that undertaking, shall continue to be subject to the legislation of the first EU Member State, provided that the anticipated duration of that work does not exceed twelve months and that he or she is not sent to replace another worker who has completed his or her term of posting.[44] Therefore, to avoid the unnecessary changes of social security entities, the regulation states that postings under twelve months' duration should continue in respect of the rules of the country where the worker is posted form. This was the key problem in this examined case.

These rules accounted for the refusal of the Portuguese social security services to accept the E101 document (a predecessor of the A1 certificates currently issued) from a Portuguese company that posted a worker in a different Member State.[45] The company in question had EUR 62,000 in national sales in Portugal in the year before, while the global amount in sales was EUR 4 million. Portuguese social security decided, therefore, that the company did not have significant activity in the country.

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41. Case 0405/15, 4 February 2016, available at www.dgsi.pt
42. See Article No. 13 of Regulation 1408/71.
43. See Article No. 13/2a) of Regulation 1408/71.
44. See Article No. 14/1a)(i) of Regulation 1408/71.
45. This document allows the posted worker to continue to be bound to the social security regime of his or her country of residence. According to the Portuguese social security, the exceptions expressed in Article No. 14/1a) shall be interpreted with the support of decision 181 of the Administrative Commission on Social Security for Migrant Workers. To avoid the letterbox companies, the Commission asserts that the E101 document should only be used where companies have a significant activity in the country where the head office is located.

For its side, the company argued that the activity was significant enough for Portuguese standards and appealed to the Supreme Administrative Court. In the decision, the Court pointed out that the workers for whom the E101 was intended had contracts without any fixed term. These were workers who belonged to the company's staff and not precarious workers contracted solely to be posted for another company. Since the workers already had an employment status with the company, the Court's decision was not to intervene in these cases. The obligation to have a significant activity at the head office country only applies to the cases where an E101 document is required for workers employed to be posted. Consequently, the Court decided that the Portuguese social security's refusal was illegal. This was probably one of the most comprehensive cases on posting identified and analysed for the purpose of this chapter.

Two more cases were decided by the administrative jurisdiction, but in the North Administrative High Court. These cases only marginally refer to posting of workers. In the first, the Court had to deal with a problem related to daily allowances and social security,[46] and had to establish if these allowances were effective remuneration for this matter. Posting was only a small aspect of the problem because the key was to understand if workers and the employer should pay social security for these daily allowances. The possibility of being paid in a context of posting of workers was considered but not admitted by the Court as a relevant subject in the case. The Court decided that the amounts paid to workers should be subject of social security.

A similar case[47] of legality of daily allowances regarded taxes. Here, however, the Court accepted that the company was paying regular allowances, recognising that the worker in question was indeed posted several times and that therefore, expenses should be paid. The Tax Administration was trying to show that those daily allowances were not motivated to pay expenses and that it was just an attempt to avoid taxes.

4.2. Labour disputes

Only a few Portuguese cases are the result of labour disputes. In addition, it's important to point out that the Portuguese rules on posting are the same irrespective of the worker's nationality or his or her destination country. So, while some of the examples are not related to EU workers, they are critical in understanding how national courts manage these subjects. They also reveal the lack of depth that posting case law has in the country.

A case decided by Coimbra High Court was probably the most important concerning labour law disputes related to posting.[48] This is one of the few cases in Portugal where the concept of 'posting of workers' became part of the decision's summary.[49] However, it concerned a posting situation from Brazil - a non-Member State country - to Portugal,

46. Case 00431/15.1BEVIS, 4 May 2017, available at www.dgsi.pt
47. Case 00764/13.1BEPNF, 10 November 2016, available at www.dgsi.pt
48. Case 773/06.7TTAVR.C1, 17 March 2009, available at www.dgsi.pt
49. The decisions of Portuguese High Courts are usually underlined with a summary of the key aspects.

where damages were demanded by a Brazilian worker who was dismissed from a Portuguese company where she was supposed to represent a Brazilian company's IT products. However, the Court argued that this was not a case of posting of workers according to Portuguese law because the worker had started work on a tourist visa. The decision stated, except for work accidents, the rules of the Labour Code do not apply to workers who are working in Portugal without a permit (Romano Martinez 2013). Because it was not a posting situation and the worker was not permitted to work in Portugal, she was not protected by the Portuguese labour law.

Another posting-related case was decided by Évora High Court and it concerned the differences in salaries in the course of outbound posting.[50] In this case, a worker was posted from a Portuguese company to Luxembourg and after his return to Portugal demanded the payment of both the minimum wage during the posting, according to a particular Luxembourgish collective agreement, and the overtime by the same collective agreement standards. The worker's injunction was supported by the fact that the Portuguese employer only paid a reduced hourly rate[51] and paid less for overtime in comparison to that paid in Luxembourg. Although the worker provided evidence of the wage differences, the employment termination and the expiration of the right to demand credits against the employer were relevant side issues taken into account.[52] Still, this is one of the only cases where a worker posted from Portugal to another country went to court to ask for wage differences. However, for formal reasons, the Court did not accept the worker's claim.[53]

In another case Coimbra High Court[54] decided in a dispute on damages after a posted worker had a work accident in France, where he was posted by the employer. He demanded that the 2015 French minimum wage should be the reference for the damages' calculation. The Court decided otherwise. Basing its judgment on Article 8 of the Portuguese Labour Code, the Court's defence was that the application of the most favourable regime should not have the French law under consideration, but the Portuguese one. The main argument was very simple: the employment contract was regulated by Portuguese law. The Court stated that the posting of a worker employed in Portugal to work in France does not implicate, *per se*, the application of the *salaire minimum de croissance*.[55] This is highly relevant since the Posted Workers Directive explicitly requires that the host country's minimum wage constitutes the minimum that has to be paid to the posted worker. In this regard, the Court did not deny the posting, but defended the application of Portuguese law.

The second case on work accidents was decided by the Évora High Court.[56] The dispute in this case was related to the calculation of the pension resulting from a work accident.

50. Case 407/13.3TTTMR.E1, 30 September 2015, available at www.dgsi.pt
51. According to the case, the worker was paid the equivalent of EUR 8.50, when the Luxembourgish collective agreement demanded EUR 17.44.
52. In Portugal, workers can only demand damages or unpaid wages for one year after the employment is terminated.
53. In this case, the worker did not provide evidence of the wage while posted in Luxembourg.
54. Case 233/16.8T8LRA.C1, 12 January 2018, available at www.dgsi.pt
55. French minimum wage.
56. Case 474/10.1T2SNS.E1, 20 December 2012, available at www.dgsi.pt

The worker was employed by a company that had posted him to the Netherlands on a regular basis for periods of three months, always with ten-day intervals in Portugal. The worker then signed a new contract and returned to the Netherlands for another three months, and so on. The problem was that the worker's wage was EUR 650 per month, but when posted to the Netherlands, the wage was upgraded to EUR 13 per hour (approximately EUR 2,860 per month).

Even though the work accident happened while working in the Netherlands, the first instance court decided to calculate the indemnity and the pension taking the monthly salary and not the salary the worker received as a posted worker into account. The Court took this position because the worker was on the fourth day of the employment contract.[57] The worker appealed in order to ensure an upgrade on both indemnity and pension, demanding not only the wage paid in the Netherlands as a reference but also the daily allowance for expenses. According to Portuguese law, the compensation resulting from a work accident must be calculated with the regular salary at the time of the event. In this case, the Court decided that the worker was partially[58] right concerning the pension and indemnity calculation formula. However, the daily allowance to support expenses was not included in this calculation since the Court decided that the worker had not demonstrated an economic advantage with that payment. According to the Court, the allowance was only intended to provide for the cost of living in the Netherlands. This way, it could not be interpreted as remuneration. So, with this case, we see a Portuguese court analysing the posting of a worker from Portugal and the consequences which posting could have in work accidents in terms of compensation. Moreover, the Court's decision gave a restrictive interpretation of remuneration that didn't include daily allowances for pension and indemnity calculations in the context of work accidents when the worker does not show any economic advantage from this payment.

In a different context, Lisbon High Court had to decide a case regarding a plea of unjust enrichment by a posting worker against a temporary work agency.[59] The appellant worked for this company from 2009 to 2015 and was posted to Germany, Belgium and Denmark as a locksmith. After the final employment, the worker demanded a payment of EUR 23,950.98, an amount that related to several deductions his employer had made from his salary. However, the worker did not demand it within the limitation period of one year after the employment termination. Because of this he decided to seek compensation on the grounds of the employer's unjust enrichment instead. The critical issue was whether the concept of posting applied to that particular work. But the case was closed with the Court deciding on the basis of the end of the time limit for claiming damages against the employer.

With these cases it is possible to remove some of the uncertainty around the concept of remuneration, mainly where daily allowances or compensation for expenses are key facts in disputes. Posting of workers' rules were commonly used to distinguish between

57. The worker signed a new contract every time he returned to the Netherlands.
58. In this aspect, the Court did not give full merit to the worker's position, because his calculations were based on a 10-hour working day and not the 8 hours that were proved in Court.
59. Case 24505/16.2T8LSB.L1-4, 31 May 2017, available at www.dgsi.pt

economic advantage to a worker with daily allowances and expenses compensation. This way, unsurprisingly, work accidents are a relevant factor of dispute, while promoting this debate on remuneration issues. Clearly, Portuguese courts aim to focus this concept of remuneration in a restrictive interpretation. Moreover, it seems that national courts still have limited experience in dealing with this type of case, and case law should be improved with more substantial cases. The current debate on posting has essentially been about remuneration as opposed to any other aspect of employment conditions included in Portuguese law and the EU Directive.

4.3. Cases where posting is a marginal subject

Last but not least, the parties to some of the cases discussed here only use posting to frame their argument in court. Two examples of this were heard before the Supreme Court of Justice. Both examined work accidents in the context of posting. In the first case, the concept of posting was used to add weight to the dispute over the death in Rome of a Portuguese ambassador who was working for the Community of Portuguese Language Countries.[60] The widow and daughter of the Portuguese ambassador argued that since he was in Rome to hold a meeting shortly after the accident, the rules on posting should be applicable. The Court did not follow this line of argument because the ambassador was in the Rome region on holiday when the accident happened, and so ruled that it was neither a posting situation nor a work accident.

In the second case, the dispute was about international territorial jurisdiction and concerned a work accident that happened to a Portuguese worker in Andorra. The worker was hired by a French company and insured by a French insurance company.[61] Posting was used to frame the case because the Court called it after the reform of the Labour Code process. According to this reform, the international litigation jurisdiction by Portuguese courts regarding posting from Portugal could be accepted. However, in this case, the worker was demanding that the insurance company updated the amount of damages, an issue that is the purpose of particular regulation.[62] The Portuguese Court decided, however, that it did not have any jurisdiction to rule in this case because it had no connection to Portuguese law: it was the plea of a Portuguese worker against a French insurance company regarding a work accident in Andorra.

The Lisbon High Court decided another case in which posting was a side issue.[63] Here, the international litigation jurisdiction of a Portuguese worker employed by a Portuguese couple to work in their home in Austria as a domestic servant was under debate. The employment was arranged by an agency. After a few months, the worker decided to leave and demanded wage credits in a Portuguese court. The Court decided that even though an agency had arranged the employment, the mere fact that there was an intermediary did not create a link that made it a posting situation. Although the

60. Case 08S3047, 9 September 2009, available at www.dgsi.pt
61. Case 1710/10.0TTPNF.P1.S1, 25 January 2012, available at www.dgsi.pt
62. In this case, Regulation No. 44/2001.
63. Case 27891/16.0T8LSB.L1-4, 31 May 2017, available at www.dgsi.pt

parties did not bring up the topic of posting in their allegations, the Court decided to verify whether posting was in question. The Lisbon High Court decided that it was not a posting of workers situation, but rather a domestic dispute that should be claimed in Austria because of the lack of connection to Portuguese jurisdiction - the Portuguese courts had no jurisdiction in this case.[64]

The Lisbon High Court also briefly mentioned posting of workers in an earlier case.[65] Here, the Court used the concept of posting to show the difference between employing a non-national worker and having a worker posted in Portugal.[66] Moreover, in three other cases,[67] the same Court examined some atypical employment contracts[68] where workers were employed in Portugal to work in several companies in different countries. In this debate, the Court focused on Article No. 6/1a) of the Rome Convention, which is the law applicable to contractual obligations,[69] including posting of workers. In all these cases, national courts decided that the key is to understand the connection of the employment to Portugal and not the contract signed by both parties.[70] So it was assumed to be the jurisdiction of the national court.

The record of cases of posting of workers as a side issue is limited to four cases in the Oporto High Court, three of which have relevance here. The first[71] concerned the termination of the fixed-term contract of a worker that was posted by a Portuguese company to Austria. The worker demanded damages, arguing that his fixed-term contract was illegal. However, the Court decided that a term contract is not incompatible with posting of workers. The second case[72]concerned, once again, the question of jurisdiction of Portuguese courts over international disputes. This was a work accident suffered by a Portuguese worker working for a Spanish company and insured by a Spanish insurance company. The Court felt the need to explain that it would only have jurisdiction if it were a posting of workers situation. In this case, the worker was working for a Spanish company in Spain, so the Court did not have jurisdiction. Finally, in the third case,[73] the concept of posting was relevant in a dispute where an employee was demanding the payment of several different wage credits. Some of the amounts demanded were related to the termination of posting to Romania outside the agreed 30-day notice period. The employee received EUR 2,235.80 per month for expenses in Romania, but the employer communicated the termination of the posting with only two days' notice. The Court decided to deny the claim in the part connected to posting, because those amounts were payment of expenses rather than remuneration.

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64. The decision was supported by the Regulation (EU) No. 1215/2012.
65. Case 6197/2007-04, 7 November 2007, available at www.dgsi.pt
66. The case about the requirements of employing a Brazilian citizen who was not legally in the country.
67. Case 2998/14.2TTLSB.L1-4, 4 November 2015; Case 149/04.0TTCSC.L1-4, 15 December 2011 and Case 914/09.2TTLSB.L1-4, 18 April 2012, all available at www.dgsi.pt
68. All three cases were called as multi-location contracts.
69. According to this Article 'a contract of employment shall, in the absence of choice (…) be governed: by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country'.
70. In one of the cases, the employment contract stated that the Cayman Islands had jurisdiction, but the work was undertaken in Portugal.
71. Case 1531/11.2TTPNF.P1, 11 May 2015, available at www.dgsi.pt
72. Case 1109/10.8TTPNF.P1, 6 December 2010, available at www.dgsi.pt
73. Case 721/17.9T8PNF.P, 11 April 2018, available at www.dgsi.pt

The Oporto High Court had no cases where posting was the main subject. Nevertheless, the three analysed cases had totally different backgrounds and show that posting could be a part of a different kind of labour dispute, namely, work accidents, court jurisdiction, and breach of period of notice. Overall, all national courts, when needed, use the concepts of posting to understand which regulation should be applied in each case. In most of the cases, posting was used only to frame the judge's arguments.

4.4. Overview of Portuguese case law on posting

As we can see, the case law in Portugal regarding posting of workers is surprisingly limited; it is not a standard subject that workers, the national social security or employers take into court. Nevertheless, 16 cases worthy of report were found.

One interesting finding of the present research is that the most relevant cases were not brought into a Court of Appeal from one of the major Portuguese cities such as Lisbon or Oporto. Indeed, three cases on labour issues were decided by High Courts in Évora and Coimbra. So the subject of posting of workers has a critical impact not on the country's key economic regions, but in the most peripheral. Since the strongest economic regions in Portugal have more opportunities, most workers in these cases live in less developed locations.

Another interesting finding is the fact that work accidents and daily allowances are the subjects that boost the few existing judicial discussions on posting, with one case even dealing with both. Of course, I did not have access to all first instance cases that were decided or resulted in a settlement, but it is surprising that the volume of posting of workers from Portugal does not stimulate more case law in the country. It is important to add that the case law on posting is so limited that some findings relate to decisions where the topic is not relevant at all.

5. Critical reflection on the limited case law in Portugal

We can see from all the cases discussed in Portuguese High Courts that they are not representative of the trend of posting from the country, not even when the number increased during the country's crisis. So it is fundamental to try to understand why there is such a limited amount of case law in Portugal.

First, by taking other national reports into account, it seems that some workers decided to demand their labour dispute in the country to which they were posted. Cases identified in the national reports of Germany, France and the Netherlands seem to show that Portuguese workers are more active in foreign courts regarding posting disputes. So the limited number of cases in Portugal might be partly the result of transferring the conflicts to courts in the countries where the workers were posted.

But what would be the reason for these 'transfers'? One possibility could be the widespread assumption in Portugal that justice is too slow and unfair towards ordinary

citizens.[74] Portuguese people often have the impression that it is pointless most of the time to present an injunction in court. And indeed, there have been several relevant cases where Portugal was condemned in the European Court of Human Rights (ECHR) because of the slowness of the justice.[75] But is this a fact or a mere impression? In 2017, Bank of Portugal staff conducted research into civil case law procedure between 1993 and 2013 (Coutinho Pereira and Wemans 2017). The findings were striking. According to this study, Portuguese courts take an average of 30 months to provide a final decision (Coutinho Pereira and Wemans 2017: 8). And in cases that seek exclusively to deliver a judicial debt recovery, the average duration grows to 40 months (Coutinho Pereira and Wemans 2017: 8).

This data shows that, in general, the Portuguese courts do not respect Article 6(1) ECHR regarding the reasonable time a case should be decided. However, most of the research data examines the duration of cases in all the topics, so it is important to underline that labour cases are relatively quicker than disputes in other fields of law and that there is a clear reason for this - most of the labour cases are considered 'urgent'.[76] When a case is urgent, it means that none of the deadlines for the parties stop at judicial vacation periods.

The author believes, therefore, that in traditional labour cases, the slowness of the courts is only an impression of justice, and that the Portuguese believe in general that justice is slow. It is probably for this reason that workers decide not to demand an injunction against an employer when the posting rules were not correctly applied, or they choose to have the dispute in the country where they were posted.

The substantial economic and financial crisis that Portugal suffered in the past five or six years provides another clue. Several companies started to depend on business outside the country. So for many workers, the only chance to maintain their subsistence[77] or way of life[78] was by accepting challenges in a different country. When returning to Portugal to work for the same company, they may well have decided that it would not be advantageous to enter into a judicial conflict with their employer.[79] Nevertheless, the consequences of the recent boom of posting from Portugal are not yet visible. Workers can demand damages or work credits up to one year after the employment is terminated.

Finally, most workers posted in Portugal are well qualified and have better conditions in their home countries. Consequently, legal disputes during posting in Portugal are not likely to happen.[80]

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74. After analysing the data from Portuguese courts, Guilherme Alberto Mendes Pereira argued that the justice in Portugal is too slow (Mendes Pereira 2012). However, this research is supported mainly in the appeal courts.

75. Portugal had 295 cases in the ECHR where the principle of reasonable time provided by Article No. 6/1 of the Convention was under discussion.

76. The most important cases in courts are dismissals disputes, which are urgent in any Portuguese court. In this situation, when the first instance court does not decide within one year, if the dismissal is considered illegal, the State will pay the salaries of the workers after this period on behalf of the employer.

77. For non-qualified workers.

78. For qualified workers.

79. It is important to remember that most cases where posting was an issue were initiated by workers against former employers.

80. Nevertheless, the opposite situation is a more natural occurrence. In fact, the ECJ's case C-164/99 held the dispute on a posting from a Portuguese company to Germany (Gomes 2007: 78).

Conclusion

The posting of workers is not a common topic in Portugal, either in case law or in traditional legal research. This is surprising considering that Portugal is in tenth place in the EU in terms of the number of outbound posted workers; the lack of available data therefore made the present task very demanding.

Moreover, this chapter demonstrated that Portuguese case law on posting is not only insignificant in terms of numbers, but also with regards to the content. The lack of depth in most of the cases means that it is difficult to identify future trends. Domestic courts touched only lightly on the subject for the most part, so that only a few cases could be considered interesting for the present research.

Still, it was possible to identify some trends even from this small number of cases. First, while all cases are about posting from Portugal, they do not represent the overall numbers of posting, so there is no causal link between the impact of posting in the labour market and litigation. None of the cases were about posting to Portugal. Second, in most decisions, courts only needed to rule on posting as a side issue, which suggests that the national legal framework here is not yet mature enough. In particular, it seems that some decisions are not very well directed, such as Case 233/16.8T8LRA.C1, where the Court decided not to apply the basic principle that the host country's minimum wage constitutes the minimum that has to be paid to the posted worker. Third, despite posting not being the main subject on most studied cases, there is a trend for courts to decide against the worker's claim regarding his or her posting. This does not mean that the courts are not right, but for now this is a fact.

Work accidents outside of Portugal and disputes on daily allowances are the topics that usually bring posting to courts, but the insignificant number of examples cannot be identified as a trend. Still, the major issue is always about the different remuneration gaps, since Portuguese workers are usually posted to countries with higher salary standards. The lack of confidence in Portuguese justice does not seem to be the only trigger that causes this absence of case law and academic debate. We can assume some legal disputes are commonly developed by workers in the country to which they are posted, with these cases becoming integrated into a different country's case law.

The posting of workers is an unexplored subject in Portugal, but a more emblematic case could bring it into sharper focus in the future. Sometimes, vital concepts used in our society are not strongly reflected in court decisions and need to be enriched by an effective case law. With the subject of posting of workers in Portugal, that course is still being developed.

References

Abrunhosa e Sousa D. (2016) Portuguese labor austerity measures and the principle of freedom of association, International Labour Rights Case Law, 2 (2), 136-141.

Coutinho Pereira M. and Wemans L. (2017) Produtividade na justiça cível em Portugal: uma questão incontornável num sistema congestionado, Revista de Estudos Económicos. III (1), 1-32. https://www.bportugal.pt/sites/default/files/anexos/papers/ree201701_p.pdf

Gomes J. (2007) Direito do trabalho, Coimbra, Coimbra Editora.

Lobo Xavier B. (2011) Manual de direito do trabalho, Lisboa, Verbo.

Mendes Pereira G.A. (2012) A morosidade da justiça em Portugal: a perceção dos juízes dos tribunais de 2.ª instância. http://repositorium.sdum.uminho.pt/bitstream/1822/23454/1/Guilherme%20Alberto%20Mendes%20Pereira.pdf

Padilla B. and Ortiz A. (2012) Fluxos migratórios em Portugal: do boom migratório à desaceleração no contexto de crise. Balanços e desafios, Revista Interdisciplinar da Mobilidade Humana, 20 (39), 159-184.

Romano Martinez P. (2013) Código do trabalho Anotado, 9th ed., Coimbra, Almedina.

Vaz Marecos D. (2012) Código do trabalho anotado, 2nd ed., Coimbra, Coimbra Editora.

Chapter 11

Posting of workers before Slovenian courts[1]

Barbara Kresal

Introduction

Slovenian courts have rarely had the opportunity to address the issue of posting of workers, and therefore case law on posting is underdeveloped. The labour and other courts have recently seen a slight increase in the number of cases concerning posting of workers, but the questions raised have been limited to a small number of issues in what is a broad area and refer almost exclusively to outbound posting. Minimum rates of pay valid in the host country and the entitlement of a posted worker to the reimbursement of travel and other work-related costs are issues already dealt with in the courts, and special attention has been paid to the differentiation between the posting of workers and business trips. Two additional posting of workers issues previously tackled by the Slovenian courts are the calculation of a pension base in respect of the periods of posting, and the taxation of wages and other payments received by the posted worker. However, there are still many important legal aspects of posting of workers that have not yet been addressed. For example, there is no case law on any of the collective labour rights of posted workers. Most claims involving posting of workers have been brought before the labour and social courts (payment of wages during posting and certain other individual labour rights as well as pension rights), whereas the Administrative Courts dealt with the rest of these cases (taxation issues).

Bearing in mind the fact that the number of outbound posted workers is particularly high in Slovenia, and that this number has been rising significantly over the past ten years (especially during and after the crisis), it is somewhat surprising that more cases involving posting of workers have not been brought before the courts. At the same time, it would be incorrect to assume that the absence of claims means that rights of posted workers are fully respected in practice. Examples of violations of the rights of posted workers reported in the media and in different research reports reveal complex reasons behind the fact that posted workers do not often claim their rights in legal proceedings. Many of them are in a weak position and highly dependent on their employers. They are very often not unionised, have low qualifications and poor employability prospects. They are very vulnerable and afraid of losing their jobs. It's not often that they dare to claim their rights or even have the means and knowledge to do so. Figures show that construction workers account for most outbound posted workers. Another interesting feature is that many posted workers from Slovenia are third-country nationals, usually

1. Please refer to Annex VII for an overview of the cases analysed in this chapter.

coming from Bosnia and Herzegovina and other parts of the Balkan region. This makes the situation even more complex, not just in legal terms, but also from the cultural and social-economic perspective.

In the coming years, the growing number of posted workers will possibly prompt more court cases involving posting and consequently more detailed case law. The recent slight increase in the number of such cases brought before Slovenian courts could indicate such a trend. However, for the complex reasons mentioned, expectations in this respect should not be too high.

Despite the rather poor and fragmented case law on posting, this chapter seeks to analyse the case law that does exist, and explain its main features based on this critical analysis. Section 1 provides some basic figures on posting and the employment situation in Slovenia and puts the existing case law on posting of workers into a broader context. The relevant legal framework is then explained in section 2, with the legal rules governing posting to and from Slovenia as well as the organisation and functioning of the courts in Slovenia briefly presented. The main legal debates on posting are summarised in section 3, and section 4 gives an analysis of the most relevant judgments dealing with posting of workers. Judgments delivered by different courts (labour, social, and administrative) are grouped into three subsections dealing with labour issues, social security issues, and all other issues related to posting of workers. The Conclusion summarises the main findings and attempts to evaluate the relevance of the Slovenian case law on posting of workers from a broader EU perspective.

1. General background and basic statistics on posting of workers

Slovenia has two million inhabitants, approximately 930,000 of whom represent the economically active population. In 2017, the employment rate was just above 70%, and the registered unemployment rate around 9.5% (6.6% using Eurostat and ILO methodology), GDP per capita was approximately EUR 21,000 and real GDP growth was 5% (IMAD 2018a: 21-26; IMAD 2018b: 37, 110). In 2018, the average monthly gross wage was around EUR 1,700 (EUR 1,100 net), which sets Slovenia slightly apart from other central and eastern European (CEE) countries where wages have often been significantly lower. This is even more the case for the statutory minimum wage, which was around EUR 800 per month in 2017 (gross), EUR 840 in 2018 and, from 1 January 2019, EUR 890 (approximately EUR 670 net). In 2020, the statutory minimum wage will be raised to around EUR 940 gross (approximately EUR 700 net).

Slovenia was hit hard by the financial crisis in the late 2000s, experiencing a substantial fall in GDP, a rise in unemployment and other negative economic and social consequences. However, since 2014, and especially since 2016, the economic and social indicators have shown some improvement.

It is interesting to note that over the decade since the crisis, Slovenia has experienced a dramatic increase in outbound postings of workers. The number went up from around 25,000 A1 forms (posting from Slovenia) issued in 2010, to around 164,000 in 2016,

which constituted a 572% increase in this six-year period (European Commission 2018, European Commission 2017, De Wispelaere and Pacolet 2018). This makes Slovenia the EU Member State with the highest growth of posting of workers and one of the highest shares of posted workers abroad in the total labour force: in 2016, around 5% of the Slovenian employed population was posted abroad, whereas the EU average was 0.4% and the numbers for some of the other countries as follows: Luxembourg 3.8%, Slovakia 2.2%, Croatia 1.7% and Poland 1.2%, whereas Denmark, Finland, Sweden, Greece, Malta, the UK and Iceland had a very low percentage of their employed population sent abroad, 0.1% or less (De Wispelaere and Pacolet 2018: 25, 32-33). Another study (Voss et al. 2016: 16-17) shows slightly different numbers, however, with similar trends. By contrast, posting of workers *to* Slovenia grew at a much slower pace during the same period: around 5,100 A1 forms were issued in 2016, 52% more than in 2010 (De Wispelaere and Pacolet 2018: 26).

The share of the issued A1 forms in Slovenia when compared to total employment was 17.9% in 2016, the highest in the EU. (In Luxembourg, it was 16.4%, in Slovakia 4.5%, in Poland 3.2%; with the EU average at 1.0%). However, more than one A1 form can be issued to the same posted worker within a year; and, indeed, the average duration of an individual posting from Slovenia in 2016 was 67 days (De Wispelaere and Pacolet 2018: 17-18, 31-33).

Construction is the main employment sector for workers posted from Slovenia, with approximately 53% of all issued A1 forms (European Commission 2018a). In this sector, the share of posted workers in national employment was 49% in 2016; which means that almost five out of ten employed persons in the Slovenian construction sector are posted abroad (De Wispelaere and Pacolet 2018: 28, 33-34, 46). The high number of construction workers being posted abroad from Slovenia can to a certain extent be explained by the fact that the Slovenian construction sector was heavily hit by the crisis, during which construction activity in Slovenia shrank significantly, with many large construction companies even closing down.

There are no official statistics on the nationalities of the posted workers. However, different studies indicate that many posted workers from Slovenia, especially in the construction sector, are third-country nationals. The main destinations for workers posted from Slovenia are Germany (44.3%) and Austria (30%), followed by Belgium (6.1%), Italy (4.8%) and Croatia (4%) (European Commission 2018a). These characteristics are to a certain extent reflected in the existing case law on posting, with many judgments concerning construction workers posted to Germany or Austria.

2. Legal framework for posting of workers

The Posted Workers Directive 96/71/EC and the Posted Workers Enforcement Directive 2014/67/EU were transposed into the Slovenian law primarily by the Employment Relationships Act from 2002 and the Employment Relationships Act from 2013, as later amended (*Zakon o delovnih razmerjih* 2013), and by the Cross-border Provision of Services Act from 2017 (*Zakon* o *čezmejnem* opr*avljanju storitev* 2017). The new

Posted Workers Directive (2018/957) has not yet been transposed into Slovenian law. However, the transposition period has not yet expired.

