Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia

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Social and economic interests of 'new' and 'old' Member States along centre and periphery axis – Judicial and legislative developments concerning the posting of workers – Continuous deepening of the divide between centre and periphery – Lack of placement of new Member States' social interests at the EU level – The need to place social interests firmly in the EU (internal market) structure – Developing meaningful common social standards to mitigate the centre/periphery divide

Introduction

The posting of workers is one of the most salient issues discussed at the EU level during the last decade. It is also an area where the interests pursued by the 'new' Member States, states that joined the EU starting in 2004 during the so-called 'Eastern enlargement',[1] and the 'old' Member States, states that already were members before, have openly clashed.

The posting debate traditionally has been presented as a clash between one of the key economic freedoms in the internal market – the freedom to (temporarily) provide services across EU borders – and the right to collective action representing the autonomy of states to organise their collective labour law and social systems as they wish, independently from the EU.

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[1] 'Eastern enlargement' refers here to the three rounds of accession that took place in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia), 2007 (Bulgaria and Romania) and 2011 (Croatia). Countries such as Cyprus and Malta are not included in this study because they were not part of the Soviet sphere of influence.

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While in many contexts such juxtaposing between the 'social' and 'economic' EU aspects concerning posting of workers suffices, here in order to more aptly reconstruct the posting situation and to more fully reveal the position of the new Member States, I use an adapted version of the grid along centre and periphery axis as proposed by Damjan Kukovec.[2] According to this approach, one could identify four rather than two sets of interests at stake: (1) the centre's economic interest – protection of their domestic market from competition by foreign service providers; (2) the centre's social interest – autonomy in organising national labour and welfare systems; (3) the periphery's economic interest – access to foreign markets for their service providers; (4) the periphery's social interest – protection of their posted workers.[3] However, since I am primarily interested in the 'social interests' of both sides, this article will pay slightly less attention to analysing economic, than social, interests.[4]

I use this interest typology to reconstruct the events surrounding posting of workers during the last decade (following 2004, after accession) to identify the content and placement of the social interests of the new Member States and to assess whether the EU structure has adequately accommodated them. My findings show that while the economic interests of the new Member States have found support before the European Court of Justice, the social interests of the old Member States have met with some success in the EU legislative process. However, what is completely missing from the picture is the recognition (and accommodation) of the new Member States' social interests.

When restructured according to the interest groups along the centre periphery axis (with the new Member States representing the periphery and the old Member States representing the centre)[5] the events surrounding posting also reveal a deeper structural issue, namely the lack of placement of the new Member States' social interests in the EU level discourse (taking place within various EU institutions). Instead, the current discourse is aimed towards autonomy for national labour and welfare systems in a way that might restrict access to markets, from the core countries, and towards access to markets with autonomy in social and labour matters, from the periphery, an option that inevitably fosters creating only minimal welfare standards at the EU level. The possibility of combining both high level social protection and deeper economic integration – made possible via raising the standards for social and labour law protection specifically for posted workers – is not even considered by the EU-level stakeholders.[6] This then has led to a lack of placement of new Member States' social interests at the EU level.

[2] D. Kukovec, 'Law and Periphery', 21(3) *ELJ* (2015) p. 406.

[3] Compare with ibid., p. 419-422.

[4] For more in-depth analysis of this 'economic' element *see* ibid.

[5] Ibid., p. 408-411.

[6] Such stakeholders as the EU institutions, and Member States. For a comparison, *see* the social 'trilemma' as identified by M. Barslund and M. Busse, 'Labour Mobility in the EU. Addressing challenges and ensuring "fair mobility"', CEPS special reports, No. 139, 2016, p. 10.

The article unfolds as follows. First, I set out the context for the posting developments, including the available key numbers and data concerning the posting phenomena, to offer a more contextual perspective. Second, I follow the developments at the EU level in the posting saga (both judicial and legislative) from the perspective of the divide between the centre and the periphery (old and new Member States). Third, to more closely identify and assess the content and existence, if at all, of the social interests of new Member States, I take the example of Latvia and look at the situation concerning the posting of workers via national case law. Therefore, the posting developments are analysed along two axes – first, the supranational debate at the level of EU institutions that displays a gradual widening of the divide between the new and old member states leading to more and more pronounced centre and periphery; second, I look at the national posting situation in Latvia that reveals a potential home country dominance in the actual enforcement of posted workers' rights.

The Background of the Posting Debate

The posting of workers relies on a wide set of EU-level rules both at the level of primary and secondary law. At the Treaty level, the posting is based on the freedom to provide services (Article 56 TFEU), but also potentially restricted by the need to exercise it in line with the right to take collective action and the right to collective bargaining that is established in Article 28 of the Charter of Fundamental Rights (Charter), and the recognition of the diversity of national systems when it comes to the role of the social partners (Article 152 TFEU). Finally, among the EU's social objectives is also the need to respect 'diverse forms of national practices' in advancing (social) objectives (Article 151 TFEU).

Protection of the posted workers themselves, however, has a peculiar status since it has been attempted via the freedom to provide services rather than via genuinely 'social' *acquis*. The legal basis for the key secondary law measure in the field – the Posted Workers Directive[7] – is the freedom to provide services. Moreover, according to the territoriality principle of labour law, the workers who work in a certain Member State's territory would normally be subject to that state's labour laws. Posting represents a partial exception to this rule, as the workers keep the labour law protection in their home country while (temporarily) working in a host country. This is in line also with Article 8(2) of the Rome I Regulation, which states that the applicable law to an individual employment contract is the law of the country where the worker habitually works (parties also cannot derogate from this rule). The Posted Workers Directive in a way implements this principle by keeping the worker subject to home country rules with the exception of certain mandatory minimum requirements that have to be complied with according to the host country's law (Article 3(1) Posted

[7] 96/71/EC.

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Workers Directive – maximum work periods, minimum rest, minimum paid annual holidays, the minimum rates of pay and some other requirements).

Therefore, in the posting situation there is a direct clash between the level of autonomy of the host state to determine which conditions apply for the posted worker, and the access to the market by a service provider established in another member state and largely following this, the home Member State's labour law in its relationship with the worker.

