

Chapter 7

Posting of workers before Latvian courts

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Introduction¹

In Latvia the posting of workers is not so much discussed as it is litigated, a fact that distinguishes this case study from most of the other chapters in this volume. In so far as there is discussion, there is little congruence between the prevailing discourse and judicial reality. While, politically, the discourse on posting is driven by the emphasis on ‘competitive advantage’ (at the EU level) and shortage of workforce (at the national level), the judicial reality reveals that workers use courts to achieve, first, clarity on what labour law standards apply to them, and second, actual enforcement of their labour rights. The focus in litigation is always on the financial aspects of the employment relationship. The posted workers demand their salaries and benefits afforded under the Latvian law during posting; employers, in turn, try to minimise the costs and avoid payment of taxes, social contributions, and the posting-related benefits due to workers.

The Latvian situation is somewhat unique, because the posted workers themselves (as opposed to, for example, trade unions or institutions such as the Labour Inspectorate) seem to actively use the courts for exercising their voice.² Earlier research that included Latvia in the sample failed to identify the prevalence of litigation on posting-related matters.³ The intensity of litigation also distinguishes this case study from the findings in other research projects, where authors have emphasised that posted workers exercise their voice (exclusively) by exiting the employment relationship. In this regard Nathan Lillie has found that ‘hypermobility’ characterises posted work.⁴ While the Latvian case law indeed reveals that posted workers tend to terminate their employment relationship if they are unhappy with the extent to which employers fulfil their obligations, the significant volume of case law focusing on individual judicial enforcement of posted workers’ rights demonstrates that Latvian posted workers often exercise their voice via judicial means.

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1. Please refer to Annex V for an overview of the cases analysed in this chapter.
 2. Within this volume, only in the Bulgarian chapter do we find a similar trend. At the same time, in the cases analysed in this chapter, it cannot be excluded that there is some prior consultation by workers with trade unions or the Labour Inspectorate, although judgments themselves do not explicitly reveal that.
 3. For a different description of the Latvian situation, see van Hoek A. and Houwerzijl M. (2011) Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, Amsterdam, University of Amsterdam. <http://ec.europa.eu/social/BlobServlet?docId=7510&langId=en>
 4. See Lillie N. (2016) The right not to have rights: posted worker acquiescence and the European Union labor rights framework, *Theoretical Inquiries in Law*, 17 (1), 39-62.

Money, and more specifically salary and daily allowances, with all the related issues on taxes and working time, are the two key matters litigated before Latvian courts. Although, as shown below, other issues come across in the case law as well, money remains the key focus for both companies and workers. This aligns with the information from the Latvian Trade Union Confederation, which regularly receives questions on employers' financial obligations in situations of posting.⁵ The posting companies, however, litigate mostly to challenge the decisions taken by the State Revenue Service, State Social Insurance Agency, and Labour Inspectorate, among others. Finally, the posting of third-country (non-EU) nationals has recently become more of an issue for the Latvian courts.

At the same time, one must keep in mind that the available judgments reveal only a partial picture. First, not all judgments issued by the Latvian courts are publicly available (not all are published). Second, the available data on posted workers, and also national debates, reveal that both inbound and outbound posting is highly relevant in the Latvian context, though the case law almost exclusively concerns outbound posted workers. This means that the workers posted to Latvian territory do not exercise their voice in the same way as Latvian posted workers (that is, via courts); although, of course they could be going to the court in their home countries, like the Latvian workers are doing.

This chapter unfolds as follows: section 1 engages with the main debates on posting; section 2 explains the key elements of national legal framework necessary for understanding domestic case law; and the third and final section analyses the national case law and brings out the major trends identifiable in the available judgments.

1. Debate on posting

Posting of workers is a relatively small phenomenon in Latvia and posted workers (whether inbound or outbound) do not constitute a significant part of the workforce.

To give an overall picture, in 2017 the population in Latvia was 1.95 million,⁶ with approximately half the population economically active.⁷ According to data from the same year, the Latvian authorities issued 1,529 A1 certificates⁸ to workers sent by their employer to (temporarily) work abroad.⁹ The majority of A1 certificates for posted workers were issued in the construction sector (43%), followed by transport (24%) and industrial work (17%).¹⁰ In return, 1,629 A1 certificates were issued to workers coming

5. Mickeviča N. (2012) Darbinieku pārrobežu norīkošanas regulējums Latvijā, Rīga, Latvijas Brīvo Arodbiedrību Savienība, 3.

6. Data available under: <https://www.worldometers.info/world-population/latvia-population/>

7. EURES (2018) Īss pārskats par darba tirgu. <https://ec.europa.eu/eures/printLMItext.jsp?lmiLang=lv®ionId=GR0&catId=2776>

8. Article 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123.

9. Presentation, MoveS Seminar Latvia. Posting of workers in the context of free movement and coordination of social security, Riga, 26 October 2018. <https://ec.europa.eu/social/BlobServlet?docId=20280&langId=en>

10. Ibid.

to Latvia.¹¹ Positioned against the whole workforce, these numbers are low, especially since multiple A1 certificates can be issued for the same worker. However, they do show that Latvia both ‘sends’ and ‘receives’ workers in equal measure, and in this regard, its profile is closer to Germany’s, for example, than Poland’s.

In contrast to some other EU member states where posting has figured intensively in the discussion at the national level,¹² the debate in Latvia is scarce and scattered, even though some key messages can still be identified.

First, at the EU level, Latvia opposed the recent revision of the Posted Workers Directive.¹³ The Latvian Parliament was among those who objected to the revision during the yellow card procedure. In a letter to the European Commission (EC), the Latvian Parliament criticised the initiative on subsidiarity-related grounds.¹⁴ However, the letter also disclosed a deeper concern about the potentially adverse effect of the changes proposed by the Commission on the functioning of the EU internal market,¹⁵ and declared the proposal a threat to ‘low-wage countries’ and competition in the internal market.¹⁶ The Latvian government also voted against the revision in the Council.¹⁷ Surprisingly, this stance was not much debated at the societal level; at least, there is no publicly available information about any such discussion.

This shows that in Latvia, posting is primarily seen from the perspective of a ‘sending’ country, providing an opportunity for the Latvian companies to access the foreign markets by offering their services abroad, at least at the governmental level. This is in stark contrast to the data revealing that Latvia is a country that both sends and receives.

Second, the posting of third-country nationals has gradually become a more important part of the general debate on labour mobility. Latvia, at least as argued by employers, is going through an extreme workforce shortage, especially in specific sectors such as construction and fisheries.¹⁸ The relaxing of immigration rules and also the posting of workers from either EU or third countries (often countries with much lower wages, for example, Ukraine and Belarus) is seen as one of the ways to respond to the lack of available workers. This, however, is a complex debate. There are objections that such

11. De Wispelaere F. and Paolet J. (2018) Posting of workers. Report on A1 portable documents issued in 2017, Brussels, European Commission, 24.