Other statutes relevant for the topic of this study include the Minimum Wage Act 2010, as later amended (*Zakon o minimalni plači* 2010), the Collective Agreements Act 2006, as later amended (*Zakon o kolektivnih pogodbah* 2006), the Employment, Self-employment and Work of Foreigners Act 2015, as later amended (*Zakon o zaposlovanju, samozaposlovanju in delu tujcev* 2015), and the Labour and Social Courts Act 2004, as later amended (*Zakon o delovnih in socialnih sodiščih* 2004).

The main features of the legislative framework relevant for analysing the existing case law on posting are explained below.

2.1. Workers posted to Slovenia

Sedes materiae is contained in Article 210 of the Employment Relationships Act, according to which a posted worker is entitled to the minimum level of rights (concerning wages, working time, breaks and rest periods, minimum annual leave, and so on) as regulated by Slovenian labour legislation and sectoral collective agreements, if this is more favourable to the worker. Exceptions to this rule are temporary initial work not exceeding eight working days and temporary work not exceeding one month in a calendar year, although these exceptions are not valid for the construction sector.

In Slovenia, the minimum wage regulation has a long history (see Poje 2019). It is regulated by a statute and is the same for all workers. It is adjusted regularly. As noted above, it amounts to around EUR 890 gross and EUR 670 net (in 2019), which is between 50-60% of the average wage in the country. In addition, Slovenia has a well-functioning system of collective bargaining with an important sectoral level collective bargaining and a fairly high coverage rate of around 65% (Visser 2016). This sets Slovenia apart from most CEE countries; however, the coverage rate has been steadily declining in recent years.

According to the Collective Agreements Act, a collective agreement concluded with representative trade unions (the predominant practice in Slovenia) applies to all employees of the employers bound by it, irrespective of whether an employee is a trade union member or not. The validity of collective agreements may, under prescribed conditions, be extended, that is, declared universally applicable to all undertakings in the sector concerned. In practice, many of the sectoral collective agreements concluded by the representative trade unions are extended, including in important sectors such as construction.[2] The extended collective agreement applies to all employers and employees within the relevant sector of activity. Provisions of the normative part of

2. Register of sectoral collective agreements valid in Slovenia, available at http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/socialno_partnerstvo/evidenca_kolektivnih_pogodb/ (in Slovene language only). In this register, there is also an indication (razširjena veljavnost) of which collective agreements have been extended and are universally applicable to all undertakings within the specific sector.

collective agreements (which regulate working conditions and terms of employment) have direct and binding normative effect. Provisions of the contract of employment that are contrary to the minimum rights laid down by collective agreements are null and void, and the provisions of the relevant collective agreements apply as the constituent part of the employment contract instead.

To legally provide services in Slovenia using posted workers, a statement must be submitted in electronic form to the Employment Service of Slovenia. It has to include the following information:

1. number of posted workers
2. type of service
3. location and duration of the provision of services
4. name and surname of the posted worker who acts as a contact person with the competent Slovenian supervisory authorities.

Documents regarding occupational health and safety and evidence of the working hours of posted workers must be available to supervisory authorities at the place where services are provided. At any time during their stay in Slovenia, posted workers must be able to present the A1 form to the authorities that proves they are covered by their home social security system whilst abroad.

2.2. Workers posted from Slovenia

Posting of workers from Slovenia is regulated by Articles 208 and 209 of the Employment Relationships Act. An employer may temporarily post a worker abroad, but such a posting has to be agreed upon either in the employment contract or in a specially concluded annex. A worker may refuse to be posted abroad provided that justified reasons exist, for example pregnancy or the need to care for a child under the age of seven, and so on.[3] There is also an explicit provision in the Act that after the termination of the posting period the employer must ensure the worker's return to Slovenia.

If a worker is temporarily posted abroad, the contract of employment must contain provisions on a number of issues including the duration of work abroad, holidays and work-free days, minimum annual leave, the conditions of return to Slovenia, the amount of salary and the currency in which it is to be paid, additional health insurance, other benefits in cash or kind, and the manner of ensuring and exercising rights related to wages and other benefits under the regulations of the host country. This must be within the minimum requirements provided by Slovenian legislation or more favourable to the worker.

In 2017, the Cross-border Provision of Services Act was enacted (applicable since 1 January 2018), which implements the EU Enforcement Directive 2014/67/EU and introduces additional conditions for employers posting workers to and from Slovenia.

3. A worker's refusal to temporarily work abroad in such cases, if a justified reason exists, does not constitute a breach of his or her obligations under the contract of employment (Belopavlovič et al. 2016: 1097).

It contains stricter rules, especially as regards formalities, supervision/monitoring and sanctions. It regulates subcontracting and subsidiary liability, posting of temporary agency workers, as well as the co-operation with controlling authorities of other EU Member States. One of the main objectives of this Act was to prevent abuses, for example, so-called letterbox companies. This Act is relevant only for the posting of workers within the EU,[4] and it remains to be seen whether its objectives will be met in practice. The A1 form is issued to employers who fulfil all prescribed conditions by the Health Insurance Institute of Slovenia.

2.3. Slovenian court system

As mentioned in the Introduction, most judgments concerning the posting of workers have been delivered by labour and social courts (payment of wages during posting and certain other individual labour rights as well as pension rights), whereas the remaining ones were issued by the Administrative Courts (taxation issues).

In Slovenia, labour and social disputes are dealt with by specialised labour and social courts. Labour Courts have jurisdiction to decide on individual and collective labour disputes, whereas social courts deal with social security issues (rights and obligations relating to pension, health and other social insurance schemes and similar). Labour and social courts of first instance[5] decide in a panel comprising a judge (as president of the panel) and two lay judges (as members), representing both sides of the industry. If the value of the subject matter in individual labour disputes and social disputes does not exceed the prescribed amount, and in certain other specific cases, a single judge decides the case. The Higher Labour and Social Court[6] decides on appeals against decisions of the first instance labour and social courts (in a panel of three judges), while appeals against and reviews of decisions of the Higher Labour and Social Court are heard by the Supreme Court of the Republic of Slovenia,[7] which has a specialised Labour and Social Division (the Supreme Court decides in a panel of three or five judges.

The Administrative Court has jurisdiction to decide in administrative disputes in the first instance and has the status of a higher court.[8] It decides in a panel of three judges, except in certain cases provided for by law and in which a single judge rules. Complaints against its decisions and revisions are decided by the Supreme Court. Judgments of the Administrative Court in taxation disputes are relevant for the analysis of the case law on posting of workers (types of taxable income, distinction between payment of wages and reimbursement of costs which are not taxable up to a prescribed amount, and distinction between posting of workers and a business trip).

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4. Whereas the relevant provisions of the Employment Relationships Act apply to any posting of workers, not just from and to other EU Member States.

5. The structure of first instance labour and social courts ('delovno sodišče', 'socialno sodišče') available at http://www.sodisce.si/sodisca/sodni_sistem/delovna_sodisca/). There is only one social court of first instance for the entire territory of Slovenia and four Labour Courts of first instance.

6. 'Višje delovno in socialno sodišče', available at http://www.sodisce.si/vdss/predstavitev/

7. 'Vrhovno sodišče Republike Slovenije', available at http://www.sodisce.si/vsrs/ '

8. 'Upravno sodišče Republike Slovenije', available at http://www.sodisce.si/usrs/predstavitev/

If human rights have been violated in an individual case (relevant in all types of disputes, either labour, social or administrative), a constitutional complaint may be lodged before the Constitutional Court of the Republic of Slovenia.[9] There is no case law of the Slovenian Constitutional Court on posting of workers.

3. National legal debates on posting

In Slovenia, legal debates on posting of workers have mainly focused on the problems associated with the abuses and the risks of social dumping, on critical analysis of the CJEU case law on posting and the need to amend the EU rules in this area, and on the problems of effective supervision of compliance in practice (Kresal Šoltes 2009, Kresal Šoltes 2013, Kresal 2016, Senčur Peček 2016, Tičar 2017). The CJEU case law on posting of workers (*Viking* C-438/05, *Laval* C-341/05, *Rüffert* C-346/06, *Commission* v *Luxembourg* C-319/06, *Sähköalojen ammattiliitto* C-396/13, and so on), and its broader consequences on labour rights, has attracted a lot of attention and well-argued critical debates. Special attention in the legal literature has been paid to the situation of posted temporary agency workers (Kresal Šoltes 2016).

It seems quite odd that in Slovenia, despite the quite impressive volume of Slovenian academic literature on posting and the well-developed and elaborated discussions around it, no specific attention is paid to the judicial decisions in posting of workers' matters delivered by the Slovenian courts. To a certain extent this could be explained by the fact that until recently there has been almost no relevant national case law on posting. Even now, most of the national case law on the subject deals with rather narrow, specific questions and is not very challenging from the legal point of view, whereas fundamental issues concerning the posting of workers have not yet been dealt with by the Slovenian courts. The Slovenian case law on posting has not been perceived as a source of problematic decisions and existing problems in practice; the problem has rather been its non-existence. This has changed recently, and further academic legal debates focused on posting of workers' cases coming and pending before the Slovenian courts can be expected in the future.

Recently, a lot of academic discussion has focused on the transposition of the EU Enforcement Directive into Slovenian law (see, for example, Snoj 2017 and Miklavc 2018) and on the revision of the EU rules on posting of workers in general, and also specifically in connection with the preparation of the revised Posted Workers Directive.[10] Specific problems of multinational workers who have been posted or perform work in two or more EU Member States other than that of the employer have also been addressed (Hojnik 2017, Sojč 2018). Payment of taxes and social contributions for posted workers as well as the consequences for their social security rights, especially as regards the old-age pension, have also been discussed (Mišič 2018a, Mišič 2018b, Strban 2018,

9. 'Ustavno sodišče Republike Slovenije', available at http://www.us-rs.si/en/

10. Adopted in June 2018, available at http://data.consilium.europa.eu/doc/document/PE-18-2018-INIT/en/pdf. Slovenia was the only 'new' Member State that advocated and supported a revision of the existing Posted Workers Directive. See also Kiss 2018, European Commission 2018b and European Commission 2016.

Hojnik 2006). This is one of the rare issues also mirrored in the Slovenian case law (see sections 4.2. and 4.3). Strban (2018: 425) points out that social security rules on posting need to be modernised.

The high vulnerability of posted workers makes the violation of workers' rights in practice one of the most problematic issues connected with the posting of workers. Since they are afraid to lose their jobs and income, and they are often not even aware of their rights, they rarely claim their rights before courts, or notify violations to labour inspection authorities. Besides, they are usually not unionised or involved in collective actions. The existing case law on posting (see section 4) does not reflect this problem or tackles it to a very limited extent. Perhaps it would be more correct to say that this problem of high vulnerability of most posted workers is well reflected in the lack of more elaborated national case law on posting: despite quite frequent violations of their rights in practice they do not bring cases before the court and claim their rights in legal proceedings. The many problems still occurring in practice are not identified as such from a legal point of view and are therefore remaining unresolved through judicial decisions.

Many posted workers from Slovenia (mainly in the construction sector) are foreign nationals, usually from Bosnia and Herzegovina and other Balkan countries, and their vulnerability is even higher. In this regard, Slovenia is described as a 'transition country' enabling the posting of workers from Bosnia and Herzegovina to Germany, Austria and other EU countries (Rogelja et al. 2016). In this study, Rogelja et al. point out that the problems are related particularly to the non-selective issuing of the A1 forms, sometimes to the letterbox companies whose bank accounts are blocked or closed in Slovenia, and to the poor supervision and ineffective remedies in cases of violations. Even if workers report the non-payment of wages and/or social contributions or other violations of their rights to the Slovenian Labour Inspectorate or bring an action before the Labour Court, such procedures often turn out to be too lengthy and inefficient (for example, the plaintiff may remain without compensation despite the judgement being legally effective, because the sending company no longer exists). This situation has not yet been mirrored in the national case law on posting of workers, however.

Construction has been exposed as the most problematic sector. The extremely poor working and living conditions of posted construction workers have been reported in certain cases.[11] There have been civil society initiatives as well as trade union actions in this regard to protect posted workers' rights, particularly foreign workers in the construction sector (see, for example, Lukić 2017a, Lukić 2017b).[12] Civil society initiatives and trade unions also co-operate at the EU level (see, for example, Renar 2014). The issue of letterbox companies in connection with posting of workers from

11. Such cases have also been reported in the media. See, for example, radio news (Val202 2017): '…In Slovenia, there are dozens, if not hundreds of companies that have been exporting workers. But unlike other European countries, Slovenian companies don't send citizens of their own country. No; they have mostly exported foreign workers from the Balkans.' In another contribution (Raičevič 2013) exploitation of workers and modern slavery are mentioned in relation to posting of workers. There are other examples as well.

12. Delavska svetovalnica (Counselling Office for Workers) is very active in this area in supporting foreign posted workers and helping them to protect their rights, whereby their activities are not limited to the posted workers, available at http://www.delavskasvetovalnica.si/napoteni-delavci/

Slovenia to other EU Member States has been especially problematic, since it is very easy to establish a company in Slovenia and the supervision has been poor. On the basis of studies and media reports, it can be assumed that authorities were issuing A1 forms very easily and without putting enough effort into supervising the actual situation and checking whether all conditions have been met. Another problem within the framework of posting abroad is bogus self-employment, which is becoming more and more widespread.

Trade unions in Slovenia recognise posting of workers as an important issue and have been organising, for example, information points for foreign and posted workers. They have also been very active in the preparation of the new legislation transposing the EU Enforcement Directive and have strongly influenced its content. Slovenian trade unions accept third-country workers as their members, although there is no reliable data on how many of them in reality decide to join trade unions. Initiatives to more actively support foreign workers, including third-country posted workers, by the Counselling Office for Workers (*Delavska svetovalnica)* and the Counselling Office for Migrants (*Svetovalnica za migrante*) and their day-to-day fieldwork in practice deserve particular attention. These support foreign posted workers and foreign workers in general, report cases of violation to law enforcement bodies, including the Labour Inspectorate, and assist migrants in obtaining evidence and information about these violations (Samaluk 2017: 204). Samaluk (2017: 202-206) describes their activities in more detail: the Counselling Office for Migrants prepared various multilingual publications tailored to specific migrant groups, such as migrant workers, posted workers, refugees and asylum seekers; it also organised information workshops and various linguistic groups. Counselling, empowering, awareness raising, reporting in the media, negotiating, pressure through public opinion campaigns, and co-operation with inspection are all used. By contrast, direct involvement of trade unions and civil society initiatives in legal proceedings concerning posting of workers, where they are bringing cases before courts and representing posted workers in the court's proceedings, is lacking. All in all, it seems that trade unions and civil society initiatives do not perceive judicial proceedings as a preferable - or effective - tool to protect the rights of the posted workers.

4. Analysis of the case law

This section presents an overview of the judgments on posting of workers delivered by the Slovenian courts and some basic findings from an analysis of the publicly accessible databases of the case law in Slovenia.[13] By using a combination of methods (typical keywords, review of judgments dealing with issues typically connected with posting, and so on), only 17 relevant judgments were identified in the publicly accessible databases.

13. Database of the case law of the Constitutional Court of the Republic of Slovenia available at http://www.us-rs.si/odlocitve/vse-odlocitve/ (a selection of cases can also be found in English at http://www.us-rs.si/en/case law/search-3441/). Database of the case law of the Supreme Court and higher (appeal) courts, including the Higher Labour and Social Court available at http://sodnapraksa.si/. There are no decisions of the Constitutional Court dealing with the posting of workers to date.

An in-depth analysis of these judgments reveals some common characteristics. Almost all cases concern outbound posting, that is, posting of workers from Slovenia who temporarily perform work in another country. The existing case law, however, does not reflect the fact that many of them are actually third-country nationals, mainly from Bosnia and Herzegovina, for whom Slovenia is already in a way a 'host' or 'transit' country, in other words a gateway to the EU labour market. Lack of cases concerning the inbound posting is not surprising, taking into account the low number of workers posted to Slovenia. The only inbound posting case raises issues of tax evasion and the question of the taxable income of workers posted to Slovenia. However, it concerns workers posted to Slovenia from Bosnia and Herzegovina (see section 4.3), and not intra-EU mobility of posted workers.

Another interesting feature of the Slovenian case law on posting is that in all cases brought before the Slovenian courts the plaintiff was an individual posted worker. However, in terms of who won the case, there is a significant difference between labour disputes on the one hand, and social and administrative disputes on the other. Whereas in all labour disputes except one, the court found workers' claims well founded and decided in the plaintiff's (posted worker's) favour, all social and administrative disputes were decided in the defendant's favour (against the posted worker).

It is worth noting that in labour disputes, the defendants were individual employers and they lost in all cases except one. Such case law might suggest that posted workers very rarely and with great caution decide to bring a suit before a Labour Court against their employer, and only in clear-cut cases.

In social and administrative disputes, the opposing side in the concrete analysed cases was the Pension and Disability Institute of Slovenia and the State-Ministry of Finance respectively. The posted workers have not been successful in any legal proceedings against the state or the public institution. The questions raised in those proceedings were, for example, the method of the calculation of the pension base as regards the posting periods, whether particular amounts paid to the posted worker are taxable income or not, and whether specific rules on exemptions and tax relief are applicable in the case of a posted worker. We could speculate that such outcomes of legal proceedings show that the state and public institutions have better legal support and knowledge and, consequently, do not violate rights of the posted workers, or that the public interests they represent often prevail over the interests of the individual posted workers. Or perhaps a combination of both is the case. Actually, the relatively low number of such cases up until now does not allow us to make any general conclusions, but it may be interesting and relevant to analyse developments of the case law from this perspective in the future.

The analysed cases are very much in line with the statistical data presented in section 1, which shows that Germany and Austria are the main destinations for posted workers from Slovenia and that most of them are construction workers.

As regards the substance, the questions that have been dealt with by the Slovenian courts up until now in legal proceedings do not reflect the complexity and variety of

problems connected with the posting of workers nor the elaborate legal literature on the topic. Slovenian case law on posting is mainly limited to rather specific and fragmented legal questions. Analysed cases can be divided into three main areas dealing with labour issues, social security/social insurance issues and administrative issues.

4.1. Labour issues

Seven relevant judgments dealing with posting of workers delivered by the Slovenian Labour Courts in a labour dispute have been identified. Five of them concern a construction worker posted abroad, to a construction site in Germany or Austria. The following legal issues have been raised in these labour disputes:

- obligation to pay wages according to the minimum rates of pay applicable in the host country
- reimbursement of travel/subsistence costs during posting
- payment for overtime work of a posted worker
- definition of posting and the distinction between posting of workers and a business trip
- calculation of a compensation in case of unjustified dismissal during the posting of a worker
- whether actual wages received during posting were to be taken into account when calculating the amount of a severance pay.

Let's look first at the judgments of Labour Courts dealing with the minimum rates of pay and the reimbursement of travel/subsistence costs during the posting of a worker from Slovenia to another country.

In three similar cases (Higher Labour and Social Court, Nos. Pdp 991/2015, Pdp 992/2015 and Pdp 293/2017)[14] the posted worker brought an action before the Court claiming differences in wage actually paid and that which he should have received as a posted worker, and the reimbursement of travel and subsistence costs during the posting abroad. In the first two cases, a construction worker, employed by a Slovenian building company on a fixed-term contract, was posted to Germany for three months. No specific employment contract or annex was concluded for the period of posting. The Court emphasised that the EU Posted Workers Directive 96/71/EC is relevant and that minimum rates of pay for such work in Germany should apply, since they are higher than the Slovenian minimum wage agreed upon in the existing contract of employment. The Court awarded the worker the difference in pay, which meant in absolute numbers an additional approximately EUR 1,300 per month for work in Germany. The court also awarded the posted worker the reimbursement of travel (*prevoz*) and subsistence costs (*dnevnice*) for the period of being posted to Germany to the amount of approximately EUR 1,300 per month.

14. The first two cases concerned a construction worker posted to Germany and the third one a construction worker posted to Austria.

The third case concerned an electrician posted from Slovenia to a construction site in Austria, employed under a fixed-term contract of employment which determined the amount of the worker's wage at a lower level than the minimum rates of pay applicable in Austria for such work. Here again, the Court, referring to Article 209 of the Employment Relationships Act and the Posted Workers Directive, emphasised that for the posted worker the minimum standards valid in the host country have to be respected if they are more favourable to the worker.

All three judgments address a fundamental principle as regards the remuneration of posted workers and are relevant also within the broader EU legal perspective. The judgment in the third case is especially relevant, since its line of reasoning is very clear and well structured; it addresses the applicability of the host country's sectoral collective agreements to posted workers. Besides, it explicitly refers to the CJEU judgment C-396/13 (*Sähköalojen ammattiliitto*) when defining the concept of minimum rates of pay. By applying the relevant provisions of the Austrian sectoral collective agreement, the Court found that the posted worker was entitled to a monthly wage to the amount of EUR 1,688 for the period of posting and awarded him the difference. The worker was also awarded the reimbursement of subsistence costs (*dnevnice*); the Court emphasised that *dnevnice* do not form an integral part of the (minimum) wage and should be paid in addition to the worker's wage since they cover actual costs incurred during the posting.

The same principles as regards the obligation to guarantee the posted worker the minimum rates of pay valid in the host country were confirmed in another judgment which concerned a construction worker posted to Germany (Higher Labour and Social Court, No. Pdp 1113/2015), this time as regards the payment for overtime work of a posted worker. The argumentation of the Court was similar; it referred to the EU Posted Workers Directive, emphasised that the minimum rates of pay for such work valid in Germany apply, and also for the payment for overtime work, taking into account the increased rates for this, since these are higher than those fixed in the employment contract based on the levels of minimum pay valid in Slovenia.

The Court also explained *obiter dictum* that such regulation of payment and other rights for posted workers, guaranteeing them the same minimum level of pay valid in the host country, aims at protecting local workers against competition based on low-paid posted workers from other countries.

This case also illustrates the exploitation of workers posted to foreign construction sites who are often required to work extremely long hours, often without adequate rest periods. A substantial amount of overtime work has been done by the respective posted worker, but has not been paid for by the employer at all. Although it is not possible to go into detail, it is interesting to point out the part of the Court's reasoning in which the rules on the burden of proof were discussed: since the employer has not presented the working-time records and has not proved that the worker had worked less, the Court accepted the records of working hours that the worker himself had kept for his evidence as valid and convincing evidence of the actual working hours he completed.

In a judgment of the Supreme Court from 2008 (No. VIII Ips 215/2007), the question of the definition of posting (who is a posted worker and when the posting of a worker takes place) was raised. Without going into the detail of a concrete case which is not particularly relevant from a broader EU perspective on posting,[15] let's just point out the Court's argumentation that the distinction between a business trip and posting of workers has to be made and that rules on posting do not apply in the case of a business trip. The Court used the following main criteria for the distinction between a business trip and posting of workers: the scope and the length of the period of working abroad as well as the continuity of the work. The Court concluded that the employer was not obliged to follow the legal rules on posting since there was no posting of a worker in this particular case, rather a number of short business trips. This is the only judgment in the analysed case law on posting where the employer won the case.

The rest of the judgments on posting delivered in labour disputes address certain specific legal issues, more or less relevant only within the particular Slovenian situation. In one case (Higher Labour and Social Court, No. Pdp 885/2000), the Court had to decide on the amount of the compensation to be paid to a worker following the decision that his dismissal was unjustified and reintegration ordered. The worker was posted temporarily abroad and after his dismissal he returned to Slovenia and brought an action before the Labour Court for unjustified dismissal. The Court decided that the worker was entitled to a compensation in the amount of wage he would have earned as a posted worker abroad until the end of the agreed period of posting although the worker was not actually abroad after the dismissal.

The issue of the severance payment was dealt with in another case before the Supreme Court (No. VIII Ips 97/98). A posted construction worker was dismissed. According to the then valid Slovenian law, the severance payment was calculated on the basis of the amount of the last three months' pay. The employer did not take into account the higher wage received during the posting on the construction site abroad, but calculated the severance pay on the basis of the (lower) wage that the worker would have been entitled to for such work in Slovenia (which was also the basis for the payment of the social insurance contributions for the period of posting). The Court found a violation of the worker's rights and decided that a severance pay should be calculated on the basis of the actual wages received during that period.

4.2. Social security issues

Six judgments dealing with a specific social insurance issue in relation to the posted workers have been identified in the database of the case law of the Slovenian courts. They all concern outbound posting. In all cases, the plaintiff was a former posted worker and the defendant the Pension and Disability Insurance Institute, a public body

15. The case concerned a summary dismissal on the grounds that a worker had failed to perform his duties under the contract of employment by refusing to go on a business trip abroad; however, the worker claimed that the posting was at stake and that a specific contract or annex should have been concluded and that he was not obliged to temporarily work abroad.

responsible for the compulsory (statutory) pension and disability insurance scheme that covers the entire territory of Slovenia. In all cases, the defendant, that is, the Pension and Disability Insurance Institute, won.

All these cases concern the same legal question which has its roots in a specific Slovenian legal regulation regarding the payment of compulsory social insurance contributions in the case of posting of workers. The issue is particularly delicate and problematic from the broader EU perspective, since it raises doubts as to whether the respective Slovenian legal rules violate the EU legal order by enabling Slovenian companies that temporarily post workers abroad to pay social insurance contributions at the reduced rate. However, this issue has not been tackled by the Slovenian courts from this perspective, but rather only within the limits of the national legal perspective. The issue of how social insurance contributions are calculated for the period of posting abroad has not been questioned by the Slovenian courts, only the issue of how, consequently, the amount of the retirement pension should be calculated in respect of the periods of posting abroad.

In all these six judgments (Higher Labour and Social Court, Nos. Psp 42/2016, Psp 51/2014, Psp 102/2010 and Psp 539/2007 and Supreme Court, Nos. VIII Ips 314/2008 and VIII Ips 136/2014), the Court decided that for the period of the posting of a worker, the actual wage paid to the posted worker is not to be taken into account, but only the amount that was correspondingly calculated on the basis of the then valid rules and out of which the social contributions have been paid to the pension insurance. Since the contributions have been calculated on the basis of the amount of wage that would have been paid for comparable work in Slovenia, the pension base in respect of these periods is to be calculated on the basis of the same, lower amount of a comparable wage.

In one of these judgments, the Higher Labour and Social Court (No. Psp 51/2014; see in particular the penultimate paragraph) gave an elaborate explanation for such a decision, putting it also in a broader social context. The Court emphasised that this question of how the periods of posting of a worker abroad should be taken into account within the pension insurance system has always been problematic and, therefore, it has been and still is a subject of special rules in Acts regulating pension insurance. The wages of posted workers were usually higher than those of comparable workers performing the same/similar jobs in Slovenia. The Court explicitly mentioned some of the reasons: the fact that posted workers were entitled to different supplements due to separate family life; higher living costs in a host country; arduous working conditions; or the fact that the minimum rates of pay in a host country agreed upon by social partners in collective agreements are usually set at the higher level than those applicable in Slovenia, and so on. The Court further explained that over the years the legal solution has been developed, according to which not the actual wage paid to the posted worker was relevant, but the amount out of which social contributions have been paid. This amount was determined administratively in such a way that it was comparable to wages that workers performing the same/similar jobs have received for the work done in Slovenia in the same period. Therefore, it is not the actual wage paid to the posted worker but a 'comparable wage' paid for the same/similar work in Slovenia that has to be taken into account when calculating the old-age pension.

As already mentioned, when deciding on this very delicate issue, the Slovenian courts did not find it necessary to refer to and apply any of the EU legal rules. Nevertheless, the issue has also achieved the attention within the broader EU perspective. Slovenia has been accused of exporting cheap labour, especially in the construction sector. In February 2019, the European Federation of Building and Woodworkers submitted a formal complaint to the European Commission against Slovenia, alleging that it is granting illegal state aid to companies that temporarily post workers abroad and that such reduced social insurance contributions allow a significant financial competitive advantage to the Slovenian companies by lowering their labour costs, and that this amounts to the disruption of the internal market (EFBWW 2019).

Apart from the discussed issue of the calculation of the pension base in respect of the posting periods, no other social security/insurance related issues for posted workers have been addressed so far by the case law of the Slovenian courts.

4.3. Other issues related to posting of workers

Apart from the judgments issued in labour and social disputes discussed in sections 4.1 and 4.2, all other judgments concerning the posting of workers were issued by the Administrative Court in administrative disputes dealing with various aspects of taxation. Four such judgments were identified in the database of the case law of the Slovenian courts. In all four cases, the case was brought before the court by the posted worker against the Ministry of Finance, challenging its decision that a certain amount paid to the posted worker is taxable. In all four cases the plaintiff, that is, the posted worker, lost the case. Three of these cases dealt with outbound and one with inbound posting, and raised the following legal questions:

1. whether the reimbursement of subsistence costs (as well as travel and other similar costs) is taxable or not in the case of a posted worker claiming that he was daily sent by the employer to a business trip from his ordinary place of stay abroad and the place of work abroad
2. the distinction between posted workers and cross-border workers as regards the taxation of their income and
3. the taxation of wages in case of incoming posted workers to Slovenia.

The cases mentioned in (2) and (3) are relevant mainly within a specific national context and do not tackle any general aspects of posting of workers. Comparatively, (1) is more interesting from a comparative legal perspective because it raises the question of a definition of posting of workers. Both the administrative and the Labour Courts discussed the problem of the definition of posting of workers, albeit one from the tax law perspective and another from the labour law perspective, and the comparisons are interesting (see below).

In two tax cases specific to the national situation (Administrative Court, Nos. II U 462/2011 and II U 493/2011), posted workers and cross-border workers (commuters who work in one country and live in another and commute to work usually on a daily/

weekly basis) were compared for taxation purposes, after the equal treatment principle was raised by the posted worker. The Court emphasised that the differentiation in the tax legal regulation between cross-border workers and posted workers is objectively justified. Since a cross-border commuter – because of his employment in another country and regular work there – has a stronger link with that other country, special rules providing for certain exemptions and tax reliefs are justified, whereas in the case of posting, work is performed abroad only on a temporary basis and no specific, stronger link exists with that other country.

