ENACTING

Enable cooperation and mutual learning for a fair posting of workers

DG Employment, Social Affairs and Inclusion

European Union Programme for Employment and Social Innovation ("EaSI")

CALL FOR PROPOSALS VP/2014/007

Project proposal: "ENACTING - Enable cooperation and mutual learning for a fair posting of workers"

ENACTING SOCIAL DIALOGUE WORKING GROUP

"Guidelines for social dialogue within posting of workers".

This work has been fulfilled within the **Project "ENACTING – Enable cooperation and mutual learning for a fair posting of workers".**

ENACTING received the financial support of the European Union, using funding from the European Union Programme for Employment and Social Innovation –EaSI 2014_2020 (Contracting Authority European Commission – DG Employment, Social Affairs and Inclusion, Grant Agreement no. VS/2015/0013).
The ENACTING project has been carried out by a transnational partnership involving:

- Foundation Istituto Guglielmo Tagliacarne (Coordinator)
- Arbeit und Leben
- Associazione ADAPT
- CISL - Confederazione Italiana Sindacato Lavoratori
- CSC Transport and Communication
- 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.

ENACTING has been also supported by the following associated partners: ANITA; ANCE; Belgian Ministry of Labour; CARTEL ALFA; EFBWW; FILCA CISL; FIT CISL; IG BAU.

More specifically this document has been fulfilled by the **ENACTING SOCIAL DIALOGUE WORKING GROUP.**
The Enacting project has promoted mutual cooperation among social partners (trade unions and employers' associations) to find more effective ways to inform and support workers and companies for a fair posting of workers. This line of action has been pursued through the "*ENACTING Social Dialogue Working Group*" in charge of defining: **"*Guidelines for social dialogue within posting of workers".***
***"Guidelines for social dialogue within posting of workers"* has been coordinated by: Francesco Lauria (Cisl) and Davide Venturi (Adapt) with the participation of: Bianca Baron (Ance), Maria Mihaela Darle (Cartel Alfa), Maurizio Diamante (Fit Cisl), Yannick Docquier (Csc Transcom), Francesco Lauria (Cisl), Roberto Parrillo (Csc Transcom), Giacomo Salvagno (Anita), Claudio Sottile (Filca Cisl), Licya Vari (Filca Cisl), Davide Venturi (Adapt), Bettina Wagner (Arbeit und Leben).**

Enacting Project (Agreement Number VS/ 2015/0013)

With the support of European Union
European Commission - DG Employment, Social Affairs and Inclusion.

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Introduction

The role of the social partners for a Europe of solidarity and opportunities
(*Francesco Lauria*)[1]

Transnational posting allows us to reflect on an antinomy that we want to overcome: it is the contradiction between the Europe of opportunities and the Europe of social protections.

In fact, the analysis of transnational posting tackles one of the central issues of migration within the EU.

The enlargement of the European Union produced more labour mobility which has different characteristics from traditional immigration: even more so in periods of crisis like now, the mobility of the European workers is more and more temporary and "circular", as workers do not specifically addresses to one single Country, but it follows work where it is. The increasing transnational provision of services, as well as posting, represent these needs and realities of labour mobility in Europe very well.

The **Social Dialogue Guidelines** presented in this publication are the result of two years of work through the **Enacting project:** an experience that involved the cooperation of national Trade Unions, (confederations as well as sectoral trade unions) and Employers associations.

The subject of transnational posting can appear very technical, and affordable by experts only. In fact, starting from posting work, we analyse a crucial point that will be very important in the coming years**: social protection in the globalisation process and in the economy of interdependence.**

The Guidelines issued by the social partners of the Enacting project, along with those made by the inspection authorities, represent a concrete result of this European project.

Our intention is to give answers and suggestions for the daily action of social partners, not only legislative analysis and legislation, starting from the concrete experiences both of the social partners and of the administrative authorities involved in the action.

The Guidelines of the Enacting Social Dialogue Working Group are focused, in the first chapter, on the reflection about transnational collective bargaining on the issues of posting in workplaces and in supply chains.

[1] Francesco Lauria, Cisl, Enacting Social Dialogue Working Group Coordinator

It is an innovative approach that reflects the increasing role of TCAs (Transnational Company Agreements) in industrial relations at European level (and not only European).

We develop possible occasions of work to introduce into transnational agreements content and provisions to protect the transnational posting workers in companies and within supply chains.

Not only company agreements are analyzed; but also the possible use of trilateral territorial agreements between social partners and institutions in the occasion of important international events like the case of EXPO of Milan, in 2015.

Chapter 2 of the Guidelines offers a practical *checklist* for the protection of posted workers in the workplaces that has been developed from the concrete experiences of all the Enacting Social Dialogue Working Group partners.

Chapter 3 allows, finally, a broad reflection on the transposition of Directive 2014/67 - "Enforcement" with the contributions of social partners of the different countries and sectors represented in the project: Belgium, Romania, Italy, Germany, construction sector, transport sector.

The chapter is enriched with an interesting insight into the peculiar German experience of the counselling office for posted workers based in Berlin.

The proposed texts are the point of convergence between trade unions and employers organizations: it is evident the high common interest in fighting against social dumping and exploitation of work.

We know that regulating and monitoring posting workers is rather complicated: posting of workers, often show a "conflict of rights", in which the right to collective action in support of equal treatment of workers may have problematic connections with the principles of free movement.

The dividing line in the labour market and in the service sectors is often very fragile, especially if it is considered from the point of view of the workers involved in the increasingly strong process of "dematerialization" that is present in a big number of companies.

In the various EU Member States, the social partners are often committed to fighting social dumping, which is also synonymous with irregularities and lack of security for workers. Social dumping in relation to the posting of workers can undermine collective bargaining at national level and fundamental rights which are believed consolidated although these consequences are subject to the different industrial relations systems that varies from Country to Country, inside European Union.

The Social partners are prepared to play an active role, at all levels (workplace, National/Sectoral, European) in the process of reform of Directive N ° 96/71 promoted by the European Commission.

In conclusion: it is also important to link the analysis about posting of workers within the reflection on the reinforcement of a "**pillar of social rights"** within the European Union.

The Europe that we want to build must be democratic and respectful of social dialogue, of intermediate bodies and of citizens. The European social dialogue has been, is and will be a fundamental and constituent element of the European Union.

If the European Union wants to have a future, it is only possible starting from here: from inclusive policies and from social market economy.

Work, also posted work, is not a commodity and can't be regulated as a commodity.

For this reason the Social Partners Guidelines of the Enacting project show that an approach addressed solely to **legislation** is not enough, as it must be linked to the industrial relations systems and the strengthening of **social dialogue.**

The theme of safeguarding the European social model and the democratic construction of Europe goes, in fact, through recognition and protection of sustainable mobility of workers, fighting all forms of social dumping, but at the same time without justifying, protectionism and national self-interest that have no meaning and legitimacy.

We believe in the creation of an European geopolitical-economic and juridical space, in which, through the action at every level of social partners, it will be possible an enforcement of social and economic rights.

The promotion of this vision is based on the concrete practice of supporting a European Union attentive to social developments and to the real promotion of social and economic rights.

This road is not simple, but it is also far-sighted and responsible. For many reasons, it is also obliged.

Enacting Project and, in particular, the contribution of the social partners in the project, through these Guidelines, wants to be a contribution to this fundamental process and perspective.

Chapter 1: A Guide for collective bargaining at workplace level and in chains

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1.1 Transnational Company Agreements and cooperation between social partners against social dumping *(Francesco Lauria)*

TCA's historical overview and statistical information

Thanks to the legal environment of the Single Market, Multinational companies can easily move their operations from one country to another; they can reap benefits from divergences in national legislations (arbitration), and they can diversify their investments and play on differences in labour costs and employment protection rules. At the same time, companies that do not operate in the higher segment of the market may be tempted to compete only through a progressive reduction of labour costs. In other words, a free market creates a highly competitive environment where competition takes shapes that are not desirable (i.e. social dumping, tax dumping, arbitration in cost allocations, etc.).

An important instrument to promote is represented by TCA's (Transnational Company Agreements) negotiated between multinational companies and European and global trade unions federations.

In general, all transnational framework agreements are referred to by the English term: Transnational Company Agreements (TCA). This term is used in the documents (and databases) created by the European Commission. In the literature, there is also the term: Transnational Framework Agreements.

Agreements with a global reach are called: International Framework Agreement (IFA) in contrast to the documents relating only to the European (EU) area. The latter (European Framework Agreements, EFA) constitute a separate category.

