

ENFOSTER project
(ENFORcement STakeholders coopERation)
Grant Agreement VS/2014/0009

A project for a stronger cooperation on posting of workers within the EU



“Enfoster Brief no.3 (Policy Brief)”

**Transnational Posting of Workers within the EU: emerging challenges
and opportunities in the light of Directive 2014/67/EU**

January 2015



This document has been fulfilled by the ENFOSTER project “ENFORceMENT STakeholders coopERation” . The project received the financial support of the European Union (Contracting Authority European Commission – DG Employment, Social Affairs and Inclusion - Grant Agreement no. VS/2014/0009 – Progress Programme, Budget heading 04.04.01.03, Posting of workers: enhancing administrative cooperation and access to information).

The ENFOSTER project has been coordinated by Istituto Guglielmo Tagliacarne and it has involved the following partner organizations:

- Arbeit und Leben e.V.
- CISL - Confederazione Italiana Sindacato Lavoratori
- CSC Transport and Communication
- EFBWW - European Federation of Building and Woodworkers
- ISCOS-CISL
- Italian Ministry of Labour and Social Policies (DG Inspection Activities and DG for Policies and Services for Employment and Training)
- Romanian Labour Inspection.

Authors of this document are specified in each chapter. The work has been coordinated by Debora Giannini (Istituto Guglielmo Tagliacarne).



**With the financial support of the European Union
European Commission – DG Employment, Social Affairs and Inclusion**

*The content of this document does not reflect the official opinion of the European Union.
Responsibility for the information and views expressed therein lies entirely with the authors.*

This publication is supported by the European Union Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is implemented by the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment, social affairs and equal opportunities area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in these fields. The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries. For more information see: <http://ec.europa.eu/progress>.

Introduction.....	3
1. Directive 2014/67/EU: main issues and transposition problems for the Member States. Opportunities and critical issues, possible solutions and open questions.	6
1.1. The new directive and its relations with directive 97/71/CE.....	6
1.2. A preliminary check: the case of fraud, abuse and circumvention and the application of Regulation n. 593/2008 (Rome I).....	6
1.3. A synoptic table of the main national issues pointed out by the ENFOSTER national partners.....	8
2. The new Enforcement Directive: challenges and opportunities from the point of view of the Italian Control Authorities.....	16
2.1. Introduction.....	16
2.2. National transposition of the new Directive in Italy: key issues, preliminary reflections	18
3. Reflections BY Romanian control authorities and social partners on emerging challenges and opportunities about posting of workers within EU in the light of Directive 2014/67/EU	26
Introduction.....	26
3.1. Legal issues relating to the implementation of the new directive by the Labour Inspection ...	28
3.2. Problems encountered and solutions proposed by labour inspectors	29
3.3. Perceptions and opinions of the Romanian stakeholders	30
3.4. Romanian Labour Inspection conclusions.....	32
4. Some reflections on the Enforcement Directive 2014/67/EU by CISL and FILCA CISL.....	33
5. Transposition of Directive 2014/67/EU in Belgium.....	35
5.1. Position of Belgian unions	35
5.2. Practical transposition aspects in the road haulage sector	36
5.3. Enforcement of the Posted Workers Directive in the road haulage sector.....	39
5.4. A few thoughts from CSC-Transcom:	40
6. Perspective of the German Stakeholders on the Directive 2014/67/EU	41
7. The Enforcement of the Posting of Workers Directive 2014/67/EU: the position of EFBWW (European Federation of Building and Wood Workers).....	42
Introduction.....	42
7.1. The reality of posting in the European construction industry	43
7.2. Possibilities for expanding the Enforcement Directive (thinking outside the box)	44

INTRODUCTION

(By Debora Giannini – “Istituto Guglielmo Tagliacarne” Foundation - Coordinator of the Enfoster Project)

THE ENFOSTER PROJECT: A CONCRETE EXPERIENCE OF COOPERATION AMONG STAKEHOLDERS

This report has been prepared within the project “Enfoster - ENforcement Stakeholders cooperation”. The project has been funded with the financial support of the European Union (DG Employment, Social Affairs and Inclusion) within the “Progress Programme” (budget heading 04.04.01.03 “Posting of Workers: enhancing administrative cooperation and access to information”. The project has been carried out in the period November 2013-January 2015.

The aim of the “Enfoster project” has been to support the enforcement of Directive 96/71/EC and of Directive 2014/67/EC concerning the transnational posting of workers in the framework of the provision of services within the EU. An enforcement based on a stronger cooperation among stakeholders’ (social partners and control authorities). A stronger cooperation based on shared knowledge, competencies, practices and experiences for a fair and responsible posting of workers within the EU.

A specific focus of the project has been on the posting of workers in the building sector and in the road transport sector.

The Enfoster project has been carried out by a transnational partnership representing a “multi-stakeholder” and multidisciplinary consortium:

- Coordinator: Istituto Guglielmo Tagliacarne (Foundation of the Italian Union of the Chambers of Commerce) - Italy
- Arbeit und Leben e.V. – Germany
- CISL Confederazione Italiana Sindacato Lavoratori - Italy
- CSC Transport and Communication - Belgium
- EFBWW - European Federation of Building and Woodworkers
- Iscos CISL– Italy
- Italian Ministry of Labour and Social Policies (DG Inspection Activities and DG for Policies and Services for Employment and Training)
- Romanian Labour Inspection.

FIT CISL (CISL Transport - IT) and FILCA (CISL Building Sector - IT) have been associated partners (external supporting organizations).

The basic assumption behind the project is that the enforcement of the legislation on the transnational posting of workers is a process needing a ‘multi-stakeholder vision’ (actively involving workers’ organizations, employers’ associations, labour inspectorates, other control institutions) and a multi-disciplinary approach (the legislative, administrative, social-behavioural, ethical and regulatory dimension embedded in the enforcement process).

The research, training and information activities carried out by the project have been characterized by this multi-stakeholder vision: trying to analyze positive practices and critical issues, exchanging views and reflections from both perspectives, that of social partners and that of control authorities.

The main activities of the project have been:

- An action-research on practices: four action-research teams working at national level (one in Belgium, one in Germany, one in Italy, one in Romania), definition of shared guidelines, two transnational workshops in order to collect, analyze and exchange views about practices for a fair and responsible enforcement of EU posting legislation;
- The ‘Stakeholder Academy’ : two advanced learning sessions on the posting of workers involving social partners and control authorities (6 days in total, involving 35 stakeholders);
- Five Seminars at national level in the involved countries (Belgium, Germany, Italy, Romania) to present and follow-up project’s results;
- One pilot short training for companies on basics and practices in the posting of workers;
- A Final Transnational Conference in Brussels, to capitalize the results of the project among a meaningful audience of social partners and institutions at EU level.

THE KEY TOPICS IN THE “ENFOSTER BRIEFS”

The ENFOSTER project has produced three main short reports called “Enfoster Briefs’ with the aim of summing up the main practices and reflections exchanged within the project:

- Brief no. 1 on : “Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation”, with concepts and examples of cooperation between workers’ organizations and employers’ organizations, and references to the implementation of IMI system within posting of workers;
- Brief no. 2 on “Responsible Posting of workers within the EU: actions by Unions, answers by control authorities” referring to examples of agreements for a social responsible posting and a section with suggestions by control authorities for a correct process of posting of workers;
- Brief no. 3 (a “Policy Brief”) on “Transnational Posting of Workers within the EU: emerging challenges and opportunities in the light of Directive 2014/67/EU: with analyses and reflections from control authorities and workers organizations about challenges and opportunities deriving from the so-called Enforcement “Directive”.

In line with the approach of the project, the “above mentioned “Enfoster Briefs” have been prepared thanks to the active participation by all the Enfoster partners with the aim of summing up information, experiences and reflections collected in their respective countries and institutions (Belgium, Germany, Italy, Romania, the EU level thanks to the partner EFBWW).

The preparation of the “Enfoster Briefs” was in itself an opportunity to concretely implement a participatory, multi-stakeholders and multi-disciplinary activity for the posting of workers.

All partners, with their different personal, institutional and national background, took part in the writing of the Briefs and also involved other stakeholders in their respective countries and institutions.

Each contribution in the preparation of the “Briefs” was, of course, based on a specific perspective and/or on a specific language-vocabulary, but all writers believed in the importance to merge the different perspectives in one shared effort. This shared effort enhanced mutual learning, trust and cooperation among them.

In line with the aim of the project, this “Brief” has been prepared within one of the Enfoster working groups with the aim of collecting experiences and reflections among institutions and social partners from Belgium, Germany, Italy and Romania.

The aim of this “Brief” is to sum up information, perspectives, point of views collected by the Enfoster’s partners about the emerging challenges related to the enforcement of the posting legislation in the light of Directive 2014/67/EU: which is the point of view of control authorities ? Which is the position of trade unions?

Positions, reflections, warnings are strictly linked to the precise time of drafting of this document, only few months after the approval of Directive 2014/67/EU and in the middle of the challenge of the transposition at national level.

- **Chapter 1** provides an introductory presentation of some key-issues related to Directive 2014/67/EU and a synoptic table of the main national issues pointed out by national partners of Enfoster in the following chapters.
- **Chapter 2** has been prepared by the Italian Ministry of Labour and Social Policies (by a working group at DGAI - Direction General for Inspection Activities): it recaps the main reflections of Italian Labour Inspectors about the enforcement of Directive 2014/67/EU and its transposition in Italy, referring to the main articles of the Directive.
- **Chapter 3** has been prepared by the Romanian Labour Inspection in cooperation with other key stakeholders at national level and it recaps the main reflections about the enforcement of Directive 2014/67 and its transposition in Romania.
- **Chapter 4** sums up key observations and warnings about the Enforcement Directive 2014/67/EU by CISL and FILCA CISL.
- **Chapter 5** has been prepared by CSC Transcom: it recaps the key-issues for transposition in Belgium and some specific reflections about the enforcement of the Posted Workers Directive in the road haulage sector.
- **Chapter 6** sums up the perspective of the German Stakeholders on Directive 2014/67/EU as collected by the partner Arbeit und Leben e.V. Berlin, within the ENFOSTER project.
- **Chapter 7** recaps the position on Directive 2014/67/EU expressed by EFBWW (European Federation of Building and Wood Workers).

1. DIRECTIVE 2014/67/EU: MAIN ISSUES AND TRANSPOSITION PROBLEMS FOR THE MEMBER STATES. OPPORTUNITIES AND CRITICAL ISSUES, POSSIBLE SOLUTIONS AND OPEN QUESTIONS.

Author: Davide Venturi - Adapt Senior Research Fellow

1.1. The new directive and its relations with directive 97/71/CE

Directive 2014/67/EU was published on May 28, 2014. It is aimed at enforcing the directive 96/71/EC on the posting of workers and at amending the EU Regulation n. 1024/2012 on administrative cooperation (IMI).

The claim for a new directive on the posting of workers was widely expressed by the European institutions: Parliament (Resolution 2008/2085 (INI) of October 22, 2008), Commission (proposal “COM (2012) 131 final 2012/0061 (COD)” of March 21, 2012), as well as by Member States and by Social Partners. In fact, it was commonly considered that, on the one hand, directive 96/71/EC needed enforcement because of the objective problems related to the diffusion of abusive commercial practices of social dumping, and, on the other hand, the European regulation on the posting of workers often encountered national protective measures in contrast with the European rules.

