



## Activity 1.1. National Reviews and Panels

**Country Report on implementation process of  
Directive 2014/67/EU in Germany**

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## INTRODUCTION

According to recent data published by the European Commission, Germany is the main destination country for postings from other EU-Member State countries. With 414,200 A1 forms issued for Germany, the country received 28% of all posted workers noted in the Study (European Commission 2015:p.16). At the same time Germany has issued 232,276 A1 forms for posting to other Member States which also amounts to approximately 16% of all postings. These data reveal that Germany's policies on posting affect this form of freedom of services distinctively. In this short country report, we will therefore touch upon the present legal framework as well as the debate and implementation strategy on the Directive on the Enforcement of the Posted Workers directive. We aim to present a chronological overview of the implementation process as well as the perspectives of the social partners and the counselling office for posted workers what will add a more practical perspective. These Perspectives will also touch upon two important changes in Germany being the introduction of the Minimum Wage Law and the Proposed Change of the Posted Workers Directive itself. The reopening of the Posted Workers directive will be shortly discussed itself before drawing a critical conclusion on the directive implementation process as well as on the potential challenges and opportunities.

## THE LEGAL FRAMEWORK FOR POSTED WORKERS BEFORE THE ENFORCEMENT DIRECTIVE

Germany legislated in the field of posting of workers prior to the adoption of Directive 96/71 / EC. The law on mandatory working conditions for cross-border services (Posted Workers Act PWA, Arbeitnehmerentsendegesetz) from 26.02.1996 was adapted to the requirements of the Directive in the course of its implementation on 19.12.1998 and is currently applicable in the revised version of 20.04.2009 but has been updated for the last time on August 11, 2014.

In § 2 of the Posted Workers Act (PWA) the working conditions described in Article 3 of Directive 96/71/EC were taken almost word for word. They apply to all workers who are employed on German territory.

The universally applicable collective agreements play a special role, which following § 3 AEntG apply to all employers established abroad without exception. The following industries are subject to universally applicable collective agreements in Germany: waste management, including street cleaning and winter services, education and advanced training services under Volume II or III of the German Social Code (Sozialgesetzbuch), primary and secondary

construction industries, special mining activities at coal mines, mailing services, cleaning services of buildings, nursing services, slaughter and meat processing, security services and laundry services in customer service.

The prime contractor's liability, as regulated in § 14 AEntG, applies to these industries as well. This means that employees in these industries can assert their wage claims in the event of the non-payment of outstanding wages with both the prime contractor and the subcontractors in the entire chain of subcontractors. The prime contractor's liability applies regardless of culpability, and includes the entire chain of subcontractors and not only in the construction industry, but currently to all industries listed above. When a national minimum wage is introduced on 01.01.2015 (according to § 13 of the Minimum Wage Act (MiLoG) it will apply, with only a few exceptions, to all employees in Germany in (almost) all industries. Therefore, this liability reaches far beyond the new general liability of contractors as regulated in Art.12 of the Enforcement Directive 2014/67/EU.

Article 4 paragraph 1 of the Directive states, that the customs administration Bundesfinanzdirektion West based in Wörthstraße 1-3, 50668 Cologne acts as a liaison office for cooperation between the authorities, and simultaneously operates as a monitoring authority for compliance with the minimum requirements. Additionally, the office acts as Information Authority within the scope of Article 4 paragraph 3 of the Directive on the general availability of information. The statutory requirements on posted workers can be found on the website of the customs administration. There is also a German and English telephone information line for companies, however, it is not specifically intended for issues regarding posted workers, but for all questions within the competence of the customs administration. No information office for posted workers has been established so far.

Information regarding the regulations on paid leave in the construction industry can be obtained from the Paid Leave Fund of the Construction Industry (Urlaubs- und Lohnausgleichskasse), Wettinerstraße 7, 65189 Wiesbaden. The institution has set up a telephone information line in various EU languages for employers and employees. In addition, detailed informational material can be downloaded in several European languages on the website [www.soka-bau.de](http://www.soka-bau.de).

