

Chapter 4

Posting of workers before French courts¹

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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 undoubted² (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* case⁶ 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 campaign¹³ 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 workers¹⁹) 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.

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&deplis=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 chamber²⁴ 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 Batical 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, Batical. 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

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* case³⁵ 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

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. Plén. 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 2017³⁸ 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. Plén. 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 work⁴⁰ (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* case⁴⁵ 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 CJEU⁴⁶ 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.

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 Appeal⁵² 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 Court⁶⁰ 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 Court⁶⁴ 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 Court⁶⁵ 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 Court⁶⁶ 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 2017⁶⁸ 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 2017⁷⁰ 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.

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