1.2. A preliminary check: the case of fraud, abuse and circumvention and the application of Regulation n. 593/2008 (Rome I)

A preliminary concern of the partners of the project was the fact, explicitly introduced by directive 2014/67/EU, that fraudulent transnational commercial practices involving abuse and/or circumvention of EU law should not benefit of the opportunities of the EU regulation on posting. Therefore, in case of fraud, abuse and/or circumvention, neither directive 96/71/EC nor directive 2014/67/EU will apply.

In fact, the subject matter of the new directive (art. 1.1) introduces the provision of “measures to prevent and sanction any abuse and circumvention” which are defined by the indicators set in art. 4.2 and 4.3. These indicators, set up in order to achieve throughout Europe “a common interpretation” (recital 7) of genuine posting practices, should be interpreted by the “competent authorities” (see art. 2.a) on the basis of “an overall assessment of all factual elements” (art. 4.1).

Once fraudulent practices (as well as abuse and/or circumvention) are assessed by the competent authorities on the basis of the indicators provided for in art. 4.2 and 4.3, the consequences are as follows (see recital 11):

- a) Application of the national law of the Member State where the provision of services is performed, as long as the fraudulent/abusive practice has no genuine transnational character;
- b) or, once established a “conflict of national laws” (transnational contract), the recourse to Regulation 593/2008 (Rome I), and in particular to the provisions of art. 8.1 on the protection of the workers involved.

The explicit reference to the disapplication of the EU regulation on posting in case of fraud, abuse and circumvention is a main achievement of the new directive. However, it should be noted that in other domains, such as tax law, this principle has already sound legal basis in the interpretation provided by the CJEU, whose legal reasoning could be extended to the case of fraudulent/abusive posting, too.

Some key principles pointed out by the CJEU rulings concerning fraudulent operations are provided for in the following table.

Principles	Applications	CJEU cases
<p>A Member State is entitled to take measures designed to prevent</p> <ul style="list-style-type: none"> • certain of its nationals from improperly attempting, under cover of the rights created by the Treaty, to circumvent their national legislation or • to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law 	<ul style="list-style-type: none"> • Regarding the freedom to supply services (Van Binsbergen Case C-33/74 par. 13; Veronica Omroep Organisatie Case C-148/91, par. 12; TV 10 Case, Race C-23/93, par. 21); • Regarding the freedom of establishment (Knoors C- Case 115/78, par. 25; Bouchoucha Case C-61/89, par. 14); • Regarding the freedom of movement for workers (Lair Case C-39/86, par. 43) 	<p>Centros Ltd Case (C-212/97, par. 24).</p>
<p>The concept of abuse (of rights), or abusive practice, (specifically referred to VAT)</p>	<p>The concept of an abuse of rights includes three elements:</p> <ol style="list-style-type: none"> 1) an objective element, i.e. evidence that the conditions for the grant of a benefit were created artificially, which means that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid accompanying that operation. This requires an analysis, on a case-by-case basis, of both the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in 	<p>Emsland-Starke GmbH Case (C-110/99, par. 39)</p>

Principles	Applications	CJEU cases
	<p>question;</p> <p>2) a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules</p> <p>3) a legal procedural element relating to the burden of proof. That burden falls on the relevant national administration. However, in the case of the most serious abuses, even <i>prima facie</i> evidence which might reverse the burden of proof is admissible.</p>	
<p>Abusive practices make Union law (as well as its benefits) not applicable</p>	<p>The application of Community legislation cannot be extended to cover abusive practices implemented by economic operators, which means those transactions not carried out in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.</p>	<p>Halifax Case (C-255/02, par. 69)</p>
<p>The consequences of abusive practices, once assessed and proven</p>	<p>where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.</p>	<p>Halifax Case (C-255/02, par. 98)</p>

1.3. A synoptic table of the main national issues pointed out by the ENFOSTER national partners

Having discussed the main points of Directive 2014/67/EU, the partners of the ENFOSTER project, (public authorities as well as social partners) have started a debate on the principal innovations, the critical matters and the opportunities in the next process of transposition. The outcomes of this debate are described in the following chapters of this “Brief”.

Some of the main points expressed by National partners (see the following chapters from 1 to 6) are sketched out in the following synoptic table. Please refer to chapter 7 to have a summary of the point of view expressed at EU level by EFBWW – European Federation of Building and Wood Workers.

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
Art. 1 – subject matter	A “ <u>common framework</u> ” for better and more uniform interpretation, application and enforcement of Directive 96/71/EC. *** without prejudice to the scope of Directive 96/71/EC, which prevails in case of contrast with the new directive	BE: in the road transport sector, the CJEU (Case Koelzsch C-29/10; Voogsgeerd Case C-384/10) has already outlined the key characteristics and the legal consequences of the fraudulent business practices of social dumping and unfair competition, in particular the case of the worker whose employment contract is subject to the law of a MS other than the one in – or from which –the posted worker habitually carries out his or her work. In these cases the posting directives are not applicable. DE: “The IGBAU [<i>trade union</i>] is particularly skeptical about the implementation of the Services Directive in Germany and the almost <u>simultaneous introduction of the minimum wage act</u> ”.	Are fraudulent practices in road transports to be tackled trying a difficult extension of the scope of the posting directives beyond “cabotage” (Reg. 1072/2009)? Or is it better, and more effective, to follow the path traced by the CJEU (Case Koelzsch C-29/10; Voogsgeerd Case C-384/10) (extensively) interpreting art. 8.1 Reg. 593/2008 (Rome I)?
Art. 4 – genuine posting and prevention of abuse and circumvention	Fraud, abuse and circumvention determine the inapplicability of the posting directives, and the subsequent application of the general rules of Reg. n. 593/2008 (Rome I), in case the contract still bears a transnational character, in particular the rules	IT: in transposing the directive, IT points out how essential it is that national law determines the “sanctions in the event of detection and assessment of a fake posting according to Art. 4”; on the other hand, it is not advisable to lay down a national list of the cases of abuse and circumvention (art. 4.1) more	How to afford the transposition process, with specific concern to the enforcement (sanctions) of the provisions on fraud abuse and circumvention? How reconciling

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
	<p>granting protection to the employees (art. 8.1, second part). ***</p> <p>The disapplication of the rules on posting (in case of fraud, abuse and circumvention) is decided by the “competent authorities” (art. 2.a) on the basis of “an overall assessment of all factual elements” of art. 4.2 (posting undertaking) and art. 4.3 (posted worker).</p>	<p>detailed than the indicators contained in art. 4.2 and 4.3, which are considered sufficiently clear and therefore to be transposed the way they are;</p> <p><u>IT: CISL</u> [Union] recalls: “The dialogue between national governments and social partners has an overwhelming importance, but it must be extended also to labour inspectorates, to issue transposition laws exceeding the basic elements of the Directive.</p> <p>Far from being considered as a mere technical issue, transposition acquires a clear political connotation.</p> <p>(...) in our national system, the transposition must try to bridge all gaps and interpretations that could lead to abuse by unscrupulous undertakings, thus protecting those undertakings that intend to use the posting of workers in the correct way”;</p> <p><u>RO</u> (FGS Familia; Trade Union): “because of the mirage of significantly higher earnings, an unnatural complicity occurs between the exploited employee and the abusive employer. These types of workers will always avoid relationship with the unions”.</p>	<p>protection from abuse and free provision of services?</p> <p>Will the new clear regulatory position against fraud, abuse and circumvention promote a new trend of mutual trust among MSs in tackling genuine posting? Under what circumstances?</p>
Art. 5 – access to information	Right to accessible, clear, free of charge,	<u>IT: CISL</u> [Union] recalls: “Directive 2014/67 entrusts	What type of information shall be

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
	transparent, comprehensive information, available on a “a single official national website” (art. 5.2.a). *** Involvement of the social partners (art. 5.4)	important tasks to national unions (requests of information, complaints) and therefore unions must have full access to construction sites; (...) the scope of directives on information and consultation already applied only at corporate level (European Works Councils and the European Undertaking) should be extended. Since Directive 2014/67 imposes information requirements towards the social partners, this tool can be used to inform posted workers about their rights and duties. RO (ARAMT, Romanian Association of Temporary Work Agents): “ARAMT considers of paramount importance the duties of the authorities to inform service providers and the employees involved in posting situations on the rights and obligations related to the host MS through institution website or by setting up a special information office”.	considered necessary? What is the responsibility of the MS in case some “necessary” information is not “clearly” available on the single national website? What does it happen in case an undertaking is punished and some pieces of information are claimed to be not sufficiently “clear” and/or easily available? What is the role of the social partners in the duty of providing information on posting?
Art. 6 – administrative cooperation	Cooperation through the means of the IMI system. Max terms: 25 working days; or, in urgent cases requiring the consultation of registers: 2 working days.	BE: because of the social dumping and unfair competition practices widely spread in road transports, IMI should be implemented consistently with road transports characteristics and with the peculiar control and inspection methods carried out in this sector;	Is administrative cooperation working? How can it be improved?

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
		<p>IT: with regard to urgency reasons (max 2 days), which shall be clearly indicated in the requests made by Member States, it is believed that these reasons <u>can be found only</u> where there are indexes detecting pathological phenomena such as:</p> <p style="padding-left: 40px;"><u>fraud in posting, illegal employment</u> (i.e. undeclared work) of significant economic-social impact (according to the number of workers involved or days of irregular employment); serious infringements to health and safety regulations on the workplace; cases of labour exploitation and use of <u>children</u> where prohibited by law and other significant criminal offenses.</p> <p>RO: “mutual trust in transnational cooperation can be higher with <u>a feed-back result</u> from the host MS inspection (requesting) to the origin MS authority when providing information (IMI)”.</p>	
Artt. 9 and 10 – administrative requirements and control measures.	<u>Open list</u> of administrative requirements and control measures which the directive itself considers	BE: after the CJEU ruling (3.12.2014) in case C-315/13, there is place for a specific model of preliminary	How any “other administrative requirement” or control measure can

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
Inspections	“justified and proportionate”. *** Other requirements/controls are possible, provided that they are “justified and proportionate”. k	declaration” (see the “Limosa system” in BE), especially shaped for the road transport sector; IT: IT highlights the importance of introducing a national rule concerning the duty of making a preventive communication of posting (art. 9.1.a); RO: “it is necessary to introduce information about the place where the worker performs his/her work, in the general register of employees (inside and outside Romanian borders)” (art. 9.1.a); IT: IT suggests (see the specific chapter) a possible list of “additional measures” and controls (art. 9.3) which are ordinarily carried out in the inspections of the undertakings established in Italy.	be considered “justified and proportionate”? Is this going to turn out as an increase of political/judicial conflict at EU level? What are the risks related to an “open list” whose choice is left to the MS? Is this leading to new protectionist measures? How is this avoidable?
Art. 12 – subcontracting liability	<u>Subcontracting liability (to be implemented</u> , to be transposed by all MSs) (12.2) refers to the “net remuneration” of posted workers. In subcontracting chains, this applies to the contractor of which the employer is a direct subcontractor. It is	BE: (trade unions believe) the national transposition law needs to implement and extend the existing domestic system of joint and several liability to the logistic chain and to road transports ; DE: “given the fact that the national minimum wage will be introduced [<i>in Germany in 2015, editor’s note</i>], the implementation of the Directive could be used to enforce the application of the <i>lex loci laboris</i> in Germany and hereby equal	Is joint and several liability effective in posting? Or, is it just a way to make the established company pay in place of a non-established employer? Can “due diligence” systems be effective? Under what circumstances?

