

Conclusion

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The posting of workers is often the subject of the legal and political discourse. To a large extent this is driven by factors originating at EU level – be the controversial rulings by the CJEU, or EU-level reform of posting-related rules. As the reports on the 11 EU Member States covered in this book show, both the debates and the case law are often context-specific and focus on the elements that are relevant for the domestic labour market, or on particular elements of legal framework that are at times not triggered by implementation of EU law. While several crosscutting issues emerge, in terms of both national debates and matters for judicial enforcement, on other issues, national or country-group differences remain more pronounced. Here we discuss our findings from a comparative perspective and examine their implications in more detail.

1. National debates on posting

In the context of national level debates on posting, it might be instructive to distinguish between EU Member States in western Europe, on the one hand, and those on the EU's southern and eastern flanks, on the other. As the analysis of each country Chapter suggests, public discourses in these two groups of countries differed. We discuss the two groups and reflect on the impact of the dominant discourses on worker protection in the different settings.

1.1. Debates in western European countries

In western European countries, cases of extensive abuse of inbound posted workers would occasionally hit the headlines. This was the case in Ireland, where the Gama and RAC company cases were widely publicised and discussed in parallel to court proceedings. Media outlets often criticised the public authorities for the difficulties they had in assessing the scale of abuse and prosecuting the offenders, particularly in the case of complicated subcontracting arrangements that involved employee posting at lower levels of the subcontracting chain. At the same time, it was pointed out that the exploited employees rarely seek assistance and/or enter litigation to enforce their rights because of the many vulnerabilities related to their temporary stay in the host county.

In the examined group of countries, it was not only employment conditions, but also other operations of foreign posting companies that were viewed as prone to abuse and

circumvention. The Finnish discussion, for instance, focused on the tax evasion of foreign (posting) companies, a significant proportion of which failed to register their operations in the country, did not submit their tax returns and thus ‘operate (...) largely outside of the reach of the authorities’.¹ In the Netherlands, ‘sham constructions’, in other words, fraudulent employment schemes involving foreign service providers, similarly attracted the attention of public opinion and several governmental ministers, until they were regulated in a separate Act.

The chapters on Denmark, the Netherlands and Finland touch upon some common concerns about the impact of the EU economic integration process and the spread of cross-border service provision in domestic institutions and practices. In Denmark, the preservation of the country’s voluntary collective bargaining system and the legality of industrial action, used as means of putting pressure on the company to enter negotiations with employee representatives, were considered a top priority both by trade unions and government representatives. The Danish Parliament accordingly set up a special committee to devise means to protect domestic institutional arrangements and fight social dumping. In the Netherlands, public opinion similarly feared that the increase in labour migration and posting after EU eastern enlargement might lead to job losses among the domestic population. A special body designated by the Social and Economic Council of the Netherlands looked into fraudulent employment schemes and examined possible ways to fight such practices and minimise their negative impact on law-abiding enterprises.

Overall, it seems that the media and public opinion in western European countries have been very sceptical towards cross-border service provision and forms of mobile employment. In France, the public image on inbound posting is so negative that it has almost become synonymous with social dumping and unfair practices. As a result, even employer associations and large companies that use the services of foreign services providers and rely on posted workers at lower levels of their supply chain refrain from publicly endorsing posting in fear of negative publicity. The limited evidence on the impact of posting on national labour markets makes it difficult to judge whether its disparaging image is justified, and to what extent it has been bolstered by the widespread feelings of uncertainty evoked by the recent economic crisis and the subsequent austerity drive.

Last but not least, in some western European countries the topic of posting emerges as part of broader discussions on social standards. These discussions do not focus specifically on posted workers, but rather concern all categories of employees, irrespective of their nationality and legal status. In Ireland, for instance, the debates in the construction industry - the sector with the highest proportion of inbound posted workers - focused on the need to ensure that the wages of Irish, migrant and posted workers alike are shaped in accordance with the sectoral collective agreement. By the same token, in Germany, the topic of employee posting has fed into a broader discussion on minimum social standards for low-income segments and leased employees. Notably, the participants in these debates have pointed that cross-border forms of employment such as posting,

1. Hirvonen, as cited by Tuovinen.

as well as ‘domestic’ arrangements, while perfectly legal in light of the German law, are nevertheless prone to abuse and worker exploitation. In recent years, employee posting has also indirectly entered public discussions on the extent of employee interest representation rights within so-called matrix enterprises, that is, companies applying new forms of work organisation that cut across corporate and national boundaries, thanks to progress in information technologies.

All in all, the debates in western Europe seem distinctive in two respects. The first is related to the negative undertones in most countries. Irrespective of the extent of posting and migration-related challenges, the excessive negativity expressed by headlines such as ‘Cheap foreign workers get Dutch people’s jobs’ in the Dutch *De Telegraaf* should not be ignored. As posting becomes demonised in the eyes of host country populations and institutions, it could become more difficult for inbound posted workers to exercise their rights and seek justice in the case of abuse. In addition, such discourses create a false expectation that regulating and even limiting this form of mobility would cure the countries’ socioeconomic problems, diverting the public and policymakers’ attention from other, oftentimes more common irregularities related, for example, the growth of precarious employment and/or the spread of shadow economy.² More generally, by feeding into xenophobic and EU-sceptic attitudes amongst the countries’ populations, they might cause the EU integration process to be put on hold. The fate of the EU Constitutional Treaty, rejected in the 2005 Dutch and French referenda amidst fears of ‘Polish plumbers’ allegedly taking the jobs of domestic workers, or the United Kingdom’s 2016 referendum on EU membership, in which the majority of voters decided to leave the EU amidst anti-immigrant rhetoric, are particularly indicative in this respect.

