

Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers

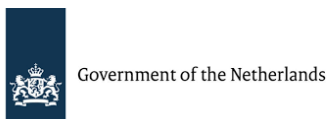
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This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains.

Furthermore, a part of the publication is based on research supported by the Visegrad Fund and by the Ministry of Foreign Affairs of the Kingdom of the Netherlands within the project named “Towards Stronger Transnational Labour Enforcement Cooperation on Labour Migration (STRONGLAB)”, under serial No. 21650194.



• Visegrad Fund



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Published in April 2018 © SOLIDAR



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Executive summary

The PROMO project is based around a series of policy workshops/conferences from 2017 and 2018. The project aims to make recommendations to improve:

- national labour protection systems for posted workers;
- institutions, practices and channels for promoting industrial democracy for posted workers;
- the collection of data relevant to making informed posted worker policy decisions.

Our method is to take existing research knowledge and improve on it through policy workshop discussions with experts and stakeholders. The first PROMO briefing paper (Kall and Lillie 2017), based on an extensive literature review, established that the monitoring and enforcement of the rights of posted workers is problematic in many respects. This is mostly relating to the fact that posted workers' employment regulation falls under multiple jurisdictions, while enforcement of workers' rights tends to assume a single national jurisdiction. This second PROMO report aims to improve national labour protection systems by identifying issues, through research, and proposing solutions to enhance administrative cooperation and information sharing between labour regulation enforcement agencies. The aim is to build a well-functioning system of labour protection within the European framework of free movement.

We suggest the following policy reforms:

1. Establishing a European Labour Authority (ELA)

Considering the complex and interrelated challenges that cross-border posting brings to national authorities, the most effective way to tackle them would be a comprehensive transnational approach. In his State of the Union Address on 13 September 2017¹, European Commission President, Jean-Claude Juncker, put forward a proposal to establish a European Labour Authority (ELA). The idea of a European Labour Authority is a step in the right

direction. Like European Union organizations generally, however, it would depend on relations with national authorities. It would also need direct access to workers: there is a need for a place where workers can go when they fall between the cracks in national protection systems, and national authorities will not or cannot help — the ELA should be the institution to go to in that kind of situation. To be effective, the ELA must also be focused specifically on labour mobility and the rights of mobile workers. While it would be tempting to restrict the focus even further, to just posted workers (as they have enough problems), posted work does not compose a separate labour market of its own but is just one way among many that employers employ transnationally mobile workers.

How to set up and operate the ELA is an important and difficult question. EU authorities normally operate by regulating rather than implementing. A way forward though could be an EU inspector network, with labour inspectors employed by both the EU and by national authorities, perhaps half-and-half. This would make them bridge builders between the EU and their own countries' labour inspectorates, allowing them both to operate effectively in their home state as well as to handle the complaints of mobile workers, whose work arrangements span across borders. It would allow inspectors to leverage relations with national agencies effectively, while still providing the capacity for independent action – a capacity which would be crucial to ensure that the ELA has the ability to effectively resolve issues that national enforcement agencies can no longer effectively address.



1. http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm

2. Improving the Internal Market Information System (IMI)

IMI is a tool used by labour inspectors (and other relevant state actors) to exchange information. It has the advantage of allowing labour inspectors who do not know each other, and who may not share a common language, to transmit labour inspection related requests via the system to any other EU country. Its usefulness, however, is limited by the low priority sometimes given to IMI requests, the fact that the requests may not always be transmitted to the appropriate person to handle them, and it is not always clear which information can be given out to foreign agencies that request it. Most of these problems cannot be resolved through technical fixes to IMI, but rather would require changes in national laws and/or bureaucratic processes which would require EU legislation, such as a directive or a European Labour Authority.

On the other hand, some of the problems are related to the lack of trust and lack of knowledge of the foreign organizations they are interacting with. These could be resolved through increased intensity of joint EU IMI trainings and exchanges at the field-inspector level, both improving their knowledge of EU procedures and foreign organizations as well as their networks of foreign contacts.

3. Creating a common EU-level electronic system for A1 forms

Currently, the EU is developing an Electronic Exchange of Social Security Information (EESSI) system that would replace paper-based exchanges of social security files with electronic exchanges². The paper version of A1 forms is easily manipulated, but nonetheless has a binding character, obligating host country authorities to take it at face value³. Obligatory online documentation of the social insurance status of the posted workers would be a possible solution, so we encourage the development of an EESSI system. Moreover, the system would be more effective if A1 forms included information about remuneration and working hours.

4. Strengthening registration requirements for posting employers

At the moment, inspectors often work with little and sometimes incorrect information about posted workers and their employers. In the absence of registration requirements, employers sometimes even declare workers as posted ex post facto to confound enforcement efforts. Registration requirements diverge greatly between countries and sectors, with some systems providing extensive useful information. The Belgian LIMOSA system is often cited as a good example. However, it has been contested by employers as a restriction on free movement. Any national registration system in the EU must contend with this limitation. We therefore recommend a common EU-level framework – which, because of its universal applicability and EU legislative sanction, would not then be a restriction to the free movement of services/establishment. Penalties to firms for non-compliance would be necessary. A possible further step would be to create a common EU-level electronic system for registering posted workers. This could then be connected to other systems such as A1 declarations (an EESSI system), income tax and social security information.

An effective registration system (from the viewpoint of inspectors) should contain the following elements⁴:

- Registration/notification should be made on or before the beginning of a posting;
- Changes should be reported;
- The system should be simple and electronic;
- There should be a high enough penalty to compel compliance;
- It should contain information about the service provider and recipient (contact information, sphere of activity) and about posted workers (including their citizenship, address of the workplace/site, type of contract, working hours, remuneration);
- The system should be connectable to other relevant systems (tax information, social security information).

2. <http://ec.europa.eu/social/main.jsp?catId=869>

3. The Court of Justice of the European Union has ruled that in cases where certificates were fraudulently issued, they can be disregarded, but only under a stringent set of conditions (see Ömer Altun and Others Case C-359/16).

4. Outcome of the conference working group.



5. Enhancing a framework for joint cross-border inspections

The experience of national inspectors show that inspecting posting workplaces can be more effective when both receiving and sending state officials are involved. Many inspectorates already have bilateral cooperation agreements, including the possibility of joint cross-border inspections, but there are still barriers preventing such cooperation from being widespread, limiting its effectiveness. These include legal barriers, financial constraints, differing organizational mandates and areas of responsibility, language differences and an unwillingness to cooperate.

In the end, as with the limitations of IMI, fixing problems as well as expanding and making more effective bilateral cooperation would require greater political commitment at the national-level⁵. In the absence of this, we would still recommend expanded efforts to foster cooperation through, for example, project based funding. One basis could be bi-lateral cooperation around large construction mega-projects or around particularly recalcitrant “problem” firms.

6. Creating a common framework for determining the nature of employment

Labelling dependent (posted) workers as self-employed is a frequently used tactic by (posting) employers seeking to avoid the application of labour law. Reducing ambiguity when classifying workers and limiting the possibilities for the abuse of self-employment are crucial challenges for the European Union and its Member States⁶. In some countries, the definition of self-employment is too broad. The International Labour Organization’s (ILO) recommendation No. 198 concerns the determination of the existence of an employment relationship⁷. In general, tests for the authenticity of self-employment involve work autonomy, the ability to contract with more than one client, whether the worker must perform the work personally, whether the work is performed on the client’s premises and

the ownership of tools. Although some countries, like Finland and Norway, have established guidelines for inspectors to determine the nature of employment, we also recommend Member States look at the clarity and enforceability of the guidelines given to inspectors. Furthermore, we recommend harmonizing the definition of self-employment through an EU directive so that it is consistent with the ILO recommendation No. 198.

7. Firewalls protecting the labour rights of posted non-EU citizens

Posted non-EU citizens have recently come to the fore as a growing issue in monitoring posted work. It concerns situations where non-EU citizens are given work permits for one EU member state, not in order to work in that Member State, but rather to accept a posted position in another EU Member State. When done intentionally and on a large scale, this undermines the rights of EU Member States to control immigration from outside the EU. Our concern here, however, is that the legal ambiguity of this status and the dependency of non-EU workers on both their posting employer and the sending country work visa makes these workers particularly vulnerable to abuse.

The ambiguous residency status of these worker means that national authorities might not treat them as having the right to work and reside in the EU. Regardless, the workers themselves are often unclear as to their status. The potential application of immigration controls has perverse and unjust effects on these workers labour conditions – perverse in the sense that they drive the workers underground into potentially even greater exploitation, and unjust in that it makes it more difficult for these workers to claim labour rights because contact with host country authorities could result in deportation. The ILO Committee of Experts on the Application of Conventions and Recommendations (ILO CEACR) has stressed that the labour inspectors’ mandate

5. See Stefanov, R. and Mineva, D. (2017) for an analysis of this issue.

6. See Eurofound (2017); Heinen, Müller and Kessler (2017).

7. <http://www.ilo.org/legacy/english/inwork/cb-policy-guide/employmentrelationshiprecommendationno198.pdf>



should be distinguished from other bodies so they can maintain a climate of confidence between labour inspectors and workers, including the undeclared⁸. We therefore suggest establishing firewalls between labour rights inspections and immigration enforcement. This means that workers could contact labour inspectors in the case of labour rights breaches, join unions or take their employers to court, but this information would not be given to the police, allowing them to pursue back pay and wage claims against their employers. In general, we also suggest that “classical” labour inspection functions should not be subordinated to migration control.