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
	<p>limited to the sectors covered by the Annex 1 of dir. 96/71/EC (construction sector): alternative measures are also possible (art. 12.6) <u>Subcontracting liability (possible introduction</u>, as a possible choice of the MS) for the other economic sectors (art. 12.1), applicable to the contractor of which the employer is a direct subcontractor, regarding “any outstanding net remuneration” of posted workers</p> <p>*** Systems of “due diligence” are possible, in place of the subcontracting liability. They are also possible if provided by national law.</p>	<p>pay according to the services trade union in Germany”; DE: (IGBAU, trade union) concludes that a “point of concern is the regulation of the opportunity for exculpation at the European level within the framework of the general contractor liability, under Art.12 of the Enforcement Directive”; IT: Italian national law provides for an extended form of joint and several liability in commercial contracts. Applying to all economic sectors, it concerns the remuneration and the social contribution of the workers in outsourcing (chains). National law is already substantially consistent with the new directive. IT: Italian national law provides for a model of “due diligence” as a possible option to rule out, as long as the model is set by a generally binding collective agreement. This option (“due diligence”) is not available at the moment, as the social partners have not implemented it yet.</p>	
Chapter VI – cross-border enforcement of financial administrative penalties and/or fines	<p>Cross-border enforcement and execution of administrative penalties and/or fines</p> <p>*** Request for recovery and notification of</p>	<p>RO (ANAF, National Tax Administration Agency): ANAF specifies “the special situation of the temporary-work agency (TWA), who pays to posted workers allowances for relocation. These allowances</p>	Will the recovery of sanctions system work? Is it going to be fair and effective?

Articles of Directive 2014/67/EU	Keynotes	National issues/comments BE: CSC Transcom/Trade unions; DE: Arbeit und Leben (bilateral agency of employers’ and workers’ representatives) IT: Ministry of Labour and Social Policies IT: CISL RO: Labour Inspection National Agency; RO: other stakeholders.	Open questions
	administrative penalties and/or fines (art. 16) *** Amounts recovered shall accrue to the requested authority (see art. 2.c and art. 19.1).	are not covered by the special fiscal definition of <i>daily allowances</i> ”. Therefore, they are not considered as remuneration by the fiscal authorities, and these “allowances for relocation” are subject neither to social contribution payments, nor to social benefits of any kind for the worker.	

2. THE NEW ENFORCEMENT DIRECTIVE: CHALLENGES AND OPPORTUNITIES FROM THE POINT OF VIEW OF THE ITALIAN CONTROL AUTHORITIES

Authors: Working Group at the Italian Ministry of Labour and Social Policies (DGAI –Direction General Inspection Activities: Antonio Allegrini, Roberta Fabrizi, Sonia Colantonio, Mariagrazia Lombardi, Marina Strangio. In cooperation with: Massimilano Mura, Fabrizio Nativi, Davide Venturi).

2.1. Introduction

The 1996 Directive on the posting of workers (96/71/EC) lays down essential provisions to safeguard and protect the rights of posted workers and to prevent social dumping, by stating a set of core and mandatory provisions about employment conditions that must be applied when a worker is posted in another Member State.

In particular, these provisions (Article 3) require Member States to ensure that posted workers are subject to the laws, regulations or administrative provisions of the host country in relation to:	
maximum work periods and minimum rest periods	EU companies posting workers in Italy shall comply with the provisions and sanctions provided for by Legislative Decree n. 66/2003, concerning working hours. Administrative penalties are imposed to the offender by the inspection staff of the Ministry of Labour and Social Policies.
minimum period of paid annual leave	
minimum wage, including extra amounts for overtime	Although in Italy there are no legally defined minimum rates of pay, the wage setting is included in the collective bargaining agreements entered into for each industry sector by the most representative trade unions at national level, in compliance with the principle of proportionality of remuneration laid down in Article 36 of the Italian Constitution The concept of wage must include all outlays of the reporting period concerning the employment relationship, gross of any contributions (social security and welfare) and withholding tax (Personal Income Tax).
conditions for temporary hiring-out of workers, in particular the supply of workers by temporary employment agencies	Cross-border employment With regard to the treatment to be granted to temporary workers, Article. 4 of Legislative Decree No. 72/2000 provides for the compliance by employment agencies having headquarters in another Member State with the rules laid down for the Italian

	agencies, now contained in sections 20-28 of Legislative Decree n. 276/2003.
health, safety and hygiene at work	EU undertakings posting workers in Italy shall comply with the provisions and the system of sanctions foreseen by Legislative Decree n. 81/2008 (Consolidated Safety Act). Legislative Decree n. 151/2001 Law no. 977/1967 and subsequent amendments In case the violation is a criminal offence, the procedure to be followed is the one under art. 15 D.Lgs. 124/2004 (compulsory warning).
Protection measures for the working conditions and employment of new or expectant mothers, children and young people	
equality of treatment between men and women and other provisions on non-discrimination	Equal Opportunities Code - Legislative Decree n. 198/2006 and subsequent amendments.

The *Enforcement Directive* (2014/67/UE) on the application of Directive no.96/71/EC makes no changes to the text of the latter, but is intended to fill regulatory gaps and overcome the uncertainties of interpretation that have accompanied its implementation in the Member States.

Therefore, the new Directive contributes to ensure that these rules are enforced more effectively in practice, particularly in some sectors such as construction and road haulage where the phenomenon of the so-called "shell companies" (without any real economic activity in their own country "of origin") is often observed, who use fake "posting" to circumvent national laws relating to social security and working conditions.

In particular, the <i>Enforcement Directive</i> :
clarifies the definition of "posting", thereby ensuring legal certainty for posted workers and service providers, and acts at the same time against "shell companies" using posting to evade the law (art. 4);
ensures better protection of the rights of posted workers by preventing fraud especially in subcontracting chains, in which workers' rights are often not respected (Article 12);
enhances cooperation between national authorities responsible for the posting (obligation to respond to requests for assistance by the competent authorities of other Member States: up to 2 working days in case of urgent requests for information and up to 25 working days in case of non-urgent requests) (art. 6);
lays out the responsibilities of the Member States to verify compliance with the rules laid down in the 1996 Directive (Member States shall designate the authorities responsible to verify compliance with the rules);
regulates the possibility for the Member States in which service providers have their registered

offices to take the necessary surveillance and enforcement measures (Article 9) or to require undertakings posting workers to:

- designate a person to liaise with the competent authorities;
- declare their identity, the number of posted workers, the beginning and end date of the posting, the address of the workplace and the nature of the services;
- make available basic documents such as employment contracts, payslips and time-sheets of posted workers.

improves rights enforcement and the handling of complaints, prescribing that both host and origin Member States ensure that posted workers, with the support of trade unions and other interested parties, can submit complaints and take legal action and / or administrative action against their employers if their rights are not respected;

ensures that administrative penalties and fines imposed on service providers by a Member State for failure to comply with the requirements of the 1996 Directive can be enforced or paid in another Member State;

stipulates that penalties for non-compliance with the directive must be effective, proportionate and dissuasive.

2.2. National transposition of the new Directive in Italy: key issues, preliminary reflections

Directive 96/71/EC was transposed into Italian law by Legislative Decree 25 February 2000 n.72 ("*Implementation of Directive 96/71/EC on the posting of workers in the framework of the provision of services*")¹, issued by the Government upon mandate of the Parliament by Community Law for 1998, whose provisions shall be supplemented and amended in the light of the changes introduced by the *Enforcement Directive* (2014/67/EU).

An examination of the new Directive shows, in fact, legal provisions particularly relevant in the field of inspection that necessarily require to be transposed in the national law of each Member State; other rules, however, are **directly applicable** in the national law as they can be qualified as **authentic interpretation** with respect to rules and precepts already in force and adopted by the Member States pursuant to Directive 96/71/EC.

We believe that the articles analysed here below (Articles 6, 9, 4 and 12) fall among the most significant provisions for the control action pertaining to the inspection staff.

¹ The Legislative Decree n. 72/2000, implementing Directive 96/71, significantly extends its scope of application in two respects: with regard to working conditions, not limited to the list of topics contained in the Directive and with reference to collective bargaining as a source of these conditions, not limiting it to the construction industry only. In the case of domestic procurement, the decree provides (through a provision that is not transposed, but that already exists in the Italian law) that the posted worker is guaranteed the same legal and economic treatment of the employees of the client company and, in addition, the latter is jointly and severally responsible for such treatment.

Article 6 - Cooperation between national authorities responsible for the posting - Request for information (Extracts)
In order to improve cooperation between national authorities responsible for the posting, Article 6 of the Directive provides that Member States shall supply the information requested by other Member States or the Commission by electronic means with the following deadlines:
a) urgent cases requiring the consultation of databases or registers, such as those on confirmation of the VAT registration, for the purpose of checking an establishment of an undertaking in another Member State: up to a maximum of two working days from the receipt of the request. The reason for the urgency shall be clearly indicated in the request, including some details to substantiate that urgency.
b) All other requests: up to a maximum of 25 working days from receipt of the request unless a shorter time limit is mutually agreed between the Member States.

About the enforcement of Article 6, it is evidenced the need to provide - through administrative channels - some operative clarifications related to the dual deadline set for the requests of information, in order to make the cooperation between the concerned Member States timely and effective, in view also of the organizational arrangements of the activities of territorial labour offices, local provincial offices of the Italian Ministry of Labour and Social Policies, competent to carry out the supervisory activities in the field of labour and social legislation.

With reference to the first deadline of **2 working days** from receipt of the request, given the particularly stringent time limit in question, it is necessary to point out that not all the relevant information aimed at verifying the actual incorporation of an undertaking in the country are available from the databases that the inspection staff of the aforementioned Territorial Offices can consult. Therefore, it is believed that, to be evaded within two days, urgent requests can only concern that information contained in the following systems:

- **InfoCamere**, the IT information system that allows the consultation of the (ordinary and historical) certificate of incorporation of the companies established in Italy and registered in the Commercial Register kept by the Chambers of Commerce (existing in each province), from which it is possible to infer information such as the VAT registration number of the undertaking, its registered office and operational headquarters, its productive and economic sector, etc..;
- **Sistema Informatico per le Comunicazioni Obbligatorie** (Information System for Compulsory Communications), *on-line* single point of access for information on establishment, extension, alteration, termination of an employment relationship, according to the unified models defined by the Ministry of Labour and Social Policies, by all parties qualified and responsible for providing information.
- **INPS database**, to verify the payment of social security contributions by the undertaking and for each individual worker.

