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Not as simple as it should be? Why the judicial enforcement of posted workers' rights needs improvement

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Not as simple as it should be? Why the judicial enforcement of posted workers' rights needs improvement



Companies based within the EU occasionally send their employees to work in other EU member states for limited periods of time – a process commonly termed ‘posting’. In principle, these workers are entitled under EU law to certain rights while working abroad, but in practice these rights are not always respected. Drawing on a new study, [Magdalena Bernaciak](#) and [Zane Rasnača](#) explain that part of the problem stems from inadequate judicial enforcement, exacerbated by a lack of clarity concerning the key legal aspects of posting.

aspects of posting.

The posting of workers, a practice whereby a company sends or ‘posts’ their employees for a limited time period to work in another EU member state, continues to feature high on the political agenda in Europe. Yet it is startling how little we actually know about the day-to-day experiences and problems of posted workers. When on assignment in another country, these workers largely maintain the rights they have in their home (or ‘sending’) country, but the [Posted Workers Directive](#) does provide for some exceptions: certain aspects of working time, minimum annual holidays, and rates of (minimum) pay, for example, should be determined according to the law of the ‘host’ country. In reality, however, these rights are not always respected.

This may be common knowledge, but even though stories of exploited posted workers and harmful company practices often hit the headlines at the European and national levels, there is very little information available about the struggles they face in asserting their rights. Do they achieve justice? And if so, how? And where? In the worker’s home country or in their ‘host’ country? In a [new study](#), the first to be done on this subject, we shed some light on these questions by examining the national-level case law on the posting of workers in 11 EU member states. Together with national experts, we analyse litigation processes and outcomes in cases which involve posted workers or companies that employ posted workers.

The key finding of our study is that judicial enforcement matters for both workers and companies alike. However, merely having access to courts does not suffice, since there are many other aspects that create significant legal uncertainty for these actors. The case law may differ from one member state to the next, from one court to another and even between judges. Moreover, certain structural barriers (such as a lack of expert knowledge or a language barrier, amongst others) can stand in the way of achieving justice in individual cases.

Why do posted workers go to court?

Wages and working conditions are among the most disputed matters in posting-related cases before national courts. For example, the national courts in Ireland, Finland and France have all dealt with instances of denied payment or underpayment – that is, a situation in which the wage received by the posted worker was below the minimum rates in the host country. In fact, our analysis shows that the enforcement by courts of a posted worker’s right to (at least) the host country’s minimum wage, as currently demanded by the Posted Workers Directive, remains an acute problem. In some countries, for example in Latvia and Bulgaria, courts tend to ignore this right altogether.

A common trend in a number of countries (Bulgaria, Latvia, Poland and Slovenia) has been litigation over what types of allowances posted workers are due when abroad. Are they on an assignment and should they therefore receive daily allowances and coverage of all their expenses on top of their wage, or is posting distinguishable from an assignment, and thus no such allowances have to be paid by the employer? In addition, courts in Germany, Portugal, the Netherlands, Denmark and France have all grappled with the question of whether the posting regime applies to temporary agency workers sent abroad.

A further three 'themes' that have emerged in disputes litigated before national courts are: whether and to what extent a host country's law and collective agreements apply to posting companies and their workers; the payment and calculation of posted workers' social security contributions; and the posting of third-country nationals. All in all, there are many similar disputes coming before the courts in different EU member states. However, the approaches of courts to these issues can vary significantly.

In which country do posted workers go to court?

Our research reveals an interesting pattern in relation to the involvement of 'host' and 'home' country courts in posting-related disputes. Posted workers themselves tend to go to court in their countries of origin in order to assert their rights. This pattern can be easily explained: workers do not face linguistic or cultural barriers when dealing with their 'own' courts. In contrast, the cases brought by public authorities against posting companies and the latter's appeals against the decisions of the former are most often made in the 'host' countries.

Our findings show that two aspects are critical for improving legal opportunity structures for workers in posting-related disputes. First, posted workers need expert guidance in how the justice system works and how the law is applied in a particular country, as well as financial and linguistic help. This is needed in their home countries but even more so in the host countries if they are to have even the slightest chance of litigating in order to assert their rights there.

Second, some of our country studies reveal that posted workers often do not receive justice even when a ruling is in their favour, either because they did not even know about the litigation against their employer in the first place or because they have already left the country. This was the case for a large group of Turkish construction workers who had been posted to work in Ireland (the Gama dispute) and largely failed to receive compensation due to jurisdictional hurdles. The cross-border enforcement of judgments therefore clearly needs to be improved, as does the co-operation between courts and administrative authorities in different member states. Only in this way can justice for these vulnerable workers be achieved.

What do the courts typically decide?

In cases related to the posting of workers in the transport sector, the courts of some member states such as France and Germany are fairly united in applying the EU legal framework of posting. The approach by the Latvian and Bulgarian courts, however, is completely the opposite: these courts do not consider that posting rules (including the right to receive the minimum wage of the host country) apply in this sector. The Danish courts, meanwhile, take an approach that is somewhere between the two: they assess in each transport-related case whether there is a sufficiently strong link to Denmark, in consideration of multiple factors such as the place of delivery or the length of time that the worker was present in the country.

A relatively new but growing body of disputes before national courts involves the posting of third-country nationals. Interestingly, many EU member states do not distinguish between posting to other EU member states and posting to non-EU countries, de facto extending the rights of posted workers beyond the territorial scope of EU law. However, at home, where the interaction of EU law and national immigration rules is complex and sometimes confusing for national courts (as revealed by national case law), the story can be different. This was the case in Latvia, for instance, where the court annulled the authorities' decision denying a residence permit to a non-EU worker who had been brought to Latvia with the sole purpose of being posted to another EU country. Justifying its ruling, the court argued that the denial restricted the company's freedom to provide services in the EU. Through this approach, the EU rules can significantly encroach upon national immigration law.

Towards a brighter future for posted workers?

The lack of clarity about key legal aspects of posting are currently putting actors who seek justice – workers and companies alike – in a highly uncertain and vulnerable position. Therefore, there is an urgent need to clarify basic terms and legal constructs related to posting: there should be less doubt concerning the interpretation and application of both national and EU rules on posting.

Furthermore, it is important to raise awareness of posting as a form of cross-border mobility among national-level courts and law enforcement authorities. If they do not correctly identify posting situations, they can neither ensure compliance with the existing legislation nor effectively protect the rights of workers and companies involved in cross-border service provision.

Concerning the (judicial) enforcement aspect, it seems that the revision of the Posted Workers Directive may fail to provide the necessary clarity: while it replaced host-country minimum pay guarantees for posted workers with 'equal remuneration' (i.e. to that of a national worker with an equivalent or similar position), it is not clear whether domestic courts will find the latter notion easily applicable if they already struggle with determining the 'minimum wage' of the host country (particularly if it does not have a statutory minimum wage). It may well be that the European Labour Authority will provide some much-needed answers to these problems of enforcement, but it remains to be seen whether it will have enough capacity to significantly improve the situation; indeed, its limited mandate and administrative capacity casts doubt upon the prospect.

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