12. See, e.g. chapter 4 on France.

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

14. Opinion of the European Affairs Committee of the Saeima, 5 May 2016. http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npa/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf

15. Replacing ‘minimum wage’ by ‘remuneration’ and limiting the period of posting to 24 months.

16. Opinion of the European Affairs Committee of the Saeima, 5 May 2016. http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npa/docs/latvia/2016/com20160128/com20160128_saeima_opinion_en.pdf

17. Tani C. (2017) EU overcomes divisions on posted workers, EUObserver, 24 October 2017. <https://euobserver.com/social/139599>

18. Ambote S. (2019) Dažādu nozaru uzņēmumos drabnieku trūkums aizvien ir liela problēma, LSM, 16 January 2019. <https://www.lsm.lv/raksts/zinas/ekonomika/dazadu-nozaru-uznemumos-darbinieku-trukums-arvien-ir-liela-problema.a306189/>; Pauniņš A. (2011) Celtniecībā trūkst darbinieku, TVNet, 20 April 2011. <https://www.tvnet.lv/5421798/celtnieciba-trukst-darbinieku>

‘import of workers’ would be unfair to the local workforce and, instead of importing workers, employers should pay higher wages to local workers.¹⁹ In this regard, in order not to crowd the labour market with third-country nationals, the Latvian law demands that these receive at least the average wage multiplied by one and a half times, and may be hired only if workers cannot be found locally. Their employer also needs to arrange their accommodation and residence permits.²⁰ In spite of these stringent rules, the number of work permits for third-country nationals has doubled over the past three years (reaching 6,000).²¹ There are also temporary work agencies offering workers from third countries to companies for shorter periods of time. However, it seems that this applies only to skilled workforces because these companies argue that the immigration rules are too strict and costly to provide the local companies with low-skilled workers.²² The lobby to ease labour market entrance for third-country nationals in 2018 resulted in the Cabinet of Ministers adopting a list of professions in which workforce shortages are predicted and in which foreign workers may be invited, based on less stringent rules.²³

More recently, however, posting is increasingly being used to circumvent immigration rules. Under such arrangements the workers are hired by employers, for example, in Poland, where the immigration rules are less strict. Then, by relying on EU posting rules, workers are posted to work in Latvia.²⁴ This allows employers to circumvent the rule that the workers have to receive at least one and a half times the average wage, the requirement to ensure accommodation and so on; instead they can be hired for the minimum wage of either home or host country (whichever is higher). For an illustration of how significant this difference is, suffice it to say that the average gross wage in Latvia in 2018 was EUR 1,004, while the minimum wage was EUR 430. The minimum wage in Poland is slightly higher than the Latvian one but still amounts to only slightly above EUR 500.

According to information from the State Labour Inspectorate, there are currently multiple open cases regarding Polish companies who do not fulfil all the rules that apply to workers posted to Latvia.²⁵

19. While employers are obliged to pay at least the average wage in the sector to workers from abroad, they are allowed to pay the Latvian minimum wage to local workers and this is seen as unfair practice.
20. Miteniece A. (2018) Jelgavas uzņēmumi jau nodarbina viesstrādniekus’, Jelgavas Vēstnesis, 16 September 2018. <https://www.jelgavasvestnesis.lv/pilseta/jelgavas-uznemumi-jau-nodarbina-viesstradniekus>
21. Lazdiņš A. (2017) Viesstrādnieki uz Latviju labprāt brauc pelnā, aizpildot brīvās darba vietas, SKATIES, 4 February 2017. <https://skaties.lv/zinas/latvija/viesstradnieki-no-arvalstim-labprat-uz-latviju-brauc-pelna-aizpildot-brivas-darbavietas/>
22. Miteniece A. (2018) Jelgavas uzņēmumi jau nodarbina viesstrādniekus’, Jelgavas Vēstnesis, 16 September 2018. <https://www.jelgavasvestnesis.lv/pilseta/jelgavas-uznemumi-jau-nodarbina-viesstradniekus>.
23. The professions include researchers and scientists, ICT specialists, manufacturing industry professionals, specialists in electrical technology and electrical engineering and construction, fishing vessel management specialists, and aircraft pilots and maintenance specialists. Cabinet of Ministers’ Regulations No 108 ‘Specialitātes (profesijas), kurās prognozē būtisku darbaspēka trūkumu un kurās darbā Latvijas Republikā var izaicināt ārzemniekus’. Available under: <https://likumi.lv/ta/id/297537-specialitates-profesijas-kuras-prognoze-butisku-darbaspeka-trukumu-un-kuras-darba-latvijas-republika-var-zaicinat-arzemniekus>.
24. LSM (2019) “Aizliegtais panēmiens” uziet shēmas noteikumu apiešanai viesstrādniekiem, LSM, 18 February 2019. <https://www.lsm.lv/raksts/zinas/zinu-analize/aizliegtais-panemiens-uziet-shemas-noteikumu-apiesanai-viesstradniekiem.a309717/>
25. Ibid.

All in all, the posting of workers is not the central aspect discussed in Latvia in the context of labour mobility. At the same time, it is increasingly playing a role in this debate and is often discussed as one of the more problematic aspects of the picture. There is a sharp difference between the Latvian government's position at EU level, where posting is seen as a mechanism for accessing markets and exercising 'competitive advantage' of 'low-wage' countries, and the national level discussion in the media outlets where posting is discussed as part of the larger phenomenon of labour mobility (both intra-EU and beyond). Here, it is framed either as a way of bringing in a 'cheaper workforce' to circumvent the problems companies are facing locally, or as a threat or even replacement for local (Latvian) workers. As we will see, the case law does not seem particularly congruent with these debates, although the posting of third-country nationals has in fact come before the Latvian courts.

2. The relevant legal framework

Latvian law regulating posting is largely based on EU law. The provisions on posted work can be found in labour law, and, for the most part, simply replicate the requirements found in the Posted Workers Directive and the Enforcement Directive.²⁶

Labour law focuses primarily on the inbound posted workers since it is presumed that the general labour law framework applies to the workers posted abroad by Latvian companies. Every employer that posts workers to Latvia has to inform the Labour Inspectorate about each posted worker (name, place of work, contact details of the representative, type of service and details of service recipient) and also keep all the related documentation, including the employment contract, payslips, timesheets, proof of payment of wages and so on, for at least two years after posting has finished, and if needed, to provide their translation in Latvian.²⁷ Specifically for the third-country nationals posted to Latvia, the employer has to submit a confirmation that the worker is lawfully working for an employer in another EU or European Economic Area (EEA) Member State (14¹(2) labour law). These rules also apply to intra-company transfer (14¹(7) labour law). Only crews of trade ships are explicitly exempt from all these rules (Article 14(3) labour law).