The implementation of a range of measures, which are prescribed in Art. 5 of the Directive to ensure compliance with the Directive, was realized through the introduction of registration, recording and storage requirements regarding working hours and the compulsory storage of documents domestically. They apply only to the sectors with universally applicable collective agreements on minimum working conditions, which have been included in the Posted Workers Act. In accordance with § 16 of the Minimum Wage Act (MiLoG), additional reporting requirements have been introduced for those employers established abroad, who employ workers in those industries referred to in § 2a of the Act to Combat Clandestine Employment, including the transport industry. Before engaging in any work or service, a written notification

of the posting has to be submitted in German to the competent authority of the customs administration, which includes all essential details necessary for the review process.

According to § 18 of the PWA, the foreign service supplier has to submit a written report in German, describing minimum working conditions, such as minimum wage, overtime pay, tariff vacation, holiday pay or additional holiday pay or when it must pay holiday fund contributions to a holiday fund. Furthermore, there is also an obligation to designate a responsible agent and a representative authorized to receive official documents and communication.

Investigations are carried out by the office for Financial Control of Illegal Work (FSK) of the customs administration and are limited to the review of the universally applicable collective agreements on minimum working conditions. Additional sanctions are provided for non-compliance with the requirements of a regular posting: Companies that do not comply with the provisions of the Posted Workers Act, may under certain conditions be subject to partially high fines. They can also be excluded from participation in public tenders, when convicted in a corresponding matter.

Unfortunately, neither a legal definition of a posted worker, nor the conditions for establishing the authenticity of the employer in the sending state and the temporary nature of the posting were introduced as part of the implementation of the Directive (Art. 2).

When the Minimum Wage Act came into force on January 1<sup>st</sup>, 2015, the prime contractor's liability mentioned in §14 of the PWA was extended to the minimum wage, stating that liability for the minimum wage would be regulated in the same manner. In addition the Minimum Wage Act also mentioned that posted workers not covered under one of the universally applicable collective agreement mentioned in §4 of the PWA would be entitled to receive the minimum wage just as domestic workers.

## **CHRONOLOGICAL OVERVIEW OF THE IMPLEMENTATION PROCESS OF THE ENFORCEMENT DIRECTIVE IN GERMANY**

With the Enforcement directive being signed on the 15<sup>th</sup> of May 2014, all Member States had time until the 18<sup>th</sup> of June to implement the directive. The following chronological overview is meant to present a overview of the existing published communication and discussion at the level of Parliament (in German: Bundestag).

The National Trade Union Confederation DGB (DeutscherGewerkschaftsbund) first raised the issue of implementation of the Enforcement Directive 2014/67/EU in September 18, 2014 within a statement on law of free movement of people within the EU. In this statement the crucial role of the Enforcement Directive as an opportunity to improve transnational

cooperation of control mechanisms to prevent illicit employment was directly mentioned with a concrete reference to Article 4 of the Directive. The statement of the DGB was presented within the 25 Meeting of the German Parliament (Deutscher Bundestag) which took place on October 2014<sup>1</sup>.

Following this, the opposition *Bündnis 90/die Grünen* (the green party) published a request to the German Government on November 25, 2014 on the topic of fair mobility within the European Union, and asked specifically when the Enforcement Directive 2014/67/EU would be implemented, and how the government would ensure the improved access of information for posted workers as mentioned in Article 5 of the directive. In addition the paper requested a statement on which national ministry would be entitled to elaborate a concept on the implementation strategy of Germany, which social partners and external experts would be involvement in the development of such a concept and what concrete suggestions existed for the implementation of article 8 of the Directive<sup>2</sup>.

The national government responded to the request of *Bündnis 90/die Grünen*, on December 12, 2014 with regard to the implementation of the Enforcement Directive reminding that the implementation deadline was June 2016 and that Germany, in comparison to other countries had already implemented a large part of the content of the Directive. Therefore, it would require a profound verification what points of the directive would ask for further implementation and legal changes. However, the statement also confirmed that the National Ministry of Labour would be in charge of the implementation and that the inclusion of experts or social partners would be decided at that level. Moreover, the German government explained that a state of the art evaluation would be necessary and conducted by an already established group of national experts without further explanation of these experts' position or the group's composition<sup>3</sup>.