8. Institutional support for workers making wage claims

Posted workers face practical barriers when claiming unpaid wages from delinquent employers. Posted worker employers sometimes make themselves inaccessible through the use of letterbox subsidiaries or the strategic use of bankruptcy. In this way, they avoid being held liable for debts such as back wages or unpaid social security costs. Even when an employer can be found, pursuing court cases in a host country where the worker is not a resident is difficult, expensive and risky. Subcontracting chain liability and similar mechanisms have been put forward as a solution to this problem by holding (main) contractors responsible for the unpaid wage bills of subcontractors. Chain liability possibly reduces the risk that workers will be cheated of their wages or that social security fees will be unpaid by motivating (main) contractors to vet their subcontractors. This is an approach endorsed by the Enforcement Directive (2014/67/EU). While in principle, chain liability could be an effective part of a total solution, pursuing claims successfully is difficult for posted workers. Among other barriers, employers sometimes take measures (often planned in advance) to make wage claims difficult, such as making workers sign false statements that they have received the required wages. Where legal systems allow, we suggest the collective redress of claims; often claims are not in fact

individual, although treated as such by the courts. In countries where trade unions have standing to pursue claims (*Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna (C-396/13)*), it is more efficient and more practical from the workers’ standpoint to pursue a collective claim as it does not necessarily require all workers be present in court. This also requires a host country union interested in pursuing posted worker claims.

In addition to the liability mechanisms, another way to make subcontracting more controllable would be to restrict the subcontracting possibilities. For example, it might be reasonable that core tasks cannot be subcontracted, all subcontractors should be announced in the bid and/or subcontractors cannot have previous convictions for illegal activities.

Worker advice centres run either by NGOs, unions or labour inspectorates have had success. German experience has demonstrated that Fair Mobility offices (coordinated by the German Confederation of Trade Unions), which provide counselling for labour migrants/posted workers, can be effective. Norway currently has a state-run Service Centre for Foreign Workers where the Labour Inspectorate, the police, the tax authorities and the Norwegian Directorate of Immigration work together on foreigners arriving in Norway for employment purposes, with the aim of providing them appropriate guidance and shortening the time used to process their applications. We recommend enforcement agencies consider establishing worker advising services.

9. Restricting the use of letterbox companies

Many employers of posted workers create shell companies in countries where it is cheap and convenient to do this, without having to maintain significant activities or a substantial presence. Slovakia, for example, has become one popular location for Belgian road transport firms to open letterbox subsidiaries (ABVV BTB 2017). The purpose of doing this

8. 2006 General Survey on Labour Inspection and opinion issued by the ILO CEACR.

is to avoid national labour law and legal liabilities by providing an extra corporate layer in an inaccessible jurisdiction between the beneficial owner of the firm and the enforcement agencies or potential litigants (such as, inter alia, the firm's own workers pursuing wage claims or seeking compensation for accidents). National law is varied on what constitutes a "real" company.

We recommend EU legislation to restrict the creation of letterbox companies based on a requirement that real headquarters activities be carried out in the place of incorporation (cf. Hasting and Cremers 2017). While the application of the Enforcement Directive's Article 4 list of elements for evaluating the bona fides of a company is useful, other aspects of EU company law should also remain consistent with this. Failing a more comprehensive solution, we recommend that enforcement and liability rules take into account the possibility (likelihood) of letterbox companies being used to circumvent the law in cases of posting; for example, if chain liability extends two links down, by inserting two shell companies in the chain, the main contractor liability can be avoided. Liability which extends through the entire chain cannot be so easily circumvented.

10. Execution of fines

One of the most important sanctions available to national authorities when regulating the posted worker labour market and ensuring compliance with national labour regulation is fines. National authorities have found it difficult to compel employers of posted workers to pay the issued fines because the sanctioned firms are based in another country. The Enforcement Directive sets out a framework for transnational cooperation around the collection of fines; our research found that enforcement agencies are waiting to see how the measures in the Enforcement Directive will work out in practice before passing judgement on whether more action is needed.

Introduction

The posting of workers poses unique challenges to national labour rights monitoring and enforcement bodies of EU Member States. While transnational service providers move between national systems, labour inspectorates (and other national authorities) are organizationally and legally constrained – in the ways they can inspect transnational companies and enforce the rights of posted workers – by the national focus of their jurisdictions and the need to respect the free movement rights of employers. National enforcement systems within EU Member States vary structurally in various ways (Hartlapp 2014), implying different challenges and diverging capabilities when facing them in the enforcement of labour rights within each Member State (van Hoek and Houwerzijl 2011). This makes it harder to develop transnational cooperation. The role of the monitoring/enforcement bodies in posting is even more crucial due to posted workers often falling outside of the protection of trade unions (cf. Heyes and Rychly 2013: 250, see also Kall and Lillie 2017: 30-31). The PROMO project⁹ is based around a series of policy workshops/conferences from 2017 and 2018. The project aims to make recommendations to improve:

- national labour protection systems;
- institutions, practices and channels for promoting industrial democracy;
- the collection of data relevant to making informed posted worker policy decisions.

Our method is to take existing research knowledge and improve upon it through policy workshop discussions with experts and stakeholders. From these discussions, we produce policy reports with well-grounded recommendations. The first PROMO briefing paper (Kall and Lillie 2017), based on an extensive literature review, established that the monitoring and enforcement of the rights of posted workers is problematic in many respects, mostly relating to the fact that posted workers' employment regulation falls under multiple jurisdictions, while the enforcement of workers' rights tends to assume

a single national jurisdiction. Networks and procedures for the transnational enforcement of workers' rights are underdeveloped. Furthermore, deepening cooperation raises questions beyond just the challenges of building the transnational links themselves, including tensions with national laws and bureaucratic procedures.

This second PROMO report aims to improve national labour protection systems by identifying issues and proposing solutions for the enhancement of administrative cooperation and information sharing between labour regulation enforcement agencies. The aim is to build a well-functioning system of labour protection within the European framework of free movement. In this way, we can support the establishment of a level playing field for companies and countries in the common EU labour market, on the one hand, and protect the rights of posted workers on the other. First, this paper is based on a review of the existing literature on labour inspection and regulatory enforcement, particularly as it applies to posting, and on a series of local workshops and interviews in which the knowledge and opinions of labour inspectors and other officials involved in enforcing national rules related to the Posting of Workers Directive were solicited. This research in Austria, Czechia, Estonia, Finland, Italy and Norway resulted in country reports written by PROMO project partners, which are available as an attachment to this report and also separately¹⁰. Additionally, we conducted interviews in Belgium, Hungary, Lithuania, Poland and Slovakia¹¹. Reference to information from national discussions herein is done by either direct mention of the country report's author(s) or indicating the country abbreviation.

Secondly, this report's previous version was distributed to the participants of the conference 'Transnational Cooperation among Labour Standards Enforcement Agencies in Europe: Challenges and Opportunities' (24-25 November 2017 in Prague), who were asked to evaluate and develop the findings.

9. PROMO is organised by a consortium led by the University of Jyväskylä, Finland and including the University of Padova, Italy, the Multicultural Center Prague, Czech Republic, the Fafo Institute for Labour and Social Research, Norway, SOLIDAR, Belgium, and Forschungs- und Beratungsstelle Arbeitswelt FORBA, Austria. See more: <http://www.solidar.org/en/activities/protecting-mobility-through-improving-labour-rights-enforcement-in-europe-promo>

10. <http://www.solidar.org/en/activities/protecting-mobility-through-improving-labour-rights-enforcement-in-europe-promo>

11. Additional interviews and other data from the Visegrad states were collected as part of the 'Towards stronger transnational labour inspection cooperation' (STRONGLAB) project funded by the International Visegrad Fund and by the Ministry of Foreign Affairs of the Kingdom of the Netherlands.



The conference provided a format in which the participants (i.e. representatives of labour inspectorates, public administration, the International Labour Organization, trade unions, academics and non-governmental organisations) were able to assist us in updating our findings and developing new policy proposals based on discussions during the thematic workshops of the conference.

Existing research on how national administrative systems monitor and protect posted workers' rights is not extensive (especially about some countries/regions), and there are major differences in how Member States inspect posted workers' rights. On the other hand, there are common short-comings in the current systems, and our aim here is to help to improve these. In the first stage, this paper was evaluated by stakeholders from different countries. In the second stage, the paper was modified and distributed to national and EU-level policy makers, as the proposed policy changes require EU-level action. One aim of this study has been to identify changes following the implementation of the Enforcement Directive 2014/67/EU (hereinafter ED). While we have done this as much as possible, too little time has passed since the national implementations of the Directive to allow for a proper evaluation of the effects of the relevant changes on, for example, mutual enforcement of sanctions. One area where the ED has clearly had an effect, however, is in the increased emphasis put on registration systems for posted workers, which many countries are implementing or working on improving.

We first present the complex institutional landscape of the labour inspectorates and other institutions responsible for the control of posting. This institutional diversity affects the possibilities for effective monitoring and enforcement. More specifically, we focus on existing, mostly horizontal cooperation – i.e. cooperation between line-level officials “in the field”, who are directly involved in inspecting companies. It is based to a great extent on technical innovations in communication (the Internal Market Information System, IMI) among labour inspectorates and other national monitoring/enforcement bodies, as well as

on other, more or less autonomous approaches to national-level labour enforcement, which has been supported by networks such as the Senior Labour Inspectors' Committee or the European Platform tackling undeclared work (Heidbreder 2015).

Some of the important questions that will be addressed in the first part on “Institutional diversity and transnational cooperation” are: What are the views of labour inspectors and other national enforcement bodies on this kind of rather technical cooperation? How does an increase in cooperation “compensate for the loss of administrations' authority on their national territory” (Hartlapp 2014: 820)? How does the politicisation of posting interfere with the controls of line bureaucrats at labour inspectorates? What do the diversity in political approaches to posting and the diversity of institutions mean for the priorities of control? The following section will concentrate on the main pertinent issues in the transnational enforcement of posting:

- Posting as an area of special competence
- Insufficient information on posting;
- Regime shopping, fraudulent posting and letterbox companies;
- Complex subcontracting chains;
- Transnational execution of fines;
- Manipulation of wages and underpayment;
- Privacy and confidentiality concerns;
- Posted workers' awareness of rights and their relations with the labour inspectorates and other national enforcement bodies;
- Non-EU citizens as posted workers.

