



Activity 1.1. National Reviews and Panels

Country Report on National legislation transposing Directive 2014/67/EU in Italy

This document has been fulfilled within the Project “ENACTING – Enable cooperation and mutual learning for a fair posting of workers”. ENACTING received the financial support of the European Union, using funding from the European Union Programme for Employment and Social Innovation –EaSI 2014_2020 (Contracting Authority European Commission – DG Employment, Social Affairs and Inclusion, Grant Agreement no. VS/2015/0013).The ENACTING project has been carried out by a transnational partnership involving:

- Foundation Istituto Guglielmo Tagliacarne (Coordinator)
- Arbeit und Leben
- Associazione ADAPT
- CISL - Confederazione Italiana Sindacato Lavoratori
- CSC Transport and Communication
- ISCOS-CISL
- Italian Ministry of Labour and Social Policies (DG Inspection Activities and DG for Policies and Services for Employment and Training)
- Romanian Labour Inspection.

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

The aim of this report is to:

- **provide a summary of the provisions of Legislative Decree n. 136/2016 that is the Italian Law transposing Directive 2014/67/EU**
- **sum up the point of view about the transposition of three social partners involved in the Enacting project: CISL (partner of the project), ANCE (associated partner to the project), ANITA (associated partner to the project).**

Introduction, chapters from 1 to 6 of this report has been prepared within the “Enacting team” activated within the DGAI (General Directorate for Inspection Activities) of the Italian Ministry of Labour, involving: Sonia COLANTONIO, Alessia DI BENEDETTO, Roberta FABRIZI, Mariagrazia LOMBARDI, Massimiliano MURA, Fabrizio NATIVI, Marina STRANGIO (original version of these chapters are in Italian).

Annex 1 has been prepared by CISL (original version in Italian).

Annex 2 has been prepared by ANCE (original version in Italian).

Annex 2 has been prepared by ANITA (original version in Italian).

September 2016

ENACTING (VS /2015/0013)



With the support of European Union

European Commission - DG Employment, Social Affairs and Inclusion.

The content of this report does not reflect the official opinion of the European Union. Responsibility for the information and views expressed therein lies entirely with the author(s)

Table of contents

INTRODUCTION – THE TRANSPOSITION OF DIRECTIVE NO. 2014/67/UE INTO ITALIAN NATIONAL LAW	5
1. Fraud, Abuse and Circumvention of relevant Rules	6
1.1. Issues and Solutions at the National Level.....	6
1.2. The Transposition of the Concepts of “Fraud,” “Abuse” and “Circumvention”	6
1.3. Elements assessing the Genuine Nature of Posting	6
1.4. The consequences for workers who have not been genuinely posted	7
2. Access to information.....	8
3. Administrative Cooperation.....	8
4. Administrative requirements, inspections and sanctions: national Rules and their compliance with Directive 2014/67/EU.	9
4.1. Obligations to provide certain documentation	9
4.2. Inspection activities	12
4.3. Sanctions.....	12
5. Several and joint liability (and/or systems of “due diligence”) protecting posted workers in Italy	13
6. Effectiveness of sanctions	15
ANNEX 1 -	16
Legislative Decree of 17 July 2016 No. 136: reading insights and comments by CISL.....	16
ANNEX 2 -	22
A Statement from ANCE – Associazione Nazionale Costruttori Edili.....	22
ANNEX 3 -	25
A statement from ANITA (the Italian Association of Employers in the Road Transport and Logistics Industry).....	25

INTRODUCTION – THE TRANSPOSITION OF DIRECTIVE NO. 2014/67/EU INTO ITALIAN NATIONAL LAW

Free movement of workers, freedom of establishment and free supply of services are fundamental principles laid down in the Treaty on the Functioning of the European Union (TFEU). EU legislation (e.g. Directive No. 96/71/EC) ensures the application of these principles also in relation to equality between companies and the rights of workers. The experiences resulting from commercial and industrial relations at the EU level based on the economic freedom referred to above have stressed the need to improve the application of EU provisions, after the first years of enforcement of the Directive previously mentioned about the posting of workers in the European Union.

