ENACTING

Enable cooperation and mutual learning for a fair posting of workers

Transnational posting of workers within the EU.

Guidelines for administrative cooperation and mutual assistance

in the light of Directive 67/2014/EU

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

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Introduction

THE ENACTING PROJECT: A CONCRETE EXPERIENCE OF MUTUAL LEARNING ABOUT POSTING OF WORKERS WITHIN EU

Debora Giannini, Enacting Coordinator - Istituto Guglielmo Tagliacarne

These Guidelines have been fulfilled within the Project "ENACTING – Enable cooperation and mutual learning for a fair posting of workers", thanks to the "Enacting Administrative Cooperation Working Group" involving Labour Inspectors and experts from Belgium, Germany, Italy and Romania.

ENACTING is an action-learning initiative for a stronger cooperation about posting of workers among trade unions, control authorities, employers' organizations.

During the project (December 2014-September 2016), the Working Group organized three workshops and had a cooperative work at distance in order to debate and follow up a number of key-topics selected because of their importance to build up a stronger administrative transnational cooperation, in the light of Directive 2014/67/EU.

In the intention of the Working Group, the Guidelines could represent a document useful for Labour Inspectors and professionals interested to follow up about concepts, legal contents and experiences related to Labour Inspection activities on transnational posting of workers within EU.

The overall questions the Working Group intended to answer were:

Which are the key topics needing a follow-up? Which are the peculiarities of the National transposition laws to be shared? Which National practices can inspire other countries? Which methods and tools can be further improved and/or diffused?

Starting for these overall, general questions, some specific ones were selected by the Working Group as follows:

1. *The principles of "**fraud, abuse and circumvention**" within posting of workers: which is the position of ECJ? Which is their implementation according to Directive 2014/67/EU? How the EU*

principle of abuse of rights is rather differently approached among the countries involved in the Enacting project (i.e. Belgium, Germany, Italy, and Romania)?

2. *How the principle of "**Mutual assistance**" has been transposed in the National transposition law in Belgium, Italy and Romania?*
3. *Which experiences related to the **use IMI (Internal Market Information system)** can be capitalized to make its use more effective within controls about posting of workers?*
4. *"**Joint and several liability**" principle: which is the impact according to Art. 12 of Directive 2014/67/EU? Which are the National provisions in the respective transposition laws in Belgium, Germany, Italy and Romania?*
5. *The meaning of minimum rate of pay applicable to posting of workers: Which is the position of the European Court of Justice? Which are the National provisions in Belgium, Germany, Italy, and Romania?*

The above mentioned 5 specific questions correspond to as many chapters of these Guidelines:

- Chapter 1, about Fraud, abuse and circumvention, with comparisons among the four Enacting countries;
- Chapter 2, with national sub-chapter about Mutual assistance for administrative cooperation in the four Enacting countries;
- Chapter 3, about IMI, with overall comparative reflections based on a questionnaire filled by Labour Inspectors involved directly or indirectly in the ENACTING project, and national practical cases;
- Chapter 4, about joint and several liability with a comparative overview and national sub-chapters;
- Chapter 5, about minimum rate of pay with references to EU legislation and jurisprudence, and national sub-chapters with clarification about national legislations in the four ENACTING countries.

Each contribution in the preparation of this document was, of course, based on both a specific national perspective and a transnational joint effort. This shared effort has enhanced mutual learning, trust and cooperation among the involved control authorities .

All involved authors took part in the various activities of cooperation and mutual learning carried out within the ENACTING project. They are directly involved in labour inspection or in coordination of labour inspection activities, in the process of preparation and implementation of the National measures implementing Directive 2014/67/EU in their respective countries. A sincere thanks to all authors for their strong commitment to prepare these Guidelines.

Chapter 1 - Fraud, abuse and circumvention within posting of workers

Davide Venturi, PhD– Adapt Senior research Fellow (text provided in English by the author)

1.1. Fraud abuse and circumvention: the progressive affirmation of a general principle of prohibition of abuse of EU Law by the ECJ.

The prohibition of fraudulent and abusive practices meant at getting illicit advantages from the application of freedoms and rights established by EU Law has been a constant concern of the European Court of Justice since 1974.Though the rulings of the ECJ are not directly referred to labour law, as they concern cases of transnational commercial law and tax law, nevertheless, the arguments referred to the prohibition of abusive practices meant at taking illicit advantages of EU law, as established by the ECJ in the fields of commerce and taxation, are perfectly suitable for tackling abusive practices related to PW too. That is because the principle of prohibition of the abuse of rights is more and more widely considered as a general principle of EU law.

Hereafter are reported a few of the pivotal judicial steps and principles, meant at identifying and contrasting abusive practices, as established by the ECJ. These principles have been considered by the Partners of the Project as key elements in order to tackle the concept of fraud and abuse in PW.

(I) In the ***Van Binsbergen case C-33/74***, point 13, the Court states: «*a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services*».The case is referred to a professional who, establishing his/her office in a Member State, pursues his/her entire/prevalent activity in a different Member State, whose restrictive legislation he/she intends to avoid. The ECJ establishes it is not against European law that this Member State

has a law for combating such a fraudulent practice. This is a case of "circumvention" of Member State legislation through transnational practices, taking illicit (as contrasting with Member State law) advantages from circumventing EU law based rights.

The Van Binsbergen case is also important because for the first time it points out one of the major type of abusive practices: the so called "**U turn"** situations, where persons or goods move from one MS to another in order to come back to the original MS, and, because of that practice, some benefits established by EU law are claimed for. Obviously not all "U turn" practices, after being attentively regarded by National Authorities, turn out to be abusive practices under EU law, as they can be considered so only in case they are carried out in order to circumvent some restrictive national legislation, unduly benefiting of the freedoms and rights granted by EU law.

Anyhow, "U turn" situations are actually very common practices in posting, as it was pointed out by the National Authorities represented in the Enacting project.

(II) In the ***Centros ltd. case, C-212/97***, the Court, while affirming the principle that no barrier (denial of permits) can be allowed to a Member State in case a Company established in another MS means to open a branch in that State, in point n. 24 holds that «*it is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law*». Prohibition of fraudulent practices and circumvention of State law cannot be pursued by general regulatory barriers, but it has to be tackled by national anti-fraud measures directly taken to prohibit specific conducts to be proved as fraudulent case by case.

(III) For the first time, in the ***Emsland-StärkeGmbH case, C-110/99***, the ECJ clearly affirms **the principle of "abuse of rights"** in EU law, whose juridical notion is composed of objective

and subjective factual elements, as follows: « *A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.*

It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country».

(IV) It is with the ***Halifax plc case, C-255/02***, that a major step forward is made. In fact, in this case, the ECJ clearly affirms the prohibition of abusive practices as a general principle of EU law. In n. 69 it sais «*The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law*».

A very important point in the legal definition of "abusive practices" is the following: they are transactions which are not carried out *bona fide*, meaning "in the context of normal commercial operations"; therefore they are not even understandable and justified on a commercial basis, but only on "the purpose of wrongfully obtaining advantages" or specific rights granted by EU law.

Another central point of the Halifax ruling is that the ECJ explains the consequences of fraudulent and abusive practices. The consequence of abuse is the "**re-establishment**" of facts and regulation that would have been applicable without these illicit practices. More precisely, «*Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice*».

The Enacting group agrees in considering this principle as very relevant in order to reasoning on the consequences of fraudulent posting. In fact, this principle seems very much in tune with the similar principle established in Regulation 593/2008 (Rome 1), art. 8.1, in the following part: «*Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable*». More particularly referred to PW, a very similar concept to the one above mentioned, even expressed almost in the same wording, is provided by Recital 11 of Directive 2014/67/EU, where it refers to norms «*that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit*».

(V) In the ***Cadbury Schweppes case, C-196/04***, in point n. 75 the ECJ states «*articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable*». This is not a case of "U turn" like in *Van Binsbergen*, but a case where a multinational chooses to move its interests from one MS to another. But even in that situation, abusive practices can occur when profits are artificially subjected, circumventing EU law, to a different and more favourable national taxation through "artificial arrangements", without which the national taxation applicable would have been the one of another MS.

Moreover, that ruling points out what the proof of the existence of abusive practices should be. It is the concept of "**objective evidence**", which is based on objective facts, documents and any other element of proof that, if all analysed by a third party, that third party would come to the same conclusion that fraudulent practices were carried out. In fact, in that case

the ECJ holds «*accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties that despite the existence of tax motives that controlled company is actually established in the host Member State and carries on genuine economic activities there*».

1.2. The principle of prohibition of abusive practices and the EU norms, in particular the Directive 2014/67/EU

Once defined by the ECJ, the principle of prohibition of abusive practices carried out in order to get improper advantages provided by EU law has been taken up in the secondary legislation.

For example, according to **art. 11 of Directive 90/434/EEC** (the so called "Merger Tax Directive"),Member States may refuse to apply or withdraw the benefits of all or any part of the provisions in case a transaction «has *as its principal objective or as one of its principal objectives tax evasion or tax avoidance*». Interpreting this legal provision, in the ***Leur-Bloem case, C-28/95***, the ECJ, though never directly referring to abusive practices, follows a legal argument falling in the same scope of the prohibition of abuse, concluding that «*the Member States may stipulate that the fact that the planned operation is not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance*».

More directly intended to affirm the principle of abuse of EU law, **art. 35 of Directive 2004/38/EC** on the rights of the citizens to move and reside freely in all MS, is titled «*abuse of rights*» holding that *«Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience*».

Finally coming to posting, following the same pathway the EU secondary legislation is being undertaking, **Directive 2014/67/EU** clearly refers to the principle of abuse of the EU law, excluding that abusive practices may take advantage of the legal benefits of the PW norms.

In particular, the partners of Enacting highlighted the following as some of the major concepts referred to abuse contained in the Enforcement Directive, which have undoubtedly directed the transposition process of MSs:

- «*In order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC*» (*recital 7*);
- Defining the Subject of the Directive it includes «measures to prevent and sanction any abuse and circumvention of the applicable rules» (art. 1.1);
- Art. 4, drawing a common framework for all MS for defining and identifying genuine posting, is titled «*Identification of a genuine posting and prevention of abuse and circumvention*»;
- In providing a sort of identification of the possible consequences of fraudulent/abusive posting, recital 11 holds «*where there is no genuine posting situation and a conflict of law arises, due regard should be given to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council ('Rome I') or the Rome Convention that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit*» (See in particular art. 8.1 of Regulation 593/2008, as mentioned above).

1.3. The principle of prohibition of abusive practices in transposing Directive 2014/67/EU: the case of BE, DE, IT, RO[1]

The question of how to transpose into national law the EU principle of the abuse of rights is rather differently approached among the MSs of the Enacting partners: Belgium, Germany, Italy and Romania.

The first point to be addressed is whether, according to the Directive, the discipline of the abuse of rights necessarily needed specific transposition. The Enacting partners consider this as a major point

[1]Please refer to Appendix 1, 2 and 3 to this chapter for further details, by Belgian Ministry of Labour, by Italian Ministry of Labour and by Romanian Labour Inspection, about "Fraud, abuse and circumvention" according to the respective National legislations.

and it is quite a shared view among them that, though a specific provision of national law regulating the consequences of fraudulent and abusive practices in posting would be absolutely recommendable and worthy in order to let national interpreters have a clearer framework of the enforcement measures concretely applicable at national level, the provisions of art. 4 of the directive, interpreted with the reference to Rome 1 indicated in Recital 11 of Directive 2014/67/EU, could probably be considered as clear enough for the interpreters even if not expressly transposed.

In fact, the indicators provided by art. 4 are sufficiently clear and directly applicable at national level by the competent administrative Authorities and by judges, through the indicated method of the "overall assessment". And the legal consequence of fraud, as clearly pointed out by Recital 11, is the application of Rome 1, provided that «*where there is no genuine posting situation and a conflict of law arises, due regard should be given to the provisions of Regulation (EC) No 593/2008*».

Anyhow, **Germany**, for example, did not directly transpose the provisions referred to art. 4 of the directive in a new law. In that respect, Germany seems to consider that its national legal system related to abusive practices is already adequate enough for tackling fraud in posting.

The specific choice of Germany was to concentrate on the new law on minimum salary (MiLoG), introduced on 1.1.2015 (for more information on the German legal system, see the specific Country Report, and see also the chapter on joint and several liability), which made joint and several liability applicable to posting as well. Obviously this provision does not directly face the case of abuse referred to PW (letter-box companies, workers not genuinely posted, etc.), and nevertheless it does provide posted workers of some forms of protection (JSL rights), so that the norms applicable to posted workers are the same as those applicable to German workers whose employment contracts are covered by the MiloG system (minimum salary).

On the other hand, it should be pointed out that Germany has always based its labour inspection system solely on the competences of controls referred to occupational safety and health, and therefore inspections on regular posting are basically left to Tax and Customs Authorities, whose major concern is in recovering taxes more than in providing for protection to workers, or more precisely to posted

workers. Anyhow, it should be noted that specific sanctions may be issued by the German Customs Authority, Office for Financial Control of Illegal Work (FSK), to the employer in case of not genuine posting.

In **Belgium**, at the moment of the conclusion of Enacting project [i.e. September 2016], the law of transposition of Directive 2014/67/EU has already been approved by the government but yet not voted by the Parliament and thus still not published. . The Belgian draft law regulates the principle of abuse in posting and its consequences in art. 7, which replaces art.2 of the law 5 Mars 2002 of transposition of Directive 96/71/EC. These provisions, referred to the definition of "posted worker" and of "employer" are very much based on the provisions of art. 4.3 and 4.2 of the "enforcement directive". The consequence of not genuine posting, in both cases referred to alleged "posted worker" or alleged posting "employer", is the misapplication of the rules referred to posting and as a consequence, it should be argued, the application of Regulation 593/2008.It should be also noted that no reference has been made by the Belgian transposition law to the provisions of art. 23-24 of the "*loi-programme anti-abus 27.12.2012*", which was object of a procedure of infraction in 2013 and, though that controversial norm was never formally abrogated, it has never been applied by the Belgian Authorities, following the principle of "good administration" aimed at avoiding dual social security taxation.

Legislative Decree 136/2016 transposes the "enforcement directive" in **Italy**, and having actually abrogated previous Legislative Decree 72/2000, it is at the moment the unique national legislation on posted workers, providing for transposition of both directive 96/71/EC and directive 2014/67/EU.

Art. 3.4 of Legislative Decree 136/2016 holds that in case of non genuine posting practices «*employees alleged posted workers, ed.]are considered in all respects as employed by the subject who have benefited of their work*». This specific provision, which is very close to the general law enforcing the prohibition of abusive provision of services, is probably understandable considering that in case of abuse/fraud the contract of transnational provision of services is to be considered null and void because of contractual fraud. That contractual nullity has consequences even for the activities of the posted

workers whose protection is granted either by the intervention of the Labour Inspectorate, or by the workers themselves, by directly claiming their rights in Courts against the subject they are considered employers of.

Anyhow, the expression "in all respects" does not seem to be able to granting the "employees" involved to be immediately registered to the Italian Social Security system in case a "model A1" has been produced by their sending Country. That is because "models A1" may only be challenged by following the procedures between the "requiring authority" and the "requested authority" of the posting Country defined and regulated by Decision A1 of 12 June 2009.

In any case, due to the provision of art. 3.4 above mentioned, in case of abusive posting, Italian law seems to provide for the subject benefiting of the abusive transnational provision of services a sort of shift from "joint and several liability" to "direct liability", as, due to abuse, his condition turns from "client" of a transnational provision of services to "employer" of falsely posted workers. Joint and Several Liability, in fact, is provided for (art. 4.3, 4.4 and 4.5 of Legislative Decree 136/2016) in case of genuine posting only.

The transposition law in **Romania**, at the moment of the end of the Enacting Project [i.e. September 2016] is still in front of the Parliament, and therefore the text of the draft law is still subject to changes. Article 7 of the law is devoted to contrasting fraud in posting and it basically refers to the indicators provided by art. 4 of the "Enforcement Directive". Nevertheless, art. 7.6 contains a provision which is somehow similar to the one above described for the case of Italy, holding that these indicators «*may be taken into account by labour inspectorates in order to determine whether a person has the status of employee under national law [of Romania, ed.], including to identify possible cases of false self-employment*».

Chapter 2- Mutual assistance in the light of Directive2014/67/UE

2.1. Introduction

Roberta Fabrizi, Alessia Di Benedetto, Sonia Colantonio – DGAI (DG Inspection Activities) of Italian Ministry of Labour (text translated into English from the Italian version provided by the authors)

Directive 2014/67/EU (Enforcement Directive) requires Member States' direct commitment to the realization of close administrative cooperation and mutual assistance in order to facilitate the practical application of the provisions of the said Directive and Directive 96/71/ EC, for the protection of workers employed in cross-border services (see. art. 6, paragraph 1).

The administrative cooperation and mutual assistance, to which Chapter III of the enforcement Directive is devoted, involves, essentially, the competent supervisory authorities in individual Member States, which, in turn, shall assume the legal status of "applicant authority" and "requesting authority".

Directive 2014/67/EU provides for the strengthening of the system of administrative cooperation and mutual assistance, focused on the exchange of information between the competent authorities of the Member States concerned by posting situations, also through a formalization and a more precise definition of the content of the cooperation itself and the laying down of its terms in order to make the activities of each individual operators more effective and timely.

This obviously has an impact on the concrete accomplishment of surveillance in the different EU Member States, since information sharing can help both the authorities of the host country and those of the country of establishment of the posting undertaking to acquire several useful elements for the purposes of the specific investigation about the authenticity of the posting and, more generally, the discovery of any further irregularities relating to employment and social legislations.

In this area we have identified cases in which the exchange of information plays a decisive role for the investigations carried out by the control bodies, to check whether:

1. The posting undertakings are letterbox undertakings, not exercising any substantial economic activity in the country of origin, related to the provision of services rendered in the country of destination;
2. posting undertakings do not pay any service but just provide the staff in the absence of the relevant authorization;
3. posted workers, regularly employed by the posting undertaking, whether he/she resigned or was laid off during the period of posting, continue to pursue their professional activities, mainly as undeclared work, in the host country;
4. at the time of hiring by a foreign undertaking, posted workers already reside and work in the place of performance of posted work, i.e. in the host country;
5. posting is not temporary, such as in the case where a plurality of posting undertakings that are part of the same subject using the same worker for a total period exceeding that considered compatible with the temporary nature of the posting itself.

In view of the decisive strengthening of the system of administrative cooperation promoted by the Directive, it must be taken into account that, at the moment, in some Member States there are some critical issues ranging from a lack of interconnection among the databases that allow to find the information needed to analyze the phenomenon and carry out focused inspections to the poor use of instruments of international cooperation by the operators.

Databases, in fact, are not always interconnected or updated in real time, with implications both on the domestic system and the relations between the different Member States. Moreover, at present, not all countries have specific organised data on posting and this can clearly result in information gaps. A possible incentive to improve the functioning of the systems and to ensure greater access to available data can be identified in the provision of the Directive which provides that Member States should allow access to their databases on IMI also to the competent authorities of other countries; in this case,

however, the difficulty of reading this data, due to linguistic differences only partially solved by the machine translation system present on the IMI platform, cannot be underestimated.

It also remains to be seen whether, in reality, the new terms of 2 and 25 working days specified in the Directive 2014/67/EU for the responses, respectively, to urgent and ordinary requests will be sufficient to ensure an efficient exchange of information. In fact, we cannot hide that, especially in countries with a certain spatial extent or organizational complexity, the need to manage the co-operation through centralized forms of coordination will involve the use of part of these days to verify the requests and sort them to the different competent authorities, which, in turn, in the presence of such short deadlines, could be induced to favour the objective of timeliness of response instead of that of its completeness.

A further aspect linked to the issue of administrative cooperation provided for by Directive 2014/67/EU, Chapter Vi, regards the procedures for the request for recovery of an administrative penalty and/or fines and for the notification of a decision concerning such a penalty and/or fine, in respect of which several other critical issues emerge.

The implementing rules of Chapter VI of the Directive, concerning cross-border enforcement of administrative sanctions imposed on undertakings which post one or more workers in violation of the posting regulations are primarily aimed at solving these problems and at allowing an easier execution of the sanctions adopted by each individual State, thus promoting a more effective administrative cooperation among the competent authorities.

It must be stresses, however, that, following the transposition in each Member State, the provisions of Chapter VI will be applied only on a residual basis, i.e. when the requesting authority is not able to proceed independently with the notification of the decision or its implementation for the recovery of the fine, under the provisions and procedures laid down by domestic law.

In this regard, it should be noted the difficulty of adjusting the reduced formality of transmission of the measures through IMI, covered by the Directive, with the internal procedures and domestic rules

applicable in the country that will have to comply with the notification requirements or enforcement of decisions.

In light of the above, priorities and key objectives to be pursued under the administrative cooperation and mutual assistance in the different Member States - after the transposition of the Directive - can go in a triple direction:

- Strengthening of the IMI system (Commission's activities to which the Member States can and should make their contribution through feedback and suggestions on the amendments to be made);
- Awareness raising, training and retraining of the staff that will be expected to use IMI for the purposes of administrative cooperation, with specific reference to the new features offered for the notification and cross-border enforcement of the measures;
- Promoting the conclusion of supporting bilateral arrangements and agreements on administrative cooperation, in particular with those countries in which posting is most frequent.

2.2. Mutual assistance: the specific perspective in Belgium

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author).

2.2.1 Priorities and expectations

Priorities about mutual assistance for the Belgian inspection authorities are:

a. Using IMI as much as possible for:
    - requesting information about the nature of posting in order to detect fictitious companies ("letterbox companies);

- identification of the responsible person and its role in his/her relationship with the Belgian company;
- giving information concerning wage adjustments and regularisations after injunctions by the labour inspection;

b. providing and requesting information on the status of A1 in case of serious suspicions of social fraud or not fulfilment of the A1 requirements;

c. Continuing to work in the framework of the bilateral administrative arrangements

d. applying Chapter 6 of Directive 2014/67: cross-border enforcement of administrative fines.

One of the main expectations is to improve the quality of answers for an effective assessment of:

- the real (genuine) nature of posting
- the conditions for issuing the A1: are they respected?
- the cases of social fraud.

The main weak points are:

a) inadequate human resources

b) complexity of structures and bureaucratic obstacles and issues related to "protection of privacy" (no national regulations in line with EU regulation 45/2001)

c) difficult access to databases (offenses, social security, A1, etc,…)

d) the registers in IMI (e.g. trade register) are sometimes not effective or usable (language barrier, no data regarding responsible managers)

e) the deadlines for answers are too tight .

Article 7, paragraph 4 and 5 are difficult to be implemented:

- where there are facts revealing possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay ;

- because competent authorities of the host Member State may also ask the competent authorities of the Member State of establishment to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules.

We hope:

- the creation of a European database of the infringements committed by posting companies, (based on the model of « ERRES » for infringements in the transport sector);
- the creation of an alert mechanism in IMI (E.g. concerning the existence of a letterbox company, to be diffused amongst all M.S.).

2.2.2. A practical case in Belgium: the cooperation between the French and the Belgian Labour Inspectorate

From the second half of the nineties, Belgian Labour Inspection has started systematic inspections in the Antwerp harbour area, more specifically in the biggest concentration of chemical-petrochemical plants of Western-Europe. These inspections revealed a lot of infringements regarding minimum wages of posted workers, excess of working time and even social frauds.

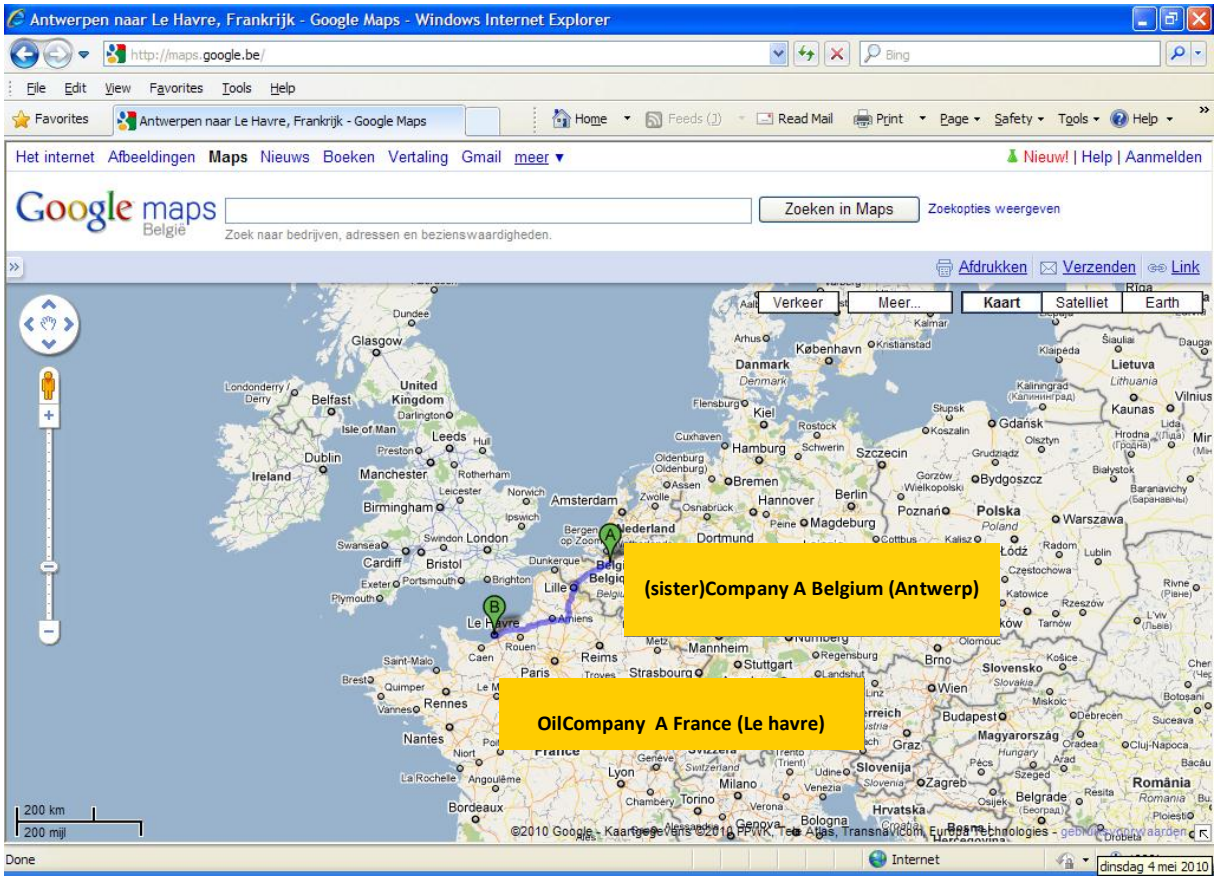
Thanks to the cooperation among Belgian and French Labour inspectorates, some interesting tips and information were given to the Belgian inspectors. According to the received information, an important control took place in the plant of a bug French oil company in Le Havre, as a result of complaints by French trade unions.