More than ten years ago the *Laval* judgment exposed the fault lines of conflict between the freedom to provide services across borders and the host country's discretion in imposing its standards of (collective) labour law in posting situations. The case concerned a collective action brought against a Latvian company that had posted Latvian workers to Sweden but had refused to sign a collective agreement with more protective terms than those required under Article 3(1) Posted Workers Directive in a situation where Sweden did not have a system dictating a statutory minimum wage (the wages are set via collective bargaining). The Swedish construction unions 'blockaded' Laval's sites in Sweden, as a result of which the company went bankrupt and brought proceedings before the local court, arguing that the blockade infringed its right to the free movement of services under Article 49 EC (now Article 56 TFEU).[8] The European Court of Justice ruled that Article 56 TFEU and Article 3 Posted Workers Directive preclude a trade union from forcing a service provider established in another member state to enter into negotiations with it on rates of pay for posted workers and to sign a collective agreement in terms of favourability going beyond the (maximum) conditions set out in Article 3 Posted Workers Directive.[9]

The case has been frequently invoked as an example of wage dumping[10]; however, when we compare the wage requested by the Swedish trade unions (approximately €2,560 per month with a 'fall-back' option of €1,920 per month) with the wage Laval expressed readiness to pay (€1,500 per month and supplements in kind covering meals, travelling and accommodation amounting to €660, together approximately €2,160 per month) the difference is not striking. This 'supplement' aspect also reveals the possible additional posting costs for employers, an expense local employers normally will not have. The question then is at what point does the posting become so expensive that it amounts to the foreclosure of the market? And, in addition, it also shows that the protection of workers has to be seen in its entirety, as not concerning solely one element (the wage), but also other elements (help with formalities, accommodation, travel costs etc). Considering these additional costs, posted workers are not in a comparable situation to the local workforce.

[8] ECJ 18 December 2007, Case C-341/05, *Laval un Partneri*.

[9] Ibid., para. 121.

[10] M. Whittall, 'Unions fear ECJ in Laval case could lead to social dumping', available at <www.eurofound.europa.eu/observatories/eurwork/articles/unions-fear-ecj-ruling-in-laval-case-could-lead-to-social-dumping>, visited 12 January 2018.

The bigger issue triggering further developments in this area was certainly about principles – about the clash between access to the Swedish market on Latvian labour law terms, from one side, and the discretion Swedish trade unions have in exercising Swedish collective labour law, from the other. For this reason, the case has become the symbol for juxtaposing free movement rules with collective labour rights[11] and from this perspective the judgment was seen as trying to prohibit trade unions from hindering social dumping as well as hindering the spontaneous order of the markets.[12]

This symbolic aspect of the case is the reason the judgment has the significance it currently enjoys in the realm of EU law. When the posting situation is put in a broader empirical context, its importance 'in principle' and its salience due to the fundamental aspects of EU and national orders clashing becomes even more apparent, because as such the posting debate presents a sort of paradox. While in the political sphere its salience is incredibly high, the actual numbers of posted workers are quite negligible, especially when observed from the core/periphery perspective.

Available data show that in 2014, for example, there were only 1.92 million posted workers in the whole of the EU.[13] Although this number increases every year, it is still very modest.[14] While the receiving countries are indeed predominantly the 'old' Member States, these same countries are also often the main sending countries (e.g. France and Germany).[15] Moreover, in many 'old' Member States (e.g. Austria, Belgium, France and the Netherlands), the vast majority of posted workers come from other 'old' Member States, and only Germany, Finland and Sweden receive a higher percentage of posted workers from the 'new' rather than the 'old' Member States.[16] In real terms, the 'old' Member States send more workers than the 'new' ones: 60% and 40% respectively.[17]

The core/periphery divide becomes slightly more visible in the net balance between sent and received workers. Poland, Slovakia and Slovenia send significantly higher numbers than they receive, which suggests that they should

[11] J. Malmberg and T. Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', 45 *CMLR* (2008) p. 1115; S. Deakin, 'Regulatory Competition after Laval', 10 *CYELS* (2007-2008) p. 581.

[12] Kukovec, *supra* n. 2, p. 418.

[13] 'Questions and Answers on the revision of social security coordination rules', European Commission, 13 December 2016, <europa.eu/rapid/press-release_MEMO-16-4302_en.htm>, visited 12 January 2018.

[14] C. Dhéret and A. Ghimis, 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?', EPC Discussion Paper, 20 April 2016, p. 2.

[15] M. Bernaciak, 'Intra-EU employee posting and PWD revision debates', ETUI, Presentation, 30 May 2017, Brussels.

[16] Dhéret and Ghimis, *supra* n. 14, p. 5.

[17] Ibid., p. 5-6.

be especially concerned with access to the markets, and according to my classification of interests involved, also with the protection of the sent workers. In contrast, Austria, Belgium, Germany and the Netherlands are at the other end of the spectrum, receiving more than they send,[18] thus indicating that there should be a primary interest in protecting their own social systems.

Two other constellations also exist. In such 'periphery' countries as Latvia, the Czech Republic, and Bulgaria the difference in numbers between sent and received workers is small. This indicates that these countries should be interested in both accessing markets and protecting sent workers on the one side, but also in shielding their national social systems and markets from competition, on the other.[19] Finally, such old member states as France, Denmark, Italy and the United Kingdom also both send and receive workers in approximately comparable numbers.[20]

When it comes to concerns about social dumping, there is very little empirical data demonstrating any displacement of the local workforce and no research showing evidence that posting actually drives down wages. While Frederic De Wispelaere and Jozef Pacolet have argued that the risk of displacement appears to be high,[21] recent research actually suggests that, rather than displacing the local workforce, posted workers seem to complement native employment by filling low-skilled job positions in high-wage Member States in a period of market upswing.[22] Nevertheless, sector-specific research in the construction sector has shown that, in some Member States, potential displacement effects have been at play. Yet there is no great divide between centre and periphery in those findings. In fact, for 2012 and 2013, it was found that some displacement may have taken place in Belgium, Latvia, Slovenia and the United Kingdom – two 'old' and two 'new' Member States.[23]

When taking available data into account, it becomes clear that what we are talking about here are not so much problems 'on the ground' (not excluding the possibility that they do exist in some specific cases or can exist in other related situations – e.g. bogus self-employed, illegal work, etc.) but rather a problem of 'principles', a problem of clashing perspectives on the interaction between the economic and the social in the EU realm, a problem in part triggered by EU law. Therefore, the capability of the EU's legal structure to offer a solution that would allow adequate placing and accommodation of the interests of all the key actors remains extremely relevant.

[18] Ibid, p. 6.

[19] Barslund and Busse, *supra* n. 5, p. 6.

[20] Ibid.

[21] F. De Wispelaere and J. Pacolet, 'An ad hoc statistical analysis on short-term mobility – economic value of posting of workers', HIVA Research Institute for Work and Society, KU Leuven (2016), p. 19.

[22] Research by Pellegrina and Saraceno, 2013, as cited in ibid.

