

# Chapter 5

## Posting of workers before German courts<sup>1</sup>

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### Introduction

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

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

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

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

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2. Collaborative Research Council 1342 'Worlds of Labour'. This work has also been funded by the German Research Foundation (*Deutsche Forschungsgemeinschaft*) (DFG) – Projektnummer 374666841 – SFB 1342.
  3. First introduced by law of 26 February 1996, BGBl. I, p. 227; major restructuring on 20 April 2009, BGBl. I, p. 799; last large reform passed on 11 August 2014, BGBl. I p. 1348, 1356, as part of a package of laws on minimum wages.
  4. Adopted 11 August 2014, BGBl. I 2014, p. 1348.
  5. Adopted 6 June 1994, BGBl. I 1994, 1170, 1171.
  6. Adopted 8 January 1963, BGBl. I 1963, 2.

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

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

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

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

## 2. German case law on posted workers

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

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

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

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

## 2.1. Labour Court decisions

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

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

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

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

### 2.1.1. Paid leave funds at the core of posting decisions

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

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

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

9. This means that collective agreements are applicable to all labour relations irrespective of union affiliation, membership in the employer organisation and even applicability of regular German labour law.
10. First introduced by law of 26 February 1996, BGBl. I, p. 227; major restructuring on 20. April 2009, BGBl. I, p. 799; last larger reform passed on 11 August 2014, BGBl. I p. 1348, 1356, as part of a package of laws on minimum wages.
11. In 2017, after the Federal Labour Court had ruled that ministerial declarations concerning overriding mandatory character in the years between 2008 and 2014 were invalid (decisions of 21 September 2016 – 10 ABR 33/15 & 10 ABR 48/15 – and of 25 January 2017 – 10 ABR 34/15 & 10 ABR 43/15), the Bundestag passed a new law guaranteeing the validity of the overriding mandatory character of the collective agreement regardless of the exact number of companies and workers bound directly to it (*Sozialkassenverfahrensicherungsgesetz*) (SokaSiG) as of 16 May 2017, BGBl. I S. 1210).

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

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

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

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

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

The far-reaching CJEU *Finalarte* decision<sup>16</sup> of 2001 concerned the compatibility of the declaration of overriding mandatory validity of the social funds (SOKA)

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12. CJEU decision of 25 October 2001, C-49/98 et al.

13. CJEU decision of 24 January 2002, C-164/99.

14. CJEU decision of 12 October 2004, C-60/03.

15. Recently, a discussion to introduce a Labour Inspection has been started by the German trade union movement in order to improve basic working conditions, especially in areas where unions are weak; position paper of the German section of Justitia & Pax and DGB, *Arbeitsinspektion in einer globalisierten Welt*, Bonn/Berlin March 2017.

16. CJEU decision of 25 October 2001, C-49/98 et al.

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

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

17. Paragraphs 42 and 46 of the judgment.

18. Hessian State Labour Court, 24 March 2003 – 16 Sa 874/02 –, par. 44.

19. Hessian State Labour Court, 24 March 2003 – 16 Sa 874/02 –, par. 55 et seq.

20. Federal Labour Court, 20 July 2004 – 9 AZR 343/03, par. 51 et seq.

21. Shortly after the *Finalarte* decision, the Federal Labour Court applied the principle of favourability to Poland (25 June 2002 - 9 AZR 405/00), Slovak Republic (25 June 2002 - 9 AZR 439/01) and Romania (25 June 2002 - 9 AZR 406/00) – in all cases the German system was found to be more favourable to workers.

22. Federal Labour Court, 20 July 2004 – 9 AZR 343/03, and 20 July 2004 – 9 AZR 369/03.

23. Federal Labour Court, 3 May 2006 – 10 AZR 344/05.

24. Federal Labour Court, 14 August 2007 – 9 AZR 167/07.

25. Hessian State Labour Court, 19 March 2007 – 16 Sa 1297/06.

26. Hessian State Labour Court, 18 September 2015 – 10 Sa 1780/14.

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

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

### 2.1.3. Portugaia and resultant German decisions

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

### 2.1.4. Wolff & Müller and contractor liability

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

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

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27. Federal Labour Court, 25 January 2005 – 9 AZR 44/04 et al.