Shortly before Minimum Wage Act came into force in Germany, the topic of posting and subsequently the implementation of Directive 2014/67/EU was re-raised by the opposition party. In this case the opposition party *die Linke* launched a request on December 19, 2015. The party asked the German government how exactly the minimum wage which was not also valid for all posted workers in sectors not covered by a universally applicable minimum wage would apply. The party asked which aspects of remuneration for posted workers would be counted as part of the minimum wage and which would not.

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<sup>1</sup><https://www.bundestag.de/blob/348500/b7e7052c8a59df2105845758144e0e76/protokoll-data.pdf> page 52)

<sup>2</sup><http://dip21.bundestag.de/dip21/btd/18/033/1803332.pdf> p.4

<sup>3</sup><http://dipbt.bundestag.de/dip21/btd/18/035/1803520.pdf> p.18

In addition this request referred to the request made by *Bündnis 90/die Grünen* in November and re-launched the question on support and information centres for posted workers and expanded it to the topic of the minimum wage, asking how the German government would plan to inform posted workers of the new Minimum Wage Act<sup>4</sup>.

The Minimum Wage act came into force on January 1<sup>st</sup> 2015, and the national Government responded to the request by *die Linke* explaining the composition of the minimum wage for posted workers but without further explanation or new elaborations on its implementation strategy of Directive 2014/67/EU<sup>5</sup>.

The next official information on the state of the Art of the implementation process of Directive 2014/67/EU was on September 30, 2015 (please see section position of the Ministry of Labour). Here Members of the Committee of Labour and Social Affairs asked concrete questions on the implementation process with concrete reference to transnational cooperation in enforcement as well as to information and support of posted workers.

On October 8, 2016 an Act for the implementation of Directive 2014/50/EU was presented in the Bundestag<sup>6</sup>. The Directive was amended in April 2016, but in contrast to the Enforcement Directive the German government managed to find an agreement on its implementation and the Law was passed by both the Parliament and the General Assembly on December 21, 2015 and will come into force on January 1, 2018<sup>7</sup>.

Shortly before finishing this country report, we contacted the responsible person in the Ministry of Labour for the transposition of the Enforcement Directive 2014/67/EU asking for the current status (May 2016). We receive the following statement.

*The necessary legal changes have been elaborated and concluded, however, the transposition of Chapter VI with a specific focus on sanctions not falling under the framework agreement 2005/214/JI are still to be clarified. Also initiatives regarding the adjustment or changes in organisational structures are still to be elaborated. Therefore, not concrete statement can be made at present.*

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<sup>4</sup><http://dip21.bundestag.de/dip21/btd/18/036/1803637.pdf> p.3

<sup>5</sup><http://dipbt.bundestag.de/doc/btd/18/038/1803824.pdf> p.3

<sup>6</sup><http://dip21.bundestag.de/dip21/btd/18/062/1806283.pdf>

<sup>7</sup>[http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=//\\*/%5b@attr\\_id='bgbl115s2553.pdf'%5d#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl115s2553.pdf%27%5D\\_1469387866052](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*/%5b@attr_id='bgbl115s2553.pdf'%5d#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl115s2553.pdf%27%5D_1469387866052)



Up to this day (July 23, 2016) no Act has been proposed or passed on the transposition of the Enforcement Directive 2014/67/2014, although the deadline has passed more than one month ago.

We will subsequently present the positions of the social partners, government institutions and control institutions on the transposition of the directive and the need for transnational cooperation

### **Perspective of the Counselling Office for Posted Workers (BEB)**

The Counselling Office for Posted Workers, that is a project partner in the Enacting project, decided to contribute and actively involve into the implementation process and published a statement based on the own practical experience and the exchange with the project partners from other countries present within the Enacting project. The statement entailed perspectives on the necessary legal steps for the implementation of the enforcement directive. In consequence, the Counselling Office analysed the Enforcement Directive and identified the most critical points in the implementation based on practical experience for each article of the Directive. This text was subsequently sent to Member of the Parliament in Germany as well as interest groups in early September 2015.