Accordingly, a new Directive was envisaged, Directive No. 2014/67/EU (the “Enforcement” Directive), with the aim of improving the application of previous community sources, also as regards the introduction of uniform, interpretative and operational criteria in the different countries involved. Like any other EU country dealing with the transposition of community norms, Italy too had to consider the impact of implementing this Directive nationally. In particular, it was agreed to produce a consolidated text regarding transnational posting, concurrently repealing Legislative Decree No. 72/2000. The latter would implement the main Directive, the provisions of which were included into the Decree transposing the “Enforcement” Directive (Legislative Decree n. 136/2016).

Moreover, some issues of an interpretative nature concerning such concepts as “fraud, abuse and circumvention of the rules” – which were crucial to identify cases of non-compliance with rules and unlawful practices of transnational posting – were discussed; besides, among others, particular matters have been deepened as those concerning the identification of the most efficient (and possible) system to attribute financial liability to all the economic actors involved in the employment of detached workers, according to the rules of solidarity concerning employers’ obligation to remuneration and the payment of contributions; the identification of an adequate and efficient sanctioning system, intended to effectively discourage those involved from committing the illegal practices referred to above; the provision of efficient and effective systems of international cooperation, in order to exchange data and information and enforce transnational sanctioning measures (whether administrative or judicial ones). Transposition of the community norms ensuring compliance with such measures also took place, in order to allow effective monitoring aimed at avoiding illicit transnational posting. Finally, transposition also concerned the criteria to be used by monitoring bodies to carry out overall evaluation processes regarding each case, so that to assess its compliance with relevant legislation.

1. FRAUD, ABUSE AND CIRCUMVENTION OF RELEVANT RULES

1.1. Issues and Solutions at the National Level

The existence of a practical case of genuine posting is a necessary condition for the application of community and national law on transnational posting. As a result of the assessment of fraudulent practices and the attempts to circumvent the rules concerning workers' posting identified by the supervisory bodies of the different member States during checks, Directive No. 2014/67/EU attempted at defining more clearly the criteria to establish when workers are genuinely posted to another country and when this is not the case. The dividing line draws on those concepts laid down in the heading of Article 4, "abuse and circumvention", and in the notion of "fraud" referred to in Article 12, which concerns joint and several liability in the event of subcontracting.

1.2. The Transposition of the Concepts of "Fraud," "Abuse" and "Circumvention"

Regarding the provisions laid down in the Legislative Decree that implements Directive 2014/67/EU (Legislative Decree n. 136/2016) the concepts referred to above have not been specified, since they are already present in Italy's national law and can be applied to the posting of workers.

1.3. Elements assessing the Genuine Nature of Posting

In order to assess cases of fraud, abuse and circumvention of rules, Directive No. 2014/67/EU provides some elements to evaluate the genuine character of posting (see article 4, paragraph 3 and 4, which refer to the genuine nature of the posting company and that of the posted worker) that were fully transposed into national law, even if with some adjustments (see article 3, sub-sections 2 and 3, of Legislative Decree n. 136/2016). Among the elements hinting at the genuine nature of posting, which complement those indicated in the Directive, national law makes mention of "*the certificate concerning applicable social security legislation*" (the Mod. A1), released from the social security bodies in the worker's country of origins.

Furthermore, Italian law refers to "any other useful element" (see article 3, sub-section 2, letter *g* and paragraph 3, letter *i*) to be used at the time of assessing each specific case. The inclusion of this clause characterizes the limited nature of the list of elements referred to before. This is in line with the provisions of Directive No. 2014/67/EU, seeing that article 4 of the document repeatedly makes use of the expression "in particular" when referring to the elements mentioned in par. 2 and 3, pointing to the fact that they only have an illustrative function.

Concerning this aspect, it is important to recall that, according to the Community legislation, supervisory bodies must use these elements to assess the genuine nature of posting making an "*overall*

evaluation of all the elements of each case” (article 3, sub-section 1, Legislative Decree n. 136/2016), since that they cannot “be considered on its own” (article 4, paragraph 1, 2014/67/EU Directive). In the same way, article 4, paragraph 4, of the Directive referred to, states that “The failure to satisfy one or more of the factual elements (...) shall not automatically preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation”.

1.4. The consequences for workers who have not been genuinely posted

An important provision is the one pursuant to which workers who have not been genuinely posted to a company based in Italy have to be considered as employees of the company that made use of their services (see article 3, sub-paragraph 4, Legislative Decree number 136/2016).

