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# Social dumping at work: uses and abuses of the posted work framework in the EU


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## Policy recommendations


**Regulatory frameworks on intra-EU mobility have created new windows of opportunity for firms to access less restrictive and cheaper regulatory environments while employing foreign labour. The complex interaction of EU directives and national industrial relations norms leads to legal ambiguities, allowing firms to circumvent social regulations. In order to prevent social dumping and stop the downward spiral in wages and working conditions in Europe, it is crucial that public authorities and trade unions enforce the existing labour standards. Policymakers, on their part, should consider re-regulating certain aspects of employee posting so that the latter is not used solely as a cost-saving strategy.**


## Introduction

Labour mobility in Europe can occur either as posting – when an employer sends an employee abroad to perform a job – or as individual migration. These two forms take place under different regulatory frameworks – the free movement of services and the free movement of workers, respectively – and are related to distinct sets of worker rights. As a consequence, EU citizens may be employed in other EU countries under conditions that in certain respects refer back to the labour standards of their country of origin or another sending country (posted work), or under temporary contracts conditioned by host-country regulations.

These different regimes on the free movement of labour and services within the EU, and firms' ability to interact with them, have created opportunities for firms to access less restrictive and cheaper regulatory environments. Firms can consciously strategize across different regulatory systems between and within countries in search of the lowest cost structure for employing workers.

In this Policy Brief, we present social dumping[1] strategies that firms employ when they have the option to choose between different regulatory regimes. On the basis of the evidence from the Netherlands and Finland, we identify three categories of such cost-saving regulatory recruitment practices: regulatory evasion, regulatory arbitrage and regulatory conformance. *Regulatory evasion* refers to the violation of formal and informal national industrial relations rules. *Regulatory arbitrage* is defined as strategizing about the regulatory treatment of a transaction in the selection between two (or more) alternative regulatory regimes from different sovereign territories (Fleischer 2010: 4). *Regulatory conformance* means conforming to the formal industrial relations system but manipulating the rules for cost advantage. It does not involve breaking industrial relations rules directly, but may put them under pressure as employers access foreign workers who accept worse treatment than natives.

## Regulatory evasion

Regulatory evasion involves the violation of formal national industrial relations rules, and implies the concealment of these violations from regulatory authorities. Much of the public attention given to posted work has been due to the very poor labour conditions of some posted workers and the illegal activities of their employers. The growth of posted work has been associated with the appearance of numerous 'fly-by-night' temporary work agencies supplying cheap labour at substandard conditions. These

1 For the concept of social dumping, see Bernaciak (2014).


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are so-called shell firms that disappear as soon as regulatory authorities take too close an interest; they often simply change their names and move elsewhere. Many of these firms appear to be just small entrepreneurs, using their personal contacts to deliver workers to job sites. Though employers may rhetorically draw a line between themselves and unscrupulous grey-market employers, making the problem of regulatory evasion out to be a technical issue of control and enforcement, these labour suppliers nonetheless are often present on the production sites of 'respectable' core firms; they are a part of a spectrum, and an inevitable presence in the regulatory environment that permits and promotes their activities.

Some of these shady businesses have professionalized. Atlanco Rimec, for instance, is a multinational manpower firm that has made a business out of hiring workers from low-wage EU countries for work in high-wage EU countries. It has also systematically utilized legal uncertainty and enforcement difficulties created by the interaction of national systems and EU rules to violate national laws and industrial relations norms. While doing this hardly makes it unusual, what is unusual is that it operates on a large scale, in a systematic and apparently respectable way. Its clients are often well-known firms and household names. It has offices around Europe and appears to be a firm of substantial size and resources; it reported 84.3 million turnover in its 2004 Annual Report.[2] Atlanco Rimec consists of a network of companies, which appear in many cases to be shell firms created with the goal of avoiding legal responsibility.

Workers who have worked for Atlanco or one of its subsidiary firms, as well as unions that have dealt with them, accuse them of not paying regularly, of dismissing workers who complain, and of using double contracts and paying wages in violation of the relevant collective agreement and/or less than what was originally agreed. Atlanco has been at the centre of several industrial and legal disputes. Misconduct by Atlanco has been reported at, among other places, the construction of the nuclear power plant in Flamanville, France, Olkiluoto in Finland, the Eemshaven and Avenue 2 construction sites in the Netherlands, and several sites in Sweden. At Olkiluoto, Atlanco Rimec's behaviour resulted in a major work stoppage (Lillie and Sippola 2011).

At the building site in Eemshaven, several Atlanco employees did not receive the collectively agreed wages. An Atlanco Rimec worker working in Eemshaven (2011) explained the firm's practices as follows:

> 'Atlanco Rimec is a dangerous firm because it abuses people...It abuses the law, in this case the Dutch law, by stretching it to find ways to circumvent it, only to rob us. It is a criminal agency'.