Under the supervision of the French public prosecutor, about 200 police forces and labour inspectors made inspections and a lot of infringements were detected.

The French Labour inspectorate transmitted to the Belgian Inspection a complete list of names of foreign companies, the identity of their workers, the amount of their salary, the list of infringements, etc, …

The most important message, was that the French oil company planned a shutdown in its subsidiary in the Antwerp harbour plant a couple of months later. This shutdown area was a big as the one in Le Havre. Most important: a lot of foreign undertakings found in breach of law in Le Havre would also be active in Antwerp. The whole list of subcontractors would be for 80% the same.

Knowing which foreign companies were announced, the Belgian Labour inspection were able to make large scale controls in Antwerp, a couple of months later. And the same undertakings were found in breach of law (underpayment, non-declaration to the social security in their sending state, excess in working time etc.). Only this consecutive control action in Belgium allowed such a success , thanks to the detailed information received from our French colleagues.



In Le Havre and in Antwerp ,Labour inspectors detected, in different places and in different periods of time the same trends, the same subcontractors, the same posted workers, the same infringements which lead to the same penal prosecution. Therefore, Labour Inspectorates concluded an administrative bilateral agreement and a number of small scale joint inspections has taken place, now

and then, with the assistance of inspection teams of both countries. In these inspection actions , all information is shared “on the spot”.

2.3. Mutual assistance: the specific perspective in Italy

Roberta Fabrizi, Alessia Di Benedetto, Sonia Colantonio, Marina Strangio – DGAI (DG Inspection Activities) of Italian Ministry of Labour (text translated into English from the Italian version provided by the authors).

2.3.1. Administrative cooperation and mutual assistance in national law

In order to achieve effective administrative cooperation, Article 6 of the Directive has been transposed into the national law by art.8, Legislative Decree No. 136/2016, under which the National Labour Inspectorate is required to:

- timely respond to reasoned requests for information made by the requesting authorities;
- perform the checks and inspections including the investigation of cases of non-compliance or violation of the law applicable to the posting of workers.

The ultimate end of the administrative cooperation and mutual assistance is the protection of workers employed in transnational postings, including the possibility to adopt "*measures to prevent possible violations of the provisions*" of the Legislative Decree. No. 136/2016 (see Art. 8, paragraph 8).

In implementing a specific provision of the *Enforcement* Directive, the national legislature has made it clear, in paragraph 2 of art. 8, which requests are to be considered as administrative cooperation requests, including those involving the relevant information on:

– the possible recovery of an administrative fine;

– the notification of an administrative or judicial order imposing a penalty;

– sending documents and information about the legality of the establishment;

– sending documents and information concerning the conduct of the service provider.

Concerning the three types of involved authorities, in accordance with the content of Directive 2014/67/EU, these are indicated in art. 2, letters a), b) and c) of Legislative Decree No. 136/2016. In particular, “requiring authority”' means "the competent authority that makes a request for assistance, information, notification or recovery of a penalty in accordance with this decree"; “requested authority” means "the authority to which a request for assistance, information, notification or recovery of a penalty in accordance with this decree is addressed"; “competent authority” shall mean "the Ministry of Labour and Social Policy and the National Labour Inspectorate and, for the sole purpose of the provisions relating to the procedure for recovery of administrative sanctions provided for in Article 21, the judicial authority ".

All operations carried out by Member States under this cooperation and mutual assistance should take place "*without undue delay*" and "*free of charge*". The information generated by this activity is handled in compliance with the principle of relevance ("... *shall be used exclusively for the applications to which they relate*"), as stated in art. 8, section 9 of Legislative Decree. N. 136/2016, implementing the Community legislation.

To allow the competent national authority ("*requested authority")* to respond to the request submitted by the competent authority of another Member State ("*the requesting authority*"), the recipients of the provision of services established in Italy must give the National Labour Inspectorate all the necessary information.

The communication channels for inquiries and their findings are, essentially:

- IMI (to be favoured as the Internal Market Information tool that plays a strategic role to achieve effective cooperation between the competent national authorities responsible for surveillance on labour matters);

- other electronic ways (e.g. e-mail).

It should be noted that, in accordance with a specific national provision (Art. 8, paragraph 5, Legislative Decree. No. 136/2016), in order to verify and monitor the conditions applicable to posted workers and without prejudice to the use, as far as possible, of IMI, for the exchange of information, the national Labour Inspectorate shall implement the agreements and bilateral arrangements on administrative cooperation (see below).

2.3.2. Main terms and conditions

As specification of the timeliness requirement, already foreseen in the EU regulation[2], the national legislation mirrors the strict discipline of the end-dates for feedback requests[3]. End-dates are set to a different timeframe depending on the presence or absence of elements of complexity characterizing the response destined to the requesting authority.

In particular, pursuant to art. 8, paragraph 4, of Legislative Decree No. 136/2016 (in accordance with Art. 6, Directive 2014/67 / EU), the answer must be provided (via IMI or electronically) within:

- two working days from reception of urgent requests, requiring only the consultation of records (and, therefore, not involving further acquisitions of information, inspections, investigations or surveys).In these cases, the urgency must be stated and demonstrated in the request;
- twenty-five working days from reception of the request in all other cases.

[2] Art. 6, paragraph 1, Directive 2014/67/EU: "Member States shall work in close cooperation and provide each other with mutual assistance without undue delay in order to facilitate the implementation, application and enforcement in practice of this Directive and Directive 96/71/EC".

[3] Art. 8, paragraph 1 of Legislative Decree N. 136/2016: "In order to achieve effective administrative cooperation, the National Labour Inspectorate promptly responds to reasoned requests for information made by requesting authorities (...)".

Should objective difficulties to comply with the terms set out in the request arise, in cases where information should be obtained from the mere consultation of documents as well as in cases where checks and inspections should be carried out, the requested authority (the National Labour Inspectorate) shall provide timely notice to the applicant authority in order to find a common solution.

2.3.3. Role of Member States

In the context of the implementation measures of administrative cooperation and mutual assistance, Member States have an important role in the process of implementation of the principles established by art. 7, Directive 2014/67 / EU, to be developed in the framework of national laws, by means of implementing legislation or by administrative practice, with the main goal of making effective and facilitate the concerned cooperation.

In particular, the provisions transposing the measures of administrative cooperation into national law shall be further discussed when preparing circular letters and operational provisions to give effect and facilitate cooperation activities and mutual assistance.

The main provisions of the Directive that the competent national authorities are required to implement provide that:

- during the period of posting of a worker to another Member State, the inspection of terms and conditions of employment to be complied with according to Directive 96/71/EC is the responsibility of the authorities of the host Member State in cooperation, where necessary, with those of the Member State of establishment (see. Art. 7, paragraph 1)
- the Member State of establishment of the service provider shall monitor, control and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State. (v. art . 7, paragraph 2)

- the Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and Directive 2014/67/UE. That responsibility shall not in any way reduce the possibilities of the Member State to which the posting takes place to monitor, control or take any necessary supervisory or enforcement measures in accordance with the *"Enforcement"* Directive and Directive 96/71/EC. (see Art. 7, paragraph 3)
- competent authorities of the host Member State may also ask the competent authorities of the Member State of establishment, in respect of each instance where services are provided or each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules. The competent authorities of the Member State of establishment shall provide this information in accordance with the above mentioned Article 6. (see Art. 7, paragraph 5)
- where there are facts that indicate possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay. (see art. 7, paragraph 4).

The set of activities covered by the administrative cooperation and mutual assistance can deal with both the provision of documentary information and the performance of supervisory measures, for example in order to verify whether a posting entities carries out, in the State of establishment, substantial business activities compatible with the activities within the transnational provision of services.

It is understood that the obligations of cooperation and assistance, provided by art. 7 of the Enforcement Directive, shall not give rise to a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State in which the service is provided. Such checks and controls may be carried out by the authorities of the host Member State on their own initiative or at the request of the competent authorities of the Member State of establishment (see Article 10 , Directive 2014/67 / EU) and in conformity with the powers of

supervision provided for in the host Member State's national law, practice and administrative procedures and in compliance with Union law (see Art. 7 paragraph 6).

Those provisions, in essence, require that in the interest of the lawfulness of transnational postings, and subject to the discretion of national authorities in the choice of the most appropriate procedures:

- the Member State of establishment shall carry out, at the request of the Member State in which work is performed, specific inspection activities with particular reference to the posting undertaking;
- the Member State in which work is performed is called upon to undertake, at the request of the Member State of establishment, specific checks on the authenticity of the posting, and on the working and employment conditions applicable to posted workers.

The above obligations of administrative cooperation and mutual assistance are not accompanied by sanctions: their observance is in fact anchored in the principle of mutual duty of sincere cooperation between the supervisory authorities of each Member State. The Commission is still called upon to oversee the effective and efficient implementation of the provisions in question and to adopt the necessary measures in case of detection of persistent problems in the exchange of information or a permanent refusal to provide information on the part of one or more Member States (Article 6, paragraph 5, second sentence of Directive 2014/67/EU).

2.3.4 Bilateral agreements and arrangements

In order to allow for a more effective application of the EU and national provisions in the field of transnational posting and ensure better protection for workers involved in the provision of services, the Ministry of Labour and Social Policy - Directorate-General for Labour Inspections, in the exercise of its coordination role of supervision on employment and social legislation, has expressed particular interest in the issue of administrative cooperation, also through the conclusion of bilateral agreements with the supervisory authorities of other member States.

The effective implementation of the principle of mutual assistance, in fact, is an essential tool to curb the improper use of the institute of transnational posting of workers and the subsequent situations of economic and social dumping, which are closely related to a lower labour cost. In recent years, activities were undertaken in collaboration with the French supervisory authorities, to jointly address a number of significant issues of protection of employment and health and safety conditions of personnel engaged in the works for the Turin -Lyon high-speed railway line (HST), following ratification (by Law 27 September 2002, n. 28) of the Agreement between Italy and France of 29 January 2001 on the construction of the railway line in question.

In this regard, on September 27, 2011, a Declaration of Cooperation was signed between the Labour Ministries of the two countries, on the subject of "control of transnational mobility of workers and the fight against illegal employment", aimed also at ascertaining "the implementation of the provisions relating to working conditions and employment laid down in Directive 96/71 / EC ". The cited document also refers to the provision of mutual assistance between the competent authorities of each signatory country through:

- prevention initiatives;
- joint investigations;
- exchange of information.

As a result, contacts have been made between the French inspection authority (Directorate-General of the French Labour, Regional Directorate of the Rhône-Alpes Lyon and territorial Directorate of Savoie Chambery) and the Italian inspection authority (Ministry of Labour and Social Policy - Directorate-General for Labour Inspection, Turin territorial labour Department and former regional Directorate of Labour for Piedmont) aimed, first, at deepening their knowledge of their national legislation and control methods in the field of labour and safety at work. The final objective pursued by the parties was to establish valid methods of cooperation aimed at achieving an effective contrast to the "black economy" and undeclared labour, and targeted to contain accident issues through joint operational

guidelines such as to ensure cross-border workers the same level of protection, regardless of whether they operate in the French or Italian territory.

The opportunity to realize the following activities was, therefore, shared by the Italian and French delegations: preparation, in Italian and French, of a single declaration model, to be adopted at the inspections performed by the authorities of the two countries, in order to acquire, by workers and employers involved in the controls, the information necessary to investigations in progress; planning and carrying out, of joint actions, on an experimental basis, by the Italian and French inspection staff, to be implemented in the border areas of the regions of Liguria, Piedmont and Valle d'Aosta and the corresponding French border regions.

Another significant experience of bilateral agreement carried out is the "Protocol of Cooperation" signed, on November 9, 2010, between two Directorates-General of the Italian Ministry of Labour and Social Policy (the Directorate-General for Labour Inspection and the former Directorate-general for the labour market - current Directorate-general for active policies, employment services and training) and the Labour Inspectorate of Romania. This protocol, lasting two years, relates to*" administrative cooperation in the field of labour inspections, with particular reference to the use of posted workers" and is targeted "to the prevention and combating of undeclared and illegal work and control of the real employment and safety conditions in the workplace."*

Under that protocol document, forms of cooperation concerning the exchange of documents, information and experiences were planned and implemented, realized also through the participation of Labour Inspectors delegations of a Member State in surveillance activities on the territory of the other Member State. In particular, partially anticipating the discipline on mutual assistance, set out in Directive no. 67/2014/EU, the parties to the contract have undertaken to implement control activities targeting:

- the verification of employment conditions for posted workers, at the headquarters of the Romanian or Italian posting undertaking, as well as at the place of work performance, that is, the headquarters or production unit of the Romanian or Italian posting undertaking;
- the verification that the posting undertaking from one of the two signatory countries carries on business in that country and possesses the human and material resources for the realization of its business ".

Finally, in July 2015, during a visit of the Romanian Minister of Labour to Italy, the renewal of the Protocol was agreed, taking into account the shared positive evaluation of the experience made.

The conclusion of such an agreement between the respective supervisory authorities of labour and social legislation, in fact, would further strengthen the working relationship already established between the two countries, after the successful subscription, on 7 November 2012, of a cooperation protocol between the Italian Ministry of Labour and social policies and the Ministry of Labour, family and social protection of Romania. With the said Protocol, the Parties undertook to cooperate in the field of labour, including with regard to labour inspection, through the "exchange of information on working conditions" applied to posted personnel "within the framework of the provision of services at transnational level" and carry out the necessary controls in case of any abuse and illicit case.

2.4. Mutual assistance: the specific perspective in Romania

Dantes Nicolae Bratu, Larisa Otilia Papp, Marius Lixandru, Florin Cosma, Simona Iuliana Neacșu and Cătălin Țacu - Romanian Labour Inspection (text provided in English by the authors)

2.4.1. The mutual assistance according to the National transposition law

The Romanian Labour Inspection (Inspectia Muncii) took part in the process of drafting the law transposing *Directive 2014/67/EU* within the technical commission constituted at the level of *Ministry of Labour, Family, Social Protection and Elderly*. At the time of completing these "Enacting Guidelines" (Summer 2016) the Law proposal (available on the official web page of the *Ministry* (*http://www.mmuncii.ro/j33/index.php/ro/transparenta/proiecte-in-dezbatere/4350-proiect-de-lege-privind-detasarea-salariatilor-in-cadrul-prestarii-de-servicii-transnationale*), has been approved by the *Government* and it is following the procedure in *Parliament* (debate and vote).

From its accession to the *European Union* in 2007, Romania adopted a normative package including administrative procedure for the undertakings posting workers to Romania. These procedures include a prior declaration, obligation to provide documents regarding labour relation and to designate a representative in Romania.

Romania is opting for a single act that including entire legal provisions regarding transnational posting of workers: provisions transposing *Directive 96/71/EC* and the new provisions transposing *Directive 2014/67/EU*. The transposition of the *Directive 2014/67/EU* will be made through a new law adding new chapters and articles to the *Law no. 344/2006*.

The main points of the Romanian law are the following:

- disclosure of the documents other than these imposing a financial administrative penalties by the undertakings to the responsible authorities in other Member States is performed by the Labour Inspection, through labour inspectorates;

- the risk assessment procedure for inspections;
- precise administrative requirements and control measures, offenses and the penalties applicable to undertakings for non-compliance;
- the definition of a procedure and terms of communication of administrative decisions imposing a financial sanction.

- Art. 6: urgent request of information, cumulative conditions:
  - up to a maximum of two working days from the receipt of the request;
  - just in urgent cases, motivated and presented in details by the requesting authority;
  - requiring only the consultation of national registers available to *Labour Inspection* (other authorities could be included in IMI for receiving and responding to other kind of information requests - e.g. VAT, social insurance, etc...).
- Art. 7: suggestions/practices useful to implement the provisions of this article:
  - exclusive competence of the authorities from the host Member State regarding the working conditions provided by Directive 96/71/EC;
  - continuing to monitor, control and take the necessary enforcement measures by the Member State of establishment authority (Labour Inspection) for the other labour law provisions.
- Art. 9: prior declaration of posting is a crucial source of information, also in the case of fraud and undeclared work. Prior declaration of posting has been introduced in Romanian administrative procedure since the transposition of *Directive 96/71/EC*.
- Art. 9, lett. e):
  - obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices;

- obligation to designate a person to liaise with the *Labour Inspection* has been already introduced in Romanian administrative procedure since the transposition of *Directive 96/71/EC*.

- Art. 9 – Time limit to keep documents after the end of posting (proportionality linked to the duration of the posting and no more than 1 year):

  - obligation to deliver the documents after the period of posting, for a period of three years.

A meaningful specific bilateral agreement supporting mutual assistance and administrative cooperation is the *Cooperation Protocol between MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI* and *ROMANIAN LABOUR INSPECTION* signed in November 2010 and facilitated by the *Project "EMPOWER"*. Both parts are now considering how to update the *Protocol* taking into account the new challenges settled by the *Directive 2014/67/EU*.

Chapter 3 - The IMI System and posting: lesson learnt from practical cases and future perspectives

3.1. Introduction: IMI and the Directive 2014/67/EU

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author).

The article 21 of the Directive 2014/67, the so-called "Enforcement Directive", states that administrative cooperation and mutual assistance through the IMI system, shall be used also for the provisions of the articles 6, 7, 10(3), 13, 14 and 15.

Article 21 identifies the "Internal Market Information (IMI) system" as the main tool for administrative cooperation between Member States in the framework of transnational posting of workers

The article 6 of the Directive, about general principles in the mutual assistance, provides obligation for the competent national authorities to answer to reasoned requests of information sent by the authorities of other Member States. This mutual assistance shall be realized through IMI system.

The article 10, paragraph 3 about inspections provides that information needed to carry out controls shall be asked by host Member State to the Member State of establishment, in accordance with the rules and principle on administrative cooperation, namely through IMI system.

The articles 13, 14 and 15 about "cross-border enforcement of financial administrative penalties and/or fines", concerning the notification and recovery of financial penalties and or fines require the use of IMI. In particular, article 14, in order to ensure the effectiveness of transmission and reception of requests and concrete assistance to other relevant authorities, establishes that "each Member State shall inform the Commission through IMI which authority or authorities, under its national law, are competent for the purpose of this Chapter".

IMI, indeed, supports the competent authorities in the 'identification of their corresponding authorities in another Member State, in the management of the exchange of information, including personal information, overcoming the limitation of language barriers on the basis of predefined procedures and pre-translated questions concerning posting companies and posted workers.

Exchanges take place with competent authorities of other Member States, which are also registered in IMI.

Therefore, the other forms of cooperation, such as bilateral of administrative agreements, are secondary, residual options, though not excluded as such.

3.2. The advantages of IMI

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author).

The exchange of information through IMI system is faster and more effective than before, because it allows to easily find the competent authority in another Member State, to communicate with it, via a standard list of questions and answers translated into all EU languages, and finally, to follow the progress of the request through a traceability process.

IMI system, because of the flexibility of its structure, allows a simplified administrative cooperation and a more effective exchange of information across borders, respecting the personal data processed in accordance with Directive 95/46 /EC and the principles of proportionality and provisions of EU Regulation no. 1024/2012. The system is mainly financed by the European Commission programmes "IDABC" (Interoperable Delivery of Pan-European e-Government Services to Public Administrations, Business and Citizens) and "ISA" (Interoperability Solutions for European Public Administrations) and it is used by the authorities of the 28 EU Member States as well as those of Liechtenstein, Norway and Iceland (EEA).

The "Enforcement Directive" replicates the best practice of the "Pilot Project for the use of a specific module of the IMI system for the exchange of information in the area of transnational posting of workers". The European Commission launched it in the spring of 2011, which provided for the enlargement of a trial of the system, even to the posting sector.

More information about the benefits of IMI can be find at:

- http://ec.europa.eu/internal_market/imi-net/about/index_en.htm
- http://ec.europa.eu/internal_market/imi-net/_docs/library/imi_leaflet_web_en.pdf

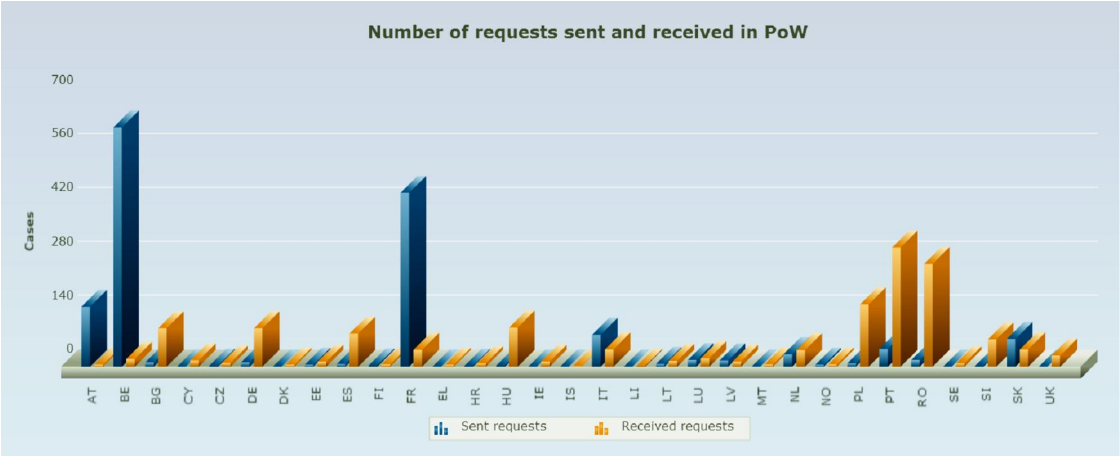
3.3. Some facts and figures about IMI

Philippe Vanden Broeck - Labour Inspectorate of the Belgium Federal State (text provided in English by the author).

The Romanian Labour Inspection is one of the most important receiving authorities of IMI requests regarding posting of workers. According to data supplied by *European Commission,* 17% of the total requests in 2015 are addressed to *Romanian Labour Inspection*. Situation from last 4 years shows an increasing trend of the *IMI* requests.

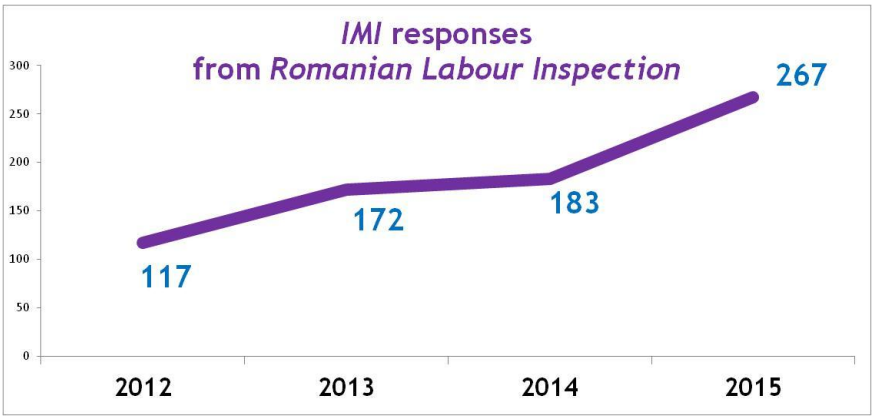
On the other hand, the Belgian posting directive authority is one of the most active in sending requests in IMI:

- sent request by Belgian labour inspectorate since the start in 2011= 1.654 (to Romania: 210 – to Italy 33 – to Germany 71)
- received requests: 50.

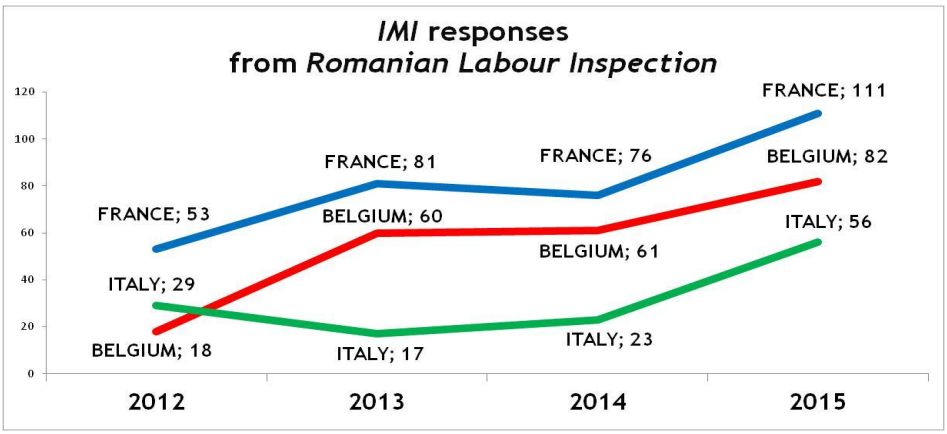


Source: 2015 data, *European Commission*

Romania is one of the M.S. most requested , especially by France, Belgium and Italy and this is a constancy on the last few years.

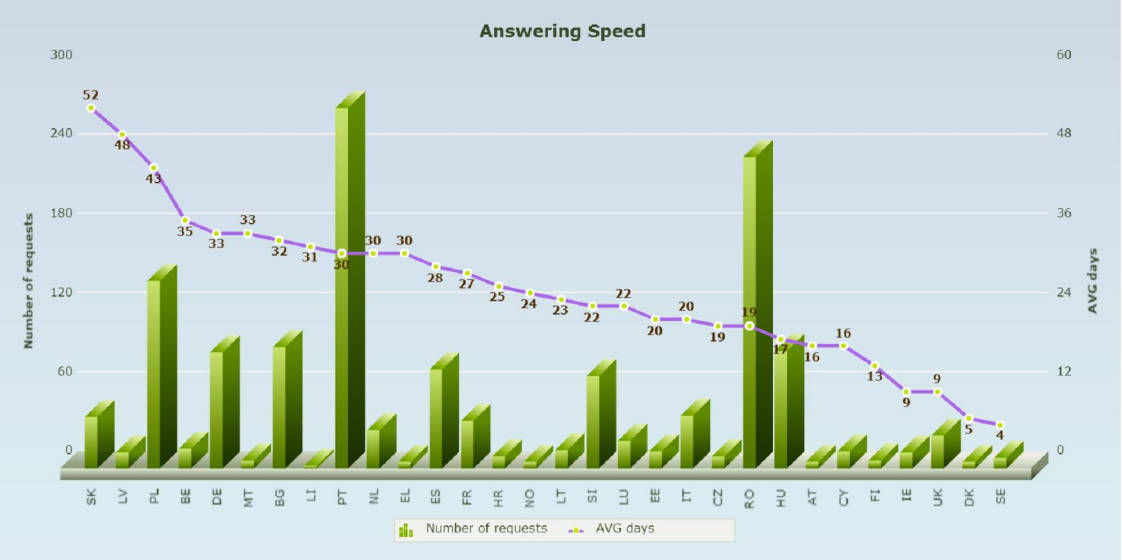


Source: *Romanian Labour Inspection*.