Establishing that the worker will be considered as employed by the user company implies that the employment relationship will be governed by national labour legislation and social security regulations. On this latter case, as posting was not legally performed as a form of provision of services, it will be for the user company to comply with rules on social contributions and pay them to Italian social security bodies, pursuant to the principles laid down in (EC) Regulation number 593/2008 (the so called “Roma Regulation I”), taking into account the obligations provided by law in the country where work is provided (see Recital n. 11 of Directive n. 2014/67/EU).

In order for the monitoring bodies to assess the non-genuine nature of posting and recover the contributions already paid to the national system of social security, it is necessary to make the A1 Mod. null and void, as laid down in Article 5, paragraphs 2-4, of the (EC) Regulation n.987/2009:

“2. 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.

3. 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.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission 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 national provision under examination is not linked to Article 8, Reg (EC) n. 593/2008 (Rome Regulation I), and to the Rome Convention of 19 June 1980, both concerning the law applicable to contractual obligations. However, in the examination of the genuine nature of posting, it is always important to bear in mind that the specific employment relationship under scrutiny, based on the overall evaluation of all the elements of the case, may present more common aspects with other countries than with Italy, making national legislation inapplicable.

2. ACCESS TO INFORMATION

The principles presented in Article 5 of Directive 2014/67/EU on facilitating access to information about working conditions and employment as laid down in article 3, Directive 96/71/EC, are implemented in article 7, Legislative Decree n. 136/2016. Par. 2 of the aforementioned national provision provides for the publication, even in English, of information about working conditions – which is mandatory in the event of posting – on the institutional website of the Ministry of Labour and Social Policies. This information must be regularly updated and should contain:

- Working conditions and national laws applicable to posted workers in Italy;
- Collective agreements applicable to posted workers with particular attention to minimum remuneration rates and their main elements, wage calculation methods and criteria concerning the employee grading system;
- Procedures to file a complaint;
- Legislation on health and safety;
- People to whom workers can refer to receive information on rights and legal requirements set at the national level.

3. ADMINISTRATIVE COOPERATION

Article 8 of Legislative Decree n. 136/2013 transposes the new provisions on administrative cooperation into national legislation. The exchange of information with Member States authorities involves inspection services from the Ministry of Labour, which now fall within the remit of the newly-created “National Labour Inspectorate”, which are also coordinated at the territorial level. The National Labour Inspectorate promptly deals with reasonable requests and carries out controls and necessary inspections. Requests also include relative information about the possible payment of administrative penalties or the notification of administrative and judicial measures. They may include

the exchange of documents and information about the legality of the establishment and the service provider's conduct.

The exchange of information between the monitoring bodies of the different member States takes place through the IMI system, which is already up and running. Those making use of the services of the posted worker have the obligation to provide the Labour inspectorate with the information requested. Despite no specific sanction is foreseen by Legislative Decree nr. 136/2016 for undertakings when not providing the information required, the national sanctions applicable to those refusing to supply information apply all the same, as do those concerning the provision of incorrect or incomplete information.

4. ADMINISTRATIVE REQUIREMENTS, INSPECTIONS AND SANCTIONS: NATIONAL RULES AND THEIR COMPLIANCE WITH DIRECTIVE 2014/67/EU.

4.1. Obligations to provide certain documentation

At the time of transposing Directive 2014/67/EU into Italian law, lawmakers have pointed out the absence in national legislation of obligations for the contractual parties concerning the fulfilment of certain documents, in order to monitor posting workers and allow the inspection authorities to effectively assess the genuine nature of posting and – more generally – the regularity of the employment relationships concluded.

Before the entry into force of Legislative Decree n. 136/2016, the only document available to the inspection authorities was the Mod A1., referred to in Regulation (EC) N. 883/2004 and in its implementing Regulation N. 987/2009, released by the relevant social security body in the worker's country of origins. Nevertheless, this document – which has the function of certifying whether the social security legislation of sending countries applies to the concerned worker– is not suitable to certify if the status of the posted worker is in line with the features of genuine posting (i.e. considering 12, Directive 2014/67/EU).