The following points were highlighted in this declaration:

#### **Questions and Concerns of the Counselling Office for Posted Workers regarding the implementation of the so-called Enforcement Directive 2014/67/EU**

##### **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 Counseling 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 counseling 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 procure 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 secondment 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 in consequence 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.*

***Which means does Germany have at its disposal 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 what kind of cases 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 counseling offices is regulated via grant agreements at the state level, which are written out every other year.*  
***How does the Federal Government plan to 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 the lower parts of the chain no exploitation and evasion 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.*

Apart from the statement on the transposition of the Enforcement directive and the current problems visible based on the counselling work, the Counselling Office worked closely with the Trade Unions IGBAU (responsible for construction and agriculture) and ver.di (with particular focus on the transport sector) to enhance cooperation in the support for posted workers.

### **Perspectives of Trade Unions**

During the preparation process of the Directive, both the German Trade Union Confederation, DGB as well as the Member Union IGBAU and ver.di were active in pointing on the necessary measures and aspects needed in the Directive for an improvement of the situation posted workers. In February 2014, the DGB launched a common statement with the employers organization of the skilled crafts sector (in German: Zentralverband Deutsches Handwerk ZDH)<sup>8</sup>. The statement focussed on five main points to be improved in the then existing proposal for an enforcement Directive. First, the legal consequences of Article 3, being the criteria of a real or fans posting, were demanded to be concretised, claiming that only concrete regulations would impede abuse or regularly gaps. The second request focussed on the demand for efficient control mechanisms and asked for a long-term notification system as well as a prior notice request in order to expand the control responsibilities and control duties. The third point underlined the need for increase in flexibility of control mechanisms asking for the implementation of laws that allow investigations without a given suspicion. DGB and employers' organisation ZDH also asked

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<sup>8</sup><http://www.dgb.de/themen/++co++d8e1d8da-99f9-11e3-a341-52540023ef1a>

for an effective general contractor's liability scheme which should not be restricted in direct or indirect implementation within sub-contracting schemes. The social partners asked for a clear formulation of Article 12 not allowing for any loopholes. The final point of the statement focused on the strengthening and expansion of information and support mechanisms of posted workers. Shortly after the Directive was adapted at the EU – level, the DGB launched a critical statement about the content and the context of Directive 2014/67/EU claiming that it was a missed chance in for the improvement and strengthening of workers' right. In a statement issued before the final text was implemented at the EU level, the DGB claimed that the Directive would not help the existing problems of posted workers because its proposed mechanisms to effectively control the working conditions of posted workers were insufficient<sup>9</sup>.

However, in its yearly report of 2015 the German Trade Union confederation asked for a common initiative of social partners in cooperation with government institutions as the national as well as federal level for the implementation of information and cooperation structures within the context of implementation of both the free movement of workers Directive (2014/54/EU) and the Enforcement directive (2014/67/EU)<sup>10</sup>.

In June 2016, the DGB launched an official statement on the current debate on the revision of the Posted Workers Directive 96/71/EC and referred repeatedly to the Enforcement Directive and the issued that have been left open or unclear within the latter that could be re-addressed within the course of the revision<sup>11</sup>.