At the same time, examples of a more inclusive approach towards posted workers are also identifiable. In Ireland, posted workers are treated in the same way as local workers, and their rights are upheld by the authorities and trade unions alike. In Finland, the famous Finnish Electricians’ Union case that was referred to the Court of Justice of the EU for a preliminary ruling was brought by a local trade union branch on behalf of posted workers.

The second characteristic of the western European debate on posting is its exclusive focus on inbound posting and the need to safeguard local employment conditions and social standards in the context of increased inflows of workers from other (predominantly cheaper) EU Member States. The one-sided nature of the posting debate is problematic because many western European countries both receive *and* send significant numbers of posted workers. As Table 1 in the Introduction shows, in our sample, Germany and France feature a particularly high occurrence of outbound posting, while the number of A1 certificates issued by Denmark and Ireland also remains substantial relative to the number of received posted workers. To an extent, the discursive ‘self-identification’ of the countries primarily (or exclusively) as receiving states can be explained by the fact that most of their outbound posting is directed to other high-wage countries, which, at least in theory, should limit the scope for potential abuse. It is also a function of the

2. For a similar argument see Darvas Z. (2017) Revision of the Posted Workers Directive misses the point. <https://bruegel.org/2017/10/revision-of-the-posted-workers-directive-misses-the-point>

substantial politicisation of inbound posting, which is probably most pronounced in the case of France. As indicated above, such fixation on the negative aspects of inbound posting is dangerous and potentially detrimental for the exercise and protection of inbound posted workers' rights. It also removes outbound posted workers from the radar of western European public opinion and policymakers. This might contribute to the insufficient protection of the rights of this often quite sizeable group of workers. For example, the rules of posting rarely feature in western European collective agreements; by the same token, most western European countries have no rules on reimbursement for posting-related expenses.³ This indicates that both inbound and outbound posted workers in western Europe would benefit from more balanced discussions on the risks and benefits of different forms of posting.

At the same time, one could argue that political support for revising the Posted Workers Directive was strong in these countries partly due to the fact that the debate focused on inbound posting. This discourse, prevailing in the western countries, strongly influenced the reform of posting rules at the EU level and was evidently led by politicians from this group of countries (e.g. President Macron in France). The reform of the posting rules was therefore a clear political success for this group.

1.2. Debates in southern and central and eastern European (CEE) countries

In southern and CEE countries, cross-border services' provision has generally received less public and scholarly attention than in western Europe. Furthermore, the intensity of the debate and the issues discussed have varied considerably across these states.

The topic of posting hardly ever features in national public debates in Portugal, the only southern European country analysed in this book. This comes somewhat as a surprise, given the country's rich and longstanding tradition of migration related to its colonial past, as well as its relatively high number of inbound posted workers (see Introduction). When it came to the question of whether or not to include the transport sector within the scope of the revised Posted Workers Directive, both Portugal and Spain joined the CEE Member States in their objection to the idea.⁴

A different trend can be observed in Slovenia. Following the virtual collapse of the domestic construction sector during the late-2000s economic crisis, Slovenian building companies have begun shifting their operations to foreign markets, which has led to a surge in posting numbers: the number of A1 certificates issued by the country's social security authorities to transnationally-mobile workers increased from 25,000 in 2010 to 164,000 in 2016 – an almost six-fold increase in just six years. It is also notable that the majority of Slovenian outbound posted workers have come from former Yugoslav

3. For an EU-wide overview of this issue, see Rasnača Z. (2019) Reimbursement rules for posted workers: mapping national law in the EU28, Background Analysis 2019.01, Brussels, ETUI.

4. Barbière, C. (2017) Posted Workers: Macron's first victory in reforming the EU'. Euractiv, 24 October 2017. <https://www.euractiv.com/section/economy-jobs/news/posted-workers-macrons-first-victory-in-reforming-the-eu/>. This initial idea was rejected, and there are now on-going, separate negotiations about how to regulate posting in the transport sector.

republics, in particular from Bosnia and Herzegovina; their migrant status as well as their employment in labour-intensive market segments leaves them particularly prone to exploitation. Addressing the challenges, Slovenian trade unions and non-governmental organisations have accordingly launched multiple initiatives targeting migrant and posted workers, including direct assistance; government lobbying; and information campaigns among a broader public. These multiple and varied initiatives have raised public awareness of loopholes in the otherwise relatively developed Slovenian system of social protection and induced regulatory changes.⁵ The issue of employee exploitation has similarly entered the Bulgarian public debate, through an investigation conducted by Belgian, Dutch and Bulgarian journalists that revealed a long-time fraudulent posting scheme involving worker underpayment and other irregularities. In contrast to Slovenia, however, the Bulgarian scandal did not spark the creation of special organisations that would assist the country's posted workers.