So transnational service providers were not legally compelled to bring evidence of some crucial information showing the genuine character of posting, among which are, for example, the effective existence of the employment relationship with the employer in a country other than Italy and the existence and the operational nature of the posting company, in the country of establishment that has been indicated. Therefore, the Italian legislator has implemented article 9(1) (a) to f)), Directive 2014/67/EU to promote more efficiency as regards inspection controls, providing a series of “*administrative requirements*” ensuring posting, as laid down in article 10, Legislative Decree n. 136/2016. In particular, in

- Par. 1, from letter a) to g), the legislator has provided the obligation of early notification of posting to the Ministry of Labour and Social Policies. It should be submitted before the midnight of the day prior to the beginning of posting, along with the obligation to communicate any variation within five days. Early notification, whose operational requirements will be defined with a specific decree of the Ministry of Labour and Social Policies (paragraph 2), shall include the main information of the services supplier and that of the person that is posted overseas; the number and the main information of all the posted workers; the anticipated duration, envisaged beginning and end date of the posting; the nature of the services justifying the posting; the ID number and identification data of the contact person of the services supplier – to whom relevant documents should be submitted – and those acting as a representative of posted workers when interacting with the social partners; the details of the authorization to send workers overseas, where required by the legislation of the country of origin.
- Paragraph 3, letter a), the legislator has introduced the obligation to supply a copy, written in Italian, of the employment contract or of any other document that contains information, as laid down in art. 1 and 2, Legislative Decree n. 152/1997, to be kept up to two years from the termination of posting¹. The posting company should make available, upon request of the inspection body, a copy in Italian of the pay slips, the documents showing the start and finish, and the duration of daily working time, as well as the documents that certificate remuneration or equivalent documents. The national legislator, in accordance with the principle of proportionality, has made the existence of such an obligation dependent on a reasonable period called “*period of posting*”, lasting up to a maximum of “*two years from its conclusion*”, using as a parameter the limitation period applying for the client’s joint and several responsibility;

¹According to articles 1 and 2 of Legislative Decree No. 152/1997: “1. The employer, either in the public or the private sector, is obliged to provide to the employee and within 30 days of the day of recruitment, the following information: a) identity of the parties; b) place of work and – absent a predominant or fixed location, the employer shall indicate that the worker operates in different locations – and the registered office and the address for service of the employer c) the commencement date of employment d) the duration of the employment contract, specifying if it is a fixed-term or an open-ended employment contract e) the duration of the probationary period, if any f) the worker’s job level and title, or the job description g) starting remuneration and its main terms, as well as the payment date h) the duration of paid leave the worker is entitled to and the criteria used to determine it; i) working hours; l) the notice period in the event of termination. 2 The obligation referred to in 1 can be fulfilled by stating these particulars in a) the written employment contract or in the letter of appointment, to be sent to the employee within 30 days from the day of appointment b) in the declaration detailed in Article 9-bis, par. 3, of Law-Decree 1 October 1996, no. 510, as converted with amendments by Law 28 October 1996, no. 608, to those to which this provision applies.

- In paragraph 3, let b), in order to allow the issue of communications by the inspection authorities also to posting companies without offices or branches in Italy (e.g. request of information and documentation, notification of the minutes of first access and the identification of possible infringements), the legislator has introduced the obligation to appoint a contact person, who should have an Italian address for service, who is in charge of interacting with the control bodies and receiving or sending acts and documents. Absent this appointment, the registered office of the posting company should be the same as that of the client making use of the worker's performance or coinciding with the latter's residency;
- In paragraph 4, the amending provision sets forth the obligation of appointing a person in charge – who can be different from that referred to in 3, let. B) – with powers of representing the posted worker, in order to “maintain relationships with the social partners interested in promoting decentralized bargaining. He/she should be always available if a motivated request is provided from the social partners”.

The identification of the first contact person, that can also be a worker of the posting company, with an address for service in Italy, has the aim of guaranteeing higher effectiveness in terms of monitoring as regards international posting. This is because until now, monitoring activities have been affected by the difficulty to communicate with the company and send it information or notice in the case it did not comply with rules on posting.