[23] Ibid.

Centre and Periphery in the Posting Saga

To assess the content and placement of the respective interests of both centre and 'periphery' states in the posting context, here I trace their development by looking at both the EU-level judicial and legislative processes. Overall, the trigger for the division between the old and the new (between the centre and periphery) can be found in the judicial process – before the European Court of Justice. This core/periphery relationship then migrated, fully developed and even flourished in the legislative process. Notably, however, the discourse unfolding before the European Court of Justice and within the EU legislator reveals the limited success in accommodating various interests of the Member States. The debate due to the underlying structure of EU law was repeatedly and increasingly framed in terms of market access vs protection of national social systems. The interest of workers' protection was rarely even mentioned and not pursued, and the shielding of the markets is not identified as a separate EU level concern at all.

Interestingly, the events surrounding posting also have over time normalised, if not even constitutionalised the centre/periphery discourse with the practical consequence of not merely results capable of potentially significantly restricting access to the centre's markets for 'periphery' service providers, but even more importantly, resulting in displacement of the weakest party's interests in this story – the interests of the posted workers. By solving concerns rooted in the centre's current wish to ensure strong territoriality of labour law, the collateral damage potentially becomes an overall level of protection for the posted worker.

Centre and periphery before the European Court of Justice

Before the European Court of Justice, the 'periphery' states enjoyed success in terms of the outcomes they had sought, especially so in the earlier years of the whole debate on the almost unlimited access to markets granted by a more or less broad interpretation of the freedom to provide services. Only very recently, when protection of posted workers has been recognised and accommodated by the host country's trade unions by bringing the claim directly on their behalf, have the results started to turn. At the same time, the successes booked before the European Court of Justice by the 'periphery' states have always been argued almost exclusively in the language of access to markets (in line with the rationale of the freedom to provide services) rather than by invoking the protection of posted workers.

Before the European Court of Justice, the clear divide between the new and the old member states has been present at least since *Laval*. In this case nine 'old' and five 'new' Member States intervened.[24] Austria, Belgium, Denmark, Ireland,

[24] Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Poland, Spain and Sweden.

Spain and Sweden argued that the Swedish law was consistent with the requirements of EU law.[25] Finland suggested that the Court should use a balancing exercise similar to the one applied in *Schmidberger*[26] in order to resolve the case.[27] Finally, Germany was more critical and argued that the collective action was not contrary to Article 49 EC only if it was proportional and aimed at enforcing a universally applicable collective agreement.[28] All the old member states rallied together behind the objective of defending the autonomy of national welfare states in the sense that the objective was to continue exercising the right to collective action, independent of its practical consequences (not only bankruptcy for the company, but also the job loss suffered by the Latvian workers).

In contrast, all the 'new' Member States that intervened in the case (Czech Republic, Estonia, Latvia, Lithuania and Poland) argued that the collective action in question was in breach of Article 49 EC and that the national legislation was likewise inconsistent with Treaty requirements.[29] This position can be seen as advancing market access. Actually, nowhere in the available case materials does any intervening Member State refer to the interests and protection of the posted workers themselves. The European Court of Justice, however, explicitly referred to their protection as a matter imposing a limit on how far the protection of collective rights of the Swedish trade unions could be advanced.[30]

This trend towards divergence has continued in all the subsequent posting cases. The 'old' Member States have almost exclusively intervened to argue in favour of the compatibility of the national provisions on posting with EU law, while the 'new' Member States have argued the opposite. In almost all cases, the objectives pursued by the respective groups of states could be identified and divided into a group advocating the protection of national autonomy when it comes to social and labour law standards, on one side, and a group advocating the objective of broadening access to the market of host states for service providers based on the home country's (less protective?) employment terms with the help of the freedom to provide services, on the other. The protection of posted workers

[25] Report of the hearing in ECJ in Case C-341/05, *Laval*, paras. 26, 24, 31, 29, 30, 34.

[26] In *Schmidberger*, the ECJ reasoned that, since the restriction resulted from the exercise of fundamental rights, and given that fundamental rights constitute general principles of EU law, measures incompatible with human rights were not acceptable (paras. 72 and 73). The Court decided that the interests involved had to be weighed in order to determine whether a 'fair balance' had been struck (paras. 80-81) (ECJ 12 June 2003, Case C-112/00, *Schmidberger*).

[27] Report of the hearing in *supra* n. 25, para. 26.

[28] Ibid., para. 27.

[29] Ibid., paras. 25, 28, 32, 33 and 35.

[30] Only in so far as they pursue the protection of posted workers, and not going beyond that (ECJ 18 December 2007, Case C-341/05, *Laval un Partneri*, para. 57).

themselves (supposedly in the interest of the periphery) and the protection of national companies, of national markets (supposedly an interest of the centre), remained unformulated.

In *Rüffert*,[31] the question was whether the German requirement for the contracting authority to choose only a company that has agreed to pay its employees a rate established by the collective agreement in force at the place where the services are performed breached the Posted Workers Directive.[32] Here again one could identify a social interest of posted workers to work in Germany, especially because of the possibly higher wages than those they receive in Poland. One could also reformulate the obligation to pay a locally agreed upon rate as being protectionist towards the German market, especially if one agrees with the idea that the posting of workers necessarily involved additional costs for the company, costs that local companies did not have to incur (e.g. accommodation, supplements for working abroad, travel costs as determined by the home country's law). Finally, the foreign service provider also was not a party to the negotiation of the local collective agreement. Therefore, and in contrast to the local employers, its terms are not necessarily agreeable or even known to him, since such agreements are often not publicly available.

In this case, the objective of protecting the posted workers once again does not surface in terms of EU law and in terms of the reasoning. Here, all the core states – Austria, Belgium, Denmark, France, Germany and Ireland – argued that the national rules were compatible with EU law,[33] with the exception of Finland, which believed that the Member State, in deciding what constituted the minimum wage, also had to comply with fundamental freedoms.[34] Poland, the sole 'new' Member State in this case, in contrast, argued that the restriction could not be justified.[35]

Identical positioning can be found in practically all the cases. Interestingly, the old Member States intervened in posting cases much more frequently than the 'new' ones. For example, in *Commission* v *Germany*,[36] Denmark and Sweden intervened in support of Germany; in *Santos Palhota*,[37] Belgium, Denmark, France, Germany and Greece argued that Belgian law was compatible with the freedom to provide services;[38] while in

[31] ECJ 3 April 2008, Case C-346/06, *Rüffert*.
[32] Ibid., para. 44.
[33] Report of the hearing in *Rüffert*, paras. 21, 22, 23, 24, 25 and 27.
[34] Ibid., para. 29.
[35] Ibid., paras. 26 and 28.
[36] ECJ 15 July 2010, Case C-271/08, *Commission* v *Germany*.
[37] ECJ 7 October 2010, Case C-515/08, *dos Santos Palhota and Others*. The case concerned a requirement to send a prior declaration of posting to the Belgian authorities (para. 16).
[38] Report of the Hearing in *Santos Palhota*, paras. 24, 25, 26, 27 and 28.