In the literature, it is considered that the first transnational framework agreement was a text entitled "Common Point of View" and signed in 1988 between the International Federation of Food Industry Workers IUF and the French corporation BSN (since 1994 functions under name Danone). It contained specific points in four areas: training of workers, the right of trade unions to economic information, equality between women and men and compliance with ILO conventions.

The European Commission has established an official TCA database which is available on: http://ec.europa.eu/social/main.jsp?catId=978

Currently, the European Commission database contains information about 265 TCA's.

These are the agreements added every year.

2015- 16
2014- 19
2013- 16
2012- 22
2011- 15
2010- 25

TCA's as an element of international cooperation of trade unions (taking into consideration the regulatory frameworks)

Charles Levinson[2] identified three steps that trade unions can take towards realising transnational collective bargaining. Firstly, unions can support each other internationally, for example through solidarity messages and actions when a union in one country takes an industrial action. Secondly, unions can exchange information related to collective bargaining aimed at coordinating the demands made during the negotiations and their timing. Thirdly, collective bargaining would move to the transnational level, for the purpose of unifying working conditions, and eventually wages.

Concerning the regulatory framework at European and global level, it is possible to take into consideration the following instruments:

ILO documents: Art. 2 of the Convention 154, Recommendation 91 of 1951 and Recommendation 163 of 1981. One should stress, that these documents relate to national rather than transnational level of negotiations.

Concerning the legal basis of the European Framework Agreements (EFA), we can refer to the European Social Charter - Art. 6 and Art. 152, 153 of the Treaty on the Functioning of the European Union and Art. 28 of the Charter of Fundamental Rights of the EU.

AS to EFA, there are demands to establish optional legal framework setting out the procedure for their conclusion and the legal consequences of their entry into force.

TCA's could represent also an important task for social partners: fair competition concerns employers as well and social partners must have an offensive strategy to carry out.

Fighting social dumping helps both workers and fair undertakings and could be an important action to support the social dialogue at every level.[3]

[2] Levinson, C. (1972). International Trade Unionism, London, Allan and Unwin.

[3] An interesting publication was published 2012 by ETUI. ñ*Transnational collective bargaining at company level. A new component of European Industrial Relations*ò, European Trade Union Institute (ETUI), Brussels, 2012.

In this respect, TCAs could be advantageous for the EU institutions and satisfy the social partners as well.

The more the social partners are able to self-regulate relationships between labour and management, the less regulators have to interfere in market dynamics with binding legislation. The greater the social partners' capacity to engage in cross-border agreements, the more the legislator can use the co-regulation option to integrate binding legislation and collective agreements.[4]

Skanska Agreement as an example

An interesting example is the Transnational Company Agreement between Skanska and IFBWW (International Federation of Building and woodworkers), signed the 8 of February 2001.[5]

The agreement applies to all units and subsidiaries in the Skanska Group.

Skanksa is one of the world's leading companies in building related services and project development. At the time of the signature, the agreement covered 80.000 employees

Others interesting peculiarities of the agreement, also regarding posting workers, are the following:

- Information to the suppliers;
- Establishment of an arbitration board about interpretations and applications of the agreement.
- Employment is freely chosen (ILO conventions 29 and 105)
- No discrimination in employment (ILO conventions 100 and 111)
- Child Labour not allowed (ILO conventions 138-182)
- The Right to organize (ILO conventions 87, 98, 135 and recommendation 143)
- Fair compensation: wages, salaries and employment condition shall meet all minimum requirements mandated by national agreements and laws. All employees shall be provided with written and comprehensible information in the official language of the workplace.
- Reasonable working hours

[4] An interesting document is the report of the project: ñ*Building an enabling environment for voluntary and autonomous negotiations at transnational level between trade unions and multinational companies*ò. The project was carried out in partnership between ETUC, EPSU, ETF, industriAll and UNI Europa. (May, 2016)

[5] The text of the agreement and some useful comments about the contents can be reached at this internet address: http://www.bwint.org/default.asp?Index=43&Language=EN

- Working conditions including reasonable housing conditions in direct proximity to the construction site

An alternative model: international events and territorial agreements

As regards the transnational agreements that could be important to promote a fair transnational posting, TCA's are not the only possible option.

An alternative (but also synergic?) model can be represented by territorial agreement in the occasion of international events.

For example: in the occasion of the International Expo of 2015 a "legality protocol" was signed the 13 of February 2012 between the Prefecture of Milan and Expo Company S.p.A. The protocol provides some measures to support the obligation for the contractor to proceed with the labour posting, as regulated by art.30 of Legislative Decree no. 276/2003, except with consent of EXPO S.p.A. entrance to the building site workers.

This authorization is subject to prior acquisition by the EXPO S.p.A of "antimafia information" on the company as regulated by the art. 10, paragraph 7, letter. a), b), c) of Presidential Decree 252/98.

The agreement covers all the subjects, in any way involved in the Expo 2015, which will take advantage of the labour posting faculty. Therefore, the contractor is obliged to send to the Prefecture of Milan the documents related to the posting undertaking.

TCA's main contents

It is important to summarize the most important Tca's themes and contents that could be taken into consideration also for guidelines on posting workers:

- Respect for freedom of association and the right to collective bargaining
- Work as free choice (no forced labour, no retention of passports etc.)
- Equal opportunity and treatment in working conditions and wages of whatever ethnicity, religion, skin colour (no discrimination)
- Protection of migrant workers and posted workers ("equal pay for equal work")
- No child labour
- Decent wages (written agreements on wage and working conditions – wage deductions only those foreseen by law)

- Å Respect of working time in accordance with the Host country law - overtime is accepted within certain limits – at least one day off per week.
- Å Health and Safety of workers (working environment safe and healthy - decent housing - receiving personal equipment for safety in building-sites - training - risk prevention - the right to have representatives on the safety committees)
- Å Commitment to extend Health and safety principles to contractors - subcontractors and suppliers (their participation in meetings, seminars, as well).

One important issue is the "supply chain": a better enforcement of TCAs in the supply chain is desirable for both trade unions (spreading higher working standards) and multinational companies (strengthening the control over lower managers, subsidiaries, sub-contractors and suppliers as well as avoiding reputational risks).

TCA's and posting, proposals for specific contents in the framework agreements

Some contents of TCA's are strictly linked to the right of posting workers.

The well known Viking and Laval cases, for example, have clearly shown how the call to rethink labour law and collective bargaining in a transnational context cannot be put off any longer.

During the activities of Enacting Social Dialogue Working Group, a list of these contents has been drafted:

- Trade unions access to workplaces
- Possibility of organizing actions for collective redress
- Obligation for info and consultation in transnational workplaces
- A prior declaration of postings in a multinational group and in the supply chain
- Opportunity for TUs to appeal directly to the Court without the express permission of workers (it is necessary to take into consideration the legislative framework)
- For transport companies: minimum wage by agreement has to be applied –
- Problems with temporary work agencies related to posting

Conclusions

Posting workers issues and Transnational Company Agreements reveal that "transnationality" in industrial relations and labour market regulation must be built both conceptually and in practice.

Revision of directives on posting workers and a legal regulatory framework for TCA's are important topics but must be putted in relation with the daily work of social partners.

Posting workers and multinational companies are quite often two sides of the same coin faces of the same medal.

For example in 2009 Lindsey Oil Refinery strikes were a series of wildcat strikes that affected the energy industry in the United Kingdom. The action involved workers at around a dozen energy sites across the UK who walked out in support of other British workers at the Total's Lindsey Oil Refinery against Italian and Portuguese posted workers. [6]

This is only an example that international company agreement must cover also transnational posting and the relations between multinational companies and workers in case of transnational procurements.

Social partners guidelines are also an instrument to solve these conflicts using the language of industrial relations and not only legislative instruments or conflict.

1.2 General clause related to the respect of "decent work" (ILO conventions and standards), Corporate Social Responsibility (CSR), Multinational Corporations (MNC) *(Claudio Sottile)*

Introduction

The International Framework Agreements - (IFAs) or Transnational Company Agreements (TCA's) are generally negotiated by the Multinational Companies (MNCs), the International Trade Union Federation of the sector the MNC belongs to, together with the national Trade unions of the country where the MNC has its Headquarters. IFAs are signed on a voluntary basis by the MNCs and not exactly "binding" but with a strong commitment to implement their contents by the MNCs. Their aim is to ensure international labour standards in all the countries and productive sites where the MNCs operate. IFAs are a very important transnational tool of social dialogue and consist of proposals made by the trade unions to

[6] An interesting document about this dispute is *"British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law"* by Claire Kilpatrick LSE Law, Society and Economy Working Papers 16/2009: https://www.lse.ac.uk/collections/law/wps/WPS2009-16_Kilpatrick.pdf

improve the social and employment matters such as social and working conditions in the context of globalization. It's crucial that MNCs share, through these IFAs, the Corporate Social Responsibility with the Trade unions and leave their usual way to consider CSR as a unilateral matter with their "self-certification".