## Perspectives of the Ministry of Labour

The Following text is a translation of the Briefing of the Committee of Labour and Social Affairs from September 30, 2015:

*Briefing by the Federal Ministry of Labour and Social Affairs*

### **Report of the Federal Government on the state of implementation of the Enforcement Directive on the Posting of Workers Directive 2014/67<sup>12</sup>**

*The Enforcement Directive 2014/67 serves for the better enforcement of the European Posting of*

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<sup>9</sup><http://www.dgb.de/presse/++co++e79f0004-c551-11e3-80b5-52540023ef1a>

<sup>10</sup>[https://www.dgb-bestellservice.de/besys\\_dgb/pdf/DGB10018.pdf](https://www.dgb-bestellservice.de/besys_dgb/pdf/DGB10018.pdf) p27

<sup>11</sup>[https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiG04Sb9ozOAhWMSRoKHZctC2IQFggcMAA&url=http%3A%2F%2Fwww.dgb.de%2F%2B%2Bco%2B%2Bdca70342-3159-11e6-9b1f-525400e5a74a%2FDGB-Stellungnahme-zur-nderung-der-Entsenderichtlinie.pdf&usq=AFQjCNFcmgwneAwKv8cEYLahsKFe9M10YA&sig2=3k6rPfntcNoHAfG9\\_9Lj9A&bvm=bv.127984354,d.d2s](https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiG04Sb9ozOAhWMSRoKHZctC2IQFggcMAA&url=http%3A%2F%2Fwww.dgb.de%2F%2B%2Bco%2B%2Bdca70342-3159-11e6-9b1f-525400e5a74a%2FDGB-Stellungnahme-zur-nderung-der-Entsenderichtlinie.pdf&usq=AFQjCNFcmgwneAwKv8cEYLahsKFe9M10YA&sig2=3k6rPfntcNoHAfG9_9Lj9A&bvm=bv.127984354,d.d2s)

<sup>12</sup> Supplementary Report on agenda item 5 of the 50th Session, 30.09.2015.

*Workers Directive. The Posting of Workers Directive was already adopted in 1996, and requires the Member States to establish certain obligatory minimum working conditions in their state vis-à-vis cross-border postings of workers.*

*The Enforcement Directive encompasses a whole variety of measures that should ensure that the protection standards for posted workers guaranteed by the Posting of Workers Directive are effective in practice.*

*These measures include, i.a.*

- *Guiding elements for the definition of the concept of posted work*
- *better information for employers and employees about the applicable working standards for posted workers*
- *Rules on cross-border cooperation between the authorities of the Member States*
- *Requirements for control instruments of the Member States,*
- *Mandatory introduction of liability for sub-contracts in the construction sector,*
- *Provisions on cross-border enforcement of financial administrative penalties.*

*The implementation efforts of the Member States are accompanied by the European Commission's Working Group "TREND". It consists of national experts responsible for the implementation of the Enforcement Directive, as well as representatives of the European Commission, both of which will exchange information on outstanding issues of implementation and the work in progress in their respective Member States. For Germany the Federal Ministry of Labour and Social Affairs is taking part, next to representatives of other ministries and public agencies, depending on the specific issues at hand.*

*According to general assessment, Germany has no special need for implementation concerning the points of the Directive, which were central issues in the discussion during the negotiations on the enforcement directive:*

*The Posted Workers Act and the Minimum Wage Act already established contractor liability. The relevant provisions are fully covering the requirements of the Directive; with them Germany meets the obligation to implement the Directive. However, they do also not exceed the EU's legal requirements for liability in subcontracting.*

*The control instruments of the Posted Workers Act are also consistent with the provisions of the Enforcement Directive. The demands of the German handicraft sector for an expansion of control mechanisms foreseen by the Posted Workers Act AentG, which were raised in the committee*

meeting are not known to the federal government.

*The elements to define the existence of a posting within the purposes of labour law, as contained in Art. 4 of the Directive, do not pose an additional need for legislation. The provisions of the Posted Workers Act are designed as international mandatory regulations within the meaning of Article 9 of Regulation (EC) No 595/2008 of 16 June 2008 about the applicable law concerning contractual liability (Rome I); they are applicable, when an employee of a foreign-based employer is working on German territory. However, the presence of a "posting" is not a factual precondition for the authorities to act. In that regard, Art. 4, which is supposed to counteract the abusive construction of situations in the context of the term "posting", does not require further adjustments or amendments of the national law, simply because there is no corresponding legal precondition in national law.*