Source: *Romanian Labour Inspection*.

Concerning the issue of the "**Urgent request of information (use of registers/databases)**", the famous "two days deadline " in case of urgent request of information through *IMI,* can generate practical real problems in terms of internal bureaucratic management of documents. Even in those simple cases of accessing registers and electronic databases, communication trough *IMI* remains an *important transnational issue* which cannot shortcut the multilevel hierarchical processing of the request (input and output of institutional documents).



Source: 2015 data, *European Commission*

As a result , the focus in those M.S that are most requested will be on compliance with deadlines and not on the comprehensiveness and matching of data. Aiming to solve this issue those M.S. may propose a list of public source of public information accessible through internet that can be made directly available to those authorities that have this kind of urgent need of information. For example, on behalf of *Romanian Labour Inspection* this kind of information could be:

- *Trade Register* (*Office of Trade Register*);

- information from financial balance sheets (*Ministry of Finance*);

- list of authorised temporary work agencies (*Ministry of Labour*);

- Romanian legislation (*Ministry of Justice*);

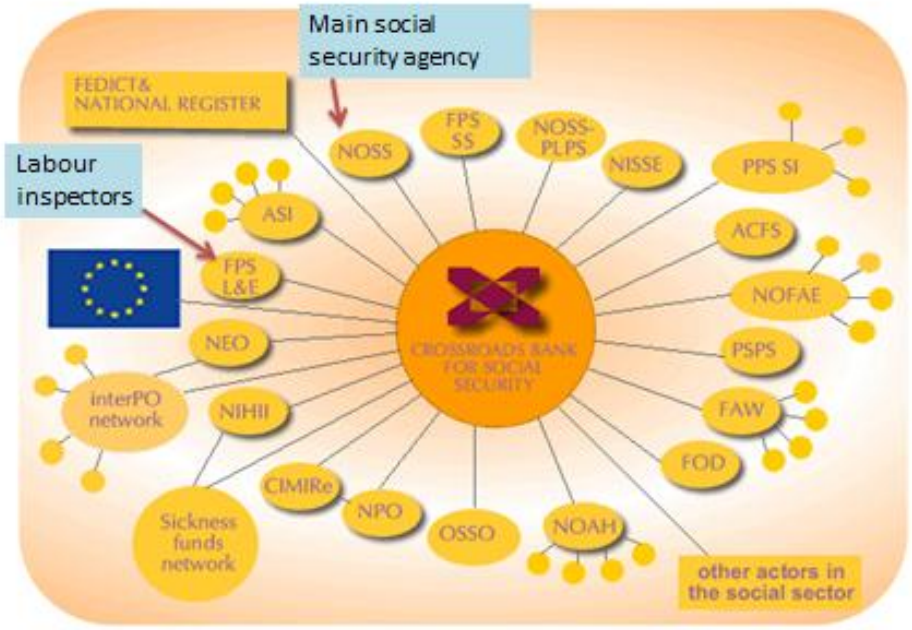
- collective agreements (*Ministry of Labour* and territorial labour inspectorates).

3.4. Some issues related to the use of IMI

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author). This paragraph is based on the information and views collected via a questionnaire among a group of Inspectors in Belgium, Italy, and Romania.

Is it useful to verify (on demand of a counterpart in IMI) if an undertaking/employer is registered at the social security Agency/office of the sending State? Does the competent authority have access to such kind of information ? Does the competent authority of the sending state provide by himself the information asked for ? Or does it refer to the contact person of this Agency/Institution?

The issue is important in the light of the very short deadlines (2 or 25 working days). Some M.S. like Belgium, Italy, Spain etc. do have direct access to those databases and this is very important to assess if an undertaking is established in another MS and if the criteria for a genuine posting situation are met. It helps to discover letterbox companies. In Belgium, for example all labour inspectors have direct access to the information needed via the database of social security or via the database of enterprises.



Competent authorities in other M.S. do not have such a direct access (Romania, Bulgaria, Poland, etc. Therefore very often the authorities in the latter M.S. can only refer to the competent National Agency or the Fiscal administration which is not "member" of the IMI posting module (communication on

paper/email). In the best case scenario, the receiving authority forwards the question himself and provides the answer in IMI, as soon as the answer of the other national authority came in. It would be better if the other national authority would be added as a competent authority in the posting module, but that is often not possible for internal structural reasons.

Does the national legislation concerning the protection of privacy allow a M.S. to reply with information protected by its legislation and related to natural or legal persons ?

There seems to exist two cases . One this of M.S. were protection of privacy and reasons of confidentiality are a real problem and national legislation prohibits free information exchange (Poland, Romania, etc) and the other case of a M.S. where no barriers exist as long as the basic conditions are met. The latter is the case for Belgium and Italy. In Belgium all labour inspectors have been granted access by law to freely communicate at the outcome of a general demand of recurrent access to information and use of it , for the entire labour inspectorate and granted by the Privacy commission on the grounds of a motivated demand and under strict conditions (which mainly are the same as those laid down in the regulation of the European data protection authority: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1995.281.01.0031.01.ENG)

The coupling of the privacy-free and privacy covered capabilities of labour inspectors to their right of direct access to relevant national databases is very useful. This is the situation for example in Belgium where everything starts with the database of Social Security: https://www.ksz-bcss.fgov.be/binaries/documentation/en/cbss_2014_def_web.pdf.

Labour inspectors have access to all applications they need for their job.

The European authority for data protection stated that the IMI platform is in full conformity with Regulation 45/2001. So, then the next thing to consider is: *do the NATIONAL provisions exist in the MS , protecting personnel data?* If yes: no problem for exchanging all personal data within the limits of this national Act.

Article 9 of the Enforcement Directive states that the protection of those involved in the inspection provides that information exchanged between MS should be used by the authorities consistently with the issues for which it was requested.

In the Italian National Decree, this provisional has been replaced and connected with the privacy rule framework laid down in y EU Regulation 45/2001, Legislative Decree n. 196 of 2003 "Code of privacy" and EU Regulation 1024/2012 (IMI Regulation). Moreover, in the IMI system, in particular, according to the aims to protect privacy, all personal data disappear 6 months after the requests closure.

*Does the national legislation concerning the **secrecy in penal matters** allows a competent authority to forward information extracted from a penal file or enquiry ? (e.g. extract from a penal report to the public prosecutor).*

This issue is a tricky one for M.S. In many States , like Italy and Romania, a motivated request must be addressed to the judicial authorities and an authorisation has to be granted for use information exchange about data covered by the penal secrecy. Moreover, labour inspectors are not criminal investigation agents in some M.S. (like Romania) and they refer the situation to police officers who investigate under the supervision of the prosecutor.

Only in some few M.S. the situation is different and a-typical like in Belgium. Article 57 of the Belgian Social penal code is of uttermost importance and it provides a solid basis for labour inspectors to share information with their counterparts or public authorities abroad. This legal fundament provides opportunities for them to use the information extracted from IMI requests without fear and with legal proof in order to use them in their reports and actions even for those that at the end may lead to proceedings before a court, be it in civil or in penal matters: (See: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2010060607&table_name=loi)

Belgian labour inspectors may communicate their findings, facts and evidence in the framework of an enquiry which lead to a criminal report to the social prosecutor, as long as the receiving party has competence to use this information in its own case and as long as the enquiry has been made on its

own initiative and not on instruction of the prosecutor. In the latter case, authorisation of the prosecutor is needed for any dissemination of the information. Authorisation in such cases is always granted.

*Do M.S. got experience with IMI request helping to detect cases of "**non genuine" posting**? (not meeting the criteria of article 4 of the Enforcement Directive)? And in cases of letter box companies?*

With the help of IMI most M.S. have been capable to detect cases of non-genuine posting and letterbox companies. In some M.S. more than in others.

Although , gathering proofs of substantial activity in the state of establishment is a difficult assessment fort most M.S..

Substantial activity spread over a period of time may vary a lot and sometimes cases of substantial activity were found, but they disappeared after some time and on the moment of the request.

*Are M.S. able to reply in IMI on questions concerning the **real (substantial) activity, assets or turnover** of a company in their MS? If not, how do you try to help their correspondent?*

The majority of M.S. can supply information. Some competent authorities supply data without making any evaluation, others try to help in making a general assessment of these criteria, mostly without performing specific enquiries or inspections. There are some exceptions (e.g. if an entrepreneur is operating completely illegally).

*Do the answers obtained via IMI have the value of **legal proof in proceedings** (in penal or in civil matters)?*

In some M.S. the national legislation accepts the legal proof of findings and data from IMI origin. This is the case of Belgium (article 57 of the social penal code) for information gathered from competent authorities abroad (in the framework of countries that ratified ILO Conventions 81 and 129 concerning Labour inspection).

It is less obvious in some other M.S. In Italy the value of proof is guaranteed, but in practice is only used in a few cases. In Romania, as the labour inspection has no direct penal competence, their findings originated from IMI could rather be accepted by a judge in civil matters.

*Do M.S. have experience with **complaints filed by (returned) posted workers** at the labour inspectorate of your MS ? Do they forward these complaints to the receiving (working) state via IMI? Is IMI a satisfactory tool for handling such a complaint ?*

Definitely, for some sending M.S. like Romania, IMI is useful for handling such complaints and obtain information from the host State authorities (there are a lot of complaints of posted workers at their return to Romania). In other (mostly receiving) M.S. , posted workers don't easily deposit a complaint at the labour inspection office; the barrier for them is still too high. This could be improved, once article 5 of the Enforcement Directive has been fully transposed in Member States and better information concerning working conditions will be made available and kept at the disposal of the companies and the workers.

*Is IMI useful to detect **social fraud** (non declared work, non registration at the social security) ? Do M.S. have any practical experience ?*

As the practical cases will show (see below), some M.S. detected organised social fraud with the help of evidence obtained via IMI.

*If posted workers (as a result of an enquiry of the labour inspection) received a **back payment as compensation** for the work carried out in another MS (while their minimum rate of pay was not sufficient in order to meet the minimum level of their working State), are M.S. interested in these results? What could be interesting for their national enforcement (Labour Inspectorate) and Social Security Institution ?*

It could be helpful for receiving parties to have knowledge of such kind of information. In some M.S. this could allow the labour inspectorate to check if the national sending company complies (not only with the obligations imposed by directive 96/71 but also with) their national legislation. It could also

help to find out if those additional payments have been declared to the Tax and/or social security Authorities (which sometimes seems not to be the case). So, this kind of exchange via IMI can help in the fight against undeclared work, it's a win-win situation for both competent authorities. When the competent IMI authority has no competence in this matter himself, he could forward the information to the labour inspectorate, the Social security body or the tax officers. Some M.S. like Belgium send automatically such kind of information about back payments. It's in fact an information which doesn't demand an answer but gives the opportunity to the counterpart to make verifications on its own behalf and interest.

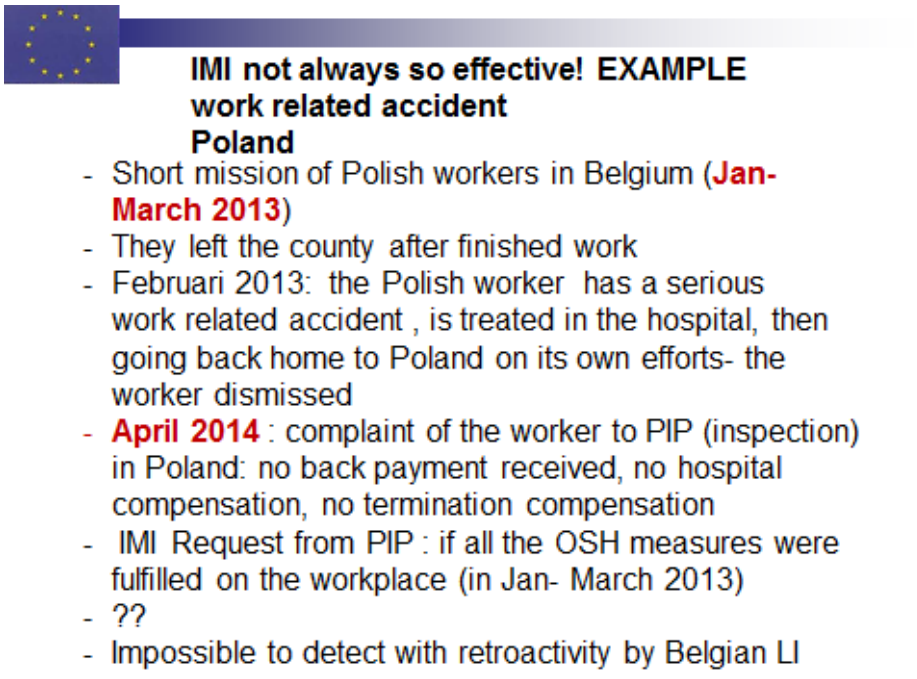
Do M.S. have experience with clarifications popped up in IMI about ***disputes concerning the calculation of the minimum rates*** *of pay applicable in the receiving State and the (reimbursement of) cost of living allowances as a constituent element of the minimum rates of pay (travel, lodging, food)?*

Yes, definitely and it's most helpful to exchange information about this rather difficult topic as there are lots of disputes on the field (invoked by employers and their lawyers or attorneys).The information to be exchanged is important for evaluating and finding clarification concerning the nature and details about some mandatory provisions applicable in the sending State. Example: concerning allowances that have to be paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging (article 3,7 directive 96/71). We are talking about *Diety, Diurna, ajuda de custoestrangeiro*(Portugal) etc.

Though not all M.S. are persuaded , this kind of exchange is extremely important for a correct check and interpretation of payslips, verifications of payments and to check whether the minimum rates of pay applicable in the receiving State are met.

*Do M.S. have IMI experiences in matters concerning **work related accidents** that happened during the posting ? What are the problems encountered in matters of OSH?*

Several M.S., once or a while, face such work related accidents, sometimes with bad injuries and dramatic consequences for the posted worker. M.S. encounter problems in qualification of the labour relations, access to results of inspection and effective joint activities. There are problems with non-declaration of labour related accidents, insurance provisions, repatriation, acceptance of a medical screening or vocational training attestation in the sending State, insurance systems incompatibility etc. Most of the problems occur when such a case is communicated via IMI (after an intervention in the home country), several months later, after the accident. An example of such cases is shown by the example of a IMI request addressed to Belgium:



*Can M.S. give direct information in IMI about **a delivered A1 form?***

Some M.S. can do it, by simply doing online research in the social security databases (condition sine qua non is to have been granted access), others cannot. Some M.S. can forward the request to the competent social security body. This can be explained by the fact that posting in the context of the social security regulation is not identical to the posting in the meaning of Directive 96/71, although in the majority of cases, posted workers depend on both European legislation at the same time. The

problem is rather that the authorities competent for both legislations are completely different from each other and there is no direct link between them, nor right to have access to each other's databases (for example: National labour inspectorates and social security agencies or tax authorities in Romania).

*Do M.S. consider it useful/feasible to **carry out inspections** in order to answer the IMI questions? Which cases/issues could be subject of such enquiries?*

The answer is yes. Most M.S. need to carry out inspections for some requests, depending on the size, importance, gravity of the communicated problems (assessment is made in such case). Some M.S. like Poland and Romania initiate inspections on any (or mostly all) IMI request(s).Their concern is also respecting the rights of inspected entity. Some M.S. face rules providing the employer rights related to non-discrimination, frequency of controls and rationale of initiating inspections. Other M.S. try to resolve individual and small scale problems via direct contact with the Belgian client/contractor and injunctions given to the posting employer within a strict time schedule. They prefer real life inspections rather for combating bigger scale organised fraud, social dumping, human trafficking or letterbox companies. This is a matter of the National choice depending on the national policy, capacities of inspection teams and priority in the annual inspection plans.

*According to Directive 2014/67/EU, IMI acquires a new function as tool **to notify sanctions and recover financial penalties.** Which are the positive elements of this provision? Which are the main critical implications in the implementation of this provision?*

The answer is very much depending on the national system of the sanctioning. Is it rather penal, administrative, or civil? Which are the rules of priority in prosecuting? Which are the competent bodies or authorities for notifications and recovery of financial penalties?

The situation amongst EU M.S. shows a great variety. Therefore the transposition of chapter 6 of the Enforcement Directive encounters very different levels of difficulties, depending on the M.S.

The study made by the "CIBELES project group" was interesting in that respect. CIBELES stay for "Convergence of Inspectorates Building a European Level Enforcement System" and it was a project

funded by the European Commission and coordinated by the Spanish Inspectorate for Labour and Social Security. Participating countries included Austria, Belgium, France, Germany, Hungary, Italy and Portugal.

A positive element is that the IMI tool can be used for exchanging information with EU colleagues, during the entire period of inspections, from the first step to the last step (imposing of the sanctions). IMI system guarantees that all communication are made in a secure system and are addressed to competent Authorities. The critical factor is connected with the legal requirement that National sanctions legislations recognize IMI as a legal instrument to notify sanctions. In most M.S. where IMI will play a substantial role in the future, this requires modification of the national legislation and often also a kind of reorganisation of empowering bodies. In most M.S. independent departments like the legal department of the competent administration, or even the Ministry of justice will have competence to act as an IMI author. New national procedures have to been developed in order to streamline this new opportunity.

For some M.S. in particular this is a great step ahead. For example Belgium: 70% of the infringements that didn't lead to a friendly settlement or regularisation are prosecuted (30% penal and 40% administrative fines). 450 to 500 criminal reports (average per year) concern foreign employers with posted workers.

*Is the existing IMI **questionnaire** exhaustive? Does it need to be clarified ? If so, in which parts?*

Yes, definitely it needs to be updated according to the Enforcement Directive. Some questions regarding the application of article 4 should be implemented. Some predefined and pre-translated questions should be added, some of the questions should be deleted. Some more questions concerning health and safety at work should be added.

Should other national authorities be added in the posting of workers module of IMI?

In some M.S. it would be helpful, like in Romania: the Ministry of Finance, National House of Public Pensions, State Inspectorate for Road Transport Control could be taken in account. If an IMI user is not competent to reply to a request or some questions from a request, he/she will be able to forward it to

the authority that is dealing with the issue. New users in IMI should take advantage of training. In several M.S. the competent authority for notification of sanctions will also take part.

*Would M.S. try not to use the default/standard choice of **« information not available »** for giving answers ? In case they do not have access to the information by themselves do they use other sources or means to help their counterpart (forward the request ? provide contact address of competent services ?). Do they proceed this research for themselves in order to provide the answer in IMI?*

Some M.S. try to avoid giving answers like "information not available" as much as possible. Unfortunately, there is often no other choice, as result of a lack of information or access to it. In such cases, those M.S. insert the email address of the external competent service or try to indicate the coordinates or address of the other competent authority to which the sending state can communicate.

*Are the **deadlines** for answering problematic ? If so, in which cases?*

The Enforcement Directive (article 6,6) stipulates that:

"Member States shall supply the information requested by other Member States or the Commission by electronic means within the following time limits:

(a)in urgent cases requiring the consultation of registers, such as those on confirmation of the VAT registration, for the purpose of checking an establishment in another Member State, as soon as possible and up to a maximum of two working days from the receipt of the request.

The reason for the urgency shall be clearly indicated in the request, including some details to substantiate that urgency.

(b)in all other requests for information, up to a maximum of 25 working days from the receipt of the request, unless a shorter time limit is mutually agreed between the Member States."

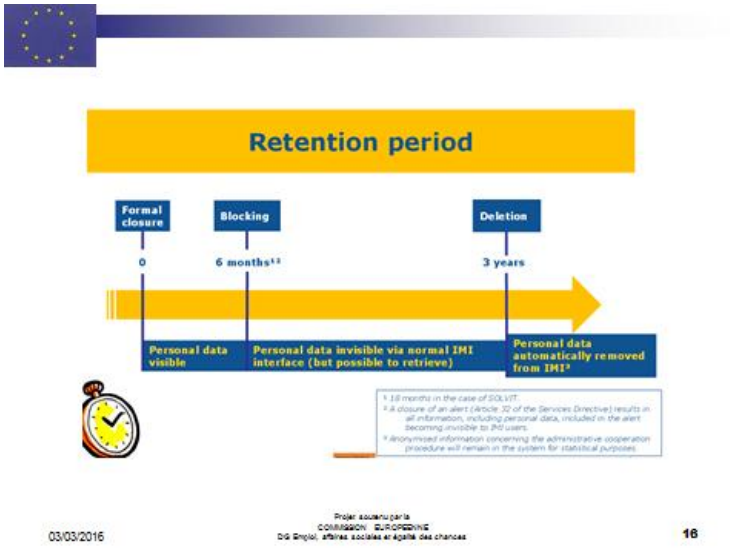
Several M.S. are of the opinion that those deadlines are very often not realistic and that the Enforcement Directive doesn't help in this respect. Moreover, when an inspection on the spot is needed those deadlines cannot be met in the majority of cases. In difficult and delicate cases some

M.S. tend to propose to "leave" IMI, to close the request and to continue "outside" IMI (e.g. via e-mail) for a follow-up. In a couple of cases there were even commissions organised by the judicial powers as result of the enquiry started up by the IMI request.

The automatic IMI alert for exceeding the time limit for answering is counter-productive. Such a proceeding is only possible amongst competent authorities who know each other (well), have other contacts outside IMI (e.g. via existing bilateral agreements). On the other hand, for some M.S. the use of IMI is the rule without exception.

A solution for a stronger mutual cooperation? M.S. could mutually agree for the maximum period of time and about the timing of the expected deliverables. Some M.S. agreed to close a request and to re-open it in view of new elements expected in the follow-up in the same case. This technique may seem odd at first sight, but is in line with procedures of IMI.

Anyway, the IMI procedure, backed up by the enforcement directive overshadows initiatives to apply flexibility because of the limitations of the retention time for personal data, inherent to IMI.



What can a M.S. offer as (spontaneous) information for the benefit of its addressee/counterpart?

It depends from what the sending state can supply. Some M.S. have no real or complete Labour Inspection, others have limited competences.

Those that have an all-round (often multi-disciplinary) inspection service can for example provide information concerning:

- detailed facts about infringements, contractors, agencies, workers operating on Belgian yards (identity, nature, sector, periods, contracts e.g.)
- complete picture of worker's work volume (e.g. time-sheets, excel-sheets…), amount of salary etc.

Or, in cases where amounts of additional back payments as result of warnings, injunctions of Labour Inspectorate (& according to the national regulations) are communicated via IMI, this could be useful information for the fight against social fraud in the sending MS and enhancing protection of workers, by verifying if the announced back payments (regularizations) are effectively done (proof of payment) and have been declared to tax/social Security. Most of the time, there doesn't exist any other channel to exchange that kind of information, by lack of a sort of "alert mechanism" in IMI.

3.5. IMI as a tool for notifications of sanctions

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author).

The Enforcement Directive 2014/67 (Chapter 6 - CROSS-BORDER ENFORCEMENT OF FINANCIAL ADMINISTRATIVE PENALTIES AND/OR FINES) has introduced provisions in a system of cross border implementation of administrative fines and sanctions. The new related module in IMI is still in progress but the testing phase can start.

Service providers who do not fulfil their obligations, will no longer escape the payment of a fine. Yet, Member States should be advised to rather use sanctions that do not depend on a cross border collections, because the enforcement procedure is suspended when the service provider lodges an appeal in the course of the procedure. Another action that can be taken by the inspection is to temporary order cessation of the activity at a building site, or putting the seals for instance until the

employer complies with the legal provisions, but not all Labour Inspectorates have such empowered competences .

Even once Member States have transposed the Enforcement Directive and apply it, social dumping and unfair competition will not have disappeared. The Enforcement Directive makes a stronger and better control of posting of workers possible, but does not solve the core of the problem. Posted workers from low cost M.S. remain a cheaper work force than local employees. As long as the Posting Directive itself is not adapted and as long as there is no better procedure to deal with disputes over A1's that have been wrongly handed out, unfair competition will find its way throughout Europe.

The Enforcement Directive, moreover, pays very little attention to the social progress of the workers involved, or to matters like safety at the workplace. Europe has the good intention to reinforce controls on social dumping, but the dumping practices themselves are insufficiently dealt with. Especially in view of the "yellow card" procedure originated by a majority of eastern European M.S. , enforcement will still rely very much on an enhanced mutual cooperation between M.S.

3.6. BELGIUM: some successful examples of exchange of information via IMI

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author)

A/ The case "D…TRANS BVBA & D…TRANS SRO"

D…Trans BVBA is a Belgian transport & logistics company with its seat established in Belgium. It is managed by the Belgian entrepreneur *JD.,* domiciled at the address where the company is registered.
D…Trans Sro is a Czech transport company with its seat in Prague. *JD.* is the only shareholder and manager together with an administrative manager at the premises in Prague .*D…Trans Sro* is in fact a filial or branch of the mother company *D…Trans BVBA.*
The official business manager of both companies is the same Belgian JD.
The business premises of *D…Trans Sro* in Prague are situated in an…apartment building block.

That was already obvious by checking Google street view and was afterwards confirmed by the Chez Labour inspection (request IMI).

D…Trans BVBA has no truck drivers in service anymore ("too costly" as stated by *JD*.), only administrative employees. *D…Trans Sro,* on the other hand, had more than 130 truck drivers all locally recruited in the region of Prague and with each recruitment "approved" by the staff of the Belgian mother company. Not only had *D…Trans Sro* no real premises for housing, maintenance and storage for more than 100 trucks and tractors, but neither had the Czech company administrative employees engaged.

The Czech truck drivers from *D…Trans Sro performed* exclusively international transport on behalf of their employer *D…Trans Sro* so to say, but in fact all transports were de facto commissioned by the Belgian *D…Trans BVBA.*

The Czech Labour Inspection confirmed what our Belgian labour inspection already found in their enquiry in the Belgian mother company, the following elements:

- The bookkeeping for both companies was taken care of by the administrative employees in Belgium
- The salaries of the Czech workers were calculated in the Belgium mother company, then bank payment orders were given for payment to Belgian banks on the account of the mother company
- The payslips were handed over to the Czech drivers in the office in Belgium and all disputes had to be arranged with the local Belgian bookkeeper
- The central controller activity (all transport orders, assignments, route planning and detailed instructions) were centrally managed in the Belgian office and as such addressed to the Czech drivers. The go-between was an employee of *D…Trans BVBA.* being too sick to work, or asking for a holiday needed the approval of the Belgian company.
- The Czech drivers were declared to the Czech social security agency, but didn't need a A1 form (though their activity was most of the time illegal cabotage). They earned the lower Czech minimum rate of pay and allowances for spending the night (free from tax or social security

contributions) which they used as an extra income, not for spending the night somewhere in cheap hotels. They lived in their truck cabins…

- Every couple of weeks, the Czech drivers returned at home for a WE. They used minibus of the Belgian company and at the restart of their work, the minibus brought them to Belgium where the key of the truck were handed over together with new transport orders.
- The drivers documents (use of gasoil, list of miles driven, tachograph , etc..) had to be verified and checked by the controller of *D…Trans BVBA*
- *Etc…*

At the outcome of this enquiry, a penal report was addresses to the prosecutor.