The only tax law case about inbound posted workers (Administrative Court, No. I U 673/2012) concerned construction workers from Bosnia and Herzegovina, and raised complex issues of non-transparent legal structures of associated companies and tax evasion. However, the rights of posted workers were not dealt with in this case at all; only tax obligations. It is worth mentioning that the Court emphasised, among others things, that any payments received by the posted worker, which is related to his or her work while being posted to Slovenia, is taxable in Slovenia under the Slovenian tax legislation.

Let us now move to the case which raises much more interesting legal questions and might be relevant also in a broader, comparative perspective.

In a far more relevant and interesting tax dispute (Administrative Court, No. I U 1750/2015) in which the definition of posting of workers was at stake, the main question was how to distinguish between the posting of a worker and a business trip. The workers employed by the Slovenian company were temporarily posted to Germany to work there on different construction sites. They lived abroad and travelled daily to the construction site where they worked. The workers were paid their monthly wage as well as the reimbursement of subsistence costs for business trips on the basis of the so-called travel orders issued by the employer, specifying the location and duration of their work at that location. According to the Slovenian tax legislation, the reimbursement of subsistence costs (as well as travel and other costs) in the case of a business trip is not taxable up to a certain prescribed amount/ceiling.

The Court found that although the employer issued travel orders for business trips (and on this basis paid the workers the reimbursement of subsistence costs or *dnevnice*), the situation could not be considered a business trip. As workers were not entitled to reimbursement of subsistence costs for business trips, the amounts paid to the workers were actually wages and therefore a taxable income. The Court used a set of criteria to distinguish between the business trip and the posting of workers: among other things, it emphasised that their daily travel to the ordinary place of work during posting could not be considered as a business trip. The Court also pointed out that issuing the travel order for a business trip cannot be the decisive factor and that the actual situation and characteristics of that situation have to be taken into account when deciding whether a business trip or the posting of a worker took place in a particular case.

The comparison between the case law of Labour and Administrative Courts as regards the definition of posting reveals some inconsistencies. In particular, it is not entirely clear what the relationship is between the posting of workers and a business trip

abroad. Are they entirely distinct legal concepts, or do they overlap? A settled case law is missing: judgments of the Labour Court confirm that a posted worker is entitled to daily allowance for a business trip, whereas the Administrative Court decided (as presented here) that a posted worker cannot be considered to be on a business trip and, therefore, the daily allowance paid to him or her as being on a business trip cannot be exempted from the income tax base. It seems that this is the most problematic specific legal issue within the national legal perspective on posting of workers. Uncertainties in this respect are definitely not helpful in establishing a safe and predictable legal environment for posted workers.

Conclusion

Slovenian case law on posting of workers can be summarised from this analysis of the findings as being poor and underdeveloped, with many gaps, and dealing with only a few relevant legal aspects. Many fundamental and delicate legal questions as regards posting of workers remain unanswered, such as, for example, the right to strike of posted workers, collective bargaining and other collective labour rights, health and safety at work, lengthy and irregular working time, the right to annual leave, access to education and training and promotion, continuity of their employment, as well as extreme cases of workers' exploitation and so on. There has not yet been any collective labour dispute on posting of workers brought before Labour Courts in Slovenia; and no cases have dealt with posted workers' collective labour rights.

Not many posted workers claim their rights before the courts and consequently the courts do not have many opportunities to decide on important issues related to posting. This is somewhat surprising, considering the high number of posted workers, especially outbound posted workers, and the steady, substantial increase of posting of workers during the past decade. At the same time, there are many reasons for this situation: posted workers are not aware of their rights; they are afraid of losing their jobs; they are usually non-unionised, and in precarious employment, often hired on a short-term basis with many interruptions and unemployment periods. The sudden increase in posting during the recent crisis, when workers were exposed to fear, uncertainty and consequently overall precariousness, has further added to their vulnerability. Consequently, Slovenian case law mainly addresses specific issues in the area of posting of workers, and it is likely that a significant number of problematic situations never get to litigation.

The existing Slovenian case law on posting mainly focuses on:

1. payment of wages to the posted worker according to the minimum standards that apply in the host country
2. posted worker's entitlement to the reimbursement of subsistence/travel costs
3. the difference between posting of workers and a business trip abroad
4. calculation of a pension base in respect of the periods of posting
5. taxation of wages and other payments received by the posted worker.

Issues on posting of workers that have been dealt with by the Slovenian courts up until now do not reflect the complexity of the phenomenon of posting of workers and the variety of problems connected with it, and do not reflect the elaborate legal literature on this topic. The relevant labour law literature in Slovenia[16] addresses all main aspects of posting of workers and critically analyses the Slovenian as well as the EU level legal regulation, the CJEU case law and developments in practice, presents the main dilemmas and offers many relevant and well-argued solutions.

By contrast, the Slovenian case law on posting is still at the beginning. Some additional observations can be made about it, however. First, almost all cases refer to outbound posting of workers from Slovenia temporarily to another country. In addition, in all cases on posting brought before the Slovenian Labour Courts the plaintiff was an individual posted worker, and the court found their claims well founded and decided in the plaintiff's (worker's) favour except in one case. Finally, most cases concern the posting of workers in the construction sector and the posting to Germany or Austria.[17]

Slovenia has many characteristics that differentiate it from other CEE countries: a developed labour legislation; a co-ordinated system of (sectoral) collective bargaining and a high coverage rate; relatively strong trade unions; a statutory minimum wage at a relatively high level that constitutes between 50-60% of the average wage in the country. In addition, even though Slovenia is predominantly the sending and not the receiving country as regards posting of workers, it was the only 'new' EU Member State that advocated and supported a revision of the existing EU Posted Workers Directive in line with the 'same wage for the same job in the same place' principle.

From a broader EU perspective, however, the Slovenian case law on posting seems to be of minor importance and with no significant influence on developments in this area at the EU level or in other EU Member States. This may change if Slovenia remains one of the countries with a high share of posting and if that continues to grow. Besides, it seems that at least one of the existing problematic legal aspects of the Slovenian regulation of posting - the calculation of social insurance contributions at the reduced rate for the posted workers - has already attracted wider attention at the EU level. It remains to be seen whether these developments and possible procedures at the EU level against Slovenia will be reflected in the Slovenian courts' case law on posting of workers in the future.

16. Especially articles in the specialist labour law and social security journal Delavci in delodajalci,as well as in the journals Podjetje in delo, Pravna praksa and others (see section 3).

17. This is somehow parallel with the statistics (see section 1) which show very high numbers of posting from Slovenia to other EU countries (i.e. posting out) and especially a very high share of posting in the construction sector and also that Germany and Austria are the two main destinations for posted workers from Slovenia.

References

Belopavlovič N., Kresal B., Kresal Šoltes K. and Senčur Peček D. (eds.) (2016) Zakon o delovnih razmerjih s komentarjem [Commentary on the Employment Relationships Act], Ljubljana, GV Založba.

De Wispelaere F. and Pacolet J. (2018) Posting of workers - Report on A1 portable documents issued in 2016, Brussels, European Commission. https://publications.europa.eu/en/publication-detail/-/publication/0357b7d3-49c7-11e8-be1d-01aa75ed71a1/language-en

EFBWW (2019) Formal complaint to the European Commission against Slovenia for the granting of 'illegal state aid' to companies that temporarily post workers abroad and for the disruption of the European internal market, Brussels, European Federation of Building and Woodworkers. http://www.efbww.org/default.asp?Index=1012&Language=EN

European Commission (2016) Commission staff document: Impact assessment concerning the revision of the posting of workers Directive, SWD (2016) 52 final, 8 March 2016.

European Commission (2017) Posted workers in Slovenia 2015 – country factsheet. http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=50&&langId=en&mode=advancedSubmit&advSearchKey=PostWork

European Commission (2018a) Posted workers in Slovenia 2016 – country factsheet. Towards fair labour mobility: revision of EU posting of workers rules. https://ec.europa.eu/social/keyDocuments.jsp?pager.offset=0&langId=en&mode=advancedSubmit&advSearchKey=PostWork

European Commission (2018b) Posting of workers: Council adopts the Directive. http://www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/

Hojnik J. (2006) Socialna varnost napotenih delavcev v EU [Social security of posted workers in the EU], Pravna Praksa, 25 (44), I-XI.

Hojnik J. (2017) Pravni status multinacionalnih delavcev v EU [Legal status of multinational workers in the EU], Pravna Praksa, 36 (39-40), 13-16.

IMAD (2018a) Slovenian Economic Mirror, 24 (5), Ljubljana, Institute for Macroeconomic Analysis and Development. http://www.umar.gov.si/fileadmin/user_upload/publikacije/eo/2018/5-2018/sem_0518_splet.pdf

IMAD (2018b) Development Report 2018, Ljubljana, Institute for Macroeconomic Analysis and Development. http://www.umar.gov.si/fileadmin/user_upload/razvoj_slovenije/2018/aPOR2018_splet_novo.pdf

Kiss M. (2018) Posting of Workers Directive - briefing, Brussels, European Parliament. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582043/EPRS_BRI(2016)582043_EN.pdf

Kresal B. (2016) The tense relationship between labour market rights and respect for dignity at work: European dimension, in Buelens J. and Rigaux M. (eds.) From social competition to social dumping, Cambridge, Intersentia, 85-97.

Kresal Šoltes K. (2016) Agencijski in napoteni delavci [Temporary Agency Workers and Posted Workers], Podjetje in delo, 42 (6-7), 877-890.

Kresal Šoltes K. (2008) Aktualna vprašanja sistema kolektivnih pogodb - pred novelo ZDR-A in po njej [Open questions in the area of collective bargaining'), Podjetje in delo, 34 (6-7), 1232-1242.

Kresal Šoltes K. (2009) Primera Laval in Viking z vidika slovenske pravne ureditve avtonomije kolektivnega pogajanja [Viking and Laval in the Light of Slovenian Legal Regulation Regarding the Autonomy of Collective Bargaining], Delavci in delodajalci, 9 (4), 465-489.

Kresal Šoltes K. (2013) Kršitve temeljnih socialnih pravic v imenu kriznih varčevalnih ukrepov [Violations of fundamental social rights in the name of crisis-related austerity measures], Delavci in delodajalci, 13 (1), 11-27.

Kresal Šoltes K. (2015) Sindikalna svoboda z vidika omejevanja gospodarskih svoboščin in prepovedi diskriminacije – nazaj na začetek? [Freedom of association in the light of the restrictions on economic freedoms and the prohibition of discrimination – Back to the start?], Delavci in delodajalci, 15 (2-3), 263-290.

Lukić G. (2017a) Working conditions of posted workers – what about OSH?, paper presented at POOSH Conference, 15 February 2017, Ljubljana. http://www.poosh.eu/multimedia/video-material/key-note-at-poosh-conference/

Lukić G. (2017b) Zaposlovanje in delo tujcev, s poudarkom na napotenih delavcih: Napotitev delavcev v tujino - kaj nam prikaže aktualna praksa? [Posting of workers abroad – What does the actual practice show to us?], paper presented at the Conference of the Labour Inspectorate of the Republic of Slovenia. http://www.id.gov.si/fileadmin/id.gov.si/pageuploads/Splosno/KONFERENCE/15_konferenca_2017/konferenca_2017_del_svet.pdf

Miklavc N. (2018) EU-Napotitve delavcev - spremembe pri napotitvah delavcev od 1. januarja 2018 [The EU posting of workers – Changes after 1 January 2018], Pravna Praksa, 37 (7-8), 22-24.

Mišič L. (2018a) Plačevanje prispevkov in davkov za napotene delavce [Payment of Contributions and Taxes for Posted Workers], Delavci in delodajalci, 18 (2-3), 427-452.

Mišič L. (2018b) Plačilo davka od dohodka iz zaposlitve napotenih delavcev [Taxation of Income from Employment of Posted Workers], Pravna Praksa, 37 (26), 6-8.

Poje A. (2019) The introduction of a ‚monthly living wage' in Slovenia, Transfer. https://doi.org/10.1177/1024258919855180

Raičevič M. (2013) Zaradi izkoriščanja delavcev v tujini bo podana kazenska ovadba, 24ur.com, 10 April 2013. https://www.24ur.com/novice/slovenija/namesto-dobrega-zasluzka-le-drobiz-in-suzenjstvo.html

Renar J. (2014) Posting Report – Slovenia, Brussels, European Federation of Building and Woodworkers. http://www.fiec.eu/en/cust/documentview.aspx?UID=17ed5983-b281-46f8-bbe6-8dc5b58e6667

Rogelja N., Toplak K., Vah Jevšnik M. and Mlekuž J. (2016) Napotitve delavcev iz Slovenije: nekatere specifike in problemi [The Posting of Workers from Slovenia: some Particularities and Problems], Dve Domovini, 44, 125-137. https://www.dlib.si/stream/URN:NBN:SI:DOC-ER8D9OR8/8c38a868-62fa-4d09-b097-b64b8a99148c/PDF

Samaluk B. (2017) Innovative trade union practices addressing growing precarity characterised by rescaled governance and the shrinking welfare state: the case of Slovenia, in Bernaciak M. and Kahancová M. (eds.) (2017) Innovative union practices in Central-Eastern Europe, Brussels, ETUI, 197-217.

Senčur Peček D. (2016) Vpliv prava EU na slovensko delovno pravo [The impact of the EU law on Slovenian labour law], Podjetje in delo, 35 (6-7), 921-934.

Snoj J. (2017) Kakšne novosti prinaša Zakon o čezmejnem izvajanju storitev za podjetja in napotene delavce [What is new for the companies and posted workers in the cross-border provision of services act], Delavci in delodajalci, 17 (2-3), 341-353.

Sojč U. (2018) Neenotna obravnava statusa napotenih delavcev v slovenski zakonodaji ['Inconsistent treatment of the status of posted workers in Slovenian legislation], Pravna Praksa, 37 (10), 18-21.

Strban G. (2018) Socialno zavarovanje napotenih delavcev v zakonodaji in sodni praksi EU, Delavci in delodajalci, 18 (2-3), 405-425.

Tičar L. (2008) Oblikovanje nacionalnega delovnega prava v okolju EU [Development of the national labour law within the framework of the EU], Pravna Praksa, 27 (27), 28-29.
Tičar L. (2017) Dileme v zvezi z napotitvijo delavcev [Dilemmas in relation to the posting of workers], Podjetje in delo, 43 (6-7), 1185-1192.
Val202 (2017), Slovenia is the biggest exporter of foreign workers to the West - Investigative report on posted workers, Radio Slovenia, 24 May 2017. https://val202.rtvslo.si/2017/05/slovenia-is-the-biggest-exporter-of-foreign-workers-to-the-west/
Visser J. (2016) What happened to collective bargaining during the great recession?, IZA Journal of Labor Policy, 5 (9), 1-35. https://doi.org/10.1186/s40173-016-0061-1
Voss E., Faioli M., Lhernould J.-P. and Iudicone F. (2016) Posting of Workers Directive – Current situation and challenges, Brussels, European Parliament.
Zakon o delovnih razmerjih (2013) Official Journal of the Republic of Slovenia, No. 42/2013 and subseq. http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5944, unofficial English translation: http://www.mddsz.gov.si/en/legislation/ [Employment Relationships Act 2013].
Zakon o čezmejnem opravljanju storitev (2017) Official Journal of the Republic of Slovenia, No. 10/2017, 27 February 2017. http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7438# [Cross-border Provision of Services Act 2017].
Zakon o minimalni plači (2010) Official Journal of the Republic of Slovenia, No. 13/2010 and subseq. http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5861, unofficial translation: http://www.mddsz.gov.si/en/legislation/ [Minimum Wage Act 2010].
Zakon kolektivnih pogodbah (2006) Official Journal of the Republic of Slovenia, No. 43/2006 and subseq. http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4337, unofficial English translation: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/zkolp_en.pdf [Collective Agreements Act 2006].
Zakon o zaposlovanju, samozaposlovanju in delu tujcev (2015) Official Journal of the Republic of Slovenia, No. 47/2015 and subseq. http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6655, unofficial English translation: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/zaposlovanje/ZZSDT_ang.pdf [Employment, Self-employment and Work of Foreigners Act 2015].
Zakon o delovnih in socialnih sodiščih (2004) Official Journal of the Republic of Slovenia, No. 2/2004 and subseq. http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3657 [Labour and Social Courts Act 2004].

For the list of cases please refer to Annex VII.

Conclusion

Zane Rasnača and Magdalena Bernaciak

The posting of workers is often the subject of the legal and political discourse. To a large extent this is driven by factors originating at EU level – be the controversial rulings by the CJEU, or EU-level reform of posting-related rules. As the reports on the 11 EU Member States covered in this book show, both the debates and the case law are often context-specific and focus on the elements that are relevant for the domestic labour market, or on particular elements of legal framework that are at times not triggered by implementation of EU law. While several crosscutting issues emerge, in terms of both national debates and matters for judicial enforcement, on other issues, national or country-group differences remain more pronounced. Here we discuss our findings from a comparative perspective and examine their implications in more detail.

1. National debates on posting

In the context of national level debates on posting, it might be instructive to distinguish between EU Member States in western Europe, on the one hand, and those on the EU's southern and eastern flanks, on the other. As the analysis of each country Chapter suggests, public discourses in these two groups of countries differed. We discuss the two groups and reflect on the impact of the dominant discourses on worker protection in the different settings.

1.1. Debates in western European countries

In western European countries, cases of extensive abuse of inbound posted workers would occasionally hit the headlines. This was the case in Ireland, where the Gama and RAC company cases were widely publicised and discussed in parallel to court proceedings. Media outlets often criticised the public authorities for the difficulties they had in assessing the scale of abuse and prosecuting the offenders, particularly in the case of complicated subcontracting arrangements that involved employee posting at lower levels of the subcontracting chain. At the same time, it was pointed out that the exploited employees rarely seek assistance and/or enter litigation to enforce their rights because of the many vulnerabilities related to their temporary stay in the host county.

In the examined group of countries, it was not only employment conditions, but also other operations of foreign posting companies that were viewed as prone to abuse and

circumvention. The Finnish discussion, for instance, focused on the tax evasion of foreign (posting) companies, a significant proportion of which failed to register their operations in the country, did not submit their tax returns and thus 'operate (…) largely outside of the reach of the authorities'.[1] In the Netherlands, 'sham constructions', in other words, fraudulent employment schemes involving foreign service providers, similarly attracted the attention of public opinion and several governmental ministers, until they were regulated in a separate Act.

The chapters on Denmark, the Netherlands and Finland touch upon some common concerns about the impact of the EU economic integration process and the spread of cross-border service provision in domestic institutions and practices. In Denmark, the preservation of the country's voluntary collective bargaining system and the legality of industrial action, used as means of putting pressure on the company to enter negotiations with employee representatives, were considered a top priority both by trade unions and government representatives. The Danish Parliament accordingly set up a special committee to devise means to protect domestic institutional arrangements and fight social dumping. In the Netherlands, public opinion similarly feared that the increase in labour migration and posting after EU eastern enlargement might lead to job losses among the domestic population. A special body designated by the Social and Economic Council of the Netherlands looked into fraudulent employment schemes and examined possible ways to fight such practices and minimise their negative impact on law-abiding enterprises.

Overall, it seems that the media and public opinion in western European countries have been very sceptical towards cross-border service provision and forms of mobile employment. In France, the public image on inbound posting is so negative that it has almost become synonymous with social dumping and unfair practices. As a result, even employer associations and large companies that use the services of foreign services providers and rely on posted workers at lower levels of their supply chain refrain from publicly endorsing posting in fear of negative publicity. The limited evidence on the impact of posting on national labour markets makes it difficult to judge whether its disparaging image is justified, and to what extent it has been bolstered by the widespread feelings of uncertainty evoked by the recent economic crisis and the subsequent austerity drive.

Last but not least, in some western European countries the topic of posting emerges as part of broader discussions on social standards. These discussions do not focus specifically on posted workers, but rather concern all categories of employees, irrespective of their nationality and legal status. In Ireland, for instance, the debates in the construction industry - the sector with the highest proportion of inbound poster workers - focused on the need to ensure that the wages of Irish, migrant and posted workers alike are shaped in accordance with the sectoral collective agreement. By the same token, in Germany, the topic of employee posting has fed into a broader discussion on minimum social standards for low-income segments and leased employees. Notably, the participants in these debates have pointed that cross-border forms of employment such as posting,

1. Hirvonen, as cited by Tuovinen.

as well as 'domestic' arrangements, while perfectly legal in light of the German law, are nevertheless prone to abuse and worker exploitation. In recent years, employee posting has also indirectly entered public discussions on the extent of employee interest representation rights within so-called matrix enterprises, that is, companies applying new forms of work organisation that cut across corporate and national boundaries, thanks to progress in information technologies.

All in all, the debates in western Europe seem distinctive in two respects. The first is related to the negative undertones in most countries. Irrespective of the extent of posting and migration-related challenges, the excessive negativity expressed by headlines such as 'Cheap foreign workers get Dutch people's jobs' in the Dutch *De Telegraaf* should not be ignored. As posting becomes demonised in the eyes of host country populations and institutions, it could become more difficult for inbound posted workers to exercise their rights and seek justice in the case of abuse. In addition, such discourses create a false expectation that regulating and even limiting this form of mobility would cure the countries' socioeconomic problems, diverting the public and policymakers' attention from other, oftentimes more common irregularities related, for example, the growth of precarious employment and/or the spread of shadow economy.[2] More generally, by feeding into xenophobic and EU-sceptic attitudes amongst the countries' populations, they might cause the EU integration process to be put on hold. The fate of the EU Constitutional Treaty, rejected in the 2005 Dutch and French referenda amidst fears of 'Polish plumbers' allegedly taking the jobs of domestic workers, or the United Kingdom's 2016 referendum on EU membership, in which the majority of voters decided to leave the EU amidst anti-immigrant rhetoric, are particularly indicative in this respect.

At the same time, examples of a more inclusive approach towards posted workers are also identifiable. In Ireland, posted workers are treated in the same way as local workers, and their rights are upheld by the authorities and trade unions alike. In Finland, the famous Finnish Electricians' Union case that was referred to the Court of Justice of the EU for a preliminary ruling was brought by a local trade union branch on behalf of posted workers.

The second characteristic of the western European debate on posting is its exclusive focus on inbound posting and the need to safeguard local employment conditions and social standards in the context of increased inflows of workers from other (predominantly cheaper) EU Member States. The one-sided nature of the posting debate is problematic because many western European countries both receive *and* send significant numbers of posted workers. As Table 1 in the Introduction shows, in our sample, Germany and France feature a particularly high occurrence of outbound posting, while the number of A1 certificates issued by Denmark and Ireland also remains substantial relative to the number of received posted workers. To an extent, the discursive 'self-identification' of the countries primarily (or exclusively) as receiving states can be explained by the fact that most of their outbound posting is directed to other high-wage countries, which, at least in theory, should limit the scope for potential abuse. It is also a function of the substancial politicisation of inbound posting, which is

2. For a similar argument see Darvas Z. (2017) Revision of the Posted Workers Directive misses the point. https:// bruegel.org/2017/10/revision-of-the-posted-workers-directive-misses-the-point

probably most pronounced in the case of France. As indicated above, such fixation on the negative aspects of inbound posting is dangerous and potentially detrimental for the exercise and protection of inbound posted workers' rights. It also removes outbound posted workers from the radar of western European public opinion and policymakers. This might contribute to the insufficient protection of the rights of this often quite sizeable group of workers. For example, the rules of posting rarely feature in western European collective agreements; by the same token, most western European countries have no rules on reimbursement for posting-related expenses.[3] This indicates that both inbound and outbound posted workers in western Europe would benefit from more balanced discussions on the risks and benefits of different forms of posting.

At the same time, one could argue that political support for revising the Posted Workers Directive was strong in these countries partly due to the fact that the debate focused on inbound posting. This discourse, prevailing in the western countries, strongly influenced the reform of posting rules at the EU level and was evidently led by politicians from this group of countries (e.g. President Macron in France). The reform of the posting rules was therefore a clear political success for this group.

1.2. Debates in southern and central and eastern European (CEE) countries

In southern and CEE countries, cross-border services' provision has generally received less public and scholarly attention than in western Europe. Furthermore, the intensity of the debate and the issues discussed have varied considerably across these states.

The topic of posting hardly ever features in national public debates in Portugal, the only southern European country analysed in this book. This comes somewhat as a surprise, given the country's rich and longstanding tradition of migration related to its colonial past, as well as its relatively high number of inbound posted workers (see Introduction). When it came to the question of whether or not to include the transport sector within the scope of the revised Posted Workers Directive, both Portugal and Spain joined the CEE Member States in their objection to the idea.[4]

A different trend can be observed in Slovenia. Following the virtual collapse of the domestic construction sector during the late-2000s economic crisis, Slovenian building companies have begun shifting their operations to foreign markets, which has led to a surge in posting numbers: the number of A1 certificates issued by the country's social security authorities to transnationally-mobile workers increased from 25,000 in 2010 to 164,000 in 2016 – an almost six-fold increase in just six years. It is also notable that the majority of Slovenian outbound posted workers have come from former Yugoslav republics, in particular from Bosnia and Herzegovina; their

3. For an EU-wide overview of this issue, see Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in the EU28, Background Analysis 2019.01, Brussels, ETUI.

4. Barbière, C. (2017) Posted Workers: Macron's first victory in reforming the EU'. Euractiv, 24 October 2017. https://www.euractiv.com/section/economy-jobs/news/posted-workers-macrons-first-victory-in-reforming-the-eu/. This initial idea was rejected, and there are now on-going, separate negotiations about how to regulate posting in the transport sector.

migrant status as well as their employment in labour-intensive market segments leaves them particularly prone to exploitation. Addressing the challenges, Slovenian trade unions and non-governmental organisations have accordingly launched multiple initiatives targeting migrant and posted workers, including direct assistance; government lobbying; and information campaigns among a broader public. These multiple and varied initiatives have raised public awareness of loopholes in the otherwise relatively developed Slovenian system of social protection and induced regulatory changes.[5] The issue of employee exploitation has similarly entered the Bulgarian public debate, through an investigation conducted by Belgian, Dutch and Bulgarian journalists that revealed a long-time fraudulent posting scheme involving worker underpayment and other irregularities. In contrast to Slovenia, however, the Bulgarian scandal did not spark the creation of special organisations that would assist the country's posted workers.

An interesting picture emerges from the analysis of the Polish discourse. Despite the high absolute numbers of outbound posted workers (573,358 A1 certificates issued to transnationally-mobile workers in 2017, including 217,154 under the Article 12(1) of the social security co-ordination Regulation),[6] wage levels and working conditions of this category of employees have not been widely debated by the media or social partners. If anything, posting has been viewed as an element of the Polish 'service export' EU success story – that is, the post-accession expansion of Polish service providers to other European markets.

Neither is outbound posting much discussed in Latvia. Instead, at government level, the position expressed has been one of defending the freedom to provide services and promoting a liberal approach to the internal market as such. In contrast, however, posting features negatively in the local debates on inward labour migration. There, for example, posting of third-country nationals via Poland is seen as detrimental to the local workforce. In this regard, the debates reflect Latvia's position as receiving and sending posted workers in approximately equal measure and to an extent align with the debates in Western European Member States.

Since 2017, the public debate has centred to a significant extent on the EC's initiative to revise the Posted Workers Directive. The chapter on Poland shows how the proposal has divided the Poles into two camps. The government and employer associations were opposed to the recent revision of the Posted Workers Directive, which grants posted workers equal remuneration (this was previously the minimum wage). Polish trade unions, by contrast, sided with their counterparts from other European countries and EU-level umbrella organisations in defending the 'same wage for the same job in the same place' principle proposed in the Commission and which was ultimately accepted by the European legislators. This discourse is now playing out before the CJEU where

5. For more details on trade union and NGO initiatives targeting migrant and posted workers in Slovenia, see Samaluk B. (2017) Innovative trade union practices addressing growing precarity characterised by rescaled governance and the shrinking welfare state: the case of Slovenia, in Bernaciak M. and Kahancová M. (eds.) Innovative union practices in Central-Eastern Europe, Brussels, ETUI, 204-217.

6. Pacolet J. and De Wispelaere F. (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission.

Poland (and Hungary) has brought a legal challenge about the revision of the Posted Workers Directive, in which they demand the Court rules on its invalidity.

It seems, then, that following CEE countries' accession to the EU, posting was mainly seen as a business opportunity for local companies, aiding their expansion into European markets. The lower wages of their outbound posted workers were viewed as part of their competitive advantage. The working conditions and rights of workers temporarily sent to other countries were for a long time excluded from the public debates; only recently did they enter the discourse in relation to exposed cases of abuse and the EU-level discussion on the revision of the Posted Workers Directive. The emphasis on the competitive aspects of posting left little space for concerns over the rights of posted workers and their adequate enforcement. Another distinctive feature of CEE discussions on posting was their primary focus on outbound posting. The picture could be changing, however. In Latvia, for example, increasing labour shortages have led to inbound posting being suggested as a remedy by companies, especially in the construction sector; but concerns about the possible negative effects of this inbound posting on local workers have grown. To a large extent this could be down to the growth in the posting of third-country nationals (see Section 3.3.5). In a similar vein, debates on inbound posting have also emerged in Slovenia. Therefore, the diversity of the prevailing debates in this group of countries is significant.

2. National case law on employee posting: a comparative overview

In this Section, we provide a comparative assessment of posting-related case law in the 11 examined EU Member States. As stated in the Introduction, the aim of the study is to map out country-level litigation on posting, outlining the similarities and differences in terms of number and type of the judgements, as well as to explore what issues are litigated in individual EU countries and who brings posting-related cases to court.

We briefly discuss the actors involved in judicial proceedings and out-of-court dispute settlement systems in the examined countries. We then account for the observed variation in terms of the number of posting-related court cases. Finally, we identify themes that cut across national reports, referencing specific court cases to illustrate the points.