Regio Post,[39] Germany and Italy argued that the situation was entirely internal and that the freedom to provide services did not apply.[40] Instances of intervention by 'new' Member States are much rarer. An exception is *Vicoplus*[41] where among the intervening parties were Austria, Denmark, Germany and the Netherlands, on the one hand, and the Czech Republic and Poland, on the other. Also in *Martin Meat*[42] – a case involving transitional post-accession rules on posting and the distinction between 'hiring out' and 'posting' – Austria, Germany, Hungary and Poland all intervened. Hungary argued that the situation should have been considered as constituting the posting of workers and that work permits would not have been necessary (pro-posting stance),[43] and the record suggests that Poland supported this position.[44] A similar positioning of 'new' vs 'old' Member States can be found in *Bundesdruckerei*,[45] *Isbir*[46] and *De Clerq*.[47]

When reconstructed according to centre/periphery sets of interests, as proposed in this article, *Finnish Electrical Workers' Union* provides an especially interesting case.[48] A company established in Poland with a branch in Finland had posted 186 Polish workers to Finland. The dispute was about how much time the workers spent travelling from the place where they were accommodated to the worksite, and about the remuneration they were due.[49] Austria, Belgium, Denmark, Finland, Germany, Poland and Sweden intervened (six 'old' and one 'new' Member State). Poland supported the undertaking,[50] while the records show that 'a great majority' of the other intervening Member States (all 'old' Member States) argued the opposite.[51]

[39] ECJ 17 November 2015, Case C-115/14, *RegioPost*. In this case, the question arose as to whether a Member State contracting authority can require tenderers and their subcontractors to undertake to pay the statutory minimum hourly wage (paras. 1-2).

[40] Ibid., para. 27.

[41] ECJ 10 February 2011, Cases C-307/09, C-308/09 and C-309/09, *Vicoplus and Others*.

[42] ECJ 18 June 2015, Case C-586/13, *Martin Meat*. A Hungarian company sought to establish the civil liability of its legal advisers, claiming that they had failed to advise that its contract with a slaughterhouse established in Austria constituted the hiring-out of Hungarian workers in Austria and that, consequently, those workers could not be employed in that Member State without obtaining a work permit (para. 18).

[43] Ibid., para. 44.

[44] Ibid., para. 46.

[45] ECJ 18 September 2014, Case C-549/13, *Bundesdruckerei*. The Czech Republic, Hungary and Poland intervened.

[46] ECJ 7 November 2013, Case C-522/12, *Isbir*. Austria, Denmark, Poland and Sweden intervened.

[47] ECJ 3 December 2014, Case C-315/13, *De Clercq*.

[48] ECJ 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto*.

[49] ECJ 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto*, paras. 11-18.

[50] ECJ 18 September 2014, Opinion of AG Wahl, Case C-396/13 *Sähköalojen ammattiliitto*, para. 45.

[51] Ibid., paras. 43, 73, 81.

Notably, this case concerned a situation where the posted workers' claims had been assigned to the Finnish trade union bringing the case. This is a key difference from the other cases where posted workers were not directly represented by either party to the dispute. Since, as far as the outcome is concerned, the core states in the case had supported the Finnish trade union which was, in return, directly representing the posted workers involved, those states had sided not only with the protection of national autonomy but also could by the same token be seen as having been 'on the side' of the posted workers. In this regard the situation differed from previous posting cases. This leaves Poland, the only 'periphery' state intervening, supporting only the economic (market access) objective.

Notably, and to the credit of the European Court of Justice, this difference did not remain unrecognised. The Court ruled that, first, the Posted Workers Directive together with Article 47 of the Charter of Fundamental Rights prevents a rule prohibiting assignment of workers' claims to a trade union and bringing a case in the host country. Second, the Court allowed the calculation of minimum wage based on a categorisation of employees as provided in the relevant collective agreements, and it also allowed inclusion of daily allowance and compensation for daily travelling time as part of the minimum wage (but not accommodation or meal vouchers).[52] The key element distinguishing this case from the others discussed above was the assignment of posted workers' claims to the Finnish trade union, and accordingly, the accommodation of their social interests within the collective labour law system of Finland (host country).

A strong positioning along the periphery/core lines can be found in the European Court of Justice cases involving the posting of workers. At the same time, these cases can also be restructured in a more nuanced way than by merely juxtaposing the social and the economic interests. For the most part the social interest of concern here – the protection of the posted workers themselves – is not identified or expressed in terms of EU law, the only exception to this being the judgment in the *Finnish Electrical Workers' Union*.

Core and periphery in the legislative process

Another forum that allows exploration into the development of the divide between old and new Member States (or the 'core' and the 'periphery') is the legislative process, more precisely the positions of the states in the Council and also during the 'yellow card procedure'[53] often used during the amendment process of EU posting rules. Here the division in terms of outcome sought came about

[52] Case C-396/13, *Sähköalojen ammattiliitto*, para. 71.

[53] The national parliaments may carry out a subsidiarity check on new Commission's legislative proposals (Art. 6), and, if at least one-third of them object to a proposal on subsidiarity grounds, the proposal must be reviewed (Art. 7(2)(3) of Protocol 2 TFEU).

much more gradually than before the European Court of Justice; however, at the same time the mismatch between the interests whose protection was sought can be identified early on. The three key 'events' that triggered the positioning of the Member States in the posting saga were the adoption of the Enforcement Directive seeking to improve the implementation and enforcement of Posted Workers Directive,[54] the failed Monti II[55] proposal[56] and the 2016 Proposal to revise the Posted Workers Directive.[57] The latter two triggered a 'yellow card procedure'.