28. Federal Labour Court, 17 June 2015 – 10 AZR 257/14; 7 July 2015 – 10 AZR 548/14.

29. Hessian State Labour Court, 2 February 2004 – 16 Sa 47/03; 9 February 2004 – 16 Sa 393/00; 22 November 2004 – 16 Sa 81/04 up to 18 September 2015 – 10 Sa 1780/14.

30. CJEU decision of 24 January 2002, C-164/99.

31. Federal Labour Court, 20 January 2004 – 9 AZR 343/03 and 9 AZR 369/03.

32. Federal Labour Court, 3 May 2006 – 10 AZR 344/05.

33. CJEU decision of 12 October 2004, C-60/03.

34. Federal Labour Court 20 July 2004 – 9 AZR 345/03.

35. Federal Labour Court 12 January 2005 – 5 AZR 617/01.

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

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

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

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

### 2.1.5. Further SOKA cases

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

36. Federal Labour Court 2 August 2006 – 10 AZR 348/05 and 10 AZR 688/05.

37. Federal Labour Court 28 March 2007 – 10 AZR 76/06.

38. Federal Labour Court 19 November 2008 – 10 AZR 864/07.

39. Federal Labour Court 17 August 2011 – 5 AZR 490/10.

40. Federal Labour Court 14 August 2007 – 9 AZR 167/07.

41. Labour State Court Rhineland-Palatinate 3 August 2005 – 9 Sa 1330/02.

42. Hessian State Labour Court 29 October 2007 – 16 Sa 2012/06.

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

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

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

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

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

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43. Federal Labour Court 18 October 2006 – 10 AZR 301/06.

44. Federal Labour Court 20 June 2007 – 10 AZR 302/06.

45. Federal Labour Court 26 September 2007 – 10 AZR 415/06.

46. Federal Labour Court 21 January 2009 – 10 AZR 325/08; 21.01.2015 – 10 AZR 55/14.

47. Federal Labour Court 21 October 2009 – 10 AZR 73/09.

48. Federal Labour Court 20 January 2010 – 10 AZR 927/08.

49. Federal Labour Court 18 April 2012 – 10 AZR 200/11.

50. Federal Labour Court 17 April 2013 – 10 AZR 185/12.

51. Federal Labour Court 15 February 2012 – 10 AZR 711/10.

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

#### 2.1.6. Individual labour law decisions

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

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

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

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

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

52. Federal Labour Court 19 May 2004 – 5 AZR 449/03.

53. Federal Labour Court 20 April 2011 – 5 AZR 171/10.

54. Federal Labour Court 23 August 2012 – 8 AZR 804/11.

55. Hessian State Labour Court 18 July 2014 – 10 Sa 187/13.

56. Labour State Court Rhineland-Palatinate 7 October 2004 – 6 Sa 770/03 and 6 Sa 827/03.

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

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

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

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

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

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57. Labour State Court Rhineland-Palatinate 13 July 2017 – 2 Sa 468/16.

58. Labour Court Lörrach 3 May 2012 – 1 Ca 31/11.

59. Labour Court Ulm 29 July 2009 – 2 Ca 571/08.

60. Labour State Court Baden-Wuerttemberg 21 November 2005 – 15 Sa 95/05.

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

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

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

#### **2.1.7. Collective cases – matrix and more**

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

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

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

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

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

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

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

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

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

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

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

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62. Labour State Court Munich 8 July 2009 – 11 TaBV 114/08.

63. Labour State Court Munich 7 July 2010 – 5 TaBV 18/09.

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

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

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

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

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

64. State Labour Court North Rhine-Westphalia 13 January 2016 – 12 TaBV 67/14; see also Saarland State Labour Court 7 December 2016 – 2 TaBV 6/15.