Institutional Diversity and Transnational Cooperation

This section elaborates on the existing diversity in national labour protection systems, shows how it poses a challenge for transnational cooperation, and how the challenges related to monitoring and enforcing the rights of posted workers diverge, depending on the national context. Because in most EU countries labour inspectorates (LIs) are responsible for the enforcement of posting regulations, our main focus is on them. However, in some countries, like Austria, LI only monitors occupational health and safety (OHS) issues, thus other state actors involved with the monitoring/enforcement of posting-related regulations must be included as well.

Institutional Diversity of National Monitoring/Enforcement Systems

Labour inspection is not a “monolithic concept, let alone a single organization” (De Baets 2003: 39). Some EU Member States follow a generalist labour inspectorate model (e.g. Czechia, France, Spain and Portugal), where an inspectorate’s responsibilities can include such areas as the control of labour relations, OHS, social security administration and both legal and illegal work. Specialist inspectorates (e.g. in the UK, Sweden and Austria), on the other hand, are mainly responsible for occupational health and safety issues and welfare. Some countries have elements of both generalist and specialist models, making the picture quite complicated. More specifically, we can talk about single, dual or multi-functional inspectorates (Walters 2016). In the UK, Ireland, Denmark and Sweden, the inspectorate is responsible only for a single function, that being OHS. In dual-system countries (e.g. Germany, Estonia, Finland, Norway and the Netherlands), they also cover a range of matters related to working conditions, including wages. On the other end of the spectrum are France and Spain, where inspectors also cover different employment-related matters, industrial relations and social security issues (Walters 2016). In Italy, there has been a

complete reconfiguration, which has unified the labour inspectorate with social security inspection (Inps) as well as workplace accidents’ insurance (Inail) (Iannuzzi et al. 2018).

These systems are not only diverse in terms of structure and functions but also in terms of capacity. Comparing capacity, however, is difficult because of the diversity in structure and functions. One cannot simply compare the number of inspectors, for example, since the systems are so diverse, as is the role of the inspectors. Still, to cautiously refer to relevant statistics, in some countries (Austria, Cyprus, Slovakia and Slovenia) the number of inspections per inspector in 2015 exceeded 200, indicating that the workload of the inspectors might be rather intense. Another comparative indicator available shows that in some countries (e.g. Romania, Finland, Germany and Lithuania) there is a much higher probability that your workplace will be inspected than in others (ILO database 2017).

For the purpose of this paper, we use a functional definition of what constitutes labour inspection (cf. Alli 2001 in De Baets 2003: 39) focused around posting. If a state regulatory body inspects the working conditions, safety, labour rights, wage payments or tax, and social security compliance relating to posted work, then it is a labour inspection body for our purposes. At the centre of our analysis are labour inspectorates, but also other main institutions/inspection bodies involved in the transnational enforcement of posting rules. The functional definition allows for the realisation of not only which institutions but also what kind of departments or specialisations of labour inspectors (the “inside” of labour inspectorates) are involved in the control of posting in particular local labour markets. While in most countries national labour inspectorates are also the implementing authority regarding posted workers’ rights, in some countries multiple actors are involved, and in the United Kingdom no authority is officially involved (van Hoek and



Houwerzijl 2011). In Austria, for example, it is not the Labour Inspectorate per se but the Financial Police and the Construction Workers Leave and Severance Pay Fund (for the construction sector) which investigates posted workers' remuneration and the compliance of posting firms with regulations; the Competence Centre for Combatting Wage and Social Dumping (run by the Vienna Regional Health Insurance Fund) monitors suspicious cases investigated by Inspectorate or Financial Police. The Labour Inspectorate is a separate entity, in charge of compliance with occupational health and safety and working time regulations (Haidinger 2018).

In Italy, there was a recent unification of various functions under one institutional roof; enforcement capacity has been at least temporarily diminished due to the reform, because, inter alia, the national headquarters was disestablished and has not yet been re-established (Iannuzzi et al. 2018). In Czechia, the liaison office for posting is within the State Labour Inspection Office, and it is the inspectors specialising in illegal employment controls who mostly inspect posting. As in other countries, the involvement of the institution responsible for the control of social insurance contributions in the IMI¹² national "architecture" has been crucial; the Czech Social Security Administration (CSSA), however, has not joined the IMI, which makes administrative cooperation more complicated (Table 1, see also Čaněk 2018). In addition, in several countries (e.g. CZ, EE, FI, NO) labour inspectors do joint visits with police and/or tax authorities¹³ to sites with posted workers in order to also check tax issues and living and working permits (relevant for posted third country citizens, see the section "Non-EU citizens as posted workers").

12. IMI is a computer system linking the labour inspectorates of EU Member States, with which they can send and receive data from other inspectorates, using an interface in their own language

13. Not with the tax authorities in CZ – apart from the Police, controls are also occasionally carried out with the Customs Administration.



Table 1: Building the “architecture” of administrative cooperation on posting using IMI at the national levels

	Liaison office(s)	Other institutions in IMI for posting	Cross-border enforcement of sanctions	Comment
AT	Federal Ministry of Science, Research and Economy	Financial police, competence centre, BUAK, district administration authorities, specific courts	Too early to assess; one main problem mentioned was a lack of feedback from executing authorities to the authorities imposing the fines	Good experiences with information requests, given mostly in time.
				Relevant information about posting firms (e.g. do they pursue an economic activity in the sending state?) can be provided.
CZ	State Labour Inspection Office	-	No sanction sent. One sanction received from the Netherlands, redirected to the Customs Administration of the Czech Republic, was successfully enforced.	Good experience with information requests.
				Main issue has been to set up functional cooperation with the Czech Social Security Administration due to its non-involvement in IMI. IMI is not used for sending requests on social insurance matters.
EE	Estonian Labour Inspectorate (ELI)	-	Too early to assess. After the implementation of ED, it was possible to sanction foreign service providers.	Social Insurance Board and Tax Office are willingly cooperating when ELI requires information for IMI requests.
FI	Regional State Administrative Agency for Southwestern Finland/Division of OSH	All the five Regional divisions of Occupational Safety and Health.	Too early to assess.	IMI is not used for sending requests on social insurance matters. Regional State Administrative Agency does not handle social insurance issues.
IT	National Labour Inspectorate	-	Too early to access.	Good experience with information requests. Significant increase of inbound requests about posting firms. Access to social security information is also possible because the National Social Security Institute is a member of the National Labour Inspectorate.
NO	Norwegian Labour Inspectorate	-	Too early to assess. After the implementation of ED the Norwegian National Collection Agency may request competent authorities of other EEA States to claim monetary requirements as provided for in the Working Environment Act.	According to the Labour Inspectorate, the system has made it easier to reveal letterbox companies and information about the owners of the companies.

The problem with the diversity, from the perspective of transnational cooperation, is that labour inspection bureaucracies in different countries do not necessarily share the same priorities and goals. Some are in charge of ensuring that taxes or social security fees are paid, others have workplace safety as their main goal, while some see worker rights and wage payments as their first priority. Competences may overlap in some cases but not others, and access to the kind of information inspectors need in one country might be spread across different agencies in another country. This complicates the process of developing transnational cooperation and information sharing.

Multi-level Transnational Cooperation

Given the unique challenges of regulating posted work in the single European market, it is understandable that the majority of transnational cooperation at this point has taken the form of information sharing and networking between inspectorates and other administrative bodies.

Cooperation between labour inspection agencies is being built on multiple levels, i.e. both at the top and bottom of labour inspection agencies' bureaucratic hierarchies. The Senior Labour Inspectorates Committee (SLIC) has been particularly visible as the most prominent and effective arena for cross-border cooperation thus far. The SLIC promotes best practices and mutual learning through required annual reports published by national inspectorates that detail their respective contributions and transnational activities that year. The SLIC is useful for spreading information and giving direction and political priority to transnational cooperation; however, more developed cooperation, for example, to resolve specific cases, requires multifaceted cooperation with links between persons in various operational capacities. Multilevel cooperation is developing. It consists of inter-“organizational cooperation” that builds on existing networks (e.g. Senior Labour Inspectors' Committee /SLIC/), new ones (e.g. European Platform tackling undeclared work) as well as other kinds of deeper cooperation organised on a bilateral or multilateral basis among labour inspectorates

and other institutions (Stefanov and Mineva 2017). This horizontal, network-based cooperation within the EU is based on elements such as information sharing through IMI and other channels, and also extends to substantial action, such as mutual recognition of sanctions and fines. It has been characterised as direct, decentralised, joint and, based on “actual administrative policy enforcement” (rather than setting legal rules at the EU level), as “a genuine solution to common concerns” (Heidbreder 2015: 370).

There are good reasons to believe that the current difficulties with labour regulation enforcement are basic and structural and cannot be sufficiently addressed without major legislation and structural reform. Nonetheless, transnational network building and inter-organizational cooperation has proven useful and seems likely to continue to grow and develop as a process of organizational learning. For many labour inspectors, transnational links at the level of field inspection is something new: “there is distinction from the traditional occupational safety and health. They have the SLIC meetings, working groups, all that... So, when it comes to posting, migration and social dumping, it's quite new for many of us to have transnational cooperation”¹⁴. Also, if there has been cooperation in posting, it sometimes involves only high-level meetings in which the regular labour inspectors do not take part, as has been the case in some Scandinavian countries: “We should actually have connections between inspectors, not always just high level and just certain people meeting. So, it should be inspectors that are actually doing the job”¹⁵. As inspection cooperation deepens, more inspectors operating in the field are brought into the cooperation networks.