There are 8 fundamental ILO Conventions for a "decent work":

1. **Freedom of Association and Protection of the Right to Organise – Convention, 1948 (no. 87);**
2. **Right to Organise and Collective Bargaining - Convention, 1949 (no. 98);**
3. **Forced Labour – Convention, 1930 (no. 29);**
4. **Abolition of Forced Labour - Convention, 1957 (No. 105)**
5. **Minimum Age - Convention, 1973 (no. 138);**
6. **Worst Forms of Child Labour – Convention, 1999 (no. 182);**
7. **Equal Remuneration – Convention, 1951 (no. 100);**
8. **Discrimination (Employment and Occupation) - Convention, 1958 (No. 111).**

All these Conventions are included in the IFAs together with *ILO Recommendations and Declaration on Fundamental Principles and Right to Work*, *fundamental principles of human rights defined in the Universal Declaration of Human Rights and the OECD guidelines on MNC.* Besides the matters mentioned above, it's very important to integrate these agreements with the clause specifying the protection *of migrant and posted workers* too and clauses regarding the Welfare, Health and Safety and Social Security items for all workers both directly employed and employed by a contractor/subcontractor or suppliers. (See the annex about Salini Impregilo IFA on these items). IFAs foresee a monitoring group with the aim to verify their implementation also through visits in working places and by a trade union network that should be established with local trade unions in order to have a constant and permanent check.

Annex - Examples

Salini-Impregilo IFA was signed in October 2014 after a merger between the 2 Italian Multinationals. It was a sort of renewal with some improvements of the already existing Impregilo IFA that had been signed in November 2004.

Below some extracts from Salini-Impregilo IFA considered as good practices for a decent work and social security matters:

Free choice of Employment

……Workers shall not be required to lodge deposits, visas or other immigration fees, transportation costs, and recruiting or hiring fees. Workers shall be required to surrender their passports and other travel or identity documents only if necessary to fulfil the national requirements in the country of destination and not for any other purpose. The company agrees that migrant workers shall be recognized the right to legal redress in the country of work and the right to organize and join trade unions. The company also agrees that migrant workers shall be provided with detailed information about their living and working conditions in the destination country in a language they can understand before leaving their country of origin.

"Non Discrimination"

….All workers shall receive equal pay for work of equal value.

Migrants and posted workers shall enjoy at least the conditions applicable to the local national workers.

Freedom of Association and Collective Bargaining

… Salini Impregilo S.p.A. shall adopt a positive approach to union activities and an open attitude towards union organizing. Subject to the prior on site consent of the contractor/company/consortium, the company shall grant union representatives access to the building site.

Living Wages

Workers' wages shall comply with the applicable laws and collective agreements. They shall therefore be fair and non discriminatory, and sufficient for workers to cater for the fundamental needs of a decent life in the social context where they live and work.

Working Conditions

…. a safe, healthy and sustainable working environment shall be provided. The best health and safety practices will be promoted and shall comply with the ILO Guidelines for Occupational Health Management Systems, in coordination with contracting and subcontracting companies within the same construction site. Training on safety and risk prevention at the work place shall be provided to all workers on a regular basis.

Employment relations

Employers' obligations towards employees are prescribed by laws and regulations on employment and social security and originate from the compliance with a regular labour contract……..Salini Impregilo S.p.A. considers the respect of workers' rights to be a fundamental component of sustainable development and its subcontractors and suppliers shall also recognize and meet the abovementioned criteria. The company shall pay **any social security and pension contributions as required under applicable legislation in the place where the employee works**, except when more favourable individual conditions apply. The company shall raise the awareness of its consortia and subsidiaries in order to avoid that workers are classified as self-employed although they are assigned typical employee tasks **(bogus self-employment).**

1.3 Examples in the construction sector and in supply chains *(Licya Vari)*

A huge number of subcontractors in the chain characterizes the construction sector and this is the reason why social partners have always had particularly attention to this point. This peculiarity increases the risk of accidents at work and the presence of black labor.

For these reasons, collective bargaining is one of the most important tool to prevent abuse and to spread out the culture of cooperation between all the subjects involved.

In particular, we are referring to the national collective agreement and the provision of the article n.14.

- **National Collective Labour Agreement of building sector, Article 14 - Clause of preventive information to Unions**

  The Article n.14:

  1. Provides for an obligation to give preventive communication to workers reps./Unions 15 days before the start up of the building site informing its location too;
  2. Provides that the communication must contain the adhesion of contractors and/or subcontractors to respect the national/territorial collective agreements applied by the General contractor.

  Finally, it is really important to underline that even in case of non compliance of the collective agreement/part of it, the joint and several liabilty system is applied in all the supply chain.

  The communication about contributions is a crucial tool to avoid social dumping and verify the coverage for H&S matters. All this information is transferred to the paritarian bodies at the same time.

  In case some enterprises don't apply the Collective agreement of building sector, they have to provide information of the contract applied according to point 2 above mentioned.

- **Health and Safety – The role of Trade Unions**

  First of all, it's fundamental to act within the framework of the national laws in matter of H&S and foster a proactive involvement of all the stakeholders who can express their comments with regard to the planning of H&S matters.

Through the paritarian bodies the access to the workplace is crucial and a way to verify the correct application of the several H&S rules.

H&S, in all its aspects, has a great importance for TCAs too and needs to be monitored constantly and very closely. It's needed to set up a Committee devoted to this matter at the workplace where workers' representatives (appointed by Trade Unions) together with suppliers contractors and subcontractors representatives are entitled to attend.

Best Practices and possible clauses of collective agreements at workplace level (construction sites):

1) Before starting to operate in a building site, the workforce must attend a meeting where all the details about the operational modalities adopted in the workplace are shown (e.g. specific roles about H&S reps.);

2) H&S and linguistic training provided by the competent bipartite bodies, especially for foreign workers;

3) No access to the workplace for workers without a good knowledge of the language of the country where they operate and H&S signals (the responsible person for this evaluation is paid by customer);

4) Safety Coordinator at runtime can verify at the workplace the competences and information/consultation of the workforce by eventual incorrect behaviours on procedures regarding H&S;

5) Importance of transferring concepts expressed in the planning into practice by organizing regular meetings involving all the stakeholders designated for H&S in the building site;

6) The bipartite body (CPT – Bipartite Body Committee) provides training on demand on H&S at the workplace giving support to the workers and the company.

1.4. Road Transports: which information is needed by trade unionists at workplace level (*Yannick Docquier*)

In road transports, prior information to staff representatives (trade unions at workplace level) when performing certain types of jobs is essential.

1. Scope

All SMEs (500 employees) of the private sector whose registered office is situated in an EEC member country.

2. To which destination

The prior information is for joint dialogue places of the user undertaking of posted workers.

3. The goal

The impact on employment volumes and the quality of work in the undertakings in question is significant.

The use of staff from subsidiaries or subcontractors whose labour cost is lower because of social tax legislations is governed by the "posting" Directive.

Some abusive situations lead to unfair competition and social dumping.

When an employer posts workers to another EEC country, for a limited period, the employer must comply with the legal provisions of the country where work is provided, in terms of the minimum wage, paid holidays or working hours.

However, social contributions are paid in the country of origin of the worker.

On the other hand, it is very difficult to get information on the posting permits issued by the country of origin.

To limit abusive situations or social dumping, we strongly support a European directive to set the right to prior information to staff representatives in undertaking using posted workers.

4. Object of prior information clauses

The information should at least include:

- The number of posted workers.
- The period of posting.
- The reasons for the use of posted workers.
- The impact on local employment.
- The practical rules for this posting (wages, working time, daily and weekly rest, transport, etc ...).

In the absence of prior information, posting is considered illegal and inspection services are informed.

Chapter 2: Approaching posted workers: a practical checklist for trade unionists at workplace level – by Enacting Social Dialogue Working Group[7]

The major problems that the trade union members face in approaching posted workers are the followings:

- Adequate training in tackling the problems posted workers face in their hosting Country;
- Providing concrete and effective protection to posted workers and tackling the pitfalls and the negative effects of social dumping among workers in workplaces.

Adequate training for trade union members at workplace level is necessary, and it will be a major issue in the next years for trade unions. Maybe creating, within trade unions pools of experts on this subject could be an answer too.