To this end, we underline the need to implement the IMI system at national level by extending its participation to other bodies such as the Revenue Agency. With regard to **urgency reasons**, which shall

be clearly indicated in the requests made by Member States, it is believed that these reasons **can be found only** where there are indexes detecting pathological phenomena such as illegal employment of significant economic-social impact (according to the number of workers involved or days of irregular employment); serious infringements to health and safety regulations on the workplace; cases of labour exploitation and use of children where prohibited by law and other significant criminal offenses.

No specific criticalities arises, however, for the "usual deadline" of **25 working days** from receipt of the request of information, which covers all other cases not covered above, including those **involving investigations or inspections**.

In light of the foregoing, in cases of emergency requiring an inspection, effective cooperation between Member States could be achieved through two successive stages of action. First, within a maximum of 2 working days, all requests for information that can be obtained from the databases available at Offices shall be dealt with, with the right reserved - within a maximum of 25 working days - to carry out all investigations and inspections deemed necessary.

Finally, please note that, because of the implementation of the new Directive, **the IMI system** necessarily becomes the strategic tool to achieve an effective cooperation between national authorities responsible for labour supervision.

Article 9 – Administrative requirements and control measures (Extracts)
Member States may only impose the necessary administrative requirements and control measures in order to ensure the effective monitoring of compliance with the obligations set out in the "Enforcement" Directive and Directive 96/71/EC, provided that these are justified and proportionate in accordance with Union law
a) typical administrative requirements and control measures, including the prior declaration of posting;
b) additional measures to be introduced in the case of new situations or developments which show that the existing control measures are insufficient.

Upon examination of Article 9 of the new Directive, the importance of the inspection for the purposes of the provisions contained therein becomes clear. The first part of the rule, with general requirements, provides for a list of typical control measures which Member States may introduce, in order to ensure the verification of the authenticity of the posting, as well as the protection of working conditions for posted workers.

In particular, the above mentioned list, to be considered as illustrative and not exhaustive, contains a list of control measures that Member States may impose without the need to subject them to the so-called proportionality/ compliance with Union law, as opposed to what happens to the other control measures additional to those listed in paragraph 1, in accordance with paragraph 2 of the same provision. With respect to these additional measures (paragraph 2), Member States must take into account that they are required to undergo a prior test of "justification" and "proportionality" in order to ensure their conformity with Union law.

Article 9 – Administrative requirements and control measures

(Summary)

1. Member States may only impose those administrative requirements and control measures necessary to ensure the effective monitoring on the compliance with the obligations laid down in this Directive and Directive 96/71/EC, **provided that they are justified and proportionate in accordance with the Union law.**
2. Member States may impose other administrative requirements and control measures, in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, **provided that they are justified and proportionate.**

For the latter (1-2), it is necessary to inform the Commission and the other Member States, as well as to have a monitoring and evaluation by the Commission on their implementation and enforcement in accordance with Union law.

In short, based on the above mentioned art. 9, the Member State may impose:

- *"In particular,"* the control measures identified in the list included in the second part of paragraph 1 of Article. 9, without the need to refer them to the so-called proportionality / compliance with Union law (typical measures - second sentence, paragraph 1, letters from a) to f)).
- *"Only"* administrative requirements and control measures not contained in the list, necessary to ensure an effective supervision, provided that they are justified and proportionate in accordance with Union law (first sentence of the 1st paragraph).
- Additional administrative requirements and control measures to those typical and atypical referred to in paragraph 1, in case of new situations or new developments showing that the existing administrative requirements and control measures are insufficient and inefficient for an effective supervision, to be communicated to the Commission which shall assess their compliance with Union law (2nd paragraph). These measures must, however, aim at "ensuring effective monitoring of compliance with the obligations laid down in this Directive and Directive 96/71/EC" (first sentence, 1st paragraph), and are not the expression of national protectionist principles.

With regard to those typical measures identified in the list, we highlight the importance of introducing, through transposition into national law, in countries where this is not already present, the obligation for the service provider to make a prior declaration of posting to the competent national authorities of the host State, in the official language or any other language accepted by the latter, containing information relating to the identity of the service provider, the expected number and identification of posted workers, the address of their workplace, the type of services justifying the posting, and the contact persons.

With particular reference to the prior declaration of posting - that must be made, at the latest, at the beginning of the provision of service - it will be necessary to evaluate the possibility of creating a

special platform designed to enable companies established in another Member State to carry out this requirement by electronic means and in a *user-friendly* manner, as required by the directive itself, or to use IT systems that already exist.

It is also necessary, when transposing all this into national law, to predict an appropriate regime of administrative sanctions in order to ensure the fulfilment of the obligations created by the rule in question and, therefore, improve the impact of the supervisory action.

In contrast, with regard to the atypical measures referred to in Article 9.1 and the additional measures mentioned in Art.9.2 of the Directive, the national legislation transposing the Directive must first list such measures and then - with reference to the latter - identify the condition in the presence of which it is possible to implement them.

A tentative list of administrative requirements to be introduced, which meets the requirements of the supervisory bodies of our country, is contained in the table below.

Additional measures to be introduced by national legislation transposing the Directive: the obligation, during the period of posting, to make or keep available and / or retain the following documents in an accessible and clearly identified place in the territory of the host State:
1. E101-102 Forms and / or A1 Forms (Focus on INPS)
2. Document identifying the workers (to be requested already on first access) / ID Card
3. Any letter of employment, as this originates from a European law (Legislative Decree of 26 May 1997 no.152 - Implementation of Directive 91/533/EEC on the obligation of the employer to inform employees of the conditions applicable to their contract or employment relationship).
4. Declaration of hiring - public registration - or equivalent documentation (according to the legislation of the country of establishment of the employer);
5. Certificate of Incorporation of the undertaking (according to the legislation of the country of establishment), in order to verify its technical-professional competence;
6. Commercial contract between the posting company and the host company: procurement, transport, employment services (temporary), and so on.;
7. Any administrative authorizations of the country of establishment (e.g., in the case of employment services, personnel selection)
8. Driver attestation for the transport sector
9. Certificate of affiliation to the Construction Workers' Social Security Fund (or equivalent document) for the construction sector

The above documents may be requested by the inspectors if, on the occasion of the investigation, elements hinting at the existence of a case of fake posting are detected. This is our understanding of the words "*justified and proportionate*", contained in this Directive.

In this way, the possibility of enforcing optional measures to be identified by the national legislation would be triggered whenever some of the facts set out in Article 4 of the Directive in question should arise and not allow, however, to qualify the employee as a posted worker within the meaning of Directive 96/71/EC.

As these are only indicative and not mandatory elements, and can be considered only as part of an overall assessment of the case, it is considered appropriate that a certain amount of discretion is left to the supervisory bodies regarding those investigations, without the need for further specification of the requirements of Art. 4 of the Directive by the appropriate national legislation transposing it.

**Article 4 - Key facts aimed at identifying a genuine transnational posting
(Extracts)**

For the purpose of implementing, applying and enforcing Directive 96/71/EC, the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary. Those elements are intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71/EC. Those elements are intended to support the competent authorities in the verification and control and are indicative factors in the overall assessment to be made and therefore shall not be considered in isolation.

The rule is silent with regard to the penalties applicable in the event of a fake posting.

Therefore, in the transposition of the new Directive, it seems useful to clarify, first of all, that the Directive 96/71 does not apply, and therefore the worker must be considered as employed in the territory of the host State, as well as the main sanctions in the event of detection and assessment of a fake posting according to Art. 4. In this regard, in Italy it is considered appropriate to recall the national systems of penalties, both criminal and administrative, contained in art. 18 of the Decree n. 276/2003, applicable in case of suspected illegal employment, and fake posting and contract. That provision, as a compulsory rule, would apply irrespectively of the national law which governs employment contracts.

**Article 12 – Subcontracting liability
(Extracts)**

1. In order to tackle fraud and abuse, Member States may, after consulting the relevant social partners in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to, or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.
2. As regards the activities mentioned in the Annex to Directive 96/71/EC, Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.

- | |
|--|
| 3. The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his or her subcontractor. |
| 4. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those referred to in the Annex to Directive 96/71/EC. |
| 5. Member States may, in the cases referred to in paragraphs 1, 2 and 4, provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable. |

The extent of liability referred to at paragraph 1 may concern:

- remunerations to be paid to posted workers (to the extent corresponding to the minimum rates of pay provided for in the place of performance of the service);
- contributions and insurance premiums owed to social security and insurance funds or institutions.

The measures for subcontracting chains may be provided by Member States as additional or replacement measures with respect to the employer responsible for the transnational provision of services, and in any case must comply with the principles of non-discrimination and proportionality.

The term "transnational provision of services" means the case made pursuant to art. 1, paragraph 3, letters a), b) and c) of Directive 96/71 / EC, with the exceptions indicated.

The scope of responsibility for subcontracting is set by art. 3 of Directive 96/71 / EC (see, in particular, the exclusion of "initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days.", set for in art. 3, paragraph 2 of the above mentioned Directive).

The activities mentioned at point 2 of the table are those listed in the Annex to Directive 96/71 / EC and include all activities in the construction industry relating to the construction, repair, maintenance, alteration or demolition of buildings, and in particular excavation work, accommodation, construction, assembly and dismantling of prefabricated elements, fitting out or installation, alteration renovation repairs, dismantling, demolition, maintenance, painting and cleaning work, improvements.

Directive 2014/67 / EU, Art. 12, par. 3, provides that the liability of the subcontract shall be limited to workers employed in the provision of services inferred in the contract between the contractor and his or her subcontractor. It seems that the limitation of liability to the sole periods in which the provision of services has taken place is implicit.

It should be noted that, pursuant to art. 12, paragraph 4, the Member States, when implementing Union laws on liability in subcontracting, can:

- provide for more stringent rules, while respecting the principles of non-discrimination and proportionality;
- extend the scope of liability to areas other than those referred to in the Annex to Directive 96/71 / EC.

A final, but no less important reflection on the foregoing reasoning concerns the due diligence, mentioned in art. 12, paragraph 5. Based on this general provision, Member States, when implementing it, shall define the practices and procedures of monitoring and control, planned and implemented by the contractor of the transnational service, involving the overall compliance of the subcontractor, which may held the contractor not liable for the subcontract.

The provisions of art. 12 of Directive 2014/67 / EU give way to important reflections on the specific methods of implementation of the Directive, under the objective and subjective profiles of the exact scope of application (see, for example, under Italian law, the need to overcome the obsolete formulation of art. 3, paragraph 3, of Legislative Decree no. 72/2000, which is affected by the regulations then in force in the prohibition of interposition in the performance of work).

Another very sensitive matter is the identification of effective practices of *due diligence* ensuring effective controls on the overall compliance of the transnational service provider and by consequence guaranteeing, through their observance by the contractor, that the latter be not held liable for the subcontract .