IMI serves as a technical basis, facilitating direct horizontal transnational cooperation between inspectors about specific cases. EU Member States have far-reaching autonomy in setting up the functioning of IMI as they see fit within their national contexts (Heidbreder 2015). Use of IMI has risen since its im-

14. Focus group with labour inspectors, Norwegian Labour Inspector, Helsinki, 24 May 2017.

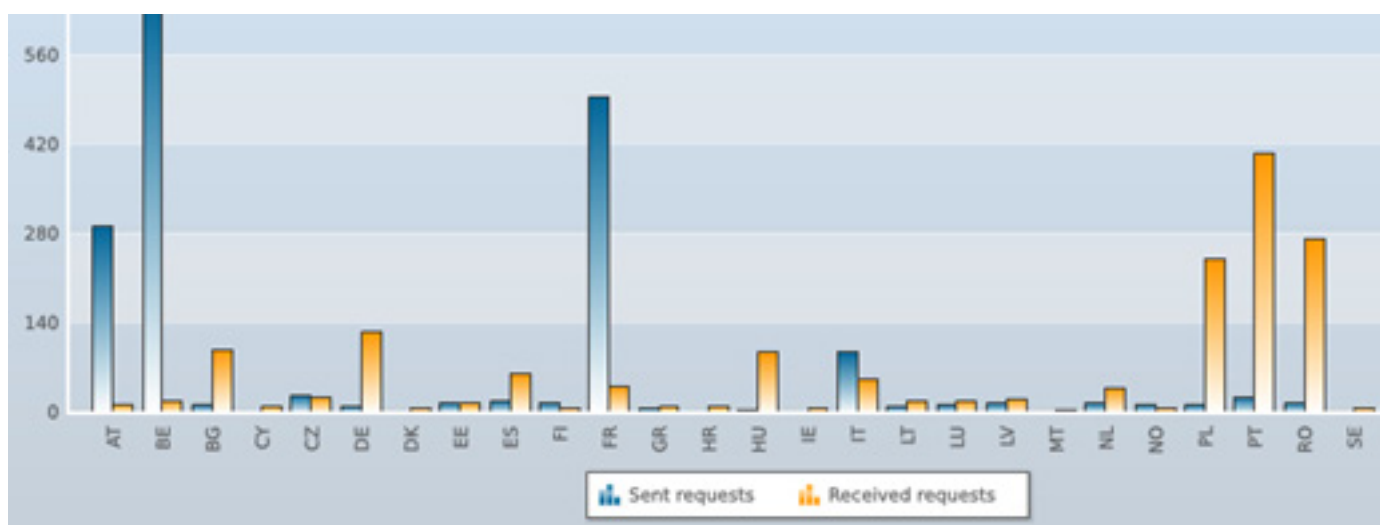
15. Focus group with labour inspectors, Finnish Labour Inspector, Helsinki, 24 May 2017.



plementation, being boosted by the implementation of the Enforcement Directive 2014/67/EU, implemented in 2016. In 2016 alone, there were 1769 requests sent and, in the first half of 2017, 1275 were sent (Internal Market Information System 2017). In Figure 1 below are the numbers of sent and received requests for the whole year of 2016. First, the numbers indicate that there are only a few countries that send the majority of requests (Austria, Belgium and France). At the receiving end, in terms of absolute numbers, there are more important receiver countries (Portugal, Romania, Poland, Germany, Slovenia, Bulgaria, Hungary, Slovakia, etc.). Major request sending countries are mostly labour importers (“old” EU), while major request receivers are labour exporters (CEE). There are some traditional sender countries, like Czechia, that have become more of an importer of posted workers (Čaněk 2018), thus both receiving and sending requests.

However, based only on the number of requests sent and received it would be misleading to draw conclusions too quickly. It seems, for example, that some labour importers do not send out too many requests – e.g. the low number of requests sent from Finland corresponds to scepticism shared by interviewed labour inspectors about the quality of information received through IMI (Alho 2018). In some cases, this indicates that administrations use other means than IMI to exchange information, like personal contacts, which means the low use can also be indicative of highly developed cooperation. In other cases, the low use might mean poor relations, as there is no expectation of a useful response to a request. Some labour inspectorates also still communicate using paper format, which has been the experience of the Czech Labour Inspectorate, receiving some requests in that form (Čaněk 2018). The IMI posting module is generally intended for posted-related matter, but in fact not all IMI use relates to posting, according to some inspectors. In these situations, receiving a reply depends on the good will of the particular labour inspectorate receiving the request¹⁶.

Figure 1: Number of IMI requests sent and received in the posting of workers (as of 31 December 2016)



Source: http://ec.europa.eu/internal_market/imi-net/statistics/2016/12/index_en.htm#t_1_2



16. Telephone conversation, Liaison Officer, State Labour Inspection Office of the Czech Republic, 20 October 2017.



At this point, the IMI is the only EU-wide mechanism allowing labour rights inspecting bodies a systematic way of sharing information about specific posting companies and posted worker cases across borders¹⁷. Though this system is an important step toward mutual assistance, the information it contains is not yet comprehensive enough to fulfil all enforcement needs, and it is not clear when exactly a member state is obligated to supply information to the IMI when requested by another Member State (Velázquez Fernández 2011). Based on the discussions with labour inspectorate representatives from several countries, we conclude that information sharing via IMI has a number of shortcomings that could be improved. These include insufficient language translations for less frequently used languages like Estonian, difficulty in finding the right partner to communicate with and administrative barriers within countries.

Sometimes the inspectors themselves are not the ones using IMI; instead, it may be an administrative person without direct access to the field. Answers to inquiries may need to be collected from different (perhaps multiple) state agencies, which are not necessarily involved in IMI (see also Table 1). In some countries it is not possible to get tax/social security information through IMI. The speed of getting an answer is sometimes too slow, and sometimes the answers are insufficient. For example, a Danish Working Environment Authority representative explained:

Well that [the IMI] is not for inspectors, it is for administration people, who do that [send and answer requests]. ... what they tell me is that it can be difficult to get the information that is requested. It can [take a] very long time, [and you might get] false information and sometimes information that does not help with the request.¹⁸

The Czech IMI liaison officer explained past difficulties with the search of answered queries, which, however, improved throughout the time of our research:

Before the major IMI-Posting of workers module update in the first half of 2017, you could search for the answers sent and received, but in practice it didn't always work –only the numbers of the search function worked reliably. Once you replied to a request from another Member State, you could see the answer in the list of answered requests to be accepted by the requesting authorities. When that person okayed the answer, it disappeared from the list. If you did not write down the IMI number of the request, you could not find it afterwards. That's why we have our own internal database of requests, their status, and their respective numbers. [...] The search functionality now allows searching for past requests by company name. This, however, is not the case for past requests which were raised before the major update in 2017.¹⁹

With the IMI update, there have also been other improvements:

Following the major update in 2017, the graphic user interface changed significantly and so did the lists of questions, making standardised question selection a lot easier. The new category of questions related to occupational safety and health was added, and the new types of requests appeared (i.e. Uniform instrument – Request to notify of a decision / Request to recover a penalty and/or fine).²⁰

Predominantly positive experiences have been reported by the Austrian authorities: the flow of information is mostly sufficient, as is the time needed for responses. In addition, as one representative of the Competence Center for Wage and Social Dumping reports, requests about suspicious companies from the receiving country (like Austria) can draw particular attention about this firm to the authorities from the sending country, and this can turn out to be a relevant indicator in the detection of letterbox companies.

17. In addition, the Senior Labour Inspectors' Committee also has a Knowledge Sharing System for exchanging information on occupational health and safety issues

18. Focus group with labour inspectors, Danish labour inspector, Helsinki, 24 May 2017.

19. Email conversation with the Czech Liaison Officer, 9 November 2017.

20. Email conversation with the Czech Liaison Officer, 9 November 2017.



However, IMI alone is not enough for successful transnational cooperation, as communication through it can be rather formal and non-personal, as explained by the head of the main Department for Labour Safety and Labour, Government Office of Budapest:

Sending requests through the IMI system to each other is not cooperation. Someone must coordinate real cooperation, but NGM [The Ministry for National Economy in Hungary], with one employee dedicated to IMI, is not able to do that. In its current form (IMI), the cooperation is an alienated process; nobody takes the problems seriously, and the authorities are very distant from one another.²¹

A mix of formal (through IMI) and informal cooperation might lead to better outcomes. The necessity of establishing personal relations and, through it, creating trust, common objectives and the feeling of reciprocity is also highlighted by the identity work literature (e.g. Greer and Hauptmeier 2012; Snow and McAdam 2000). The interviewed Slovak labour inspector has had good experience with the Polish inspectors based on a combination of the two forms of communication:

At first, we tend to contact them by phone rather than officially. Cooperation has improved. We have established personal relationships. I can just call them and ask if I can send an official letter about the particular issue – so that things get sped up. Because of all this writing and time limits of 30 to 50 days, we lose contact with the people involved in the inspection, also with regards to enforcement.²²

In addition to the IMI system, several inspectorates have established bi/(tri)lateral cooperation agreements and memorandums of understanding (for an overview, see Stefanov and Mineva 2017; van Hoek and Houwerzijl 2011: 161-168) that first and foremost aim to enhance information sharing between the inspectorates of different countries, share good

practices, support common activities (like joint inspections) and also establish personal ties between inspectors. These agreements are generally motivated by the interdependence of the countries' labour markets. While several of the newer ones (like Estonia has with Finland and Poland) focus specifically on posting issues, there are also agreements that focus on other topics (like tackling social fraud and undeclared work).