For workers posted abroad, the labour law determines that the same core provisions laid down in Article 3(1) of the Posted Workers Directive will apply in line with the standards set by the host country's law or universally applicable collective agreements. More recently, and specifically in reaction to the now-settled case law by the Supreme Court, the legislator has specified that the rules on so-called assignments (missions and business trips) apply to posted workers, including rules on the daily allowances and

26. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28 May 2014, 11–31.

27. Samlaja I. (2016) Latvia: new reporting requirements and compliance measures introduced for employees posted to work in Latvia, Taylor Vinters, 16 November 2016. <https://www.taylorvinters.com/news/latvia-new-reporting-requirements-compliance-measures-introduced-employees-posted-work-latvia>

the obligation to reimburse assignment-related expenses. The daily allowance can be treated as part of the minimum wage only if the host country's law so requires (Article 14²(3) labour law). This attribution of the assignment rules to posting situations also means that pregnant workers, workers one year after giving birth, and breastfeeding workers may not be posted without their explicit agreement (Article 53(3) labour law).

Assignment-related benefits and reimbursements are regulated by the Cabinet of Ministers' Regulations No. 969.²⁸ The Regulations give posted workers the right to daily allowance and reimbursement of several types of expenses (transport, accommodation expenses, luggage transportation, parking, currency exchanges, related bank fees, travelling within the host country, public transport and health insurance).²⁹ Importantly, the daily allowance (if paid in line with the amounts determined in the Regulations) is not taxable under Latvian law. The amount of daily allowance changes for different countries, but is currently, for example, EUR 40 per day for Belgium, and EUR 46 for the Netherlands, Finland and Germany. In Latvia where the average net wage for 2018 was EUR 746, this is a significant bonus for posted workers. The daily allowances may, however, be reduced by 70% if the cost of three meals per day and accommodation is covered by the employer.³⁰ Interestingly, there is not much information on how daily allowances fit with Article 3(7) of the Posted Workers Directive, which states that allowances should be part of the minimum wage unless paid in reimbursement of expenditure actually incurred. Some aspects have been clarified by courts, but largely it seems that the daily allowance, at least in line with Latvian assignment rules that also apply to posting, must be paid in addition to the minimum wage and reimbursement of the actual expenses.

Finally, following the suggestion of the Enforcement Directive, Latvia introduced subcontracting liability in relation to posted workers in the construction sector. Posted workers can demand wage payment from the contractor (one level above the employer) if their direct employer refuses to pay (Article 75²(1) labour law). The Article suggests that it applies to employers in other EU Member States as well (not just general contractors in Latvia), since the posted worker is given the right to the minimum wage in the host country (second sentence of the same Article). This aspect has not yet been litigated but is potentially interesting for judicial enforcement of posted workers' rights in the future.

3. Litigating on posting: to pay or not to pay?

Unsurprisingly, the central question in posting cases before Latvian courts is money. The litigation concerns mainly the obligation to pay salaries and daily allowances as well as taxes and social contributions together with various ways of how they should or could be calculated. This section is an overview of the key matters litigated and the patterns and characteristics of Latvian case law.

28. Cabinet of Ministers' Regulations No 969, 'Kārtība, kādā atlīdzināmi ar komandējumiem saistītie izdevumi'. Available under: <https://likumi.lv/doc.php?id=220013> [accessed 9 August 2019].

29. *Ibid.*, point 8.

30. *Ibid.*

First, however, a disclaimer: not all judgments issued by Latvian courts can be found in the publicly available database. The courts are encouraged to publish judgments after anonymisation in a united database.³¹ However, that is not yet mandatory, and thus potentially gives an uneven picture. This means that the data set for my analysis is not complete. Nevertheless, the number of judgments available that concern posting (and their variety in terms of both courts and subject matter) is encouraging, and therefore, one can hope that the analysis below presents a fairly accurate picture of the overall situation.

For this study I analysed 95 available judgments adopted between 2008 and 2019. Latvia does not have specialised labour law courts. Labour disputes typically are tried before the general civil courts. An important role concerning posting is also played by the administrative courts, since the decisions of Latvian authorities (for example, Labour Inspectorate, State Revenue Service, Office of Citizenship and Migration) may be challenged only before them. This means that the cases brought by posted workers or by companies against posted workers will typically be brought before the civil courts, while cases brought by either workers or posting companies against the decisions of public authorities are heard before the administrative courts. In my sample of 95, 36 judgments were made by the administrative courts and 59 by the civil courts. Sixty-five judgments were from the first instance, and 31 were from second (appellate) or third (cassation) instance. If most of the available judgments were initially (between 2010 and 2013) issued by the administrative courts, more recently the civil courts dominate the litigation scene. This means that the focus of litigation has shifted from administrative fines and taxes to the individual employment relationship and labour law.

The vast majority of judgments (80) concern outbound posting and hence deal with Latvian posted workers or Latvian companies posting workers rather than workers posted to Latvia, even though Latvia sends and receives posted workers in equal numbers and therefore one could have expected the picture to be more even. Only three cases concern workers posted to Latvia, with 12 concerning workers (third-country nationals) immigrating to Latvia and then being posted to other countries in the EU. There were no cases brought by trade unions on behalf of workers, even though in six judgments (belonging to one larger case) it was found that the workers had, prior to bringing the case, consulted a trade union.³²

The case law suggests that the main countries of origin for workers posted to or through Latvia are Ukraine and Poland, while the most popular destination countries for the workers posted from Latvia are Germany, Norway, and Sweden, and to a lesser extent, France, Belgium and Lithuania. Overall, the geographical proximity seems to matter. Sectors where the posted workers work, as evidenced by the case law, are diverse. Not all judgments explicitly identify the sector, but from the ones that do, it follows that the two most popular for posted work are construction (32 judgments) and transport (27 judgments). Other cases emanated from the cleaning/domestic services, meat processing, IT, telecommunications and advertising sectors. While most cases concern

31. The database is available under: <https://manas.tiesas.lv/eTiesasMvc/nolemumi>

32. For an example see judgment by Kuldīgas District Court, 2017, C19040317.

'low-skilled' work, there are several cases involving highly qualified posted workers such as engineers, managers and consultants.