*That is why the posting certificate (A 1 certificate) regulated by Regulation (EC) 883/04 (and the related criticism on abusive constructions of situations or "bogus postings" under applicable law in Germany), is relevant for the application of social security legislation, but neither for the application of the Posted Workers Act, nor for other provisions of labor law. For example, in case the respective units of the customs authority would need information on the A 1 certificate in order to verify compliance with the reporting duties under the social security law, they can acquire this information regularly via accessing the database of the data office of the pension insurance administrators (DSRV). This practice regarding A 1 certificates also helps explain why the German customs authority hardly ever uses the cross-border electronic cooperation instruments provided by the IMI-Regulation. In contrast, 27.896 A1-requests were made by the customs authority's "Financial Control of Illegal Work" unit (FKS) to the DSRV in the months from January to August alone.*

*In remaining demand for implementation of the Enforcement Directive in Germany is more related to administrative and other supportive measures (esp. information services, administrative cooperation and enforcement).*

*In this respect new and complex issues need to be solved, in particular within Chapter VI of the Directive on cross-border enforcement of financial administrative penalties. However, this does not concern the penalties imposed by German authorities in accordance with the Posted Workers Act. For their enforcement across borders, the Council Framework Decision 2005/214/JHA of 24<sup>th</sup> February 2005 concerning the application of the principle of mutual recognition of financial penalties remains applicable. A remaining demand for implementation of the Enforcement Directive could, however, still exist for financial administrative penalties, which are to be imposed by authorities of other Member States against employers established in Germany, as far as the*



*already mentioned Council Framework Decision does not apply to them under the national system.*

*The Enforcement Directive contains further requirements for expanding and improving the information service for sending employers workers and their posted workers. In that regard, it is not fully understood, to which extent the existing information services in need to be supplemented and what kind of concrete individual measures are necessary for this purpose.*

*With regard to the issues in need of further clarification, the Federal Ministry for Labour and Social Affairs, which is responsible for the implementation of the Directive as a whole, still reviews together with the affected ministries the nature and extent of the remaining demand for implementation. In that respect it is not yet been conclusively determined whether a formal law is required for the remaining implementation of the Directive. Simultaneously, the Ministry maintains a close exchange about technical aspects of implementation with the responsible representatives of the EU Commission and the other Member States' experts on implementation within the Commission's Working Group TREND.*

*The European platform against undeclared, which was also discussed by the Committee, constitutes a separate initiative at European level. The European Commission proposed on 9<sup>th</sup> April 2014, the establishment of a European platform to strengthen cooperation at European level for the prevention and deterrence of undeclared work. The platform aims to bring the different national enforcement authorities together, which proceed against undeclared work. This initiative is - in contrast to the Enforcement Directive - not yet adopted; as of now it still remains within the phase of informal trialogue with the European Parliament, in which the German government participates constructively on the basis of the established procedural framework.*

*The Committee also discussed the positions taken by some Eastern European Member States on the issue of establishing a binding maximum duration for the posting of workers as it is debated currently within EU Commission's review process of the Posting of Workers Directive 96/71/EC. In the current preparatory stage, some Member States have approached the Commission with a joint letter that criticizes the proposed maximum length of a posting and its effects on labour law.*

## **Perspectives of the Control Institutions**

Within the context of the running Enacting project, the responsible institution for controlling the legal status of posted workers and regularly verifying work sites, the Finanzkontrolle Schwarzarbeit (FKS, in engl: National Agency Combatuing Illicit Employment).

As the FKS is a controlling institutional under the Directory of Finance it is primarily responsible with the control of financial fraud within the payment of wages, entitled to impose fines on both employers and employees when the necessary documents are abundant, false or not complete.

With regard to the posting of workers, the FKS is responsible in checking the existence of an A1 forms as well as the payment of contributions to taxes and social security (after 181 days). The FKS is entitled to check the payment of wages based on universally applicable collective agreements or the Minimum Wage Act. However, in a case of fraud, the FKS will primarily institute proceedings against the employer for non-payment of taxes and is not entitled to enforce the payment of wages for employees. The latter can only be done by trade union representative bodies (if the employees are members), or by lawyers.