For example, to tackle social security fraud and undeclared work, the Netherlands has signed memorandums of understanding with Czech Republic, Slovakia, the UK, Portugal and Bulgaria (Stefanov and Mineva 2017: 8). Common working language and similar legal systems between countries make the implementation of cooperation agreements smoother (Stefanov and Mineva 2017).

Inspector exchange programs (as part of the agreements) have become increasingly more common as a way to facilitate learning and improve inspections, particularly in border regions (Hartlapp 2014; Velázquez Fernández 2011). While there are numerous cooperation agreements between different EU countries, these kinds of agreements are usually lacking between EU and non-EU inspectorates. There is, however, cooperation between the Ukrainian labour inspectorate and the Polish and Slovak labour inspectorates.

21. Interview at the Department for Labour Safety and Labour, Government Office of Budapest, 11 October 2017.

22. Telephone interview with Slovak labour inspector, Košice, 6 October 2017.



Good practice: Deep and multifaceted cooperation between Estonian and Finnish inspectorates

In 2014, the Labour Inspectorate of Estonia and the division of Occupational Health and Safety of the Regional State Administrative Agency for Southern Finland signed a bilateral cooperation agreement for the protection of posted workers. The parties agreed to (1) share information (e.g. when IMI is not sufficient); (2) have biannual meetings; (3) exchange inspectors; and (4) raise awareness of Estonian workers posted to Finland. The Estonian Labour Inspectorate's representative we interviewed²³ considered this kind of cooperation useful. For example, they have exchanged information fast about companies operating both in Finland and Estonia that otherwise might have been problematic: e.g. slower through IMI.

Main Issues in the Transnational Enforcement of Posting

The posting of workers is a complicated phenomenon where service providers and posted workers fall under several jurisdictions. It is regulated by European Union legislation and case law; most prominently, the Enforcement Directive, the Posting of Workers Directive and regulations on the coordination of social security systems (Regulations (EC) No 883/2004 and 987/2009). However, EU rules serve as a basis for coordinating and resolving conflicts between national systems, rather than as a direct basis for labour market regulation. It is well established that posting practices can often also entail elements of social dumping (for an overview, see for example Cremers 2011; Kall and Lillie 2017). Following Bernaciak (2014: 5), we define social dumping “as the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage”. Thus, it includes legal, semi-legal and illegal practices. A basic fundamental structural problem, whenever confronting posted work, is that posted workers are not entitled

to equal treatment because of the constitutional basis of their mobility (i.e. as a right accruing to their employer); in this sense, social dumping dynamics are legal, permitted and endorsed by EU policy. From this aspect a number of issues arise which complicate the enforcement of the rights of posted workers by national authorities.

Posting as an Area of Special Competence

Posting is a complicated matter, often requiring new skills from inspectors. As a form of mobility, its use is not spread evenly across the EU; there is sometimes a lack of expertise in the area of posting either nationally or regionally (e.g. in Southern Italy, see Iannuzzi et al. 2018). The necessity to train labour inspectors in posting-related rules and skills was thus pointed out by several interviewed labour inspectors. For example, in the case of Hungary:

If the state wants an effective labour inspection of posted workers, then someone must be trained as an expert, at least at the national level, because this is not a routine inspection. And even how the court interprets legal documents is not trivial. There are no experts in this sense in the Hungarian system. This lack of expertise does not help the country's labour inspectorates to go into details about such cases involving posted workers²⁴.

Such a need for specialisation is even more urgent in view of the rising use of attorneys on the side of problematic employers (e.g. using fake posting and labour subcontracting only); inspectors must be able to evaluate whether a specific case is in fact posting and know what rules apply if it is (Čaněk 2018).

23. Focus group interview, Estonian Labour Inspectorate's representative, Helsinki May 2017

24. Interview at the Department for Labour Safety and Labour, Government Office of Budapest, 11 October 2017.



Good practice: Combating social dumping by training a special group of inspectors

In Norway, there is a separate group of inspectors dedicated to “social dumping”. An important task for these inspectors is controlling working conditions for posted workers as well as for foreign workers employed by Norwegian companies or foreign companies established in Norway. Their work is concentrated on risk-branches like construction, cleaning, shipyards, transport and farming. The “social dumping” inspectors have special training, and they normally have in-depth knowledge about one of the risk-branches (Ødegård and Alsos 2018).

Insufficient Information on Posting

A well-recognized issue that complicates Member States’ efforts to effectively regulate posted work is the fundamental lack of information concerning the companies posting workers abroad and the workers they employ. The lack of sufficient information available to labour inspectorates plagues the enforcement process and manifests itself in related issues, like checking the genuine nature of posting and detecting letterbox companies.

The only systematically collected European-wide data source on the posting of workers is derived from A1 portable social security documents (PDs A1). These documents are intended to establish a presumption that a worker active in two or more Member States is properly affiliated to the social security system of the Member State which has issued the certificate. This is so that the worker, or the workers’ employer, will not have to pay employment related social security taxes in two countries. Member States can freely determine their own procedures for issuing A1 forms (Jorens and Lherould 2014).

A1 forms do not provide a good information basis for labour inspection. These documents are not always accessible to labour rights enforcing bodies, and, if they are, they have several shortcomings in their use for inspection, e.g. they do not provi-

de relevant data for finding posted workers. Many Member States seem to issue A1 forms without sufficient checks²⁵, and this has led to problems with A1 forms being fraudulently issued²⁶. Furthermore, posting employers are not required to obtain A1s for their workers prior to posting. They can do so after the fact; for example, when faced with an inspection, they can seek A1s from their sending state. This means the A1 can be used as a tool by employers to obfuscate, thereby hindering efforts to determine the (posted or not) status of particular workers. Although some countries have established mandatory registration systems for posted workers/service providers, this has not been the situation in all countries and sectors, and the nature and amount of data that is collected through registration systems differ considerably. The Court of Justice of the European Union (CJEU) has also raised the possibility that mandatory registration can serve as a restriction on freedom of movement by determining that certain aspects of the Belgian Limosa system placed an unreasonable burden on employers (Mussche et al. 2016: 8).

In the Czech Republic, there is a general notification system for non-Czech nationals in the labour market, which, however, does not always provide accurate or precise information; the data is also collected by the Labour Office and is used for posting-checks carried out by the State Labour Inspection Authority of the Czech Republic in case of need. Also, in Norway, where the Central Office for Foreign Tax Affairs handles the register of foreign companies, inspectors do not automatically get the information about registered posted workers. They also do not generally use the registration system when looking for posted workers. The Inspectorate of Norway, however, would like to have a better registration system. To this end, they made a request to the Ministry of Labour and Social Affairs to get a similar register of posted workers to that of Denmark (RUT), which they regard as superior. They justified it as something that should be part of Norway’s implementation of the ED, but thus far has not got it (Ødegård and Alsos 2018).

25. For a critique of the rise of A1 forms in Slovenia, see here: <http://www.delavskasvetovalnica.si/693/?lang=en>

26. Judgment in Case C-359/16 Ömer Altun and Others



Good practice: Limosa declarations in Belgium providing extensive data on posting

Since April 2007, employers sending workers to Belgium and self-employed persons temporarily working in Belgium must fill in the mandatory Limosa declaration and submit it online. The declaration includes details about employees, employer, workplace, service recipient, posting duration, work schedule, the nature of services and, in the construction sector, whether the employer pays a premium, which is comparable to the applicable “fidelity stamps” in Belgium. Non-compliance may give rise to criminal or administrative sanctions²⁷.

After the implementation of the ED, several new countries like Estonia, Finland, Austria and Italy have also established mandatory notification/registration systems for foreign service providers. However, the representative of the Estonian Labour Inspectorate²⁸ highlighted that although a mandatory notification requirement now exists, not all employers are complying. Sometimes they undermine it by, for example, giving the wrong address for where the workers are working. Some countries like Finland and Austria have established negligence fees for companies that do not submit posting notifications.

In Austria, non-compliance with notification requirements carries high penalties. Firms must also update their notifications when changes are made. This updating is particularly relevant in the construction sector where the start of construction works can be delayed due to various reasons. This means that posted workers might be deployed later than anticipated, or there might be more or fewer workers posted to a construction site than originally planned. Austrian authorities report that using the register as a way to select sites to inspect, however, is not ideal. BUAK estimates that 50% of the inspections of construction sites with posted workers they carry out turn out to be idle sites.

On the other hand, the Austrian Financial Police find their inspection system overwhelmed by the complaints they receive, which they investigate. They estimate that 60% of their inspections are driven by complaints, which means their resources are absorbed by many small single cases instead of being dedicated on the basis of a risk analysis, which would probably be more efficient. They believe a 25% increase of personnel (to 600 inspectors) to the Financial Police would be needed to exercise their inspection mandate efficiently. The requirement for the notification of drivers in international road haulage, who are also regarded as posted workers (exception: transit traffic), had a rather counterproductive effect: notifications surged to 500.000 from Jan 2017 to October 2017, bringing the notification system temporarily to a halt because too many notifications were entered at the same time. From the point of view of employers, the national differences in posting regulations present difficulties for their operations, which has especially been the case for the transport sector (see box below).

The uneven application of the Enforcement Directive: perspective of employers

In Italy, the main issues concerning the cross-border regulation of posting take place in the transport and construction sectors. These sectors have both the most postings to Italy by foreign companies, as well as the most postings of workers abroad by Italian companies. According to interviews with a representative of ANITA (National Association of Road Transportation Companies) and of ANCE (National Association of Construction Companies), cross-border problems and administrative burdens are the result of national decisions on how to transpose the Enforcement Directive.