If we look at the 'winners' and 'losers' in the cases analysed, then before civil courts, the vast majority of cases are won by workers (43 out of 59); while before the administrative courts, cases are typically won by public authorities (24 out of 36). Hence, at least statistically, the posting companies typically seem to lose.

Typically, Latvian judges do not (explicitly) identify that the case concerns the posting of workers. This seems at times to be because there is a lack of awareness that the situation constitutes posting (especially evidenced by cases where the national court does not recognise a worker's right to receive at least the host country's minimum wage). At other times, the courts use the Latvian term '*komandējums*' (assignment), which, according to the standing case law, is a broader term comprising *inter alia* all instances of posting. Both circumstances are discussed in more detail below.

Finally, the key issues litigated directly and indirectly are payment of salary or daily allowances and their calculation by the employer on the one side, and the fines, taxes and social security costs imposed upon the undertaking by the Latvian authorities on the other. Overall, the main questions litigated concern: salaries and daily allowances (44 judgments); working-time calculations (16 judgments); immigration and work permits for third-country nationals (15 judgments); deduction from salaries and reimbursement of expenses (15 judgments); taxes and social security-related disputes (13 judgments); and distinctions between posting/business trip/mission and assignment (13 judgments). Individual cases cover some other labour law aspects such as the concretisation of employment relationships, public procurement rules, freedom to provide services, administrative fines for breaches of labour and social security law, insolvency rules and customs payments.

3.1. Posting, assignment or business trip?

The first big debate before Latvian courts was about how the EU level concept of posting fits together with the domestic labour law structures and arrangements.

Under Latvian law workers can be sent on an assignment (mission) or on a work trip. An assignment is carried out on the basis of the employer's written order to send the worker to either carry out work or obtain additional qualifications or education within Latvia or abroad for a specific period of time.³³ A work (or business) trip is when work, according to the employment contract, is carried out 'on the road' (for example, in the transport sector) or is intrinsically linked to regular traveling (construction or forestry sectors are mentioned as examples).³⁴

33. Cabinet of Ministers' Regulations No 969, '*Kārtība, kādā atļūdzināmi ar komandējumiem saistītie izdevumi*'. Available under: <https://likumi.lv/doc.php?id=220013> [accessed 9 August 2019], points 2.1 and 2.2.

34. *Ibid.*, point 3.

Workers sent on an assignment or work trip have a right to a daily allowance and reimbursement of their expenses (including travel, board and lodging, but also bank fees and so on).³⁵ Therefore, the question of how posting fits in the context of assignments and work trips became relevant shortly after Latvia joined the EU and the EU rules on posting started to matter. Labour law provided no insight,³⁶ and initially the case law was very unclear and casuistic. In several practically identical cases, the Latvian courts came to different conclusions. In some, where workers had been sent to work abroad for a short period of time, the courts held that it is an assignment and not a posting,³⁷ while in others, that it is posting and not an assignment.³⁸ In one case, the administrative regional court even devised a test according to which a situation should be deemed to constitute posting if the habitual place of work was abroad.³⁹ This seems problematic in the light of the definition of (genuine) posting, which is temporary work abroad, and also in the light of Rome I requirements.⁴⁰ In another case, a first instance court argued that an assignment is when a worker is sent to work elsewhere in Latvia, while posting is always abroad.⁴¹

After this initial confusion, the Supreme Court clarified that the posting of workers is a type of assignment.⁴² Therefore, posted workers always have the right to the daily allowance and reimbursement of travel and accommodation costs, as well as several other⁴³ expenses. In 2016, the Latvian legislator codified this approach, and now Article 14²(3) explicitly specifies that the rules on assignments are applicable to posted workers.

Transport is now the only sector where the national courts still do not consider the situation to constitute posting. In judgments by Latvian courts, (international) transport workers are not considered to be posted workers. Instead, they are seen to be on a 'work trip', which means that they have the right to daily allowances and reimbursement for expenses, but not to the host country's minimum wage.⁴⁴

3.2. Salaries, daily allowances and reimbursements

The focus of almost all cases brought by posted workers is the payment (or non-payment) of wages, daily allowances and reimbursements for posting-related expenses. Typically, cases are brought by workers before civil courts to demand payment of wages due.⁴⁵

35. *Ibid.*, point 8.

36. The original definition of posting in the labour law did not make a distinction between a posting, a mission or a business trip (Article 14(1) labour law in the version prior to 1 January 2016).

37. Administrative regional court, 31 May 2012, Case No. 142199411, para. 11; administrative regional court, 26 April 2012, Case No. A420695110.

38. Administrative regional court, 22 March 2013, Case No. 142246511; Riga Regional Court, 12 November 2013, Case No. C30606012.

39. Administrative regional court, 12 September 2013, Case No. A420290113.

40. Rome I (Article 8) provides that parties can choose which law is applied to employment relationships but that this choice cannot deprive the worker of the rights afforded by the law of the country where he or she habitually works or from where he or she carried out the work.

41. Administrative district court, 2013, A420290113, A42-02901-13.

42. Supreme Court, civil department, 2014, judgment in case No. SKC-2425/2014.

43. E.g. parking, luggage, travel documents, banking fees, travel expenses within the host country, travel insurance, vaccination expenses (point 8 MK).

44. See e.g. Rīgas Latgales priekšpilsētas tiesa, 2017, C29514916.

45. E.g. 2015, Rīga Zemgales priekšpilsētas tiesa, C31403413, C-0985-15/9; 2017, Rīgas pilsētas Latgales priekšpilsētas tiesa, C-3707-17/29.

The first problem that comes starkly across in Latvian case law is the right of the posted workers - from the perspective of EU law - to receive at least the minimum wage of the host country. In the early years (2008 – 2014) following Latvia's accession to the EU, this right was practically never recognised (or discussed) by the Latvian courts. The situation seems to be gradually changing, and in some cases the Court now recognises this right and calculates the salary rate in line with the host country's standards.⁴⁶ However, such cases are not the norm. It becomes clear from some judgments that neither the applicants nor the judges are aware of the possibility of requesting that the host country's minimum wage is applied.⁴⁷ This seems even more puzzling because labour law explicitly demands that the employer ensures that the worker is paid the minimum wage in line with the host country's law (Article 14²(1)). At the same time, there is some institutional awareness of this right because there are other examples of cases, for example, where the State Revenue Office fined a company for not paying the posted worker a salary in line with the German minimum wage.⁴⁸

A deeper explanation could be that the Latvian courts focus almost solely on the domestic structures and standards of labour law. This is especially characteristic of transport sector cases: not in a single analysed case could I find any reference at all to the host country's standards for wages. Instead, all the wage rate-related claims were decided by the courts solely in line with Latvian law. In fact, transport cases were never identified or even discussed as potentially representing a situation of 'posting'. Information from the Latvian trade unions likewise suggests that the Labour Inspectorate in Latvia does not recognise transport services as posting of workers.⁴⁹ A similar pattern of not recognising transportation services as potentially constituting posting are also present in, for example, Bulgaria and Poland (see the respective chapters in this volume).