2.1. Posting-related disputes: actors and processes

The national reports compiled in this volume display a considerable variety in terms of the actors that bring cases to courts. In addition to individual actors – workers or companies – court proceedings were often initiated or supported by collective organisations, in particular by trade unions. The latter would assist larger groups of employees in high-profile cases, such as that of the Gama company in Ireland, which involved the underpayment of 600 Turkish workers and the destruction of company records with the aim of concealing the irregularities. In certain categories of proceedings, in particular those related to social security payments, state institutions were also a party. In the majority of these cases, national courts ruled in favour of state authorities -

an observation made about the German evidence, which also applies to other examined countries.

In Denmark and in Ireland out-of-court negotiation and mediation is preferred, and indeed default, option for settling employment related disputes. In Denmark employment conditions are not enshrined in law, but are set out by trade unions and employers or their associations in the collective bargaining process and, if collective agreement provisions are breached, the case can be directed to a special arbitration body and/or mediated with the help of the state-provided public conciliator. Ireland has a similarly well-developed third-party mediation and conciliation system. The majority of the disputes, including high profile and controversial cases such as Gama, get resolved before the Workplace Relations Commission (WRC), a state agency tasked to oversee and promote good practice in the field of employment relations. In effect, a very limited number of employment-related disputes find their way to a regular civil court.

Beyond adjudication and mediation, several national reports highlight the role of national labour inspectorates (administrative enforcement) in detecting and combating posting-related abuses. In Poland, the labour inspectorate conducts regular controls of companies involved in inbound posting, verifying whether they possess the required documentation and are complying with the country's occupational health and safety standards. It also responds to the queries of their foreign counterparts, performs inspections of Polish companies posting their employees abroad, and is instrumental in revealing irregularities in relation to employee remuneration and posting of third-country nationals. The French labour inspectorate has been similarly active. On numerous occasions it has ordered closures of construction sites on which illegal employment has been detected, while the amount of administratively imposed fines on posting-related offenders has been steadily on the rise.

Several chapters (Denmark, Ireland, Slovenia and the Netherlands) point to the involvement of social partners in detecting irregularities related to inbound posting. In the Netherlands, for instance, trade unions can establish the nullity of a provision included in the individual employment agreement that deviates from a collective labour agreement, even if the union was not the party to the agreement. They also demand that the authorities start an investigation if they suspect that collective agreement provisions have been breached. In Ireland, unions share this 'policing' role with business associations, which have an interest in preventing wage undercutting by foreign posting companies and thus seek to ensure that all entities operating in a given market comply with generally applicable collective agreements. Finally, the Slovenian chapter points to the involvement of trade unions and non-governmental organisations in assisting migrant and posted workers. These organisations, however, rarely initiate litigation on behalf of the disadvantaged groups.

2.2. Number of posting-related rulings

There are significant differences between the number of cases reported and analysed by authors of the individual Chapters: while in the case of Germany, for example, 316 cases

involving transnational posting could be identified and analysed, the figure for Finland was as low as four.

The discrepancy can be partially explained by the limitations on the accessibility of the rulings' texts, which significantly differed across countries and court types. For example, in Ireland, France and partially in Latvia courts can choose which judgments should be made publicly available ('reported'). In Slovenia and Portugal, the accessibility to the judgments by lower instance courts is severely limited. In contrast, in Germany all judgments are always published, hence there is no availability issue. Finally, some authors concentrated on analysing primarily judgments by the highest courts (Supreme Courts) due to the large number of rulings (Poland).

Several other factors can also be at play. In the case of Ireland, the number of posting-related cases was limited, which could be explained by the relatively low number of both inbound and outbound posted workers. Since 2004, the country has experienced large inflows of workers from CEE counties, but the overwhelming majority of these took the form of permanent migration rather than posting, and thus were governed by a different set of regulations. Furthermore, if potential plaintiffs expect to face difficulties when seeking legal remedy to their problems, they might decide not to bring their case to court. This was the argument invoked in Portuguese chapter in relation to posted Portuguese workers, who allegedly perceive their home country's judicial system as inefficient, and might therefore be reluctant to file cases upon their return from a posting mission in another EU Member State.

The Slovenian chapter, however, rightly points out that the fact that posted workers do not seek justice in courts does not mean that they are not subject to abuse and exploitation. It discusses the plight of third-country posted workers, whose specific vulnerability results from the combination of migrant status, low skills and low income, and prevents them from standing up for their rights. By a similar token, the chapter on Finland explains the low number of posting cases in the Finnish courts by workers' inability to follow a complicated legal proceeding led in a foreign language. In this respect, it is indicative that all posting-related cases dealt with by Finnish courts were brought by trade unions rather than individual workers.

In Germany, there are notable differences in the number of posting cases related to specific elements of the country's regulatory structure. In particular, the country boasts a substantial body of case law related to SOKA-BAU, a compulsory, social-partner-run social fund in the construction sector, whereas cases related to the general social security scheme are significantly less frequent. This can be explained by the difference between the elaborate legal setup behind SOKA-BAU and the existence of efficient fund-specific law enforcement bodies, and the fragmented system of compliance monitoring in the case of the social security legislation. This divergence in practice within a single EU Member State highlights the important role played by clear legal provision and efficient law-enforcing institutions in upholding the rights of (posted) workers.

Finally, the number of court cases, when one contrasts cases concerning inbound and outbound posted workers, paint an interesting picture. Several chapters[7] indicate that while cases by posting companies against decisions of public authorities and vice versa are often brought in the 'host countries' (albeit by no means exclusively), the posted workers themselves tend to go to courts in their 'home countries'. Out of 17 cases analysed in the Slovenian Chapter, only one concerns inbound posting. The picture in Latvia is very similar: 80 out of 95 judgments concern outbound posting, a further 12 concern third-country nationals posted through Latvian territory, and only three cases concern inbound posting. Latvia is interesting also due to the fact that numerous cases by public authorities against companies in fact concern outbound posting. In countries where most cases relate to inbound posting (see the chapters on Denmark and on Germany), practically all of them deal with a dispute between either a posting company and a public authority (as in the case of SOKA-BAU), or trade unions and posting companies (Confederation of Danish Trade Unions, United Federation of Danish Workers, and so on). This reveals an important overall trend: while collective and public law-geared disputes usually take place in the host countries, posted workers tend to use judicial enforcement opportunities in the home country after their return. This is an important finding for the future design of judicial opportunity structures, which should be more easily accessible for workers in both countries, and also for the information exchange between the courts and the host countries. As the Latvian and Bulgarian Chapters show, national courts are often uncomfortable and even not competent enough to adequately apply 'foreign law'.

2.3. National case law on posting

Before we turn to the comparative presentation of national posting-related case law, an important methodological note needs to be made. In some countries analysed in this book, national experts found it difficult to obtain reliable and comprehensive information on posting-related case law. The ultimate selection of rulings was hence to a large extent guided by their accessibility. In effect, individual country reports differ in terms of the type of courts and instance covered: in Portugal, for instance, there was no access to first-instance judgements; whereas in Finland, information was available only from labour courts. We are aware that this diversity of sources compromises the representativeness and comparability of the material; however, we have no other choice than to rely on the available, piecemeal data in the absence of a standardised, EU-wide case law database.

The country Chapters identify five themes running through cases brought to courts in different EU Member States:

1. wages and working conditions of posted workers
2. reimbursement of posted workers' expenses and interaction of posting with domestic notions of 'assignments', 'missions' and 'business trips'

7. See for instance the chapters on the Netherlands, France, Ireland, Finland and Germany.

3. the applicability of host country laws and collective agreements to posting companies and their workers
4. payment and calculation of posted workers' social security contributions
5. posting of third-country nationals.

In the remainder of this subsection, we accordingly discuss the five themes and present the related case law.

2.3.1. Wages and working conditions of posted workers

Posted workers' remuneration and working conditions were often the object of litigation in the examined EU Member States. National courts dealt with instances of denied payment or underpayment, that is, the situation when the wage received by the posted worker was below the minimum pay rates in the host country. In Bulgaria, Portugal, Latvia and Slovenia, cases of this kind were brought by individual workers. In Ireland and Finland, in contrast, underpayment was detected and publicised by trade unions, which subsequently represented larger groups of posted employees in court proceedings. At the same time, there is little information about whether these workers actually received the payments. In the case of Ireland most of the workers had already returned home when the cases were concluded, and it has been difficult to find them to give them their due payments. Also, what happened to the workers on whose behalf cases were brought in Finland was not reported. This points to the need to ensure better co-ordination between the host system that is executing the judgments, and the posted workers, namely, there should be a way to reach them and inform them about compensation due.

Latvian and Bulgarian chapters suggest that the awareness and the enforcement of a host country's minimum wage via the courts remains an acute problem. The national courts in these countries tend to ignore a worker's right to receive at least the host country's minimum wage. This happens mainly in the transport sector, but in other industries too. Only in a minority of cases is this right enforced. Courts in other countries, such as Poland and Slovenia, seem to be better informed in this regard.

Beyond wages, courts have also adjudicated on other host-country minima applicable to posted workers, such as health and safety regulations (Denmark) or overtime payments (the Netherlands and Ireland). In this category of cases courts often ruled in favour of plaintiffs; in line with the ruling issued by a German court, for instance, overtime payments were due to posted workers even if their rates were laid down in several (generally applicable) collective agreements. In another interesting case before a Slovenian court, the court based its decision entirely on evidence of working time provided by the employee, as the employer had destroyed company records in an effort to avoid payments.

Another large sub-category of case law on posted workers' remuneration concerns pay deductions. In some countries like Latvia and Bulgaria, unjustifiable – and thus illegal – deductions are made from posted workers' remuneration. In Bulgaria some cases reveal that wages had been reduced to cover accommodation costs during outbound posting.

This is actually not permitted by Bulgarian labour law. In contrast, in the case of Latvia, employers often relied on claims of overpayment of posting-related expenses in their advance payments. Such claims were brought separately and as counterclaims against workers' demands before the civil courts.

All in all, the evidence suggests that more than 20 years after the adoption of the Posted Workers Directive, considerable uncertainty remains among national actors as to what elements of posted workers' remuneration can be set off from posted workers' wages in the period of their temporary deployment in another EU Member State. In some jurisdictions, such as Slovenia, the issue is decided by courts, while in others it is clarified in separate regulations. The Netherlands is an example of the latter approach: there, a law from 2015 specifies the maximum level of such deductions (in terms of the proportion of wage) and stipulates that the posted workers' wage after the deduction cannot be below the minimum rates set in the country's collective agreements.

2.3.2. Reimbursement of posted workers' expenses and interaction of posting with domestic labour mobility structures

The identification of posting and differentiation between posting and other forms of cross-border labour mobility, in particular short-term business trips ('missions'), preoccupied courts in a number of examined EU Member States, in particular Latvia, Slovenia, Bulgaria and Poland. To an extent, this issue of distinction arises because the EU rules on posting did not occupy a completely blank space. Instead, a number of similar legal structures meant for protecting workers who are assigned to work elsewhere (abroad or within the country) in both the private and public sector already existed. Accordingly, the question of how posting would co-exist with these national structures became pertinent.

Such distinction has important practical implications: it determines what wage-setting regime applies to the given worker; what type of allowances he or she is entitled to; and, in some countries, whether the allowances received by the worker during his or her deployment abroad will or will not be taxed (see for example, the Chapters on Latvia and Poland). So far, the legal practice on the issue has varied considerably across EU Member States. While Slovenian courts employ clear criteria that allow differentiating between the two forms of short-term labour mobility, in Latvia the matter has been clarified only after lengthy struggles by the courts and amendments of labour law; in Bulgaria, in contrast, the jurisprudence on the issue has not been consistent. The evidence from the last two countries shows that one could even go as far as to claim that for a long time some judges were not familiar, or at least not comfortable, with the legal construction of posting. Such lack of knowledge on the part of controlling and/or law-enforcing institutions is a matter of particular concern as it could provide an incentive for abuse.

Beyond the differentiation between posting and business trip, courts were often asked to determine whether the posting regime applies to agency workers sent abroad (Portugal); employees of so-called group undertakings (the Netherlands) or matrix company structures (Germany); personnel of aviation companies (Denmark, France);

or third-country nationals that came to an EU member state on a tourist visa (Portugal). Just like the posting/business trip differentiation dilemma discussed above, the high number of such clarification requests calls for a more precise definition of posting and its clear differentiation from other forms of cross-border mobility.

An important subset of cases dealing both with remuneration and distinction (or the lack thereof) between posting and assignments and business trips, is the treatment of allowances and reimbursements received by posted workers.

The reimbursement of expenses relating to posting is regulated in several ways.[8] Some EU Member States explicitly provide for the right to reimbursement; others have left this question for the social partners or individual employment contracts. At the same time, in a number of countries workers are paid 'daily allowances' when sent on an assignment abroad (or even within the territory of the country). From the perspective of the Posted Workers Directive, these allowances are seen as part of remuneration only when they go beyond posted workers' actual expenses.[9]

In the EU Member States analysed in this book, the reimbursement is regulated in several different ways. In Poland, allowances are not paid to posted workers, but only to workers on assignment, which is seen as a concept different from posting. In Bulgaria, the law now obliges the employer to pay allowances to all posted workers independently of whether they are posted for 30 days or less.[10] Finally, after lengthy litigation and legislative changes, Latvia combines the national notion of 'assignment', which is seen as broader and encompassing all the situations of posting. Hence workers posted from Latvia always have a right to daily allowance on top of reimbursement for travel, board and lodging.

Two issues in particular were subject to court interpretation in the examined EU Member States. First, courts had to decide whether payments such as daily or travel allowance can be included in the calculation of minimum pay rates that the worker is eligible to during his or her deployment in the host country. Our overview shows that court practice and specific rules on how to classify the allowances vary across countries.[11] In the examined country sample, Slovenian courts would rule that transport and subsistence costs should be excluded from the calculation of posted workers' wages; in addition, they were taxable, unlike those received by employees going for a business trip ('mission') to another EU Member State. In Bulgaria, in contrast, there is no unified court practice in relation to this type of payment: while courts in larger cities tend to treat allowances as supplementary payments, counterparts in smaller localities usually consider them as part of the wage. According to the Bulgarian chapter, the latter – essentially incorrect in light of the national law – practice can be accounted for by the fact that the judges consider wages obtained by outbound posted workers

8. Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in the EU28, Background Analysis 2019.01, Brussels, ETUI.
9. Article 3(7) Posted Workers Directive.
10. There was a 30-day limit in the Bulgarian Labour Code until 2017.
11. Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in the EU28, Background Analysis 2019.01, Brussels, ETUI.

'sufficiently high' in comparison with the low Bulgarian remuneration standards. As a consequence, they save companies extra costs related to the payment of allowances. In Latvia, after lengthy battles before courts and legislative amendments, the situation has recently become clear: allowances have to be paid on top of the minimum wage, with the exception only in situations where the host country's law explicitly demands that they are paid as one of the constituent elements of the minimum wage. This latter addition, which in practice means that workers receive less money if the host country provides for such an inclusion, was triggered by the decisions of the Latvian Supreme Court following the CJEU's ruling in the *Finnish Electrician Union's* case.[12]

2.3.3. Applicability of host and home country laws and collective agreements

A large proportion of court cases in the examined countries concerned the applicability of national legislation to inbound posted workers. This was the case in France, where a Polish business association questioned the right of French authorities to apply the country's minimum wage regulations to foreign hauliers and their employees. French courts similarly had to decide on the legality of the so-called Molière Clause, that is, the locally imposed provision added to public procurement contracts that obliged tenderers to use French at the locality's construction sites. It is notable that neither the first-instance judges nor their Supreme Administrative Court counterparts found the requirement unjustified or disproportionate.

Several disputes concerned the choice of applicable law, particularly in the context of airline operations, with France and Denmark featuring several high-profile cases of this kind. A Dutch court, however, had to decide whether Dutch collective agreements applied in relation to so-called company groups, in a case where company operations are formally situated in a foreign country, but the groups' employees work predominantly in the Netherlands. The rulings in such cases – and the decision as to whether to treat a given worker as a Dutch or foreign employee – ultimately depended on the ability of plaintiffs to prove that the Netherlands was the workers' habitual place of work.

Last but not least, in a similar set of cases, German courts had to decide whether or not to grant employee representation rights to employees of the matrix structures in multinational companies, which involve new organisational and task-based units cutting across state boundaries. So far, courts have tended to make workers' status as German employees - and the related representation rights - conditional on their physical presence in Germany. Judicial practice in this regard, however, is very dynamic and might change as more and more jobs escape neat territorial classifications. These cases reveal a structural issue in terms of judicial enforcement which might not be available to posted workers in the same way as to local workers. As stated above, they already face more difficulties in enforcing their rights in the host countries (language barrier; lack of knowledge of the administrative and judicial enforcement system and so on). If this is then exacerbated by strict admissibility criteria pertaining to the mobility of these workers, the situation becomes dire.

12. CJEU judgment of 12 February 2015 in case C-396/13 *Sähköalojenammattiliitto*.

Courts have also dealt with the issue of the applicability of concrete provisions enshrined in the host country's collective agreements to posted workers and posted companies, such as, for example, occupational pension schemes stipulated by the Irish general collective agreement for the construction sector. In a high-profile case brought by the Finnish electricians' trade union and referred to the CJEU, the court confirmed that posted workers can be remunerated in line with pay classification schemes, taking into account their seniority and skill levels, if such schemes are part of generally binding collective agreements in the host country.

Two cases related to the interaction between sending and receiving country's regulation deserve special attention. The first one was brought before a Polish court and addressed the question of whether a worker posted abroad can be excluded from employment-related benefits offered by the Polish collective agreement if the remuneration he or she received in the time of posting is higher than that in the host country. The court decided in the affirmative, limiting the employee's access to the additional benefits during the time of the person's deployment abroad. Another dispute involved a Polish company that sued its workers in the Polish court and wanted them to repay the penalty for underpayment that the enterprise had been forced to pay them in Denmark. The Danish court ruled that the company's demand constituted an attempt to undermine the Danish collective agreement that was still binding for the company, even after the posting assignment comes to an end.

2.3.4. Social security contributions and their calculation

In the field of social security, three broad themes in national case law can be identified. The first group concerns the choice of social security regime applicable to posted workers and is directly linked to the broader questions of applicable laws and collective agreements addressed in the previous subsection. Here, the key issue for national courts was to assess whether a company's activities on the territory of a given EU Member State can be considered significant enough to justify the workers' inclusion in the country's social security regime. This question was raised in several countries, including Portugal, France and Poland. In the latter, the courts would determine the applicable social security regime by applying the EU establishment criteria and establishing the proportion of the company's turnover made on the Polish territory. In addition, they would examine whether outbound posted workers had been subject to Polish social security regulations in the time preceding their deployment abroad. In Poland, the court practice in this field has depended very much on specific company circumstances, and decisions are made on a case-by-case basis.

The second large group of cases concerns the basis for calculation of social security contributions for the time of posted workers' deployment abroad. In particular, it was not clear to the stakeholders involved whether home country rates or hourly rates of pay received by workers during the posting period should be taken into account. Rulings on the issue varied considerably across countries. For instance, while the Portuguese court decided in favour of host country's wage rates as a basis for the calculation, its Slovenian counterpart made reference to the applicability of the so-called 'comparable wage', that is, the wage that would be earned by the worker if he or she worked in Slovenia. The

latter decision was contested by EU-level trade union organisations: the European Federation of Building and Wood Workers (EFBWW) even lodged a complaint to the EC, arguing that the Slovenian scheme for calculating social security contributions can be viewed as illegal state aid granted to the country's posting companies. In Bulgaria, some companies determine the amount of their posted workers' social security contributions on the basis of Bulgarian wage rates for comparable types of work, even though the latter is permitted only if no minimum wage rates are set in the receiving states. Others seek to avoid legal uncertainty and/or higher payments by repeatedly sending their workers abroad for periods shorter than 30 days. According to Bulgarian law, this allows them to be treated as employees on a business trip rather than posted workers.

The third subset of social-security cases concerns the issuance of A1 certificates. Here, national-level legal practice reveals considerable uncertainty in regard to whether a certain category of employees should be treated as posted workers, and accordingly, whether they should be issued an A1 certificate. Such doubts were, for instance, raised in relation to third-country nationals trained and formally employed in the Netherlands, who subsequently travelled and were active in other EU Member States as part of an entertainment show. Dutch courts were similarly unsure which social security regime should apply to transnationally-mobile workers employed by companies with complicated structures spreading across several EU Member States. All in all, national-level case law in this field suggests that EU Member States' courts and law enforcement bodies find it difficult to tap into fraudulent companies that benefit from legal uncertainty and loopholes in the existing regulations. This calls for stricter rules on company establishment and greater clarity of social security regulations applicable to business entities operating on a cross-border scale.

2.3.5. Posting of third-country nationals

A fascinating matter that surfaces in the case law only indirectly is the posting of third-country nationals. Only a couple of the Chapters point to this aspect of posted worker mobility, but their insights are potentially very interesting for future research. Most of the time the litigation focuses on another matter (often non-payment of wages or social contributions), but from the judgments it becomes apparent that the case in fact concerns posting of third-country nationals.

First, our analysis shows that many EU Member States do not distinguish between posting to other EU Member States and third countries; therefore, the rights of posted workers are *de facto* extended beyond the territorial scope of EU law. This is the case in, for example, Latvia and Portugal. In a number of cases analysed in the Latvian Chapter, the country of destination or some of the countries of destination had been non-EU countries (including, for example, Russia).

Second, a number of cases related to the *de facto* posting of workers included third-country nationals. According to the Irish chapter, the most prominent Irish case involving posting concerned the posting of Turkish workers by a parent Turkish company (the Gama dispute). Although the case primarily focused on payment of wages below the Registered Employment Agreement (REA) rate, it actually concerned posting to Ireland

from a third country: Turkey. Also, Slovenian chapter shows that a particular feature of the Slovenian situation with posting is that many posted workers from Slovenia are third-country nationals, usually coming from Bosnia and Herzegovina and other parts of the Balkan region, which complicates the posting situation not only from a legal, but also from cultural and social-economic perspective.

Finally, several Latvian cases reveal an interesting situation with third-country national posting. Some workers have been brought to Latvia with the sole purpose of being posted to other countries (this is characteristic of the shipbuilding industry). Another line of case law reveals that in order to circumvent comparatively strict immigration rules, and in particular the obligation to pay such workers at least the average wage in the sector, third-country nationals are being posted to Latvia via other EU countries, for example, Poland.

All in all, the posting of third-country nationals is a particularly interesting topic and requires further research. This is an area where immigration rules and posting rules interact and an area potentially prone to abuses since the residence permits of immigrant workers are often directly dependent on the existence of an employment contract, which means they are especially vulnerable in cases of dismissal, and therefore might be reluctant to complain or litigate about their employment conditions even in cases of serious abuses.

Conclusions: to the bright future of more data and clearer rules?

This book set out to provide an overview of national debates and case law on intra-EU employee posting. The evidence presented in the individual country Chapters shows that cross-border service provision and posting have sparked extensive discussions on workers' rights, permissible company practices, and, more broadly, on the balance between social protection and market freedoms in the EU. They have also been a subject of litigation in receiving and sending countries alike.

In view of the limited extent of posting, the high intensity of the debate on the issue and the significant body of related case law is a striking and rather surprising finding. However, it suggests that this relatively new and extraordinary form of worker mobility remains controversial, which calls for its more systematic examination and greater legal clarity.

To begin with, reliable cross-country information on the number of posted workers is currently not available. A1 social security certificates are the main source of EU-wide data in this regard, but these, however, are issued to different categories of cross-border workers, including those who do not fall within the scope of EU posting legislation. By the same token, the impact of posting on national EU labour markets and their particular sub-segments has rarely been studied. The few available accounts[13] focus on countries

13. See e.g. De Wispelaere and Pacolet's (2017) op.cit., based on the Belgian Limosa database; and Arnholtz J. and Andersen S.K. (2016) Udenlandske virksomheder og udstationerede arbejdstagere I bygge- og anlægsbranchen, København, FAOS, Sociologisk Institut, Københavns Universitet, which uses information from the Danish RUT register and data made available by the 3F union's construction branch.

that have set up national registers for foreign companies and/or workers; elsewhere, national debates and policies on posting are informed mainly by media reports on high-profile cases of fraud and worker exploitation. While such illicit behaviour and unfair practices should by all means be revealed and persecuted, media outlets should not be the primary source of information on cross-border service mobility for policymakers and the public.

The lack of reliable comparative data makes it very difficult to contextualise the available case law, and to understand which groups have no access to judicial enforcement of their rights. Therefore, we call for the establishment of standardised data gathering procedures on the issue of posting across the EU, as well as in-depth assessment of the impact of posting on national labour markets and their specific segments. Such a 'two-track' system of data collection would provide for more informed policymaking at the national level, tailored to challenges faced by particular markets and sectors. At the same time, it would prevent the spread of ill-grounded opinions on posting and keep at bay xenophobic and anti-EU sentiments. Let us hope that the newly established European Labour Authority manages to at least partly bridge this gap and fill the information void.

Second, our study points to the lack of clarity about key legal aspects of posting. Courts in the examined countries have found it difficult to identify posting and differentiate it from other forms of cross-border workers' mobility, in particular short-term assignments ('business trips', 'missions'). Court practice in this regard has varied greatly not only across, but also within EU Member States, which testifies to a high degree of uncertainty for actors involved in posting as to which set of regulations the court will apply in their particular case. Other posting-related dilemmas have similarly remained unresolved. In many countries, it is still unclear which elements of posted workers' remuneration can be set off by the employer; whether accommodation allowances and other supplementary payments can be included in the calculation of the host country's minimum wage rate; and which rate to select as a basis for the calculation of posted workers' social security contributions. In some countries, courts still struggle to apply the host country's minimum wage rates in cases that concern posting of workers. They either ignore this obligation altogether or rely on partial information in this regard. These legal loopholes and ambiguity are sometimes exploited by dishonest enterprises seeking to minimise their expenditure at the cost of workers' entitlements.

The above findings suggest there is a need to clarify basic terms and legal constructs related to posting: there should be no doubts concerning the interpretation and application of EU rules on cross-border mobility or the national legislation transposing it into EU Member States' legal systems. Furthermore, it is important to raise awareness of posting as a form of cross-border labour mobility among national-level courts and law enforcement authorities. As long as they do not correctly identify posting situations, they can neither ensure compliance with the applicable legislation nor effectively protect the rights of their workers and companies involved in cross-border service provision.

In light of our findings, it seems that the revision of the Posted Workers Directive has provided partial clarity at best. While it replaces 'minimum rates of pay' by

'remuneration', it is not clear whether domestic courts will find this notion easily applicable if they already struggle with applying the 'minimum wage'. The overall time limit of posting might clarify the situation, but only to an extent, because the incompatibility of timelines between the Social Security Regulation (Article 12(1)) and the revised Posted Workers Directive will mean that in some cases of longer postings (but below 24 months) one set of employment rules will apply (the host country's) and a different set of social security rules (the home country's). These are likely to be challenges faced by courts in the future.

Finally and unfortunately, the EU-level rules on reimbursements and daily allowances remain to an extent ambiguous, even after revision,[14] hence this matter, already prevalent in the litigation at national level, will likely remain in the judicial spotlight.

References

Arnholtz J. and Andersen S.K. (2016) Udenlandske virksomheder og udstationerede arbejdstagere I bygge- og anlægsbranchen, København, FAOS, Sociologisk Institut, Københavns Universitet.

Barbière C. (2017) Posted workers: Macron's first victory in reforming the EU,. Euractiv, 24 October 2017. https://www.euractiv.com/section/economy-jobs/news/posted-workers-macrons-first-victory-in-reforming-the-eu/

Darvas Z. (2017) Revision of the Posted Workers Directive misses the point. https://bruegel.org/2017/10/revision-of-the-posted-workers-directive-misses-the-point

De Wispelaere. F. and Pacolet J. (2017) The size and impact of intra-EU posting on the Belgian economy, Leuven, Research Institute for Work and Society (HIVA), KU Leuven.

De Wispelaere F. and Pacolet (2018) Posting of workers: report on A1 portable documents issued in 2016, Brussels, European Commission.

Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in the EU28, Background Analysis 2019.01, Brussels, ETUI.

Samaluk B. (2017) Innovative trade union practices addressing growing precarity characterised by rescaled governance and the shrinking welfare state: the case of Slovenia, in Bernaciak M. and Kahancová M. (eds.) (2017) Innovative union practices in central-eastern Europe, Brussels, ETUI.