3. REFLECTIONS BY ROMANIAN CONTROL AUTHORITIES AND SOCIAL PARTNERS ON EMERGING CHALLENGES AND OPPORTUNITIES ABOUT POSTING OF WORKERS WITHIN EU IN THE LIGHT OF DIRECTIVE 2014/67/EU

Authors: Romanian Labour Inspection (INSPECȚIA MUNCII): Gabriela RADU, Simona-Iuliana NEACȘU, Cătălin ȚACU. Representatives of the social partners involved in drafting this chapter: Dan CRISTESCU (President General Federation of Trade Unions FAMILY 'Anghel Saligny'); Maria Mihaela DÂRLE (Sociologist, National Trade Union Confederation Cartel-ALFA); Sorina DONISĂ (President Romanian Association of Temporary Work Agents); Camelia SLIVNEANU (Vicepresident Romanian Association of Temporary Work Agents.)

Introduction

The Romanian Labour Inspection (Labour Inspection - Inspekția Muncii) is an institution subordinated to the Ministry of Labour, Family, Social Protection and the Elderly (Ministry of Labour) having the following general responsibilities:

- enforcing all general and special legal provisions in the areas of labour relations, occupational health and safety and market surveillance;
- supplying information to employers and employees on the means of complying with the legal provisions in their areas of competence;
- informing the competent authorities about the deficiencies or abuses related to the application of the legal provisions in force;
- providing services, specific to their field of activity;
- initiating proposals to improve the legal framework in their areas of competence, and submitting them to the *Ministry of Labour*.

Concerning the transnational posting of workers, the Labour Inspection has the following specific responsibilities:

- to control the posting situations in terms of labour relations and occupational and health and safety measures (workers posted *to* and *from* Romania);
- to control the operation of temporary work agencies;
- to receive written communications by employers - service providers - other European Union (EU) member states (MS) regarding the posting of workers to Romania;
- to act as liaison office - exchange of information with the competent authorities concerning the posting of workers;
- to manage the general register of the employees in electronic format;
- to control employer level collective agreements registration and conciliation of the collective labour conflicts.

Labour Inspection is fully determined to maintain its role as central authority involved in the phenomenon of transnational posting and be actively involved in protecting the rights of posted

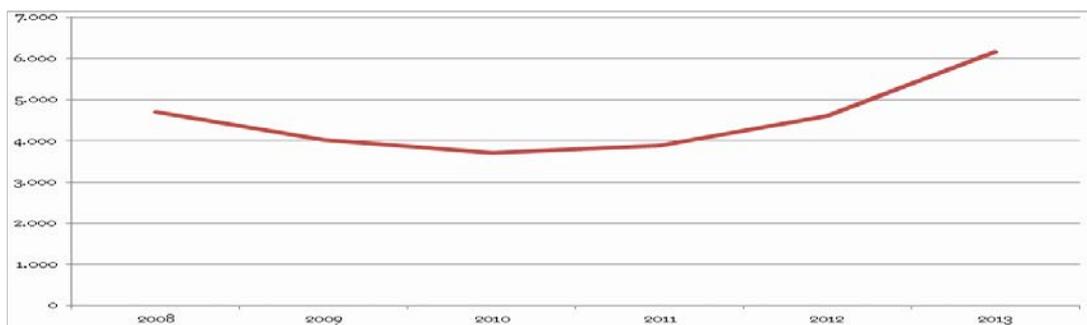
workers while ensuring a fair treatment of employers, through consultation, regulation, information, control and institutional collaboration.

To shape our institutional approach and evaluate appropriate action and necessary resources for our administrative authority to deal with this issue, *Labour Inspection* collected, processed and analyzed data related to the posting of workers. With the exception of data managed by *Labour Inspection* regarding transnational posting of workers to Romania, other information related to this form of workers' mobility are scarce, partial and difficult to validate.

With respect to the postings to Romania, we use written communications (mandatory under the G.D. no. 104/2007 managed by *Labour Inspection* as source to regulate specific procedures concerning the posting of employees in the transnational provision of services in Romania) from employers from other MS who post workers.

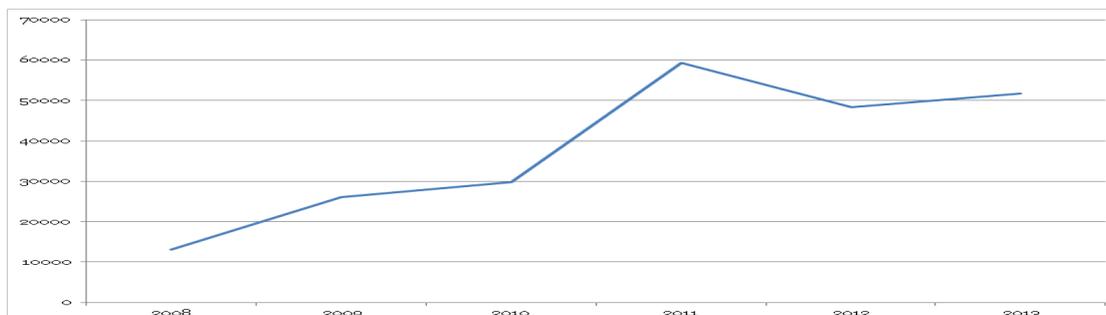
Concerning postings from Romania, available data is based on A1 portable documents (former E101 form) issued to Romanian employers that post workers abroad, administered by the *National House of Public Pensions*.

Posting of workers from other MS to Romania (number of posted workers by year)



Source: *Labour Inspection* - written communication from employers who post workers to Romania;

Posting of workers from Romania to other MS (number of posted workers by year)



Source: National House of Pensions and Other Social Insurance Rights - E101 forms and A1 portable documents issued to employers that post workers abroad (indirect through European Commission for 2008-2011, annual report for 2012 and administrative cooperation with Labour Inspection for 2013)

3.1. Legal issues relating to the implementation of the new directive by the Labour Inspection

Romanian normative acts involved in future transposition of Directive 2014/67 enforcing Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') could be:

Law no. 108/1999 for the establishment and organization of the Labour Inspection and G.D. no. 1377/2009 for approval of the Regulation of organization and functioning of the Labour Inspection;

- G.O. no. 2/2001 regarding the legal regime of contraventions;
- Law no. 53/2003 – *Labour code*;
- G.D. no. 500/2011 regarding the general register of employees;
- G.D. no. 1256/2011 regarding the authorization and functioning of temporary-work agencies,
- Law no. 344/2006 concerning the posting of employees in the framework of the transnational provision of services;
- G.D. no. 104/2007 regulating specific procedures concerning the posting of employees within the transnational provision of services in Romania.

Another possibility could be the issuing of a new law covering all regulatory directions required by Directive 96/71 and Directive 2014/67.

In any case, *Labour Inspection* will be involved in this process, even if some of the tasks of the new Directive are allocated to other national authorities (for instance, enforcement of fines). For this reason we started an evaluation process of Directive 2014/67, to find the most appropriate formal transposition and prepare *Labour Inspection* for new tasks and objectives.

Some challenges involved in the transposition of Directive 2014/67 into national law have been identified at this stage of analysis.

At national level authorities have different competencies on labour relations, occupational health and safety, hygiene at work and social security. Each MS has its own model and procedure, and this could require a relationships with more than one authority within that State for a single requesting authority.

Although a framework to assess and identify a genuine posting and prevent of abuse and circumvention exists, jurisdictional conflicts between inspection authorities belonging to the origin and the host MS can still occur. Thus, a duplication of administrative measures or differences between the appraisal of different states authorities may occur.

To ensure that service providers established in Romania supply *Labour Inspection* with all the information necessary to carry out their supervisory activities, we shall first of all identify those employers. To do so, information about the place where the worker performs his/her work must be introduced in the general register of employees (inside and outside Romanian borders).

In case of a request to recover an administrative penalty and/or fine or the notification of a decision imposing such a penalty and/or fine, "procedural mismatch" may arise in the administrative practices of the host and origin MS.

Directive 2014/67 requires a convergent approach of national inspection authorities. Communication and cooperation process shall involve at least two partners. In this case, 28 MS are engaged in finding individual solutions for the transposition of the EU legal framework.

To achieve an effective functioning of institutional cooperation mechanisms, *Labour Inspection* considers compatibility of direct relationships with inspection authorities of other MS as a fundamental element. In this context, provisions and adjustments of our strategy to respond to the new challenges with labour inspections in other MS are essential.

3.2. Problems encountered and solutions proposed by labour inspectors

To investigate the practical situation encountered while inspecting posting of workers situations, a written open questionnaire was used and disseminated to Territorial Labour Inspectorates (TLI).

The topic discussed tried to cover the most important aspects of control activities: complaints received against employers posting workers abroad and on controlled cases; information on whether posted workers informed the host country authorities; information on judicial practices on transnational posting of workers; difficulties encountered in controls aimed at checking aspects of transnational posting of workers; suggestions (administrative tools, legislative changes) to improve control activities regarding transnational posting of workers.

60% of labour inspectorates described at least one special situation encountered and identified solutions to improve control activity regarding the transnational posting of workers.

The main problems encountered by labour inspectors were:

- lack of accessible data about posting situations without receiving a complaint or a request for information;
- majority of complaints from the employees regarding non-payment of wages;
- impossibility of checking documents recording the working time;
- undeclared or delayed-declared work;
- difficulty in identifying the real employer in a subcontracting chain;
- lack of regulations regarding working conditions for self-employed workers and company owners;
- translation of the documents needed for the control;
- the enforcement of fines imposed;

- successive postings by a temporary work agency (TWA);
- interpretation of the concept of minimum wage;
- tangled employment relationships;
- absence of legal representative of the legal person in Romania;
- logistic problems;
- uneven practice of inspectorates.

Solutions and suggestions proposed by labour inspectors:

- obligation for the employers to translate the documents needed for the control in the Romanian language;
- extending the applicability of Romanian law transposing Directive 96/71 to self-employed people and the owners of companies posted in Romania;
- obliging Romanian employers who post workers to notify Romanian authorities;
- more effective and dissuasive penalties;
- better access to information for employers and employees;
- decentralization of portable document A1 at county level of issuing (now one national office);
- flexibility in assessing significant activity;
- better cooperation and exchange of information with the authority issuing portable document A1;
- financial guarantees provided by the employer posting workers.

3.3. Perceptions and opinions of the Romanian stakeholders

Labour Inspection cooperates with the **National Tax Administration Agency** (ANAF) on issues relating to the tax levying on the various components of the remuneration package paid by employers to the employees who work on a temporary basis in another EU MS.

ANAF believes that the situations of temporary-work agencies (TWA) paying posted workers allowances for relocation, are not covered by the special fiscal definition of *daily allowances*. The fiscal situation of these amounts causes a different level of social security contributions, with a major impact on TWA.

A better conciliation is also required between the simultaneous application of the domestic legislation of the origin MS transposing Directive 2008/104 and that of the host MS transposing Directive 96/71, as concerns the principle of equal treatment (for the duration of their assignment at a user undertaking, the basic working and employment conditions of temporary workers shall be at least those that would apply if they had been recruited directly by that undertaking to occupy the same position).

To solve this problem it is necessary to amend the legislative framework (tax and labour provisions) so that it could address the special problems posed by the posting of workers in the framework of the provision of services.

The National Trade Union Confederation Cartel-ALFA (*Cartel-ALFA*) was founded in 1990 to achieve a real and genuine representation of workers in Romania.

Cartel-ALFA has contributed to transform Romanian trade union movements through the training of experienced union militants who can express their views freely and truly represent workers' interests.