27. https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html

28. Focus group with labour inspectors, Estonian Labour Inspectorate's representative, Helsinki, 24 May 2017.

Italian employers complain that:

1. Austria wants all the posting relevant papers translated in German (this appears not actually to be true; only some papers must be in German);
2. Italy and France require the nomination of a representative in charge of keeping the documentation (e.g. employment contracts, pay-slips, working hours details, employment offer letters, applicable social security details), while some other countries do not want this;
3. Having an A1 processed takes different times in different countries: in Romania the office in charge takes six months, two months in Italy, one and a half months in France;
4. Special construction workers' funds exist only in some countries, so it is complicated to establish when employers must pay it in the destination country according to the rule of equal treatment of workers (to solve this problem there are some bilateral agreements between Italy-Austria, Italy-France, Italy-Germany) (Iannuzzi et al. 2018).

Regime Shopping, Fraudulent Posting and Letter-box Companies

Understanding the origins and destinations of posted workers and the companies who hire them is especially important in ensuring the fair and legal payment of social security contributions. Legally, posted workers are allowed to temporarily work in other countries under the freedom of services provision, which means social security payments are to be handled by the sending country. Some employers use this possibility and take part in “regime shopping” to pay as low social security contributions as possible by posting workers, regardless of origin or receiving country, via countries that require the lowest possible social security contributions (Jevnik and Krilic 2016; Voss et al. 2016).

In the context of social security provisions, we can distinguish between companies' legal/semi-legal social dumping practices and social security fraud.

While the former can also refer to using legal ways to gain competitive advantage, namely posting workers from countries with lower social security contributions to countries with higher ones, the latter means “any act or omission to act, in order to obtain or receive social security benefit or to avoid obligations to pay social security contributions, contrary to the law of a Member State”²⁹. For example, some employers avoid all social security contributions by creating fraudulent postings using fraudulently obtained A1 forms or letterbox companies (Maslauskaitė 2014).

The problem is that while, on a theoretical level, it is possible to distinguish between firms that are sticking to the letter of the law by taking advantage of legal rules to “shop” for the cheapest social security regime and firms that are simply committing fraud, the prevalence of letterbox companies and the ease of obtaining A1 forms without stringent checks creates a grey area which makes it difficult to distinguish between these categories. Regulating fraud and regime shopping is a difficult task because it requires countries to have the ability to discern whether or not a company posting workers in their country has a bona fide standing in another member state, which is a particularly difficult task given the current competencies of national labour inspectorates (Cremers 2016).

One problem in verifying whether an alleged posted worker is in fact a posted worker was mentioned by the Austrian Financial Police responsible for the inspection of posted workers' pay slips and social security status and the regional health insurance fund responsible for the validation of suspicious cases. Even in cases where the inspecting authorities determine that the worker's habitual place of work is in Austria (implying that he/she is not a posted worker, and should pay social insurance in Austria), it is almost impossible to overrule the binding character of an already-filed A1 form³⁰ in the context of social insurance law (which is separate from labour law,

29. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41999X0506>

30. The Court of Justice of the European Union has ruled that in cases where certificates were fraudulently issued, they can be disregarded, but only under a stringent set of conditions, see Ömer Altun and Others Case C-359/16.



and therefore might lead to different results in terms of choice of law). This means, as long as the issuing authority (from the sending state) does not withdraw this document – often a long process – the worker is regarded, from the perspective of social insurance law, as a posted worker. Welfare redistribution remains a national issue, but the case of posted work creates a need for a modern system of information sharing and transnational diligence to combat fraud and ensure that workers are actually receiving the social security benefits to which they are entitled (Aussilloux et al. 2017).

Difficulty of checking A1 forms

Austrian Financial Police regard the paper version of A1 form as easily manipulated. Enforcement authorities should know how, and under what set of standards, (posted) workers are registered in their countries of origin. Austrian authorities believe the A1 form, in its paper version, should not be regarded as sufficient proof of social security registration in another Member State. However, they are obliged by EU rules to recognize it as such. There are plans to replace it with an electronic registration by mid-2019 (Haidinger 2018).

With some posting companies trying to avoid the payment of social security contributions, a number of labour inspectors have in recent years encountered an “export” of precarious contracts (e.g. not regulated by labour law) from other countries. For example, the Czech labour inspectors have come across so-called civil contracts from Poland (mandate agreements) (see also the table below in the section on the manipulation of wages), which are not governed by the Labour Code and do not always require the payment of social insurance. Slovak labour inspectors have investigated abuse of Czech Agreements to Complete a Job (up to 300 hours of work in a year for one employer, according to the Czech Labour Code) used by Slovak workers “posted” from Czechia, which do not always require payment of social insurance either (Čaněk 2018). Furthermore, employers use a variety of contractual

arrangements with workers, which make it difficult to establish whether a conventional employment relationship exists. Workers themselves might also not be certain whether they are posted or not and what kind of employment relationship they have (Čaněk 2018; Haidinger 2018; Ødegård and Alsos 2018). An analysis conducted by Eurofound (2016) concluded that self-employment, fixed-term work and the posting of workers are the most affected by fraudulent usage.

Bogus self-employment as an employer strategy to avoid regulations

In Austria, employees are sometimes declared as associates. It is very difficult to prove in jurisprudence that workers are in reality dependent employees and not associates. In Norway, the Labour Inspectorate has developed a check-list to help inspectors to determine the line between employees and the self-employed. According to that, the worker is most likely not self-employed when:

- The employee is obliged to make his/her time available to the employer, and cannot use assistants at his/her own expense;
- The employee is obliged to subordinate to the employer’s management and control of work;
- The employer is responsible for and makes tools and work materials available for the worker;
- The employer is responsible for the outcome of the work/bears the risk;
- The employee receives remuneration;
- The relationship between the parties has a fairly stable character, with a contract that is terminable within a specific timetable;
- The work that you do is mostly for one contractor.



Letterbox companies are a particularly difficult issue because their establishment is legal under EU law³¹ and freedom of establishment within the EU. Letterbox firms are arranged in countries which make corporate registration simple and inexpensive as a strategy to attract revenue³². These companies, however, serve no purpose other than to take advantage of low levels of taxation and social security contributions and/or the less regulated labour markets of some member states, and they have no real presence or operations in the states they inhabit. Furthermore, as social security falls under national competency, Member States are free to continue policies that are attractive to letterbox companies that post workers. The result is a complex institutional picture in which many national and EU bodies are interested in regulating the activities of letterbox companies, but none has the competency to do so on its own (Cremers 2017; Voss et al. 2016). The recent Enforcement Directive³³ (Article 4) provides a list of factual elements that should make it easier to determine the genuine establishment of the posting company. These are:

- (a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable and in accordance with national law, has a professional licence or is registered with the chambers of commerce or professional bodies;
- (b) the place where posted workers are recruited and from which they are posted;
- (c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- (d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;
- (e) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

Complex Subcontracting Chains

Subcontracting chains create issues for transnational labour enforcement similar to those created by letterbox companies. Subcontracting chains can be problematic for several reasons. First, they can create labour market segmentation, which can also have a negative effect on working conditions for non-posted workers in host countries and can undermine the capacity of labour unions. In labour intensive sectors like construction, where posting is a common phenomenon, local workers usually occupy positions in the upper tier of the chain, while posted workers are employed by lower-level subcontractors and concentrated on specific occupations (e.g. Caro et al. 2015). Additionally, subcontracting chains may prevent workers from having a relationship with their de facto employer, preventing responsible actors within the firm from being held accountable and making worker resistance more difficult. The result can be depressed wages and worse working conditions, as well as a new regulatory space that requires the special attention of labour inspectorates.

It is often unclear exactly which section of a subcontracting chain should be held accountable for labour rights violations as actors shift blame up or down the chain, which presents a challenge for labour enforcement (Lillie 2012; Voss et al. 2016; Wagner 2015; Wagner and Berntsen 2016). To combat difficulties stemming from the complex subcontracting chains, different countries have established diverging systems of soft and hard law liability regulations (see Heinen et al. 2017; Jorens et al. 2012; van Hoek and Houwerzijl 2011: 130-4).

In Austria, the Anti-Wage and Social Dumping Act foresees the liability of the direct contractor (and, in specific cases, the principal contractor as well) against withheld wages in construction works and related cleaning works. Posted workers can assert their claims (in case the direct employer is not paying) to the applicable minimum wage in Austria

31. Except in the transport sector, where there is the Regulation 1071/2009 “establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator”. In Article 5, “substance requirements for establishment” are laid down, with the aim to avoid the establishment of letterbox companies.

32. Off-shore registries are a well-worn path in the maritime shipping industry, for example, where it is possible to own ships and employ seafarers via anonymous shell companies. One management textbook on maritime economics advises doing this as an effective way of avoiding regulators and legal liabilities (Stopford 1997: 438-39).

33. <http://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX%3A32014L0067>



against the client commissioning the construction works. To do so, the worker must inform the Construction Workers' Holiday and Severance Pay Fund (BUAK) of the pay claim no later than eight weeks after the pay was due. BUAK investigates the details on which the pay claim is based and supports employees in calculating the amount of claimed wages and in identifying the client potentially liable for covering the claim. Finally, BUAK informs the client, the contractor and the employee of the results of the investigation. If the client does not, however, pay the amount specified by BUAK, the employee must bring a civil action against the client. From the perspective of BUAK and the Chamber of Labour, an institution supporting workers to claim labour rights, the period for stating the claims is unrealistically short. Hence, the abolition of these periods is an important demand of the Chamber of Labour. In addition, as the representative of the Chamber of Labour states, the enforcement of liability claims is

... illusory, if a posted worker does not receive intuitional support or accompaniment in this procedure. How can a construction worker coming from Romania to Austria know what to do when his employer does not pay? And even more, that the possibility to claim the contractor exists, what steps he must take and when.

In general, the experts' group discussion in Austria considered it more efficient to limit the possibilities for subcontracting chains than to claim withheld entitlements from the contractor afterwards. This possibility exists in the public procurement of construction works: the subcontracting of specific core tasks of the works can be forbidden by the public procurer; all subcontracting entities must be announced in the bid; firms can be excluded if they have a record of convictions for underpayment or the illegal employment of foreign workers.