65. Federal Labour Court 26 April 2016 – 1 ABR 21/14.

66. State Labour Court Berlin Brandenburg 16 July 2010 – 13 TaBV 1324/10, 13 TaBV 1348/10.

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

## 2.2. Social court decisions

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

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

### 2.2.1. Right to child allowances and parental allowances

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

### 2.2.2. Right to unemployment benefits

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

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

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

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

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

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

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

### 2.2.3. Pension rights

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

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

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

71. Hessian State Social Court 18 November 2005 – L 7/10 AL 465/03; Hessian State Social Court 1 October 2010 – L 7 AL 73/07 ZVW.

72. Hessian State Social Court 11 November 2010 – L 7 AL 108/10 B ER; Hessian State Social Court 6 December 2013 – L 7 AL 117/12.

73. Bavarian State Social Court 29 March 2004 – L 11 AL 95/03 and L 11 AL 138/03.

74. Bavarian State Social Court 18 May 2005 – L 13 R 4046/02.

75. State Social Court North Rhine-Westphalia 20 March 2008 – L 2 KN 139/07 U.

76. Bavarian State Social Court 18 September 2008 – L 14 R 178/07.

#### 2.2.4. Right to statutory accident insurance

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

#### 2.2.5. Right to exemption from social security payments

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

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

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

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

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77. State Social Court Baden Wuerttemberg 28 April 2005 – L 6 U 1974/01.

78. Hessian Social Court 5 December 2011 – L 3 U 174/10.

79. State Social Court Rhineland-Palatinate 26 October 2009 – L 2 U 46/09.

80. State Social Court Rhineland-Palatinate 10 August 2009 – L 2 U 136/07.

81. State Social Court North Rhine-Westphalia 3 July 2013 – L 17 U 235/08.

82. State Social Court Berlin Brandenburg 7 December 2007 – L 1 KR 235/07.

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

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

#### 2.2.6. Other cases

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

83. Bavarian State Social Court 27 February 2007 – L 5 KR 32/04.

84. State Social Court Berlin Brandenburg 11 December 2006 – L 9 KR 73/03.

85. Hessian State Social Court 15 February 2007 – L 8 KR 122/06.

86. Federal Social Court 29 June 2016 – B 12 R 8/14 R.

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

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

### 2.2.7. Conclusion

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

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

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

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87. Bavarian State Social Court 1 July 2009 – L 9 AL 109/09 B ER.

88. Federal Social Court 17 March 2016 – B 11 AL 3/15 R.

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

### 2.3. Financial court decisions

Of the 84 financial court cases listed in the collection, 23 were handled by the Federal Financial Court and 61 by ordinary financial courts.<sup>89</sup>

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

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

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

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

89. There are only two instances in tax law/financial law in Germany.

90. Federal Financial Court 19 April 2013 – V R 63/10 et al.

91. Federal Financial Court 5 February 2015 – III R 29/14; 20.03.2014 – V R 45/11.

92. Federal Financial Court 15 March 2012 – III R 51/08 and III R 52/08.

93. Federal Financial Court 17 May 2013 – III B 121/12; 05.01.2012 – III B 42/11.

94. Federal Financial Court 22 February 2006 – I R 14/05.

95. Federal Financial Court 23 February 2005 – I R 46/03.

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

## 2.4. Administrative court decisions

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

## 2.5. Penal court decisions

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

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96. Federal Financial Court 21 January 2010 – VI R 2/08.

97. Federal Financial Court 4 April 2006 – VI R 11/03.

98. Higher Administrative Court of Berlin-Brandenburg 18 December 2008 – OVG 1 B 13.08.

99. Higher Regional Court Bamberg 9 August 2016 – 3 Ss OWi 494/16.

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

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

## Conclusion

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

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

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

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

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

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

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For the list of cases please refer to Annex III.