To defend the interests of mobile workers, including transnational posted workers, *Cartel-ALFA* has been actively involved in campaigns and projects providing information services. The Confederation had a significant participation in transnational activities carried out under this project.

As posted workers and self-employed people have a low interest in seeking information and support, information must be disseminated in different ways to reach those in need.

The **General Federation of Trade Unions FAMILY 'Anghel Saligny'** (*FGS-Familia*), affiliated to *Cartel-ALFA* confederation, is a trade union organization which brings together trade unions of construction units, building materials and ceramics, utility services, wood, and other fields.

FGS-Familia was involved mainly after Romania became a EU member State, and companies started working as subcontractors and used the posting of workers. In Directive 96/71, the "country of origin" principle created problems to eastern and westerns MS alike, as it deregulates labour markets, mainly in terms of wages and collective bargaining. To change this situation, *FGS-Familia* decided to fight against the directive's collateral effects.

Some hundreds trade union members worked as posted workers mainly in Germany and Belgium. Although they received the minimum wage foreseen in these countries; they nevertheless got a wage three times higher than the wage they would have received at home and were "NOT cheated".

In the building sector, other European Federations helped to better represent locally *FGS-Familia's* members while everybody was fighting hard to get new members. Because of the mirage of significantly higher earnings, an unnatural complicity occurs between the exploited employee and the abusive employer. These types of workers will always avoid relationship with the unions.

As concerns the actions addressed to posted workers, since 2007, *FGS-Familia* and the *Organization of Employers in the Building Industry – ARACO*, created the Joint Committee for Migrant, Mobile and Posted Workers.

Romanian employers involved in the posting of workers have described specific situations where they were required pre-licensing conditions in the host MS, although they had achieved them in the MS of establishment.

A consistent point of view was expressed by **Romanian Association of Temporary Work Agents** (*ARAMT*), due to their involvement in the activities of this project. *ARAMT* is a non-profit organisation that acts for the protection and development of the temporary work sector in Romania, and supports temporary work agencies by providing solutions to various situations, or addressing petitions to competent authorities.

ARAMT believes that transnational posting should ensure freedom of movement for workers in the EU and not restrict this right. Although transnational posting should apparently be a factor to increase

labour mobility within the EU, in fact, the high degree of bureaucracy and the difficult legal framework in this area do not only represent a hinder to mobility but they also restrict access and equal opportunities on the European labour market for all EU citizens, especially those from Eastern European MS.

Some *ARAMT* members found it difficult to obtain clear information on the applicable legislation of the MS where employees were posted because each MS had national specific social rules. The documentation process concerning the legislative requirements of the host MS is difficult, and requires the involvement of several local institutions.

On the other side, *ARAMT* considers that Romanian tax authorities have misinterpreted the rights of a temporary employee when they said that daily allowances shall not be granted to the temporary worker. *ARAMT* has encountered difficulties in obtaining A1 portable documents due to the long period of time necessary for their issuing.

ARAMT believes that the temporary employee must be free to join any trade union at home as well as in the host MS, depending on the protection he/she requires. A trade union from the origin MS cannot effectively protect the posted worker situated in a host MS, and therefore joining a trade union of the host MS is fully justified. Also, temporary employees will benefit from the collective agreement applicable to the user company.

Regarding the employer's right to join the employers' organizations in the host MS, *ARAMT* does not consider that possibility as appropriate. The reason is that in most cases employers in the origin MS do not create jobs for posted workers in the host MS. Those jobs are generally created, organized and coordinated by employers/users company from the host MS.

Representatives of temporary work agencies believe that the controls of the authorities of the host State are as important as those carried out in the State of origin to ensure the rights and working conditions for temporary employee. The user should be obliged to prove that he will remedy all irregularities, even if this involves the modification of contractual relationship with the AMT.

Communication mechanisms to the authorities from the host MS regarding posted workers have to be possible by written notices combined with e-mail sending.

ARAMT considers of paramount importance the duties of the authorities to inform service providers and the employees involved in posting situations on the rights and obligations related to the host MS through institution websites or by setting up a special information office.

3.4. Romanian Labour Inspection conclusions

An active involvement of the *Labour Inspection* in the transposition of Directive 2014/67 is necessary, after an in-depth internal analysis. We must prepare our organization for the new perspective on transnational cooperation: providing information, training human resources, technical equipment - communications - transport needs.

To realize a better monitoring of posting situations, we must rethink labour relations declaring system and develop a closer cooperation with other authorities involved in this issue.

We must evaluate and try to anticipate the possible judgment courts' position in case of a judicial procedure regarding evidence issues and procedural conditions provided or fulfilled by the foreign authorities.

In order to have an efficient implementation of the Directive, a special focus on the fraudulent conduct of employers is mandatory. This include a fight against any abuse of rights (freedom to provide services, freedom of establishment, temporary/permanent workers relocation, non-registration and non-payment of social security taxes) and actions against undeclared work (fake self-employment, fake posting, workforce sale).

Labour Inspection considers learning from good practice of other MS labour inspection authorities an important element in areas such as effectiveness and dissuasive effect of penalties, subcontracting chains, or personal "offences" records. Instruments such as these should be implemented in a uniform manner in all EU Member States.

The involvement of social partners is essential to find the best and most appropriate means to support the correct postings and combat irregular conducts.

Enhancing permanent cooperation with other authorities, unions and employers associations, national and European, is a good conduct to give a real continuity to the protection of posted workers' rights.

Mutual trust in transnational cooperation can be improved through the feed-back results from the host MS inspection (requesting) to the origin MS authority in the provision of information (IMI).

The project 'ENFOSTER' has been an excellent opportunity to strengthen the *Labour Inspection* institutional cooperation with control authorities and national social partners from other MS.

Projects like this provides the necessary financial and operational support to adapt *Labour Inspection* to the new requirements in the field of cooperation with inspection authorities of the other MS of the EU.

4. SOME REFLECTIONS ON THE ENFORCEMENT DIRECTIVE 2014/67/EU BY CISL AND FILCA CISL

Authors: Francesco Lauria (CISL Nazionale) and Claudio Sottile (FILCA CISL Nazionale).

Directive 2014/67 concerning the transnational posting of workers was a compromise, and in many ways an unsatisfactory one, to restore the social value of the Community legislation for the protection of posted workers, bridging those gaps present in Directive 96/71 and made clear by the numerous and negative judgments of the European Court of Justice.

After the official publication of the European Directive, on May 28th, 2014, the scope for concrete improvement was entrusted especially to national transposition processes. These play a fundamental

role in restoring the focus on the protection of individual rights and collective actions in the transnational posting of workers, though without prejudice to other fundamental rights of the European Union.

As concerns the transposition of Directive 2014/67/UE, we therefore believe that the active involvement of national unions is of the utmost importance in the transposition of the new “Enforcement” Directive concerning the posting of workers.

The dialogue between national governments and social partners has an overwhelming importance, but it must be extended also to labour inspectorates, to issue transposition laws exceeding the basic elements of the Directive.

Far from being considered as a mere technical issue, transposition acquires a clear political connotation.

But how will this transposition occur?

Shall it take place through a shared position among the social partners? Or through discussion and negotiation between the Unions and Confindustria (Employers’ Association)? Or, as it is unfortunately often the case, without any substantial discussion and through measures issued by the Italian government in the month of January of the year in which other directives of the European Parliament shall be transposed, through a single and comprehensive package?

Any "copy and paste" of this European Directive should be clearly avoided....

The transposition in our national system must try to bridge all gaps and interpretations that could lead to abuse by unscrupulous undertakings, thus protecting those undertakings that intend to use the posting of workers in the correct way.

Here are some possibilities for expansion and improvement of the transposition:

- Unions should be granted access to construction sites: the fight against social fraud is a matter of public policy. Directive 2014/67 entrusts important tasks to national unions (requests of information, complaints) and therefore unions must have full access to construction sites. The national transposition law can foresee practical arrangements to be developed by social partners of the industry through collective bargaining.
- Possibility to organize and present collective legal actions: since social fraud in temporary posting concerns a group of workers who are in a same situation, it is desirable that the transposition law could provide for the possibility of collective actions and collective legal claims. A single, collective claim should be allowed against a fraudulent employer to request compensation for workers.
- Compulsory information and consultation requirements in case of transnational workplaces: the scope of directives on information and consultation already applied only at corporate level (European Works Councils and the European Undertaking) should be extended. Since Directive 2014/67 imposes information requirements towards the social partners, this tool can be used to inform posted workers about their rights and duties.

- Protection of the right to strike: the transposition law may expressly provide that workers cannot be used to replace other workers who have taken strike actions.

Finally, in the same period in which the transposition of this Directive will take place, other European Directives (intra-corporate transfers - seasonal workers and free movement of workers) shall be transposed.

Since the European Directive on seasonal workers regulated in detail the issue of equal treatment, this issue could constitute a reference to achieve equal treatment also for Directive 2014/67. The need not to penalise posted workers from an EU-member State could be used as a leverage, based on the right of equal treatment granted to seasonal workers from non-EU countries.

5. TRANSPOSITION OF DIRECTIVE 2014/67/EU IN BELGIUM

Author: Roberto Parrillo (CSC Transcom, Belgium)

5.1. Position of Belgian unions

The three Belgian unions (CSC / FGVB / CGSLB) have sent a letter to the president of the CNT (*Conseil National du Travail / National Labour Council*) calling for this transposition to be done in a way supporting the rights of mobile workers and those of permanent domestic workers as best as possible, as well as supporting the interests of Belgian companies wishing to maintain healthy competition without recourse to social dumping to the detriment of everybody.

In the view of the three unions and looking beyond the proper management of intra-EU posting theory, the question is whether the industrial relations system set forth in the Law of 5 December 1968 can be maintained and whether the principles of the Law of 5 March transposing Directive 96/71/EC are complied with.

What is clear is that, for the three Belgian unions, the CNT has an important coordination role to play.

Directive 2014/67/EU covers a range of aspects needing to be dealt with in the EU Member States, at very different levels and with the risk of legal inconsistency reducing its effectiveness.

Though it is obvious that questions covering all sectors will arise, there will also be aspects specific to a sector (as in the road haulage sector). As a result, we need the CNT to ensure coordination, even if unofficially.

One important aspect will involve the role of the supervisory authorities and cross-border collaboration measures in which the economic and social councils with which the CNT maintains contacts could also play a role.

It will also be important to ensure that the directive is implemented in a manner consistent with the measures taken by Belgium with regard to social security fraud and social security criminal law.

Directive 2014/67/EU does not question Directive 96/71/EC, respecting the fundamental rights recognised in the Member States and at EU level.

Its objectives are:

- (1) to establish a common framework** of a set of appropriate **provisions**, measures and **control mechanisms necessary for better and more uniform** implementation, application and enforcement in practice of Directive 96/71/EC on the posting of workers.
- (2)** to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided.
- (3)** New provisions have been introduced requiring Member States to designate **one or more competent authorities**, which may include the liaison office(s) as referred to in Directive 96/71/EC. The contact details of the competent authorities shall be communicated to the Commission and to the other Member States.
- (4)** a regime of subcontracting liability, optional for all activities except those mentioned in the Annex of Directive 96/71/EC (basically construction though in a broader sense - i.e. including refurbishment, demolition and maintenance), where Member States must take measures ensuring joint and several liability in subcontracting chains. What is clear is that joint and several liability in subcontracting chains needs to be introduced in the road haulage sector.

