

# 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 These provisions governed outbound posted workers from August 2010 until December 2016, when they were repealed and replaced by Article 121a of the Labour Code, 'Posting and sending of workers in the framework of provision of services'.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 were 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 appellants 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](http://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](http://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](http://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](http://www.norma.bg)