Moreover, the national legislator has laid down another obligation to keep records of a copy produced in Italian of the following documents, up to a period of two years and until termination of posting (art. 10, paragraph 3, let. A), Legislative Decree n. 136/2016):

- the certificate of applicable social security legislation (the A1 Mod.), as a useful element for the overall evaluation of the genuine nature of posting;
- the *“public communication establishing the employment relationship or any relating documentation”*.

The opportunity to introduce this last obligation was provided – as already specified – by the fact that the A1 Mod. was not suitable to certify effective and regular recruitment of the posted worker on the part of the transnational supplier. This document only certifies registration of the worker to the social security system of the country of origin.

Based on this, and on the existence of a similar obligation – which is sanctioned in the event of non-compliance – in national law for the company based in the national territory, lawmakers have opted for the introduction of another obligation for the posting company. Specifically, it has to keep a copy of the public communication, produced in Italian, through which the employment relationship has been

concluded, pursuant to the principles of non-discrimination and proportionality, as laid down in article 9, paragraph 3, of Directive 2014/67/EU.

The introduction of such an obligation complies with recital 27 of the Directive mentioned above, according to which “(...) *Member States should ensure that effective and adequate inspections are carried out on their territory, thus contributing, inter alia, to the fight against undeclared work in the context of posting, also taking into account other legal initiatives to address this issue better*”.

4.2. Inspection activities

In implementing article n. 10 of Directive 2014/67/EU – according to which the different Member States are required to carry out checks and an adequate and effective surveillance activity on the correct implementation of the regulatory reference – the national legislator, by means of art. 11, Legislative Decree n. 136/2016, assigned to the National Labour Inspectorate the task of planning and carrying out investigations aimed at verifying compliance with the provisions on the transnational posting of workers.

Specifically, in accordance with the second and the third sentences of article 10, par.1, 2014/67/EU Directive (identification of the activity sectors in which “*the employment of workers posted for the provision of services is concentrated on their territory*” and in particular taking into account “*when making such a risk assessment the carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers*”), the controls of the National Labour Inspectorate will focus on those sectors (especially the construction and transportation sectors) where transnational posting is more widespread and they will also take into account the data collected in the information system used for prior notification referred to in article 10, paragraph 1, Legislative Decree n. 136/2016.

4.3. Sanctions

In accordance with the EU principles of effectiveness, proportionality and dissuasiveness of sanctions, the binding nature of the new obligations in terms of documentation laid down in the Italian legislation to be dealt with by the transnational services provider is ensured by an adequate sanctioning system. According to art. 32, paragraph 32, letter d), L. n. 234/2012 (*general norms about the Italian participation in the creation and implementation of the normative and of EU policies*)

sanctions cannot be higher than 150,000 euros. Specifically, and pursuant to art. 12. Paragraph 4, Legislative Decree n. 136/2016:

- The infringement of the obligation to communicate posting to the Ministry of Labour and Social Policies within twenty-four hours from the day before starting, shall be punished with a pecuniary administrative sanction ranging from 150 to 500 euros for each worker concerned (paragraph 1);
- The infringement of the obligation to communicate to the Ministry of Labour and Social Policies any successive amendments made to the employment relationship concluded with the posting worker – within 5 days – shall be punished with a pecuniary administrative sanction ranging from 150 to 500 euros for each worker concerned (paragraph 1);
- The infringement of the obligation to keep – during the posting period and until two years from its conclusion – a copy in Italian of the employment contract or any other document containing the information referred to in art. 1 and 2, Legislative Decree n. 152/1997, as well as the pay slips, the reports that indicate the start, the conclusion and the duration of daily working time, the documentation that certifies the payment of remuneration or equivalent documents, the public communication concerning the conclusion of the employment relationship or any equivalent document and the relative certificate referring to applicable social security legislation, shall be punished with a pecuniary administrative sanction ranging from 500 to 3,000 euros for each worker concerned (paragraph 2);
- The infringement of the obligation to designate, during the posting period and up to two years from its conclusion, a contact person with an address for service in Italy, nominated by the posting employer to receive acts and documents, shall be punished with a pecuniary administrative sanction ranging from 2,000 to 6,000 euros (paragraph 3);
- The infringement of the obligation to appoint, during the posting, a representative who has powers of representation and is empowered to liaise with the social partners, promote decentralized bargaining, and make himself or herself available upon a motivated request from the social partners, shall be punished with a pecuniary administrative sanction varying from 2,000 to 6,000 euros (paragraph 3).