German chain liability system

Germany has implemented one of the strictest and more extensive liability schemes that also applies to posted workers. As regards the payment of minimum wages, each subcontractor up to the principal contractor might be held liable in case a posted worker has not received their wage (Bogoeski 2017). In addition, less strict liability rules apply to wage taxes and social security contributions (Wagner and Berntsen 2016). Countries like Norway have followed Germany's lead. Despite this extensive liability system, posted workers in Germany still have difficulties in using the liability system effectively: Problems that constrain the effective use of the system include a lack of written employment contracts, A1 documents and official time sheets, the limited access to legal assistance and employer-generated systems of checks (posted workers might be directed to signing blanco statements showing that they have received minimum wage) (Bogoeski 2017). It seems likely that liability by itself is not going to result in better employer compliance, but it may provide either an incentive to encourage main contractor control and provide a tool or lever for inspectors.

Transnational Execution of Fines

Until the Enforcement Directive there had been no common instrument to regulate the cross-border execution of fines levied to ensure the rights of posted workers, and EU member countries still have a diverse constellation of national procedures governing the payment of fines. Though some instruments have been created to facilitate cross-border fines, none are applicable to all Member States in all cases. The varied use of administrative and/or judicial procedures among Member States in cases resulting in fines further complicates this picture (Velázquez Fernández 2011; Hartlapp 2014), and in practice, cross-border fines, when levied at all, are rarely paid. The ED (Articles 13-19) provides



a common framework for the Member States to enforce financial administrative penalties and fines across borders. Although practical examples of the functioning of the new system are still scarce, some inspectorate representatives (e.g. the Estonian ones), who previously did not have any means for sanctioning foreign employers, are optimistic about the new possibilities that the implementation of the ED gives. In 2015, a lawyer from the Estonian Labour Inspectorate³⁴ described how inspectors' hands were tied with the old act:

One of the big shortcomings in Estonia is [was until December 2016] that ELTSS does not give us a possibility to penalize; ELTSS is the Working Conditions of Employees Posted to Estonia Act. That the Enforcement Directive will be accompanied by cross-border enforcement so that it will be possible to penalize foreign companies and to recover fines through another state. (...) From the employment relations side, we currently (...) can control their employment conditions, we can point out those shortcomings, including wages, we can send summaries to sending states. And then depending on the control measures of that state whether they can do anything or not. That is why everybody is waiting for the Enforcement Directive.

Cross-border fines after the implementation of the Enforcement Directive in Austria

The expert from the Ministry of Social Affairs in Austria asserted that the execution of cross-border fines has been implemented in the Anti-Wage and Social Dumping Act, the district administration authorities (who are executing fines) are being trained and sensitized about the respective provisions of the law. In 2018, the Ministry together with the district administration authorities will examine how the implementation of the ED works in practice in selected countries sending workers. Dependent on the result of this examination, there will be an approach to the European Commission or the CJEU

about the non-adherence of particular countries to the Enforcement Directive.

It is crucial that the executing authorities are taking seriously the obligation to provide feedback about the execution to the authorities that imposed the fine. Up until now, this obligation has not worked systematically but only sporadically. Another principal problem identified by a representative of BUAK was the short lifespan of firms, especially in the construction sector, against the long duration of court proceedings: "Before a verdict is decided the penalty cannot be executed anymore because the firm has vanished or has gone bankrupt." Besides the cross-border execution of fines, the Austrian legislation foresees other penalty measures: in case of the probable non-payment of fines, tax authorities can be authorised to set and collect a provisional security deposit up to the maximum amount of the impending fine (Sicherheitsleistung). In cases of severe infringements, non-resident firms are prohibited from providing services in Austria.

Manipulation of Wages and Underpayment

Although posted workers often sign contracts that promise wages on par with their domestic colleagues, actual wages per hour can often be much lower in reality due to several unfair practices. Workers are often hired to work a set number of hours for a certain wage but are then required to work much longer hours without any increase in wages and overtime compensation. There are also cases of withholding annual leave pay and other (night, weekend) extras (Wagner 2015). Wages can also be lower for posted workers by using fixed currency exchange rates that are lower than actual rates or due to discrepancies between contracts after a worker is transferred from one country to another (Thörnqvist and Bernhardsson 2016). A well-established cost-saving strategy (also reported by the Finnish inspectors as a common problem, see Alho 2018) is not to follow pay rates based on workers'

34. Interview with the Estonian LI's representative, June 2015

skill/qualification category (that are established in several countries), but to pay highly qualified workers wages applicable to less qualified ones (e.g. the lowest pay category possible). Finally, employers of posted workers often manipulate untaxed allowances by deducting the costs associated with posting (e.g. accommodation, travel) from workers' wages in the sending country (Cremers et al. 2007; Cremers 2011; Cremers 2016). Employers are then able to pay less in social security contributions in the sending country and avoid scrutiny by labour inspectorates in the receiving country (Wagner and Berntsen 2016).

Control in the area of wages of posted work differs among the national labour inspectorates. Control of wage violations seems to be a greater priority in those countries with a longer history of posting (in terms of labour import) mostly EU workers, where it is a trade union concern (regarding violations of collective agreements), as well as where posting is understood to be part of the fight against "social dumping" (sometimes an issue around which there is a convergence on both the political left and right) (e.g. AT, DK, FI, NO).

For example, the interviewed Finnish labour inspectors estimated that in "over 90 %" of posting cases workers were paid less than they should be according to the collective agreements. However, although inspectors can give written advice/instructions to the employers who have violated posted workers' rights, it is not in the inspectorate's competency to claim unpaid wages; posted workers must claim the wages themselves either personally or with the help of trade unions (Alho 2018). In Austria, one representative of BUAK, investigating underpayment in construction, estimates that underpayment in suspected cases of the construction sector amount to 50% of the entitled remuneration: 44 out of 100 inspected cases are suspected of underpayment. In many cases, however, the results of the investigating authorities do not hold before court because new relieving documents are brought forward by employers or posted workers withdraw their testimony. Nevertheless, charges against underpayment

turned out to be successful in 1.106 cases which ended in a final conviction of the employer (551 domestic, 555 foreign employers³⁵) (Haidinger 2018). Financial penalties amounted to 7.318.190 Euro. Overall statistical data on actual earnings and wage inequality in posting have been missing (Fondazione Giacomo Brodolini and COWI 2016).

On the other hand, there are countries which have focused rather on the fight against illegal employment and/or migration. This has been the case, for example, in the "liberal"³⁶ Czech posting context (Ministry of Industry and Trade 2010), in relation to posted non-EU workers, and in Estonia, where the supervision of the legality of employment of people working in Estonia – in cooperation with the Police, Border Guard Board and the Tax and Customer Board – is the second priority (after a reduction of serious or fatal work accidents) of the Estonian Labour Inspectorate (Work Environment 2017). Control over the legality of posting (finding out information about the companies, the existence of A1 forms, social security payments, etc.) then trumps controls over wage and working conditions. According to an interviewee from Hungary, posting as such is not an issue (from the perspective of labour import) due to low wages in general: "This is not an issue today, we do not have to protect our labour market from other countries' cheap labour forces, as there is almost no cheaper labour force than Hungarians within the EU."³⁷ Both the controls of social dumping and illegality of employment and migration are variations of boundary drawing mechanisms between the local and migrant workforce (cf. Silver 2003).

From the point of view of the practical functioning of labour inspectorates, there can possibly be a convergence towards e.g. more focus on wage and working conditions in IMI (newly structured/added questions in the IMI-Posting of workers module as described in the part on Insufficient Information on Posting), as one interviewee suggested³⁸. In general, it has been a shared experience of European

35. "Summary of the LSDB-statistics", https://www.wko.at/branchen/sbg/transport-verkehr/autobus/LSDB-Statistik_Zusammenfassung_20161130.pdf

36. For example, in Czechia posted workers do not need to receive minimum wage for a period of up to 30 days.

37. Interview at the Department for Labour Safety and Labour, Government Office of Budapest, 11 October 2017.

38. Interview with the Liaison Officer, Prague, 4 October 2017.



labour inspectors to have had considerable difficulties connected with the control of wage violations. This sometimes includes the identification of the employer, getting hold of contracts or having access to any kind of wage documentation (see the table below for an example from the Czech context).

Checking the wages and civil contracts of Ukrainian workers posted to Czechia

Based on the experience of the State Labour Inspection Office of the Czech Republic (SLIO), the inspected Ukrainian workers posted to Czechia by Polish companies usually officially receive minimum wages. In practice, workers often work long hours and receive higher wages. There are often trade and civil contracts used between the labour-only subcontractor and the end user (with possibly other companies in between these two), which the labour inspectors tend to investigate as “hidden” temp agency employment³⁹. If the SLIO was successful in claiming that the “posted” employees were temp agency employees, they would have to receive comparable remuneration to their Czech colleagues in similar positions. The labour inspectors, however, may only get access in Czechia to information about payments based on the trade or civil contract between the companies; they lack wage documentation or sometimes even contracts for the workers. According to the SLIO, it would have been up to the Polish labour inspectorate to find out about the wages.