There is thus both a legal dimension **and** an administrative dimension to be introduced.

5.1.1. Role of the Belgian sectoral unions

It is clear that transposition must take into account the specific features of the main sectors, i.e. construction, transport, temp work, the food industry, etc.

To do this, it is essential that in each Joint Commission the social partners take up their responsibility and undertake to work for a transposition ensuring equal competition conditions between companies and the respect of workers' rights.

5.2. Practical transposition aspects in the road haulage sector

In transposing the directive, we need to take the specific nature of the road haulage sector into account. Indeed, while the construction sector can be characterised as being a "site-bound" sector, the road haulage sector is, by definition, a mobile sector. We must therefore also view transposition from this angle.

- Article 4 of the Directive: Identification of a genuine posting and prevention of abuse and circumvention

Transposition of the Directive in the road haulage sector must set the criteria laid down by the Directive itself as being the factual elements to be taken into consideration to assess the worker's situation.

- Article 5 of the Directive: Improved access to information

Transposition of the Directive in the road haulage sector must include a website managed by the SPF Mobility & Transport and accessible by all supervisory departments. Its purpose would be to coordinate all information regarding road transport.

The social partners should be closely involved in distributing information on working conditions (wages, ways of calculating them, etc.)

- Article 6 of the Directive: Mutual assistance - general principles

Given the recurrent occurrence of social dumping and unfair competition in the road haulage sector, there is an urgent need to implement the "IMI" system in the sector.

For this purpose, transposition should specify a time limit of two working days for urgent information demanded by a Member State or the European Commission.

For all other non-urgent information for which a 25-day time limit is foreseen, appropriate steps should be taken to reduce this.

- Article 9 of the Directive: Administrative requirements and control measures

As foreseen by Article 9.1 and 9.2, an advance declaration (Limosa declaration) needs to be foreseen for the road haulage sector, taking account of the sector's specific features. Such a declaration should be made for each haulage operation.

This declaration could also be done electronically (e.g. via an IT system, mobile phone or smartphone) in the following three situations: cabotage, cross-trade transport and intermodal transport.

- Article 11 of the Directive: Defence of rights — facilitation of complaints — back-payments

In transposition, a provision needs to be foreseen enabling a worker to submit a complaint in defence of his rights not just against his employer but also against the person placing the order, the freight forwarder, the consignor, the party for whom the services are intended as well as all those involved in the subcontracting chain.

Transposition of the Directive in the road haulage sector should clearly specify the concept of a minimum wage as foreseen in the sector's collectively agreed wage scale. For this purpose, as foreseen in Article 5, an obligation should be included requiring posted workers to receive (prior to posting) the necessary information on the working and employment conditions listed in Article 3 of Directive 96/71/EC.

- Article 12 of the Directive: Subcontracting liability

Given the recurrent occurrence of social dumping and unfair competition in the road haulage sector and the sector's specific features, there is a need not just to impose co-liability throughout the whole logistic chain involved directly or indirectly in service provision, but also to extend it to the whole period applying to a non-posted worker when a breach and/or circumvention of the applicable rules has occurred.

- Article 20 of the Directive: penalties

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 18 June 2016. They shall notify without delay any subsequent amendments to them.

Given the recurrent occurrence of social dumping and unfair competition in the road haulage sector, there is a need not just to impose all the penalties applicable in the event of infringements of the national provisions but also to put a special focus on the following legal provisions:

"Belgian social security criminal code (Code pénal social):

Art.234. Incorrect or incomplete social security declarations
§1 A level-4 penalty shall apply to anyone who has knowingly and wilfully:

1. made an incorrect or incomplete declaration in order not to pay / have others not pay contributions, or to pay / have others pay less than those that would otherwise have been normally owed;

2. omitted or refused to make a required declaration or to provide required information in order not to pay / have others not pay contributions, or to pay / have others pay less than those that would otherwise have been normally owed;

3. paid less contributions than those normally owed or has not paid them after having made a declaration pursuant to §1.1., after having omitted or refused to make a declaration or to provide information pursuant to §1.2, or performed a deed mentioned under Articles 232 and 235.

When the infringements mentioned under §1 are committed by an employer, his employee or his agent, the fine shall be multiplied by the number of workers concerned.

§ 2. A level-3 penalty shall apply to anyone who has knowingly and wilfully omitted to declare that he is no longer entitled to an exemption or a reduction in his contributions, even if this is only partly the case, in order not to pay contributions or to pay less than those normally owed.

Art.235. Under the Belgian social security criminal code, a level-4 penalty applies to fraud committed with the aim of either gaining / having others gain or retaining / having others retain an undue social security benefit, or of not paying / having others not pay contributions less than those that would otherwise have been normally owed, using false names, false titles or false addresses or committing any other fraudulent deed leading the authorities to believe in the existence of a false person, a false company, a fictitious accident or any other fictitious event or to abuse trust in any other way.

When the infringement mentioned under §1 is committed by an employer, his employee or his agent

in order to gain or retain a social security benefit to which the worker is not entitled, the fine shall be multiplied by the number of workers concerned.

"Criminal Code (Code pénal), Book II, Title III, Chapter III: "trafficking in human beings" (de la traite des êtres humains):

Article 433 quinquies:

§ 1. The offence of trafficking in human beings refers to recruiting, transporting, sheltering or receiving a person, or to passing on or transferring control exercised over him/her, in order to:

1. allow offences set forth in Article 379 §1 and §4 and Article 383bis §1 to be committed against such person;
2. allow the offence set forth in Article 433ter to be committed against such person;
3. have / allow such person to work under conditions contrary to human dignity;
4. take / allow to be taken from such person organs or tissue in violation of the Law of 13 June 1986 on the removal and transplantation of organs;
5. have a crime or offence committed against such person against his will.

Apart from the case listed under Item 5, the fact that the person referred to §1 has given his consent to the planned or actual operation is irrelevant.

§ 2. An offence as set forth in §1 shall be punished by 1 - 5 years imprisonment and a fine of €500 - €50,000.

§ 3. An attempt to commit an offence set forth in §1 shall be punished by 1 - 3 years imprisonment and a fine of €100 - €10,000."

5.3. Enforcement of the Posted Workers Directive in the road haulage sector

For the PWD to be applicable in road haulage, the driver needs to execute his employment contract for a limited period in a Member State other than the one in which he habitually works, and that:

- either he is posted within the company/group - i.e. the driver is assigned to a company branch located in another Member State or to another company within the group,
- or that he is provided by a temporary employment agency
- or that he is performing a transnational provision of services **which in the transport sector means:**
 - provision of services: transporting on behalf of a third-party - i.e. the haulage company is not the owner of the goods.
 - Transnational: this refers to the nationality of the contracting parties, where at least three are listed in the haulage contract: the sender, the haulier and the recipient. All

that is needed is for two of these three contracting parties to be based in two different Member States for service provision to be transnational.

- Working conditions in the service recipient's country which are more favourable than those in the country in which the driver habitually works. This means that the driver has to be paid in accordance with the minimum pay scales applicable in the country to which he is posted when these are more favourable than in the country in which he habitually works.

Posting legislation needs to allow the restoration of the rights of drivers who, while habitually working in a country with a lower level of wages, temporarily work in Belgium in the context of an international carriage – for the part performed on Belgian territory –, a cabotage or intermodal operation or agency work.

5.4. A few thoughts from CSC-Transcom:

- The criteria used by the Court of Justice of the European Union (the Koelzsch ruling C-29/10 and the Voogsgeerd ruling C-384/10) allow the restoration of the rights of road haulage drivers excluded from the labour law of the country in which they habitually work on the basis of the provisions of a contract concluded under foreign law but not executed in reality.
- Whether reporting or dealing with an offence, there are often several monitoring agencies involved.
- Enforcement of road transport rules and regulations is closely linked to the sector's innate problem, i.e. road transport is a mobile activity, with vehicles constantly on the move throughout Europe.
- National registers should have been introduced in all European countries by the end of 2012 and to have been linked together. The current status is that just 10 countries are linked up.
- As regards labour inspectors, there are great differences in how they enforce the rules and regulations.
- There are no data or overviews on the punishment of infringements regarding compliance with transport rules and regulations and, more particularly, with posting regulations in the haulage sector.
- The difficulty in enforcing the rules and regulations is associated on the one hand with increasingly complex fraud structures which are difficult to control and consequently to punish, and on the other hand a flagrant lack of cooperation between certain Member States in the context of cross-border fraud.
- The strategies used by Belgian-based fraudsters involve in particular the use of a subsidiary registered in a neighbouring Member State to employ drivers subject to a less favourable labour law. Such a law is very often not that of the country in which they habitually work. Certain Member

States pursue such fraudsters. Which cooperation measures could be introduced to detect and punish fraudsters benefiting from a lack of cross-border coordination?

- With regard to the enforcement of the PWD in the haulage sector or the enforcement of Regulation 593/2008, there are at present practically no precise figures available. At most, there have been perhaps a dozen surveys of illegal cabotage. And even here, the findings have rarely been used to enforce the PWD. However the response just in the field of transport legislation is incomplete and not a sufficient deterrent given the magnitude of the fraud.
- Last but not least, as a trade union organisation, in my view it is up to us in particular to make use of the instruments introduced on the basis of the directives to assist deprived workers in exercising their rights. Whether by acting on their behalf in legal disputes in courts foreign to them, or by supporting criminal charges pressed by inspectors and public prosecutors; by acting as civil parties and helping them in court. At a European level, unions may also pose the question of the admissibility of the right to sue in a foreign court.

6. PERSPECTIVE OF THE GERMAN STAKEHOLDERS ON THE DIRECTIVE 2014/67/EU

Author Bettina Wagner (Arbeit und Leben e.V. Berlin, Germany).

Within the Enfoster Project, the partner “Arbeit und Leben” has made some interviews and meetings with German stakeholders about the new Directive 2014/67/EU (the “Enforcement Directive”). The collected feedback is shortly reported in the summary below.

According to its website, the employers' organization "Professional Association for the Construction Industry" calls, similarly to the IGBAU, for an increase in the investigative staff of the FKS, and demands an intensive examination of employers prior to the awarding of contracts. Like the IGBAU, they also support the introduction of a smart, electronic social security card, in order to make labor conditions more transparent for all workers.²

The IGBAU was also very active in the period leading up to the Services Directive and issued several statements. Moreover, the IGBAU has been very active at the European Level calling upon action and presenting possibilities for altering the text during the policy making process in order to strengthen the directive and protect the workers. The IGBAU is particularly skeptical about the implementation of the Services Directive in Germany and the almost simultaneous introduction of the minimum wage act. Another point of concern is the regulation of the opportunity for exculpation on the European level within the framework of general contractor liability, under Art.12 of the Enforcement Directive. The IGBAU calls for the introduction of a labor inspection, which would be responsible for the assertion of wage claims, as it is already practiced in other Member States, e.g. Poland. It is furthermore stipulated that the expansion of cross-border cooperation of the social partners is necessary in order to solve

² <http://www.fg-bau.de/unsere-leistungen/bekaempfung-von-schwarzarbeit-am-bau.html>

complex problems such as the identification of foreign companies and cross-border organized false self-employment, which is organized across the border, quicker and in a more sustainable fashion.