5. SEVERAL AND JOINT LIABILITY (AND/OR SYSTEMS OF “DUE DILIGENCE”) PROTECTING POSTED WORKERS IN ITALY

Article 4, paragraph 4, Legislative Decree n. 136/2016 - concerning transnational posting in the event of provision of services among companies – also within the same group – or between a business and its own productive unit or any other client - refers to the application of two provisions to protect

workers' rights employed in the event of being awarded a public contract to perform works and services.

The first one is article 29, paragraph 2, Legislative Decree n. 276/2003, according to which, in case of works contracts to produce goods, works or services: *"The client or employer is jointly and severally liable with the contractor and the subcontractor (if any) for a period of two-years from the termination of the works contract, to pay workers' remuneration, the rates of severance pay, as well as social security contributions and insurance premiums for the period related to the performance of the works contract"*.

The second one is article 1676 c.c., according to which *"those working for the contractor who engaged in their own activity to carry out the works or the services required can take direct action against the client to obtain what is due to them, up until the debt the client has with the contract is paid off at the time they lodge such request"*.

The first provision sets forth a time-limit of two years from the conclusion of the contract, but over this period the one who has been regarded as jointly and severally liable is not yet released from the obligation to pay remuneration for the work or the services provided by the contractor. The provision of the civil code (that only refers to remuneration) does not provide time-limits, but refers to the debt towards the contractor to be paid off once such request has been lodged.

As for the provision of work, the same paragraph 4 provides that article 35, paragraph 2, Legislative Decree n. 81/2015 applies, according to which *"the user company and the agency have the obligation to pay workers' remuneration and social security contributions, save for those cases when relief against the agency applies"*.

Finally, in relation to posted workers hired through contracts for carriage of goods, the following paragraph 5 refers to the application of art. 83-bis, paragraphs from 4-bis to 4-sexies, Legislative Decree n. 112/2008., converted from L. n. 133/2008. The provision on road transports provides that the client must verify the actual payment of remuneration, and social security contributions by the carrier before concluding the contract, obtaining for this purposes a document produced by social security bodies concerning the three months prior to its issue. The clients who fail to do so will be held jointly and severally liable with the carrier and subcontracted carriers (if any). Therefore, and within 1 year from the termination of the employment contract, they will be compelled to pay workers remuneration and social security contributions and insurance premiums for the period referred to in the contract for carriage of goods.

The verification procedures taking place via the Internet referred to in paragraph 4-quarter, although mentioned, will not apply in the event of transnational posting, since the national register only refers to natural or legal persons based in Italy that undertake the carriage of goods by road on behalf of third parties, so that it will not be possible to collect the necessary information through the Internet portal on workers posted abroad.

Finally, the provision referred to above sets forth that in case of contracts for carriage of goods concluded orally, the client that does not carry out checks on the actual payment of remuneration and on the social contributions by the carrier will need to bear the costs of tax obligations and (any) traffic offence relating to the transportation of goods carried out on his/her behalf.

6. EFFECTIVENESS OF SANCTIONS

Pursuant to article 3, paragraph 5, Legislative Decree n. 136/2016, and similarly to what provided in article 18-bis, paragraph 5-bis, Legislative Decree n. 276/2003 (dealing with subcontracting and posting that fail to meet the requirements mentioned in article 29, paragraph 1 and 30, paragraph 1, of the Decree mentioned above), the posted worker and the user that do not enter into genuine posting shall be punished with the same pecuniary sanctions (or, in case of minors, with the same penal sanctions). In this case, a 50 euros pecuniary sanction applies for any worker and for any day of employment, which cannot be less than 5,000 euros and not higher than 50,000 euros. In case of employing minors, imprisonment will apply up to 18 months and a 50 euros fine for any worker and for any day of work, increased by up to six times.

Country Report on Transposing Legislation in Italy

ANNEX 1-LEGISLATIVE DECREE OF 17 JULY 2016 NO. 136: READING INSIGHTS AND COMMENTS BY CISL – CONFEDERAZIONE ITALIANA SINDACATO LAVORATORI

Introduction

In Italy the Legislative Decree No. 136 transposes Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014.