An interesting picture emerges from the analysis of the Polish discourse. Despite the high absolute numbers of outbound posted workers (573,358 A1 certificates issued to transnationally-mobile workers in 2017, including 217,154 under the Article 12(1) of the social security co-ordination Regulation),⁶ wage levels and working conditions of this category of employees have not been widely debated by the media or social partners. If anything, posting has been viewed as an element of the Polish 'service export' EU success story – that is, the post-accession expansion of Polish service providers to other European markets.

Neither is outbound posting much discussed in Latvia. Instead, at government level, the position expressed has been one of defending the freedom to provide services and promoting a liberal approach to the internal market as such. In contrast, however, posting features negatively in the local debates on inward labour migration. There, for example, posting of third-country nationals via Poland is seen as detrimental to the local workforce. In this regard, the debates reflect Latvia's position as receiving and sending posted workers in approximately equal measure and to an extent align with the debates in Western European Member States.

Since 2017, the public debate has centred to a significant extent on the EC's initiative to revise the Posted Workers Directive. The chapter on Poland shows how the proposal has divided the Poles into two camps. The government and employer associations were opposed to the recent revision of the Posted Workers Directive, which grants posted workers equal remuneration (this was previously the minimum wage). Polish trade unions, by contrast, sided with their counterparts from other European countries and EU-level umbrella organisations in defending the 'same wage for the same job in the same place' principle proposed in the Commission and which was ultimately accepted by the European legislators. This discourse is now playing out before the CJEU where

5. For more details on trade union and NGO initiatives targeting migrant and posted workers in Slovenia, see Samaluk B. (2017) Innovative trade union practices addressing growing precarity characterised by rescaled governance and the shrinking welfare state: the case of Slovenia, in Bernaciak M. and Kahancová M. (eds.) *Innovative union practices in Central-Eastern Europe*, Brussels, ETUI, 204-217.
6. Pacolet J. and De Wispelaere F. (2018) *Posting of workers: report on A1 portable documents issued in 2016*, Brussels, European Commission.

Poland (and Hungary) has brought a legal challenge about the revision of the Posted Workers Directive, in which they demand the Court rules on its invalidity.

It seems, then, that following CEE countries' accession to the EU, posting was mainly seen as a business opportunity for local companies, aiding their expansion into European markets. The lower wages of their outbound posted workers were viewed as part of their competitive advantage. The working conditions and rights of workers temporarily sent to other countries were for a long time excluded from the public debates; only recently did they enter the discourse in relation to exposed cases of abuse and the EU-level discussion on the revision of the Posted Workers Directive. The emphasis on the competitive aspects of posting left little space for concerns over the rights of posted workers and their adequate enforcement. Another distinctive feature of CEE discussions on posting was their primary focus on outbound posting. The picture could be changing, however. In Latvia, for example, increasing labour shortages have led to inbound posting being suggested as a remedy by companies, especially in the construction sector; but concerns about the possible negative effects of this inbound posting on local workers have grown. To a large extent this could be down to the growth in the posting of third-country nationals (see Section 3.3.5). In a similar vein, debates on inbound posting have also emerged in Slovenia. Therefore, the diversity of the prevailing debates in this group of countries is significant.

2. National case law on employee posting: a comparative overview

In this Section, we provide a comparative assessment of posting-related case law in the 11 examined EU Member States. As stated in the Introduction, the aim of the study is to map out country-level litigation on posting, outlining the similarities and differences in terms of number and type of the judgements, as well as to explore what issues are litigated in individual EU countries and who brings posting-related cases to court.

We briefly discuss the actors involved in judicial proceedings and out-of-court dispute settlement systems in the examined countries. We then account for the observed variation in terms of the number of posting-related court cases. Finally, we identify themes that cut across national reports, referencing specific court cases to illustrate the points.

2.1. Posting-related disputes: actors and processes

The national reports compiled in this volume display a considerable variety in terms of the actors that bring cases to courts. In addition to individual actors – workers or companies – court proceedings were often initiated or supported by collective organisations, in particular by trade unions. The latter would assist larger groups of employees in high-profile cases, such as that of the Gama company in Ireland, which involved the underpayment of 600 Turkish workers and the destruction of company records with the aim of concealing the irregularities. In certain categories of proceedings, in particular those related to social security payments, state institutions were also a party. In the majority of these cases, national courts ruled in favour of state authorities -

an observation made about the German evidence, which also applies to other examined countries.

In Denmark and in Ireland out-of-court negotiation and mediation is preferred, and indeed default, option for settling employment related disputes. In Denmark employment conditions are not enshrined in law, but are set out by trade unions and employers or their associations in the collective bargaining process and, if collective agreement provisions are breached, the case can be directed to a special arbitration body and/or mediated with the help of the state-provided public conciliator. Ireland has a similarly well-developed third-party mediation and conciliation system. The majority of the disputes, including high profile and controversial cases such as Gama, get resolved before the Workplace Relations Commission (WRC), a state agency tasked to oversee and promote good practice in the field of employment relations. In effect, a very limited number of employment-related disputes find their way to a regular civil court.

Beyond adjudication and mediation, several national reports highlight the role of national labour inspectorates (administrative enforcement) in detecting and combating posting-related abuses. In Poland, the labour inspectorate conducts regular controls of companies involved in inbound posting, verifying whether they possess the required documentation and are complying with the country's occupational health and safety standards. It also responds to the queries of their foreign counterparts, performs inspections of Polish companies posting their employees abroad, and is instrumental in revealing irregularities in relation to employee remuneration and posting of third-country nationals. The French labour inspectorate has been similarly active. On numerous occasions it has ordered closures of construction sites on which illegal employment has been detected, while the amount of administratively imposed fines on posting-related offenders has been steadily on the rise.