The *Laval* judgment thrust the posting of workers issue into the legislative sphere. Although the judgment sparked some discussion in the Council, all Member States, including Sweden, appeared to be opposed to any kind of legislative response.[58] However, after much criticism of the judgment by the stakeholders, and also by academics, the change of tack came not from the Member States but from the Commission during the Presidential election, when José Manuel Barroso delivered a speech to the European Parliament on 15 September 2009 in which he promised that his Commission would issue a proposal to resolve the problems arising from the European Court of Justice's case law (including *Laval*).[59]

Despite the uproar surrounding the judgment, the Commission at the time recognised that most of the 'new' Member States had reacted positively to the European Court of Justice's rulings, and most of the 'old' Member States, while officially keeping a low profile, certainly did not seem interested in revisiting the Posted Workers Directive.[60] To accommodate this lack of appetite for revision in 2012 the Commission issued two proposals. The first was a proposal for an Enforcement Directive: it proposed the introduction of an obligation to cooperate for national authorities, set out criteria for genuine posting and for recognising 'letterbox companies'[61], introduced certain reporting obligations for posting

[54] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC and amending Regulation (EU) No. 1024/2012, OJ L 159, 28.5.2014, p. 11-31.

[55] The 'Monti II' proposal was so titled in reference to the 'Monti I' Regulation ((EC) No 2679/98) that contained a 'Monti clause' similar to the one proposed.

[56] COM(2012) 130 final.

[57] COM(2016) 128 final.

[58] Council of the European Union, 'Summary of the Meeting of the Committee on Employment and Social Affairs (EMPL)', Brussels, 2 and 3 September 2009, 13081/09, p. 2.

[59] J.M. Barroso, 'Passion and Responsibility: Strengthening Europe in a Time of Change', European Commission, 15 September 2009, <europa.eu/rapid/press-release_SPEECH-09-391_en.htm>, visited 12 January 2018.

[60] European Commission (CWP DG EMPL), 'Roadmap. New Legislative Initiative for Posting of Workers' (2010).

[61] A business that establishes its domicile in a tax-friendly country with just a mailing address, while conducting its commercial activities in other countries for the purpose of minimising its tax liability.

companies, added an obligation to impose administrative fines and penalties for failure to respect the Posted Workers Directive, and provided an option to implement subcontracting liability.[62] The second proposal – Monti II – confirmed that the right to collective action and collective bargaining is a fundamental right the exercise of which, however, has to be reconciled with the freedom of establishment and to provide services, and introduced an obligation that the available national dispute resolution mechanisms extend to actors involved in cross-border disputes.[63]

In the process of debating these two proposals there was no meaningful divide between the centre and periphery in terms of the outcomes sought; however, when we look more closely at the interests pursued by these respective groups the conflict becomes apparent.

Regarding the proposal for the Enforcement Directive, the available information indicates that Austria, Finland, France, Germany, Ireland, Lithuania, Poland, Portugal and Sweden supported the Commission's approach, while the Czech Republic and the United Kingdom objected.[64] In addition, five national parliaments (Czech Republic, France, Germany, Italy and Portugal) submitted reasoned opinions under the 'yellow card' procedure. Among the 'old' Member States, the parliaments of Germany and Italy were worried that the proposal might limit their discretion at the national level,[65] but the French parliament argued that the proposal did not go far enough and that more detailed rules were needed (e.g. a social security card for mobile posted workers, a blacklist for companies that abused posting rules, and a clear obligation of subcontracting liability).[66] Among the 'new' Member States, the Czech Senate emphasised the importance of tackling letterbox companies, but objected to the regulation of trade union involvement in labour disputes and the introduction of subcontracting liability.[67]

When positions are reconstructed along the lines of the interest grid used here (including deeper economic integration by expanding the access to the market, protection of posted workers' interests, and protection of national autonomy in terms of labour law), we do get a more elaborate depiction. Here, the interests of national discretion are pursued by Germany and Italy and more stringent

[62] COM(2012) 131 final.

[63] COM(2012) 130 final.

[64] SWD(2012) 63 final, p. 15.

[65] Reasoned opinions on COM(2012) 131 final from the German Bundesrat and from the Italian Parliament, p. 2. Both available at <www.ipex.eu>.

[66] Reasoned opinion on COM(2012) 131 final from the Assemblée Nationale (France), available at <www.ipex.eu>.

[67] The Senate of the Parliament of the Czech Republic 8th term, 668th Resolution of the Senate, available at <www.ipex.eu>.

monitoring and tracking tools concerning posting are demanded by France, from one side, and broader market access via limiting trade union powers in host countries is sought by the Czech Republic, on the other

Concerning Monti II, both 'old' and 'new' Member States had objections to the proposal. This triggered the first ever successful 'yellow card' procedure[68] and because of this lack of political support, the Commission withdrew the proposal.[69]

Looking at the reasoned opinions in greater detail, one however sees a remarkable presence of specific emphasis from particular actors. From the side of the centre, the parliaments of Belgium, Denmark, Luxembourg, Sweden and the Netherlands all emphasised the need to ensure and maintain the autonomy of their well-functioning domestic (social) models as one of their objections to the proposal.[70] In contrast, the parliaments of Latvia, the Czech Republic and Poland argued from the position of ensuring the freedom to provide services, and proposed that there is no EU competence to adopt the proposal.[71] The Latvian Parliament was the sole institution to mention that it is in the interest of the Union to ensure both the equal treatment of service providers from all member states and the protection of workers' rights.[72] It was the only parliament whose position explicitly referred to posted workers' protection.

Therefore, while the divide between the core and the periphery did not exist in terms of the outcomes sought, it becomes very apparent when the actual positions and the reasoning are assessed. Recently, however, the division between the core and the periphery has become highly visible, also concerning the outcomes sought.

In its consultations on the Labour Mobility Package[73] during the summer of 2015, the Commission included mention of the intention to amend the Posted Workers Directive.[74] In response to this announcement, the Member States split into two alliances – one in favour (the 'old' Member States) and one against (the 'new' Member States). This positioning was made blatantly clear by two letters sent even before the Commission had officially issued the proposal. The first, signed

[68] Twelve national parliaments submitted reasoned opinions – both on time and after the deadline.

[69] M. Hall, 'Brussels drops plans for EU law limiting right to strike', *EURACTIV*, 14 September 2012, <www.euractiv.com/section/justice-home-affairs/news/brussels-drops-plans-for-eu-law-limiting-right-to-strike>, visited 12 January 2018.

[70] Reasoned opinions on COM(2012) 130 final from the parliaments of Belgium, Denmark, Luxembourg, Sweden and the Netherlands, available at <www.ipex.eu>.

[71] Reasoned opinions on COM(2012) 130 final from the parliaments of Latvia, Czech Republic and Poland, available at <www.ipex.eu>.

[72] Reasoned opinion on COM(2012) 130 final from Latvian Saeima, available at <www.ipex.eu>.

[73] 'College holds orientation debate on the economic and social dimension of the Single Market', 6 October 2015, <europa.eu/rapid/press-release_IP-15-5763_en.htm>, visited 12 January 2018.