14. Article 1(2)(c) of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

Annex I
Posting-related case law: Denmark

Genuine character of posting, chain liability

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
AR 2011.352 Bella Sky	2011	Labour court	Posting in	Confederation of Danish Trade Unions on behalf of the Painters' Union
FV2010.0139	2011	Industrial arbitration	Posted temporary agency workers to Denmark	3F - United Federation of Danish Workers
FV 2012.0180	2014	Industrial arbitration	Posting in	The Painters' Association in Denmark
FV 2013.014 Thyssen Lifts	2013	Industrial arbitration	Posting in	CO-industries on behalf of Danish Association of Electricians
FV 2013.0157	2013	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2016.0202	2017	Industrial arbitration	Posting in/ hiring in	The Danish Painters' Union
FV 2017.0097 FV 2017.0114 FV 2017.0202	2017	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV 2017.0114	2017	Industrial arbitration	Posting in	The Painters' Association in Denmark
FV 2017.0202	2016	Industrial arbitration	Posting in	The Painters' Association in Denmark

Breaches of collective agreements and labour standards, remuneration

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
AR 2008.464 Baltic Industries	2011	Labour court	Posting in	Confederation of Danish Trade Unions on behalf of the Danish Association of Electricians
AR 2012.0618 BIC	2014	Labour court	Posting in	Confederation of Danish Trade Unions on behalf of the Danish Association of Electricians
AR2015.0254 Solesi (second Solesi ruling)	2017	Labour court	Posting in	Confederation of Danish Trade Unions on behalf of 3F
FV2009.0093	2010	Industrial arbitration	Posting in/ posted temporary agency workers	CO-industry for 3F, Danish Metalworkers Union and the Plumbers, Energy, and Roofing Workers Union
FV2014.0064	2014	Industrial arbitration	Posting in	3F - United Federation of Danish Workers, the Building, Ground and Environment Workers' union, BJMF
FV2014.0065	2014	Industrial arbitration	Posting in	3F - United Federation of Danish Workers, the Building, Ground and Environment Workers' Union, BJMF
FV2014.0090 Solesi (first Solesi ruling)	2014	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV 2014.0141	2014	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2014.0156 Daniterm	2015	Industrial arbitration	Employed Polish workers/Danish subsidiary of Polish construction company	3F - United Federation of Danish Workers
FV 2014.171 Cipa	2015	Industrial arbitration	Posting in	Building, Ground and Environment Workers' Union, BJMF
FV 2016.0137	2016	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2016.0141	2017	Industrial arbitration	Employment of foreign workers	3F - United Federation of Danish Workers, Building and Construction group

Breaches of collective agreements and labour standards, remuneration

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
FV2016.0153	2017	Industrial arbitration	Temporary agency work - German workers employed by Danish temporary work agency and hired out to a building site in another place in Denmark	The Danish Painters' Union
FV2016.0191 - material question	2017	Industrial arbitration	Posting in	3F - United Federation of Danish Workers, the Building, Ground and Environment Workers Union, BJMF
FV2016.0202	2017	Industrial arbitration	Posting in/ hiring in	The Danish Painters' Union
FV2017.0027	2017	Industrial arbitration	Posting in	3F - United Federation of Danish Workers, the Building, Ground and Environment Workers' Union, BJMF
FV2017.0107	2017	Industrial arbitration	Employment of foreign workers (unclear if posting is involved)	3F - United Federation of Danish Workers
FV 2017.0114	2017	Industrial arbitration	Posting in	The Painters' Association in Denmark
FV2017.0168	2018	Industrial arbitration	Employment of foreign workers by Danish temporary work agency	The Painters' Association in Denmark
FV 2017.0202	2016	Industrial arbitration	Posting in	The Painters' Association in Denmark
FV2018.0019	2018	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2018.0060	2019	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2018.0064	2018	Industrial arbitration	Posting in	3F - United Federation of Danish Workers
FV2018.0075	2019	Industrial arbitration	Posting in	CO-industry

Breaches of posting procedure

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
AR2014.0659	2016	Labour court	Employment of foreign workers	Confederation of Danish Trade Unions on behalf of 3F
FV 2016.0137	2016	Industrial arbitration	Posting in	3F - United Federation of Danish Workers

Occupational health and safety

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
VestreLandsretsdom, 22 September 2014, V.L. S-2220-13.	2013	Western High Court	Posting in	Public prosecutor
VestreLandsretsdom, 16 October 2007, S-1618-07	2007	Western High Court	Posting in	Public prosecutor
ØstreLandsretsdom, 30 October 2007, S-1880-06	2007	Eastern High Court	Posting in	Public prosecutor

Formal requirements

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
VestreLandsretsdom, 22 September 2014, V.L. S-2220-13.	2013	Western High Court	Posting in	Public prosecutor
ØstreLandsretsdom, 30 October 2007, S-1880-06	2007	Eastern High Court	Posting in	Public prosecutor
Western High Court ruling of 15 May 2019, case no V.L.S-1077-15	2019	Western High Court	Posting in	Public prosecutor

Scope of posting rules

Case name and No	Year	Type of court	Posting in/out	Who brought the case?
AR2000.0455 Mitropa	2000	Labour court	Posting in	Mitropa AG, the posting entity
AR 2013.0828 Hekabe	2014	Labour court	Posting in	Hekabe Design GMbH
AR 2014.0028 OÜ	2014	Labour court	Posting in	Kim Johansen Transport OÜ, a transportation company

Annex II
Posting-related case law: France

Year	12 December 2017
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance: against Nimes Court of Appeal, 6 February 2015
Who initiated the case?	Public prosecutor
Nationality/country of origin	Bulgarian
What aspect of posting was central to the case?	Illegal work
Did the court identify that the situation concerns posting?	Undeclared work
National law measures invoked by the court	L1262-1, 3; L8221-3, 8224-1
EU law measures invoked by the court	
Outcome of the case	Sentence confirmed: one year's jail, EUR 20,000 fine
Who won the case?	Public prosecutor
Sector of activities	Construction
Individual/collective	At least 10 workers
Access to the court	

Year	17 October 2017
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance (against Agen Court of Appeal), ID:15-80166
Who initiated the case?	Bernard X, Maurice X
Nationality/country of origin	Gref-Trans Polish intermediary: transport firm (not a temporary work agency)
What aspect of posting was central to the case?	Fraudulent subcontracting: workers present for more than three years; the same workers then became independent workers under the same working conditions for the benefit of the same client
Did the court identify that the situation concerns posting?	No
National law measures invoked by the court	L8231-1 Labour Code illegal/undeclared work; L1262-1 Labour Code: definition of posting
EU law measures invoked by the court	CE 1408/71; Article 49 EU Treaty
Outcome of the case	Confirmation of the Appeal Court conviction: Provision of illegal work (marchandage)
Who won the case?	Public prosecutor
Sector of activities	Construction
Individual/collective	Collective
Access to the court	

Year	2 October 2017
Type of court	Conseil d'Etat, Supreme Administrative Court, interim measures, ID:414379
Instance	Second instance (appeal from administrative tribunal). The administrative tribunal suspended an administrative sanction against Hôtel de la Calanque (closing down for three months because of illegal work established by labour inspectors and police)
Who initiated the case?	Ministry of Labour (against the decision of the administrative tribunal to suspend the closing down of the hotel)
Nationality/country of origin	Third nationals through Italian intermediary
What aspect of posting was central to the case?	No proof of the existence of the Italian intermediary having allegedly posted the workers
Did the court identify that the situation concerns case?	Out of the scope of posting
National law measures invoked by the court	L.8272-2 Administrative sanctions for illegal/undeclared work
EU law measures invoked by the court	NA
Outcome of the case	The suspension was abrogated
Who won the case?	Ministry of Labour
Sector of activities	Hotel
Individual/collective	Collective
Access to the court	

Year	9 June 2017
Type of court	Conseil d'Etat, Supreme Administrative Court, 2-7 chambers
Instance	First instance, ID:400530
Who initiated the case?	Professional association, Transport i Logistyka Polska
Nationality/country of origin	Polish association
What aspect of posting was central to the case?	Whether restrictions owing to the implementation of the 2014/67/EU Directive, Decree 2016-418, 7 April 2016 were unjustified or disproportionate: posting certificate; minimum salary; employer representative
Did the court identify that the situation concerns posting?	NA
National law measures invoked by the court	Statute 2014-790, 10 July 2014; Statute 2015-990, 6 August 2015; Decree 2016-418, 7 April 2016; L1331-1 Code of Transport
EU law measures invoked by the court	Directive 96/71/CE; Regulations 1071/2009 and 1072/2009; Directive 2014/67/UE
Outcome of the case	The Court found the Decree was compatible with EU law. The Court found no restriction to the freedom for the provision of services
Who won the case	The French government
Sector of activities	International transport activity
Individual/collective	NA
Access to the court	

Year	28 March 2017
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, criminal chamber, ID:15-84795
Who initiated the case?	The user company (Léon X...Aquitaine, entreprise des travaux publics and M. Joël Y) against Appeal Court of Bordeaux
Nationality/country of origin	Poland (temporary agency)
What aspect of posting was central to the case?	Illegal work (marchange) conviction; duration of posting (three years); non-application of national law regarding renewal or agency work: permanent; profit-making operation? Yes
Did the court identify that the situation concerns posting?	Yes, without proof
National law measures invoked by the court	Articles 111-3 and 4 Criminal Code8241-1 Labour Code
EU law measures invoked by the court	ECHR (Articles 6 and 7)
Outcome of the case	The Court of Appeal decision was approved and confirmed
Who won the case?	Public prosecutor
Sector of activities	Contracting (user company)Temporary work agency (service provider)
Individual/collective	
Access to the court	

Year	4 January 2017
Type of court	Bastia Court of Appeal (Corsica)
Instance	Second instance, ID:15/00113
Who initiated the case?	URSSAF Corsica v Miss Pierre-Paul X SARL JVR
Nationality/country of origin	Italian (SARL Lader Construzione)
What aspect of posting was central to the case?	Illegal work; Subcontracting situation or provision of material?
Did the court identify that the situation concerns posting?	No
National law measures invoked by the court	L242-1 L136-2 social security law (code)
EU law measures invoked by the court	
Outcome of the case	Illegal work was not found because the presence of posted workers in the workplace was not proved
Who won the case?	SARL JVR (general contractor)
Sector of activities	Construction
Individual/collective	NA
Access to the court	URSSAF action

Year	22 December 2016
Type of court	Conseil d'Etat (Supreme Administrative Court)
Instance	Second instance; interim measures, ID:406202
Who initiated the case?	SAPE (French firm)
Nationality/country of origin	Subcontracting Portuguese firms: Efficiency Ocean II and Polebile Internacional
What aspect of posting was central to the case?	If Labour Inspection finds that there is recourse to illegal work and advises administrative authorities such as prefecture, the closing down of the working site where illegal work was done may be pronounced as an interim measure
Did the court identify that the situation concerns posting?	It seems that work was illegal/undeclared, so no valid posting situation
National law measures invoked by the court	L 8272-2 Labour Code: closing down of a worksite as an interim measure
EU law measures invoked by the court	
Outcome of the case	The appeal was rejected. The interim administrative measure confirmed
Who won the case?	Prefecture
Sector of activities	Construction
Individual/collective	Collective
Access to the court	

Year	13 December 2016
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, ID:15-84813
Who initiated the case?	Jean-François X, Olivier X Martine Y and Yria
Nationality/country of origin	Polkonect (Poland); Lemtrade (Poland); Interomex (Romania)
What aspect of posting was central to the case?	Letterbox companies founded by French nationals; undeclared work/ provision of work outside the framework of TWA. Romanians would have required prior authorisation to work until 31 December 2013
Did the court identify that the situation concerns posting?	No (presented as autonomous workers). Activity orientated to France exclusively: posting is therefore fraud
National law measures invoked by the court	L1262-3 Labour Code: activity exclusively orientated towards France
EU law measures invoked by the court	
Outcome of the case	Court of Appeal decision (conviction) confirmed
Who won the case?	Mutualité sociale agricole Midi-Pyrénées
Sector of activities	Forestry (woodcutters)
Individual/collective	172 people
Access to the court	

Year	15 November 2016
Type of court	Cour de Cassation (criminal chamber
Instance	Third instance, ID:15-86990
Who initiated the case?	Pascal X (solicitor)
Nationality/country of origin	Place of establishment: Luxembourg
What aspect of posting was central to the case?	Undeclared work. Worker residing and working in France (legal secretary) but hired by an employer (law firm) situated in Luxembourg
Did the court identify that the situation concerns posting?	Posting is non-applicable
National law measures invoked by the court	L1262-1 (transposition in French law of the definition of a posted worker)
EU law measures invoked by the court	
Outcome of the case	Court of Appeal decision (CA Reims 15 September 2015) confirmed: undeclared work: yes
Who won the case	Public prosecutor
Sector of activities	Law firm
Individual/collective	Individual
Access to the court	

Year	18 October 2016
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, ID:15-85946
Who initiated the case?	M. Didier X and Société X palettes recyclage (recycling)
Nationality/country of origin	Italian firm (Intermapi) providing Romanian workers
What aspect of posting was central to the case?	Illegal provision of services; unauthorised work during transitional period; fraudulent sub-contracting operation; user company being the real employer of the workers
Did the court identify that the situation concerns posting?	Not really
National law measures invoked by the court	L8241-1, illegal provision of work
EU law measures invoked by the court	25 April 2005 Protocol related to the admission conditions applicable to Romania and Bulgaria
Outcome of the case	Unauthorised work: no, because in the meantime the transitional period expired
Who won the case?	On unauthorised work, M. Didier X and Société X palettes recyclage (recycling) were found not guilty; but they were convicted as recipients (beneficiaries) of the illegal work provision
Sector of activities	Wooden pallet repairs
Individual/collective	Collective: 10 questioned
Access to the court	

Year	8 July 2016
Type of court	Conseil d'Etat (Supreme Administrative Court)
Instance	Third instance, chambers 1 and 6, ID:389745
Who initiated the case?	Federation of property developers
Nationality/country of origin	NA
What aspect of posting was central to the case?	Whether Decree 2005-364, 30 March 2015 on fraud in posting operations and illegal work - according to which local clients and general contractors are under a number of legal obligations (verifications) - was legal
Did the court identify that the situation concerns posting?	NA
National law measures invoked by the court	Decree 2005-364, 30 March 2015. Fraud in posting operations and illegal work
EU law measures invoked by the court	Directive 15 May 2014 on the implementation of Directive 96/71/CE
Outcome of the case	Annulment of the Decree because it came into force immediately (without one month's notice; by contrast, verifications and vigilance have been indirectly validated)
Who won the case?	Federation of property developers
Sector of activities	Construction
Individual/collective	NA
Access to the court	

Year	21 June 2016
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, ID:15-82651
Who initiated the case?	Christophe X; CL Alsace; CL Jura; CL Nord
Nationality/country of origin	Poland: letterbox companies JVP Polsca. Hiring of workers (drivers) and vehicles
What aspect of posting was central to the case?	Undeclared work. Was intra-group posting real?
Did the court identify that the situation concerns posting?	The Court decided there was no posting. Documents E101 were inconsistent: some workers were present for more than two, three, four or five years; they were paid, according to labour inspectors, lower salaries than local drivers Activity was permanent
National law measures invoked by the court	
EU law measures invoked by the court	Directive 1996; Regulation 1408/1971
Outcome of the case	The Court of Appeal decision was confirmed. Local firms were actual employers: undeclared work
Who won the case?	Public prosecutor
Sector of activities	Transport
Individual/collective	Yes (no precise number)
Access to the court	

Year	12 May 2016
Type of court	Paris Court of Appeal. ID:14/02360
Instance	Second Court of Appeal
Who initiated the case?	The worker (Janos C.)
Nationality/country of origin	Hungary (ARCUS BAU)
What aspect of posting was central to the case?	Illicit provision of work to a French firm called IMZO Bat SARL, causing the workers detriment: the workers claimed damages, unpaid salaries etc.
Did the court identify that the situation concerns posting?	No
National law measures invoked by the court	L 8241-2 Labour Code: illicit provision of work
EU law measures invoked by the court	NA
Outcome of the case	The worker obtained compensation for damages, mostly unpaid salaries and illegal termination of employment
Who won the case?	The worker, Janos C.
Sector of activities	Construction, painting
Individual/collective	Individual
Access to the court	

Year	21 April 2016
Type of Court	Conseil d'Etat (Supreme Administrative Court
Instance	Second instance, interim relief measures, ID:398782
Who initiated the case?	Goizuetako Estructuras SL (Spanish firm)
Nationality/country of origin	Spain
What aspect of posting was central to the case?	The Spanish firm claimed posting of its workers to French worksites but it seems that controlling authorities found illegal/undeclared work
Did the court identify that the situation concerns posting?	No posting: Goizuetako Estructuras SL directs its activities towards France habitually, in a stable manner and continually
National law measures invoked by the court	L 8272-2: Administrative interim sanctions: temporary closing down and exclusion (two months) from public procurement. R8272-9 Labour Code L1262-3 Labour Code
EU law measures invoked by the court	Regulations 987/2009, 16 September 2009
Outcome of the case	The interim judgement of the administrative tribunal (first instance) was confirmed: no violation of a fundamental right such as entrepreneurial rights of the employer
Who won the case?	Ministry of Labour
Sector of activities	Construction
Individual/collective	Collective
Access to the court	

Year	3 November 2015
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, ID:13-80523
Who initiated the case?	M. Julien X
Nationality/country of origin	Ukraine (temporary work agency)
What aspect of posting was central to the case?	Was posting real?
Did the court identify that the situation concerns posting?	No posting was found. Activity exclusively orientated towards France
National law measures invoked by the court	L1262-1 Labour Code, definition of posting D8222-7 Vigilance L8231-1 marchandage
EU law measures invoked by the court	Directive 96/71/CE
Outcome of the case	Illegal provision of work without authorisation (marchandage)
Who won the case?	Public prosecutor
Sector of activities	Agriculture
Individual/collective	Collective
Access to the court	

Year	10 June 2015
Type of court	Cour de Cassation (social chamber)
Instance	Third instance, social chamber, ID:13-27799...13-27853
Who initiated the case?	The workers (easyJet pilots brought a claim before French employment courts) requiring the application of French labour law to their contracts of employment; easyJet objected to the competence of French tribunals providing E101 documents. The argument was rejected at second instance. A1 documents were obtained fraudulently. Syndicat national des pilotes de ligne (SNPL) easyJet appealed against a Court of Appeal decision
Nationality/country of origin	Great Britain
What aspect of posting was central to the case?	Whether the pilots were posted workers?
Did the court identify that the situation concerns posting?	Posting was denied albeit rather rapidly; easyJet had a permanent establishment in France
National law measures invoked by the court	
EU law measures invoked by the court	Regulation 44/2001, 22 December 2000, judiciary competence; Article 19 Regulation 883/2004 Regulation 465/2012, 22 May 2012
Outcome of the case	E101 documents do not prove there was posting if the legal conditions of posting are not met. Court of Appeal decision confirmed: French courts are competent
Who won the case?	The workers and SNPL Although E101 documents were being issued, the Court decided that national employment courts were competent to decide if the workers were posted or not
Sector of activities	Private aviation
Individual/collective	Collective
Access to the court	

Year	27 May 2015
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, criminal chamber, ID:13-81043
Who initiated the case?	M. XM.YM. Z
Nationality/country of origin	Luxembourg
What aspect of posting was central to the case?	Undeclared work Workers domiciled in France found working in an office situated in French territory although the place of establishment and contract was Luxembourg
Did the court identify that the situation concerns posting?	Case of fraud, no posting: undeclared work
National law measures invoked by the court	L8224-1, L8221-1 Labour Code
EU law measures invoked by the court	Directive 96/71/CE
Outcome of the case	Court of Appeal conviction confirmed: among others, restriction of freedom to establish a firm for five years
Who won the case?	Public prosecutor
Sector of activities	Accountancy/management
Individual/collective	Collective
Access to the court	

Year	13 November 2014
Type of court	Cour de Cassation (social chamber)
Instance	Third instance, social chamber, ID:13-19095
Who initiated the case?	The posted workers
Nationality/country of origin	Have been posted by a Portuguese firm
What aspect of posting was central to the case?	Minimum rates of pay Whether the posting allowance, paid every month to the workers, was part of the minimum rates of pay or, on the contrary, was paid in reimbursement of actual costs
Did the court identify that the situation concerns posting?	Yes, the court applied relevant law
National law measures invoked by the court	R1262-8 Labour Code
EU law measures invoked by the court	Article 3 of Directive 96/71/CE
Outcome of the case	The workers' argument was rejected. The court found that the allowance was not paid to them in reimbursement of actual costs. It therefore formed part of their minimum rates of pay according to the applicable (extended) collective agreement.
Who won the case?	The Portuguese employer
Sector of activities	Construction
Individual/collective	Five workers
Access to the court	

Year	9 May 2014
Type of court	Paris Court of Appeal
Instance	Second instance, ID:11/10576
Who initiated the case?	The posted worker
Nationality/country of origin	Canadian employer
What aspect of posting was central to the case?	The worker claimed that since his Canadian employer infringed its obligation towards him (the posted worker), then the worker was supposed to be employed by the local entity, beneficiary of the posting operation
Did the court identify that the situation concerns posting?	Yes, from a non-EU country as a result of prior employment authorisation for the duration of posting (in this case eight months)
National law measures invoked by the court	
EU law measures invoked by the court	NA
Outcome of the case	The worker's argument was rejected. The fact that his Canadian employer did not comply with posting law does not mean that the local user company, beneficiary of the posting, becomes automatically his employer
Who won the case?	The local beneficiary, Sarl Impleo Technologies group of companies
Sector of activities	Information technology
Individual/collective	Individual case
Access to the court	

Year	29 April 2014
Type of court	Paris Court of Appeal
Instance	ID:12/04104
Who initiated the case?	The worker (French posted in Italy) Outbound posted worker
Nationality/country of origin	Orange (Telecom) posted a director in Rome, Italy for two years and two months Retirement benefit
What aspect of posting was central to the case?	Employer (Orange) failed to comply with contractual obligations; did not pay social security contributions to the Italian social security system although it seemed to follow from the drafting of the employment contract that Orange did undertake such obligation, to pay both French and Italian social security contribution for the duration of posting
Did the court identify that the situation concerns posting?	Yes, without trial
National law measures invoked by the court	
EU law measures invoked by the court	Article 17 CEE 1408/71
Outcome of the case	Loss of a chance to get a retirement benefit from the Italian social security system
Who won the case?	The worker won partially
Sector of activities	Telecommunications
Individual/collective	Individual
Access to the court	

Year	8 April 2014
Type of court	Metz Court of Appeal
Instance	Second instance, ID:14/00294
Who initiated the case?	The worker (temporary worker)
Nationality/country of origin	Luxembourg temporary work agency
What aspect of posting was central to the case?	Competence of local French courts concerning the worker's rights against the French user company
Did the court identify that the situation concerns posting?	Yes
National law measures invoked by the court	L.1261-1 to L1263-2 Labour Code R1412-5: competence of French tribunals regarding rights of posted workers
EU law measures invoked by the court	
Outcome of the case	The competence of the French courts for the application of the posted worker's rights has been confirmed. Confirmation of the first instance judgement
Who won the case?	The temporary workers against the French user company
Sector of activities	Temporary work agency
Individual/collective	?
Access to the court	

Year	11 March 2014
Type of court	Cour de Cassation (criminal chamber)
Instance	Third instance, criminal chamber, ID:12-81461
Who initiated the case?	Vueling Airlines
Nationality/country of origin	Spain
What aspect of posting was central to the case?	Whether there was posting
Did the court identify that the situation concerns posting?	The court concluded that there was no posting, but undeclared work
National law measures invoked by the court	L1262-3 Labour Code, stable and permanent activity directed towards France
EU law measures invoked by the court	Article 14 Section 1a Regulations 1408/71
Outcome of the case	Since there is no posting situation, work is necessarily undeclared; the court refused to ask a preliminary ruling from the Court of Justice and denied validity to documents E101… counter to its findings
Who won the case?	Public prosecutor
Sector of activities	Aviation
Individual/collective	Collective
Access to the court	

Year	11 March 2014
Type of court	Cour de Cassation (criminal chamber)
Instance	ID:11-88420
Who initiated the case?	Social security and employer
Nationality/country of origin	easyJet, British airline
What aspect of posting was central to the case?	Whether situation was posting
Did the court identify that the situation concerns posting?	The court decided that easyJet permanently provided its services from an establishment based at Orly airport. Posting conditions were not complied with
National law measures invoked by the court	L4742-1: easyJet was sentenced to pay EUR 100,000 for having infringed workers' representation rights
EU law measures invoked by the court	Regulations 1408/71 Articles 14 and 17
Outcome of the case	The court confirmed the decision of the Court of Appeal; easyJet was to pay a fine of EUR 100,000 Undeclared work was recognised
Who won the case?	URSSAF
Sector of activities	Aviation
Individual/collective	Collective
Access to the court	

Year	25 February 2014
Type of court	Metz Court of Appeal
Instance	Social chamber, ID:11/03737
Who initiated the case?	SA DLSI France + DLSI ZOO PolandOn appeal
Nationality/country of origin	Polish temporary work agency, part of a French temporary work agency
What aspect of posting was central to the case?	Application of local temporary agency law: reasons to conclude a contract of employment for a definite period of time
Did the court identify that the situation concerns posting?	Yes, invoked and applied Posted Workers Directive
National law measures invoked by the court	L1262-4 C. trav.
EU law measures invoked by the court	Directive 96/71/EC
Outcome of the case	The contract of employment (for a definite period) was transformed to a contract of employment for an indefinite period with the temporary work agency because no valid reason (according to French law) justified recourse to a contract for a definite period
Who won the case?	The workers. By contrast the judgement of the first judges was over-turned: no separate responsibility of the French temporary agency was found
Sector of activities	Temporary work agency and construction (masonry)
Individual/collective	Individual
Access to the court	

Year	17 October 2013
Type of court	Paris Court of Appeal
Instance	Second instance, ID:13/01030
Who initiated the case?	The worker (Pascal Marnef) and the trade union of line pilots (SNPL)
Nationality/country of origin	UK (easyJet)
What aspect of posting was central to the case?	The worker asked the Court to recognise that there was no posting and that the employer should pay social security contributions to France. The employer opposes incompetence of the Court
Did the court identify that the situation concerns posting?	No
National law measures invoked by the court	
EU law measures invoked by the court	Regulations 44/2001, 22 December 2000
Outcome of the case	National courts competent because easyJet disposed of a permanent establishment in Roissy Airport
Who won the case?	The worker and trade union
Sector of activities	Private aviation
Individual/collective	Collective, 54 pilots concerned
Access to the court	

Year	13 October 2013
Type of court	Toulouse Court of Appeal
Instance	Second instance, social chamber, ID:13/01484
Who initiated the case?	The worker
Nationality/country of origin	German worker posted to the French territory (Airbus)
What aspect of posting was central to the case?	The contract of employment was terminated and the worker brought a claim before the French courts. Whether German employer (Philotec Systementwicklung) was validly brought before French courts
Did the court identify that the situation concerns posting?	Not really, and from the outcome it seems to follow that habitual place of work was France
National law measures invoked by the court	
EU law measures invoked by the court	Regulation 44/2001 22 December 2000 Article 19
Outcome of the case	Competence of the French courts confirmed: France was the workers' habitual place of employment. Worker employed in order to be posted in France Strange decision: if the worker has habitually working in France, he was not a posted worker
Who won the case?	The worker (Sébastien Schuppa)
Sector of activities	System engineer
Individual/collective	Individual
Access to the court	

Year	27 June 2012
Type of court	Cour de Cassation (criminal chamber) Letterbox companies/international transport
Instance	Third instance, ID:11-86683
Who initiated the case?	Employer: M. Guy X
Nationality/country of origin	Letterbox companies established in Spain by a French employer; employees were also French
What aspect of posting was central to the case?	Undeclared work; illegal work
Did the court identify that the situation concerns posting?	On the contrary, affirmed it couldn't be posting as the activity of the Spanish firms was completely orientated towards France and workers were French
National law measures invoked by the court	L8221-1 Labour Code L113-6 Criminal Code L.131-27: Interdiction to exercise the same profession: maximum five years L.1262-3
EU law measures invoked by the court	NA
Outcome of the case	Decision partly confirmed. Interdiction to pursue the same activity reduced to five years instead of ten (which was exceeding the legal maximum)
Who won the case?	Partly the employer; mostly the public prosecutor
Sector of activities	International transport
Individual/collective	Collective
Access to the court	

Year	9 May 2012
Type of court	Versailles Court of Appeal
Instance	Second instance, ID:10/03842
Who initiated the case?	The case was first initiated by the Polish workers who claimed that their contracts of employment (temporary work) had become indefinite towards the French user company who had used a false motivation having recourse to them. Extraordinary activity increase. First instance judges accepted the workers' argument and condemned the user company to damages. Then the user company (MQB) introduced a claim against the temporary work agency (Atlanco) in order to recognise joint and several liability
Nationality/country of origin	Polish temporary worker employed by a Portuguese TWA, and temporarily posted to France
What aspect of posting was central to the case?	National law relevant to recourse to temporary work applies to a foreign temporary work agency. In case of infringement the user company may be held liable. Was liability joint and several?
Did the court identify that the situation concerns posting?	Yes, and considered that posting was valid
National law measures invoked by the court	L1262-2 Labour Code; a foreign temporary agency may post its workers to another member state provided that the workers remain contractually bound to the temporary agency during posting
EU law measures invoked by the court	NA
Outcome of the case	No joint and several liability was found
Who won the case?	Atlanco: a Portuguese, Cypriot and Irish temporary work agency
Sector of activities	Temporary work agency
Individual/collective	Collective (three workers)
Access to the court	

Year	9 May 2012
Type of court	Versailles Court of Appeal
Instance	Second instance, ID:10/03844
Who initiated the case?	MQB client company
Nationality/country of origin	Polish workers (plumbers) posted to France by a Portuguese temporary work agency
What aspect of posting was central to the case?	Whether the Portuguese employer is still liable for the payment of minimum salary
Did the court identify that the situation concerns posting?	Yes
National law measures invoked by the court	L1262-2 Labour Code
EU law measures invoked by the court	NA
Outcome of the case	The Court overturns the first judgement, according to which violation of the local legislation on temporary work results in an indefinite contract of employment with the user company
Who won the case?	MQB client company
Sector of activities	Temporary work agency: Eiffage general constructor, general hospital
Individual/collective	Collective
Access to the court	

Year	13 July 2011
Type of court	Toulouse Court of Appeal
Instance	Second instance, ID:09/06600
Who initiated the case?	The worker, Mr Dieter Vogt
Nationality/country of origin	German worker posted by Airbus Deutschland GmbH to Toulouse from 5 February 1996 to 31 December 2006
What aspect of posting was central to the case?	Temporary character of posting. The worker being posted for 10 years
Did the court identify that the situation concerns posting?	Yes, clearly. Posting was not questioned as such in the current circumstances. There was a valid posting operation, at least initially. As a result, the employer could not demand reimbursement of posting allowances
National law measures invoked by the court	Termination of employment law
EU law measures invoked by the court	Convention Rome I Directive 96/71 Regulation 1408/71
Outcome of the case	Although there is no limitation of the maximum period of posting, application of German law should be rejected after 10 years of posting. Germany could no longer be the worker's habitual place of work. Place where the worker habitually works: France
Who won the case?	The worker, awarded more than EUR 300,000 for unfair termination of employment according to French law
Sector of activities	Aviation/construction
Individual/collective	Individual
Access to the court	