In contrast to the ignorance of EU-based rights to the minimum wage (Article 3(1)(c) Posted Workers Directive), both Latvian posted workers and judges are well aware of the right (in Latvian law) to receive daily allowances during posting. This is the most common (and indeed financially significant) issue litigated by posted workers. Posted workers are typically successful in demanding payment of daily allowances before courts.⁵⁰ While this clearly has positive implications for the worker's immediate income, there could be potentially negative implications from these payments. If a large part of the overall remuneration is constituted by allowances, the level of future social benefits the worker might be entitled to (for example, unemployment) could be affected because daily allowances are not taxed.

Importantly, the Latvian legislator does not distinguish between posting and assignment to EU and EEA countries on the one side, and third countries on the other.

46. E.g. Riga District Court, 2013, C33487312, C-2212-13/3; 2014, Supreme Court, SKC-2425/2014.

47. 2014, Vidzeme Regional Court, C21044413, CAO202-14/12; Liepājas District Court, 2017, 20271316.

48. 2014, Administrative district court, A420422314, A42-01341-15/44.

49. Information received from Natalja Preisa, LBAS on 07 August 2019.

50. E.g. 2016, Ventspils Court, C40172915, C-0457-16/17; 2017, Liepāja District Court, 20271316; Liepājas rajona tiesa, 2017, C20271116; 2017, Rīgas rajona tiesas Jūrmalas tiesu nams, C33640816, No 3972-17/29; 2017, Liepājas tiesa, C-1684-17/6; 2017, Liepājas tiesa C20166517; 2017, Rīgas pilsētas Latgales priekšpilsētas tiesa, C-3707-17/29; 2018, Rīgas pilsētas Vidzemes priekšpilsētas tiesa, C-1948-18/18; 2018, Rīgas rajona tiesa, C-3249-18/1; 2018, Zemgales rajona tiesa, C15255316.

Therefore, posted workers to countries such as Russia, for example, also have the same rights and are successful in demanding wages and daily allowances due, as well as full reimbursement of expenses.⁵¹ Since the posting rules do not differentiate between countries, the right to the host country's minimum wage also applies to posting outside of the EU and the EEA.

Over the years, the litigation on wages and daily allowances has remained at the top of the Latvian courts' agenda. A case decided by the Supreme Court (civil department) in 2015 concerned a health sector worker who was paid two different salaries: one when working in Latvia, and another (four times higher and with a number of supplements) when working abroad during posting. This was a way in which the company complied with the obligation to pay at least the minimum wage of the host country for the work abroad. The worker demanded some of the unpaid wages and daily allowances, and that the daily allowance should be paid on top of the (increased) salary in the host country rather than as part of it. The Court reasoned that an increase in salary for the time of posting could be an adequate means of compensating the extra expenses during posting. The Court distinguished that the daily allowance exceeding the factual expenses should be part of the salary, and therefore taxable.⁵² The judgment of the lower courts was repealed and the case sent for re-evaluation to determine whether the wage rate with the allowance included as a constituent element of the salary is compatible with Articles 14 and 76 of the labour law.⁵³ So far this is the only case I have found that implicitly engages with the rule in the Posted Workers' Directive stating that allowances beyond reimbursement of factual expenses should be considered as part of the salary. Nonetheless, the Court did not explicitly refer to this EU level provision (Article 3(7) Posted Workers Directive). Following this judgment, the legislator amended Article 14 labour law in 2016 to state that the daily allowance is part of the minimum wage if the host country's law so demands.⁵⁴

Finally, in some posting situations, employers had deducted expenses and losses 'related to posting' from workers' wages. In one such case concerning posting to Germany, the Labour Inspectorate had imposed a fine on the company for unlawful deductions from the worker's salary.⁵⁵ This was unsuccessfully challenged by the company before the Latvian court, which found that the worker had not in fact received the due wage, daily allowances or reimbursement of her posting-related expenses.⁵⁶

In some cases, the companies had challenged fines imposed by the State Revenue Service with an argument that the payments to workers were not salary (taxable income) but rather a simple payment of daily allowances or reimbursement of posting-

51. 2018, Rīgas apgabaltiesas Civillietu tiesas kolēģija, CA-0486-18/37; 2018 Jēkabpils rajona tiesa, C16102316, No C-0056-18/5.

52. Supreme Court, 2015, SKC-952/2015, C37108212.

53. Supreme Court, 2015, SKC-952/2015, C37108212.

54. Amendments to the labour law, 12 May 2016. Available under: <https://www.vestnesis.lv/op/2016/101.1> [accessed 9 August 2019]. Please see a further discussion of this matter in Rasnača Z. (2018) Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia, *European Constitutional Law Review*, 14 (1), 131-153.

55. 2012, Administrative district court, 142270311, 1-1831-12/1.

56. Ibid.

related expenses. In one such case the Court ruled that in so far as an amount classed as daily allowances goes, the company does not need to pay taxes and social contributions; however, no proof was submitted that some transfers were made to cover actual work-related expenses, hence the taxes and contributions concerning those transfers were duly imposed by the State Revenue Service.⁵⁷

Advance payments to workers are especially characteristic of the transport sector. In some cases, employers demand that workers repay the ‘overpayment’ if the worker fails to submit proof of using the advance payment to cover assignment-related expenses. The courts take a case-by-case approach and such claims have been rejected in some cases,⁵⁸ while satisfied in others.⁵⁹ The situation often unfolds when the worker submits a claim for the failure to pay the agreed salary and daily allowances, and the employer then follows up with a counterclaim, arguing that the worker has failed to submit reports for assignments and proof of how advance payments meant for covering assignment-related expenses have been spent.⁶⁰

Finally, an undertaking that breaches labour law may be fined. Article 41 of the Latvian Administrative Violations Code even specifies that employers may be fined for breaches of posting-related rules. There are several cases where this has been the case, and the companies have been fined by the Labour Inspectorate. Such cases are also helpful for posted workers because they may submit their individual claims before civil courts on the basis of, for example, wages and daily allowances needing to be paid.