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

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

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

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

Art. 1 - Scope

This article was completely rewritten as a result of parliamentary procedures and consultation with the social partners.

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

The new wording (paragraph 1) states that the decree applies to "undertakings established in another (EU) Member State posting one or more workers for the **provision of services**, in favour of another undertaking belonging to the same group (or another recipient), provided

that during the period of posting, a working relationship continues to exist with the posted worker. "

In terms of the scope of the decree:

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

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

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

Art. 2 - Definitions

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

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

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

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

Art. 3 - Genuine posting

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

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

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

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

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

Art. 4 - Working and Employment Conditions

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

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

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

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

Art.5 - Protection of rights

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

The request submitted by CGIL, CISL and UIL was not accepted. This request, consistent with Article 11 of Directive No 67/2014, which, considered the high risk of blackmailing of falsely posted workers and language difficulties, and demanded for the most representative trade union organizations and/or other associations representing a legitimate interest in the implementation of EU obligations to be granted the power **to activate - in the name and on behalf of posted workers - judicial or administrative proceedings** to protect their employment claims and rights.

Art. 6 - Observatory

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

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

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

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

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

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

Art. 7 - Access to information

This article regulates the exchanges of information with the authorities of other Member States and the creation of an **institutional website**, in Italian and English, with information relating the posting regulations in force in Italy. The site will also inform undertakings about the **collective agreements applicable to posted workers in Italy**, a subject on which the involvement of Cgil Cisl Uil is expected in order to also constantly update this section with the aim of suggesting correct "minimum wage tables" besides the "method used to calculate the pay due and the criteria for the classification of employees."

Art. 8 -Administrative cooperation

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

Art. 9- Flanking measures

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

Art. 10 - Administrative obligations

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

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

Art. 11 - Inspections

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

Art. 12 - Sanctions

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

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

Art. 13-24

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

Art. 25 - Provides financial invariance clauses

Art. 26 - Establishes the repeal of Legislative Decree 72/2000.

Country Report on Transposing Legislation in Italy

ANNEX 2 -A STATEMENT FROM ANCE – ASSOCIAZIONE NAZIONALE COSTRUTTORI EDILI

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

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

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

The ENACTING Project represented an occasion for participants, the social partners and the authorities from different countries to interact. The common objective has been that of dealing with the most important issues concerning posting, as laid down by the Enforcement Directive (2014/67/EU²): tackling the circumvention of the rules concerning the posting of workers, improving workers' protection and cooperation among administrative bodies, exchanging information in relation to posting.

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

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

²This was laid down in Italian legislation by means of Legislative Decree n. 136/2015, published in the "Gazzetta Ufficiale" n. 169 on June 21 2016.

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

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

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

For this reason, ANCE is of the opinion that it is fundamental to start effective **administrative cooperation** among the countries involved³ to make all information easily accessible, both that on Italian workers posted abroad and foreign staff sent to Italian companies.

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

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

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

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

These agreements would therefore strengthen the role of **bilateral bodies in the sector** in different countries, promoting their role as institutional bodies whose effort to promote protection and guarantees should also concern posted workers.⁴

The latter should be given all the safeguards granted to workers operating in the host country, also in relation to the safety and health of construction sites, a particularly debated aspect in such a

³Referred to in Art.7, 8, 9, 10, 11 and 12 of the transposition Decree (Legislative Decree n. 136/2006).

⁴The legislator also mentioned (art.8 paragraph 5) some agreements and bilateral agreements among the countries related to administrative cooperation, that the National Labour Inspectorate must take into account in the transposition decree.

dangerous sector as the building one. To this end, the social partners agreed to give a fundamental role to their bilateral bodies, which with time has been also recognized by the State. The Ministry of Labour has, indeed, recalled the obligation of registration of the posted workers to the *Casseedil* every time no equivalent body exists in the country of origins ensuring the benefits granted by them to Italian workers.

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

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

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

Country Report on Transposing Legislation in Italy

ANNEX 3 - A STATEMENT FROM ANITA (THE ITALIAN ASSOCIATION OF EMPLOYERS IN THE ROAD TRANSPORT AND LOGISTICS INDUSTRY)

Specific national issues in relation to the laws of transposition

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

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

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

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

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

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

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

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

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

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