Year	18 January 2011
Type of court	Cour de Cassation (social chamber)
Instance	Third instance, ID:09-43190
Who initiated the case?	The worker, posted by a British temporary work agency (Resource Consulting Ltd) to a French user company, Toulouse Airbus
Nationality/country of origin	Temporary work agency, UK
What aspect of posting was central to the case?	Whether French termination of employment law was applicable to the temporary worker posted in France
Did the court identify that the situation concerns posting?	Yes, but posting was not an issue
National law measures invoked by the court	Enumeration of L1232-4 Labour Code
EU law measures invoked by the court	96/71/EC Article 3 Rome Convention on the applicable law on contractual relations
Outcome of the case	Although the Appeal Court had decided, under Article 6 of the Rome Convention, that the French law on termination of employment was applicable, the Cour de Cassation overturned the decision
Who won the case?	The employer: Resource Consulting Ltd, UK temporary work agency
Sector of activities	Temporary work agency
Individual/collective	Individual
Access to the court	

Year	14 January 2011
Type of court	Court of Appeal
Instance	Second instance, social chamber, ID:10/01143
Who initiated the case?	The workers, first instance The employers, second instance
Nationality/country of origin	Polish construction firm having recourse to Bulgarian workers
What aspect of posting was central to the case?	No posting situation: employers were French but never declared the foreign workers. The final recipients, private persons (owners of the building) knew foreign workers were being hired
Did the court identify that the situation concerns posting?	No
National law measures invoked by the court	L8221-5 Prior condemnation of the employers by criminal courts for exploitation of vulnerable persons; accommodation under conditions contrary to human dignity; unfair remuneration
EU law measures invoked by the court	
Outcome of the case	Confirmation of the first instance judgement
Who won the case?	The workers: EUR 25,000 for illegal work; EUR 15,000 for unfair termination of employment; EUR 18,000 for unpaid salary
Sector of activities	Construction
Individual/collective	Collective (2)
Access to the court	

Year	12 January 2010
Type of court	Rouen Court of Appeal, social chamber
Instance	Second instance, ID:08/04620
Who initiated the case?	The workers
Nationality/country of origin	Polish workers
What aspect of posting was central to the case?	None
Did the court identify that the situation concerns posting?	No, illegal provision of work outside the scope of temporary agency work to the detriment of the workers (marchandage)
National law measures invoked by the court	
EU law measures invoked by the court	
Outcome of the case	The workers obtained EUR 8,000 as compensation for the termination of their employment
Who won the case?	The workers against the user company, although they did not get satisfaction as to overtime
Sector of activities	Temporary work agency
Individual/collective	Collective
Access to the court	Yes, foreign workers

Year	18 September 2008
Type of court	Aix en Provence Court of Appeal
Instance	Second instance, ID:07/02093
Who initiated the case?	SA West Air Luxembourg and M. E. Verrecchia
Nationality/country of origin	Luxembourg
What aspect of posting was central to the case?	Was the operation of intra-group posting procurement of illicit work?
Did the court identify that the situation concerns posting?	The situation was presented as intra-group posting. The French company (West Air France) claimed EUR 8,000 paid to West Air Luxembourg for the provision of a service: administrative management. But the contract had an illicit object: provision of work (2 persons)
National law measures invoked by the court	L8241-1 Labour Code
EU law measures invoked by the court	Directive 96/71/CE
Outcome of the case	First instance judgement confirmed: the contract was invalid: illegal provision of work
Who won the case?	The French company (SA West Air France) was denied reimbursement of the EUR 8,000 because of the illicit object of the contract
Sector of activities	Air company
Individual/collective	2 persons
Access to the court	

Year	11 July 2007
Type of court	Conseil d'Etat (administrative court)
Instance	First instance, ID:299787
Who initiated the case?	easyJet and Ryanair
Nationality/country of origin	UK and Ireland
What aspect of posting was central to the case?	The applicants asked the Supreme Administrative Court to withdraw Decree No 2006-1425, 21 November 2006
Did the court identify that the situation concerns posting?	Denied the situation was posting Denied address of a preliminary question to the ECJ Denied any value to E101 document
National law measures invoked by the court	L342-3 and 4: activity permanently orientated to the French territory = duty of establishment
EU law measures invoked by the court	Convention of Rome 1980 Regulations 1408/71 Directive 96/71/EC
Outcome of the case	The result of the implementation to French law of the Posted Workers Directive was the decree obliging air companies to establish and therefore declare their personnel
Who won the case?	NA (decree remained valid)
Sector of activities	Private aviation
Individual/collective	Collective
Access to the court	

Year	15 January 2007
Type of court	Conseil d'Etat, ID:299788
Instance	Interim relief
Who initiated the case?	easyJet
Nationality/country of origin	UK
What aspect of posting was central to the case?	The applicant, easyJet, asked the Supreme Administrative Court to suspend, as an interim relief measure, Decree No 2006-1425, 21 November 2006, providing that private aviation companies that exercise a permanent, stable and continuous activity within the French territory should be considered as having a place of establishment, and apply French law as a whole
Did the court identify that the situation concerns posting	No
National law measures invoked by the court	L342-3 and 4: activity permanently orientated to the French territory = duty of establishment
EU law measures invoked by the court	Regulations 1408/71, Directive 96/71/EC
Outcome of the case	The court denied suspension of the Decree
Who won the case?	NA
Sector of activities	Private aviation
Individual/collective	Collective
Access to the court	

Year	7 May 2003
Type of court	Court of Appeal
Instance	Second instance, ID:03/462
Who initiated the case?	URSSAF
Nationality/country of origin	UK
What aspect of posting was central to the case?	Whether posting or undeclared work
Did the court identify that the situation concerns posting	Yes, the Court considered that E101 document created a legal presumption of posting
National law measures invoked by the court	NA
EU law measures invoked by the court	Regulations 1408/71, Article 14
Outcome of the case	No offence of undeclared work was established
Who won the case?	Ski Olympic, the posting employer
Sector of activities	Winter vacation operator
Individual/collective	Collective
Access to the court	

Annex III
Posting-related case law: Germany

Date	Case No	Court	Posting in/out	Parties	Sector
19-05-04	5 AZR 449/03	Federal Labour Court	Posting in	Individual employee, private company	Construction industry
20-07-04	9 AZR 343/03	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-07-04	9 AZR 369/03	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-07-04	9 AZR 345/03	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
12-01-05	5 AZR 617/01	Federal Labour Court	Posting in	Individual construction worker; company	Construction industry
25-01-05	9 AZR 258/04	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-01-05	9 AZR 146/04	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-01-05	9 AZR 154/04	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-01-05	9 AZR 44/04	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-01-05	9 AZR 621/03	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-01-05	9 AZR 620/03	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-04-05	7 ABR 20/04	Federal Labour Court	Posting out	Works council, company	Personnel leasing
14-07-05	8 AZR 392/04	Federal Labour Court	Posting out	Individual employee, private company	Oil industry
28-09-05	10 AZR 28/05	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
03-05-06	10 AZR 344/05	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry

Initiator	Central aspects
Individual employee	Right to overtime surcharges for construction works, if the overruling mandatory agreement on minimum wages did not foresee overtime surcharges itself, but another overruling mandatory collective agreement does
Private company	Application of the collective agreement on holiday funds (SOKA) on Portuguese company in 1999 and before 1999 (1997 and 1998); favourability principle in transnational contexts; right to information and contributions of SOKA
Private company	Applicability/application of the collective agreement on holiday funds (SOKA) on Portuguese company in 1999 and afterwards; favourability principle in transnational contexts; right to information and contributions of SOKA
SOKA	Liability as guarantor in subcontracting chains; validity of the subcontracting chain liability according to constitutional and European law
Individual construction worker	Liability as guarantor in subcontracting chains; validity of the subcontracting chain liability according to constitutional and European law
SOKA	Scope of application of collective agreement: interpretation of the term 'independent operations department' for a group of workers predominantly employed in construction
SOKA	Scope of application of collective agreement: interpretation of the term 'independent operations department' for a group of workers predominantly employed in construction; treatment of national duty to grant paid holidays in terms of the collective agreement
Private company	Scope of application of collective agreement: application to montage of steel products
Private company	Change of the law AEntG in 2004 in reaction to ECJ-decision Finalarte; scope of application of collective agreement: application to montage of steel products
Private company	Application of the collective agreement on holiday funds (SOKA) on Czech company in 1999; right to information and contributions of SOKA; forfeit of SOKA´s demands
Private company	Application of the collective agreement on holiday funds (SOKA) on Czech company in 1999; right to information and contributions of SOKA
Company	Validity of elections to works council of a company that posted workers to other companies in the same corporation without intention of making profits; counting of employees based on Temporary Works Act
Individual employee	Relationship between limited posting contract and suspended original contract; transfer of undertakings during posting and suspension of original contract
SOKA	Scope of application of collective agreement; interpretation of the term 'operations department' for a group of workers predominantly employed in construction
SOKA	Application of the collective agreement on holiday funds (SOKA) on Swiss company; right to information and contributions of SOKA; favourability principle

Date	Case No	Court	Posting in/out	Parties	Sector
02-08-06	10 AZR 348/05	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
02-08-06	10 AZR 688/05	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-09-06	6 AZR 752/05	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-10-06	10 AZR 301/06	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
14-02-07	10 AZR 63/06	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
28-03-07	10 AZR 76/06	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-06-07	10 AZR 302/06	Federal Labour Court	Posting out	Company, SOKA (ULAK)	Construction industry
14-08-07	9 AZR 167/07	Federal Labour Court	Posting in	Individual worker, SOKA	Construction industry
26-09-07	10 AZR 415/06	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
21-11-07	10 AZR 782/06	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
19-11-08	10 AZR 864/07	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
21-01-09	10 AZR 325/08	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
01-04-09	10 AZR 134/08	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
21-10-09	10 AZR 73/09	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-01-10	10 AZR 927/08	Federal Labour Court	Posting out	Company, SOKA (ULAK)	Construction industry
20-04-11	5 AZR 171/10	Federal Labour Court	Posting out	Individual employee, private company	Construction industry

Initiator	Central aspects
SOKA	Right to plead ignorance by the guarantor
SOKA	Right to plead ignorance by the guarantor
SOKA	Correct defendant in case of bankruptcy of the company sued that owes payment for holiday funds
SOKA	Applicability of collective agreement in case of posting to Germany; differentiation between prefabricated construction and other construction business
SOKA	Burden of proof for amount due as payment for holiday funds; applicability of German minimum wages (based on AEntG and collective agreement) instead of Polish wages
SOKA	Applicability of collective agreement and guarantor liability for client of construction done by posted workers; interpretation of term of contracting business (Unternehmen)
SOKA	Applicability of collective agreement in case of posting to another country; differentiation between carpenter and construction business
Individual construction worker	Forfeit of right to holiday payments and damages for holiday payments not granted; case of late payment by guarantor and lack of knowledge of a former posted worker about his rights
SOKA	Construction business as a criterion for application of collective agreement on SOKA; differentiation between construction works and mining activities; mining as separate industry (versus construction of tunnels, etc.)
SOKA	Freedom to provide services before joining EU; applicability of law on contracts agreed before law being passed/protection of legitimate expectations; scope of application of collective agreement: meaning of the term 'independent operations department' for a group of workers employed in construction and the necessity of an autonomous co-ordination; discrimination because of double burden
SOKA	Liability as guarantor; burden of proof of the existence of an autonomous operations area in Germany of a subcontractor based abroad - burden lies with SOKA
SOKA	Applicability of the collective agreement SOKA on crafts company in metal business/ pipeline engineering
SOKA - in third instance only: counterclaim of sued company	Company's right to re-compensation against SOKA for social benefits granted by company to workers temporarily posted to Germany based on payment of holiday salary due to foreign law is only given if the right is not forfeited based on rules of the collective agreement; payment duties and re-compensation rights in times of insecurity about the applicability of the law to non-EU nationals; recompensation rights in case of incomplete registration at SOKA
SOKA	Applicability of collective agreements on company that, besides construction, worked in two more areas that are exempt from applicability. Retrospective applicability of the law (AEntG) to Polish company in the context of access to the EU
German company	Right to re-compensation of company against SOKA for social benefits granted by company to workers temporarily posted to France who cannot work because of bad weather conditions in winter; right of SOKA to deny payment based on formalities (necessity of national social security aid to be granted as formal proof of winter aid conditions - denied for not being applicable to posted workers)
Individual employee	Rules on salary and time limits to be applied in case of posting if there was no agreement on these issues

Date	Case No	Court	Posting in/out	Parties	Sector
15-02-12	10 AZR 711/10	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-04-12	10 AZR 200/11	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
23-08-12	8 AZR 804/11	Federal Labour Court	Posting out	Individual employee, private company	(Technical employee)
17-10-12	10 AZR 500/11	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
17-04-13	10 AZR 185/12	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
21-01-15	10 AZR 55/14	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
17-06-15	10 AZR 257/14	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-07-15	10 AZR 548/14	Federal Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
26-04-16	1 ABR 21/14	Federal Labour Court	Posting in	Works council, company	Mechanical engineering
21-09-16	10 ABR 33/15	Federal Labour Court	Posting in	Companies, employer organisations, trade union, SOKA	Construction industry
02-02-04	16 Sa 47/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
09-02-04	16 Sa 393/00	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
15-03-04	16 Sa 1377/03	Hessian State Labour Court	Posting out	Individual employee, private company	Oil industry
29-03-04	16 Sa 1503/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry/metal industry
05-04-04	16 Sa 1504/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
17-05-04	16/10 Sa 786/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry

Initiator	Central aspects
SOKA	Applicability of German law for company that built a pavilion for Expo 2000; international jurisdiction of German courts
SOKA	Applicability of the law on holiday and sick days' payment for posted workers - if it is applicable, the company would have to pay remuneration on holidays and give information about remuneration to SOKA
Individual employee	Right of the employer to oblige employee to employ tax consultant prescribed by employer when abroad; general terms and conditions
SOKA	Scope of application of collective agreement: interpretation of the terms 'independent operations department' and 'entirety (or totality) of employees' for a group of workers employed in construction, here: facade engineering; differentiation from collective agreement on metalworks (company´s main business is metalworks); if a unit is employed in facade engineering for a metal construction, which collective agreement is to be applied?
SOKA	Applicability of the posting law to cases of illegal temporary work (leased personnel), here: the company of origin leased workers to a German construction company
SOKA	Scope of applicability: interpretation of the term 'pipeline construction' in context of the construction of a power plant; applicability of the collective agreement on metalworks; differentiation between terms 'manual' and 'industrial'
SOKA	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction - relevant for interpretation of term 'independent operations department'
SOKA	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction - relevant for interpretation of term 'independent operations department'
Works council	Right to participation of the works council on aspects of instruction to posted workers; limits to participation in case of external workers being instructed without incorporation into the local workforce; differentiation from temporary work
Private companies	Criteria for ordinance of general applicability of collective agreement
SOKA	Scope of application of collective agreement: interpretation of the term 'operations department' for a group of workers predominantly employed in construction
Private company	Scope of application of collective agreement: interpretation of the term 'operations department' for a group of workers predominantly employed in construction
Individual employee	Relationship between limited posting contract and suspended original contract; transfer of undertakings during posting and suspension of original contract
SOKA	Scope of application of collective agreement in metalworks areas
SOKA	Differentiation between construction and metalworks in time aspects
SOKA	Application of collective agreement on company that predominantly works in pipeline construction

Date	Case No	Court	Posting in/out	Parties	Sector
17-05-04	16/10 Sa 2019/99	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
09-08-04	16/10 Sa 705/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
09-08-04	16/10 Sa 1434/01	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
16-08-04	16 Sa 198/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
16-08-04	16/10 Sa 69/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
23-08-04	16/10 Sa 510/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
04-10-04	16/10 Sa 1267/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
04-10-04	16/15 Sa 143/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
22-11-04	16 Sa 81/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
22-11-04	16 Sa 143/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
29-11-04	16 Sa 427/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-03-05	16/10 Sa 1086/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-03-05	16/10 Sa 1261/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-03-05	16/10 Sa 1385/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
21-03-05	16/10 Sa 1283/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
30-05-05	16/10 Sa 407/03	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
11-07-05	16/10 Sa 2537/98	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-07-05	16/10 Sa 2239/99	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry

Initiator	Central aspects
Private company	Application of collective agreement on company that predominantly works in pipeline construction
SOKA	Relevant geographical (state) area of works to be considered for application of collective agreement; relevant time lapse for determination if work done belongs predominantly to construction area
SOKA	Independent operations department in Germany
SOKA	The company had paid into the holiday leave funds; their workers had received funds from SOKA. It was controversial if the defendant could charge up with the plaintiff for times in the past it had paid to SOKA but was not obliged because in fact the work done was found not to be predominantly in construction. The plaintiff who had paid holiday funds to the workers argued against the possibility of charging up for 'unjustified loss' by payment to the workers
SOKA	Relevant time lapse for determination if work done belongs predominantly to construction area
SOKA	Construction business as criteria for application of collective agreement on SOKA; differentiation between construction works and mining activities - mining as separate industry (versus construction of tunnels, etc.)
	See Federal Labour Court decision of 28.09.2005, Az: 10 AZR 28/05
SOKA	Application of collective agreement - belonging of defendant to construction industry; calculation of demands if customs officers proved that figures by company are wrong
SOKA	Independent operations department in Germany; legality of the offsetting ban laid down in the collective agreement
SOKA	Duty to participate in holiday leave procedure for workers who have both Polish and German nationality, for 1997 and 1998, in which the AEntG infringed European law
SOKA	Applicability of collective agreement - construction industry disputed - defendant asserts being occupied in metal industry; independent operations department
	See Federal Labour Court decision of 02.08.2006, Az: 10 AZR 688/05
	See Federal Labour Court decision of 03.05.2006, Az: 10 AZR 344/05
SOKA	Interest claims
SOKA	Amount of valid claims
Private company	Mounting of high-bay warehouse systems as construction work
Private company	Counterclaim of SOKA - infringement of freedom of services
Private company	Problems of reversal of payments done in times in which law was found to violate European law (1997-1998)

Date	Case No	Court	Posting in/out	Parties	Sector
17-10-05	16/10 Sa 725/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-11-05	16 Sa 636/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
28-11-05	16 Sa 1050/04	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
05-12-05	16/10 Sa 1955/02	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
06-02-06	16 Sa 1090/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
15-05-06	16 Sa 989/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
29-05-06	16 Sa 1529/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
03-07-06	16 Sa 1996/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
23-10-06	16 Sa 527/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
06-11-06	16 Sa 727/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
04-12-06	16 Sa 273/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
11-12-06	16 Sa 402/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
12-03-07	16 Sa 1478/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
19-03-07	16 Sa 1297/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
04-06-07	16 Sa 1444/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
22-10-07	16 Sa 1194/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
29-10-07	16 Sa 2012/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
07-12-07	10 Sa 541/07	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
10-12-07	16 Sa 368/07	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
10-12-07	16 Sa 970/07	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry

Initiator	Central aspects
	See Federal Labour Court decision of 28.03.2007, Az: 10 AZR 76/06
SOKA	Liability of associate of debtor (company without separate legal personality) to pay for claims against debtor
	See Federal Labour Court decision of 18.10.2006, Az: 10 AZR 301/06
Private company	Scope of application of collective agreement in metalworks areas
	See Federal Labour Court decision of 26.09.2007, Az: 10 AZR 415/06
SOKA	Time limit for lodging appeals
	See Federal Labour Court decision of 21.11.2007, Az: 10 AZR 782/06
Private company	Remuneration claims for payments and rights concerning years 1997-1998 in which German law was found not to apply owing to infringement of European law
SOKA	Provision of construction works; temporary work
Private company	Predominant area of work in Germany; works a thermal insulation composite system
SOKA	Proof of employment of workload of construction workers
	See Federal Labour Court decision of 14.08.2007, Az: 9 AZR 167/07
Private company	Differentiation between construction and mining industry
SOKA	Principle of favourability in comparation of collective agreements respectively legal prerequisites for annual leave payments for construction workers in Luxembourg and Germany
SOKA	Prerequisites of validity of declaration of general applicability of collective agreements
	See Federal Labour Court decision of 01.04.2009, Az: 10 AZR 134/08
SOKA	Guarantor liability demands against for British limited company that went into bankruptcy; use of self-employed workers
	See Federal Labour Court decision of 21.01.2009, Az: 10 AZR 325/08
Private company	Interpretation of term 'independent operations department'; tunnel works as 'mining' - in content parallel decision to Hessian State Labour Court decision of 11.02.2008 - 16 Sa 1517/05
SOKA	Scope of application of collective agreement: interpretation of the term 'independent operations department' for construction business in Germany done by a Polish metalworks company; relevance of a subsidiary in Germany

Date	Case No	Court	Posting in/out	Parties	Sector
11-02-08	16 Sa 1517/05	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-02-08	16 Sa 1009/07	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-08-08	16 Sa 2180/06	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
16-09-09	18 Sa 576/09	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
16-09-09	18 Sa 577/09	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
16-09-09	18 Sa 170/09	Hessian State Labour Court	Posting in	Individual employee, SOKA	Construction industry
04-11-09	18 Sa 1609/08	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
30-06-10	18/10 Sa 1113/08	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
31-08-10	12/18 Sa 1479/08	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
05-11-10	10 Sa 109/10	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
05-11-10	10 Sa 1228/09	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
02-02-11	18 Sa 635/10	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
02-02-11	18 Sa 636/10	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
02-02-11	18 Sa 637/10	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-05-11	18 Sa 125/10	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
20-06-12	18 Sa 676/11	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
14-11-12	18 Sa 1479/11	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-02-13	7 Sa 573/12	Hessian State Labour Court	Posting out	Individual employee, private company	

Initiator	Central aspects
	See Federal Labour Court decision of 25.01.2005, Az: 9 AZR 44/04 (referral back to Court of Appeal)
Private company	Interpretation of the term 'independent operations department'; tunnel works as 'mining'
	See Federal Labour Court decision of 21.10.2009, Az: 10 AZR 73/09
	Legal dispute about the extent and content of information to be submitted; legality of granting unpaid holidays while posted and leaving individual rights to holiday recompensation to workers after termination of posting, in detriment to SOKA since employer does not have to pay contribution on these days
	See Hessian State Labour Court, parallel decision of 16.09.2009, 18 Sa 576/09
Individual employee	Right to payment of holiday leave against SOKA after termination of contract with employer, when employer and employee had agreed on unpaid holiday leave during employment in order to receive payment from SOKA after termination
	See Federal Labour Court decision of 17.11.2010, Az: 10 AZR 845/09
	See Federal Labour Court decision of 14.12.2011, Az: 10 AZR 517/10
	See Federal Labour Court decision of 15.02.2012, Az: 10 AZR 711/10
	See Federal Labour Court decision of 18.04.2012, Az: 10 AZR 200/11
	See Hessian State Labour Court, parallel decision of 5.11.2010, Az: 10 Sa 109/10
SOKA	Necessity to verify legality and legal effectiveness of a collective agreement; legality of estimation of working hours in case of payment based on amount of work done
	See Hessian State Labour Court, parallel decision 18 Sa 636/10 of 02.02.2011
	See Hessian State Labour Court, parallel decision 18 Sa 636/10 of 02.02.2011
	See Federal Labour Court decision of 17.10.2012, Az: 10 AZR 500/11
	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction - relevant for interpretation of term 'independent operations department'; works in thermal insulation composite system
SOKA	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction - relevant for interpretation of term 'independent operations department'; differentiation from metalworks
Individual employee	Amount of valid claims in the context of posting - calculation of income; right to extra payment for services abroad for times spent in Germany in context of termination agreement

Date	Case No	Court	Posting in/out	Parties	Sector
13-11-13	18 Sa 366/13	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
12-02-14	18 Sa 1480/12	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
19-02-14	18 Sa 462/13	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
19-03-14	18 Sa 791/13	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
04-06-14	18 Sa 1325/13	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
25-06-14	18 Sa 1031/13	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-07-14	10 Sa 187/13	Hessian State Labour Court	Posting out	Individual employee, public company	International development sector
04-02-15	18 Sa 97/14	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
18-09-15	10 Sa 1780/14	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
19-08-16	10 Sa 1023/15	Hessian State Labour Court	Posting in	Company, SOKA (ULAK)	Construction industry
27-02-09	7 Sa 87/08	Baden-Wuerttemberg State Labour Court	Posting in	Individual employee, public employer	Education
07-10-04	6 Sa 770/03	Rhineland-Palatinate State Labour Court	Posting out	Individual employee, company	Chemical industry
07-10-04	6 Sa 827/03 (parallel decision to 6 Sa 770/03)	Rhineland-Palatinate State Labour Court	Posting out	Individual employee, company	Chemical industry
03-08-05	9 Sa 1330/02	Rhineland-Palatinate State Labour Court	Posting in	Individual worker, private contractor	Construction industry
03-05-12	1 Ca 31/11	Local labour court Lörrach	Posting out	Joint organisation, employer	Construction industry
29-07-09	2 Ca 571/08	Local labour court Ulm	Posting out	Joint organisation, employer	Painting craft, construction
26-03-14	1 TaBV 9/12	Saarland State Labour Court	Posting in	Works council, company	Mechanical engineering

Initiator	Central aspects
	See Federal Labour Court decision of 21.01.2015, Az: 10 AZR 55/14
SOKA	Calculation of demands if customs officers proved that figures by company are wrong
	See Federal Labour Court decision of 17.06.2015, Az: 10 AZR 257/14
SOKA	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction; interpretation of term 'independent operations department'
	See Federal Labour Court decision of 22.06.2016, 10 AZR 536/14
	See Federal Labour Court decision of 07.07.2015, 10 AZR 548/14,
Company	Validity of terms and conditions concerning repayment of a departure allowance paid by employer if employment ends sooner than six months.
SOKA	Criteria for estimation of holiday payment funds owed by employer; right of SOKA to reimbursement of funds paid without legal duty to pay; formal documentation requirements for right of employer to reimbursement
SOKA	Scope of application of collective agreement: interpretation of the term 'entirety (or totality) of employees' for a group of workers employed in construction - relevant for interpretation of term 'independent operations department'; fluctuation of workers as indication; relevant factual aspects for entirety of employees
SOKA	Right to recompensation of payments if there was wrong information submitted in the past; right to payment of holiday funds if there was allegedly overpayment in the past
Individual employee	Applicability of German jurisdiction on Turkish teacher employed by Turkey to teach Turkish culture to Turkish people in Germany - differentiation between acta iureimperii and acta iuregestionis
Individual employee	Right to payment for family leave travelling times
Individual employee	Right to payment for family leave travelling times
Individual employee	Claims against private principal of employer second in line to general contractor; period of limitation; validity of guarantor liability established in German posting law; substantiation duties of defendant
Swiss joint organisation of employers and trade unions in construction works	Proportionality of administrative costs imposed for control activities on a construction site in order to control fulfilment of collective agreement
Swiss joint organisation of employers and trade unions in construction works	Competence of German courts; national law applicable; right to contractual penalty based on overruling mandatory collective agreement; character of contractual penalties in overruling mandatory collective agreements
Works council	See Federal Labour Court 1 ABR 21/14 of 26.04.2016 (final decision)

Date	Case No	Court	Posting in/out	Parties	Sector
07-12-16	2 TaBV 6/15	Saarland State Labour Court	Posting in	Works council, company	Mechanical engineering
20-07-11	10 Ta 6/11	Baden-Wuerttemberg State Labour Court	Posting out	Joint organisation, employer	Gardening and construction industry
19-11-15	12 Sa 55/15	Baden-Wuerttemberg State Labour Court	Posting out	Individual employee, company	
16-07-10	13 TaBV 1324/10, 13 TaBV 1348/10	Berlin Brandenburg State Labour Court	Posting out	Works council, company	Aviation
13-01-16	12 TaBV 67/14	North Rhine-Westphalia State Labour Court	Posting out	Works council, company	Construction industry
29-03-04	L 11 AL 138/03	Bavarian State Social Court	Posting in	Employee, state	Construction
29-03-04	L 11 AL 95/03	Bavarian State Social Court	Posting in	Employee, state	Construction
18-05-05	L 13 R 4046/02	Bavarian State Social Court	Posting both in and out	Employee, state	
13-07-06	L 14 KG 8/03	Bavarian State Social Court	Posting out	Employee, state	
27-02-07	L 5 KR 32/04	Bavarian State Social Court	Posting in	Company, state	Construction
19-07-07	L 14 KG 13/04	Bavarian State Social Court	Posting out	Employee, state	Development work
19-07-07	L 14 KG 6/07	Bavarian State Social Court	Posting out	Employee, state	Development work
18-09-08	L 14 R 178/07	Bavarian State Social Court	Posting in	Employee, state (pension insurance)	Construction

Initiator	Central aspects
Works council	Participation in decision making on instruction of workers posted from Slovakia to learn to handle machinery to be installed in Slovakia in German sister company. Competence of the works council for posted workers sent to Germany in order to decide about their deployment. Context: fear of outsourcing in the long run. Consideration of workers posted for instruction as temporary workers. Consideration of workers posted for instruction as apprentices of the German business, among others.
Swiss joint organisation of employers and trade unions in construction works	International competence of German courts; competence of labour courts
Individual employee	Validity of terms and conditions concerning income tax payment abroad; validity of calculation method agreed concerning differentiation between taxes on private income and on income paid by the company which results in the plaintiff having to pay part of his income taxes on work income himself
Works council	Right to risk analysis and co-decision by works council regarding 'stand-by rules' (for pilots abroad between flights) and a 'crew hotel' in Palma de Mallorca
Company	In terms of posting: right of workers posted abroad to elect works council; validity of election with workers posted abroad in the electoral register
Individual	Right to insolvency substitute benefits for Turkish worker who was posted to Germany in context of works contract with a third company when the German subsidiary of the Turkish company which took care of posted workers became insolvent
Individual	Right to insolvency substitute benefits for Turkish worker who was posted to Germany in context of works contract with a third company when the German subsidiary of the Turkish company which took care of posted workers became insolvent
Individual	Times accountable for German pension insurance
Individual	Right to child allowance if posted to US together with the whole family, and without maintaining residence in Germany
Company	Contract for work with posting company versus temporary work of posted workers owing to integration in receiving company; binding force of decisions of Polish institutions regarding validity of posting certificate in case of invalid posting respecting effective temporary work without permit/registration as temporary works agency of the posting company
Individual	Right to child allowance for a development helper´s stepchildren who left the country with mother and stepfather while the mother´s ex-husband (natural father) stayed in Germany, received tax reduction because of children and paid child maintenance to mother and stepfather. Interpretation and constitutional handling of legal provision valid until 1999 which reserved right to child allowance to development helper´s children who did not receive tax benefits in Germany
Individual	Right to child allowance for a state-financed party foundation´s employee posted to Thailand. Equal treatment of development helpers of institutions named in the law on child allowance with comparable unnamed institutions. Changes in the system of child allowance which have changed from social aid primarily to tax law/tax exemptions
Employee	Right to disability pension; amount of pension based on the last work done in Germany - recognition of times of posted work (higher qualified) or only free mover times; time of beginning of disability to work; ability to work based on Croatian vs German norms