The case was brought to the penal tribunal in 1st instance who convicted the manager and his Belgian company. In appeal this conviction was confirmed.

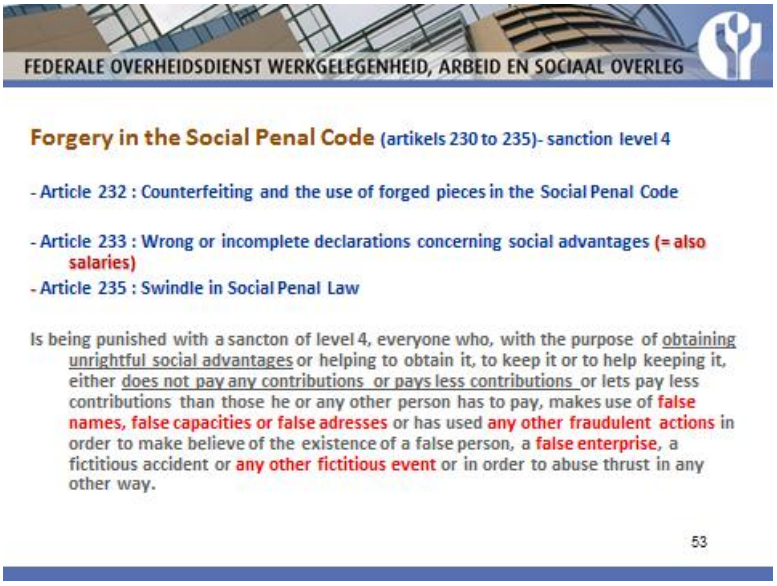
The court decided on 3 December 2015:

- There was no real business activity of *D…Trans Sro* in Prague
- *D…Trans Sro* had no real assets, premises
- A fictitious construction had been set up in Prague by the Belgian manager Jan D , - this was proven to be a letterbox company and the whole operation was considered as a fictitious "delocalisation";
- It was proven that the Czech truck drivers didn't operate at least 25% of their activity in the Czech Republic (where they were domiciled, so they were not covered by SS in their country according EU regulation Nr; 883/2004
- On the contrary, the court stated that these workers had to fall fully under the scope of the Belgian law (labour law as well as social security and tax), as they were considered to be workers working under the full authority of *D…Trans BVBA*(Belgium has a law that prohibits hiring of workers under its own authority without having a licence as temporary work agency). The court accepted the proof of several essential elements as stated in the ECJ case law Koelschz (15.03.2011) – elements gathered by Belgian and Czech labour inspection.

- Both, manager and Belgian company were convicted (each) to a penal fine of 16.500 Euro for committing "Forgery and swindle in social law" , not paying the Belgian minimum wages and not declaring the drivers to DIMONA
- The goods and bank accounts of the Belgian mother company as well of these from its manager Jan D., were provisionally seized during the enquiry and the court finally convicted to the payment of a confiscation on these goods, for an estimated value of 85.497 Euro (the amount of eluded social security contributions)

At the time of the first sentence in 1st instance, the manager stopped all his activities with the Czech Company and he announced to look for other companies in other EU MS to cooperate with , rather "subcontractors"… History starts all over again…

Forgery in the Belgian social penal code:



B/ The case OF THE SLOVENIAN CY D. S

This Slovenian building Cy was object of an inspection by the Belgian labour inspection in August 2015. The employer was asked to send the payslips of the workers to the inspector in order to verify compliance with the Belgian minimum rate of pay in the construction sector. Hearings of the workers

revealed that their actual salary was less than half those Belgian minimum wages they were entitled to. The workers were in possession of a A1 and the prior Limosa declaration was done in Belgium.

The employer refused to provide the payslips. And as a result a penal report was drawn up and communicated to the labour prosecutor. This judicial authority asks the inspector to set up a new action by asking the payslips to the Slovenian inspection service via IMI. At the same time further information was asked concerning the A1 and social security status of the Slovenian workers found at work during months on Belgian yards.

Finally, the answer was provided by the Slovenian counterpart: original payslips of all workers were included, covering their period of activity in Belgium. The Belgian labour inspector could start to make wage calculations and make the inventory of needed back-payments on demand of the prosecutor.

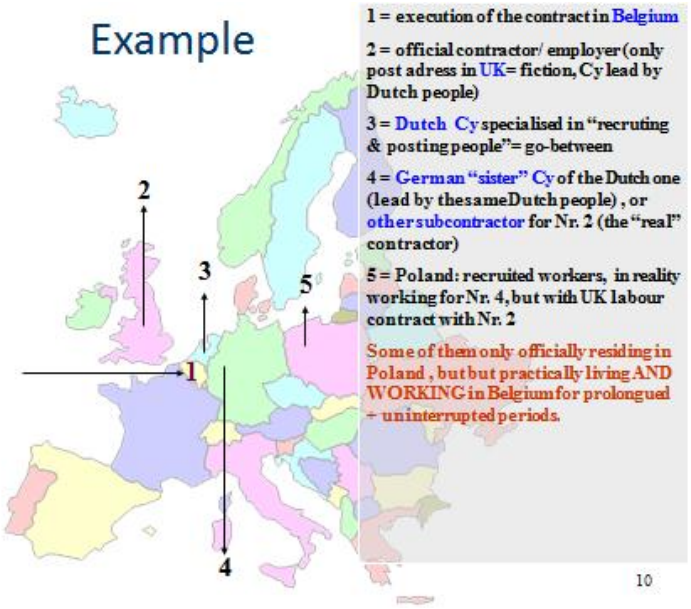
The story did not end just like that: the answers provided by Slovenia also stated that the A1 ‘s were not officially produced by the competent Slovenian SS institute and that no social security contributions had been paid in Slovenia for the period corresponding of their activity in Belgium. That was a case of pure social fraud, where the sending M.S. was also the victim by having missed the contributions the SS institute was entitled to.

For the public prosecutor those facts provided by IMI were arguments enough to consider the posting as bogus and to put the full responsibility on behalf of the Belgian entrepreneur – client for whom the Slovenian company was acting as sub-contractor. The whole Belgian labour law and social security law was applicable and the court followed this reasoning in its sentence.

C/ A case of the pre-IMI phase

An example of one of our discoveries with the aid of the mutual assistance: a letter box company by some clever Dutch entrepreneurs with bogus posting. It took two years to obtain the final result/insight. If IMI would have been available at that time during the nineties, results could have

been reached very rapidly. In the mean time of the (long) enquiry, some of the companies were able to change their status, domicile , the business manager, go bankrupt etc.



3.7. ITALY: some successful examples of exchange of information via IMI

Iolanda Guttadauro- Italian Ministry of Labour - DG for Policies and Services for Employment and Training (text provided in English by the author)

With respect to real situations encountered by labour inspectors during their inspections and which gave rise to the necessity of dealing with the authorities of other Member States to verify the accuracy of the posting and the actual existence of the posting company it is possible to affirm that:

- following the use of IMI, in some cases, the existence of a regular hiring in a posting Member State has been confirmed, but not the existence of a posting procedure (i.e. the existence of a posting communication in the country of origin);
- other times both the existence of a regular hiring and a regular posting procedure have been confirmed.

In both hypotheses, thanks to the information acquired, we were able to solve investigations and impose penalties.

The following are two specific cases that have been solved thanks to the help of the IMI system.

Case A/

The first case is about a request received by competent authority of Pesaro and send by Belgian authorities about posting of extra EU workers from Belgium to Italy. Belgian authorities found two Macedonian workers posted by undertaking established in Italy. These employees work in the field of the construction and building industry in Belgium. The deadline for answer - 30 days - expired in September. In the request, the Belgian authority's needs to assess smooth starting a business and the typology of economic activities carried out.

Therefore, inspectors had the competence assessments, carrying out a first inspection access from the advisor, delegated from the company to record keeping.

For the development of the investigation, the following acts and/or documents have been examined:

- book of the employee's Labour Law for the months from September 2014 to June 2015;

Unique book of the employee's job from January 2013 to June 2015, and in September and October 2012;

- Compulsory communications recruitment and termination;
- A1 Form years 2013, 2014 and 2015;
- Copy of residency permit;
- Invoices issued by the company addressed to the user company for siting, installation iron on real estate sites in Belgium.
- Summary financial statements years 2013-2014 and 2015 (updated to May),

The inspections showed that the company is registered at the Chamber of Commerce of Pesaro-Urbino (Italy) and operates in the construction sector. In particular, it consists in non-specialized civil engineering works. The registered offices in Pergola (PU) correspond to the residence of its owner, who comes from Macedonia. The business profile (chamber of commerce company registration) also shows that the company has begun the activityon01.03.2012. Nevertheless, for the years 2014 and

2015 there were no business costs directly attributable to the activity pursued, such as raw materials, etc. but only staff costs, telephone costs, pension contributions, etc.

The company currently employs two workers, Macedonian citizens, for which it obtained residence permits for employment in Italy, although they are employed in Belgium.

The inspections allows also assessing that:

- one worker is employed under a first employment contract of apprenticeship for n. 30 hours per week, with effect from 20.09.2012 to 03.20.2017, the job ceased for justified dismissal on 31.10.2012. The latter has been communicated only on 06.11.2012and then employed with an apprentice contract of 30 hours per week from 18.01.2013. On 11/10/2014the apprenticeship contract turned in indefinitely for early end of the training period. The examination of the documentation highlights: the compilation and writing of A1 models for the periods from 18.01.2013 to 18.04.2014 and from 22.04.2014 to 21.04.2016; the user company (BIBO GMBH Fliedeweg n. 6- Barsbuttel 22885DE- marked with 16583394- the company code).
- The other worker is employed under a contract of apprenticeship, full-time, with effect from 04/09/2014 to 03/09/2018. The examination of the documentation A1 model highlights: the personal data of the person concerned and of the validity period from 09.04.2014 to 03.09.2015;

B/

The second case is about a request received by the competent authority of Varese from French Authorities about Romanian workers posted by a company - based in Italy - to its French headquarters. The deadline for answer - 30 days - expired in August.

The request was related to “inconsistent information about various cost recovery" shown in the payroll of the Romanian workers posted at the above mentioned headquarters. The case had a greater degree of complexity since it involved Roman workers which were posted by a company, based in Italy, to a French one. After a first part of the investigation a response with the first information found was provided. After the answer, the authorities has required further information about some documents.

The Competent Authorities of Varese made further investigations and outcomes. After a new inspection at the enterprise it was possible to verify the other information required by the French authorities. In particular the company has documented, through the production of bank statements and the advances paid to employees (indicated in the payroll to the general entry "down payment") that the latter would be deducted in payroll.

The company displayed invoices and tickets related to expenses (residence and travel) incurred in advance by the company and considered, by the latter, partly to be paid by posted workers and, for this reason, deducted in payroll under the voice "various costs recovery".

The human resources manager was heard about the critical issue and he pointed out that such deductions are based on a long-established business practices never formalized in specific agreements. In addition, he said that already on 09/29/2015 there was a meeting with the French trade unions concerning the issue. On that occasion, it was reached a conciliatory hypothesis to be signed in the next date of 10/20/2015. Following the answer related to the additional information required, the French Authority was satisfied and the request was closed.

3.8. ROMANIA: some successful examples of exchange of information via IMI

Dantes Nicolae Bratu, Larisa Otilia Papp, Marius Lixandru, Florin Cosma, Simona Iuliana Neacşu and Cătălin Ţacu - Romanian Labour Inspection (text provided in English by the authors)

CASE 1.

According to demand IMI no. 48360, Liaison Office of the General Directorate of Labour France requested the Romanian Labour Inspection details about four workers engaged in road transport activities on French territory, belonging to the company CHxxx SOLUTION Lxx. Following checks carried out at the company CHxxx SOLUTION Lxx, labour inspectors found this work as temporary agency operating under the authorization issued by MMFPSPV, having signed contracts for the

provision of a total of 12 users in France. The four individuals identified to work in France, established an employment relationship with that company, based on individual employment contracts concluded in compliance with Romanian legislation, and according to the contract for the provision concluded between CHxxx SOLUTION Lxx and Nxxxx Mxxxxxx ET DEMENAGEMENTS based in France as a user undertaking.

The four people had signed addenda to the individual employment contract, given that in the period 03.08.2015 - 31.12.2015 they provided activity for Nxxxxx ET Mxxxxx DEMENAGEMENTS having a monthly gross salary of 1365.94 EURO according to an addendum amending the individual employment contract.

CASE 2

According to demand IMI no. 49033, Labour Inspectorate - Federal Public Service for Employment - Belgium requested the Romanian Labour Inspection details about four workers engaged in constructions domain on Belgian territory on Belgium territory, belonging to the company Cxxxx - Txxx LLC. The Belgium Labour Inspectorate asked Romania Labour Inspection the amount of wages for the four workers for August - October 2015 and transmitted request copies of payroll for the period specified; if the employer paid the transport costs, accommodation and food for the period of posting of workers in Belgium; if the company has contributed to the social security fund related social insurance by paying of wages reported at the wage level in the construction sector in Belgium (matter falling within the competence of the National Tax Administration Agency). Following checks carried out in the company Cxxxx - Txxx LLC, labour inspectors found that it carries out construction works of residential and non-residential buildings, according with the main business. Four persons established an employment relationship with that company based on individual employment contracts concluded in writing in compliance with Romanian legislation, and in their personnel files were identified addenda to change jobs (which proves PWD). Regarding employees posted to work in Belgium they benefited from transport and accommodation but have not received reimbursement for meals.

Considering that legislation in Romania provides that posted workers from Romania benefit (...) the minimum wage, including overtime compensation or payment, and the concept of "minimum wage" is defined by law (...)and that "allowances specific to the posting are considered part of the minimum wage, in so far, as the employee is not awarded to cover the costs generated by the posting such as transport, accommodation and meals, labour inspectors ordered the employer's compulsory compliance with the provisions above mentioned.

3.9. Conclusions

Philippe Vanden Broeck - Labour Inspectorate of the Belgium Federal State (text provided in English by the author)

3.9.1 Some pitfalls

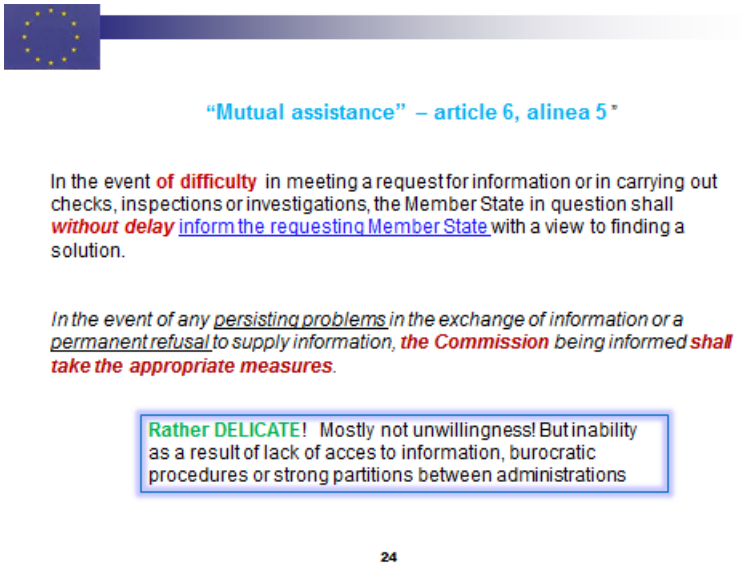
a) There is a lack of "red flags" – alarm notifications function – warnings to the sending State., This practice is already often applied by the Belgian labour inspectorate by communicating the results of wage back payments as a result of their injunction. An alert sent to all M.S. could also be useful in case of letterbox companies or human trafficking.

b) There is a lack of a "Search string" in IMI on the Company name (employer)

c) Requests sent long time after the ending of the posting and the return back home of the posted worker are very complicated because of the difficulties regarding the proofs;

d) Requests asking for carrying out inspections can be troublesome to fit those controls in the planning while respecting the deadline;

e) Lack of data regarding the posting situation provided by the requesting authority has diminished in recent years, but it still remains a problem affecting the quality of information exchanged through IMI. Without minimum data from the requesting authority, regarding the identity of the workers, the moment and the place where they were found working in the host country and if they are still in those locations, the responses to those predefined questions are inaccurate and general.



3.9.2. Some positive practices /strengths points of IMI

a) It is able to give accurate information about the genuine nature of the posting (criteria from article 4 DIR 2014/67) but also on the social security status of posted workers (A1).

b) The organisation, capacity and competence of the inspection is enough adequate to meet the requirements of a good mutual assistance.

c) The IMI coordinator, CA or inspection has direct access to relevant databases of public authorities (social security, register of commerce,…).

d) Data protection is safe and regulated in the national legislation.

e) Legal proof of gathered information is secured by legal provisions.

f) Information exchange may help to trace, detect, reveal social fraud (and eventually tax fraud which is often linked to social fraud).

g) Information exchange may help to trace letterbox companies.

h) In some cases alternative modalities for information exchange may be used thanks to bilateral agreements.

3.10. Future update of the IMI module on posting of workers

Philippe Vanden Broeck - Labour Inspectorate of the Belgium Federal State (text provided in English by the author)

The debate is going on within the expert workgroup (TREND) to develop new sets of questions , to change existing questions and to delete some questions.

The most relevant part of these new questions and opportunities are mentioned in chapter 1 .

In the existing module new possibilities will be operational at the time of reading this chapter:

- requests for sending and serving documents (Art 6(3)
- spontaneous communication of irregularities (Art 7(4))
- urgent requests/ questions to be answered within 2 weekdays (Art 6(6)(a))
- a 25 weekday / 35 calendar time limit for all other requests (Art 6(6)(b))
- a need for new questions (Art 4, Art 7(5))

3.11. Bilateral agreements

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author)

In the article 21, paragraph 2 of the Directive 2014/67/EC, indeed, it is provided that Public Administrations can conclude bilateral agreements and/or pacts for monitoring the work conditions applying to the posted workers.

According with European governance, cooperation and mutual learning by best practices is the main instruments to fulfil the process of harmonization of the normative framework in the European Countries. In the past, instead, several formal agreements were signed with the Countries to which was the most massive emigration. The bilateral agreements on social security, generally, ensure those who are or have been part of your work in a foreign country in order to:

- Benefit from equal treatment with citizens of the country in which it lends the work;
- Sum contribution periods exist in the two Contracting States for the fulfilment of the requirements for entitlement to benefits;

- Obtain payment of the pension payable by one Country in the territory of the State in which you reside.

In the last years, agreements have been gradually substituted by European acts (Directive 96/71/EC, Regulations n.883/2004/EC e n. 987/2009) which promote the common basis of rules about free movement of workers. Therefore, this type of agreements are signed only with Extra-EU Countries.

Therefore, article 21 is important because states a switching from a vision which prefers "formal cooperation" to a vision which elects an "informal cooperation". This legislative choice gives priority to the efficiency and rapidity of the exchange of the information, through formal gateways such as IMI system.

In the Italian legislative decree transposing the Directive 2014/67/EC, it is recognized the important role of IMI system, in the strict cooperation between Authorities.

In particular, the article 7, paragraph 4 provides that the exchange of information takes place via IMI System.

The following paragraph 5 provides that the Competent Authority may apply the agreements and bilateral arrangements relating to administrative cooperation. These agreements should be done to verify and monitor the conditions applicable to posted workers, still using system for the exchange of information, where possible.

The Belgian Ministry of Labour / Labour Inspectorate signed 5 administrative agreements with authorities of other M.S.:

- Agreement France – Belgium (9/5/2003)
- Agreement Belgium – Portugal (7/8/2009)
- Agreement Belgium – Luxemburg (8/7/2008)
- Agreement Belgium – Poland (7/10/2007)
- Agreement Belgium – Romania (10/9/2013).

The elements which are in common with all those bilateral administrative arrangements are:

- Exchange information about posted workers
- Exchange information about the posting employer, the legal nature of the company and the posting and type of activity
- Exchange of knowledge about fraud mechanisms
- Organisation of meetings, study visits and seminars.

The agreement France-Belgium goes beyond and it foresees a real-life cooperation, especially in the cross-border regions, including mutual joint inspections. The agreement also focus on combating illegal work, social fraud. It foresees a permanent secretariat with several annual meetings, the sharing of instruction manuals, documents, liaison contact fiches covering the whole territory of both countries.

In the framework of the BENELUX TREATY , the Belgian and Dutch Labour Inspections has developed in the last 2 years an intense cooperation in the field of temporary work agencies, fictitious constructions and social fraud. Inspections are carried out simultaneously in both countries with mixed teams of inspectors of both countries. Besides, there is a great deal of knowledge sharing in three permanent workgroups, working on the aforementioned issues.

Chapter 4 - Joint and several liability and posting of workers

4.1. Joint and several liability under art. 12 of Directive 2014/67/EU

Davide Venturi, PhD– Adapt Senior research Fellow (text provided in English by the author)

4.1.1. Joint and several liability under art. 12 of Directive 2014/67/EU

Art. 12 of Directive 2014/67/EU, titled "subcontracting liability", provides for some measures that Member States respectively "shall" (art. 12.2) or "may" (art. 12.1, 12.4 and 12.5) provide for strengthening the posted worker's rights in the Country where posting takes place.

In particular, **art. 12.1** allows MSs to provide national measures, which may apply to one/more or even all economic sectors, in order to ensure, in case of fraudulent and abusive practices, that «*the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can be held liable*» for «*any outstanding net remuneration*» they would be entitled to under the legal/contractual system (universally) applied in that Country. This type of liability may be held «*in addition to or in place of the employer*».

Having discussed this subject, the partners of the Enacting group understand this EU provision as follows (though not necessarily reflecting the official opinion of the National Authorities some of the members of the Enacting group belong to):

a) This provision is aimed at tackling fraud and abuse;
b) MSs have no legal obligation of applying art. 12.1 to their national legislation (see the wording «Member States may»);
c) Under this provision, MSs may provide for either direct liability (see the wording «*in place of*»), or for joint and several liability measures (see the wording «*in addition to*»);

d) This provision is tailored for subcontracting chains and for the direct contractual relationship between contractor and subcontractor (contractual liability, not necessarily "chain liability" engaging all the sub-contractors of the contractual chain), whose posted employees need to be protected by national provisions (see art. 12.3);

e) Under art. 12.4, Member States «*may*» also provide for «*more stringent liability rules*» with reference to «*the scope and range*» of liability. However, these national rules have to be compatible with the general principles of non-discrimination and proportionality;

f) Under art. 12.5, it is up to Member States (see thee wording «*may*») to provide for due diligence measures or not, which, if fulfilled, may exclude liability to the contractor. In that case, the posting company (employer) could be the sole subject to be considered as liable under this provision.

For the construction sector (see Annex 1 to Directive 96/71/EC), **art. 12.2**of Directive 2014/67/EU holds that «*Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1*».

Right from the first glance it is quite clear that art. 12.2 is similar and at the same time different from art. 12.1. In fact, it should be noted that art. 12.2 establishes that the national measures to be held in transposing the directive «shall» (and not just «may») be held by Member States who seem not to be free to transpose or not this provision, though these measures – like for art. 12.1 – "may" be provided for «*in addition to or in place of the employer*».

Having treated this subject quite in depth, the partners of the Enacting group understand this EU provision as follows (though not necessarily reflecting the official opinion of the National Authorities some of the members of the Enacting group belong to):

a) MSs have a legal obligation of applying art. 12.2 to their national legislation (see the wording «Member States shall»);

b) Under this provision, MSs may provide for either direct liability (see the wording «*in place of*»), or for joint and several liability measures (see the wording «*in addition to*»);

c) This provision is tailored for subcontracting chains and for the direct contractual relationship between contractor and subcontractor (contractual liability, not necessarily "chain liability" engaging all the sub-contractors of the contractual chain), whose posted employees need to be protected by national provisions (see art. 12.3);

d) Under art. 12.4, Member States «*may*» also provide for «*more stringent liability rules*» with reference to «*the scope and range*» of liability. However, these national rules have to be compatible with the general principles of non-discrimination and proportionality;

e) Under art. 12.5, it is up to Member States (see the wording «*may*») to provide for due diligence measures or not, which, if fulfilled, may exclude liability to the contractor. In that case, the posting company (employer) could be the sole subject to be considered as liable under this provision.

4.1.2. Joint and Several Liability and other measures for the protection of posted workers in some EU Countries: BE, DE, IT, RO

Reflecting the existing differences among all the Member States, some of the Countries interested in the works of the Enacting group had already, even before the transposition of Directive 2014/67/EU, a general and strong JSL national system applying to outsourcing practices (BE, DE, IT), while others had not (RO).

The major points of national legislation of BE, DE, IT and RO, treated in depth in the next paragraphs, may be summarized as follows.