However, it is strategic that in the first place trade union members at workplace level have a clear comprehension of the concrete situation referred to posted workers, when they approach them in their everyday work, both when they visit workplaces and in case posted workers address to trade unions seeking help and protection. No concrete protection for posted workers and no effective action against social dumping is possible without a clear comprehension of the concrete situation of posted workers at workplace level.

How to approach posted workers? What kind of information is necessary to grant them protection? This is a strategic preliminary point to be tackled.

In order to get the most possible information, the trade union partners have drafted a list of questions addressed to posted workers, divided in some central items from the trade unions' perspective. This is a sort of checklist that could be be useful for all the trade union members, even for those who are not expert in posting. The information which can be obtained may be useful to be reported to trade union experts and even to the competent Authorities for labour inspection.

General Questions (very general and preliminary)

- Have you got an employment contract?

[7] This document has been discussed and edited in the Enacting Social Dialogue Working Group meeting in order to provide a practical checklist for trade unionists at workplace level useful also for campanies and employers who wants to promote a fair posting in the supply chain.

- Which legislation your contract is referred to? What is the national law applicable to your employment contract?
- Do you have A1 model?
- Which is your country of residence ? Are you resident in the country where you are working now?
- How many days did you work in your country during this year? What forecasts for the future?
- How many posting periods this year?

Questions referred to check possible frauds:

- How many hours per day / week do you work normally?
- Who is your employer? Who gives you the directives and instructions for the work you are performing?
- Are there subcontracts in your workplace?
- Do you have an identity card/residence permit in your host Country?
- Do you have a primary care physician in your host Country?
- Do you have a tax code in your host Country?

Questions referred to Occupational Health and Safety (OHS):

- Have you received basic training on health and safety? In your Country or here as well? How many hours?
- Which knowledge do you have of the language of this Country you have been posted to?
- What conditions do you have where you live during the posting (housing)? Who pays for your accommodation?
- Who is responsible for Occupational Health and Safety in your workplace? Do you know who to call in case of problems? Do you have a certificate of competences on the subject of health and safety in your home country?
- Do you have information about your health insurance?

Questions related to labour conditions, working time and salary:

- Did you get your payslip already? Have you got it here?
- Have you got a document which specifies your posting and the conditions you are entitled to?

- How long do you usually stay in the host country before going back home to your family?

Questions specially referred to the Road Transport sector:

- From where did you leave with your vehicle? What was your trip and which is your final destination?
- What is the company's information system through which you receive your work directives? Who gives you these directives?
- Do you know how they are calculated/covered your days off?
- Where do you stay during the breaks/rests of your business trip?
- How many hours of work and pauses?

Chapter 3: Position papers on the state of application of Directive 2014/67/EU, with specific focus to the sectors targeted (constructions and road transports) and to the Countries involved (BE, DE, IT, RO)

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3.1 A practical guide to tackling fraudulent transnational practices in Road Transports. Law territorially applicable (*Roberto Parrillo)*

EC Regulation 593/2008 (Rome 1)

How to address fraud and abuse in the road transport sector?

Starting from Directive 2014/67 (the directive implementing directive 96/71 concerning posting of workers), Europe and the Member States can, if they have the political will, curb or even stop social dumping in road transport.

Recital 11 of Directive 2014/67 determines that:

"When there is no real posting and a conflict of laws occurs, it is necessary to take due account of the provisions of Regulation (EC) No. 593/2008 of the European Parliament and of the Council (Rome I) or the Rome Convention which aim to ensure that workers are not deprived of the protection afforded to them by provisions that can not be derogated from by agreement or which can not be derogated from to their benefit. It is necessary that Member States shall ensure that arrangements are in place to properly protect workers who are not truly posted. "

Article 4 of 2014/67 determines the true nature of posting and prevents abuse and circumvention:

- *For the purposes of implementation, application and execution of Directive 96/71/EC, the competent authorities undertake a comprehensive assessment of all the facts that are deemed necessary, including in particular those contained in paragraphs 2 and 3 of this Article. These elements are intended to assist the competent authorities during investigations and controls and when they have reason to believe that a worker can be considered to be posted within the meaning of Directive 96/71/EC. These elements provide indicators in the overall assessment that should be made and are therefore not considered in isolation.*

- *To determine whether a company actually performs substantial activities, other than those relating solely to internal or administrative management, the competent authorities shall make an overall assessment over an extended period of all the elements characterising the activities performed by a company in the Member State in which it is established and, if necessary, in the host Member State. These items may include:*
    - *the location of the registered office and central administration of the company, where it has offices, pays taxes and social contributions and, if applicable, in accordance with national law, where it is authorised to conduct business or where it is affiliated with the chamber of commerce or professional bodies;*
    - *the place of recruitment of posted workers and the place from which they are posted;*
    - *the law applicable to contracts concluded by the company with its employees, on the one hand, and with its clients, on the other;*
    - *where the company conducts most of its business and where it employs administrative staff;*
    - *the number of contracts performed and/or the amount of turnover realised in the Member State of establishment, taking into account the particular situation faced by, among others, new start-ups and SMEs.*

- *To assess whether a posted worker temporarily carries out his or her work in a Member State other than that in which he or she usually works, all the facts characterising his or her tasks and his or her location should be considered. These items may include:*
    - *the tasks that are completed in another Member State for a limited period;*
    - *the date on which the posting begins;*
    - *the worker who is posted in a Member State other than that in which or from which he or she habitually works, in accordance with Regulation (EC) No. 593/2008 (Rome I) and/or the Rome Convention;*
    - *the posted worker who returns or is expected to resume activity in the Member State from which he or she was posted after completion or after the provision of services for which he or she was posted;*
    - *the nature of activities;*

- *travel, food and lodging that are insured or covered by the employer posting the worker and, if so, how they are insured or the terms of their management;*
- *any period in the past during which the post was occupied by the same or another (posted) worker.*

- *Non-compliance with one or more of the items set out in paragraphs 2 and 3 does not automatically lead to exclusion of the current situation of the qualification of the posting. The appreciation of these items is adapted to each specific case and takes into account the specificities of the situation.*

- *The items referred to in this article employed by the competent authorities in the overall assessment carried out to determine whether a situation constitutes a real posting may also be considered to determine whether a person falls within the applicable definition of worker prescribed in Article 2, paragraph 2 of Directive 96/71/EC. Member States should rely particularly on the facts relating to the provision of work, subordination and remuneration of the worker, regardless of the characterisation of the relationship in any agreement, whether contractual or not, having been able to be concluded between the parties. "*

These various provisions are of paramount importance and should definitely form part of the transposition of the directive to overcome widespread phenomena in practice, indicating cases where there is no real posting.

NOTE: In the case of road transport, the transposition can result in this implementing directive delves a little further into unfair competition and social dumping. In fact, each Member State has the right to transfer or not some provisions that will have specific implications for the road transport sector.

In terms of road transport, as part of the overall assessment that the authorities have to perform in order to determine whether a company actually performs substantial activities, work tools and in particular, the location of vehicles (PL) should also be considered.

Recital 11 expresses clearly that when there is no real posting, the provisions of Regulation EC/593/2008 or the Rome Convention must be taken into account. This recital goes even further, stating that it is for Member States to take all necessary steps to properly protect workers who are not really posted.

Article 4 aims to determine the true nature of posting and to prevent abuse and circumvention.

But: when a real posting is clearly defined, which imposes a series of elements for the competent authorities to conduct a comprehensive assessment to determine if it is a real posting in order to prevent abuse and circumvention, it is also necessary to establish a system of sanctions to complement the above elements. However, it is clear that Directive 2014/67 refers to Regulation 593/2008 (Rome I) or the Rome Convention when there is no real posting and that a conflict of laws occurs. Therefore, the worker deprived of the protection afforded to him or her by provisions that can not be derogated from by agreement or which can not be derogated to his or her benefit, will bring a legal action to enforce his or her rights.

There is no general rule to put into practice Recital 11 and Article 4.

It is for each Member State to establish a system of penalties applicable in cases of abuse and circumvention of a real posting. In terms of penalties, the result is that the different solutions of the Member States are favoured instead of an autonomous rule that imposes clear and uniformly applicable penalties throughout the EU territory.

Paths to follow

Although we favour a European measure, it is currently left to each Member State to exercise the option to introduce provisions for workers who are not posted.

The crucial question is that Regulation 593/2008 or the Rome Convention contain no obligation to be imposed on States, and that it is for the judge to ensure the condition upon which it is assigned. This raises the question of conditions of referral: administration, unions, driver, etc.