Date	Case No	Court	Posting in/out	Parties	Sector
01-07-09	L 9 AL 109/09 B ER	Bavarian State Social Court	Posting both in and out	Employer, state (unemployment agency)	
25-10-12	L 14 KG 10/11	Bavarian State Social Court	Posting out	Missionary, state	Missionary work (church)
26-10-16	L 12 EG 13/16	Bavarian State Social Court	Posting out	Parent, state	Health/research
20-12-12	B 10 EG 16/11 R	Federal Social Court	Posting out	Parent, state	
26-03-14	B 10 KG 1/13 R	Federal Social Court	Posting out	Missionary, state	Missionary work (church)
17-03-16	B 11 AL 3/15 R	Federal Social Court	Posting out	Employer, national employment agency	Construction industry
29-06-16	B 12 R 8/14 R	Federal Social Court	Posting in	Employer, social security collecting agency (German pension insurance)	Metal industry
05-12-11	L 3 U 174/10	Hessian Social Court	Posting out	Individual (widow of deceased posted worker), state	Machine construction
18-11-05	L 7/10 AL 465/03	Hessian State Social Court	Posting in	Employer, state / public social insurance	
15-02-07	L 8 KR 122/06	Hessian State Social Court	Posting in	Employer, state / public social insurance	
01-10-10	L 7 AL 73/07 ZVW	Hessian State Social Court	Posting out	Individual, state	
11-11-10	L 7 AL 108/10 B ER	Hessian State Social Court	Posting in	Individual, state	Opticians
27-11-13	L 6 EG 4/11	Hessian State Social Court	Posting in	Individual, state	
06-12-13	L 7 AL 117/12	Hessian State Social Court	Posting in	Individual, state	Opticians
06-02-14	S 72 KR 1220/10	Berlin Social Court	Posting in	Company, state	Construction

Initiator	Central aspects
Missionary	Right to short-time allowance for workers of German branch of Austrian company posting workers to Austria where, as in the German branch, because of lack of work, working hours are reduced; applicability of the norms for short-time allowance in case of posting workers abroad
Missionary	See Federal Social Court decision of 17.03.2016, B 11 AL 3/15 R
Parent	Entitlement to parental allowance for a German living with posted husband in the US; meaning of the term 'residence'; prerequisites for being within the scope of the national social insurance; prerequisites for being considered to be posted
Parent	Entitlement to parental allowance for a German mother living and working in France for French company, when the child´s father is a German worker posted to France
Missionary	Entitlement to child allowance for time of missionary work outside EU; legality of reservation of child allowance to missionaries of certain missionary services named in law
Employer	Entitlement to reimbursement of winter pay to workers employed by German subsidiary but posted to the Netherlands
Employer	Liability as guarantor for social security payments of contractors; illegal transnational temporary work; fictitious working contract with a German company owing to illegal transnational lease
Individual	Applicability of statutory accident insurance to worker employed to be posted without former or later (planned) employment in Germany
Employer	Accountability of times as employee working abroad as vice president in a subsidiary for waiting period of unemployment benefits. Decisive character of integration into sending business and source of salary payment for differentiation between posted and non-posted employee
Employer	Duty to participate in social security system when posted to Germany for one to three years to a subsidiary company. Criteria for being considered to be posted in corporate context. Exceptional case since the German subsidiary was only active in research and development in Germany, not selling services or products, thus receiving all funds from Japan.
Individual	Right to unemployment benefits for German after return from US; absence based on 'posting' to another company within corporation which paid salaries etc.; geographical centre of employment relationship; special case: posted by German mother corporation of employer without former or later employment by corporation itself
Individual	Right to unemployment benefits; consideration of payments to social security entities in posting country based on social security convention
Individual	Entitlement to parental allowance for German living with 'posted' husband in Japan; meaning of the term 'residence'; prerequisites for being within the scope of the national social insurance; application of posting rules if employee is posted in corporate context and employment is paid by and centred in receiving country
Individual	Right to unemployment benefits; consideration of payments to social security entities in posting country based on social security convention
Company	See appeal instance State Social Court Berlin-Brandenburg of 03.06.2016 (L 1 KR 82/14)

Date	Case No	Court	Posting in/out	Parties	Sector
18-04-12	S 1 AL 195/10	Frankfurt Social Court	Posting in	Individual, state	Opticians
25-08-06	S 40 U 147/04	Hamburg Social Court	Posting both in and out	Statutory accident insurance, company	Temporary work
03-11-10	S 13 EG 4/09	Stade Social Court	Posting out	Parent, state	
10-08-09	L 2 U 136/07	Rhineland-Palatinate Social State Court	Posting in	Employer, state	Meat industry
26-10-09	L 2 U 46/09	Rhineland-Palatinate State Social Court	Posting in	Employer, state	Meat industry
28-04-05	L 6 U 1974/01	Baden Wuerttemberg State Social Court	Posting out	Employee, state/ public social insurance	
22-01-13	L 11 EG 3335/12	Baden Wuerttemberg State Social Court	Posting out	Parent, state	
24-03-15	L 11 EG 272/14	Baden Wuerttemberg State Social Court	Posting out	Parent, state	
23-02-16	L 11 EG 2920/15	Baden Wuerttemberg State Social Court	Posting out	Parent, state	
11-12-06	L 9 KR 73/03	Berlin Brandenburg State Social Court	Posting in	Employer, state/ public social insurance	
07-12-07	L 1 KR 235/07	Berlin Brandenburg State Social Court	Posting in	Employer, state	
03-06-16	L 1 KR 82/14	Berlin Brandenburg State Social Court	Posting in	Company, state	Construction
21-09-11	L 2 EG 3/11	Lower Saxony-Bremen State Social Court	Posting out	Individual (mother), state	
21-01-05	L 13 KG 13/04	North Rhine-Westphalia State Social Court	Posting out	Employee, state	
20-03-08	L 2 KN 139/07 U	North Rhine-Westphalia State Social Court	Posting in	Employee, state (pension insurance)	Mining

Initiator	Central aspects
Individual	See appeal instance Hessian State Court of 06.12.2013 (L7 AL 117/12)
Company	Binding character of a posting certificate (E101) issued by health insurance concerning statutory accident insurance in cases in which the prerequisites of a posting certificate are not given since employees are only employed in target country
Parent	Entitlement to parental allowance for a German mother living and working in France for French company, when the child´s father is a German worker posted to France
Employer	Duty for a Polish meat company to pay insurance contribution for workers posted to Germany; validity of Polish posting certificate certifying domestic social security payments in Poland; difference between certificates regarding EU and non-EU countries; lack of economic activity in Poland itself; interpretation of the term of posting; time: before joining EU
Employer	Duty for a Hungarian meat company to pay insurance contribution for workers posted to Germany; validity of a Hungarian posting certificate certifying domestic social security payments in Hungary; difference between certificates regarding EU and non-EU countries; lack of economic activity in Hungary itself; interpretation of the term of posting; time: before joining EU
Individual	Recognition of HIV infection as occupational disease of workshop foreman posted to Nigeria for five years. Regular treatment of wounds (first aid) in context of work in HIV-affected area. Relevance of possible alternative reasons for infection
Parent	Entitlement to parental allowance for a German living with posted husband in China; meaning of the term 'residence'; prerequisites for being within the scope of the national social insurance; application of posting rules if employee is posted in the context of corporate transfer and employment is paid by and centred in receiving country
Parent	Entitlement to parental allowance for a German living with posted husband in Canada; meaning of the term 'residence'; prerequisites for being within the scope of the national social insurance
Parent	Entitlement to parental allowance for a German living with posted husband in Turkey; meaning of the term 'residence'; prerequisites for being within the scope of the national social insurance; application of posting rules if employee is posted in corporate context and employment is paid by and centred in receiving country
Employer	Duty to participate in social security system when posted to Germany to a subsidiary company. Criteria for being considered to be posted in corporate context. Relevance of the legal and factual relations in order to find an employment relationship in demarcation from posting. Here, central: integration into a company/business as decisive factor
Employer	Right to social security payments for workers posted to Germany in 1991; right to reconsider quality of being posted by German authorities; legal quality of posting certificate (D/PL 101); right to ignore untested, valid certification
Company	Right to posting certificate of a Polish company against German authorities which deny contract on certificate with Polish authorities regarding six employees for not being considered posted; admissibility of action
	See Federal Social Court of 20.12.2012, B 10 EG 16/11 R: entitlement to parental allowance for German mother living and working in France for French company, when the child´s father is a German worker posted to France
Individual	Right to child allowance if posted to Canada together with the whole family, and without keeping on residence in Germany
Employee	Right to disability pension for formerly Polish citizen living in Germany since 1980, but until 1982 as posted worker; relevant date for applicable legal scheme

Date	Case No	Court	Posting in/out	Parties	Sector
10-03-11	L 16 (1) AL 21/09	North Rhine-Westphalia State Social Court	Posting out	Employer, office for disabled employees	Temporary work
03-07-13	L 17 U 235/08	North Rhine-Westphalia State Social Court	Posting in	Employer, public insurance	Meat industry
07-05-15	L 9 AL 226/13	North Rhine-Westphalia State Social Court	Posting out	Employer, national employment agency	Construction industry
03-11-16	3 K 52.15 V	Administrative Court Berlin	Posting in	Individual, state	Restaurants
23-03-09	3 K 3803/08.F	Administrative Court Frankfurt	Posting in	Individual, state	Universities
18-12-08	OVG 1 B 13.08	Higher Administrative Court of Berlin-Brandenburg	Posting in	Employer organisation, minister of social and labour affairs	Mail services
17-05-13	III B 121/12	Federal Financial Court	Posting in	Parent, state	
20-03-14	V R 45/11	Federal Financial Court	Posting in	Parent, state	
05-02-15	III R 29/14	Federal Financial Court	Posting in	Parent, state	
17-02-09	10 K 1293/08 Kg	Financial Court Düsseldorf	Posting in	Parent, state	
24-10-11	1 K 2298/08	Financial Court Düsseldorf	Posting in	Parent, state	
25-07-12	9 K 325/11	Financial Court Lower Saxony	Posting out	Parent, state	

Initiator	Central aspects
Employer	Application of minimum employment figures of disabled employees for compensatory levy in case of posting of temporary workers abroad (if 5% of employees have to be disabled in order not to pay compensatory levy, do employees posted to Netherlands count, if the employer in the Netherlands has to fulfil the Dutch social security laws for disabled people?); unequal treatment compared with Dutch temporary employment agencies that do not pay compensatory levy
Authorised representative of posting company in Germany	Validity of a Hungarian posting certificate certifying domestic social security payments in Hungary; liability of authorised representative in Germany for payments to statutory accident insurance in Germany; time: before joining EU
Employer	See: Federal Social Court of 17.03.2016 (cassation decision)
Individual	Right to legal aid for an Indian citizen who was denied working visa; posting of third-country nationals to Germany; abuse of EU law/freedom of services in order to get work permit
Individual	Access of child of a posted worker to student financial aid BAföG for foreign workers; prerequisite of three years' gainful employment
Employer organisation	Validity of the legislative decree of granting overruling mandatory character of a collective agreement on minimum wages; formal (and material aspects; applicability of the collective agreement on actors bound to other collective agreements covering the same area; right to verify validity of legislative decree for employer organisations and individual employers
Parent	Right to child allowance for a worker posted abroad for more than one year. Necessity of residence in Germany
Parent	Right to child allowance for Polish worker with a child posted to Germany several times for several months with the child staying in Poland. Right to deny child allowance based on the fact that, when posted, the employee is still subject to social security system of posting country
Parent	Right to child allowance for a Polish worker with three children posted to Germany for three months. Right to deny child allowance based on the fact that, when posted, the employee is still subject to social security system of posting country
Parent	Right to child allowance for a Polish worker with three children posted to Germany for three months. Right to deny child allowance based on the fact that, when posted, the employee is still subject to social security system of posting country (see Federal Financial Court of 05.02.2015 - III R 29/14)
Parent	Right to child allowance for a Polish worker with a child posted to Germany several times for several months with the child staying in Poland. Right to deny child allowance based on the fact that, when posted, the employee is still subject to social security system of posting country (see Federal Financial Court of 20.03.2014 - V R 45/11)
Parent	

Annex IV
Posting-related case law: Ireland

RAC dispute

Year	2018
Court	High Court [IEHC 732]
Instance	First instance (for 23 pls/assessment of damages for 27)
In/out	In
Parties	Da Silva &ors v Rosas Construtores S.A. &ors t/a RAC Contractors
Sector	Construction
Initiated by	50 former RAC workers
Collective/individual	Individual
Country of origin	Portugal
Aspect of posting	Overtime arrears. Non-application of REA. Failure to supply documentation. Unlawful deductions for accommodation/laundry services
Court ID	Posted workers
National law/CA	REA
EU law	NA
Outcome	Award of damages for breach of contract (full amount of the underpayment of wages); damages for unlawful deductions to wages (laundry and other expenses, e.g. use of car); damages for distress and inconvenience as a result of substandard accommodation
Winner	Workers

Year	2017/2016
Court	Court of Appeal [IECA 252]/High Court [IEHC 152]
Instance	Final appeal/first instance (for 27 pls)
In/out	In
Parties	Da Silva &ors v Rosas Construtores S.A. &ors t/a RAC Contractors
Sector	Construction (one cleaner)
Initiated by	27 former RAC workers
Collective/individual	Individual
Country of origin	Portugal
Aspect of posting	Overtime arrears. Non-application of REA. Failure to supply documentation. Unlawful deductions for accommodation/laundry services
Court ID	Posted workers
National law/CA	REA
EU law	NA
Outcome	Award of damages for breach of contract (full amount of the underpayment of wages); damages for unlawful deductions to wages (laundry and other expenses, e.g. use of car); damages for distress and inconvenience as a result of substandard accommodation
Winner	Workers

Gama dispute

Year	2015/2011
Court	Court of Appeal [IECA 179]/High Court [IEHC 308]
Instance	Final appeal/first instance
In/out	In
Parties	Abama&ors v Gama Construction (Ireland) Limited &anor
Sector	Construction
Initiated by	491 former Gama workers
Collective/individual	Individual
Country of origin	Turkey
Aspect of posting	Can the workers sue in Ireland for: an order directing payments of all outstanding wages, pension contributions and expenses due to them pursuant to the registered employment agreement?
Court ID	Posted workers
National law/CA	REA
EU law	NA
Outcome	The plaintiffs demonstrated that the action has the most real and substantial connection with Ireland. The Judge noted concerns as to the apparent manner in which some claims brought against Gama in Turkey had been dealt with, which led the Judge to conclude that workers may not recover their full entitlements under the relevant REA in that jurisdiction
Winner	Workers

Year	2005
Court	Labour Court
Instance	First
In/out	In
Parties	Gama Endustri and SIPTU
Sector	Construction
Initiated by	SIPTU
Collective/individual	Collective
Country of origin	Turkey
Aspect of posting	Overtime arrears. Non-application of REA. Failure to supply documentation
Court ID	Posted workers
National law/CA	REA (Construction)
EU law	NA
Winner	Workers

Year	2005
Outcome	The Court recommended (not legally binding) that overtime arrears be paid to the workers, and that the relevant workers should be subject to the provisions of the REA. The company agreed to supply all relevant documentation
Winner	Workers

Year	2009/2005
Court	Supreme Court [IESC 37]/High Court [IEHC 210]
Instance	Final appeal/first instance
In/out	In
Parties	Gama Endustri v Minister for Enterprise and Employment
Sector	Construction
Initiated by	Gama
Collective/individual	Collective
Country of origin	Turkey
Aspect of posting	Can report into alleged mistreatment of posted workers be published?
Court ID	Posted workers
National law/CA	Various employment law statutes giving powers of investigation to the Labour Inspectorate
EU law	NA
Outcome:	The persons or bodies entitled to have sight of the report are confined to those state bodies with a prosecutorial function in relation to the matters identified in the report (e.g. revenue, police, etc)
Winner	Mixed

REA dispute

Year	2010
Court	High Court [2010] IEHC 501
Instance	Appeal
In/out	In
Parties	TEEU/ECA and NECI
Sector	Electrical contracting
Initiated by	NECI
Collective/individual	Collective
Country of origin	All
Aspect of posting	Application to cancel the REA registration for the electrical contracting industry; unions and employers opposing the application argued by that, in the absence of an REA, contractors from other EU States, where wage rates were significantly lower than in Ireland, would enjoy a considerable competitive advantage over Irish contractors (appeal of Labour Court REP091/2009)
Court ID	Posted workers
National law/CA	REA (electrical contracting)
EU law	Laval
Outcome	The Court confirmed that the terms of the REA were applicable to contractors based outside Ireland, and that it was reasonable to conclude that, in the absence of an REA, contractors from other Member States could exercise their freedom to provide services in Ireland at the same rates and conditions of employment as apply in their country of origin. Depending on the country of origin this could seriously undermine the competitive position of Irish contractors
Winner	NA

Year	2010
Court	Labour Court (LCR19847/2010)
Instance	First
In/out	In
Parties	CIF and ICTU
Sector	Construction
Initiated by	CIF
Collective/individual	Collective
Country of origin	All
Aspect of posting	Argument that a reduction in REA rates was necessary to prevent unfair competition from companies posting workers to Ireland
Court ID	Posted workers
National law/CA	REA (Construction)
EU law	NA
Outcome	The Court recommended a reduction in REA rates. As regards the 'social dumping' argument made by the employers, the Court reiterated that the REA did apply to posted workers and their employers, and therefore recommended that the issues regarding non-compliance by contractors based outside the state related to enforcement of the REA. The Court recommended that the parties should jointly raise the matter with the appropriate authorities responsible for employment law compliance
Winner	NA

Year	2009
Court	Labour Court (REP091/2009)
Instance	First
In/out	In
Parties	National Electrical Contractors of Ireland and others and TEEU/ Electrical Contractors Association and others
Sector	Electrical contracting
Initiated by	TEEU
Collective/Individual	Collective
Country of origin	All
Aspect of posting	Application to Cancel the Registration of the REA for the electrical contracting industry; unions and employers opposing the application argued by that, in the absence of an REA, contractors from other EU States, where wage rates were significantly lower than in Ireland, would enjoy a considerable competitive advantage over Irish contractors
Court ID	Posted workers
National law/CA	REA (electrical contracting)
EU law	Laval
Outcome	The Court confirmed that the terms of the REA were applicable to contractors based outside Ireland, and that it was reasonable to conclude that, in the absence of an REA, contractors from other Member States could exercise their freedom to provide services in Ireland at the same rates and conditions of employment as apply in their country of origin. Depending on the country of origin this could seriously undermine the competitive position of Irish contractors
Winner	NA

Residual cases

Year	2012
Court	Labour Court (REA1294/2012)
Instance	First
In/out	In
Parties	Gord Don construction Ltd and Unite
Sector	Construction
Initiated by	Unite
Collective/Individual	Collective
Country of origin	UK (Northern Ireland)
Aspect of posting	Were the workers posted? Should they be enrolled in pension and sick pay scheme?
Court ID	Court decided workers were not posted
National law/CA	REA (construction)
EU law	NA
Outcome	The Court found that the workers were not posted (although resident in NI, they were employed by an Irish company and carried out work in Ireland), but that they were covered by the REA, and should be enrolled in the pension and sick pay scheme
Winner	Union (workers)

Year	2009
Court	Employment Appeals Tribunal (UD2366/2009)
Instance	First
In/out	In
Parties	Taylor v Daniel Lloyd Leisure
Sector	Leisure
Initiated by	Taylor
Collective/individual	Individual
Country of origin	UK
Aspect of posting	Unfair dismissal
Court ID	Posted workers
National law/CA	Section 20 2001 Act/Unfair Dismissals Act 1977
EU law	NA
Outcome	The Tribunal rejected the respondent's argument that Section 20 of the 2001 Act was intended to only to deal with the narrow range of issues referred to in Article 3; and intended further to specifically exclude Acts such as the Unfair Dismissals Acts. The Tribunal concluded the 1977 Act was applicable to posted workers
Winner	Employee

Annex V
Posting-related case law: Latvia

No	Year	Court	Posting in/out	Parties	Sector	Case No
1	2008	Administrative district court	Posting in	Latvian company v tax authority	Advertisement/ film industry	A42457707; A2298-08/10
2	2010	Administrative district court	Posting out	Latvian company v tax authority	Transport	A42775909; A04978-10/44
3	2010	Administrative district court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420536110; A5361-10/35
4	2010	Administrative district court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521210; A05212-10/36
5	2010	Administrative regional court	Posting in	Latvian company (branch of USA company) v tax authority	Advertisement/ film industry	A42457707; AA43-0183-10/18
6	2010	Administrative district court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521110/ A05211-10/36
7	2011	Administrative regional court	Posting out	Latvian company v tax authority	Transport	A42775909; AA43-0589-11/2
8	2012	Administrative district court	Posting out	Latvian company v State Labour Inspection	Hospitality (hotel cleaners)	142270311; 1-1831-12/1
9	2012	Administrative district court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420536110; AA43-0112-12/5
10	2012	Administrative regional court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Construction, dyeing works, ship renovation	A420521210; AA43-0244-12/15
11	2012	Supreme Court Administrative Department	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521110; SKA-673/2012
12	2012	Supreme Court Administrative Department	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420536110; SKA-657/2012
13	2012	Administrative district court	Posting out	Latvian company v tax authority	Cleaning	A420573911; A02363-12/17
14	2012	Supreme Court Administrative Department	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521210; SKA-450/2012

Origin	Central matters
US/Latvia	Right to deduct pre-tax (input tax) for furniture for an apartment where workers posted to Latvia will live
Latvia	Obligation to pay PIT and social contributions; employer argues that payments were not salary but work trip-related
Latvia	Bringing in third-country nationals for posting
Latvia	Bringing in third-country nationals for posting
US/Latvia	Right to deduct pre-tax (input tax) for furniture for an apartment where workers posted to Latvia will live
Latvia	Rejection of temporary residence permits
Latvia	PIT, social contributions, fine, etc; whether transport is an 'assignment' and whether one has to pay taxes for allowances; whether work trip-related allowances can be taxed as salary
Latvia	Fine for deducting expenses and losses related to posting from workers' wages; incorrect calculation of wages; posting and mission overlap
Latvia	Inviting a worker is possible only if it is justified by the needs of Latvian labour market and only when for a long period of time it is impossible to find workers here; it is important that employment is in Latvian territory; workers were de facto not employed in Latvia; the office with only three workers in Latvia
Latvia (to Sweden)	The documents for requesting residence permit have expired; workers simply sent on missions abroad without working in Latvia
Latvia	It has been proved that applicant does not employ workers in Latvia
Latvia	It has been proved that applicant does not employ workers in Latvia; restriction to freedom to provide services
Latvia	Tax authority imposed upon company obligation to pay additional personal income tax for workers, fine, mandatory social contributions and lateness charges; the dispute about whether, in case of posting, daily allowances and expenses related to a mission by employees (compensations) can be taxed
Latvia	It has been proved that applicant does not employ workers in Latvia

No	Year	Court	Posting in/out	Parties	Sector	Case No
15	2012	Administrative district court	Posting out	Company v tax authority	Advertising	142199411; 1-1157-12/26
16	2012	Administrative regional court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521110; AA43-0241-12/17
17	2012	Administrative district court	Posting out	Latvian company v State Labour Inspection	Transport	A420695110; A00568-12/16
18	2013	Administrative regional court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A4205212210; AA43-2287-13/7
19	2013	Administrative regional court	Posting out	Latvian company v State Labour Inspection		142270311; AA43-1388-13/1
20	2013	Administrative regional court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420521110; AA43-2288-13/7
21	2013	Administrative district court	Posting out	Latvian company v State Labour Inspection	Transport	142246511; 1-0391-13/10
22	2013	Riga Regional Court	Posting out	Worker v employer (private company)	Construction	C33487312; C-2212-13/3
23	2013	Administrative regional court	Posting out	Company v tax authority		142199411; AA43-1533-13/17
24	2013	Administrative district court	Posting out	Latvian company v State Labour Inspection	Health services	A420290113; A42-02901-13
25	2013	Riga Regional Court	Posting out	Worker v employer (private company)	Cleaners/hotels	C30606012; CA-2950-13/6
26	2013	Administrative regional court	Posting in/out	Latvian company v Office of Citizenship and Migration Affairs	Shipbuilding	A420536110; AA43-2375-13/7
27	2013	Administrative district court	Posting out	Company v tax authority		Nr A420445211, A-00196-13/16
28	2014	Supreme Court Civil Department	Posting out	Worker v employer (private company)	Health services	SKC-2425/2014
29	2014	Administrative district court	Posting in	Company v Public Procurement Monitoring Bureau	Construction	A420523213; A42-02117-14/44
30	2014	Administrative district court	Posting out	Latvian company v tax authority		A420224214; A42-02242-14/41

Origin	Central matters
Latvia	Company did not pay PIT and social contributions (21 356 LVL) that were instead formulated as mission allowance
Latvia (Ukraine)	Request for temporary residence permit with intention to post workers from third countries to other EU countries (via Latvia)
Latvia	The question was about whether company had to pay daily allowances (compensations during work trip/ mission) in full while the person worked in Denmark
Latvia (Ukraine)	Request for temporary residence permit with intention to post workers from third countries to other EU countries (via Latvia)
Latvia to Germany	Company had not paid daily allowances when workers worked in Germany; no proof that meals were covered
Latvia (Ukraine)	Request for temporary residence permit with intention to post workers from third countries to other EU countries (via Latvia)
Latvia (to Russia, Estonia, Finland etc.)	Administrative fine for non-payment of work trip-related expenses
Latvia (to Norway)	Non-payment of wages, mission allowances and a request for moral compensation
Latvia	Alleged cheating with mission allowances
Latvia (to Norway)	No employment contracts available, distinguishing posting from mission/business trip
Latvia (to Germany)	Non-payment of wages, compensation for annual leave, mission allowances, illegal deduction from wages, overtime pay, moral damages
Latvia	Posting of third-country nationals via Latvia
Latvia	Customs authority increased the value of goods on behalf of assignment expenses and daily allowance and hotel and travel costs in the value of declared goods at customs
Latvia	Parties concluded an employment contract where worker worked as a nurse for Latvian lats (LVL) 1.20 (approx. EUR 1.5) per hour, the permanent place of employment will be in Riga, but exercise of work duties will be connected with lengthy missions abroad, additional agreement to pay LVL 5.50 (approx. EUR 8) per hour for work as assisting nurse and LVL 7 (approx. EUR 10.4) per hour for work as a nurse. Whether it is posting or a mission abroad; the dispute about how to calculate the wages
-	Professional qualifications; exclusion from tender because company's construction manager did not have corresponding qualifications demanded by Latvian law
Latvia	Request for explanation as to why Regulations of the Cabinet of Ministers on assignment allowances do not apply to company's workers when they are posted (possibility of not paying tax and social contributions)

No	Year	Court	Posting in/out	Parties	Sector	Case No
31	2014	Riga Regional Court	Posting out	Worker v employer (private company)	Health services	C28469512; CA-0523-14/4
32	2014	Vidzeme Regional Court	Posting out	Worker v employer (private company)	Construction	C21044413; CA0202-14/12
33	2014	Administrative district court	Posting out	Company v tax authority	Cleaners/hotels	A420310513; A42-00713-14/11
34	2015	Administrative district court	Posting out	Company v tax authority	Meat processing	A420422314; A42-01341-15/44
35	2015	Riga City Suburb Court	Posting out	Worker v employer (private company)	Construction	C31403413; C-0985-15/9
36	2015	Supreme Court Civil Department	Posting out	Worker v employer (private company)	Health and social services	SKC-952/2015, Nr. C37108212
37	2016	Riga Regional Court	Posting out	Worker v Latvian company	Transport	C29554814/ CA-2707-16/21
38	2016	Supreme Court Administrative Department	Posting out	Worker v tax authority	Public sector/ consultant EU law	A420479613; SKA-739/2016
39	2016	Administrative district court	Posting out	Worker v state social insurance agency	Engineering	A420184516; A42-01845-16/23
40	2016	Riga City Suburb Court	Posting out	Worker v employer (private company)	Construction/ engineering	C29632615; C-2595-16/17
41	2016	Ventspils court	Posting out	Worker v employer (private company)		C40172915; C-0457-16/7
42	2017	Administrative regional court	Posting out	Worker v state social insurance agency	Engineering	A420184516; AA43-1076-17/23
43	2017	Liepaja Court (regional court)	Posting out	Worker v employer (private company)	Transport	20271316
44	2017	Administrative regional court	Posting out	Worker v state social insurance agency	Construction	A420228715; AA43-0481-17/3
45	2017	Administrative regional court	Posting out	Worker v state social insurance agency	Construction	A420212115; AA43-0321-17/3
46	2017	Administrative regional court	Posting out	Worker v tax authority	Not mentioned	A420524713; AA43-0122-17/3
47	2017	Administrative regional court	Not clear whether posting or not	Worker v tax authority	Not mentioned	A420236315; AA43-0461-17/7