Joint and Several Liability National Systems (JSL)			
Country	**JSL: national provisions**	**JSL: transposition of art. 12**	**Comments**
BE	L. 12 April 1965, Section VI/1: - Applying to selected fraud-	Art. 15 Draft Transposition Law: - Applicable to the constructions	- L. 12 April 1965, Sec. VI/1 is the "general

	sensible sectors: constructions, metal and electrical works, agriculture, food industry, cleaning, transports, etc.; - It is "chain liability" as all the subjects of the chain are interested to JSL: commissioner, main contractor and all subcontractors; - "due diligence", as such is not possible, JSL applies when labour inspectors issue a "notice" to the interested subjects (commissioner and main contractor). The subjects being notified are held for jointly liable, but they can lodge an appeal to a judge against this notice. JLS starts running virtually after 14 working days since the notice of the labour inspector has been submitted.	sector, and extended to the related fields of metal works, woodworks and electrical works; - this special JSL applies to all undertakings; both to established and to posting undertakings; - contractual JSL (between the two subjects of the contract), repeated between all the "direct" contractors of the chain, but not extended towards all the subjects of the chain; - "due diligence" is possible (art. 15, paragraph 2), through a *written declaration* by the employer to the subject/s who would be liable, but JSL is always working even in case of due diligence, after 14 working days the liable subject is informed that his counterpart does not pay the due salary, or part of it, to his workers; - there is no need for a labour inspector "notice" to bypass "due diligence", but it may also help.	system" of JSL in Belgium, whereas art. 12 of the draft law is a "special system" of JSL protecting also posted workers whose activities are those listed in Annex 1 of Directive 96/71/EC. - For the "general System" of JSL, originated by a Labour Inspection "notice", JSL applies only "*pro futuro*", for credits matured from 14 working days after the notification of the notice onwards. This type of JSL does not cover the workers' credits matured before. - Though for the "special system" of JSL it is not required to recur to an administrative "notice" by labour inspection to bypass "due diligence" (but it should be noted that this notice might help for overruling the due diligence), even in this case JSL works only

			"*pro futuro*", the same as in the "general system".
DE	§ 14 AEntG (posted workers act) extends, to the benefit of posted workers, the main contractor's liability (JSL) for not paid wages. This provision applies both: - in the sectors where universally applicable collective agreements apply (minimum wage there provided applies to posting companies too); - from 1.1.2015 to all the sectors (nearly all safe some few temporary exceptions) covered by the Minimum Wage Act (MiLoG).	While approving the Minimum Wage Act, whose provisions are directly applicable to PW, Germany chose not to need further specific legislation in order to grant transposition to Directive 2014/67/EU.	The same rules on JSL apply both to undertakings and workers established in Germany and to posting undertakings and posted workers; The JSL of the main contractor goes throughout the contractual chain, covering not only the sub-contractor's workers, but also all the workers of all the sub-contractors of the chain; No "due diligence" applies, and so there is no remedy/exception to JSL.
IT	Art. 29.2 of Legislative decree 276/2003 provides for JSL in commercial contracts of provision of services. Due diligence is allowed only if provided for by National Collective Agreements generally applicable;	Art. 4.3-5 of Legislative Decree 136/2016 (transposition law) extend to PW all the forms of JSL applicable to the undertakings established in Italy.	JSL provided by art. 29.2 of Legislative Decree 276/2003 goes throughout the entire subcontracting chain, and covers all the subjects of the chain (client, main

	Art. 35.1 of Legislative Decree 81/2015 provides for JSL in favour of "temporary workers"; Art. 83-bis, paragraphs from 4-bis to 4-sexies, of L. 133/2008 provides for JSL for the "contract of transport". In this specific case, "due diligence" is always possible, not needing any provision by collective agreements.		contractor, and sub-contractors).
RO	No general rule on JSL is provided for in Romania.	Art. 27 of the Draft Transposition Law - JSL limited to the sectors of Annex 1 of Directive 96/71/EC; - the provision holds a form of JSL limited to direct contractual liability, and no extension of such liability to chain liability is provided for; - "due diligence" is always possible, by means of an affidavit signed by the employer.	JSL seems to be strictly limited to the mandatory provisions of art. 12.2 of Directive 2014/67/EU.

4.2. Joint and Several Liability in Belgium

Philippe Vanden Broeck - Labour Inspectorate of the Belgium Federal State (text provided in English by the author).This paragraph is structured in questions and answers as defined and debated in the "Enacting Administrative Working Group".

Is joint and several liability applicable to (sub) contractual chains in the Belgian national legal system? Please explain (in case of positive answer). Does your national legal system provide a model of "due diligence" which may make joint and several liability not applicable? Please, explain.

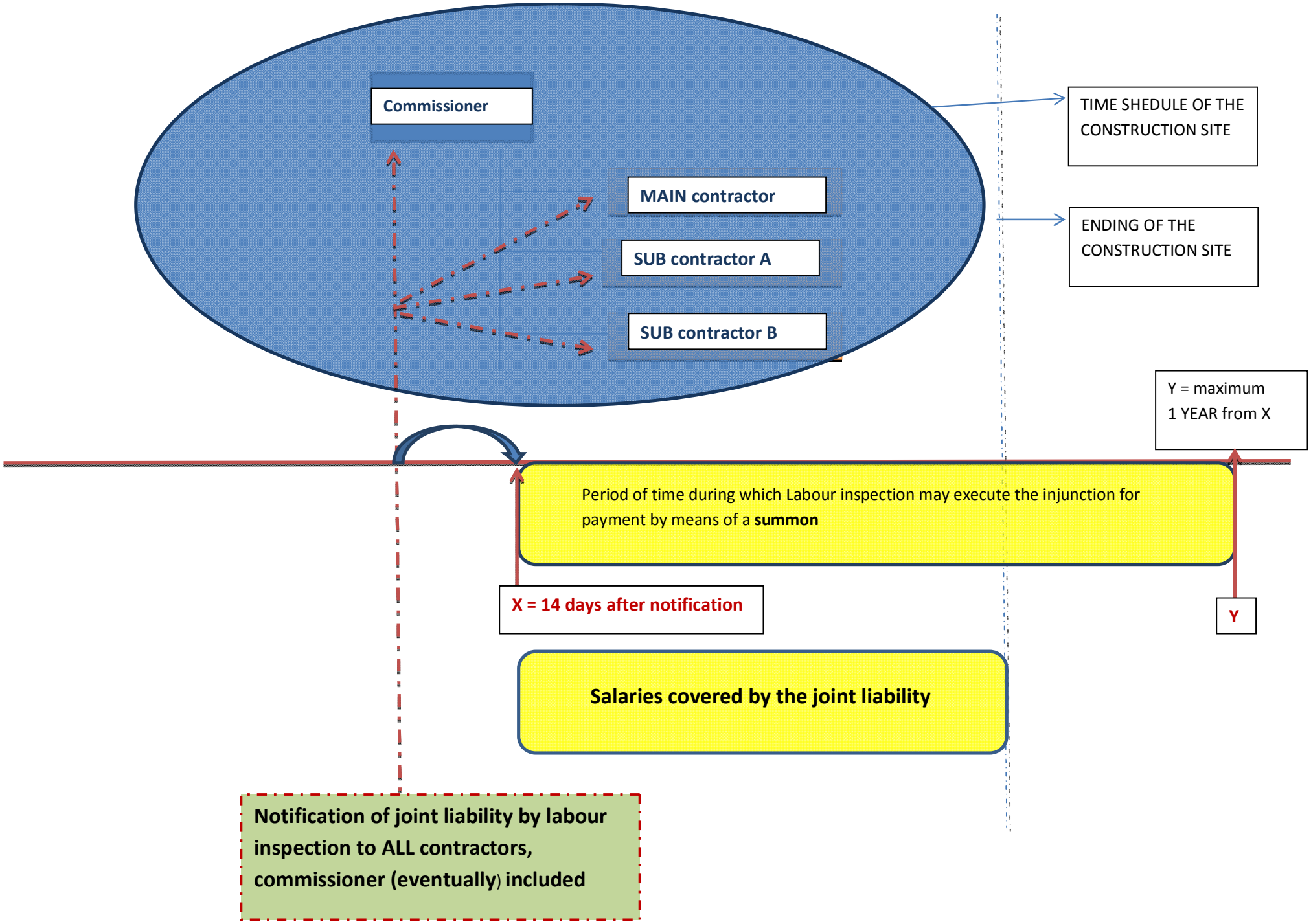
Yes it is, but without any model of "due diligence".

The law 12 April 1965 on the protection of workers' remuneration includes a chapter VI / I, which introduces two several liability regimes: Section 1 of the same chapter provides a general scheme; Section 2 provides a special regime for third country nationals residing illegally.

The general scheme applies to principals, contractors and subcontractors who, for activities determined by Royal Decree use one or more contractors, subcontractors , and are informed by written notice of the inspection that their contractors or subcontractors seriously fail in their obligation to pay on time the correct remuneration to their workers.

The joint and several liability system is applicable both to a chain of subcontractors and in the absence of such a chain. See the diagram below.

Based on its discretion, the labour inspector determines the undertaking to be informed in writing. Anyone who receives a written notification is potentially liable.


Commissioner
MAIN contractor
SUB contractor A
SUB contractor B
TIME SHEDULE OF THE CONSTRUCTION SITE
ENDING OF THE CONSTRUCTION SITE
Y = maximum 1 YEAR from X
Period of time during which Labour inspection may execute the injunction for payment by means of a summon
X = 14 days after notification
Y
Salaries covered by the joint liability
Notification of joint liability by labour inspection to ALL contractors, commissioner (eventually) included

The joint and several liability system does not apply to individual - debtor who has performed the above activities for exclusively private purposes (e.g. an individual who built his own house).

→Wage debts

These principals, contractors and sub-contractors are jointly and severally liable for a period determined by the inspection notification. This period begins after the expiration of 14 days after the written notice and it cannot be longer than a year.

Wage several liability applies only to wages which became due during the period of joint and several liability. Joint and several liability is applied, therefore, only to future salary debts, not to wage debts due before the start of the joint liability period.

Of course , there must always be a remuneration (as defined in the Act of 12 April 1965) which is due to the worker, but that has not been paid. Joint and several liability is not, however, for the compensation to which the worker is entitled as a result of the termination of his/her employment contract.

→Scope and extent of joint liability

Joint and several liability means that the principal, contractor or subcontractor who has been informed is required to make payment of outstanding wages to the contractor's employees or subcontractors covered by the notification when he has been summoned by registered letter by one of the workers concerned, or by Labour Inspection.

The specific amount of compensation to which the joint liable person is held to, depends on what is stipulated in the summon.

→Summons by the worker

When the liable person was directly summoned by one of the workers concerned, the joint liability concerns the part of the wages owed (become due during the period of joint and several liability) not already paid by the employer (contractor or subcontractor concerned with notification).

The jointly liable person, however, can limit the amount of compensation to the wages which were generated in his favour.

The liable person may prove that the working time of the worker concerned has been spent in the framework of the activities he performed for the performed jointly and severally liable, is limited to a number of well-determined hours.

In such cases, the joint liability applies only to the unpaid portion of the wages owed (become payable during the joint liability period) corresponding to the aforementioned period of time.

Furthermore, the potential liable person will not be liable if he proves that the worker concerned has not provided any provision in the activities that the responsible person has commissioned.

→Summation by the Labour Inspection

When the joint liability is generated by a labour inspection, it applies only to the unpaid portion of the due wages (that became payable during the joint liability period) corresponding to the services provided as part of activities performed by the liable person, either directly or through contractors or intermediate subcontractors.

However, if it cannot be determined which services were provided by the workers as part of the work that the liable person has performed, either directly or through contractors or intermediate subcontractors, the joint liability will apply to each worker in a list submitted by the inspection along with the sum of a percentage of the minimum wage set by Royal decree.

This percentage corresponds to the share (value) of the activities carried out by the employer concerned in the provision of services that the responsible person realizes (either directly or through contractors or intermediate subcontractors) in the value of the turnover of the employer concerned during a reference period determined by Royal decree. This complex ratio is never applied in practice! Instead, labour inspection always tries to deliver proof of the exact working hours and corresponding wages in order to start the procedure.

→Obligations

The employer-debtor concerned by the notification receives a copy of the notice and he/she shall display it at each place where he employs workers . The inspection enforces this obligation.

The principal, contractor or sub-contractor to whom the notification is addressed must also post a copy of the notification received at each workplace where he/she employs workers of this employer-debtor.

→A SPECIAL CASE : illegal hiring out of workers

By "hiring out of workers" is meant a situation where a worker is lent out by his employer to a user who makes that worker work within his undertaking and exercises over that worker a part of the employer's authority that is normally exercised by the actual employer.

This situation may give rise to abuse: the worker may not earn the wage/salary to which he would normally have been entitled if he had been engaged by the user as a permanent employee.

For this reason, it is in principle prohibited in Belgium to hire out workers. This prohibition is laid down by the Act of 24 July 1987 on temporary work, temporary agency work and hiring out of workers for the benefit of users.

4.3. The sanctions in case of prohibited hiring out of workers are as follows.

1. The user is deemed to be linked to the worker under an open ended employment contract from the commencement of the performance of work;
2. The user and the person who hired the workers out are jointly liable for the payment of remuneration, compensation, social benefit and social security contributions arising from the open-ended employment contract mentioned at point 1;

3. Employers who, contrary to law, hire out to third parties may be prosecuted under penal law (or administrative fines can be imposed). The same applies to users who, contrary to the law, employ workers posted to them.

More than once, in situations of abuses in posting of workers, this regulation leads to better results as the delivery of the proof and the burden of proof is favourable to labour inspection.

How joint and several liability are enforceable, according to Belgian national legal system?

It is very complex for labour inspection to enforce it. In real life situations, inspectors limit themselves to the first stage: the official notification.

The preventive effect and the impact on the main contractor or co-contractor who might virtually be held responsible in the future helps to obtain more smoothly cooperation of the foreign employer to carry out regularisations and back-payments to his posted workers.

Sometimes, though, the contractual relationship between co-contractors is immediately broken while the posted workers still are not paid and the employer vanishes.

Is the law transposing the Directive going to provide special measures, which are specifically referred to posting? Please, give details.

Yes, a subsidiary/alternative system of joint several responsibility will be applicable only for direct relationship among contractors in the building sector (e.g. one to one, from B to A).

Due diligence will be foreseen: the contractor responsible could escape when he has a written statement proving that he informed the direct subcontractor about the co-ordinates and information on the official website concerning obligations for posting employers (such as payment of minimum wages) and a statement of the subcontractor that he will comply with these regulations.

But, if the Labour inspector proves that, notwithstanding all this, the foreign employer does NOT comply, he addresses a notification to the co-contractor. This will start the procedure of the joint liability.

Which economic sectors are going to be covered in your Belgium by the transposition of art.12 of the Directive 2014/67?

- Within the existing generic system which does not change:

1. private Guard sector
2. construction
3. agriculture
4. cleaning sector
5. horticulture sector
6. electricians in building sites
7. woodwork
8. metal
9. metal transformation
10. road transport of goods (suspended).

- Within the transposition of the Enforcement Directive:

In the construction sector, the new parallel system of joint several responsibility will be applicable only in the case of direct relationship among contractors (e.g. one to one, from B to A).

→General remarks

The way in which article 12 of the Enforcement Directive, one of the most controversial provisions, will be implemented in the national legislation, will, to a large extent, determine the effectiveness of a system of liability for the payment of the wages of posted workers at European level. With regard to article 12,we are of the opinion that the choice of a liability chain is preferable rather

than simply the “standard” direct joint responsibility for the direct contractor of the employer-service provider. The first system is preferable, not only because of the higher number of parties that can be held responsible, but also because of the greater preventive effect it has.

The Belgian labour legislation already has provisions concerning the joint severe liability for minimum wages in 10 branches of the economic sectors (among which the construction sector) . It is a system of unlimited chain liability , possibly climbing up unto the main contractor and even the principal (client or customer). This liability was activated by written notifications of the labour inspector, certifying the serious breach of law (underpaying) by a subcontractor within the chain.
As a result of the transposition of the Enforcement Directive, an additional system of joint liability will be provided , on behalf of the labour inspectors in cases of direct relationship between contractors operating in the building sector.

Moreover, it should be recommended to the Member States to not create a too easy system of “due diligence” on the basis of which contractors can easily be exempted of their liability or by which their liability can be limited, for example by (only) providing a simple “declaration on honour”.

The carefulness for exemption, moreover, gives rise to questions about the actual interpretation of this carefulness, because a uniform European criterion is lacking. How the system of due diligence should actually be implemented is completely left to the national level, with different interpretations.

There is a danger that more “lenient” demands of carefulness will be formulated, which will allow (sub)contractors to escape their liability more easily, leaving posted workers without the correct payment of their wages.

In the Belgian transposition law a kind of due diligence is introduced for the above mentioned system of direct liability amongst construction contractors: the liable co-contractor must provide a written proof or declaration certifying having communicated to the subcontractor all relevant website information of the labour inspection with regard to minimum wages, etc…

The subcontractor must provide to his co-contractor a declaration confirming his intention to comply with these provisions and minimum wages.

Nonetheless, the liability still can at any time be activated by the labour inspection by a notification announcing to both parties the finding of breach of law concerning underpayment.

4.4. Joint and Several Liability in Italy

By Italian Ministry of Labour– DGAI: Roberta Fabrizi, Mariagrazia Lombardi, Massimiliano Mura, Fabrizio Nativi. This paragraph is structured in questions and answers as defined and debated in the "Enacting Administrative Working Group". Text translated into English from the Italian version provided by the authors.

Is joint and several liability applicable to (sub) contractual chains in the Italian legal system? Please explain (in case of positive answer). Does the Italian legal system provide a model of "due diligence" which may make joint and several liability not applicable? Please, explain.

The subcontracting liability is a legal provision for a long time recognised by the Italian Law: in fact, it can be found at several extents in the discipline provided for the procurement contracts of works and services and supply of temporary employment and transport services, and is understood as a special form of guarantee for the rights of hired workers involved in these negotiations. In particular, Article 29, paragraph 2, of Legislative Decree. n. 276/2003 provides that, in case of **procurement** of works or services, the client undertaking or employer will be jointly and severally liable with the contractor and with each of any sub-contractors for outstanding salaries (including severance indemnity quotas), contributions and insurance premiums accrued during the term of the contract. Legislative Decree n. 76/2013, ruled that the above mentioned provision is also applicable in relation to fees and pension and insurance obligations towards workers with self-employment contracts.

It should be stressed that, under the above mentioned Article 29, paragraph 2, the joint and several liability can be activated by the employee no later than two years after termination of the contract and is relevant in all economic/productive sectors, involving each entity in the chain, that is both the principal and the contractor, as well as any subcontractors. For contracts, Art. 1676 of the Civil Code shall be also recalled, which states that "*the employees of the contractor who operated to perform the work or provide the services may bring a direct action against their principal in order to obtain what is*

due to them, up to an amount equal to the debt that the principal has towards the contractor at the time when they bring their action".

A substantially similar joint and several liability regime is also foreseen in the event of supply of temporary employment under Articles 35, paragraph 2, of Legislative Decree N. 81/2015 (already provided for by art. 23, paragraph 3, of Legislative Decree no. 276/2003) and, except for some specific cases, in the case of the transport contract in accordance with art. 83 bis, paragraphs from 4bis to 4sexies, of Legislative Decree 25 June 2008 n. 112, converted, with amendments, by Law 6 August 2008 n. 133. With particular reference to the rules on transport, the above mentioned rule foresees a particular form of due diligence whereby the client, or the carrier in case of subcontract, in order to avoid the joint and several liability, are required to verify, prior to the conclusion of the contract, the pay, social security and insurance regularity of the entrepreneur they wish to turn to for the performance of the service. To this end, they may also acquire, when concluding the contract, a certificate issued by social security institutions, not older than three months, showing that the undertaking is in good standing with the payment of insurance and social security contributions. The client or the carrier that does not perform the verification described above is jointly liable with the carrier and with each possible sub carriers, within the limit of one year after termination of the contract of carriage, to pay workers their wages and social security contributions and insurance premiums due to the competent authorities, limited to the services received during the term of the contract of carriage. Finally, in case of transport contract stipulated in the form of an unwritten contract, the contractor who does not perform the examination shall bear the costs as to the breach of tax obligations and violations of the Highway Code, perpetrated in the performance of the transportation service carried out on his behalf.

Moreover, in 2012, also for procurement cases, the Legislator established a "due diligence" model depending on collective bargaining, providing that national collective labour agreements, signed by the most representative national trade union and employers' organizations, could derogate from the regulatory regime of joint and several liability, by introducing methods and procedures to check the

overall regularity of the contracts. It should be noted, however, that such a derogation, by virtue of what stated in Legislative Decree No. 76/2013, may exert its effect only in relation to compensation arrangements due to workers employed by the contract, with the exclusion of any other effect with regard to social security and insurance contributions payable by the employer.

How joint and several liability are enforceable, according to Italian national legal system?

As part of the measures transposing Directive 2014/67/EU, specifically in relation to Article 12, Italy has sought to invoke the above mentioned domestic legislation on joint and several liability in contracts, in the supplying of temporary employment as well as in transport activities, so as to make it also applicable to service providers that post workers nationwide. (art. 4 Legislative Decree 136/2016).

With specific reference to the rules on transport, it should be specified that the new mode of electronic verification described in the second sentence of paragraph 4 quarter of the said Article 83 bis shall not apply in cases of transnational posting, since the national register mentioned herein refers to natural and legal persons established in Italy, which perform the road transport of things on behalf of third parties. And therefore, it will not be possible to acquire information related to the foreign posting undertaking on the Internet portal. In such cases, therefore, a certificate issued by the social security institutions of the country of origin shall be obtained.

The choice to apply the same regime in force for similar internal situations maintains unchanged the current framework since, with ruling no. 33/2010, the Ministry of Labour has already supported – by way of interpretation - the application of art. 29, paragraph 2, of Legislative Decree. N. 276/2003 to transnational posting

In support of this hypothesis, it should also be considered that, should transposition limited the joint and several liability only to the direct-contracting (indicated in art. 12), it would engage in joint and several liability only two subjects at a time (the subcontractor and the contractor) and therefore, the client (usually the Italian undertaking or an undertaking established in Italy) would never be called to

account for the receivables of posted workers, except in cases of claims of employees hired by their "direct" contractor.

This solution would strongly limit application of the "national" system of joint and several liability also to foreign companies posting staff in Italy. It would penalize the Italian companies, since national customers would be inclined to prefer foreign companies which would not necessarily be bound by the joint liability constraints (with obvious damage to the national economy in terms of employment and social security) and would not ensure a broader solidarity protection of wage, social security and insurance claims, with the involvement of all components of the contract chain.

Which economic sectors are going to be covered in your country by the transposition of art.12 of the Directive 2014/67?

Except for the special rules provided for the transport by which the joint and several liability lasts for one year after termination of service, joint and several liability can be activated by the employee no later than two years after termination of the contract and shall apply to all economic/productive sectors, involving each actor in the supply chain (i.e. both the principal and the contractor and any subcontractors).

Is the law transposing the Directive going to provide special measures, which are specifically referred to posting? Please, give details.

In order to protect the claims of pay claimed by workers in the Community posting regime, the labour inspectors may issue a formal investigative notice, pursuant to art. 12 Legislative Decree no. 124/2004. The provision of this formal notice aims at ascertaining the pay gap to be paid to the posted worker and at notifying it to the employer (Community posting undertaking). In the event the principal is on trial as jointly liable for the fulfilment of the employee compensation and benefit amounts due to the employee's work in the performance of the contract, the employer may request, in the first defence, the benefit of prior discussion of the contractor's and of any subcontractors' assets, pursuant to art. 29, Legislative Decree No. 276/2003

If this happens and the court establishes the responsibility of the contractor for the payment of amounts due to the worker, any enforcement action against the principal can only be activated after the unsuccessful collection on the contractor's and of any subcontractors' assets.

In the cases of joint and several liability in the transport sector and in the context of a supply of services referred to above, however, the benefit of prior discussion is not envisaged, but the principal has the right of recourse against the joint debtor under the general rules.

4.5. Joint and Several Liability in Romania

Dantes Nicolae Bratu, Larisa Otilia Papp, Marius Lixandru, Florin Cosma, Simona Iuliana Neacşu and Cătălin Ţacu - Romanian Labour Inspection. This paragraph is structured in questions and answers as defined and debated in the "Enacting Administrative Working Group" (text provided in English by the authors).

Competition and general economical environment generate cost pressure which reflects on low-cost labour strategies. Business models like subcontracting chains are responses to the lowest price condition, most frequently used in relation with public procurement contracts.

Despite the existence of several law provisions related to joint and several liability in connection with labour, is hard to find evidence in terms of effectiveness of this mechanism.

Is joint and several liability applicable to (sub) contractual chains in the Romanian national legal system? Please explain (in case of positive answer). Does your national legal system provide a model of "due diligence" which may make joint and several liability not applicable? Please, explain.

Romanian *Civil code*[4]established the general principle of liability of those who, under a contract or under the law shall exercise direction, supervision and control of the entities which fulfil certain functions or assignments.

Public procurement contracting authority has to specify the obligation in area of labour that must be fulfilled by the contractor. General responsibilities of the general contractor of a public procurement contract include those related with the activity of the subcontracting companies.

Labour code[5]provides norms of *joint and several liability* for the case of secondment of workers[6](temporary cession of the labour contract to another employer) and temporary work[7](hire

[4]Article 1.373 from Law no. 287/2009 - *Civil code*.

[5]Law no. 53/2003 - *Labour code*, republished, with subsequent amendments and additions (*Labour code*).

out a temporary worker to a user, by a temporary work agency). Special provisions for *joint and several liability* in case of subcontracting chains are only in case of criminal offences, related to using undeclared work or trafficking workers which are third country nationals.

Concerning *due diligence* concept *Labour code* provides in one case application of this procedure as a consequence of committing one of the criminal offences mentioned before.

There are two other situations where *due diligence* mechanism is used. The first is related to the procedure of authorisation of the temporary work agency[8]and the second is used in issuing hiring endorsement designated to select the employer that can employ third country nationals[9].

How joint and several liability are enforceable, according to your national legal system?

In the case of criminal offences for undeclared work (more than 5 undeclared workers), of hiring workers without legal right to stay in Romania, human trafficking, or when the nature of work endangers life, integrity or health, the *Labour code* provides compensatory measures. In those cases, by judgement decision any unpaid remuneration due to people working undeclared or illegally, including transfer costs to the state of origin, can be charged to the main contractor or any intermediate subcontractor, where they knew that the employing subcontractor employed third country nationals illegally staying in Romania, jointly with the employer[10].

[6]Article 47 paragraph (3), (4) and (5) from *Labour code*.

[7]Article 96 paragraph (4) from *Labour code*.

[8]Article 3 letter d) from Government Decision no. 1.256/2011 *regarding the operating conditions and the procedure for authorizing temporary work agency*, with subsequent amendments and additions.

[9]Article 4 paragraph (2) letter d) from Government Ordinance no. 25/2014 *regarding hiring and posting of foreigners in Romania and amending and supplementing certain acts on foreigners in Romania*, with subsequent amendments and additions.

[10]Article 265 paragraph (6) from *Labour code*.

Is the law transposing the Directive going to provide special measures, which are specifically referred to posting? Please, give details.

The law transposing Directive 96/71/EC[11] and the draft proposal of the law transposing Directive 2014/67/EU do not provides special measures of joint and several liability and due diligence which are specifically referred to posting.

Which economic sectors are going to be covered in your Country by the transposition of art.12 of the directive?

At this stage of the draft proposal of the law transposing *Directive 2014/67/EU* there are not specific economic sectors explicitly included or excluded by the application.

This subject of *joint and several liability* and *due diligence* are elements of the wider issue of responsibility and effectiveness of the enforcement measures. Within this topic we consider of crucial importance individual responsibility and the fight to fake practice of abandoning a firm with debt and bad criminal records and continuing the same business with a new clean company, eventually also with an interposed *bogus legal representative*. For tackling those conducts with transnational effects it is necessary to create a *transnational due diligence system*, based on administrative cooperation between labour inspection authorities.