While the law of posting puts the onus of responsibility on the Member States to transpose into national law a series of measures that will help to give full effect to the rights provided in favour of posted workers, there is no onus of responsibility on the Member States to make fully applicable to workers the right under Article 8.2 of Regulation 593/2008 as interpreted by the EU Court of Justice for an international road transport driver.

Now, it is the non-application of this law territorially applicable to the employment contract which explains the majority of social fraud in road transport.

In road transport, the non-application of the law territorially applicable law to the employment contract, as defined in section 8.2 of Regulation 593/2008 interpreted by ECJ ruling C 29/10 KOELZSCH of 15 March 2011, is the non-application of the provisions of Regulation 1071/2009 requiring that transport companies with appropriate technical equipment to operate a transport business are registered in the national registers of carriers. But the extent of the phenomenon of domiciliation in some States of the European Union demonstrates the need to make effective law on this point by deleting from national registries transport companies that have no business in the country in which they are registered.

It is necessary that the implementation of Article 8.2 of Regulation 593/2008 is accompanied by the same obligations for Member States as those that impose upon them the law of posting.

In road transport, Member States should be under the obligation to make a disclosure on the employment law applicable to the employment contract of a driver usually working within their territory or from their territory, and on the penalties incurred by employers that do not implement this law.

Member States should be able to transpose the joint responsibility of instructors of fraud to employment contract law. They should be imposed upon to provide the same opportunities for access to the law and the courts to apply Article 8.2 of Regulation 593/2008 as those provided by the posting directives (96/71 and 2014/67), and they should appoint one or more competent authorities to carry out checks and go to court. The conditions for cooperation between administrations should be specified as they are for the posting. A European Agency for regulation of road transport could facilitate these exchanges and ensure the necessary coordination.

In the Koelzsch case, the Court of Justice provides a broad understanding of the Convention to ensure adequate protection to workers in that it is the weaker contracting party in the relationship with the employer. Admittedly, the Rome Convention provides that the employment contract is normally governed by the law chosen by the parties. But it says in Article 6 § 1 that "the choice by the parties of the applicable law can not have the result of depriving the employee of the protection afforded by the mandatory provisions of the law which would govern in the absence of choice under paragraph 2 of this Article."

To understand this provision of the Rome Convention, the Grand Chamber refers not only to the objective pursued by the provision in question, namely "to ensure adequate protection to the worker" (paragraph 42), but also the interpretation that it is appropriate to give to Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, that it is certainly not applicable to the temporal case, but does offer a tool for understanding the objective of the Convention. Recital 23 of said regulation provides that "in respect of contracts concluded with parties regarded as weaker, they should be protected by conflict rules more favourable to their interests than the general rules." And the Court of Justice concludes that "the interpretation of this provision must be guided by the principles of *favor laboratoris*" (paragraph 46).

What conclusion is drawn by the Grand Chamber? That Article 6 § 2 of the Rome Convention should be understood "as guaranteeing the applicability of State law in which he or she carries on his or her professional activities rather than that of the State of the registered office of the employer (paragraph 42). In other words, a broad interpretation is to be given in terms of "criterion of the country where the worker" "habitually carries out his or her work" (paragraph 43).

This is essential in the present case concerning a worker conducting his or activities in several States.

In conclusion, the country of habitual work of a worker is determined through a body of evidence released by the Court of Justice in judgement C 29/10 (Koelzsch). This body of evidence enables the law applicable to the employment contract to be determined.

One example is where there is no real posting, where the employment law and social security of the country applies and where or from which the employee habitually carries out his or her work: a Romanian temporary job agency offers Italian transport companies workers who are of Romanian nationality BUT who have been residing for years in Italy, where they have their families and their interests. In order to benefit from substantial advantages (transport company + temporary job agency), these agencies hire these Romanian workers in Romania and then proceed with their "posting" in Italy. Obviously, these workers are under Romanian contract!

The Belgian case

Accepting the arguments tabled by the European Commission in its report of 14 April 2014: "Regulation (EC) No. 593/2008 on contractual obligations ... defines the general criteria for determining the law applicable to contractual obligations. ”

Under Article 6 of the Rome Convention of 19 June 1980, or Article 8 of Regulation EC 593/2008 on the law applicable to contractual obligations which succeeded it - the latter applying to contracts entered into from 17 December 2009 - as interpreted by the Court of Justice of the European Union in judgement C29/10 of 15 May 2011: *"The individual employment contract is governed by the law of the country in which or, failing that, from which the employee in performance of his or her contract habitually carries out his or her work.* " if this law is more favourable to the driver.

So that the application of Article 8.2 of Regulation 593/2008 is subject to the same obligations for Member States as those that apply the law on posting.

The Employment Minister has presented a draft aimed at a collective application of Article 8.2 of Regulation 593/2008.

Minimum wage, remuneration, various allowances

Directive 96/71 assumes a link to minimum wage, the new posting directive proposed by Marianne Thyssen assumes a link to a remuneration, BUT another element is equally if not more important, and that is the share of items not subject to social security contributions in the total remuneration.

In the CNR (Comité National Routier) studies on the flags of road transport of European goods, we find that elements not subject to social contributions in remuneration vary from 10 to 76% in Europe (see annex).

Moreover, if in Belgium the ARAB allowances and overnight stays (not subject to social security contributions and tax) are regulated in precise manner according to national and sectoral collective agreements with force of law. It is not the same in a certain number of European countries or items not subject to social contributions are left to the discretion of the employer and do not fall under collective agreements.

Social security

The social security law (Regulation EC/883/2004) arises from regulations coordinating social security systems. The principle remains the maintenance of posted workers in the social security system of the sending State.

The application of the social security system of the sending State is a definite economic advantage for companies operating in States where labour costs are lower, resulting, when

there is no real posting, in social dumping. In fact, with a difference in social allowance going from single to triple, it is easier to understand the phenomenon of social dumping.
Thus we see that the posting, far from its initial ambition to facilitate the continuity of social protection of the driver, has become a way to circumvent the social norms of the various host countries.

Therefore, from the time when there is no real posting, and the country where or from which a road transport driver habitually works is determined, it becomes clear that it is the "overall" social law that applies to it. That is to say: labour and social security law.

Moreover, the same regulation EC/883/2004 provides that a person who is employed in a Member State is subject to the law of that Member State (Art. 11 § 3).

Annex:

International road transport, cabotage, posting and registration of vehicles

Regulation (EC) No. 1071/2009 of 21 October 2009 has added to the 3 qualitative criteria for access to the profession of road transporters, i.e. good reputation, financial standing and professional competence, a fourth condition: that of establishment that is permanent and effective in a member state.
It is reminded that cabotage is a provider of transport services within a Member State by a transport company established in another Member State. It is therefore non-resident transport services which, on the occasion of an international posting, find themselves in a host country and which, to avoid returning empty, perform one or more inland transports in this country before reaching the border. Obviously, the cabotage operation must always be consecutive to an international journey to the cabotage host country. In other words, the cabotage transports are defined as national transports for hire or reward carried out on a temporary basis in a host Member State.

Coherence of the various legislations in force

If one assumes that in general a number of vehicles registered in that Member State corresponds with regard to stable and effective institutions in a Member State A, then we can

ask the question of vehicles registered in a Member State B, but which perform regular and systematic transport operations at national and international level from Member State A. To this is added the law territorially applicable to the driver of the vehicle registered in the Member State B which performs its work systematically and regularly from Member State A.

It also appears that in terms of registration some countries accept the transport in or from their country with vehicles that are not registered and that, in contrast, some countries prohibit it.

This results in unfair competition between resident and non-resident transporters.

These reflections should be able to help stakeholders better understand the interconnections between international transport, posting, cabotage, combined transport, Regulation Rome 1 and vehicle registration.

3.2. Questions and Concerns of the Counselling Office for Posted Workers regarding the implementation of the so-called Enforcement Directive 2014/67/EU in Germany *(Bettina Wagner)*

Article 4.

In the view of the Counselling Office for Posted Workers the implementation of Article 4 of the Enforcement Directive 2014/67/EU plays a central role, namely the finding of an actual posting and the prevention of abuse and circumvention.

This still unsolved problem has a high practical relevance in Germany. The Counselling Office for Posted Workers regularly undertakes cases of foreign workers in Germany who, here on the basis of secondment schemes, find themselves outside of any legal framework. Belonging to these cases are the so-called "Mailbox firms," which establish themselves in other EU countries for the sole purpose of recruiting and posting workers to worse working conditions. These businesses do not perform an actual economic activity in the member state and the workers are at no point actually employed in the sending state. In some cases the workers are posted over a period of years (like, for example, in the meat industry) and upon return to their homeland are terminated because there is no position similar to the one for which they were posted. Until now, this has never been checked.