Origin	Central matters
Latvia (to Norway)	Wages, idle time, mission, transport was paid, mission and not posting, daily allowance had to be paid though
Latvia (to Sweden)	Wages, compensation for idleness, court applies no minimum Swedish rules
Latvia (to Germany)	Wage for workers less than German minimum wage; not counting time spent on the way to work as working time; recovery of social contributions and income tax; non-payment for vacations, etc.
Latvia	In case of posting whether taxes and contributions have to be paid for allowances paid to workers; need to distinguish missions from posting (in case of mission the permanent workplace of the worker is not relocated)
Latvia	Payment of wages
Latvia	Employment contract, one salary for work in Latvia, another one when working abroad (four times higher plus supplements), payment of wages and allowances
Latvia	Claim to recover withheld wages, compensation for work-related expenses, daily allowances, moral compensation for inhuman and degrading treatment, obligation to return personal tax book; mission and work trip; working time
Latvia	Person employed in Kosovo, repayment of personal income tax, double taxation; resident abroad; no employment in Latvia; not employed by Latvian government (directly by EU mission); income in Kosovo tax free
Latvia	Whether time spent working abroad (where person, a spouse of a person commanded to work in the third country for a certain period of time) comes within time period for calculating pension
Latvia (to Ukraine)	Non-payment of wages
Latvia	Non-payment of wages, mission allowances, etc.
Latvia	Whether time spent working abroad (same employer) comes within time period for calculating pension
Latvia	Non-payment of wages and expenses connected with a mission abroad; non-payment of daily allowance for missions abroad; person on a mission for 41 days in July and August 2016 in Sweden, Denmark, Norway and Finland
Latvia	Repayment of unduly deducted social contributions (employee's part); social contributions deducted both in Latvia and in Norway (employer - a company registered in Latvia)
Latvia	Repayment of unduly deducted social contributions (employee's part); social contributions deducted both in Latvia and in Norway (employer - a company registered in Latvia)
Latvia	Claim that the employer has unduly deducted from salary personal income tax and social contributions in both Latvia and Norway from 11 July 2011 until 31 December 2011; the employer corrected reports to tax authority, in result tax authority deleted income of worker for that period (on request by employer) - request by employer was grounded in the fact that Norwegian authorities had deducted social contributions and personal income tax
Latvia	Income that has not been declared and taxes have not been deducted (income received from physical and legal persons of foreign origin); tax authority as a result of audit-imposed tax obligations on this income

No	Year	Court	Posting in/out	Parties	Sector	Case No
48	2017	Liepaja Court (district court)	Posting out	Worker v company	Transport	C20250416, Nr C-0497-17/6
49	2017	Jelgava Court (district court)	Posting out	Company v worker	Transport	C1516361617
50	2017	Jelgava Court (district court)	Posting out	Company v worker	Not mentioned	C15174217
51	2017	Riga City Vidzeme Suburb Court (district court)	Posting out	Worker v company	Telecommunications (field technician)	C30415417, Nr C-4154-17/4
52	2017	Ogre Court (district court)	Posting out	Company (insolvency case)	Not mentioned	C-1226-17/6
53	2017	Ogre Court (district court)	Posting out	Worker v company	Transport	C24071317
54	2017	Liepaja Court (district court)	Posting out	Worker v company	Transport	C20271116
55	2017	Riga District Court, Jurmala court house	Posting out	Worker v company	Transport	C33640816, Nr 3972-17/29
56	2017	Dauvgavpils Court	Posting out	Company v worker	Transport	C12391716, Nr C-1194-17/11
57	2017	Dauvgavpils Court	Posting out	Worker v company	Not mentioned	C12135417, Nr C-1354-17
58	2017	Riga Regional Court of Latgale Suburb	Posting out	Worker v company	Transport	C29514916, Nr C-1875-17/24
59	2017	Dauvgavpils Court	Posting out	Worker v company	Transport	C12201817
60	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C19040517
61	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C19040317
62	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C19040417
63	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C19040717
64	2017	Liepaja Court	Posting out	Worker v company	Construction	C-1684-17/6
65	2017	Liepaja Court	Posting out	Worker v company	Construction	C20166517

Origin	Central matters
Latvia	Received slightly more than minimum wage; was on assignments abroad for three months without holidays. Four assignments: 22 Feb-12 Mar; 18 Mar-4 Apr; 8 Apr-19 Apr; 6 May-31 May
Latvia	Demand to repay overpayment (advance payment for which worker had not submitted proof that he has used it for assignment-related expenses)
Latvia	Advance payment for assignment, overpayment
Latvia	Pay and daily allowance claim; sent immediately to Germany, returned but work was not ensured; wage had not been paid in full, also daily allowance and work was not ensured and standby was not being paid
Latvia	Insolvency, unpaid salaries and daily allowance for mission to Germany
Latvia	Transport worker on assignments in Europe (France, Spain, Sweden and Finland) 17 Aug until 3 Sep; no new work after return
Latvia	Company paid daily allowances only in part
Latvia	Wage and daily allowance
Latvia	Advance payment for expenses, worker did not submit proof of expenses for amount of EUR 1,159.05
Latvia	Worker claims extra pay for three additional days, which he says he has worked in Germany; no proof in this regard
Latvia	Set pay and daily allowance for one day EUR 85 to Germany, on assignment in Germany 20 Sep until 23 Oct. Pay EUR 39 when daily allowance for Germany taken into account, not reimbursed expenses for travel back to Latvia from Germany. Applicant had received pay in full but not daily allowance (which was more than pay)
Latvia	Worker on assignment, dispute about payment of wages (worker in Spain, claims that he was in France instead), hourly rate EUR 2.30. Work trip rather than assignment, no proof that payments were not adequately made
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Salary and daily allowance not paid, only travel expenses and accommodation covered
Latvia	Pay and daily allowance

No	Year	Court	Posting in/out	Parties	Sector	Case No
66	2017	Riga City Pardaugava Court	Posting out	Worker v company	Not mentioned	C-4152-17/5
67	2017	Riga City Latgale District Court	Posting out	Worker v company	Transport	C-3707-17/29
68	2017	Ventspils Court	Posting out	Worker v company	Domestic services (cleaning)	C40092617
69	2017	Liepājas Court	Posting out	Worker v company	Transport	C20-17817/12
70	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C19040917
71	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C-0410-17/2
72	2017	Kuldiga District Court	Posting out	Worker v company	Construction	C-0406-17/2, Nr C19040617
73	2017	Riga Regional Court	Posting out	Worker v company	Construction	C29746312, Nr CA-0977-17/17
74	2017	Daugavpils Court	Posting out	Worker v company	Transport	C12238517
75	2017	Riga City Latgale District Court	Posting out	Worker v company	Construction	C29687316, Nr C-3065-17/28
76	2017	Tukuma District Court	Posting out	Company v worker and counterclaim	Transport	C37082416, Nr C-0138-17/5
77	2017	Vidzeme District Court	Posting out	Company v worker	Transport	C21030217, Nr C-1275-18/16
78	2018	Riga City Vidzeme District Court	Posting out	Company v worker	Transport	C-1948-18/18
79	2018	Riga Regional Court	Posting out	Company v worker	Transport	CA-0159-18/24
80	2018	Riga District Court	Posting out	Worker v company	Transport	C-3249-18/1
81	2018	Zemgale District Court	Posting out	Worker v company	Not mentioned	C15255316
82	2018	Vidzeme District Court	Posting out	Company v worker and counterclaim	Transport	C-1285-18/16
83	2018	Riga District Court	Posting out	Workers v company	Construction	C33475217, Nr C-2562-18/27

Origin	Central matters
Latvia	Calculating daily allowance only for working days; pay and daily allowance, deadline for claim missed in part
Latvia	Payment of wages
Latvia	Stopped work for unforeseen circumstances at home, losses of employer EUR 2,000, worker demanded wages and ending of the employment contract
Latvia	Unfair dismissal, requests additional severance pay
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Sent to work in Norway in construction sector. Claims that he was required to work more than 40 hours per week and also on Saturdays, employer has not paid daily allowance
Latvia	Non-payment of wages and unacceptable living conditions
Latvia	Unjustified dismissal, due to sickness, did not know that he was dismissed, demands wages
Latvia	Assignment expenses, accommodation and daily allowance. Applicant has not submitted reports for assignment hence respondent cannot pay out the assignment allowances etc.
Latvia	Advance payment and daily allowances, work trip
Latvia	Non-submission of report for assignments
Latvia	Pay and allowances
Latvia	Non-submission of proof of how means for assignment have been spent. However, wages were included in the advance payment and for that no proof about how it is spent is needed
Latvia	Pay and daily allowance
Latvia	Pay, daily allowance and holiday pay
Latvia	For expenses an advance payment, spent, pay, daily allowance
Latvia	Law applicable to employment relationship. Applicants argue that Latvian law is applicable to their situation rather than Norwegian. Three months' contract. First posting, then standard employment contract in another place in Norway. Did not consider that new employment contracts have been concluded but that the old one continued despite what annexes say

No	Year	Court	Posting in/out	Parties	Sector	Case No
84	2018	Zemgale District Court	Posting out	Company v tax authority	Transport	1A-0073-18/2
85	2018	Kurzeme District Court	Posting out	Worker v State Border Guard Authority	Construction	1A-0103-18/2
86	2018	Zemgale District Court	Posting out	Worker v company	Transport	C152521156
87	2018	Zemgale Regional Court	Posting out	Worker v company	Not mentioned	CA-0350-18/12
88	2018	Riga Regional Court	Posting out	Worker v company	Management	CA-0486-18/37
89	2018	Jekabpils District Court	Posting out	Worker v company	Transport	C16102316, Nr C 0056-18/5
90	2018	Kurzeme District Court	Posting out	Worker v company	Transport	CA-0099-18/4
91	2019	Supreme Court Senate	Posting out	Worker v company	Construction	C69182218, SKC-541/2019
92	2019	Riga District Court	Posting out	Worker v company	Not mentioned	C33283019, Nr C-2830-19/27
93	2019	Kurzeme District Court	Posting out	Worker v company	Not mentioned	C-1292-19/32
94	2019	Riga District Court	Posting out	Company v tax authority	Not mentioned	1A-0125-19/17
95	2019	Kurzeme District Court	Posting out	Worker v State Border Guard Authority	Construction	1A69010118/11

	Origin	Central matters
	Latvia	No records for assignments, company deducted some money from wages
	Ukrainian	Work permit, third-country national (Ukrainian) posted to Latvia by Lithuanian company. Liability for working without work permit (charged by Border Guard). Contract envisions Lithuanian company guaranteeing Latvian company with workers specialising in metal constructions
	Latvia	Keeping security deposit from daily allowances. Court relied on proof from the Labour Inspectorate which did not find proof of deductions
	Latvia	
	Latvia	Pay and daily allowances
	Latvia	Pay and daily allowance
	Latvia	Payment of wages and daily allowance
	Latvia	Recognition of employment relationship, reinstatement, payment of average salary, forced downtime, overtime, daily allowance
	Latvia	Daily allowances and assignment expenses
	Latvia	Salary and allowances
	Latvia	Non-payment of wages in time, discovered by the tax authority's investigation, also deductions from wages
	Ukrainian	Work permit, third-country national (Ukrainian) posted to Latvia by Lithuanian company. Liability for working without work permit (charged by Border Guard). Contract envisions Lithuanian company guaranteeing Latvian company with workers specialising in metal constructions

Annex VI
Posting-related case law: The Netherlands

	Court	Claimant(s)	Date	ECLI and JAR
1	Kantonrechter Heerlen	Employee	24 September 2003	JAR 2003/268
2	Rechtbank 's-Hertogenbosch	Employees	9 September 2008	ECLI:NL:RB-SHE:2008:BF0793
3	Kantonrechter Roermond	FNV Bondgenoten	10 August 2011	ECLI:NL:R-BROE:2011:BR4863 JAR 2011/234
4	Voorzieningenrechter Rechtbank Groningen	FNV Bondgenoten	5 October 2012	ECLI:NL:RBGRO:2012:BX9234 JAR 2012/269
5	Gerechtshof 's-Hertogenbosch	FNV Bondgenoten	28 May 2013	ECLI:NL:GH-SHE:2013:CA1457 JAR 2013/159
6	Voorzieningenrechter Utrecht	TBB	11 December 2013	ECLI:N-L:RBMNE:2013:6250
7	Raad van State	Minister SZW	12 November 2014	ECLI:N-L:RVS:2014:4062
8	Rechtbank 's-Hertogenbosch	Employees (names unknown)	8 January 2015	ECLI:NL:RBO-BR:2015:18 JAR 2015/29
9	Kantonrechter 's-Hertogenbosch	FNV Bondgenoten	8 January 2015	ECLI:NL:RBO-BR:2015:19

Summary
An accident occurred when a Dutch employee was posted to Germany for construction work. The case was dealt with by applying Dutch law only. The employer was held liable
The court considers that Dutch law, due to the Waga, applies in an intergroup company posting situation to Belgium
The court considers that the Waga applies to Polish employees hired from the Polish subsidiary of Nico Mooy by the Dutch transport company Nico Mooy. As a result, the universally applicable transport collective labour agreement applies as well
The preliminary relief judge considers that the Waga applies to the temporary posting of employees. The main question is which elements of the universally applicable construction collective labour agreement constitute the minimum wage
Appeal of the Nico Mooy case. The Court of Appeal holds that Dutch law applies to the employment agreements of the Polish workers, besides the Waga
The subdistrict court considers that TBB – a foundation ensuring that the universally applicable construction collective labour agreement is complied with - cannot sufficiently substantiate that this collective labour agreement applies to Rimec, a company that posts employees in the construction sector. Therefore, the attachment of money in the bank accounts of Rimec by TBB is lifted
The WML does not preclude set off. Costs for housing and insurance premiums may be deducted from the wages of posted employees
The subdistrict court considers that the statement of the employees that transport company Van den Bosch BV must be regarded as their employer cannot be followed. Silo-Tank Kft is an independent Hungarian legal entity and Silo-Tank Kft concluded the employment contracts with the employees. Still, Dutch law applies to the employment agreements of these employees, either on the basis of Rome I or of the Waga. Thererefore, the universally applicable transport collective labour agreement applies as well
The subdistrict court rules along the same line as the previous case in respect of Hungarian and German drivers. Defendants are the Hungarian, German and Dutch entities of the Van den Bosch Group

	Court	Claimant(s)	Date	ECLI and JAR
10	Rechtbank Noord-Nederland	FNV Bondgenoten	4 March 2015	ECLI:NL:RB-NNE:2015:1076
11	Rechtbank Utrecht	Mecra (Rimec)	18 March 2015	ECLI:N-L:RBMNE:2015:1752 JAR 2015/83
12	Rechtbank Utrecht	Mecra (Rimec)	22 July 2015	ECLI:N-L:RBMNE:2015:5393 JAR 2015/203
13	Kantonrechter Zwolle	FNV Bondgenoten	24 Augustus 2015	ECLI:NL:R-BOVE:2015:3865 JAR 2015/239
14	Gerechtshof Arnhem-Leeuwar-den	FNV	17 May 2016	ECLI:N-L:GHARL:2016:3792 JAR 2016/147
15	Gerechtshof 's-Hertogenbosch	FNV	24 May 2016	ECLI:NL:GH-SHE:2016:2011 JAR 2016/163
16	Gerechtshof 's-Hertogenbosch	Transporten B.V.	2 May 2017	ECLI:NL:GH-SHE:2017:1873 JAR 2017/151
17	Gerechtshof 's-Hertogenbosch	Silo-Tank	2 May 2017	ECLI:NL:GH-SHE:2017:1874
18	Afdeling Bestuursrecht Raad van State	Unknown companies	5 July 2017	ECLI:N-L:RVS:2017:1819 ECLI:N-L:RVS:2017:1818
19	Gerechtshof Arnhem-Leeuwar-den	Mecra (Rimec)	27 February 2018	ECLI:N-L:GHARL:2018:1942

Summary
The trade union argued that the Dutch company retained the services from posted workers working through a temporary agency rather than from posted workers working in the context of a contract of services. The Court ruled that, in the light of the universally applicable collective labour agreement in the metal sector, the Dutch recipient of the services should prove that a contract of services was concluded. As the Dutch recipient failed to do so, whilst the work performed seemed to be performed under management of the Dutch recipient, the Court regarded the work performed by the posted workers as work done through a temporary agency
The subdistrict court rules in summary proceedings that the universally applicable construction collective labour agreement applies to construction workers who temporarily work in the Netherlands. These employees habitually work in the Netherlands, therefore Dutch law applies
The subdistrict court finds in proceedings on the merits the same as mentioned in the case above
The subdistrict court holds that transport company Vos uses foreign workers. The question is whether the so-called charter clause deriving from the universally applicable transport collective labour agreement applies. The court rules that the trade union did not sufficiently argue why that would be the case
Appeal from the previous case. The Court of Appeal rules that the aforementioned charter provision does not apply to situations in which a Dutch transport company merely contracts a foreign transport company to transport goods, regardless of whether the transport starts or ends in the Netherlands
The charter provision applies to transport company Farm Trans when retaining the services of a Polish subsidiary
The Court of Appeal overturned the ruling of 8 January 2018 in the Van den Bosch cases. Dutch law does not apply. The Posted Workers Directive does not apply in a posting situation from (as opposed to in) the Netherlands
The Court of Appeal rules along similar lines as in the case above
If the Minister states that the companies involved violate migration rules, as foreign employees are hired through a temporary agency (which is not allowed), rather than on the basis of a contract of services (which is allowed), the Minister must prove that statement. If there is sufficient doubt, no fine is due
Appeal of the Mecra case. The Court of Appeal holds that the 'posted' workers involved were, according to their employment contracts, explicitly and solely hired for a specific construction project in the Netherlands. Therefore, their 'habitual' country of work under the contract was the Netherlands. As a consequence, Dutch law was deemed to be objectively applicable to the employment contracts of the workers pursuant to Article 8(2) Rome I. The Waga lacked applicability

	Court	Claimant(s)	Date	ECLI and JAR
20	Hoge Raad	FNV	4 May 2018	ECLI:NL:HR:2018:678
21	Gerechtshof 's-Hertogenbosch	Company (name unknown)	17 July 2018	ECLI:NL:GH-SHE:2018:3116
22	Gerechtshof Arnhem-Leeuwarden	De Verenigde Eigen Vervoerders BV	31 July 2018	ECLI:NL:GHARL:2018:6962 JAR 2018/220
23	Centrale Raad van Beroep	Unknown company	20 September 2018	ECLI:NL:CRVB:2018:2878
24	Hoge Raad	FNV	23 November 2018	ECLI:NL:HR:2018:2174 JAR 2018/314
25	Hoge Raad	Employees (names unknown)	23 November 2018	ECLI:NL:HR:2018:2165 JAR 2018/313

Summary
The collective labour agreement in the construction sector arranged, in short, that the employer should pay the temporary housing costs for the employee working on a construction site that is so remote from his house that it cannot be reasonably expected for the employee to commute between his house and the construction site. The question was whether this clause also applied to posted workers, who had to pay temporary housing in the Netherlands themselves. The Supreme Court interpreted this clause using Dutch interpretation techniques. It ruled that the clause concerned does not apply to the actual house abroad of the posted workers, but that their temporary housing should be considered the 'house' from which they commute as referred to in the collective labour agreement. As a result, the posted workers – who rented temporary dwellings near to the construction site - were not eligible to compensation for their temporary housing in the Netherlands
The Court of Appeal states that the Waga/WagwEU and Article 6 Dutch Code of Civil Procedure prevail over the EEX and Rome I. This means that Dutch working conditions' laws apply when employees are posted from Belgium to the Netherlands. The employer infringed Dutch law in that regard and is therefore liable towards its employee for a company health and safety accident
The Court of Appeal holds that the charter clause deriving from the universally applicable transport collective labour agreement applies in case there is a close link between the transport and the Dutch territory. That close link is present in this case
This case concerns international truck drivers who live in the Netherlands. A company situated in Cyprus allegedly employs them. The employees are posted to Dutch companies. Some of the companies are the former employers of the employees involved. The employees do not perform most of their work in the Netherlands. The SVB regards this construction as a sham construction and argues that Dutch social security law should apply. The employer states that the legal and factual construction is genuine. Cypriot social security law should therefore, according to the employer, govern the employees. The question arises whether Dutch or Cypriot social security should apply in the case at hand. The Central Appeals Tribunal has referred prejudicial questions to the ECJ
The Supreme Court asks preliminary questions about the interpretation of the Posted Workers Directive in international transport in the Van den Bosch cases
The Supreme Court finds the ruling of the Gerechtshof 's-Hertogenbosch of 2 May 2017, in which it is decided that Dutch law does not apply to foreign employees working for the Van den Bosch Group, is either wrong or insufficiently motivated. The case is referred back to another Court of Appeal for reassessment

Annex VII
Posting-related case law: Slovenia

ZDR-1 Zakon o delovnihrazmerjih 2013 (Employment Relationships Act 2013)
ZDR Zakon o delovnihrazmerjih 2002 (Employment Relationships Act 2002)
ZDR90 Zakon o delovnihrazmerjih 1990 (Employment Relationships Act 1990)
ZEPDSV Zakon o evidencahnapodročjudela in socialnevarnosti (Labour and Social Security Registers Act)

Judgment	Year	Type of court	Instance	Posting in/out?	Who initiated the case?	Nationality/ country of origin	What aspects of posting were central to the judgment?
Pdp 991/2015	2015	Labour dispute	Appeal	Posting out	Posted worker	Slovenia	Payment of wages, reimbursement of subsistence costs
Pdp 992/2015	2015	Labour dispute	Appeal	Posting out	Posted worker	Slovenia	Payment of wages, reimbursement subsistence costs
Pdp 1113/2015	2016	Labour dispute	Appeal	Posting out	Posted worker	Slovenia	Payment for overtime work
VIII Ips 215/2007	2008	Labour dispute	Cassation (Supreme Court)	Posting out	Worker	Slovenia	Distinction between posting of workers and a business trip abroad
Pdp 885/2000	2002	Labour dispute	Appeal	Posting out	Worker	Slovenia	Dismissal of a posted worker, amount of compensation
VIII Ips 97/98	1998	Labour dispute	Cassation (Supreme Court)	Posting out	Worker	Slovenia	Dismissal of a posted worker, amount of severance pay
Pdp 293/2017	2017	Labour dispute	Appeal	Posting out	Worker	Slovenia	Payment of wages, reimbursement subsistence costs

ZDavP-2 Zakon o davčnempostopku (Tax Procedure Act)
ZDDO Zakon o delavcih v državnihorganih (State Employees Act)
ZPIZ-1 Zakon o pokojninskem in invalidskemzavarovanju 1999 (Pension and Disability Insurance Act 1999)
ZDoh-2 Zakon o dohodnini (Personal Income Tax Act)

National law measures and EU law measures invoked by the court	Outcome of the case	Who won the case?
ZDR-1: Article 212, 134, 130, 131 Directive 96/71/EC	The posted worker is entitled to minimum rates of pay according to the minimum standards valid in Germany, because these minimum standards were higher than those agreed upon in the contract of employment under Slovenian law	Posted worker
ZDR-1: Article 212, 134, 130, 131 Directive 96/71/EC	The posted worker is entitled to minimum rates of pay according to the minimum standards valid in Germany, because these minimum standards were higher than those agreed upon in the contract of employment under Slovenian law	Posted worker
ZEPDSV Article 18, ZDR-1 Article 211, ZDavP-2 Article 352 Directive 96/71/EC	The employer should register the working hours of the worker. The posted worker is entitled to minimum rates of pay, including for overtime work, according to the minimum standards valid in Germany, because these minimum standards were higher than those agreed upon in the contract of employment under Slovenian law	Posted worker
ZDR 211, 212, etc. Directive 96/71/EC, Directive 91/533	Rules on posting do not apply in the case of a business trip. The main criteria for the distinction between a business trip and posting of workers used by the Court were the scope and the length of the period of working abroad as well as the continuity of that work. According to the Court's reasoning, rules on posting of workers cover only temporary continuous working abroad, whereas the plaintiff was sent on a number of short business trips	Employer
ZDDO	After ordering the reintegration of the worker, following the decision that the dismissal was unjustified, the Court decided that the worker was entitled to a compensation in the amount of wages he would have earned as a posted worker abroad until the end of the agreed period of posting	Posted worker, partly employer
ZDR90 Article 36, 36f	In the case of a dismissal, a worker is entitled to severance pay on the basis of the higher amount of his wages that he had received as a posted worker during the reference period while he was posted abroad	Posted worker
ZDR-1 Article 209 Directive 96/71/EC	Posted worker is entitled to the wage according to the minimum standards in the host country, since they are more favourable to the worker. The posted worker was also awarded the reimbursement of subsistence costs (dnevnice)	Posted worker

Judgment	Year	Type of court	Instance	Posting in/out?	Who initiated the case?	Nationality/ country of origin	What aspects of posting were central to the judgment?
Psp 42/2016	2016	Social dispute	Appeal	Posting out	Worker	Slovenia	Amount of old-age pension
VIII Ips 136/2014	2015	Social dispute	Cassation (Supreme Court)	Posting out	Worker	Slovenia	Amount of old-age pension
Psp 51/2014	2014	Social dispute	Appeal	Posting out	Worker	Slovenia	Amount of old-age pension
Psp 102/2010	2010	Social dispute	Appeal	Posting out	Worker	Slovenia	Amount of old-age pension
VIII Ips 314/2008	2010	Social dispute	Cassation (Supreme Court)	Posting out	Worker	Slovenia	Amount of old-age pension
Psp539/2007	2008	Social dispute	Appeal	Posting out	Worker	Slovenia	Amount of old-age pension
I U 1750/2015	2016	Administrative court	First instance	Posting out	Worker	Slovenia	Distinction between a business trip and posting of workers, taxable income from employment
I U 673/2012	2013	Administrative court	First instance	Posting in	Worker	BiH	Taxable income from employment
II U 462/2011	2012	Administrative court	First instance	Posting out	Worker	Slovenia	Taxation, comparison between posted workers and cross-border workers who commute on a daily/ weekly basis
II U 493/2011	2012	Administrative court	First instance	Posting out	Worker	Slovenia	Taxation, comparison between posted and cross-border workers

National law measures and EU law measures invoked by the court	Outcome of the case	Who won the case?
ZPIZ-1 Article 39, 41, 46, 203	For the period of posting, only the amount that was correspondingly calculated on the basis of the then valid rules and out of which the social contributions have been paid to the pension insurance, and not the actual wage paid to the posted worker, is taken into account for the calculation of the old-age pension	Pension and Disability Institute of Slovenia (ZPIZ)
ZPIZ-1 39, 46, 203	Same/similar as above	ZPIZ
ZPIZ-1 39, 46	Same/similar as above	ZPIZ
	Same/similar as above	ZPIZ
	Same/similar as above	ZPIZ
	Same/similar as above	ZPIZ
ZDavP-2 Article 36, 37, 59, 59	Although the employer issued travel orders for business trips (and paid the reimbursement of subsistence costs (dnevnice), the situation could not be considered a business trip, and therefore the amounts paid to workers are wages, i.e. a taxable income. The court used a set of criteria to distinguish between a business trip and posting	Ministry of Finance - financial administration
ZDoh-2 Article 105, 127, ZDavP-2 Article 58	Any payments received by the posted worker that are related to his work while being posted to Slovenia is taxable in Slovenia under the Slovenian tax legislation	Ministry of Finance - financial administration
URS Article 14, ZDoh-2 Article 5, ZDavP-2 Article 145	Differentiation between cross-border workers and posted workers is justified. According to the court, the situation of the Slovenian posted worker, who is employed by the Slovenian employer and regularly works in Slovenia, whereas his work abroad as a posted worker is only temporary, is not comparable to the situation of a Slovenian cross-border worker who regularly works in another country. Since a cross-border commuter has a stronger link with that other country, special rules providing for exemptions and tax reliefs are justified	Ministry of Finance - financial administration
URS Article 14, ZDavP-2 Article 145	Same as above	Ministry of Finance - financial administration

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Posting of workers before national courts

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Intra-EU employee posting remains a politically and legally contentious matter that continues to feature on the agendas of lawmakers, trade unions and researchers alike. Numerous cases brought before the Court of Justice of the European Union (CJEU), as well as recent and ongoing revisions of the posting-related EU legal framework, suggest that problems are arising from clashing legal competences, weak enforcement and the breach and/or circumvention of posted workers' rights. Furthermore, until now there were virtually no accounts detailing issues related to the application of posting legislation in disputes at the national level.

This book fills that gap by offering a comparative analysis of national case law on posting-related matters in 11 EU Member States: Bulgaria, Denmark, Finland, France, Germany, Ireland, the Netherlands, Latvia, Poland, Portugal and Slovenia. The individual chapters focus on the main debates at the national level and the available case law, with a particular focus on who litigates, in which situations and exactly about what.

In view of the limited extent of posting, the intensity of the debate on the issue and the significant body of existing related case law is a striking and rather surprising finding. The evidence presented in the book shows that cross-border service provision and posting have sparked extensive discussions on workers' rights, permissible company practices, and, more broadly, the balance between social protection and market freedom in the EU. The analysis of the case law reveals that there is a need to clarify basic terms and legal constructs related to posting because currently there are still doubts concerning the interpretation and application of EU and national rules on cross-border mobility.

By providing an insightful and critical analysis of national case law on this issue, the authors of this book offer a novel perspective on the issue of posting which, in part, challenges existing perceptions. Their analysis shows that workers tend to defend their rights in their countries of origin, while posting companies principally litigate in the courts of the host country. There is also a significant overlap in matters litigated before the courts of both low- and high-wage countries, and the concept of posting and related EU-level rules still often collide with similar concepts of national law. Finally, the books highlights some upcoming issues in case law; for example, litigation on the rights of third-country nationals in relation to posting is becoming increasingly prevalent before courts in some countries.

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