Atlanco often lumps all social security deductions together so that workers cannot detect what kind of payments have been made on their behalf. This is something our interviewee also discovered when he received his first payslips:

> 'When the first pay slips arrived, they did not provide us with any information, except for my last name, the company name, and a mysterious logo. The agency's address is not on there, nor my personal identification number. There are no separate entries for pension or social security or tax payments. There is only a general sum. This is very secretive'.

At the Olkiluoto 3 site in Finland, a number of Polish workers went on a wildcat strike because of unexplained deductions to their pay check. When the union investigated on their behalf, the workers were surprised to find that, while they thought they had been posted from Poland by an Irish company to Finland, they were actually employed via a Cypriot shell firm, and their social contributions were therefore being paid to Cyprus.

Regulatory evasion like that of Atlanco Rimecs is made possible by the existence of the formally, legally legitimate strategy of regulatory arbitrage. The case illustrates how legal ambiguity and enforcement difficulties mean in practice that it is difficult to draw a clear line between these two types of social dumping.

## Strategic posting: regulatory arbitrage

Regulatory arbitrage is the exploitation of differences between national systems within the constraints set out by the Posted Workers Directive (PWD). Firms that engage in regulatory arbitrage follow EU and national rules, but remain partially outside the national industrial relations framework of the host country. The PWD ensures a minimum set of rights for posted workers, including minimum-wage standards in countries where these are present, but this list of rights does not concern social contributions. Social contributions are paid in the country from which a worker is posted (which is not necessarily the worker's home country). Many practices of regulatory arbitrage currently fall into a grey zone in EU legislation. Unions have campaigned against the opportunities for social dumping practices that the PWD creates, when firms strategically locate themselves and post employees so as to benefit from the differences between national social security systems in Europe.

In our fieldwork we encountered many instances of strategic posting. One example was a Portuguese temporary agency firm that posted Portuguese and Polish workers to work in the Netherlands. A Polish worker we interviewed in 2012 explained that he had been recruited in Poland but had received a Portuguese employment contract from a Portuguese subsidiary agency firm of the Polish firm that had recruited him. Since he worked as a posted worker via Portugal, he thought all social security payments were made in Portugal, but he was not sure:

> '...all such payments [pension, social security, etc.] go to Portugal. At least that is what they tell us...Time will tell [if the TWA is being truthful]'.

The practice of regulatory arbitrage is a known phenomenon among temporary agency firms in the construction sector, as this Dutch trade union official (2011) elaborates:

2 Atlanco Rimec incorporated off-shore after 2004, and since then its financial reports have been secret (RTE television).

> 'What they [agency firms] do is look for the countries with the lowest social contributions, in this case Portugal [put them under Portuguese contracts]...and pay social fees in Portugal instead of in the Netherlands or Poland. And if you compare these rates, there is an easy difference of 25 per cent to be made'.

Table 1 provides an illustration of cost savings that can be achieved through strategic posting. The example shows that even though the three nationals earn the same net income, posting a worker from Portugal (or Poland) saves an employer a significant amount on labour costs through the difference in social security payments.

Table 1 **Savings made by companies through strategic posting (€)**

| **Dutch worker** | | **Portuguese worker** | | **Polish worker** | |
|---|---|---|---|---|---|
| Net salary | 1600 | Net salary | 1600 | Net salary | 1600 |
| -/- soc. sec in NL | 496 | -/- soc. sec in Portugal | 81 | -/- soc. sec in Poland | 350 |
| -/- taxes in NL | 81 | -/- taxes in NL | 81 | -/- taxes in NL | 81 |
| **gross salary** | **2177** | **gross salary** | **1762** | **gross salary** | **2032** |

Source: Wapening in Beton (2012), p.7.

Also in regard to wages, it is possible to make cost savings compared to firms complying with host-country regulatory frameworks. In Finland, wages are set through national-level collective bargaining, with uniform minimum standards through the whole country, but some regional wage standards are higher. Firms practising regulatory arbitrage make cost savings by paying their workers exactly the collective agreement rate and conforming to Finnish norms only in regard to the mandatory items mentioned in the PWD (Lillie 2012). This is one reason why the number of posted workers tends to be high in the south of Finland, where Finnish workers' wage are high but posted workers still only receive collectively agreed minimum rates (Finnish Union Official 2009).

## Regulatory conformance

In general, there is considerable room for achieving labour-cost savings in ways that bend but do not break the rules of national social and industrial relations systems. Often firms find it cheaper or more convenient to follow local rules than to access foreign rule systems. Even when firms comply with the regulatory framework, however, they can still set in motion a social dumping dynamic. We refer to this as regulatory conformance, which means conforming to the formal industrial relations system, but manipulating the rules for cost advantage.