In some cases, the workers are not even employed directly but rather are hired as bogus independent contractors in their homeland. This practice exists in the construction industry as well as in nursing, courier service and transport. In the beginning of January 2015 Romanian couriers were posted in Germany, that were hired though a Czech firm as independent contractors, receiving payment under the German minimum wage and no social security. Third-country workers, mainly from the Ukraine, will be posted in EU countries increasingly often, have their work permits prepared in their country and then sent to Germany. Thus, the working conditions can be curtailed even further.

The counselling office knows about numerous cases, in which the posting of workers takes place permanently, e.g. technicians or construction workers from Poland who are posted to a German company for over 8 years. These workers have fixed-term contracts for 2 years, after which they take a 2-month leave in their home country. After this leave, they get a new A1 certificate for the next 2 years without difficulty.

These chain assignments are also common in industries that do not provide order-based services, such as the meat processing industry. Here subcontractors employ posted workers on the basis of service contracts, so that the long-term place of work is factually in Germany, however, via the posting the social security contributions are paid in the home country.

This is certainly an issue within the competence of foreign social security authorities, but it leads to abuse which has domestic consequences and should therefore be effectively controlled and fought here. The abuse originates often from the sending states, but the damage is done in the labour market of the receiving country. However, in addition to the impairment of the legitimate interests of workers, fraudulent companies can gain unduly competitive advantages through social dumping.

Out of these problems the following questions arise:

In Germany, which authority is responsible for checking the authenticity of a posting and by means of what process will it carry out the overall assessment described in Art. 4.2 of the Enforcement Directive? What occasion will trigger such a process? What effective measures will Germany undertake in the fight against fraudulent postings? Which authority in Germany is responsible for checking whether the posting is temporary or permanent and with what kind of means can it do so?

To our knowledge, the data on A1 certificates, which were applied for in the sending states, is submitted to the social security authorities. Additional information on the actual economic activity could be transferred via these channels as well.

Articles 9 and 10 and Article 21

The recital No. 49 of the preamble of the Enforcement Directive 2014/67/EU provides that an improved system for electronic information exchange is to be established, in order to ensure an improved and more uniform application of Directive 96/71/C and a better administrative cooperation. The responsible authorities should use the Internal Market Information System (IMI) as far as possible. According to Art.21 of the Enforcement Directive, the administrative cooperation and mutual assistance between the competent authorities of the Member States should be based on the IMI system as established by Regulation (EU) No. 1024/2012.

Closely related to this is the problem of the effective utilization of the Internal Market Information System (IMI). The IMI system for posted workers allows the competent authorities to collect information through bilateral and direct contact about the conditions in the sending states in respect to the sending situation (e.g. whether the posting company undertakes a real economic activity, which goes beyond mere administrative activities; whether the A1 certificate is authentic; and whether the social insurance contributions are actually paid).

As the annual statistics of IMI show: Germany (the most prominent destination for posted workers in the European Union) has made not a single inquiry about sending situations in

2014. In 2015 up until June only 3 requests have been sent. In comparison, other large receiving states France and Belgium have sent 184 or 213 requests respectively via the IMI system in 2014.

The responsible liaison office in Germany is the Federal Finance Office West, Directorate for Operations (Bundesfinanzdirektion West, Abteilung Zentrale Facheinheit). The access to the IMI system concerning secondments is set up there. Local FKS inspectors and FKS units have no direct access to the IMI system. Our partners, the representative of the German inspection authorities in the project ENFOSTER (a project for a stronger cooperation on posting of workers within the EU, in which the Counseling Office for Posted Workers was involved) have told us that the IMI system for secondments is rarely used precisely because of this centralization. The control authorities confirm that the process of exchanging information with foreign authorities is so lengthy and protracted that it drags on over years and it becomes inefficient.

What measures will Germany undertake to make the use of the IMI system in cases of worker postings effective? Will the regional financial control units also get access to IMI and made familiar with the system?

The cooperation between domestic and foreign authorities is indispensable for examining the legality of postings.

Article 8

What legal framework can Germany establish and what kind of support structures should be introduced to improve cooperation between German and foreign control authorities in accordance with Article 81 of the Enforcement Directive?

On top of the low remuneration that is paid to seconded employees, comes a limited social insurance cover. Seconded workers from Eastern Europe get most of their wages paid as expenses that are exempt from social security. In one of the cases at the Counselling Office last month, the social insurance contributions of a polish nurse were deduced from her base payment of 100 PLZ (i.e. € 25.00) and paid in her home country. This is no longer an acceptable competitive advantage resulting from the differences in the social costs of the EU countries, but a clear case of social dumping.

Has Germany the possibility to examine whether the social insurance contributions are actually paid in the country of origin and from which basic amount they are deduced? How often are such checks carried out? And which are the cases that are controlled?

Article 5/Article 11

The article foresees the provision of a central information and support structure to posted workers to learn about the legal framework and wage levels in the host country. The Counselling Office for Posted Workers in Berlin takes up this specific task since 2010. However, the funding of counselling offices is regulated via grant agreements at the state level, which are written out every other year.

How the Federal Government plan ensure this envisaged improvement of access to information?

Article 12 Liability in case of sub-contracting

The liability of general contractors, Paragraph 14 of the Posted Workers Act was incorporated into the German minimum wage law. It is imperative to keep this as it stands and to not soften it. Especially the direct liability of the general contractor is particularly useful in the counselling work.

However, here a shortening of the subcontractor chains that extend to other Member States would be helpful. In that way, one could determine in advance that the chains of subcontractors are not extended for the same order without providing an order or sector-related service. This goal-oriented restriction would also help the general contractors in safe-guarding their liability to ensure that in downstream activities exploitation and non-compliance of legal regulations takes place.

Moreover, we see in other Member States that the control authorities enforce rights and wages for the workers as part of enforcing the liability of general contractors.

3.3 Position paper – CISL: Trade Unions and the Legislative Decree of 17 July 2016 No 136 - reading insights and comments *(CISL)*

Introduction

Legislative Decree No 136 implementing Directive 2014/67 of the European Parliament and of the Council of 15 May 2014.

This directive is known at European level as "Enforcement" or "implementation" Directive and was approved because, in light of numerous judgments of the European Court of Justice on the issue of transnational posting of workers, it became clear that the regulatory framework outlined in the nineties by the original directive on this issue (96/71) needed to be updated, especially in light of the EU enlargement process.

As we know, Directive 96/71 establishes a core set of employment terms and conditions that the employer must respect during the transnational posting period, in order to protect workers and avoid social dumping practices, contractual irregularities and unfair competition between companies.

It should be stressed that the European Commission also presented a proposal to revise the "mother" Directive now "suspended" due to the opposition of a significant number of national states, in particular in Eastern Europe.

The peculiarity of the Legislative Decree No 136, also at European level, is that, in a sense, it anticipated, at least partially, any amendments to the mother Directive. In fact the decree abolished the previous Legislative Decree 72/2000 transposing Directive 96/71, constituting a sort of Italian "single text" on transnational posting.

Art. 1 Scope

This article was completely rewritten because of parliamentary procedures and consultation with the social partners.

The text proposed in earlier drafts, in fact, left a few gaps in the definition of posting and seemed not to include the posting operated in the context of procurement.

The new wording (paragraph 1) states that the decree applies to "undertakings established in another (EU) Member State posting one or more workers for the **provision of services**, in favour of another undertaking belonging to the same group (or another recipient), provided that during the period of posting, a working relationship continues to exist with the posted worker. "

In terms of the scope of the decree:

Paragraphs 2 and 3 emphasize that the decree also applies to **labour supply agencies** established in another Member State posting workers to a user undertaking having its registered office or productive unit in Italy. The decree provides that no specific authorization is required if agencies demonstrate that they operate under an "equivalent" administrative provision.

This paragraph is one of the weak points of the decree because the notion of equivalence is excessively "vague", leaving margins for elusive uses of the posting by foreign labour supply agencies.

In the case of road transport, this decree applies also to cabotage and, with certain limitations, to undertakings established in a non-EU State, which post workers to our country. It does not apply, however, to merchant navy crews.

Art. 2 Definitions

This article defines the “working and employment conditions" in the case of posting.

In line with Directive 96/71 the scope of application and "equal treatment" of posted workers regard the following matters:

1) Maximum work periods and minimum rest periods:
2) Minimum paid annual holidays;
3) Minimum wage packages, including overtime rates;
4) Temporary assignment of workers;
5) Health and safety in the workplace;
6) Protective measures with regard to working conditions and employment of pregnant women or nursing mothers, children and young people;
7) Equality of treatment between men and women and other provisions on non-discrimination.