[74] SWD(2016) 52 final, p. 4.

by seven 'old' Member States[75], advocated forging ahead by introducing the principle of 'equal pay for equal work in the same place'[76] and amending and widening the Posted Workers Directive's rules on working and social conditions to be regulated by the host country's law.[77] The second letter, signed by nine 'new' Member States[78], argued that a review of the Posted Workers Directive was premature, that the principle of equal pay for equal work in the same place would be incompatible with the single market, and that posted workers should remain under the legislation of their home country, the place where they habitually work.[79]

In the spring of 2016, the Commission issued a proposal whose two main elements were replacing 'minimum rates of pay' with 'remuneration'[80] (a broader term that gives more leeway to host Member States[81]) and introducing a 24-month limit to the duration of posting.[82] When these two elements are looked at more closely, it becomes apparent that they are both protectionist in nature with regard to both national social systems and (potentially) the national market. 'Remuneration' is not a concept familiar to EU law, and not one that can be easily clarified even within any national system. Therefore, while it might give posted workers the possibility to earn more, the legal uncertainty surrounding it might have a deterrent effect for foreign employers. Moreover, it is not clear whether remuneration would not also render the posting significantly more expensive than hiring locally, since extra costs are necessary to ensure adequate circumstances for the posted workers (accommodation, travel costs, daily allowances and meal costs) – expenses which employers do not necessarily have for local workers. This would then mean that foreign workers – also short term – would likely be hired on local contracts, even though they are in fact foreign and would be spending little time in the host country. The second aspect – the time limit – certainly can be welcomed from the perspective of clarifying the 'temporary' aspect of posting; however, it is not clear whether and how, if at all, it would ensure better protection for the posted workers.

During the revision of the Posted Workers Directive, the discord between the 'old' and 'new' Member States has been widely reported.[83] The proposal, as was the case for Monti II, triggered a 'yellow card' procedure during which the

[75] Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden.
[76] COM(2016) 128 final, p. 4.
[77] Ibid., p. 5.
[78] Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Romania and Slovakia.
[79] COM(2016) 128 final, p. 5.
[80] Ibid., p. 12.
[81] Ibid.
[82] Ibid., p. 7.
[83] E.g. A. Eriksson, 'EU Parliament delays a posted workers vote', *EUobserver*, 1 June 2017, <euobserver.com/social/138073>, visited 12 January 2018.

parliaments of France,[84] Italy[85] and Portugal,[86] in an unprecedented move, submitted letters in support of the initiative rather than reasoned opinions objecting to the initiative. In contrast, 10 'new' Member State parliaments[87] opposed the proposal by reasoned opinion. Their main arguments concerned the existence of differing living conditions in the Member States,[88] the failure, in implementing the concept of 'remuneration', to take into account additional expenses incurred by posted workers,[89] the possibly adverse effects on the economic prosperity of some Member States[90] and the threat to legal certainty.[91] The Czech Republic argued that 'real' problems like undeclared work and bogus self-employment are not tackled by the proposal in any way.[92] Denmark was the only 'old' Member State to side with the opposition.[93] Here the 'periphery' countries once again focused almost exclusively on the access-to-market aspects, without analysing what the proposal might mean for their 'own' workers who leave to work in another member state for short periods of time.

The currently reached compromise in the Council keeps the replacement of 'minimum wage' by 'remuneration', shortens the maximum time limit for posting to 12 months (with the possibility of extending this time limit to 18 months), provides that universally applicable collective agreements will now apply to posted workers across all sectors (not only construction), and equal treatment between temporary agency workers and local workers will have to be ensured.[94] Overall, all these changes could be seen as primarily pursuing the autonomy of the (host country's) national welfare and social systems rather than establishing a common substantive standard for the protection of posted workers. The compromise was greeted by the core member states and lamented by the 'periphery' countries. The specific amendments were strongly backed by France

[84] Sénat and Statement from the Assemblée Nationale (France) concerning COM(2016) 128 final, available at <www.ipex.eu>.

[85] Camera dei Deputati (Italy), COM(2016) 128 final, available at <www.ipex.eu>.

[86] Assembleia da República (Portugal), COM(2016) 128 final, available at <www.ipex.eu>.

[87] BG, CZ, EE, HR, HU, LT, LV, PL, RO and SK.

[88] Chamber of Deputies and Statement from the Senate (Czech Republic), COM(2016) 128 final, available at <www.ipex.eu>.

[89] Latvijas Republikas Saeima (Latvia), COM(2016)128 final, available at <www.ipex.eu>.

[90] Camera Deputatilor (Romania), COM(2016) 128 final, available at <www.ipex.eu>.

[91] Reasoned opinions on COM(2016)128 final from the Seimas of the Republic of Lithuania; the National Council (Hungary); the Senate of the Republic of Poland; and the Camera Deputatilor (Romania), all available at www.ipex.eu.

[92] Reasoned opinion on COM(2016)128 final from the Chamber of Deputies and Statement from the Senate (Czech Republic), available at <www.ipex.eu>.

[93] Folketing, COM(2016) 128 final, available at <www.ipex.eu>.

[94] *See* <www.consilium.europa.eu/en/press/press-releases/2017/10/23/epsco-posting-of-workers/#>, visited 12 January 2018.

with support also coming from Germany, Belgium, Luxembourg, the Netherlands and Austria, while Hungary, Lithuania, Latvia and Poland voted against the compromise.[95]

Regarding the arguments invoked, the two key aspects supported by the 'old' Member States are primarily rooted in concerns about market access (time limit on posting workers) and wage dumping ('remuneration') that do little to increase the overall level of protection for posted workers. The positions of the 'new' Member States, while clearly appearing to be primarily rooted in economic and competitive concerns, also raise allegations of legal uncertainty and highlight the threat of illegal work. Broadly speaking, while the 'old' Member States are vying for more control for host countries, the 'new' Member States are seeking to retain the principle of home state control. The two other interests identified in connection with the posting of workers – the protection of posted workers and the shielding of national markets – hardly make an appearance, and even if some such arguments were to be raised, EU structure does not currently seem capable of recognising and accommodating these interests of home and host states.[96] This leads to a misrepresentation of various groups of interests, whereas not all interests actually involved are adequately balanced and weighed at the EU level.[97]

Put in a broader context, the lack of adequate accommodation of the periphery's interests in the EU allows us to predict not only an existential crisis along East/West lines, but also a further reduction of social standards in the periphery in the absence of action at the EU level towards substantial protective standards for posted workers – an action not possible without support from the 'core' states.