All in all, this failure to pay the agreed salary, and especially the failure to pay the daily allowance due to the worker, is the most litigated issue related to posting situations, and there are many similar judgments. Latvian posted workers seem to exercise their voice in financial matters by using litigation opportunities. When set against the overall numbers on posting, the number of such cases reveal the significance of judicial enforcement for posted workers. However, such enforcement seems to take place exclusively in relation to outbound posted workers. At the same time, Latvian case law is problematic in some respects. First, the right to the host country’s minimum wage is not always recognised, the Latvian courts seem much more comfortable to remain within ‘Latvian law’. Second, the transport sector falls outside the posting rules, at least according to the Latvian courts. Third, the case law shows that the relationship between EU level rules on allowances and Latvian law in this regard is somewhat unclear.

3.3. Taxes and social security contributions

Most cases concerning taxes and social contributions challenge decisions by the State Revenue Service to recover unpaid taxes, which are then challenged by the applicant

57. 2012, Administrative district court, 142199411, 1-1157-12/26.

58. 2017, Liepājas tiesa, District Court, C20250416, Nr C-0497-17/6.

59. 2017, C1516361617, Jelgavas tiesa, district court; 2017, Jelgavas tiesa, District Court, C15174217; Dauvgavpils tiesa, 2017, C12391716, No C-1194-17/11.

60. E.g. 2017, Vidzemes rajona tiesa, C21030217, No C-1275-18/16; 2018, Vidzemes rajona tiesa, C-1285-18/16; See e.g. 2018, Rīgas apgabaltiesa, CA-0159-18/24.

(typically – an undertaking that posts workers). In addition, matters of double taxation and the deduction of posting-related expenses from taxes are more recently being brought to the attention of Latvian courts.

First, in a number of such cases where decisions by the State Revenue Service have been challenged, the companies attempted to argue that the payments to workers were not salary but rather reimbursement of work trip-related expenses (advance reimbursement).⁶¹ For example, in 2010, the administrative regional court rejected one such appeal by reasoning that the additional income tax and social contributions should be duly imposed on the company since the employer who tried to rely on the rules on assignment-related expenses and allowances was not able to prove that certain payments to the worker were in fact daily allowances (it was not indicated in the payment orders and other documentation), and thus the court found that this had been simply an attempt to circumvent the taxation rules concerning part of the worker's salary.⁶²

Second, in one of the rare cases brought concerning inbound rather than outbound posted workers, the company that had posted workers to Latvia wished to deduct the expenses for furnishing an apartment used as accommodation for the said workers from its income tax. The State Revenue Service did not allow this deduction and this decision was then challenged before the administrative court. The court argued that the provision of employees with accommodation could not be considered 'essential' for the economic activity of the applicant and ruled in favour of the Revenue Service.⁶³

In one case, the worker demanded repayment of unfairly deducted social contributions (employee's part) because, according to him, social contributions had been deducted in both Norway and Latvia. The Latvian company had operated in the construction sector in Norway, and the local tax authority had imposed upon the company an obligation to pay social contributions in Norway (the company had paid only in Latvia). The worker's claim was rejected because no proof of payment of social contributions in Latvia was found.⁶⁴ Interestingly, the court did not analyse whether this was a situation of exercising the freedom to provide services (posting of workers) at all, merely arguing that if contributions were paid in Norway, they were not due in Latvia. In this specific case, the employer in question had first declared all its income in Latvia and paid contributions in Latvia, but afterwards had corrected this and indicated that the worker in question had no income in Latvia. This correction was used to cover other of the company's tax debts (in Latvia).⁶⁵

In a similar case, the court argued that while the employer in question had declared taxes in Norway, he has not yet paid them. Therefore, there is no double taxation and the worker in question has no subjective right to submit and request the Latvian tax

61. 2010, Administrative district court A42775909, A04978-10/44.

62. 2011, Administrative regional court, A42775909, AA43-0589-11/2.

63. Administrative district court, 2008 A42457707, A2298-08/10.

64. 2017, Administrative regional court, A420228715, AA43-0481-17/3.

65. Ibid.

authority to recover deductions, and no right to intervene in the relationship between the company and the state revenue authority.⁶⁶

The question never discussed by the courts, however, is what this break in contributions means for the social insurance of the worker under consideration. A break in social contributions in Latvia and a very short time period when contributions are paid in Norway might mean that the worker ends up falling through the cracks of the social protection systems of both states and not being covered against some risks at certain moments. In Latvia, for example, the right to unemployment benefits arises only if several conditions are fulfilled. One of these conditions is the payment of social contributions for at least 12 months during the reference period of the previous 16 months. Most of the Member States have similar eligibility criteria. This could lead to a situation where breaks in work patterns and social contributions end up with the worker being ineligible for unemployment benefits (or other social benefits) even though he has, in fact, worked (just very short term and in multiple countries).

3.4. Working time

In some cases, the posted workers have demanded compensation for the so-called 'idle time' - time during which they should have worked, but did not, because no tasks were allocated by the employer. In this context, the courts are often requested to award compensation for the time not worked, which they do.⁶⁷ For example, a telecommunications field technician was posted to Germany immediately after the conclusion of his employment contract. However, no work was given to him in Germany and he returned to Latvia, where he was also assigned no work. The worker demanded the payment of salary and daily allowance and his claim was satisfied by the court.⁶⁸

Sometimes workers claim that they have worked significantly more hours than they have been paid for. A good example of this is a group of cases (eight very similar claims by eight different workers).⁶⁹ The workers were posted to Norway to work in construction and claimed that they had worked more than 40 hours per week and also worked on Saturdays, but had not been paid daily allowances for these days. The court satisfied the claims of both the actual working time and the daily allowances.⁷⁰ This was an interesting group of cases because the workers had received the minimum wage in line with Norwegian standards, but with some help in terms of information from the trade unions, they demanded the recognition of their actual working time and the payment of allowances (extra rights that are based solely on Latvian law). In terms of the working time, the court looked at the evidence. In this group of cases witnesses were

66. 2017, A420524713, AA43-0122-17/3, Administrative regional court.

67. 2014, Vidzemes Reģionālā tiesa, C21044413, CA0202-14/12.

68. Rīgas priekšpilsētas tiesa, District Court, 2017, C30415417, No C-4154-17/4.

69. 2017, Kuldīgas rajona tiesa, C19040517; 2017, Kuldīgas rajona tiesa, C19040317; 2017 Kuldīgas rajona tiesa, C19040417; and Kuldīgas rajona tiesa 2017 C19040717; 2017, Kuldīgas rajona tiesa C19040917; 2017 Kuldīgas rajona tiesa C-0410-17/2; 2017 Kuldīgas rajona tiesa C0406-17/2, No C19040617; 2017 Kuldīgas rajona tiesa C29746312, No CA-0977-17/17.