From the subcontracting chain perspective it is important to be able to make an overall evaluation of fulfilment of duties regarding the dimension of the activity within a project or a period of time (not to punish the main contractor for one infringement of one subcontractor).

[11] Law no. 344/2006 *concerning the posting of employees in the transnational provision of services*, with subsequent amendments and additions.

Chapter 5 – The minimum rate of pay within posting of workers

5.1. Introduction the protection of the minimum rate of pay within EU

By Massimiliano Mura, Territorial Unit Director of Italian Ministry of Labour and Social Politics (translation into English from the Italian text provided by the author).

The freedom to provide services is one of the EU fundamental principles contained in Articles 49, paragraph 1 and 53, paragraph 1 of the Treaty establishing the European Community (TEC) and Articles 56, paragraph 1[12] and 60, paragraph 1[13] of the Treaty on the Functioning of the EU (TFEU).

One of the results produced by the recognition of this principle is the possibility for undertakings established in a Member State to post their workers to work in a different Member State. According to the rules of transnational posting, this often involves the fact that workers normally employed in the country of establishment shall be temporarily present of in the country where the work is performed (host country).

As known, the social security systems and pay levels of employees differ across the different States of the Union and indeed these differences are often significant, such as to make substantial divergences

[12] Article 56, paragraph1, TFEU provides that*" Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*." According to the subsequent paragraph *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."*

[13] Article. 60, paragraph1, TFEU provides that" *The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit."* Under the subsequent paragraph, *"To this end, the Commission shall make recommendations to the Member States concerned."*

between the labour costs of the different States. This situation can lead to distortions of competition between undertakings and social under protection for posted workers.

These "side effects" of the free movement of services were taken into consideration by the Union legislature, which, since the adoption of Directive 96/71/EC, has been concerned to ensure a "***climate of fair competition and measures guaranteeing respect for the rights of workers;***"(see recital 5, cited Directive).

In particular, Art. 3, paragraph 1, called on Member States to ensure that the posting undertakings guarantee workers posted to their territory the **terms and conditions of employment** in force on the basis of laws, regulations or administrative provisions and/or collective agreements or arbitration awards declared universally applicable, whatever the law applicable to the employment relationship. Specifically, this *lex loci laboris* principle is applied, among others, to the matter regarding *"**minimum rates of pay**, including overtime rates (...) with the exception of supplementary pension schemes*".

It should be noted that, in compliance with EU regulations, "*the concept of minimum rates of pay (...)is defined by law and / or practice of the Member State in whose territory the worker is posted.* "

In addition, at the subsequent paragraph 7 of the above mentioned Art. 3, the EU Directive indicates a selective criterion with which legislators and national courts must comply in defining the nature of wage elements payable to posted workers, providing that "*Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging*". The fact remains that compliance with art. 3, paragraphs 1 to 6 of Directive 96/71/EC does not prevent "*application of terms and conditions of employment which are more favourable to workers* " (see the first period of Art. 3, paragraph 7)

The Court of Justice is another element of this regulatory framework, in which it plays a role of binding interpretation of the Union Treaties, and whose pronunciations reveals an evolution, which can be summed up into the following phases:

- **1st phase** in which, according to the Court of Luxembourg, Directive 96/71/EC represents t**he minimum level of protection of posted workers' rights.** In this phase, the limit to the extension of internal rules, in favour of posted workers, was represented by the proportionality test[14]In other words, the contents and measures for the social protection effected by the implementation of the Directive on posting, were not to exceed the pursued aim, which consists in the economic treatment of the posted workers with the workers normally employed in the target (recipient) country in similar activities(see ECJRush Portuguesa, C-113/89, paragraph 17[15] ; Finalarte, C-49-50-52-54-68-71/98[16]https://translate.google.com/toolkit/content?did=00dxx0100xdx8ljqbgu8&rid=0&hl=it - _ftn5);

[14]In the field of transnational posting of workers, the proportionality test requires that the State intending to adopt or apply a specific internal arrangement in pursuing an objective enshrined in an EU directive (in this case, the adoption of a domestic rule for the protection of the remuneration of posted workers in its territory, in accordance with Directive 96/71/EC) "limiting" the freedom to provide services (the main principle of the Treaty), should justify its adoption by arguments to establish whether and to what extent the application of this domestic rule to posted workers on its national territory (for example, a provision for the automatic adjustment of wages to the cost of living) can contribute to the achievement of that objective without being detrimental to undertakings with headquarters in another member State in exercising their freedom to provide services.

[15]ECJ, Rush Portuguesa, C-113/89, paragraph 18: *"(...) Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means"*

[16]ECJ, Finalarte, C-49-50-52-54-68-71/98: *"Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) do not preclude a Member State from imposing national rules* (...) *guaranteeing entitlement to paid leave for posted workers, on a business established in another Member State which provides services in the first Member State by posting workers for that purpose, on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued. 2)a) Articles 59 and 60 of the Treaty do not preclude the extension of the rules of a Member State which provide for a longer period of paid leave than that provided for by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to workers posted to that Member State by providers of services established in other Member States during the period of the posting. (b) Articles 59 and 60 of the Treaty do not preclude national rules from allowing businesses established in the Federal Republic of Germany to claim reimbursement of expenditure on holiday pay and holiday allowances from the fund, whereas it does not provide for such a claim in the case of businesses established in other Member States, but*

- **2nd phase**, in which the Court of Justice **dilutes** its position of maximum protection of **equal economic treatment of posted workers**, using a more stringent proportionality test. In this stage of evolution, the Court stated that **the protection of the wages of workers employed in a transnational posting must be compatible with the freedom to provide services.** This is based on the principle, codified in the Treaty concerning the prohibition of restrictions on freedom to provide services within the Union, which is specified in the prohibition of restrictions against EU nationals established in a member country other than the recipient country and where work is performed performance (see ECJ André Mazzoleni, C - 165/98[17] https://translate.google.com/toolkit/content?did=00dxx0100xdx8ljqbgu8&rid=0&hl=it_ftn6);

- **3rd phase**, in which the Court reached the **position of maximum protection of the freedom to provide services** and the focus on regulation was shifted from the social protection of the transnational worker to the free provision of services. In this perspective, the Directive on posting represents the maximum level of protection of the rights of posted workers. **The protection of the freedom to supply services reaches its highest point while all other protections of the labour market recede** (see Laval ECJ, C-341/05[18]; Ruffert, C-246-06[19];

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instead provides for a direct claim by the posted workers against the fund, in so far as that is justified by objective differences between businesses established in the Federal Republic of Germany and those established in other Member States" (...)".

[17]ECJ, André Mazzoleni, C-165/98:*"Articles 59 of the EC Treaty (now, after amendment, Art.49 EC) and 60 of the EC Treaty (now Article. 50 EC) do not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State. The application of such rules might, however, prove to be disproportionate in the case of employees of an undertaking established in a frontier region who are required to perform, on a part-time basis and for brief periods, a part of their services in the adjacent territory of a Member State other than that in which the undertaking is established. It is therefore incumbent on the competent authorities of the host Member State to determine whether the application of its rules imposing a minimum wage is necessary and proportionate, to ensure the protection of the workers concerned. "*

[18]ECJ, Laval, C-341/05: *"Articles, 49 EC and Article 3 of the Directive of the European Parliament and of the Council of 16 December 1996 96/71/EC, concerning the posting of workers in the framework of the provision of services, shall be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters*

Commission vs. Luxembourg, C-319-06, which contains - among other things - the interpretation of public policy referred to in Article 3, paragraph 10, Directive 96/71 / EC[20]https://translate.google.com/toolkit/content?did=00dxx0100xdx8ljqbgu8&rid=0&hl=it_-_ftn9). At this stage, any additional measure of protection for posting workers' conditions "exceeding" what defined by the Directive falls under the axe of the Court of Justice and of the

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referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive".

[19]ECJ, Ruffert, C-246-06, based on*:" The Directive of the European Parliament and of the Council of 16 December 1996 96/71 / EC, concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC precludes, in circumstances such as those of the main proceedings, such a legislative measure, issued by an authority of a Member State, requiring the contracting authorities to award public contracts for building services only to undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, a wage not less than the minimum prescribed by the collective agreement in force at the place of execution of the works in question. "*

[20]ECJ, Commission vs. Luxembourg, C-319-06: *"29. (...)it must be recalled that the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State (...) 30. (...)the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States (...) 43. (...)he freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (...) 47. (...)the Community legislature intended, by means of point (c) of the first subparagraph of Article 3(1) of Directive 96/71, to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay. It follows that the requirement in the Law of 20 December 2002 concerning the automatic adjustment of rates of pay other than the minimum wage to the cost of living does not fall within the matters referred to in the first subparagraph of Article 3(1) of Directive 96/71. (...) 50. (...)while the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions (...). It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (...) 51. (...)the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (...) ".*

more stringent proportionality test oriented to the maximum protection of the freedom to provide services;

- **4th phase,** in which a reconsideration of **the protection of fair competition between undertakings and the social protection of posted workers** during their period of posting in the country of services - which is not the country where their usual place of work is located – seems to emerge, provided that such a definition, as reflected by law or by the relevant national collective agreements or the interpretation given to them by national courts, **cannot have the effect of impeding the free provision of services between Member States**[21].This stage was inaugurated by the recent ruling on the Sähköalojenammattiliittorycase[22], in which the Luxembourg Court first recognized that a trade union organization in the country of performance of the service was legitimated to sue the Court to assert claims for the salary of posted workers who belonged to that organization.

In the above decision, the Court of Justice has also recognized specific salary items within the minimum wage rates guaranteed to posted workers. The underlying message of this ruling shows important information for EU member countries' legislative and judicial bodies about the selection criteria of each economic item in the calculation of the minimum wage, pursuant to Art. 3, paragraphs 1 and 7, Directive 96/71 / Eking particular:

- ❖ The amounts to be paid for the performance of work (by piecework of by the hour) are among the items making up the minimum wage[23], or the compensations for the discomfort due to the removal of the workers from their usual environment (daily allowance throughout the posting

[21]ECJ, Isbir, C-522/12, paragraph 37.

[22]ECJ, Sähköalojenammattiliittory, C-396/13.

[23]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 45*: "(...) Article 3, paragraph 1, of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that it does not preclude a calculation of the minimum wage for hourly work and/or for piecework which is based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify. "*

period)[24], or related to the journey (in respect of the existing conditions in the country of job performance)https://translate.google.com/toolkit/content?did=00dxx0100xdx8ljqbgu8&rid=0&hl=it - ftn14[25], or amounts compensating compulsory annual holidays[26] .

- To be enforceable against the posting employer, the items making the minimum wage in the country of performance of the service must be binding and meet transparency requirements, which implies, in particular, that they must be accessible and clear (CGE ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 40);
- The determination of the minimum wage of the posted worker cannot depend on the collective agreement freely chosen by the posting employer just to obtain a labour cost lower than that of local workers[27];
- To posted workers shall apply the current regulations of the host Member State concerning the organization of workers in wage groups, identified on the basis of several criteria, including professional qualification, training and experience of workers and/or the nature of the work performed. Working and employment conditions laid down by the host Member State will find residual application only if it appears from a comparison between them and the current conditions in the host Member State that the former are more favourable to the

[24]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 52:*"(...) a daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned"* is conditional.

[25]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 57:*"(...) compensation for travelling time, such as that at issue in the main proceedings, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of the posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify."*

[26]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 67:*"(...) he purpose of requiring payment to be made in respect of that leave is to put the worker, during such leave, in a position which is, as regards his salary, comparable to periods of work"*; paragraph 68 *"(...) the pay which the worker receives during the holidays is intrinsically linked to that which he receives in return for his services.";* paragraph 69*"(...) Article 3 of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that the minimum pay which the worker must receive, in accordance with point (b) of the second indent of Article 3(1) of the directive, for the minimum paid annual holidays corresponds to the minimum wage to which that worker is entitled during the reference period."*

[27]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 41:*"(...) the minimum wage calculated by reference to the relevant collective agreements cannot be a matter of choice for an employer who posts employees with the sole aim of offering lower labour costs than those of local workers."*

worker[28](which, however, is in line with the provisions of art. 3, paragraph 7, first sentence, Directive 96/71 / EC);

- Meal vouchers (when they do not find foundation in the legal provisions in force in the host Member State but derive from the working relationship established between the posted workers and their posting employers)[29] and housing costs (due to their non remunerative nature, as they are mere reimbursement of expenses incurred or to be included in the employer's direct assumption of costs)[30] are not among the items making the minimum wage, in accordance with article 3, paragraphs 1 and 7, Directive 96/71/EC.

In light of the foregoing, we can state that after a period in which the protection of the free movement of services prevailed, the Sähköalojenammattiliittory ruling seems to have reconsidered a new balance between the conflicting interests of posted workers, on the one hand, and market and fair competition, on the other[31]. In other words, the last ruling examined seems to go towards a greater protection of the

[28]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 43:*"(...) the rules for categorising workers into pay groups, which are applied in the host Member State on the basis of various criteria including the workers' qualifications, training and experience and/or the nature of the work performed by them, apply instead of the rules that are applicable to the posted workers in the home Member State. It is only where a comparison is made between the terms and conditions of employment, referred to in the first subparagraph of Article 3(7) of Directive 96/71, applied in the home Member State and those in force in the host Member State that the categorisation made by the home Member State must be taken into account when it is more favourable to the worker. "*

[29]ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 61: *"(...) the provision of those vouchers is based neither on any law, regulation or administrative provision of the host Member State nor on the relevant collective agreements (...),but derives from the employment relationship established in [the State of establishment], between the posted workers and their employer";* paragraph 62*"(...) these allowances are paid to compensate for living costs actually incurred by the workers on account of their posting.";* paragraph 63:*"(...) it is clear from the actual wording of paragraphs 1 and 7 of Article 3 of Directive 96/71 that the allowances concerned are not to be considered part of the minimum wage within the meaning of Article 3 of the directive.".*

[30] ECJ, Sähköalojenammattiliittory, C-396/13, paragraph 58: *"(...) coverage of the cost of the accommodation of the workers concerned is to be regarded as an element of their minimum wage, the Court finds that, on the wording of Article 3(7) of the directive, that cannot be the case.";* paragraph 59:*"Even though that wording excludes only the reimbursement of expenditure on accommodation which has actually been incurred on account of the posting and, according to the information available to the Court, [the employer] defrayed the accommodation costs of the workers concerned without the latter having first to pay them and then seek to have them reimbursed, the method which [the employer] has chosen to cover such expenditure has no bearing*

social needs of the person-worker temporarily employed in a country other than that of origin, provided that such requirements do not have the effect of precluding the freedom to provide services between Member States[32] .

Please refer to "APPENDIX no. 3" to this Chapter 5 for the main references to minimum rate of pay in Directive 96/71/EC and in Directive 2014/67/EU.

5.2. Some comparisons between Belgium, Germany, Italy and Romania

By Massimiliano Mura, Territorial Unit Director of Italian Ministry of Labour and Social Politics (translation into English from the Italian text provided by the author).

The forms of protection of minimum wage in the laws of Belgium, Germany, Italy and Romania do not appear entirely homogeneous, starting from the sources of law.

In particular, in Germany, since 1 January 2015, the minimum wage is legally guaranteed to all workers for whom a valid collective bargaining cannot be applied, to the extent of 8.50 euro per hour, while in Romania the Labour Code establishes the obligation for all employers to pay the minimum wage, whose gross monthly measurement is determined by a Government Decision issued every six months. For the second half of 2016, the amount of the minimum wage in Romania is set at 277.57, a

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on the legal classification thereof"; paragraph 63:*"(...) the actual wording of paragraphs 1 and 7 of Article 3 of Directive 96/71 is that the allowances concerned are not to be considered part of the minimum wage within the meaning of Article 3 of the directive ".*

31 ECJ, Sähköalojenammattiliittory, C-396/13, point 34, shows that the dual objective of Article 3, paragraph1, Directive 96/71 / EC, is made up primarily by*"(...) ensuring fair competition between national undertakings and undertakings which carry out transnational provision of services, the latter are required to grant their workers, in a limited range of issues, working conditions and employment laid down in the host member State ", and second by "guaranteeing posted workers the application of the minimum protection of the host Member State as concerns the terms and conditions of employment covering the matters at hand, in the period when they temporarily perform work activities in the territory of such Member State".*

32ECJ, Sähköalojenammattiliittory, C-396/13, *paragraph34.*

measure well below the average of European minimum wages (the ratio is 1: 3.5) and definitely incomparable with the highest levels of minimum wages (where the ratio reaches even 1: 8.2).

In Belgium, on the contrary, the setting of the minimum wage is entrusted to collective bargaining, declared by law as "generally applicable", according to a two-level mechanism: industry bargaining and cross-sector bargaining, established with the "National Labour Council", which determines the amount of the *guaranteed average minimum monthly income –(GAMMI).*

In Italy, no specific provision is found for the concept of a minimum wage, and collective agreements do not have an *erga omnes* effect. The only source on the subject is Article 36 of the Constitution (which states that "*The worker is entitled to a remuneration commensurate with the quantity and quality of his work and in all cases sufficient to ensure him and his family a free and dignified life*")that provides an overall concept of pay: the judgment of proportionality and sufficiency required by that provision is in fact based on the measurement of wages as a whole, including ancillary asset allocations (such as allowances, awards, etc.), with the sole exception of occasional emoluments and expense claims. Please note, however, that the well-established case law on the point, interpreting the said Article 36 of the Constitution as a mandatory provision, believes that adequate wages should be identified with the minimum wage rates set by the national collective agreements signed by the most representative national trade unions of the various industries.

Also with regard to the applicability of the minimum wage to posted workers, there are differences across EU countries. In Italy, for example, both domestic and posted workers benefit from the same case law of Art. 36, paragraph 1 of the Constitution, whereas in Belgium, although the minimum wage is provided for the majority of workers, those on posting benefit from it to a different extent than Belgian workers, while in compliance with what stated by Directive 96/71/EC. The uniformity of protection between all workers and "domestic" workers was only recently foreseen in Germany, while the interest on the extension of the minimum wage in favour of posted workers in Romania abates, in consideration of the amount foreseen for the minimum wage guaranteed therein.

Finally, it must be noted that the four countries considered show implementation procedures for the minimum wage payment, in case of default, involving public supervisory authorities, entitled to enforce the payment to the employer (Belgium, Italy, Romania), to impose sanctions (Belgium, Romania and Germany, the latter by the supervisory authority on tax offenses) or to send a notice of violation to the competent authority (Romania), where the offense takes on criminal relevance.

5.3. The minimum rate of pay in Belgium

Philippe Vanden Broeck - Labour inspectorate of the Belgium Federal State (text provided in English by the author)

5.3.1. Legal source

Minimum-wage setting in Belgium is a matter of collective agreements both at national and sector level. Those at sector level, concluded within the joint committees and sub-committees (J(S)Cs), constitute the main source. The determination of the joint committee to which a particular undertaking belongs depends on the undertaking's main activity.

The collective agreements concluded within these committees include provisions to determine the general basis for calculating wages/salaries according to the various levels of qualifications.

Sectoral CLAs (Collective Agreements) lay down function classification schemes and corresponding minimum wage scales while at the same time implementing the automatic indexation mechanism.

Legal extension of sector CLAs by royal decree is easy and is consistently applied in all sectors. CLAs that have been declared universally applicable are binding for all employers within the remit of the J(S)Cand within the scope of the CLA; also employers that are not affiliated with the employers' federation that signed the CLA are obliged to respect the CLA in respect of their employees, regardless of whether or not the latter are a member of a signatory trade union. The respect of universally applicable CLAs is penally enforced.

The second central coordination tool directly relates to minimum-wage setting. Intersectoral CLAs concluded within the National Labour Council determine the guaranteed average minimum monthly income (GAMMI). The relevant agreements are CLAs No. 43 of 2 May 1988 (lastly amended by CLA No 43 quaterdecies of 26 May 2015) and CLA No. 50 (of 29 October 1991, lastly amended by CLA No. 50

ter of 26 May 2015). Both agreements have been declared universally applicable by royal decree and extend to all private-sector employees. The GAMMI (to be not confused with the subsistence minimum, which is a social assistance benefit) is subject to automatic indexation according to developments in the health index. It acts as a floor for all wages paid in Belgium: in the absence of a specific scale within the sector or the company, an employee's wage should correspond at least to the GAMMI. It may be noted that the GAMMI includes certain amounts paid in the course of the year, such as the end-of-year bonus. The GAMMI amount varies according to age and seniority. This GAMMI, by nature, is rarely applicable to posted workers.

The minimum wages provided for in CLAs may be exceeded in individual agreements. The opposite is not allowed, i.e. wages in individual agreements cannot be lower than those in sector CLAs. This mechanism cannot be enforced actually to the benefit of posted workers.

Belgium has a particularly strong tradition of automatic wage indexation. The quasi-totality of private-sector employees in Belgium are covered by a system automatically linking their wage to the inflation, in particular to developments in the so-called health index (using a four-month moving average of this index). This (virtually) complete coverage by an automatic wage adjustment mechanism is rather unique in Europe. The system is not centrally organised, but is provided for in the sector CLAs laying down the minimum wage scales.

Conclusion: in principle, the minimum wage scales are laid down per sector by the competent joint committee in their collective agreements.

The following data summed up about minimum wage for the building sector and the transport sector.

Building sector: minimum wages per hour (gross) -1.1.2016

ADULTS

Hourly schedule (on weekly basis) 40 hours/week

Cat. I		13.453
Cat. IA	(Cat. I + 5%)	14.122
Cat. II		14.339
Cat. IIA	(Cat. II + 5%)	15.055
Cat. III		15.252
Cat. IV		16.188
Head of team (III)	(Cat. III + 10%)	16.777
Head of team (IV)	(Cat. IV + 10%)	17.807
Foreman	(Cat. IV + 20%)	19.426

Transport sector: minimum wages per hour (gross) per 1.1.2016

Vehicle Crew members	38h-week
1. Assistant-attendant	10.3630
2. Worker in training (accompanied by an experienced worker	10.3630
3. Worker on a vehicle with a payload of less than 7 T,	10.7640
Worker of a delivery service <6 months seniority in the sector	
4. Worker on a vehicle with a payload of at least 7 T and less than 15 T,	11.0055
Worker of delivery services> 6 months seniority in the sector	
5. Worker of a vehicle with a payload equal to 15 T or more,	11.3910
Worker on an articulated vehicle,	
Worker on an approved ADR vehicle,	
Worker on a refrigerator vehicle,	
Worker of a courier company	

What is to be considered in Belgium as «minimum rates of pay», in the sense of the transposing Directive?

The Directive 96/71/EC is transposed into Belgian legislation by the Act of 5 March 2002 (Belgian Monitor, 13 March 2002) as well the Royal Decree of 29 March 2002 laying down arrangements for implementing the simplified establishment and social documentation system for undertakings posting workers to Belgium and defining the activities in the construction industry listed in Article 6(2) of the Act of 5 March 2002 (Belgian Monitor, 17 April 2002).

One must distinguish what is applicable as “minimum rates of pay” for Belgian workers and what the notion covers for posted workers.

Whereas for Belgian workers the full CLA's apply without constraint, it must be said that only very exceptionally such a collective agreement stipulates special provisions for posted workers. Therefore, faced to posted workers, the Belgian labour inspection enforces only a minimalist part of the whole package of minimum wage components (laid down in CLA's) applicable to Belgian workers in order to keep in line with the hard core of Directive 96/71 and not to take too much risks for being held responsible for not justified hindering of free provision of services.

Indeed: the Belgian legislature has opted for an extremely broad transposition of the Posting Workers Directive. This holds true for the personal scope, but certainly also for the material scope, which is defined by means of an open-ended rule activating both the substantive extension of Article 3(10)(1) (i.e. other public policy provisions) and the formal one of Article 3(10)(2) (universally applicable collective agreements beyond the construction sector).

The main criterion is the penal enforcement of the provisions laying down the employment terms and conditions. In particular, Article 5(1) of the Act of 5 March 2002 stipulates that an employer posting an employee to Belgium has to comply with "labour, wage and employment conditions laid down by law, administrative regulations or conventional provisions (i.e. agreements) which are enforced by penal law".

Virtually the whole labour law applies as of the moment that a foreign employer instructs his/her employee to perform any activity in Belgium. It is apparent from the explanatory memorandum that the government considered this criterion to be an objective one and capable of encompassing the concept of 'public policy provisions' referred to in Article 3(10)(1). Notwithstanding, the labour inspection acts with prudence and restricts its enforcement for posted workers only to the "real hard core" elements of the minimum rate of pay. This is a pure pragmatic choice.

These enforced elements are the basic minimum wage scales and function categories (see general introduction), eventually supplemented with some other components or advantages such as overtime payments and, under strict conditions, a limited number of supplements directly related to the work performed (E.g. wage allowances for special works, notably the supplement for work at heights, the

supplement for work within the confines of petrochemical companies in operation and the supplement for roof works, provided the performance of the said work corresponds to the posted worker's normal activities in the sending country).This in principle applies to all sectors.

In addition, although they are not considered to be part of the minimum rates of pay, the following items are imposed upon foreign employers posting workers:

- Social protection-related advantages / bonus granted on a regular basis: end-of-year bonuses – which are considered as deferred wage – unless the posted worker, further to regulations to which his/her employer is subject, enjoys an equivalent advantage;
- Other advantages in kind / cost reimbursements: boarding and housing (costs); Until now, only in the construction sector, labour inspection enforces the mandatory allowance covering boarding and housing.

The relevant CLA (of 12 June 2014, No 123,026) provides that "when the blue-collar worker is employed on a building site whose distance from his/her place of residence is such that returning home on a daily basis is impossible, the employer shall provide him proper boarding and housing". The employer may discharge himself of this obligation by paying a compensation for boarding and housing (EUR 26.06 and EUR 12.45, resp. in January 2015).

While this compensatory allowance is not seen as part of the minimum wage, it is imposed upon foreign employers posting construction workers to Belgium, where necessary through enforcement.

At the same time, the inspection emphasise that, in practice, situations of actual enforcement of this provision do not occur systematically. The reason is that very often foreign employers themselves provide for boarding and housing or, failing that, comply with the obligation contained in the Belgian CLA by paying a fixed cost allowance (per diem). Only those who do neither, see themselves confronted with the obligation to provide boarding and housing according to said Belgian CLA.

→Flat-rate / daily allowances (a special case)

Very often, and across the sectors, posting employers have recourse to daily flat-rate allowances (per diem allowances), whose amount in many cases exceeds that of the actual wage paid to the posted worker, and may reach up to EUR 110 per calendar day.