The Enforcement Directive has not yet been discussed internally at the FKS, the responsible institution for combatting illicit employment. The primary focus has been on the introduction of the minimum wage in January 2015. However, it was discussed already within the sector-specific alliances. It is expected that once the Directive must be implemented at national level, the finance offices will also address it and verify in how far changes will be necessary in the present handling.

According to the SOKA-Bau all sectors have to be included into the German Posted-Workers Act. The implementation of the Enforcement Directive would offer a good opportunity to include them. This would help at the national level to impede circumvention mechanisms as they are used at present.

Moreover, given the fact that the national minimum wage will be introduced the implementation of the Directive could be used to enforce the application of the *lex locus labori* in Germany and hereby equal pay according to the services trade union in Germany.

7. THE ENFORCEMENT OF THE POSTING OF WORKERS DIRECTIVE 2014/67/EU: THE POSITION OF EFBWW (EUROPEAN FEDERATION OF BUILDING AND WOOD WORKERS)

Author: Werner Buelen (EFBWW)

Introduction

In view of the significance for trade unions and workers of transposition of the Enforcement Directive, the EFBWW recommends that this discussion be conducted against the backdrop of appropriate media focus on cross-border social fraud and exploitation of workers. Every effort must be made to ensure that transposition is not viewed as a technical discussion to be held within a limited group. Naturally, it is also crucial for national trade unions to play a direct role in transposing the Enforcement Directive. Since some articles of the Directive relate directly to the role of trade unions, the national unions must be involved in its transposition. In this context, unions must also seek out support from other parties such as labour inspectorates and NGOs, for example.

Despite the low targets set by the Enforcement Directive in the form of minimal requirements as regards national enforcement of the Posted Workers Directive, it is crucial that transposition of it by Member States into national law seeks to achieve the very highest targets possible. The underlying principle throughout must be that of "equal pay for equal work", and the provisions contained in Articles 1 and 21.1 of the Charter of Fundamental Rights of the European Union should be taken as the benchmark in this context. Said articles state, respectively: "*Human dignity is inviolable. It must be respected and protected.*" and "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be*

prohibited.” Since the Charter now forms part of the EU Treaty, its provisions should be viewed as authoritative as regards the interpretation, transposition and application of the Enforcement Directive.

Furthermore, reference should be made to the *Laval* ruling by the European Court of Justice (case 0341/05) on 18 December 2007, which stipulates that practices to combat social dumping “may constitute an overriding reason in the general interest” (point 103).

In looking at transposition of the Enforcement Directive, consideration should also be given to whether failure to comply with the Posted Workers Directive should be subject to penalties. The previous two comments could be used in this context. Adopting a criminal approach to non-compliance would offer more options in terms of inspections and penalties than going down the civil route.

In any case, however, discussion of transposition of the Enforcement Directive should take place within a much broader framework than merely non-compliance with the Posted Workers Directive. It should certainly be extended to include non-compliance with the Temporary Workers Directive, the Free Movement of Workers Directive, rules governing the movement of workers from non-Member States and, by extension, aspects of undeclared labour. Points for discussion should certainly include the number of labour inspectors, frequency of inspections, extension of the scope of inspections, authority as regards penalties and necessary resources.

7.1. The reality of posting in the European construction industry

Over the past decade, the labour market and economic situation for the construction sector have changed dramatically. Some of these changes are quite logical transformations that have affected all sectors, such as the greening of the economy and the effects of the financial and economic crisis.

In addition to these changes, there has also been a sharp increase in unfair competition, which now affects thousands of workers and construction companies daily. This trend is significantly undermining companies' competitiveness, as well as being an obstacle to the sustainable development of the construction sector. Such unfair competition is an unequal fight based strictly on lowest price, rather than on innovation, expertise and quality. Within the current system, there is almost no longer a level playing field for companies, which is leading to further abuse. In the long term, this is a lose-lose model: companies are no longer able to compete with each other on equal terms, workers are increasingly considered solely as a cost factor, governments lose out on billions of euro annually in revenue (through un-paid social security contributions and taxation) and consumers get products with lower quality for their money.

Because construction is a highly labour-intensive industry, in which around 50% of the turnover consists of staff costs, it is no surprise that the unfair competition occurs primarily on the labour market and particularly in relation to the labour cost of workers.

Since construction projects cannot be moved from one place to another, the construction sector is characterised by a high level of mobility among companies and workers. Cross-border mobility is also very high.

The current system of unfair competition has its origins in a failed EU policy that has resulted in a wide g between the Europe 2020 strategy, which aims to develop the European economy into a highly competitive, social and green market economy, and the current reality of growing unfair competition and social dumping on the labour market in the construction sector.

In view of these serious developments, the EFBWW has sound the alarm, at national and EU-level and insists that the exiting problems acknowledged, discussed and that viable solutions are found.

These problems can only be addressed by acknowledging the reality of the situation, without hindrance from "political taboos". This is the only way to resolve the problems we face.

All national labour markets within the European Union are in many aspects unique and completely different from each other. This is not a problem in itself and it is a characteristic feature of the pluralistic European labour market.

However, a number of labour markets (mainly in Eastern European countries and some southern European countries) are seriously distorted by phenomena such as undeclared work, widespread mistrust of government institutions due to inefficiency and corruption, absence of social dialogue between the two sides of industry, no efficient labour market supervision, etc. In addition, the minimum wages applied in some countries are not high enough to give ordinary workers a normal quality of life, further exacerbating the above phenomena. These major distortions of national labour markets foster a culture of resignation and acceptance among both employers and workers, which in turn leads to a culture of "we sort out our own problems".

Within the context of a European internal market, with its freedom to provide services and freedom of movement, these national characteristics are exported, as it were, to other countries. When this "culture" is applied in a country where the national labour market operates in a normal regulated way, the phenomenon leads to major labour market conflicts in the country of employment. Many employers and workers know very little about the operation, structures and rules of labour markets in other countries and their automatic response is to take their "system, model and culture" with them when they go abroad.

To solve this fundamental problem, it is not enough simply to provide adequate information to employers and workers when they start operating in another Member State. This crucial problem can and must be addressed in the Member States where the problems arise. This means that all Member States must be obliged to “regularise” their labour markets in order to create a level playing-field and a common base within the European labour market.

7.2. Possibilities for expanding the Enforcement Directive (thinking outside the box)

The EFBWW considers that the Enforcement Directive is a minimum-standards framework directive and in addition to expanding the provisions it already contains, it could also be expanded at national level to comprise additional specifications. A few possible examples are given below – examples which could also be included in the implementing legislation or in addition to the implementation law:

A. Union access to work sites

Given that combating social fraud is a public-policy issue and that the Enforcement Directive makes specific provision for certain key tasks to be assigned to national unions (e.g. information, complaints), it would be logical for unions to be granted access to work sites. If required, national implementing legislation could make provision for the practicalities of such an arrangement to be drawn up by the social partners in the construction sector by means of a collective agreement.

B. Possibility of organising and lodging action for collective redress (class action)

Since social fraud in the context of temporary posting in almost all cases affects a group of workers in the same situation, and given the substantial cost to an individual of legal action, it would be advisable for implementing legislation to make provision for class actions for collective redress. In such a scenario, a single action could be brought against employers who engage in social fraud and they could be compelled to pay greater compensation. Higher levels of compensation would, in turn, act as stronger deterrent to other such employers.

C. Requirement for "transnational information and consultation of employees" with regard to jobs

A requirement for transnational information and consultation already exists via Directives 2009/38/EC (EWC) and 2001/86/EC (European Company), however the provisions only apply in the context of companies. The Enforcement Directive makes provision for a special temporary yet mandatory information and consultation procedure as regards jobs where foreign workers are temporarily posted elsewhere (transnational jobs). Since the Enforcement Directive places a special information requirement on the social partners (and therefore also on unions), such a mechanism may be used to inform foreign workers of their rights, options and obligations. If necessary, additional measures could be included such as inspections, consultations, complaints procedures and so forth.

In the past, EFBWW has spearheaded a range of projects in relation to transnational jobs (e.g. Alp-Transit, sites along the Cologne-Frankfurt rail line) and is currently organising a similar project in France/Italy for the Lyon-Turin site. This experience could be utilised as an example of best practices.

D. Safeguarding the right to strike

Implementing legislation could include the specific provision that temporary posted workers may not be hired to replace workers who have stopped work as a result of industrial action (i.e. strike or lock-out). Recital 7 of the Enforcement Directive makes indirect reference to this and could be used as a basis.

E. Strengthening checks, investigations and control

All Member States should use the Enforcement Directive as an opportunity, to ensure that labour checks, investigations and controls are effective and adequate, announced and unannounced, inspections must be carried out on their territory to control any form of social fraud. The EFBWW wishes' to emphasise that such inspections shall primarily take place on site. In order to achieve

the highest outcome, at least 20 percent of all services providers, must be controlled annually by the competent authorities in the Member States.

With a view to increasing effectiveness of inspections, Member States shall on the basis of a periodical (minimum once a year) risk assessment increase the number of controls of those activities in which illicit employment are concentrated on their territory.

An efficient control requires that there is a smooth internal coordination between the different national administrative bodies (migration, taxation, social security, labour labour, traffic ...) and that all relevant information and data is exchanged with bureaucratic, organisational or political obstacles. The EFBWW strongly insists that all member states must ensure an enhanced coordination of strategies and operations, including uniform data sharing at national, regional and local levels with a wide array of relevant social partners included at all special levels.

F. Specific rules to tackle illicit labour providers (gang masters) and labour users

The EFBWW strongly encourages all Member States to lay down strict conditions on employment intermediaries in the labour market (such as temporary agency work, temporary recruitment, posting, ...). The reasons for this are clear as, based on our experience, posted workers who are hired via intermediaries – within the so-called triangular employment relationship - are significantly more likely to be illicitly engaged.

All Member states should ensure that all intermediary labour providers must clearly demonstrate and prove that they are complying with the law, regulations and collective agreement of the country to which they provide labour. In addition to this all “business-users” must play their part by using only those labour providers that can demonstrate and prove that they are complying with the law, collective agreements, regulation and relevant practices of the construction sector. The national sectoral social partners of the construction industry are strongly encouraged to discuss this. Possible suggestions are that all labour providers must:

1. join a mandatory register set up by the Member States;
2. must be regularly audited by an independent body,
3. provide tangible proof that labour suppliers are in compliance with the law and in particular working time, applicable minimum wage, adequate pay slips, social security, health and safety, housing allocation.

Due to the high incidence of social fraud by intermediaries, which provide labour in a transnational context (posting), the EFBWW favors that they should be subject to additional controlling measures as well in the host as the country of origin. Due to the high risk of social fraud, in case of a cross-border employment, the EFBWW proposes that those intermediaries should prove that they have paid the payment of the wages, respected the working conditions and paid all social security premiums for each worker they employ abroad.