70. 2017, Kuldīgas rajona tiesa, C19040517.

enough. However, in another case where the worker failed to prove that he had worked three extra days in Germany, the claim was rejected.⁷¹

Overall, working time has been among the issues litigated but typically as an accessory to the matter of calculating workers' salaries and daily allowances.

3.5. Employment relationship

Some cases have dealt with the establishment and termination of employment relationships. Posting usually complicates the situation because there are often numerous contracts (one for Latvia, one for the posting period, and so on) or other unusual circumstances.

However, a preliminary issue when it comes to posted workers is the dilemma over the applicable law. Within my sample, there was only one case where the national court analysed this. Some workers had concluded an employment contract in Latvia (with minimum wage) but were told that the 'real' contract would be in Norway for the Norwegian minimum wage. Once in Norway, they signed one (initial) employment contract to work in Norway for three months, then another contract to work in another place in Norway was signed.⁷² The workers submitting the claim argued that the Latvian rather than Norwegian law was applicable and that they should be paid both the wages agreed in the initial contract and its 'supplements', as well as the daily allowances in line with Latvian law. The court reasoned that the initial employment relationship continued, and the company was obliged to pay the workers the Norwegian minimum wage, and in addition, the daily allowances and reimbursement of all expenses related to posting. The argument that the reduction of daily allowances by 70% should then apply was also rejected because there was no evidence that the travel, accommodation costs and three meals per day had been covered by the employer.

This was an interesting case from the perspective of the choice of law, especially because Norway had been the sole place of employment. No A1 forms had been issued for the workers in Latvia, and the workers had in fact never worked in Latvia for this employer. The court nevertheless did not analyse the issue of the applicable law in detail; it merely cited the rules of Rome I without deeper analysis and decided to apply the Latvian law. Interestingly enough, it was more financially profitable for the workers to rely on the Latvian rather than the Norwegian law, and something they successfully did.⁷³

In another interesting case, a transport worker had been on assignments in France, Spain, Sweden and Finland, and then returned to Latvia. He did not receive any new tasks and went to court to demand salary and compensation. The court satisfied the

71. 2017, Daugavpils tiesa, C12135417, No 1354-17.

72. 2018, Rīgas rajona tiesa, C33475217, NoC-2562-18/27.

73. Ibid.

worker's claim in full, presuming that since no termination was requested from either side and no dismissal had taken place, the employment relationship continued.⁷⁴

Another case concerned the start of a working relationship. A worker posted to Tallinn, Estonia requested unpaid wages, and the court demanded proof that he had in fact started an employment relationship with the employer. The court did not accept the hotel receipts as proof and stated instead that evidence that would prove that the worker had in fact started the employment relationship was needed. The worker had failed to do that, and since the employer had not registered him as (a posted) employee with the Estonian authorities either, the court rejected the worker's claim. Other reasons that would explain his stay in Tallinn were not really discussed.⁷⁵

Another case belonging to this group concerned the termination of an employment relationship. The worker had been posted abroad but decided to stop work and return to Latvia because of unforeseen circumstances at home (sickness of a family member). She demanded the termination of the employment contract and unpaid wages. The employer, in a counterclaim, claimed that he had suffered the loss of EUR 2,000 due to the worker unexpectedly leaving. The court satisfied the worker's claim and rejected the counterclaim by the employer.⁷⁶

The establishment and termination of employment relationship has been comparatively frequently analysed by the Latvian courts in relation to posting of workers. It seems that in most cases the court has tended to side with continuity of the employment relationship and the application of Latvian law. All in all, these matters have also come before the courts within the context of demands for unpaid salaries and allowances and the enforcement of their payment through the courts.

3.6. Posting of third-country nationals

An increasingly relevant aspect of case law related to the posting of workers is the posting of third-country (non-EU) nationals. The posting of third-country nationals might also be present in other situations, but since the names and other identifiable information about the workers involved in cases are anonymised, posting of third-country nationals is a clearly identifiable issue only in cases dealing with work permits and immigration. There are two groups of such cases.

In the first group, a Latvian company had challenged a series of refusals by the Office of Citizenship and Migration Affairs to grant residence and/or work permits to workers that the company had brought to Latvia to work in shipbuilding. Even though the company had indicated that their habitual place of work will be in Latvia, the Office of Citizenship and Migration Affairs had established that it will not be the case since the

74. Ogres rajona tiesa, 2017, C24071317.

75. 2017, Rīgas pilsētas Latgales priekšpilsētas tiesa, C29687316, No C-3065-17/28.

76. 2017, Ventspils tiesa, C40092617.

company did not carry out any commercial activity in the country.⁷⁷ This group of cases concerned 70 individual instances of such refusals to Ukrainian workers.⁷⁸ There was no proof of any economic activity in Latvia by the company concerned.⁷⁹

The results of litigation of these individual challenges, while mixed in the first two instances,⁸⁰ were favourable to the company in the end. At first, the courts considered that since these workers were not in fact working in Latvia, and were instead simply sent on assignments abroad, the residence permits could not be granted.⁸¹ However, in the third instance (cassation), the Supreme Court overturned the judgments of the first two instances and argued that first, the fact that the company had indicated that the workers would work in Latvia, whereas in fact they worked abroad but formally still for the Latvian shipbuilder, is not enough to refuse the residence permits.⁸² Second, at this instance the company began to rely on the freedom to provide services, and rather surprisingly, the court held that such refusals created an unjustified restriction of their freedom to provide services and that the residence permits should have been granted.⁸³ The Supreme Court of Latvia interpreted the judgments in *Vander Elst*,⁸⁴ *Commission v Luxembourg*,⁸⁵ *Commission v Germany*⁸⁶ and *Rush Portuguesa*⁸⁷ in a way that the rules on free movement of services should be applicable to a situation potentially involving letterbox companies that import workers from third countries with the intention of posting them to other EU countries.⁸⁸ This case law has been upheld in further cases.⁸⁹

The second group of cases concerns workers challenging the decisions by the State Border Guard to deport workers found working without a work permit. In several cases, Ukrainian workers had been posted to Latvia by a Lithuanian company. There was a contract between a Latvian company and some Lithuanian construction companies for the supply of workers specialising in metal constructions. The workers challenged the decision by the State Border Guard and won. The court found that, because the Ukrainian workers were permitted to work in Lithuania and that they were in fact merely posted to Latvia, they could work there too. These particular workers had work visas in Lithuania, and they had a right to work in and hence could not be expelled from Latvia.⁹⁰ Importantly, under this arrangement it was permissible to pay the Latvian minimum wage to these workers instead of the average wage in the sector.