Several chapters (Denmark, Ireland, Slovenia and the Netherlands) point to the involvement of social partners in detecting irregularities related to inbound posting. In the Netherlands, for instance, trade unions can establish the nullity of a provision included in the individual employment agreement that deviates from a collective labour agreement, even if the union was not the party to the agreement. They also demand that the authorities start an investigation if they suspect that collective agreement provisions have been breached. In Ireland, unions share this 'policing' role with business associations, which have an interest in preventing wage undercutting by foreign posting companies and thus seek to ensure that all entities operating in a given market comply with generally applicable collective agreements. Finally, the Slovenian chapter points to the involvement of trade unions and non-governmental organisations in assisting migrant and posted workers. These organisations, however, rarely initiate litigation on behalf of the disadvantaged groups.

2.2. Number of posting-related rulings

There are significant differences between the number of cases reported and analysed by authors of the individual Chapters: while in the case of Germany, for example, 316 cases

involving transnational posting could be identified and analysed, the figure for Finland was as low as four.

The discrepancy can be partially explained by the limitations on the accessibility of the rulings' texts, which significantly differed across countries and court types. For example, in Ireland, France and partially in Latvia courts can choose which judgments should be made publicly available ('reported'). In Slovenia and Portugal, the accessibility to the judgments by lower instance courts is severely limited. In contrast, in Germany all judgments are always published, hence there is no availability issue. Finally, some authors concentrated on analysing primarily judgments by the highest courts (Supreme Courts) due to the large number of rulings (Poland).

Several other factors can also be at play. In the case of Ireland, the number of posting-related cases was limited, which could be explained by the relatively low number of both inbound and outbound posted workers. Since 2004, the country has experienced large inflows of workers from CEE counties, but the overwhelming majority of these took the form of permanent migration rather than posting, and thus were governed by a different set of regulations. Furthermore, if potential plaintiffs expect to face difficulties when seeking legal remedy to their problems, they might decide not to bring their case to court. This was the argument invoked in Portuguese chapter in relation to posted Portuguese workers, who allegedly perceive their home country's judicial system as inefficient, and might therefore be reluctant to file cases upon their return from a posting mission in another EU Member State.

The Slovenian chapter, however, rightly points out that the fact that posted workers do not seek justice in courts does not mean that they are not subject to abuse and exploitation. It discusses the plight of third-country posted workers, whose specific vulnerability results from the combination of migrant status, low skills and low income, and prevents them from standing up for their rights. By a similar token, the chapter on Finland explains the low number of posting cases in the Finnish courts by workers' inability to follow a complicated legal proceeding led in a foreign language. In this respect, it is indicative that all posting-related cases dealt with by Finnish courts were brought by trade unions rather than individual workers.

In Germany, there are notable differences in the number of posting cases related to specific elements of the country's regulatory structure. In particular, the country boasts a substantial body of case law related to SOKA-BAU, a compulsory, social-partner-run social fund in the construction sector, whereas cases related to the general social security scheme are significantly less frequent. This can be explained by the difference between the elaborate legal setup behind SOKA-BAU and the existence of efficient fund-specific law enforcement bodies, and the fragmented system of compliance monitoring in the case of the social security legislation. This divergence in practice within a single EU Member State highlights the important role played by clear legal provision and efficient law-enforcing institutions in upholding the rights of (posted) workers.

Finally, the number of court cases, when one contrasts cases concerning inbound and outbound posted workers, paint an interesting picture. Several chapters⁷ indicate that while cases by posting companies against decisions of public authorities and vice versa are often brought in the ‘host countries’ (albeit by no means exclusively), the posted workers themselves tend to go to courts in their ‘home countries’. Out of 17 cases analysed in the Slovenian Chapter, only one concerns inbound posting. The picture in Latvia is very similar: 80 out of 95 judgments concern outbound posting, a further 12 concern third-country nationals posted through Latvian territory, and only three cases concern inbound posting. Latvia is interesting also due to the fact that numerous cases by public authorities against companies in fact concern outbound posting. In countries where most cases relate to inbound posting (see the chapters on Denmark and on Germany), practically all of them deal with a dispute between either a posting company and a public authority (as in the case of SOKA-BAU), or trade unions and posting companies (Confederation of Danish Trade Unions, United Federation of Danish Workers, and so on). This reveals an important overall trend: while collective and public law-geared disputes usually take place in the host countries, posted workers tend to use judicial enforcement opportunities in the home country after their return. This is an important finding for the future design of judicial opportunity structures, which should be more easily accessible for workers in both countries, and also for the information exchange between the courts and the host countries. As the Latvian and Bulgarian Chapters show, national courts are often uncomfortable and even not competent enough to adequately apply ‘foreign law’.