Identifying the Periphery's (Latvia's) Social Interest

But is the 'social' interest of the periphery identifiable at all? The 'periphery' countries are often seen as a sort of neoliberal monsters in the EU debate that are ready to compete to the level of stripping their own social and labour law protections bare. While this accusation may strike very close to home, I however argue that one can make a start of finding a genuine 'social' interest in the periphery that is worth protecting at the EU level. The question also then arises of whether EU-level reforms have afforded at least some response to the social issues linked with posting that prevail in the periphery.

[95] See <euobserver.com/social/139599>, visited 12 January 2018.

[96] *See also* the call for change in legal thinking by Kukovec, *supra* n. 2, p. 427-428.

[97] And due to the primacy and direct effect of EU law, and the accordingly limited discretion at the national level, this non-representation exaggerates the existing imbalance.

To sketch the first contours for an answer to these questions, this section examines the national (Latvian) situation through the available case law. It seeks to connect the national situation with the EU-level debate on posting, to gauge whether there is any connection between these two dimensions and to try to identify the social interest of the Member States of the periphery.

While – with the exception of *Laval* – no cases have been brought on behalf of, or at least involved, Latvian posted workers abroad,[98] plenty of such cases have been brought before Latvian courts by 'returning' posted workers.[99] Hence the first thing to emphasise is that, at least via judicial means, posted workers seem to be better protected in their home, rather than host, country. Moreover, all of the court cases concern the 'posting out' (posted workers who are sent from Latvia) rather than those posted to Latvia from other countries, despite Latvia being both a sending and a receiving country.[100] This again demonstrates the relevance of home country rules for such workers.

The difficulty with posting lies in the fact that it requires the host country to rely on adequate protection by the law of the home state since, at least currently, only the listed mandatory minimum requirements can be imposed according to the host country's labour law standards.[101] Concerning the set of conditions in Article 3(1) Posted Workers Directive, host country rules always apply; however, what happens if home country rules are more protective e.g. in terms of protection of pregnant women or women who have recently given birth? This is significant because such situations often arise in practice. For example, the rules on maternity and parental leave in Latvia offer far more protection than those of Belgium (in terms of both length of leave and benefits). Will Latvian (more protective) standards still apply? And who is to ensure compliance with more favourable rules – the host or the home country?

In practice Latvian courts seem only to apply Latvian standards in posting situations. This is fine as long as they offer more protection than the mandatory minimum standards in the host country. However, pressure to deregulate national rules concerning posted workers is growing and this is often due to shifting more control over posted workers to the host country. The reaction of the Latvian legislator to the *Finnish Electrical Workers' Union* case is a good example. In 2014 the legislator amended the national rules by clarifying that the worker in posting situations has the right to daily allowances and protection normally due to workers sent abroad. However, for situations where host country rules allow deducting

[98] At least to the best of my knowledge.

[99] Only judgments that were made publicly available (at <manas.tiesas.lv/eTiesasMvc/nolemumi>) for the years 2012-2015, and that involved a situation in which the posting of workers was involved, formed part of this analysis. The number of judgments analysed was 112.

[100] Bernaciak, *supra* n. 15.

[101] *Laval*, para. 121.

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allowances from minimum wage, the Latvian law changed its previously more protective stance and allowed the employers to follow suit. This was in direct response to the judgment in the *Finnish Electrical Workers' Union* case[102] and the way the European Court of Justice had explained the notion of minimum wage (as including the daily allowances in Finland as part of the sum). Here, EU law development had a deregulatory effect – to the detriment of Latvian posted workers.

For the most part, Latvian courts have been occupied with the identification of posting situations and with the question of whether benefits that are generally made available to workers sent abroad by the employer (daily allowances etc.) apply to posted workers.[103] Initially, the definition of posting in the Labour Law provided no insight,[104] and national case law was initially very unclear and casuistic. In practically identical cases, Latvian courts have often held that a situation does not constitute posting (even where it is clearly a posting situation under EU law),[105] while in others it does.[106] In one case, the Administrative Regional Court even devised a test by which a situation was deemed to be posting if the habitual place of work was abroad.[107] This is in clear contradiction to the Posted Workers Directive where, due to the temporality inherent to the concept of posting, the habitual place of work, by definition, remains the home country.

Another way EU law on the posting of workers has been used in Latvia is by reinterpreting the freedom to provide services as giving employers a right to request the granting of immigration permits for workers who are hired specifically for posting to other EU countries. When work visas for third country nationals were refused because of the risk of illegal immigration, and since there was not enough proof that the companies requesting them carried out (any) economic

[102] The Latvian courts, and also other stakeholders (including trade unions), have interpreted the judgment in the *Finnish Electrical Workers' Union* case (*supr*a n. 48) as prohibiting the home state from adopting rules on the relationship between 'minimum wage' and 'daily allowances' more favourable than those required by the host country. While the ECJ has interpreted the Posted Workers Directive as a partly maximum harmonisation measure only in regard to host country rules, the Latvian courts have extended this to apply to home country rules as well.

[103] For example, Administrative Regional Court, 31 May 2012, Case No. 142199411, para. 11; Administrative Regional Court, 26 April 2012, Case No. A420695110; Administrative Regional Court, 22 March 2013, Case No. 142246511; Riga Regional Court, 12 November 2013, Case No. C30606012.

[104] The original definition of posting in the Labour Law did not make a distinction between a posting, a mission or a business trip (Art. 14(1) Labour Law in the version prior to 1 January 2016).

[105] Administrative Regional Court, 31 May 2012, Case No. 142199411, para. 11; Administrative Regional Court, 26 April 2012, Case No. A420695110.

[106] Administrative Regional Court, 22 March 2013, Case No. 142246511; Riga Regional Court, 12 November 2013, Case No. C30606012.

[107] Administrative Regional Court, 12 September 2013, Case No. A420290113.

activity in Latvia, they started invoking the freedom to provide services in their pleadings before the Supreme Court. 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.[108] The Supreme Court of Latvia interpreted judgments in *Vander Elst*,[109] *Commission* v *Luxembourg*,[110] *Commission* v *Germany*[111] and *Rush Portuguesa*[112] in such a way that the rules on the 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.[113]

Finally, Latvian courts rarely enforce the requirement to pay the minimum wage rate set by the host country.[114] Instead, the case law for the most part relies solely on national law without even assessing the mandatory minimum conditions that must be applied according to the host country's law in line with Article 3(1) of the Posted Workers Directive.