Examples: *diety (Poland), diurna (Romania) or ajuda de custoestrangeiro (Portugal).*

Such allowances are generally considered to be paid as reimbursement of expenditure incurred on account of the posting, and hence are rejected, i.e. disregarded for the purposes of assessing whether the Belgian minimum rates of pay are met. This general rule, however, is applied with some leniency. There are basically two derogations:

- If the employer demonstrably bears the costs associated with the posting (travel, boarding, housing) and, *additionally,* pays a per diem allowance (like a *diety* or *diurna,* normally intended to cover such costs) or another flat-rate allowance, such allowance can be regarded as a component of the minimum rates of pay, to the extent of the costs actually borne by the employer. The fulfilment of this condition is meticulously scrutinised by the inspection services. In particular, the employer needs to provide physical evidence attesting to his/her providing for food, transportation, travel, accommodation, in the form of vouchers, a rental contract, hotel invoices etc.
- In respect of flat-rate allowances other than the "usual" per diem allowances, posting employers may also refute the principal denial as a wage component by proving that the allowance, far from covering costs, serves a different purpose (e.g. an expatriation allowance) and/or is directly related to the work carried out.

The draft of the transposition law, actually discussed by the social partners at the cross-sectoral (highest) level in the National Labour Council, doesn't add any new element to the legal and practical situation as mentioned before.

Which enforcement systems are applicable in Belgium in order to make the «minimum rates of pay» effective?

a) penal sanctions (and subsidiary administrative sanctions)

Any breach of the non-payment of the minimum wages (minimum wages or any other wage component , be it at the benefit of a Belgian worker or of a foreign posted worker) may lead to sanctions, penal (first priority choice for the public prosecutor) or administrative fines (in case of dismissal by the prosecutor). The latter is imposed by an autonomous general directorate of the Ministry of Labour. For both kind of sanctions the same basic rules (typical for penal law proceedings) are followed.

The sanctions for non-compliance are provided by article 162 of the social penal code: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2010060607&table_name=loi

The basic amount of the fines is: 50 to 500 Euros (penal fine) or 25 to 250 Euro (administrative fine). The basic amount of the penal and administrative fine is multiplied by factor 12 when this infringement occurs together with other infringements (for example exceeding maximum labour time).

The basic fine is always multiplied by 6 (indexation) and by the number of workers concerned.

b) Enforcement by Labour Inspection

In the case breaches are found, the labour inspection generally gives preference to a regularisation of the illegal situation, rather than pursuing the traditional judicial enforcement system which is less willing to prosecute simple non-compliance with the hard core of the posting of workers Directive. Prosecution rather aims the cases of important fraud. Regularisation moreover safeguards the interests of the workers, who are best served with an effective payment of the correct wages. Only in cases of severe social fraud or where the employer fails to collaborate will the inspection services draw up an official penal report and relay it to the public prosecutor's office in view of judicial prosecution. As an average, some 75% of the cases involving wage condition breaches result in regularisations.

The system of the joint several liability sometimes helps to generate spontaneous cooperation by the foreign employer (in order to accept proposed back-payments)because of the pressure exerted by the (virtually) responsible main contractor.

The way the Labour inspection in Belgium acts for the enforcement of minimum wages is explained on their website: http://www.employment.belgium.be/defaultTab.aspx?id=38244#social

For general information about minimum wages in Belgium, please refer to:

- Minimum wages and working conditions in all economic sectors: https://www.salairesminimums.be/index.html?locale=fr
- Minimum wages and working conditions in building sector: JC 124 Building sector (PDF, 178 KB)
- Minimum wages and working conditions in transport sector: JSC 14003 Road transport and logistics on behalf of third parties : mobile workers (PDF 38,8KB)

5.3.2. Minimum rate of pay – a practical Case in Belgium

The CASE "ZUC" (xxxxxxx) – a typical problem encountered for wage calculation with Portuguese undertakings

→About the Portuguese employer ZUCxxxxx active in Belgium

- ZUCxxxxxxx is established in Portugal and is a 100 % daughter subsidiary of Cy S, one of the bigger European building companies, established in Austria.
- ZUCxxxxxxx is a real company (no letterbox Cy) with real economical turnover in Portugal and has quite a good reputation and seems to be one of the better one.
- ZUCxxxxxxx is often (but not always) active as one of the subcontractors for Cy S, especially in Germany, the Netherlands and Belgium.
- ZUCxxxxxxx has been subject to enquiries by Labour inspection in Belgium since 2012 (also in 2013, 2014, and 2015).

→The (minimal) obligations for ZUCxxxxxxxto fulfilled in Belgium

- Hourly minimum wages (bruto) :

ADULTS

Hourly schedule (on weekly basis) 40 hours/week

Cat. I		13.453
Cat. IA	(Cat. I + 5%)	14.122
Cat. II		14.339
Cat. IIA	(Cat. II + 5%)	15.055
Cat. III		15.252
Cat. IV		16.188
Head of team (III)	(Cat. III + 10%)	16.777
Head of team (IV)	(Cat. IV + 10%)	17.807
Foreman	(Cat. IV + 20%)	19.426

- Reimbursement of boarding and housing costs : CLA of 12 June 2014

→What are the Portuguese obligations for ZUCxxxxxxxx based on the Portuguese Law?

- The Portuguese law sets as mandatory applicable the Collective agreement in the construction sector: 505 to 847 Euro /month (2,91 to 4, 88 Euro / hour Bruto) , but often salaries exceed those amounts on company level.

- a daily allowance for posting : "Ajudas de Custo estrangeiro" in 2016:

  - Food: 4,27 Euro
  - All in (lodging + food): up to 50 EUR/day may be granted
  - Those daily allowances enjoy the benefit of an advantageous social security and tax regime.

→In general which are the comparative social contributions differences between construction companies in Belgium and Portugal?

This element is not used in the enquiry of Labour inspectors as it is out of scope of Directive 96/71. It just shows that the share of social security contributions alone is not decisive in the total wage cost comparison.

On the basis of the official MISSOC Comparative Tables Database (Social security contributions), http://www.missoc.org/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparative Table Search.jsp:

BELGIUM	PORTUGAL
Basic contribution: 37.84% total, of which - 24.77% employer - 13.07% employee No ceiling	Basic contribution: 34.25% total, of which - 23.25% employer - 11.00% employee No ceiling.

→About the findings of the Labour Inspection

ZUCxxxxxxx, when posting its workers abroad provides lodging and catering to posted workers in other M.S. by the services of "Euroservxxxx" , another subsidiary of Cy S.

Euroservxxxx makes an invoice for ZUCxxxxxxx, which, on its turn, asks a contribution to the posted workers, by deducting part of this cost on the salary.

The real total cost for ZUCxxxxxxx – on the basis of invoices and book keeping, amounts (average) to 23,90 EUR/day per worker (11.50 EURO catering + 12.40 lodging)

ZUCxxxxxxx deducts on the salary of the worker (if he used the catering and lodging service):

- 4 EUR/day (for lodging)
- 10 EUR/day (for food)

The activities and income of the posted workers were submitted to the Belgian tax regime during the enquiries (> 183 days).

Former enquiries (2013- 2015) in different parts of the country, regarding ZUCxxxxxxx lead, most of the time, to discussions concerning the minimum rates of pay to be complied with in Belgium, especially with regard to the constituent components (on the pay-slips) to be accepted by the Belgian Labour Inspection.

Labour Inspection always received the original pay-slips issued from Portugal and, from time to time, double-checked by the Portuguese inspection via IMI, (there were no double or false pay-slips).

The discussions concerned the Portuguese basic (monthly) wage, often from 500 to 700 € increased by the full daily allowance (Ajudas de Custoestrangeiro included), often up to 1.000 €.

The allowances were systematically rejected by the Labour Inspection as a component to be considered in order to meet the Belgian minimum wages. The Belgian minimum rate of pay could not be met.

There were also deductions on the salary for the "construbadge" (20 €).

As a result, several injunctions for back-payments were addressed to the employer but refusals of the latter lead systematically to notifications to the main-contractors (e.g. Cy S.) and commissioner/client in the framework of the joint and several liability.

This case is still pending. Belgian Labour Inspection:

a) still requires full Belgian minimum wage on the pay-slip
b) will require submitting those full Belgian minimum wages to the Portuguese Social security (all payments are checked via IMI)
c) requires function cat 2 (exceptionally cat 3)
d) rejects deduction on the salary for "construbadge
e) rejects deduction of the full daily allowance &Ajudas de Custoestrangeiro.

The Belgian CLA 12 06 2014 for boarding and housing is applicable and it cannot be undone by deducting the costs for lodging & food provided by Euroservxxxx (these services represent costs on behalf by the employer). A court case is pending in appeal in another Portuguese case and Labour Inspection is waiting for the outcome.

And what about social security in Portugal?

As the paid daily allowances have an advantageous social security status in Portugal, Belgian Labour inspection needs to check – by every step in the enquiry – its IMI counterparts.

5.4. The minimum rate of pay in Germany

Bettina Wagner- Arbeit und Leben (text provided in English by the author)

5.4.1. Introduction

On January 1st 2015 the Minimum Wage Act (MWA) came into force in Germany setting a wage floor of 8.50 Euro in all sectors without a valid applicable collective agreement. According the Ministry of Labour and Social Affairs approximately 37 Million employees are currently receiving the minimum wage[33]. Although the minimum wage was introduced as an initiative to prevent low wage employment the implementation of the wage floor had an immediate impact in some sectors while in other sectors the adjustments are implemented gradually.

The list of sectors for which gradual adjustments currently undermining the minimum wage have been allowed reads as follows:

Sector	Region	from 01.01.2015	01.01.2016	01.01.2017	01.11.2017
Agriculture, Forestry and Gardening	West	7.40	8.00	8.60	9.10
	East	7.20	7.90	8.60	9.10
Textile and Clothing Industry	West	8.50	8.50	8.50	Min. wage
	East	7.50	8.25	8.75	Min. wage 8.75

In addition, in a number of sectors the social partners had singed universally applicable collective agreements temporarily undermining the minimum wage in 2015 but have been adjusted by 2016.

According Section II §4-§10, with the MWA coming into force, a Minimum Wage Commission has been established containing Social Partners and Government representatives that act as advisory bodies to

[33] BMAS (2016) Der Mindestlohn wirkt. P.7 https://www.der-mindestlohn-wirkt.de/SharedDocs/Downloads/ml/informationen-zum-mindestlohngesetz-im-detail.pdf?__blob=publicationFile

the national government on questions regarding the level and implementation of the national minimum wage. This Commission announced in June 2016 that the Minimum Wage will increase to 8,84 Euro as of January 2017.

5.4.2. Applicability for Foreign Companies and Posted Workers

One of the most important sections for posted workers is §1.3 stating that the minimum wage is also a wage floor for workers temporarily posted to Germany. Before its implementation, within the aspect of wage levels, the *lex loci laboris* applied only for the sectors mentioned within the Germany Posted Workers Act (PWA; in German: Arbeitnehmerentsendegesetz). For the sectors not mentioned in the law, home country wage levels were possible while temporarily working in Berlin. The implementation of the national minimum wage has therefore also ended wage discrepancies between domestic and posted workers.

In addition to the wage level, the national minimum wage also entails a second important reference to the German Posted Workers Law in §13 of the MWA. This paragraph focuses on the liability of contractors and states that §14 of the PWA applies also for the minimum wage. §14 PWA indicates that chain liability applies for all contractors in the liability chain and that the general contractor is liable irrespective of the chain length. Put into practice, the chain liability previously applying for a certain number of sectors with universally applicable collective agreements, has been extended to all sectors and industries. Workers temporarily posted to Germany can address their wage demands to the general contractors in Germany. However, this chain liability extension of the PWA to all sectors is based on the precondition of increased cooperation of investigating institutions in order to verify wage claims. International Cooperation is explicitly mentioned in §18 of the MWA stating that, German control institutional shall cooperate with the respective institutions in other Member States based on the existing concept of international legal support.

Apart from the liability and wage level, §16 clarifies the necessary registration criteria to be fulfilled by foreign companies active in the sectors mentioned in §2a of the Act on Combating Illicit Employment[34], that plan to perform any economic action in Germany.

The following information has to be registered at the Financial Control Combating Illicit Employment, FKS (in German: FinanzkontrolleSchwarzarbeit):

1. *Name, Surname, date of birth of all employees active in Germany and falling under the MWA*
2. *Start and approximate termination of employment*
3. *Place of employment*
4. *The place within the country where all the documents about the employment situation that are mentioned in §17 are held.*
5. *Name, Surname, address, date of birth of the person in charge in Germany. as well as*
6. *Name, Surname and address of a person entitled to receive correspondence (can be the same as person in section 5)*

There requirements apply also to temporary work agencies.

5.4.3. Items included in the minimum wage[35]

According to section 20 of the MWA the payments that can be considered to be part of the normal or usual work are counted as components of the minimum wage. Payments referring to compensation for work beyond the regular work may not be counted as part of the minimum wage.

Extraordinary payments that might be included into the minimum wage are:

- Payments that refer to regularly paid work such as additional payments for certain sectors

[34]https://www.gesetze-im-internet.de/schwarzarbg_2004/__2a.html

[35]https://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Mindestlohn-Mindestlohngesetz/mindestlohn-mindestlohngesetz_node.html

- Additional payments for posted workers that are paid and declared as difference between the home country and the minimum wage in Germany.
- Additional supplementary payments existing in sectors where piecework payment might the norm.
- Specific lump-sum payments such as Christmas bonuses or holiday allowances, but might only be added to the month in which they are paid and not on the entire year.
- Daily allowances for housing and food can be counted as part of the minimum wage as long as they are specifically mentioned in their composition and do not exceed the amount of 236 Euro per month for food and 223 Euro for housing. However, taken together the total value of these non-monetary benefits accounted to the monthly wage may not exceed the height of the attachable part of the claimant. However, as stated in the Posted Workers Directive of 96/71/EG the provision of housing and food cannot be counted as part of the wage for posted workers.

Extraordinary payments to be excluded are as follows:

- Bonuses for extraordinary work for piecework payments (premium payments)
- Bonus for extraordinary work engagement
- Working at unreasonable hours (overtime, nightshifts, on bank holidays or Sundays)
- Bonuses for work in dangerous or hazardous conditions
- All payments that refer to performances not mentioned in the work contract
- Contributions to private pension schemes or insurances
- Daily allowances if they are not further specified and exceed the maximum amount allowed.

5.4.4. Implementation and Verification

§14 and 15 determine that the verification of documents and responsibility compliance of companies is carries out by the customs institution to which the Financial Control Combating Illicit Employment, FKS (in German: FinanzkontrolleSchwarzarbeit) is counted.

This institution is solely responsible for the verification of work contracts, as well as documents providing direct or indirect information of compliance with the MWA (§15).

An important change directly linked to the control authorities is laid down in §2.2. Accordingly, the employers are responsible for the documentation of all hours and every employee receiving the minimum wage in the sectors mentioned in §2a of the Law on Combating Illicit Employment (§17 of the MWA).

5.4.5. Worker Information and Support

Apart from the Minimum Wage Commission consisting of social partner representatives, $12 lays down that an information office shall be established within the national agency for employment protection and medicine informing employees as well as employers on the minimum wage.

In addition, a hotline was established for the first year after implementation addressing citizens' request and issues, but was closed down on January 1st 2016.

As Germany does not have a labour inspection employees as well as employers both can address the Financial Control Combating Illicit Employment, FKS (in German: FinanzkontrolleSchwarzarbeit). However, they are not entitled to make wage claims for workers.

Still one important change for employees has been included into the MWA. In contrast to prior periods for addressing wage claims that were only 3 months, with the implementation of the Minimum Wage Act the period has been extended to three years, in which employees can claim their unpaid wages.

5.4.6. Validity of the MWL in the transport sector

Shortly after the implementation of the MWA considerable controversy was evolved within the transport sector. International companies approached the German government asking in how far the minimum wage would also apply to international road haulage drivers transiting through Germany[36].

First the question has been temporarily suspended at the national level allowing for transit drivers to be exempted from the MWA. On June 16, 2016 the European Commission decided to take legal action against Germany claiming that a systematic application of the MWA to transit drivers would restrict the freedom to provide services as well as the free movement of goods in a disproportionate manner.[37]

[36] http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-labour-market-industrial-relations-business/controversy-over-german-minimum-wage-for-international-truck-drivers-q2-2015

[37] http://europa.eu/rapid/press-release_IP-16-2101_en.htm

5.5. The minimum rate of pay in Italy

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5.5.1. Introduction

On July 22, 2016, the Legislative Decree 17 July 2016, n. 136 came into force, implementing Directive 2014/67/EU, on the application of Directive 96/71/EU, concerning the posting of workers in the framework of the provision of services and introducing the amendment to Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ("IMI Regulation"). In essence, the process of national transposition of Directive 67 (the so-called Enforcement Directive) has provided the opportunity to include in a single legislative text the rules applicable to cases of posting of workers by undertakings established in another EU member state. Article 26 of the decree in question has, in fact, enshrined the repeal of the provisions of Legislative Decree No. 72/2000, implementing Directive 96/71/EC, which were transferred, with partial modifications, in the text of the legislative decree N.136/2016.

As known, the transnational posting of workers within the meaning of Articles 1, paragraph 3, and 2, paragraph 1, Directive 96/71 / EC, is based on the freedom to provide services, acknowledged by Article 49, paragraph 1 and Article 53, paragraph 1 of the Treaty establishing the European Community - EC Treaty and by Article 56, paragraph 1[38] and Article 60, paragraph 1[39] of the Treaty on

[38]Article 56, paragraph1, TFEU provides that " Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended." Pursuant to paragraph 2 "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.."

[39]Article 60, paragraph 1, TFEU provides that " The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59 (1), if their general economic situation and the

the Functioning of the European Union - TFEU). Such legal basis does not allow to consider as the primary goals of the transnational posting the protection of wage levels for posted workers, i.e. employees employed in a Member State (the State where services are rendered) different from the State of origin (State of establishment of the posting employer - provider of transnational services).

This, however, even in light of the rulings of the Court of Justice of the European Union, is not an obstacle to the contrast of distortion of competition between businesses generated by substantial differences in the economic treatment of workers of different national origin but employed in the same EU Member State.

5.5.2. The minimum wage in the Italian Law

As mentioned, in Italy there isn't a law imposing or somehow regulating a minimum wage for workers.

The protection of the minimum wage levels is ensured through the implementation of the case law of art. 36, paragraph 1, of the Constitution, which provides that "*The worker is entitled to remuneration **commensurate** with the quantity and quality of his work and in all cases **sufficient** to ensure him and his family a free and dignified life*."

The case law, is unanimous in considering that Article 36 of the Constitution is a mandatory rule (and can be therefore directly invoked in court together with art. 2099, paragraph 2, Civil Code[40]), which,

situation of the economic sector concerned so permit." Under paragraph 2, "To this end, the Commission shall make recommendations to the Member States concerned."

[40]Art. 2099 Civil Code: "The salary of the employee may be established by piecework or by the work, and must be paid to the extent determined by [the corporate] standards, with terms and procedures in use in the place where the work is performed. In the absence of [corporate standards or] agreement between the parties, remuneration is determined by the court, taking into account, where appropriate, the opinion of professional associations. The employee may also be paid in whole or in part with profit participation or products, with commission or benefits in kind ".

over the years, has formed a real jurisprudence on the guarantee of the minimum wage for workers, anchoring the parameter of the **adequacy** of the compensation (where the adequacy is the result of the requirements of proportionality and sufficiency) to the level of pay determined by national collective agreements applicable to the specific category of goods or productive sector, having regard to the **collective contractual tables** relating to the tasks performed by the worker and the corresponding qualification framework, subject to the extension of the protection of collective bargaining also to workers who are not union members[41].

In Italy, the above interpretation of case law referring to art. 36, paragraph 1 of the Constitution, allowed to create "*a functional equivalent of the legal minimum wage foreseen in other legal systems*"[42]. This did not prevent the jurisprudence, in specific and substantiated cases, to recognize the legitimacy of the use of different parameters to determine the appropriate remuneration[43], in certain cases even with variations in the quantification provided by national sector collective bargaining agreements[44] .

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[41]Cass. SS.UU. n. 2665/1997

[42]V. S. Leonardi, Salario minimo e ruolo del sindacato: il quadro europeo fra legge e contrattazione – Problemi di relazioni industriali, in Lavoro e diritto, 1, 2014, pp. 190 e 204-205 (minimum wage and the role of the union: a European frame work between law and bargaining - Problems of industrial relations, in Lavoro e Diritto, 1, 2014, pp. 190 and 204-205); V. Speziale, Il salario minimo legale (the legal minimum wage), in WP C.S.D.L.E. Massimo D'Antona. IT, 244, 2015, p. 3; M. Cinelli, Retribuzione dei dipendenti privati (voce), (Salary of private employees (item)9in Novissimo Digesto Italiano, appendice, VI, 1986, p. 658 (

[43]Cass. n. 2245/2006; Cass. n. 1903/1994; Cass. n. 2382/1966.

[44]Cass. n. 14211/2001; Cass. n. 3218/1998; Cass. n. 7885/1997; Cass. n. 928/1993; Cass. n. 12490/1992; Cass. 2380/1972; Cass. n. 2245/2006 (assuming the deviation from the national collective contract rates in selected geographic areas); Cass. n. 3218/1998 (assuming a "down" offset by local or company collective bargaining, compared to the national one, with reference to the depressed labour market hypothesis); Cass. n. 14211/2001 (assuming a "down" difference by the decentralized bargaining, compared to the national collective bargaining, in view of the limited size of the undertaking); Cass. n. 7383/1996 (assuming a "down" difference by the decentralized bargaining in small businesses);

It can be therefore said that in the Italian law the task of "*guaranteeing the certainty of common economic and regulatory conditions for all workers in the sector, wherever they work across the national territory*" is given to the national collective agreement (see also point 2 of the Interconfederal Agreement of 28 June 2011 and paragraph 2.2. of the Interconfederal Agreement of 22 January 2009), signed by the more representative national organizations of workers and employers, which assumes the role of a non-derogable compensation parameter that cannot allow for a lower wage[45].

5.5.3. Minimum wage in Italy for transnational workers

Unlike the abolished Decree No. 72/2000, the Legislative Decree. No. 136/2016, article 2, paragraph 1, letter E), provides the definition of working and employment conditions, reproducing, the so-called hard core of the subjects (listed in art. 3, paragraph 1, Directive 96/71 / EC[46]) to which the principle of "*lex loci laboris*" applies. Among these subjects, as we have seen, we find the "*minimum wage rates, including those increased for overtime work*".

[45] Const. No. 51/2015, asked to rule on the constitutionality raised with reference to Article 39 Const, Art. 7, paragraph 4, of Law Decree no. 248/2007, converted and amended by Law n. 31/2008, insofar as it provides for the application - if there are more collective agreements in the field of worker-members of cooperatives - of "total economic treatments not lower than those dictated by collective agreements between employers and most representative national trade unions of the industry", and ruled that the said provision of the law "far from granting the *erga omnes* effect to these collective agreements signed by the most representative trade unions, in contrast to the overall minimum rates therein, as external parameter to be used by the court in determining the proportionality and sufficiency of the remuneration payable to the worker member, pursuant to art.36 of the Constitution".

[46] They are the following subjects "(...) a) maximum work periods and minimum rest periods; b) minimum paid annual holidays; c) minimum rates of pay, including overtime rates; this point does not apply to supplementary pension schemes; d) conditions of hiring of workers, in particular the hiring-out of workers by temporary employment agencies; e) health, safety and hygiene at work; f) protective measures with regard to working conditions and employment of pregnant women or nursing mothers, children and young people; g) equality of treatment between men and women and other provisions on non-discrimination (...) ".

Art. 4, paragraph 1 of Legislative Decree No. 136/2016, with a provision similar to that already contained in Article 3, paragraph 1 of Legislative Decree No. 72/2000, stipulates that "*the same labour conditions foreseen for the workers carrying out similar tasks in the place where the posting takes place shall apply to the employment relationship between [posting undertakings[47]], and posted workers, during the period of posting.* "

5.5.4 Minimum wage composition

In the light of Union and national laws in force, it is possible to identify which economic protections may apply to workers employed on the Italian territory, as part of a transnational provision of services, with particular reference to cases in which workers come from (i.e. they carry out their usual activities in) countries where wage levels are lower than those of Italy. In this regard we should note the clarifications provided by the Court of Justice of the European Union (see the introductory paragraph of this chapter) and, in particular:

– the free movement of services is one of the EU's fundamental principles, enshrined in both the Treaty establishing the European Community (Art. 49, paragraph 1 and Art. 53, paragraph 1), and the Treaty on the Functioning of the European Union (Art. 56, paragraph 1 and Art. 60, paragraph 1)

– the fundamental principle of free movement of services must be balanced with the objective, set by Directive 96/71 / EC, of fair competition between national undertakings and undertakings which carry out transnational provisions of services;

– another purpose stated in Directive 96/71/EC is to ensure to posted workers the application of minimum protection rules in the host Member State as regards working and employment conditions, as set in art. 3, paragraph 1, in the period in which they work as posted workers[48];

[47]These are the "undertakings referred to in Article 1, paragraphs 1 and 4" Legislative Decree No. 136/2016

[48]ECJ, Laval un Partneri, C-341/05, paragraphs 74 and 76.

– on the subject of minimum rates of pay, including pay for overtime, the legal and/or collective bargaining provisions of general application in force in the Member State where the service and employment are provided (*lex loci laboris* principle - see art. 3, paragraph 1, Directive 96/71/EC) shall apply also to the employees of the transnational posting undertaking or service provider;

– in case of litigation, the identification of the level of remuneration to be paid to the posted worker shall be assessed by the national courts of the Member State in which the posting takes place, subject to the prohibition of restrictions to the freedom to provide services between Member States. To this end, the competent court must take into consideration the rules on the professional category of workers in wage groups applied in the host Member State on the basis of various criteria, such as, in particular, the qualification, training and experience of the workers and/or the nature of work performed;

– the professional classification of workers, according to the rules of the home Member State, should only be used if, after a comparison with the rules in force in the host State, the latter turn to be more favourable to the worker;

– In any case, the definition of minimum wage, as reported by national law or by collective agreements of general application or by the interpretation of national courts, shall not have the effect of preventing the freedom to provide services between Member States[49], also in accordance with the principle of non-discrimination on grounds of nationality, enshrined in Articles 12 and 45 TEC and 39 and 45, paragraphs 1 and 2 TFEU[50];

[49]ECJ, Isbir, C-522/12, paragraph37 and CGE, Sähköalojenammattiliittory, C-396/13, paragraph 34.