2.3. National case law on posting

Before we turn to the comparative presentation of national posting-related case law, an important methodological note needs to be made. In some countries analysed in this book, national experts found it difficult to obtain reliable and comprehensive information on posting-related case law. The ultimate selection of rulings was hence to a large extent guided by their accessibility. In effect, individual country reports differ in terms of the type of courts and instance covered: in Portugal, for instance, there was no access to first-instance judgements; whereas in Finland, information was available only from labour courts. We are aware that this diversity of sources compromises the representativeness and comparability of the material; however, we have no other choice than to rely on the available, piecemeal data in the absence of a standardised, EU-wide case law database.

The country Chapters identify five themes running through cases brought to courts in different EU Member States:

1. wages and working conditions of posted workers
2. reimbursement of posted workers’ expenses and interaction of posting with domestic notions of ‘assignments’, ‘missions’ and ‘business trips’

7. See for instance the chapters on the Netherlands, France, Ireland, Finland and Germany.

3. the applicability of host country laws and collective agreements to posting companies and their workers
4. payment and calculation of posted workers' social security contributions
5. posting of third-country nationals.

In the remainder of this subsection, we accordingly discuss the five themes and present the related case law.

2.3.1. Wages and working conditions of posted workers

Posted workers' remuneration and working conditions were often the object of litigation in the examined EU Member States. National courts dealt with instances of denied payment or underpayment, that is, the situation when the wage received by the posted worker was below the minimum pay rates in the host country. In Bulgaria, Portugal, Latvia and Slovenia, cases of this kind were brought by individual workers. In Ireland and Finland, in contrast, underpayment was detected and publicised by trade unions, which subsequently represented larger groups of posted employees in court proceedings. At the same time, there is little information about whether these workers actually received the payments. In the case of Ireland most of the workers had already returned home when the cases were concluded, and it has been difficult to find them to give them their due payments. Also, what happened to the workers on whose behalf cases were brought in Finland was not reported. This points to the need to ensure better co-ordination between the host system that is executing the judgments, and the posted workers, namely, there should be a way to reach them and inform them about compensation due.

Latvian and Bulgarian chapters suggest that the awareness and the enforcement of a host country's minimum wage via the courts remains an acute problem. The national courts in these countries tend to ignore a worker's right to receive at least the host country's minimum wage. This happens mainly in the transport sector, but in other industries too. Only in a minority of cases is this right enforced. Courts in other countries, such as Poland and Slovenia, seem to be better informed in this regard.

Beyond wages, courts have also adjudicated on other host-country minima applicable to posted workers, such as health and safety regulations (Denmark) or overtime payments (the Netherlands and Ireland). In this category of cases courts often ruled in favour of plaintiffs; in line with the ruling issued by a German court, for instance, overtime payments were due to posted workers even if their rates were laid down in several (generally applicable) collective agreements. In another interesting case before a Slovenian court, the court based its decision entirely on evidence of working time provided by the employee, as the employer had destroyed company records in an effort to avoid payments.

Another large sub-category of case law on posted workers' remuneration concerns pay deductions. In some countries like Latvia and Bulgaria, unjustifiable – and thus illegal – deductions are made from posted workers' remuneration. In Bulgaria some cases reveal that wages had been reduced to cover accommodation costs during outbound posting.

This is actually not permitted by Bulgarian labour law. In contrast, in the case of Latvia, employers often relied on claims of overpayment of posting-related expenses in their advance payments. Such claims were brought separately and as counterclaims against workers' demands before the civil courts.

All in all, the evidence suggests that more than 20 years after the adoption of the Posted Workers Directive, considerable uncertainty remains among national actors as to what elements of posted workers' remuneration can be set off from posted workers' wages in the period of their temporary deployment in another EU Member State. In some jurisdictions, such as Slovenia, the issue is decided by courts, while in others it is clarified in separate regulations. The Netherlands is an example of the latter approach: there, a law from 2015 specifies the maximum level of such deductions (in terms of the proportion of wage) and stipulates that the posted workers' wage after the deduction cannot be below the minimum rates set in the country's collective agreements.

2.3.2. Reimbursement of posted workers' expenses and interaction of posting with domestic labour mobility structures

The identification of posting and differentiation between posting and other forms of cross-border labour mobility, in particular short-term business trips ('missions'), preoccupied courts in a number of examined EU Member States, in particular Latvia, Slovenia, Bulgaria and Poland. To an extent, this issue of distinction arises because the EU rules on posting did not occupy a completely blank space. Instead, a number of similar legal structures meant for protecting workers who are assigned to work elsewhere (abroad or within the country) in both the private and public sector already existed. Accordingly, the question of how posting would co-exist with these national structures became pertinent.

Such distinction has important practical implications: it determines what wage-setting regime applies to the given worker; what type of allowances he or she is entitled to; and, in some countries, whether the allowances received by the worker during his or her deployment abroad will or will not be taxed (see for example, the Chapters on Latvia and Poland). So far, the legal practice on the issue has varied considerably across EU Member States. While Slovenian courts employ clear criteria that allow differentiating between the two forms of short-term labour mobility, in Latvia the matter has been clarified only after lengthy struggles by the courts and amendments of labour law; in Bulgaria, in contrast, the jurisprudence on the issue has not been consistent. The evidence from the last two countries shows that one could even go as far as to claim that for a long time some judges were not familiar, or at least not comfortable, with the legal construction of posting. Such lack of knowledge on the part of controlling and/or law-enforcing institutions is a matter of particular concern as it could provide an incentive for abuse.