In the Dutch supermarket distribution sector, for instance, firms exploit loopholes in the temporary work agency regulatory regime to segment the labour market into domestic core workers and contingent foreign workers in order to maximize their flexibility and achieve cost savings. While Dutch workers are employed on direct contracts with the client firm, Polish workers are employed on Dutch temporary agency contracts. In the Netherlands, the collective agreement for the temporary agency sector provides for the 'contractual phase system', ranging from phase A to C, with employment security increasing in each phase. Phase A is the first phase, where there is no limit on the amount of temporary contracts an employer can sign with an employee, but the total duration is maximum 78 weeks (unless other arrangements are made in a company collective labour agreement). Phase A agency contracts can be terminated at any time and provide no guaranteed number of hours' work, as this Dutch agency worker explained (2013) when we talked about his employment contract:

> 'Phase A contract is a zero-hours contract...But it is only one way. Because when you say one day in advance that you cannot come to work, it is not possible. But when they [the agency firm] say that you don't have to come, there is nothing you can do about it. '

After 78 weeks, the firm must provide the employee with a more secure phase B contract. However, when an employer sends the employee on a break that lasts at least 26 weeks, the worker's length of employment is reset and the worker can once more be rehired on a phase A contract. This happens often to Polish workers, as this Polish agency worker told us (2013):

> 'There is a policy of almost never giving phase B. Once you have worked for that period, then you are simply kicked out'.

The firms' practices comply with the letter of the regulatory framework for the agency sector. However, they do so in a way that undermines the intention of the collective labour agreement, which is to provide workers with a longer length of employment and more job security. As a result, even though firms do not violate the rules enshrined in law, they do violate the expectations that unions had when they concluded the collective agreement.[3]

## Posting as a way of circumventing labour standards

Sectoral and national regulatory structures inform firm strategies. More lax regulation attracts firms seeking cost advantages that subsequently employ workers under that particular regime. Countries with less extensive social security systems, such as Cyprus, attract letter-box posting companies that post workers all around Europe to save on indirect labour costs. Firms also strategize in terms of the way they operate and structure their firm: for example, do they operate as an agency firm, a posting

3 Recent industrial actions by the Dutch union *FNV Bondgenoten* forced client firms to stop the practice of resetting the length of employment of the Polish workers they hire via temporary agency firms and instead accumulate the total length of employment in the future.

subcontractor firm or a posting agency firm? For each type of firm, different regulations apply and provide the firm with different responsibilities towards their employees. EU regulations on transnational employment relations are not yet well established and firms exploit existing legal uncertainties to their advantage. Recent legal developments include a decision by the European Court of Justice (C- 396/13), which confirmed the right of unions to apply extended collectively agreed pay rates above the minimum rate to posted work, specified more clearly when allowances can be included in calculating minimum pay rates and when not, thus narrowing the area of legal uncertainty. On the other hand, the PWD Enforcement Directive passed in 2014 may introduce even more grey areas, because of its emphasis on the need for national enforcement measures to be 'proportionate' to the goals to be achieved.

The fact that firms operate in a legal grey zone where effective enforcement is lacking makes regulatory evasion hard to detect and control. As a result, firms experiment with cost-saving social dumping practices with little risk of getting caught and punished. This sets in motion a dynamic where the ability and willingness to violate norms becomes a competitive parameter. In this Policy Brief, we presented instances of firms' social dumping practices that clearly fit into one or another of our categories. In reality, firms experiment and move fluidly between one strategy and another. Certain instances of regulatory arbitrage seem legally sound while others are not, but firms use the plausibility that they might be legal to complicate enforcement. Since enforcement remains ineffective and since jurisprudence on posted workers' employment rights remains slim, firms continue to operate via these channels and within these grey zones, pushing the boundaries of the regulatory system.

From the perspective of labour protection, these findings point to the need to reduce the scope for posted work to be a strategy for regulatory evasion and arbitrage. While there is a genuine need for posted workers employed by transnational contractors to fill short-term labour and skill requirements, and in these cases sending-country contracts and social security conditions make sense for purely administrative reasons, a large portion of posting is motivated by regulatory evasion and arbitrage strategies. In the end, posted work has become a way for the EU institutions to sanction social dumping via the back door, circumventing public discussion of what sort of working conditions should be permitted. While certain policies, such as better cooperation between labour inspectorates, or strengthening union rights for organizing and representing posted workers, would clearly help ameliorate the problem, at the core of the issue is the regulatory arbitrage which could be minimized by regulating posted work in such a way that it no longer serves as a cost-competition strategy, but is rather used only for its intended purpose of sending employees abroad for very brief periods to complete specific tasks. As the cases we have presented here suggest, when posted work contracts are not the best option for recruiting cost-competitive labour, employers instead use host-country contracts, which, though not always perfect, are legitimately regulated within national industrial relations systems, and do not fall as readily into the grey zone of semi-legal work arrangements.

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