77. Administrative district court, 2010, A420536110, A5361-10/35.

78. Administrative regional court, 2013, A4205212210, AA43-2287-13/7.

79. Administrative regional court, 2013, A4205212210, AA43-2287-13/7.

80. See e.g. administrative district court in 2010 in A420521110/A05211-10/36; 2012, A420536110, AA43-0112-12/15; administrative regional court, 2012 A420521210, AA43-0244-12/15.

81. Administrative regional court, 2012 A420521210, AA43-0244-12/15.

82. Supreme Court administrative department, 2012, A42051110, SKA-673/2012.

83. Supreme Court, 10 December 2012, Case No. A420521210; Supreme Court, 28 December 2012, Case No. A420536110; Supreme Court, 14 December 2012, Case No. A420521110.

84. CJEU, 9 August 1994, Case C-43/93, *Vander Elst*.

85. CJEU, 21 October 2004, Case C-445/03, *Commission v Luxembourg*.

86. CJEU, 19 January 2006, Case C-244/04, *Commission v Germany*.

87. CJEU, 27 March 1990, Case C-113/89, *Rush Portuguesa*.

88. See Supreme Court, 10 December 2012, Case No. A420521210; Supreme Court, 28 December 2012, Case No. A420536110; Supreme Court, 14 December 2012, Case No. A420521110.

89. Administrative regional court, 2013, A420536110, AA43-2375-13/7.

90. 2018, Kurzemes rajona tiesa, 1A-0103-18/2; 2019, Kurzemes rajona tiesa, 1A69010118/11.

These two groups of cases reveal that the posting of third-country nationals is becoming an increasingly more important phenomenon in Latvia, featuring in political and national discussions and as part of the labour migration debate. The cases show that such debates are not just theoretical, that third-country nationals are sometimes arriving in Latvia for the sole purpose of being posted abroad, and that the EU posting rules are being used to circumvent Latvian immigration law for workers from third countries.

Conclusion

The analysis of Latvian judgments on posting of workers offers extremely interesting insights into aspects of regime competition, on one side, and the reality of posted workers' enforcement opportunities on another. It also adds some new elements and assumptions for the research on posting in general.

Even though Latvia in theory belongs to the 'low wage' group of countries and would therefore be one of those blamed for 'social dumping',⁹¹ its legal framework is unusually generous to posted workers. As a result of the case law bringing posting within the larger umbrella of 'assignment', the Latvian courts have contributed to the creation of a relatively protective system for these workers, apart from those in the transportation sector. This is also evidenced indirectly by workers demanding before Latvian courts the application of Latvian law (rather than, for example, Norwegian law) to their employment relationships and their consideration as posted workers.

Most importantly, the Latvian case law reveals that it is not always in the interests of posted workers to apply the host country's laws because it could offer less financial advantage and also pose a threat to the continuity of social security coverage. In the general posting debate, the interests of the host countries are often found to conflict with the interests (or 'competitive advantage') of the home countries and the posting companies, while the workers' interests are not adequately taken into account.⁹²

In this sense, the Latvian case study shows that the labour law regimes are placed in direct competition with each other.⁹³ However, they compete on a set of factors broader than salary. To an extent we can talk about 'regime competition' in the sense proposed by Deakin,⁹⁴ but it is not as clear-cut as trying to access the application of the legislation of the 'least regulative' state.⁹⁵ The interests of the companies (not to pay social contributions in the host country and not to operate within the unfamiliar host country's system of labour law and social security) and of posted workers (to receive daily allowances and not to have their social contributions moved to the host country) could coincide here. Imposing the host country's labour and social security

91. Defossez A. (2014) Le dépassement de la question du dumping social : une condition nécessaire à une meilleure application de la directive détachement, *Revue de Droit Social*, 1, 100.

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

93. Deakin S. (2007) Regulatory competition after Laval, *Cambridge Yearbook of European Legal Studies*, 10 (1), 582.

94. *Ibid.*

95. *Ibid.*

standards in the name of preventing ‘social dumping’ could even worsen the situation of posted workers, at least from their perspective, and so might not be welcomed by those workers. The Latvian legal framework offers ‘extra’ benefits, such as daily allowances and generous reimbursement of expenses the worker incurs abroad, which may not be available when working on the ‘local contract’. At the same time it also offers the possibility for the employer to pay lower wages and thus remain ‘competitive’, while retaining access to the foreign market.

It is not clear, however, that Latvian standards can necessarily be considered ‘higher’. The picture is more complex than that. In some respects, the standards indeed could be higher (especially from the point of view of a worker’s short-term financial perspective). However, non-payment of higher social contributions (allowances are not taxed) could have negative long-term consequences. Also, this does not say anything about other aspects of labour law in the host country (for example, dismissal protection and working time) and how they would ‘compare’ with Latvian standards.

With implementation of the revised Posted Workers Directive, and especially the requirement to pay the host country’s ‘remuneration’ rather than the minimum wage, the whole picture will soon change. It will be interesting to see how this affects the case law of Latvian courts, which already have huge difficulties in applying foreign law as such, and the much clearer concept of the host country’s minimum wage, and whether in the longer term there will be some deregulatory effect on the Latvian assignment rules.

To sum up, the Latvian experience seems to show that Latvian laws at least do not seem to easily yield to simple ‘optimisation’ for firms posting workers,⁹⁶ and instead of reduced costs, they have to cover salaries, assignment-related expenses, and daily allowances. At the same time, the Latvian situation also reveals that from the perspective of a posting company calculating which regime will be more cost efficient, it could be more complex than a mere comparison of wages. The considerations also include social contribution rates for specific wages and assignment-related expenses including bonuses such as daily allowances. From the perspective of the posted workers, the continuity (and not just volume) of social contributions might also play a more significant role than expected.

In addition, the Latvian case law reveals that, in contrast to other EU Member States analysed in this volume, most notably Portugal, the posted workers that are in a vulnerable position owing to poor knowledge of the local language, lack of connections and information in the host country, and are mistreated by their employer,⁹⁷ do in fact come back to Latvia and assert their rights through the courts. They not only exercise their voice by breaking the employment relationship, but also, and strongly so, via courts in their home country.

96. Maslauskaitė K. (2014) Posted workers in the EU: state of play and regulatory evolution, Notre Europe, Jacques Delors Institute, 24 March 2014, 3.

97. *Ibid.*, 4.

Finally, probably the most troublesome finding is that the Latvian courts are not familiar enough with the EU level regulatory framework on posting. They often seem unaware of the obligation regarding several matters to rely on the host country's standards in line with the Posted Workers Directive. The Latvian courts seem much more comfortable relying solely on Latvian law and Latvian standards, despite the Posted Workers Directive being (seemingly) duly implemented in the domestic legal system.

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For the list of cases please refer to Annex IV.