Beyond the differentiation between posting and business trip, courts were often asked to determine whether the posting regime applies to agency workers sent abroad (Portugal); employees of so-called group undertakings (the Netherlands) or matrix company structures (Germany); personnel of aviation companies (Denmark, France);

or third-country nationals that came to an EU member state on a tourist visa (Portugal). Just like the posting/business trip differentiation dilemma discussed above, the high number of such clarification requests calls for a more precise definition of posting and its clear differentiation from other forms of cross-border mobility.

An important subset of cases dealing both with remuneration and distinction (or the lack thereof) between posting and assignments and business trips, is the treatment of allowances and reimbursements received by posted workers.

The reimbursement of expenses relating to posting is regulated in several ways.⁸ Some EU Member States explicitly provide for the right to reimbursement; others have left this question for the social partners or individual employment contracts. At the same time, in a number of countries workers are paid ‘daily allowances’ when sent on an assignment abroad (or even within the territory of the country). From the perspective of the Posted Workers Directive, these allowances are seen as part of remuneration only when they go beyond posted workers’ actual expenses.⁹

In the EU Member States analysed in this book, the reimbursement is regulated in several different ways. In Poland, allowances are not paid to posted workers, but only to workers on assignment, which is seen as a concept different from posting. In Bulgaria, the law now obliges the employer to pay allowances to all posted workers independently of whether they are posted for 30 days or less.¹⁰ Finally, after lengthy litigation and legislative changes, Latvia combines the national notion of ‘assignment’, which is seen as broader and encompassing all the situations of posting. Hence workers posted from Latvia always have a right to daily allowance on top of reimbursement for travel, board and lodging.

Two issues in particular were subject to court interpretation in the examined EU Member States. First, courts had to decide whether payments such as daily or travel allowance can be included in the calculation of minimum pay rates that the worker is eligible to during his or her deployment in the host country. Our overview shows that court practice and specific rules on how to classify the allowances vary across countries.¹¹ In the examined country sample, Slovenian courts would rule that transport and subsistence costs should be excluded from the calculation of posted workers’ wages; in addition, they were taxable, unlike those received by employees going for a business trip (‘mission’) to another EU Member State. In Bulgaria, in contrast, there is no unified court practice in relation to this type of payment: while courts in larger cities tend to treat allowances as supplementary payments, counterparts in smaller localities usually consider them as part of the wage. According to the Bulgarian chapter, the latter – essentially incorrect in light of the national law – practice can be accounted for by the fact that the judges consider wages obtained by outbound posted workers

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

9. Article 3(7) Posted Workers Directive.

10. There was a 30-day limit in the Bulgarian Labour Code until 2017.

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

‘sufficiently high’ in comparison with the low Bulgarian remuneration standards. As a consequence, they save companies extra costs related to the payment of allowances. In Latvia, after lengthy battles before courts and legislative amendments, the situation has recently become clear: allowances have to be paid on top of the minimum wage, with the exception only in situations where the host country’s law explicitly demands that they are paid as one of the constituent elements of the minimum wage. This latter addition, which in practice means that workers receive less money if the host country provides for such an inclusion, was triggered by the decisions of the Latvian Supreme Court following the CJEU’s ruling in the *Finnish Electrician Union’s* case.¹²

2.3.3. Applicability of host and home country laws and collective agreements

A large proportion of court cases in the examined countries concerned the applicability of national legislation to inbound posted workers. This was the case in France, where a Polish business association questioned the right of French authorities to apply the country’s minimum wage regulations to foreign hauliers and their employees. French courts similarly had to decide on the legality of the so-called Molière Clause, that is, the locally imposed provision added to public procurement contracts that obliged tenderers to use French at the locality’s construction sites. It is notable that neither the first-instance judges nor their Supreme Administrative Court counterparts found the requirement unjustified or disproportionate.

Several disputes concerned the choice of applicable law, particularly in the context of airline operations, with France and Denmark featuring several high-profile cases of this kind. A Dutch court, however, had to decide whether Dutch collective agreements applied in relation to so-called company groups, in a case where company operations are formally situated in a foreign country, but the groups’ employees work predominantly in the Netherlands. The rulings in such cases – and the decision as to whether to treat a given worker as a Dutch or foreign employee – ultimately depended on the ability of plaintiffs to prove that the Netherlands was the workers’ habitual place of work.

Last but not least, in a similar set of cases, German courts had to decide whether or not to grant employee representation rights to employees of the matrix structures in multinational companies, which involve new organisational and task-based units cutting across state boundaries. So far, courts have tended to make workers’ status as German employees - and the related representation rights - conditional on their physical presence in Germany. Judicial practice in this regard, however, is very dynamic and might change as more and more jobs escape neat territorial classifications. These cases reveal a structural issue in terms of judicial enforcement which might not be available to posted workers in the same way as to local workers. As stated above, they already face more difficulties in enforcing their rights in the host countries (language barrier; lack of knowledge of the administrative and judicial enforcement system and so on). If this is then exacerbated by strict admissibility criteria pertaining to the mobility of these workers, the situation becomes dire.