These matters are regulated by law and collective agreements mentioned in **Art. 51 of Legislative Decree No 81 of 2015. i.e. the "national collective, territorial or company agreements stipulated by most representative trade unions at national level and company collective agreements between their trade union representatives or the works council".**

Art. 3 Genuine posting

This article deals with the action of the supervisory bodies (National Labour Inspectorate) in order to ascertain the authenticity of the posting.

There are several elements assessed during the inspections, which relate to the posting undertaking (business location and type of business) and the "nature and the modalities of work and the worker's salary".

To this end, paragraph 3 of this article has an important content, recalling that elements to be assessed are the actual temporary nature of work carried out in Italy, and the start date of the posting. One point that has partially included the comments expressed by CGIL, CISL and UIL is that also **travel, accommodation and meals arrangements** payable by the employer shall be taken into account in order to assess the authenticity of the posting.

Paragraph 4 underlines that, if the posting is not genuine, workers are considered in all respects subordinate to the person who has used their services.

Paragraph 5 specifies the sanctions that may vary between 5,000 and 50,000 Euros and foresee the arrest in case of illegal posting of minors.

Art. 4 Working and Employment Conditions

It is stressed that, for the matters provided for, working and employment conditions of posted workers are the same as those envisaged for workers who perform **similar employed activities** in the place where the posting takes place.

Certain limitations are established in case of assembly or first installation of goods, whereas it is stated that, for posted workers, working conditions are regulated by Art. 31 of Decree No 81/2015 (so-called Jobs Act).

Paragraph 4 recalls how, in the case of posting, where it is applicable under Italian law, the **joint and several liability** regime shall apply.

Paragraph 5 states that, in the case of **posting under a contract of carriage,** regulations relating to road safety and regularity of the haulage market provided for by Art. 83 bis of Legislative Decree 112, 2008, and their subsequent amendments shall apply.

Art.5. Protection of rights

It must be noted that posted workers can assert their rights at administrative and judicial level.

The request submitted by CGIL, CISL and UIL was not accepted. This request, consistent with Article 11 of Directive No 67/2014, which, considered the high risk of blackmailing of falsely

posted workers and language difficulties and demanded for the most representative trade union organizations and/or other associations representing a legitimate interest in the implementation of EU obligations to be granted the power **to activate - in the name and on behalf of posted workers - judicial or administrative proceedings** to protect their employment claims and rights.

Art. 6 Observatory

The most significant new feature of the final draft of the Legislative Decree is represented by the creation of a **joint Observatory between the Ministry of Labour and social partners on the transactional posting of workers in Italy**, with the participation of INPS, Isfol and the Presidency of the Council of Ministers.

The observatory shall have the task of monitoring the phenomenon, in order to improve a respectful use of posting of workers in compliance with the working and employment conditions provided for by Italian and European regulations.

It is an important recognition of the role of the social partners to promote a transparent and inclusive labour market, fully consistent with the approach of the Enfoster and Enacting European projects, involving Cisl and the Ministry of Labour and social policies, and focusing on the phenomenon of transnational posting of workers, as part of a wider European and national partnership.

A specific agreement is foreseen with the **National Agency for active labour market policies** (Anpal) to get access to data on the number, duration and location of the posting in Italy, in addition to the classification of posted workers and the type of services for which the posting takes place.

The Observatory has the very important task of formulating proposals to implement the institutional website requested by Directive 2014/67 in each country in order to disseminate information regarding proper arrangements to be made in a genuine and authentic posting.

It is desirable, in order to collect information on sanctions and dynamics of non-genuine posting, to involve the Observatory of the National Labour Inspectorate.

Art. 7 Access to information

This article regulates the exchanges of information with the authorities of other Member States and the creation of an **institutional website**, in Italian and English, with information relating the posting regulations in force in Italy. The site will also inform undertakings about the **collective agreements applicable to posted workers in Italy**, a subject on which the

involvement of Cgil Cisl Uil is expected in order to also constantly update this section with the aim of suggesting correct "minimum wage tables" besides the "method used to calculate the pay due and the criteria for the classification of employees."

Art. 8 Administrative cooperation

This article regulates the exchanges of information between the National Labour Inspectorate and the authorities of other Member States through the Internal Market Information System (**the so-called IMI system**).

Art. 9 Supporting measures

It promotes initiatives for the exchange of personnel responsible for administrative cooperation, mutual assistance and supervision.

Art. 10 Administrative obligations

Paragraph 1 is particularly worth of mention, as it establishes the obligation for the undertaking that intends to post workers in Italy **to communicate to the Ministry of Labour and Social Policies, within the twenty-four hours of the day before the posting, a series of identifying elements** of the posting undertaking and posted workers, as well as a **contact person with powers of representation to liaise with the relevant social partners interested in promoting second level collective bargaining with the obligation to be available in case of a reasoned request of the social partners.**

Further modalities of such communications will be established through an implementing circular within 30 days after the entry into force of the decree.

Art. 11 Inspections

Specific inspections are foreseen, in compliance with the principle of proportionality and non-discrimination.

Art. 12 Sanctions

Specific sanctions are foreseen in case of failure to fulfil reporting obligations, with a maximum total ceiling of 150,000 Euros for the undertaking.

As Cisl, we emphasize how the sanctions are definitely adequate, even if the real challenge is the effective and concrete collection of those sanctions, very difficult in a transnational framework.

Art. 13-24

They regulate the cases of cross-border enforcement of administrative sanctions provided for by the decree in line with the framework reference of Directive 2014/67, the real key element for the effectiveness of the sanctions for which cross-border administrative cooperation will be crucial to request the enforcement of the sanction in the country where the posting undertaking has its registered office or domicile.

Art. 25

Provides financial invariance clauses

Art. 26

Establishes the repeal of Legislative Decree 72/2000.

3.4 Position paper of the employers in the Italian construction sector *(ANCE)*

As the main representative body in the construction sector, ANCE has always been monitoring the posting of workers, that is now a well-established practice in the current European market. For this reason, overcoming those barriers that restrict free movement of workers is regarded as important, as is providing giving clear-cut rules about how posting should take place.

This aspect is even more significant in the construction sector, in which performance of services within the community takes place not in terms of movement of goods but in terms of circulation of entire *teams of workers,* to whom labour protection should be ensured for the benefit of all the market operators and fair competition among them.

In this respect, it suffices to mention the peculiarities of the construction sector, concerning both the temporary nature of work and workers' significant levels of mobility. For these reasons, the construction sector might be exposed to illegal practices and social dumping, which might affect compliant companies and workers' protection in terms of health and safety.

The ENACTING Project represented an occasion for participants, the social partners and the authorities from different countries to interact. The common objective has been that of dealing with the most important issues concerning posting, as laid down by the Enforcement Directive (2014/67/EU[8]): tackling the circumvention of the rules concerning the posting of workers, improving workers' protection and cooperation among administrative bodies, exchanging information in relation to posting.

The transposition of the Enforcement Directive in Italy has been concluded in July and may be considered as satisfying. The legislator, besides transposing those principles laid down at EU level, has included all the provisions set forth in the implementing Decree (Legislative Decree n. 72/2000) concerning the previous directive on posting (96/71/EC), which led to the enforcement of a Consolidated Text on this aspect. Such proposals have mainly concerned the amendment of the first Directive on posting (96/71/EC) and the introduction of a "Services" Passport to be issued to the companies that operate in the Community.

As for the first provision, after experiencing some setbacks, the Commission will evaluate the possible amendments and changes that will involve national governments. The second

[8] This was laid down in Italian legislation by means of Legislative Decree n. 136/2015, published in the "Gazzetta Ufficiale" n. 169 on June 21 2016.

provision is highly debated and is opposed particularly by representatives of the building industry, even at a European level.

In any case, the Enforcement Directive has already represented an important step forward on the posting of workers and the mobility of businesses at EU level. Therefore, monitoring activities would be desirable concerning the impact of norms transposing the provisions referred to above, in order to facilitate the implementation of further amendments, if any.

The Directive has provided more stringent rules to tackle widespread cases of circumvention of rules on posting, which affect fair competition and result from the lack of monitoring activities and exchange of information and dialogue among the countries involved.

For this reason, ANCE is of the opinion that it is fundamental to start effective ***administrative cooperation*** among the countries involved[9] to make all information easily accessible, both that on Italian workers posted abroad and foreign staff sent to Italian companies.

This should also take place to ensure the adequate monitoring of posting, especially if implemented in companies from European countries with particularly low labour costs, an aspect which alters the market and promote unfair competition, leading to such phenomena as social dumping.