In fact, when we look at the EU-level debate from the standpoint of the Latvian situation, keeping the objective of ensuring adequate protection for posted workers in mind, the EU-level debate seems quite remote from this objective. Even though the primary concern in national case law seems to be the protection of the rights of the individual posted worker, this particular concern, as we have seen, is at best barely addressed at the EU level.

For the most part, Latvian national issues involving posting relate to problems with the (correct) enforcement of workers' rights. While the Enforcement Directive could be invoked as an example for adding some clarity when it comes to the issue of letterbox companies (a situation virtually never identified by Latvian courts), it does not add much beyond providing some assistance in identifying posting situations, and does hardly anything to clarify the rights of posted workers themselves. The Enforcement Directive contains a non-exhaustive list of possible attributes which should help the country of origin to recognise bogus companies as well as the elements that characterise a posted worker (Article 4). While this might indeed help to better identify posting situations (therefore, the Enforcement

[108] Supreme Court, 10 December 2012, Case No. A420521210; Supreme Court, 28 December 2012, Case No. A420536110; Supreme Court, 14 December 2012, Case No. A420521110.

[109] ECJ 9 August 1994, Case C-43/93, *Vander Elst*.

[110] ECJ 21 October 2004, Case C-445/03, *Commission* v *Luxembourg*.

[111] ECJ 19 January 2006, Case C-244/04, *Commission* v *Germany*.

[112] ECJ 27 March 1990, Case C-113/89, *Rush Portuguesa*.

[113] *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.

[114] Vidzeme District Court, 18 September 2014, Case No. C21044413; Administrative Regional Court, 28 October 2015, Case No. A420422314.

Directive could be seen as a step in the right direction – also from the Latvian perspective), Latvian courts do tend to succeed in identifying postings; the problem lies rather in the danger of exaggerating the protection for undertakings afforded by the freedom to provide services. At the same time, the Enforcement Directive failed to clarify the situation on how the minimum mandatory standards should be applied in the interaction with (at times more favourable) home country standards – the key social interest at stake from the perspective of the posted workers in Latvian cases.

In addition, the more recently proposed revision of the Posted Workers Directive will not address the relevant national level social concerns at all. Introducing the concept of 'remuneration' might even lead to greater legal uncertainty, while the clearer time limit for posting again merely aims to better identify posting situations.

The example provided by the deregulation of protection following the *Finnish Electrician's Union* case is worrisome; broadening the host country's level of protection by expanding the notion of minimum wage can lead to the deregulation of the protection available in the home country. In this sense, following the centre's social objective of ensuring more discretion over labour law rules in posting situations may damage the social interest of the periphery and even trigger deregulation of more protective home country rules. Given that – for the 'sent' posted workers – what matters in practice seems to be home country labour law and enforcement rather than the expansion of the host country's margin of discretion in social matters, the current expansion of host country control might in fact trigger further deregulation of the social and labour law systems of 'periphery' countries. Also, aligning posted workers with host country workers in terms of the protection offered may be detrimental to the interests of posted workers since they are in the host country temporarily, do not speak the language, incur additional and different kinds of expenses compared to local workers, and need help with housing and living expenses; comparing them to local workers is almost like comparing apples to oranges.

A much more reasonable outcome capable of actually benefiting the interests of posted workers would be to raise the level of their protection across the Union by, for example, setting some common labour law and social standards at the EU level. This then would remove the incentive to deregulate in the name of economic objectives in the 'periphery' countries, and at the same time would also ensure competition on fair social terms. The cost of more substantial and protective social standards would be a reduction in discretion for national labour law systems in posting situations; but this might not be so detrimental if the only addressees of such a new legal framework were to be the posted workers. The EU has rather broad competence to protect workers in cross-border situations and to ensure that adequate social protection standards apply to them (for example, by combining

the legal bases of the freedom to provide services (Articles 53(1) and 62 TFEU), with the free movement of workers (Articles 46 and 48 TFEU) and social policy (Article 153(1)(c) TFEU)), therefore establishing an EU-level protection framework for the narrow group of posted workers is not unimaginable. Harmonisation of labour law and social standards specifically for posted workers at the EU level would cater both to addressing the host member states' fear of 'unfair competition' from foreign service providers using low host country labour law and social standards and would ensure adequate protection of the posted workers themselves without causing deregulatory pressures in 'periphery' countries. This would also mean a common EU-level protection standard that is more easily understandable for national courts than the current system of coordinating the overlapping elements of home and host country systems.

Conclusion

The posting of workers is certainly one of the most controversial of EU law issues dealt with by EU courts, the EU legislator and the individual Member States in recent years. It is a matter that, even in the absence of significant numbers involved 'on the ground', challenges basic structures of EU and national law and has, as such, continued to trigger heated discussion over the years. At the same time, a perspective that is still at least partly missing from this discussion is the perspective from the periphery, the perspective of the 'new' Member States in the posting story, but from a social rather than an economic standpoint.

By taking as a basis a more nuanced elaboration of centre/periphery interests involved in the posting saga first developed by Damjan Kokuvec, in this article I have assessed how these interests have played out in practice both at the EU and at the national level to identify how and where the social interests of the periphery are placed.

At the EU level the only interests that are adequately raised (and also heard) are the interests of the periphery to ensure market access, and the interests of the core states in protecting and shielding their national social and labour law systems. While the cases on posting that have been brought before the European Court of Justice can be restructured in a more nuanced way than simply juxtaposing an economically oriented periphery with a socially oriented core, this is almost never reflected in either the respective positions of the Member States or in the outcomes; the only partial exception to this being the *Finnish Electrical Workers' Union* case.

Also, in the legislative realm – the place where the core Member States have been much more successful especially recently – the situation is similar, and it has proven impossible to identify any social interest of the periphery rearing its head.

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Finally, at the national level, when a national posting situation is assessed we see that the protection of posted workers is a very topical and prevalent issue before Latvian courts. The EU reforms, while potentially having some small impact when it comes to identifying genuine posting and concerning letterbox companies (Enforcement Directive), in some ways seem, at the same time, to trigger deregulatory tendencies rather than ensuring more protection.

In a broader context this lack of identification, accommodation and placement of the periphery's social interests on the EU level might lead to an even greater social and economic divide between the core and the periphery. The current structures of EU law do not seem capable of recognising and dealing with this issue. One direction of action – not currently on the EU agenda – does however remain. Deeper economic integration could be achieved along with greater (or at least adequate) social protection if there was more harmonisation of social standards, if a meaningful level of protection was ensured, at least in specific situations triggered and made possible by EU law. The posting of workers might be an area where such a solution is necessary and, given that it is a rather narrow field involving a limited number of workers, a targeted compromise on high(er) social standards across the EU might actually be achievable.