12. CJEU judgment of 12 February 2015 in case C-396/13 *Sähköalojen ammattiliitto*.

Courts have also dealt with the issue of the applicability of concrete provisions enshrined in the host country's collective agreements to posted workers and posted companies, such as, for example, occupational pension schemes stipulated by the Irish general collective agreement for the construction sector. In a high-profile case brought by the Finnish electricians' trade union and referred to the CJEU, the court confirmed that posted workers can be remunerated in line with pay classification schemes, taking into account their seniority and skill levels, if such schemes are part of generally binding collective agreements in the host country.

Two cases related to the interaction between sending and receiving country's regulation deserve special attention. The first one was brought before a Polish court and addressed the question of whether a worker posted abroad can be excluded from employment-related benefits offered by the Polish collective agreement if the remuneration he or she received in the time of posting is higher than that in the host country. The court decided in the affirmative, limiting the employee's access to the additional benefits during the time of the person's deployment abroad. Another dispute involved a Polish company that sued its workers in the Polish court and wanted them to repay the penalty for underpayment that the enterprise had been forced to pay them in Denmark. The Danish court ruled that the company's demand constituted an attempt to undermine the Danish collective agreement that was still binding for the company, even after the posting assignment comes to an end.

2.3.4. Social security contributions and their calculation

In the field of social security, three broad themes in national case law can be identified. The first group concerns the choice of social security regime applicable to posted workers and is directly linked to the broader questions of applicable laws and collective agreements addressed in the previous subsection. Here, the key issue for national courts was to assess whether a company's activities on the territory of a given EU Member State can be considered significant enough to justify the workers' inclusion in the country's social security regime. This question was raised in several countries, including Portugal, France and Poland. In the latter, the courts would determine the applicable social security regime by applying the EU establishment criteria and establishing the proportion of the company's turnover made on the Polish territory. In addition, they would examine whether outbound posted workers had been subject to Polish social security regulations in the time preceding their deployment abroad. In Poland, the court practice in this field has depended very much on specific company circumstances, and decisions are made on a case-by-case basis.

The second large group of cases concerns the basis for calculation of social security contributions for the time of posted workers' deployment abroad. In particular, it was not clear to the stakeholders involved whether home country rates or hourly rates of pay received by workers during the posting period should be taken into account. Rulings on the issue varied considerably across countries. For instance, while the Portuguese court decided in favour of host country's wage rates as a basis for the calculation, its Slovenian counterpart made reference to the applicability of the so-called 'comparable wage', that is, the wage that would be earned by the worker if he or she worked in Slovenia. The

latter decision was contested by EU-level trade union organisations: the European Federation of Building and Wood Workers (EFBWW) even lodged a complaint to the EC, arguing that the Slovenian scheme for calculating social security contributions can be viewed as illegal state aid granted to the country's posting companies. In Bulgaria, some companies determine the amount of their posted workers' social security contributions on the basis of Bulgarian wage rates for comparable types of work, even though the latter is permitted only if no minimum wage rates are set in the receiving states. Others seek to avoid legal uncertainty and/or higher payments by repeatedly sending their workers abroad for periods shorter than 30 days. According to Bulgarian law, this allows them to be treated as employees on a business trip rather than posted workers.

The third subset of social-security cases concerns the issuance of A1 certificates. Here, national-level legal practice reveals considerable uncertainty in regard to whether a certain category of employees should be treated as posted workers, and accordingly, whether they should be issued an A1 certificate. Such doubts were, for instance, raised in relation to third-country nationals trained and formally employed in the Netherlands, who subsequently travelled and were active in other EU Member States as part of an entertainment show. Dutch courts were similarly unsure which social security regime should apply to transnationally-mobile workers employed by companies with complicated structures spreading across several EU Member States. All in all, national-level case law in this field suggests that EU Member States' courts and law enforcement bodies find it difficult to tap into fraudulent companies that benefit from legal uncertainty and loopholes in the existing regulations. This calls for stricter rules on company establishment and greater clarity of social security regulations applicable to business entities operating on a cross-border scale.

2.3.5. Posting of third-country nationals

A fascinating matter that surfaces in the case law only indirectly is the posting of third-country nationals. Only a couple of the Chapters point to this aspect of posted worker mobility, but their insights are potentially very interesting for future research. Most of the time the litigation focuses on another matter (often non-payment of wages or social contributions), but from the judgments it becomes apparent that the case in fact concerns posting of third-country nationals.

First, our analysis shows that many EU Member States do not distinguish between posting to other EU Member States and third countries; therefore, the rights of posted workers are *de facto* extended beyond the territorial scope of EU law. This is the case in, for example, Latvia and Portugal. In a number of cases analysed in the Latvian Chapter, the country of destination or some of the countries of destination had been non-EU countries (including, for example, Russia).

Second, a number of cases related to the *de facto* posting of workers included third-country nationals. According to the Irish chapter, the most prominent Irish case involving posting concerned the posting of Turkish workers by a parent Turkish company (the Gama dispute). Although the case primarily focused on payment of wages below the Registered Employment Agreement (REA) rate, it actually concerned posting to Ireland

from a third country: Turkey. Also, Slovenian chapter shows that a particular feature of the Slovenian situation with posting is that many posted workers from Slovenia are third-country nationals, usually coming from Bosnia and Herzegovina and other parts of the Balkan region, which complicates the posting situation not only from a legal, but also from cultural and social-economic perspective.