One move that has been particularly appreciated has been the inclusion of article 6 in the last stage of transposing the Directive into national law. This enables the legislator to set up an Observatory for monitoring posted workers that consists of representatives from public institutions and the social partners. The hope is that the Observatory will soon be up and running in order to effectively promote cooperation among different administrative bodies.

The conclusion of *bilateral agreements* among member States or among national institutions is also recommended, in order to ensure that companies that operate in the countries concerned fulfil their obligation and the mutual recognition of posted workers' rights, notwithstanding their peculiarities, for example in relation to the benefits provided by bilateral bodies.

These agreements may, among other things, facilitate comparison in relation to workers' remuneration and other pay-related aspects (in this sense, the national board of bilateral bodies in the construction sector operating in different European countries are already working to meet this goal).

[9] Referred to in Art. 7, 8, 9, 10, 11 and 12 of the transposition decree (Legislative Decree n. 136/2006).

These agreements would therefore strengthen the role of ***bilateral bodies in the sector*** in different countries, promoting their role as institutional bodies whose effort to promote protection and guarantees should also concern posted workers.[10]

The latter should be given all the safeguards granted to workers operating in the host country, also in relation to the safety and health of construction sites, a particularly debated aspect in such a dangerous sector as the building one. To this end, the social partners agreed to give a fundamental role to their bilateral bodies, which with time has been also recognized by the State. The Ministry of Labour has, indeed, recalled the obligation of registration of the posted workers to the *Casse edili* every time no equivalent body exists in the country of origins ensuring the benefits granted by them to Italian workers.

Proper communication and information among countries about posted workers will facilitate the correct application of community legislation regarding equal treatment, and that of national legislation to safeguard workers and companies.

In this respect, the terms for the adaptation of information systems for the exchange of information should be complied with, while correctly implementing the IMI (information on the internal market) system as soon as possible.

ANCE will provide full cooperation, together with the other social partners operating in the sector, in order to promote the most effective application of current legislation.

[10] The legislator also mentioned (art. 8 paragraph 5) some agreements and bilateral agreements among the countries related to administrative cooperation, that the National Labour Inspectorate must take into account in the transposition decree.

3.5 Position paper of the employers in the Italian road transports sector

(ANITA - Association of Employers in the Road Transport and Logistics Industry)

Specific national issues in relation to the laws of transposition

The Association of Employers in the Road Transport and Logistics Industry (ANITA) brings together the most important companies in the sector and is a member of Italy's association of industry (Confindustria). ANITA participated in the ENACTING project with interest. Its aim is to promote cooperation among Member States, ensure the widespread use of transnational posting, and prevent illegal practices that might result in social dumping.

As it is in other sectors, transnational posting and provision of labour are widespread practices in the road transport industry. For this reason, we have followed with interest the national and international debate concerning the transposition of the Enforcement Directive into national law. This was done to guarantee the genuine nature of posting, offer more protection to workers and enable information exchange among public administrations, also in relation to sanctions, by means of cooperation of administrative bodies at transnational level.

The work of the Enacting project has been particularly helpful in the discussion with the social partners and the Ministry of Labour, with the latter that has stimulated the search of normative solutions in line with the European directive.

Anita welcomes the possibility to apply this measure to operations concerning road cabotage (art. 1, paragraph 4 of the legislative decree referred to above), taking into account the peculiarity of this mode of transport seeing that these tasks are increasingly widespread. Yet in this case an implementing provision is needed, as is coordination among different Ministers (e.g. Internal Affairs, Labour, and Infrastructure and Transport). The explicit extension of norms on posting to this practice is also laid down in recital 17 of Regulation (EC) n. 1072/2009, that makes the provisions of Directive 96/71/EC applicable to those transport companies that perform cabotage operations.

Anita expresses satisfaction with the indicators used to evaluate the genuine nature of posting and intended to prevent abuses and the circumvention of rules, in particular in those cases when a worker regularly performs his work in the country to which he has been posted, in accordance with Rome I Regulation. Under these circumstances, the new norms regarding the genuine nature of posting should be useful to prevent unfair and anti-competitive practices.

Anita also welcomes the introduction of the obligation to send a prior notification of commencement of posting to Italian monitoring bodies.

It seems equally useful that the provision implementing the norm concerning prior notification contains rules requiring the user company to keep the notification documents – which should be kept in the vehicle in the event of road checks. With a view to reduce red tape and due to the increase use of digital documents on the part of Italy and Europe, it is suggested that secondary rules concerning implementation explicitly provide that such documentation can also be produced in a digital format.

Still on the specific nature of the transport sector, a clarification is necessary concerning joint and several liability laid down by the Decree, pursuant to which art. 83-bis, Legislative Decree n. 112/2008 also applies to posting.

In particular, ANITA is of the opinion that it is not clear who is the client and the carrier for the purposes of article 83-bis, especially at the time of verifying the legal nature of remuneration, social security contributions and the payment of the carrier's insurance.

Accordingly, ANITA will ensure its full cooperation, not only in the transport sector strictly speaking, but as a way to promote the efficient implementation of rules.

3.5 The Romanian posting experience *(Maria Mihaela Darle)*

1. Legislation

Now in Romania is in force law 344/2006 transposing Directive 96/71 / EC but also the GD No. 104/2007 regulating the specific procedure concerning the posting of workers in the provision of transnational services in Romania.

However, there is also a law project that basically would have to transpose both directives (96/71 D / D EC and 2014/67 / EU) but is still in the Parliament for approval.

2. Trade Union experience

In recent years, our confederation has been involved in several projects due to which we managed to get some information about the profile of Romanian people working as posted workers (especially people from transport and construction sector), the problems they face while being posted and also some statistical data (which we have to recognize that are very poor).

Very briefly, we managed to find that, according to the *European Commission. Employment, Social Affairs & Inclusion (2012b). Posting of workers in the European Union and EFTA countries: Report on A1 portable documents issued in 2010 and 2011,* Romanians are posted workers mainly in **Germany** (31.609), **France** (13.159), **Italy** (6.677), **Belgium** (3.396), **The Netherlands** (2.765), **Austria** (871) and **Great Britain** (285).

Another very important thing is the socio-demographic profile of posted workers both in construction and in transport.

Those working in construction sector are usually men, with average or low skill level, aged between 25-45 years. However, we see an increase, in age, over 45 years old among those posted. This could also happen because of the aging population in general.

Regarding transporters they are usually men aged 30-55 years with specific qualifications on the work they do. Those posted from Romania are mostly truck drivers and trucks and to a lesser extent drivers of buses and coaches.

One aspect that is reflected in socio-demographic profile of posted transporters from Romania is the increasing age average of drivers, the aging workforce. It is a phenomenon little analysed, but which can have serious consequences, especially if we talk about a labor market quite competitive:

1) Increase the risk of accidents;

2) Difficulties in adapting to modern technologies (aspect found in interviews with transport workers posted from Romania);
3) The emergence of health problems and the difficulty of solving them (especially when health insurance responsibility is shared between employer and employee or is diffuse because there are many subcontractors);
4) The importance of social insurance payment for these people approaching retirement age;
5) Difficulties in continuing to work extended periods away from family.

3. Conclusions and "solutions"

✓ Employers based outside Romania must conduct significant business in their home country, to send in Romania employees as posted workers.

♦ Lack of information for construction workers when they leave to work abroad and preference rather informal networks created state levers are the main issues facing representatives of the trade unions in this area.

✓ Creating partnerships between vocational schools that run programs in construction and international companies that carry out such activities would be helpful in establishing common standards for performance.

♦ The posted workers in construction also criticized that have virtually no contact with the society of the host country, something that makes them quite vulnerable when they need help and they discussed the issue of barriers language.

✓ The main measures to stimulate the dialogue between employees, employers and trade unions should follow:

a. Knowledge of European legislation on the posting by all parties involved;
b. That are subject to risks by not applying the law;
c. Establishing a climate of confidence between the three parties;
d. The availability of information to drivers in their own language and in a legible manner;
e. Use of new communication technologies (Facebook, websites) to communicate more easily with those, a large part of the year can not be found at home.

♦ Fake posted work practices are common in the road and recording workers in the country is most advantageous to the employer is not related to the volume of economic activity.

- ✓ Increasing the number of International Framework Agreement sign by the MNC appliable to the posted workers of the MNC and by their subcontractors, too.
- ✓ Should be a stronger joint and several liability mechanism in the subcontracting chains in order to be respected the posted workers rights.
- ✓ Cooperation between trade unions in the origin state and the destination one.