However, the FKS is the only institutions involved in the IMI cooperation system. The formal procedure and responsibilities within the IMI system in German are as follows:

For the transnational cooperation in the context of administrative assistance on the basis of Directive 96/71/EC (PWD) liaison offices are to be appointed by all EU/EEA States in accordance with Article 4, paragraph 1 PWD. The Directorate VII, National Institution combating illicit employment (Finanzkontrolle Schwarzarbeit), the Customs Directorate General is the liaison office solely responsible for Germany. Due the sole responsibility for Germany, the IMI is consequently used in the legal framework of the posting of workers exclusively by the Directorate VII. The Directorate VII is responsible for the nationwide professional control of the customs administration's authorities in combating undeclared work and illegal employment and therefore also a central agency for the international cooperation in combating undeclared work and illegal employment.

The use of the IMI by the Directorate VII is always subject to compliance with data protection. Therefore, responses to requests concerning administrative assistance are only possible if the basis for the request is an administrative procedure. Requests that are based on investigations regarding criminal or administrative fines, must be forwarded to the Directorate VII directly in the form of police or judicial requests for legal assistance and not through the IMI.

The legal framework of the posting of workers within the IMI refers to the provisions of the PWD as a legal basis. The use of the IMI for requests concerning the legal aspects of social security covered by Regulation (EC) 883/2004 - such as the assessment of posting certificates A1 - would require an extension of the IMI within the scope of the legal issues laid down in this regulation. Since the questions raised by the customs administration in combating undeclared work and illegal employment largely concern the legal extent of social security issues, an according extension would be helpful.

Incoming requests from the IMI where the Directorate VII is responsible for its processing - as far as an answer cannot be obtained from existing data - are forwarded to the responsible local customs offices for carrying out inspections. This is applicable where the content of the requests regards the customs administration's responsibility.

Requests whose processing do not fall within the responsibility of the Directorate VII will be forwarded to the responsible national authorities. The answers of the responsible national authorities are sent by the Directorate VII to the liaison office of the requesting State.

## **RE-OPENING THE POSTED WORKERS DIRECTIVE: CHALLENGES AND OPPORTUNITIES**

While both the German government as well as the Federal Assembly (Bundesrat) have been particularly silent on the transposition of the Enforcement Directive 2014/67/EU, when the proposal of for the revision of the Posted Workers Directive came out in March 2016, the Federal Assembly launched a recommendation in which a strengthening of workers' rights has been proposed as a way to move forward on the revision of the directive<sup>13</sup>. It remains to be seen in how far the revision of the Posted Workers Directive will also create an opportunity to implement the unclear aspects of the Enforcement Directive 2014/67 or when and in how far the Commission will request a declaration from the German government on the transposition status.

## **CONCLUSIONS FROM THE GERMAN PERSPECTIVE**

The German perspective on the transposition reveals that whereas some aspects of the directive such as general contractor's liability might already be regulated, the focus on control as well as information and support mechanisms is very much nationally oriented. Data on IMI requests from other countries reveals that the number of requests that Germany has issued via IMI in comparison to the number of postings is extremely low. One explanation might be that only few problems occur in relation to posting either to or for Germany. Another explanation might be that the institutional structure of the institution in charge with posting, i.e. the FKS it is itself nationally oriented and consequently the legal bases for action are also only nationally focussed. Transnational cooperation and action does not seem to be the primary focus as the legal instruments are primarily focussed on tax or social security questions which remain within

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<sup>13</sup>[https://www.bundesrat.de/SharedDocs/drucksachen/2016/0101-0200/114-1-16.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesrat.de/SharedDocs/drucksachen/2016/0101-0200/114-1-16.pdf?__blob=publicationFile&v=2)

national competences within the EU. However, trade unions as well as counselling institutions show that posted workers are confronted with a range of problems and hurdles that cannot be solved with tax focussed institutions combating illicit employment at the national level, but need worker's focussed institutional changes.