Finally, several Latvian cases reveal an interesting situation with third-country national posting. Some workers have been brought to Latvia with the sole purpose of being posted to other countries (this is characteristic of the shipbuilding industry). Another line of case law reveals that in order to circumvent comparatively strict immigration rules, and in particular the obligation to pay such workers at least the average wage in the sector, third-country nationals are being posted to Latvia via other EU countries, for example, Poland.

All in all, the posting of third-country nationals is a particularly interesting topic and requires further research. This is an area where immigration rules and posting rules interact and an area potentially prone to abuses since the residence permits of immigrant workers are often directly dependent on the existence of an employment contract, which means they are especially vulnerable in cases of dismissal, and therefore might be reluctant to complain or litigate about their employment conditions even in cases of serious abuses.

Conclusions: to the bright future of more data and clearer rules?

This book set out to provide an overview of national debates and case law on intra-EU employee posting. The evidence presented in the individual country Chapters shows that cross-border service provision and posting have sparked extensive discussions on workers' rights, permissible company practices, and, more broadly, on the balance between social protection and market freedoms in the EU. They have also been a subject of litigation in receiving and sending countries alike.

In view of the limited extent of posting, the high intensity of the debate on the issue and the significant body of related case law is a striking and rather surprising finding. However, it suggests that this relatively new and extraordinary form of worker mobility remains controversial, which calls for its more systematic examination and greater legal clarity.

To begin with, reliable cross-country information on the number of posted workers is currently not available. A1 social security certificates are the main source of EU-wide data in this regard, but these, however, are issued to different categories of cross-border workers, including those who do not fall within the scope of EU posting legislation. By the same token, the impact of posting on national EU labour markets and their particular sub-segments has rarely been studied. The few available accounts¹³ focus on countries

13. See e.g. De Wispelaere and Pacolet's (2017) *op.cit.*, based on the Belgian Limosa database; and Arnholtz J. and Andersen S.K. (2016) *Udenlandske virksomheder og udstationerede arbejdstagere i bygge- og anlægsbranchen*, København, FAOS, Sociologisk Institut, Københavns Universitet, which uses information from the Danish RUT register and data made available by the 3F union's construction branch.

that have set up national registers for foreign companies and/or workers; elsewhere, national debates and policies on posting are informed mainly by media reports on high-profile cases of fraud and worker exploitation. While such illicit behaviour and unfair practices should by all means be revealed and persecuted, media outlets should not be the primary source of information on cross-border service mobility for policymakers and the public.

The lack of reliable comparative data makes it very difficult to contextualise the available case law, and to understand which groups have no access to judicial enforcement of their rights. Therefore, we call for the establishment of standardised data gathering procedures on the issue of posting across the EU, as well as in-depth assessment of the impact of posting on national labour markets and their specific segments. Such a 'two-track' system of data collection would provide for more informed policymaking at the national level, tailored to challenges faced by particular markets and sectors. At the same time, it would prevent the spread of ill-grounded opinions on posting and keep at bay xenophobic and anti-EU sentiments. Let us hope that the newly established European Labour Authority manages to at least partly bridge this gap and fill the information void.

Second, our study points to the lack of clarity about key legal aspects of posting. Courts in the examined countries have found it difficult to identify posting and differentiate it from other forms of cross-border workers' mobility, in particular short-term assignments ('business trips', 'missions'). Court practice in this regard has varied greatly not only across, but also within EU Member States, which testifies to a high degree of uncertainty for actors involved in posting as to which set of regulations the court will apply in their particular case. Other posting-related dilemmas have similarly remained unresolved. In many countries, it is still unclear which elements of posted workers' remuneration can be set off by the employer; whether accommodation allowances and other supplementary payments can be included in the calculation of the host country's minimum wage rate; and which rate to select as a basis for the calculation of posted workers' social security contributions. In some countries, courts still struggle to apply the host country's minimum wage rates in cases that concern posting of workers. They either ignore this obligation altogether or rely on partial information in this regard. These legal loopholes and ambiguity are sometimes exploited by dishonest enterprises seeking to minimise their expenditure at the cost of workers' entitlements.

The above findings suggest there is a need to clarify basic terms and legal constructs related to posting; there should be no doubts concerning the interpretation and application of EU rules on cross-border mobility or the national legislation transposing it into EU Member States' legal systems. Furthermore, it is important to raise awareness of posting as a form of cross-border labour mobility among national-level courts and law enforcement authorities. As long as they do not correctly identify posting situations, they can neither ensure compliance with the applicable legislation nor effectively protect the rights of their workers and companies involved in cross-border service provision.

In light of our findings, it seems that the revision of the Posted Workers Directive has provided partial clarity at best. While it replaces 'minimum rates of pay' by

‘remuneration’, it is not clear whether domestic courts will find this notion easily applicable if they already struggle with applying the ‘minimum wage’. The overall time limit of posting might clarify the situation, but only to an extent, because the incompatibility of timelines between the Social Security Regulation (Article 12(1)) and the revised Posted Workers Directive will mean that in some cases of longer postings (but below 24 months) one set of employment rules will apply (the host country’s) and a different set of social security rules (the home country’s). These are likely to be challenges faced by courts in the future.

Finally and unfortunately, the EU-level rules on reimbursements and daily allowances remain to an extent ambiguous, even after revision,¹⁴ hence this matter, already prevalent in the litigation at national level, will likely remain in the judicial spotlight.

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