[50]Under Articles.12 TEC and 18 TFEU "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination." Under Article 39 TEC and 45 TFEU, paragraphs 1 and 2 "Freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. "

– The items forming the minimum wage shall have a close correspondence with the work carried out during the period of posting and shall not be provided as compensation for expenses incurred as a result of the posting[51];

– The items forming the minimum wage in the country of work performance are binding for the posting employer, as they comply with the criteria of transparency, accessibility and transparency[52].

Accordingly, in order to ensure adequate financial protection to posted workers in the Italian territory, their minimum wage **should include** the following items:

- basic wage;
- each element of remuneration (Italian wage item liked to the worker's contractual status, just as the basic wage);
- bonuses linked to length of service (if connected to the professional classification of wage bargaining groups and/or the nature of the work);
- any allowance over basic pay (individual or for groups of workers if connected to the professional classification for wage groups and / or the nature of the work);

[51]In the light of Article 3, paragraph 7, second sentence of Directive 96/71/EC, see ECJ, Commission vs. Germany, C-341/02 "39. (...) allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of "of the minimum wage. See also ECJ, Isbir, C-522/12, paragraph 38.

[52]EJC, Sähköalojenammattiliittory, C-396/13, paragraph 40: " the rules in force in the host Member State may determine whether the calculation of the minimum wage must be carried out on an hourly or a piecework basis. However, if they are to be enforceable against an employer which posts its employees to that Member State, those rules must be binding and must meet the requirements of transparency, which means, in particular, that they must be accessible and clear. "

- remuneration for overtime, night and weekend work;

- posting allowance (if compensatory for the discomfort due to removal of workers from their usual environment);
- travel allowance (in the existing limits set by the country of performance of the service).

On the contrary, precisely because of the absence of the strict correspondence with the performed work, the items that make up the minimum wage of the posted worker should not include the amounts provided for by national laws to be paid as:

- additional awards for quality and / or increases in wages and / or incentives, required by law in the host country (for example, for performing work in particularly difficult, heavy or dangerous conditions)[53];
- costs of accommodation provided by way of reimbursement or directly borne by the posting employer;
- meal vouchers.

The minimum wage obligation under Article 36, paragraph 1 of the Constitution can also be fulfilled regardless of a perfect match between the payroll costs of posted workers and those of the host country workers classified in similar job categories. What matters is that a **substantial equality** is guaranteed for the sums paid by way of remuneration to posted workers and those paid to workers of the host country, so as to ensure a uniform minimum wage treatment, for the same work performed by posted and national workers.

[53]ECJ, Commission vs. Germany, C-341/02 points 39 and 40: "(...) It is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage".

Finally, the uniformity of treatment is also realised by means of the payment of one or more compensation items, denominated, for example, "posting allowance", which fulfil the pay obligation in a substantially analogous and equivalent manner, provided that also posted workers are guaranteed the adequacy of remuneration, according to the constitutional principles of sufficiency (to ensure the worker and his family a free and dignified life) and proportionality (the quality and quantity of the work performed).

5.5.5Joint and several protection of credit

As more fully explained in the chapter on joint and several liability, the paragraphs 4 and 5 of art.4, Legislative Decree No. 163/2016, implementing art. 12, paragraph 2, Directive 2014/67/EU, recall the rules of joint and several liability of the buyer, foreseen at national level, for compensations and benefits payable by the contractor:

– art. 29, paragraph 2, of Legislative Decree No 276/2003

– art. 35, paragraph 2, of Legislative Decree No 81/2015, concerning labour supply;

– art. 83-bis, paragraphs from 4-bis to 4-sexies, Legislative Decree No. 112/2008, converted by Law no. 133/2008, as amended by art. 1, paragraph 248, Law no. 190/2014, in the road transport sector.

By virtue of the above paragraphs 4 and 5, the joint liability extends beyond the close relationship of "direct contracting", and involves all levels of the procurement chain. In the case of transnational postings (even in cases in which this is realized by means of transnational labour supply or in the field of road transport operations), it means that the Italian employer, or an employer otherwise established in Italy, can be held to account for credits payable to posted workers.

That legislation, while going beyond the limits set by Directive 2014/67 / EU, art. 12, paragraphs 1 to 3, which refer to a joint liability to the extent of the relationship "*between the contractor and its sub-contractor*," complies with the provisions of the subsequent paragraph 4, according to which in the

first place "*Member States may, in compliance with EU laws, also provide for more stringent national rules on liability, in a non-discriminatory and proportionate way, as regards the scope of the responsibility of the subcontract "and furthermore," (...) may (...) in accordance with Union laws, provide for such liability in sectors other than those foreseen in the Annex to Directive 96/71/ EC* ".

5.6. The minimum rate of pay in Romania

Dantes Nicolae Bratu, Larisa Otilia Papp, Marius Lixandru, Florin Cosma, Simona Iuliana Neacşu and Cătălin Ţacu - Romanian Labour Inspection (text provided in English by the authors).

5.6.1. Introduction

Differences among the labour relation frameworks within *European Union* Member States (*EU MS*) especially minimum remuneration mechanism, at the time of adopting of the posting directive and also in the present[54], made impossible to establish *one single rule*, a *unique definition* and *precise scale* of the minimum rates of pay.

The rate between the level of minimum wage in *Romania* and the average in *EUMS* is *1:3,5*. Related to the highest minimum wage level the rate is *1:8,2*[55]. This is the reality of labour economics which constitutes the base of host country minimum rates of pay principle provided by the article 3 of the *Directive 96/71/EC*.

Adding or including other wage incentives or allowances related to the host country minimum rates of pay generates complicate judicial decisions[56]. In the meantime the idea of a *targeted revision* of the *Directive 96/71/EC* create tough political debates[57]. In this complex state of the art, *Romanian Labour*

[54]European Commission, Directorate-General for Employment, Social Affairs and Inclusion, "*Study on wage-setting mechanisms and minimum rates of pay applicable to posted workers in accordance with Dir. 96/71/EC in a selected number of Member States and sectors*", January 2016.

[55]Eurostat, semester I 2016, data base "*Monthly minimum wages - bi-annual data [earn_mw_cur]*".

[56]European Union Court of Justice, Decision Sähköalojen/Elektrobudowa C‑396/13.

[57]*http://www.euractiv.com/section/central-europe/news/kalfin-expect-long-discussions-over-revision-of-posted-workers-directive/*;*http://www.mobilelabour.eu/5279/eurociett-no-need-to-revise-the-posting-of-workers-directive-of-1996/*; *http://www.pes.eu/pes_urges_commissioner_thyssen_to_propose_a_substantial_revision_of_the_posting_of_workers_directive*;

Inspection continue to accomplish the primary mission - to effectively protect the effectiveness of worker rights and to ensure that the labour law principles are fully observed by every employer.

5.6.2.The «minimum rates of pay» in the Romanian legal system

For the workers who are working on the basis of an individual employment contract there is a minimum wage **mandatory by *Labour code***[58]. For the employers it is compulsory to establish and to guarantee the payment of the **gross monthly minimum wage**, in accordance with the working time of the employee.

The level of the minimum wage is set through government decision[59] enacted every year, usually establishing two stages of setting (from January and from July). For the year 2016, will be a single rise since May[60], on the monthly gross level of 277,57 euro.

Legally[61] there is the possibility for conclusion of sectoral collective agreements universally applicable if specific condition and procedure is fulfilled. In such an agreement theoretically could be established a minimum rates of pay. Practically, since 2011 in Romania there are no sectoral collective agreements universally applicable.

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https://www.businesseurope.eu/publications/target-revision-posting-workers-directive-announced-commission-2016-work-programme.

[58]Article 164 - 165 of the Law no. 53/2003 - *Labour code*, republished, with subsequent amendments and additions (*Labour code*).

[59]233,16 euro since 1st of June 2015 by Government Decision no. 1.091/2014 *for establishing gross minimum wage* (*GD 1.091/2014*).

[60]Government Decision no. 1.017/2015 *for establishing gross minimum wage*.

[61]Law no. 62/2011 *of the social dialogue*, with subsequent amendments and additions.

5.6.3. The«minimum rates of pay» in Romania, in the sense of the transposing Directive 2014/67/EU

The law transposing *Directive 96/71/CE*[62] provides that the minimum wage is established by law or by universally applicable collective agreement (sector).

Allowances specific to posting are considered part of the minimum wage, unless they are granted to cover expenses related to employee relocation, such as transport, accommodation and meals.

Origin country wage	+	**Allowances specific to posting** (*not covering transport, accommodation or meals*)	≥	**Romanian (host) minimum wage**
Romanian (origin) wage	+	**Allowances specific to posting** (*not covering transport, accommodation or meals*)	≥	**Host country minimum wage**

5.6.4.The enforcement systems applicable in Romania in order to make the «minimum rates of pay» effective

The *Labour Code* states that it is an offense to guarantee the payment of the gross minimum wage[63] and it is a criminal offense to repeat this deed[64]. Setting wages below gross minimum wage is also an

[62]Law no. 344/2006 *concerning the posting of employees in the transnational provision of services*, with subsequent amendments and additions.

[63]Admonition or fine between 66 and 444 euro, under article 260 paragraph (1) letter a) of the *Labour code*.

[64]Penal fine or prison between one month and one year, under article 264 paragraph (1) of the *Labour code*.

offense[65]. Labour inspectors investigate offenses and impose the penalties or, where appropriate, refer the matter to the prosecuting authorities.

In the case of non-compliances on gross minimum wages[66], Labour Inspectors may order mandatory compliance measures to the employer.

[65]Admonition or fine between 222 and 444 euro, under article 3 paragraph (1) of the *GD 1.091/2014*.

[66]Article 19 of the Law no. 108/1999 on the establishment and organization of the Labour Inspection, republished, with subsequent amendments and additions.

APPENDIX 1 to Chapter 1 – BELGIUM: Fraud, abuse and circumvention within national legislation

Philippe Vanden Broeck, Belgian Ministry of Labour (text provided in English by the author)

A1.1 National legal concepts which might apply to the case of «fraud», «abuse» and «circumvention» provided by the Directive

1.1.1. Anti-abuse provision (Programme Act 27.12.2012) but attacked by the EU Commission (infringement procedure), so not applied hitherto.

Fraudulent posting

European social law is frequently subject to circumvention and elusions, and therefore the programme Act of 27 December 2012 (31 December 2012) introduced new measures for the fight against abuses that occur in cross-border work, particularly as part of the international mobility of workers.

From now on, it will be an abuse of the rules determining the applicable law when, in respect of an employed or self-employed worker, these rules are not respected in order to avoid the Belgian social security which should have been applied to a specific situation.

For example it is conceivable that a Belgian undertaking creates a "mailbox" company abroad, which employs overseas workers residing in Belgium to post them in Belgium. So the bogus company could apply the social security of the sending State, which is contrary to the determination rules of the Regulation to the extent that the posting undertaking must have significant economic activities in the sending State and workers must have been subject to social security in the sending State for at least a month, before being posted elsewhere. Such practices undoubtedly constitute elusion of the law.

Similarly, these measures aim to curb such simultaneous employment in several Member States. By simultaneous employment here we mean workers who, only on paper, work in several states (e.g.: the inclusion in the employment contract of a clause providing for workplaces in different countries), while in reality they pursue their professional activities in a single country. Such arrangements are often used to escape the obligation of social security contributions in Belgium, as payroll taxes are lower in most foreign regimes.

When the national court, a public institution of social security or social inspector discover such abuse, the employed or self-employed worker concerned will be subject to the Belgian social security legislation if that legislation had to be applied in accordance with European rules, from the first day when the conditions for their application are met, taking into account however the limitation periods applicable in social security.

It is for the institution or inspector that invokes the abuse to prove it.

1.1.2. Forgery in the Social Penal Code (article 230 to 235)- sanction level 4

These articles may be applied to situations of fictitious posting or the abuse of letterbox companies in the road haulage sector (methodology developed and agreed upon by some public labour prosecutors). The effect is that the letterbox company is considered as non existing and the labour relations concerned are fully submitted to the Belgian labour Law. There is a problem if the A1 is (incorrectly) issued by another MS. Withdrawing is asked to the social security body that issued this A1, which raises problems in case of refusal. In any case, the prosecutor tries to obtain conviction also to a damage compensation (for the benefit of the social security body) equal to the eluded social security contributions in Belgium.

- Article232 : Counterfeiting and the use of forged pieces in the Social Penal Code

- Article233 : Wrong or incomplete declarations concerning social advantages (= also salaries!)

- Article235 : Swindle in Social Penal Law.

A sanction of level 4 is inflicted to everyone who, with the purpose of obtaining unrightful social advantages or helping to obtain it, to keep it or to help keeping it, either does not pay any contributions or pays less contributions or lets pay less contributions than those he or any other person has to pay, makes use of false names, false capacities or false addresses or has used any other fraudulent actions in order to make believe of the existence of a false person, a false enterprise, a fictitious accident or any other fictitious event or in order to abuse thrust in any other way.

A1.2 Definition and enforcement measures, in case of «fraud», «abuse» and «circumvention» in Belgium

- Definition: there is no "positive" definition of fraud, abuse, circumvention in Belgian law as such. Not even in the transposing law.

  There are positive definitions/criteria though that have to be met for being considered "posted worker" and (posting) "employer": see article 3 and 7 of the draft of the transposing law which is actually at discussion in the national labour Council (text attached to this check-list).

- Enforcement measures: no specific measures as such for Labour inspectors detecting an providing proof of circumvention in the meaning of article 4 of the Enforcement Directive.

  The usual and common investigation powers of inspectors provided by the social penal code are sufficient. See the articles from 16 to 67 of the code (in French: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2010060607&table_name=loi).

  Add to that the monitoring of specific obligations to be complied with by posting employers (E.g. mandatory prior declaration of posted workers : "LIMOSA" and some specific rules concerning the wage protection.

A1.3 Specific measures related to «fraud», «abuse» and «circumvention» in the National law transposing Directive 2014/67/EU67(*with the restriction of the preservation of the draft of law by the vote of the Belgian Parliament*)

We wait for the judgment of the ECJ in the case of our anti-abuse provision (see paragraph 1.1.1).

Art. 7 of the draft transposition law, emending art. 2 Law 5 March 2002, provides for a definition of "posted worker" which is very much tailored on the definition of art. 2 directive 96/71/CE, as it sais a posted worker is «a worker who temporarily carries out his work in the territory of Belgium and usually works on the territory of one or more other MS, OR, a worker recruited in another MS». In the same way, the same article provides for the definition of "employer" (posting employer): «natural or legal person employing workers posted to Belgium, and whose undertaking performs relevant substantial activities in a MS different from Belgium. For relevant substantial activities it has to be intended activities which are not only referred to internal and administrative matters»

In all situations where posted workers or employers do not fit into the legal definitions above, the consequence is that, under the Belgian Law, the specific "posting" cannot be considered as a genuine posting, and therefore it is regulated under Regulation Rome I, and not under the EU posting directives. This is the main consequence to be applied in case of fraudulent practices which, though formally treated as posting by the employer, have actually no substantial characteristic of a regular posting and are only meant to circumvent EU legislation in order to be granted the advantages connected to posting (art. 4, Dir. 2014/67/EU).

[67] At the moment (September 2016) the Belgian Law transposing Directive 2014/67/EU is still waiting for the final approval by the National Parliament.

APPENDIX 2 to Chapter 1 – ITALY: Fraud, abuse and circumvention within national legislation

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A2.1. Fraud, abuse and circumvention in the Italian legislation

As part of the **Italian provisions implementing the Enforcement Directive no. 2014/67/EU (Legislative Decree no. 136/2016)** it was not considered necessary to explain the definitions of "fraud, abuse and circumvention" in the case of the transnational posting of workers, since these concepts are already provided for, in general, in our legal system and can find useful application also to assess the case in question.

Along the lines of the aforementioned Directive, however, the transposing legislation identifies a non-exhaustive series of elements useful for the purposes of the ascertainment that supervisory bodies are required to carry out in order to establish authenticity of the posting, with reference both to the posting undertaking and the posted worker (art. 3 Legislative Decree 136/2016).

In this regard, with specific reference to the indices relating to the worker, it must be taken into account that a decisive importance cannot be attributed to the lack of the A1 Form (certificate of registration of the posted worker to the social security system of the country of origin), since it "*may indicate that the situation does not qualify as a genuine posting*" (see recital 12, Directive 2014/67/ EU), but it is still only one of the elements useful for the overall assessment to identify a non genuine posting, and therefore a fraud or abuse.

Similarly, the presence of the A1 Form issued by the competent institution of the country of origin does not exclude the possibility for supervisors to proceed to ascertain alleged fraud, abuse or circumvention of the rules and regulations governing posting, on the basis of the assessment of a series of elements providing evidence to that effect. By way of example, on the occasion of inspections,

it may emerge that posting companies are bogus companies, who do not exercise any economic activity or provide any services in the country of origin, merely providing staff in the absence of the relevant authorization; or it can occur that posted workers, regularly employed by the posting undertaking, are laid off during the period of posting but continue to pursue their professional activities, basically as undeclared activities, in the host country or that these posted workers, when recruited, already resided and worked in the host country where the service is provided in respect of which they have been formally posted.

In this respect it should be noted that whether, despite the presence of the A1 Form, a non genuine posting is ascertained, for the inspection body to deduce the consequences of contributory sanctions and demand omitted payments in favour of the social security and national insurance system, it is necessary to proceed to the prior annulment of the A1 Form, according to the procedure laid down in article 5, paragraphs 2, 3, 4 of Regulation (EC) No. 987/2009*(Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission* (referred to in articles 71 and 72 of Regulation 883/2004),*by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it").*

The cited art. 3 also specifies that, **in cases where the authenticity of the posting is established, workers are considered in all respects as hired by the principal/user;** this consequence stems from the fact that these workers cannot be considered as posted within the meaning of the Directive and that the negotiation carried out must therefore be considered null and void. However, if the circumstances point out that the working contract is more closely connected with the country of origin, pursuant to art. 8 of Regulation (EC) No. 593/2008 (Rome 1 Regulation), even in the absence of the conditions of a genuine posting, the employment relationship remains with the posting service provider.

With regard to the sanctions regime applicable to both the posting employer and the user undertaking, the Decree foresees the imposition of a sanction similar to that provided by art.18, paragraph 5-bis of Legislative Decree n. 276/2003 for the procurement domain, and therefore an administrative fine of EUR 50 for each worker employed and per each day of employment, provided that the total amount of the sanction is at least 5,000 Euros and does not exceed 50,000 Euros. If there is employment of minors, as in the recalled domestic regulation, both the employer and the user undertaking shall be subject to detention of up to eighteen months and a fine (pecuniary sanction) of 50 euro per person employed and per each day of employment, increased up to six times.

A2.2 Specific measures in Italy to prevent and combat elusive phenomena and abuses

With reference to the specific measures to prevent and combat elusive phenomena and abuses of transnational posting of workers, it is noted that, until the transposition of Directive 2014/67/EU, nor a monitoring mechanism of undertakings and workers involved in transnational posting, nor specific requirements for the above mentioned undertaking were foreseen in Italy: the only document that supervisory bodies could verify during inspections was the above mentioned A1 Form attesting the applicability, to the worker concerned, of the social legislation of his country of origin, from which, however, it is not possible to deduce information on working conditions, payment of salaries and social security contributions, or the actual existence of an employment relationship (Regulation (EC) No.883/2004; Implementing Regulation No. 987/2009).

This was likely to affect both the effectiveness of the protection of the working conditions of the workers involved in the transnational provision of services, and the effectiveness of inspections and controls on the assumptions of abuse, fraud and circumvention of the rules on transnational posting.

Therefore, it was considered appropriate to introduce in the Italian legislation all the administrative requirements and control measures provided for by art. 9, paragraph 1, letters from a) to f) of the Enforcement Directive.

In particular:

- the obligation for the service provider, to provide, electronically and in the Italian language, a prior declaration of posting of workers sent to Italy, by midnight, on the eve of the beginning of the posting: this declaration shall contain information disclosing the identity of the service provider, the expected number and identification of the posted employees, the address or addresses of their workplace, the specific nature of services justifying the posting, as well as the contact persons; moreover, the service provider must notify, within 5 days after the event, any change in the declaration that does not affect essential elements of the same (in the latter case a new prior declaration shall be provided);
- the obligation, for the service providers, to keep, during the posting period and up to two years after its termination, paper or electronic copy, in Italian, of the documentation pursuant to art. 9, paragraph 1, letter b) (employment contract or other employment document in accordance with Directive 91/533/EEC, pay slips, sheets indicating the start, end and duration of daily work, documentation proving the payment of salaries or equivalent document).In the transposition text, this obligation refers also to the certificate of applicable social security legislation (**A1 Form**), which is already required by the Italian authorities during the investigation inspection, and communication/public registration of the setting up of employment relationship as this is functional to the establishment of the fact that the posted worker is not unknown to the competent authorities of the country of origin and, therefore, and also because of recital 27 of the same Directive - which promotes the

cooperation between Member States in the fight against undeclared work - and the similar domestic rule laying down the obligation to communicate this, backed by sanctions, for companies established on the Italian territory.

- the obligation to designate, during the posting period and up to two years after its termination, a contact person domiciled in Italy, with the task to provide, send and receive documents in the name and on behalf of the legal representative of the posting undertaking, including the formal notification of acts by the inspection staff. This is to fully address the problem of the notification of inspection reports/sanctions to an undertaking not established in Italy, guaranteeing the effectiveness of the inspection action;
- the obligation to designate a person, not necessarily coinciding with the one mentioned above, to act as a legal representative in order to bring together the social partners concerned and the service provider for a possible collective bargaining; this contact person shall have no obligation to be present at the place where the posted work is carried out, but must be available in case of a motivated request.

However, it is worth mentioning that, if offices, departments and production units of the foreign posting undertaking are present on the national territory, even if they do not qualify as registered or administrative offices, the posting undertaking shall be deemed as to be established in Italy and consequently shall fulfil the obligations laid down by the Italian law for the retention of documents. In fact, the national rules pertaining to the retention and entries on the Labour Law Book (Articles 39 and 40 of the Decree Law of 25 June 2008, n. 112, converted into law, with amendments, by Law 6 August 2008, n. 133), containing the main information on the establishment and modalities of the employment relationship (attendance, schedules, holidays, leaves, sickness, wages, contributions, etc.), also apply to undertakings posting workers from another member State if the same have headquarters or operational /production units on the Italian territory. In this respect, it is useful to clarify that the expression "offices, departments and production units" used in the transposition text mean the premises used by the foreign posting undertaking other than its legal and

administrative headquarters, if some organization of means and/or persons or operational/production facilities are to be found, on the basis of which the undertaking can be considered as established in the Italian/EU member State territory.

APPENDIX 3 to Chapter 5 - Minimum rate of pay within posting of workers: main sources of EU legislation

By Massimiliano Mura, Territorial Unit Director of Italian Ministry of Labour and Social Politics

(translation into English of the text provided in Italian by the Author)

→Directive 96/71/EC, Art. 3

"1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings (posting workers) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down :

— by law, regulation or administrative provision, and/or

— by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the **minimum rates of pay**, *including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*

(…)

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."

7. "Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers. Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging."

→Directive 2014/67/EU

– **Recital 15:***" In many Member States, the social partners play an important role in the context of the posting of workers for the provision of services since they may, in accordance with national law and/or practice, determine the different levels, alternatively or simultaneously, of the applicable minimum rates of pay. The social partners should communicate and inform about those rates.";*

– **Recital 35 -**With the aim of guaranteeing posted workers the remuneration due, it deals with the specific remuneration represented by posting allowance, stating that: *" For the purpose of ensuring that a posted worker receives the correct pay and provided that allowances specific to posting can be considered part of minimum rates of pay, such allowances should only be deducted from wages if national law, collective agreements and/or practice of the host Member State provide for this.";*

– **Recital 36 -** it creates the prerequisite for the rule, contained in art. 12, concerning the protection of the minimum wage for the workers involved in commercial, industrial and, in general, entrepreneurial operations taking place through the conclusion of subcontracts aimed at the realization of specific works or services:*" Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and in compliance with Union law. Such measures may include the introduction on a voluntary basis, after consulting the relevant social partners, of a mechanism of direct subcontracting liability, in addition to or in place of the liability of the employer, in respect of any outstanding net remuneration corresponding to the* ***minimum rates of pay*** *and/or contributions due to common funds*

or institutions of social partners regulated by law or collective agreement in so far as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis.";

– **Art. 5, paragraph 4,** concerning the facilitation of access to information,*" Where, in accordance with national law, traditions and practice, including respect for the autonomy of social partners, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3 (1) and (8) of that Directive, Member States shall ensure that those terms and conditions are made available in an accessible and transparent way to service providers from other Member States and to posted workers, and shall seek the involvement of the social partners in that respect. The relevant information should, in particular, cover the different* ***minimum rates of pay*** *and their constituent elements, the method used to calculate the remuneration due and, where relevant, the qualifying criteria for classification in the different wage categories.";*

– **Art. 10, paragraph 4,**relating to controls in the use of posted workers to ascertain compliance with the regulations for a genuine posting, and relating particularly to inspections," *In Member States where, in accordance with national law and/or practice, the setting of the terms and conditions of employment of posted workers referred to in Article 3 of Directive 96/71/EC, and in particular the* ***minimum rates of pay****, including working time, is left to management and labour they may, at the appropriate level and subject to the conditions laid down by the Member States, also monitor the application of the relevant terms and conditions of employment of posted workers, provided that an adequate level of protection equivalent to that resulting from Directive 96/71/EC and this Directive is guaranteed.";*

– **Art. 12, paragraph 1,** for the enforcement of the obligations imposed on the "economic entities" involved in Community posting, the protection of posted workers and, in particular the control of the subcontracting liability," *In order to tackle fraud and abuse, Member States may, after consulting the relevant social partners in accordance with national law and/or practice, take additional measures on a*

non–discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the ***minimum rates of pay*** *and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC".*

In addition, Directive 2014/67/EC includes a number of provisions referring to working conditions, among which, for the protection of workers' economic rights, it seems relevant to recall **Art. 11, paragraph 6**, which states that" *Member States shall ensure that the employer of the posted worker is liable for any due entitlements resulting from the contractual relationship between the employer and that posted worker. Member States shall in particular ensure that the necessary mechanisms are in place to ensure that the posted workers are able to receive :*

(a) ***any outstanding net remuneration*** *which, under the applicable terms and conditions of employment covered by Article 3 of Directive 96/71/EC, would have been due;*

(b) ***any back-payments or refund of taxes or social security contributions*** *unduly withheld from their salaries;*

*(c) r****efund of excessive costs****, in relation to net remuneration or to the quality of the accommodation, withheld or deducted from wages for accommodation provided by the employer;*

(d) where relevant, ***employer's contributions due to common funds or institutions of social partners*** *unduly withheld from their salaries.*

This paragraph shall also apply in cases where the posted workers have returned from the Member State to which the posting took place."