The workers have disposed of different kinds of labour and civil contracts from Poland. With civil contracts such as mandate agreements there is no minimum wage set (they are not covered by the Polish Labour Code), nor are social security payments always obligatory. It is possible to have a Polish work permit with the mandate agreement. The SLIO has not, however, accepted the mandate agreements as a proper type of contract for posting because they are not employment contracts, which was made clear in one of the construction cases investigated and can be implied from par. 98 k of the Employment Code No. 435/2004, Coll.⁴⁰

Good practice: Use of tax numbers at Finnish construction sites

The Finnish government, influenced by the social partners, has reregulated the construction sector and made construction sites more controllable after problems related to the posting of workers became a political issue (Sippola and Kall 2017). For example, since 2013, all workers in the construction sector are obliged to obtain a tax number and the register of tax numbers has been made public⁴¹. In addition, the Act on the Contractor’s Obligations and Liability when Work is Contracted Out establishes that companies who use temporary agency work or subcontractors must check that their contractual partner is reliable and can take care of its legal obligations. Furthermore, construction contractors, project supervisors or employers directing/supervising a construction site must make sure that all workers on the site are wearing a visible pictorial identification that includes their name, tax number and their employment relationship, including the name of their employer. A project supervisor must maintain a list of workers on the site.⁴²

In some countries, there are notification and reporting requirements on remuneration; e.g. in Austria these were introduced with the implementation of the Enforcement Directive⁴³. Violations of reporting obligations and the obligation to keep documents readily available can be penalised with fines between 1.000 and 20.000 Euro (in case of repetition)⁴⁴.

From the point of view of the workers’ concerns about underpayment or non-payment of wages, they may be hesitant to contact the labour inspectorates or other relevant state institutions enforcing wages. In Austria, neither labour inspectorates nor other public authorities are the contact points in charge of the enforcement of non-paid wages. They are only the investigating authorities for the enforcement of public law, i.e. law in place to combat wage and social dumping that penalises employers in case of infringement.

39. See the new par. 4 g) of the Employment Code 435/2004/Coll.

40. Anonymised minutes from control, Regional Labour Inspectorate for Central Bohemia, 13 June 2017.

41. https://www.vero.fi/en/individuals/tax-cards-and-tax-returns/tax_card/individual_tax_numbers/

42. <https://www.rakennusteollisuus.fi/globalassets/tyoelama/tyovoima/guide-for-employment-of-foreigners-2013.pdf>

43. http://www.entsendeplattform.at/cms/Z04/Z04_10.5.1/formal-requirements/notification-requirements

44. Anti-Wage and Social Dumping Law, Section 26.



Some labour inspections issue a demand to an employer to pay back the correct wage; however, the posted workers usually need to take the case to court in the case of employer's non-compliance (e.g. FI, EE). Recently, along with the implementation of the Enforcement Directive in Estonia, posted workers can also bring their case to the Labour Dispute Committee (which works much faster than the court system); however, so far there has been little experience with it as only one worker posted via a Polish company to Estonia has turned to the Committee with the aim of getting their back pay, and the Committee partially satisfied the claim (Kall 2018). With the lack of functioning institutional mechanisms to cover wage violations, posted workers may look for alternatives to the state enforcement of labour law and/or NGO support; in the Czech case, there are private services provided by quasi-mafia structures which are efficient in providing unpaid wages for a commission (Trčka et al. 2018). In Austria, the Anti-Wage and Social Dumping Act foresees – to a certain extent – the possibility of a forbearance of fines for an employer accused of underpayment if they acknowledge their faults and pay the missing wages to the respective employees (Nachsichtsregelung).

Likewise, workers who are affected by employer misconduct do not automatically receive any financial compensation unless they themselves take misconduct to the courts and win (Čaněk 2018; Ødegård and Alsos 2018; Wagner and Berntsen 2016). In some countries, trade unions also have standing to pursue claims (Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna (C-396/13)).

Privacy and Confidentiality Concerns

Though the need for information sharing between national labour inspectorates is clear, simplified access to the personal information of EU citizens involved in posted work also raises security and confidentiality concerns. Currently, there are EU legal provisions in place designed to protect the personal information of individuals by establishing limits on the capacity of national bodies to share personal

data. Individual states must pass laws at the national level in order to allow for labour inspectorates to legally share personal information with other states. As the protection of personal data is recognized as a fundamental right in the European Union, it is important that member states create a legal framework for the sharing of information that facilitates transnational cooperation without compromising citizens' right to privacy (Velázquez Fernández 2011).

Therefore, the IMI Regulation 2008/49/EC sets out a number of limitations and protections for the personal data submitted to IMI that concern, amongst others, a purpose limitation (the data in IMI “shall only be used for the purposes for which the data were submitted”, art. 13) and its retention (length of keeping it accessible only as long as necessary for the purpose of its collection, art. 14). Some of the critical voices by interviewed labour inspectors towards the particular features of IMI's functionality may be related to the privacy concerns and risks with the build-up of IMI as a “single centralized electronic system” (Wall 2016: 29).

The sharing and archival of data always needs to be negotiated with the conditions regarding the aforementioned purpose and retention period. There are practical issues related to the confidentiality of data, i.e. sharing of data among national institutions. There are cases when data is not passed from one national institution to the next concerning a particular request through IMI precisely because of sensitive personal data issues. Sometimes the labour inspectorates are not certain whether they can pass on some data that could be useful to their partnering institution:

We had an inspection, we got information from another country. But we don't know if we are allowed to give these documents to the police. In the first place, they should only be used for our case.⁴⁵

45. Focus group, Finnish Labour inspector, Helsinki, 24 May 2017.



Good practice: Joint agency for establishing mutual trust and cooperation

In Norway so-called labour crime-centres are established in seven cities across the country. These are practical cooperation- and investigation-centres between labour inspectors, police, tax-authorities, and the welfare authorities. The centres conduct joint inspections and might bring with them persons from the fire-department, customs service, the food safety authority, municipal treasurer and others. A main challenge for these centres is the exchange of sensible information from one authority to another due to sensitive personal data issues. All the authorities are now working to make the cooperation easier in the field of confidentiality.

Posted workers' awareness of rights and relations with enforcement bodies

In addition to the above-mentioned problems related to effectively monitoring and enforcing the rights of posted workers, posted workers' lack of awareness of their rights is also an important issue that hampers the lawful functioning of the posting system. Workers can be unaware of or confused about their employment situation; for example, are they categorized under posted or seasonal workers? Or are they even working in the country legally?

Labour inspectorates in some countries either lack or have an ineffective information policy towards posted workers, and posted workers themselves might be too afraid to turn to the labour inspectorate for help. The lack of a proper information policy towards posted workers can be illustrated through the situation in Austria.

First, inspection authorities in Austria (Financial Police, BUAK, competence centre for wage and social dumping) do not primarily have the mandate to actively inform posted workers about their rights and entitlements. BUAK generally informs posted workers about their entitlements and rights (in its

office and online) but does not actively accompany posted workers to pursue their claims in the case of a suspicious underpayment (BUAK is a unique institution for the construction sector; in other sectors, no particular sector-related information policy for posted workers by authorities exists). As was mentioned by the BUAK representative, it is crucial to reach posted workers personally. The online posting platform does give all the necessary and relevant information; however, written and impersonal information is less accessible than information provided face-to-face. Second, BUAK does not represent posted workers in court to claim their wages when underpayment has been detected.

Norwegian inspectors, on the other hand, are (pro) actively informing (posted) workers about their rights. The Norwegian Labour Inspection Authority has implemented practices to facilitate better communication with foreign/posted workers. For example, they have inspectors with different language skills, they use questionnaires and leaflets about working conditions in multiple languages, and they have established a communication training program for inspectors. In addition, Norway has five service centres for foreign workers (Ødegård and Alsos 2018). Generally, in order to better reach posted workers, inspectors in most countries need more staff and resources.

Good practice: Service centres for foreign workers

Ten years ago, the first Service Centre for Foreign Workers (SUA) was established in Norway, Oslo. After that, four additional centres have opened in different places in Norway. The centres are operated in cooperation between the Labour Inspectorate, the police, the tax authorities and the Norwegian Directorate of Immigration (UDI). The authorities work together on foreigners arriving in Norway for employment purposes, with the aim of providing them appropriate guidance and shortening the time used for processing their applications. Those who can use the services at the offices are persons from EU/EEA-countries who come to work in Norway, their family members, persons from countries outside the EU/EEA who are going to apply for a residence permit in order to work in Norway and their family members, and employers.

Non-EU citizens as posted workers

From the point of view of some national labour inspectorates there is a notable presence of posted non-EU citizens from other EU Member States (e.g. CZ, DK, EE, FI). While, for example, in Belgium the posting of non-EU workers remains small in comparison to the overall numbers of posted persons (Mussche et al. 2017), in some countries the posting of non-EU workers has grown; e.g. in Czechia, 500 recorded posted Ukrainian workers in 2015 and about 7 thousand currently. Regarded as “fake” posting (cf. Cremers 2011), it has received substantial attention from the Czech State Labour Inspection Office since the end of 2015.

Regardless of whether the status of the workers as posted is real or fake, ILO conventions – C97 Migration for Employment Convention (Revised), 1949 and C143 Migrant Workers (Supplementary Provisions) Convention, 1975 establish that all migrant workers, even if their status in the host country is irregular, have basic human and labour rights. For this reason, as well as to help ensure labour market

stability and to gain the cooperation of these workers in investigations, labour inspectorates should seek to protect the rights of these workers and avoid being caught up in immigration enforcement operations.

In 2016 there were about 1.3 million Ukrainian workers that received declarations of intent to employ a foreigner⁴⁶ in Poland. The more liberal labour migration policy in Poland, along with labour migration restrictions in the receiving states, partly explains the important role played by companies established in Poland that post Ukrainian workers to other EU states. The Polish National Labour Inspectorate has been receiving the most IMI requests for information about non-EU workers posted via Poland from Germany, France and Czechia⁴⁷. This labour migration is short-term, circular and attests to the rise of intermediaries. These intermediaries are a new development in Ukrainian-Poland labour migration, as they had not played such a role in organising Ukrainian labour migration in the recent past (Keryk 2018).

The legal status of (re)-posted non-EU nationals is tangled. It has been complicated for some labour inspectorates and other state bodies to navigate EU law, the Court of Justice of the European Union decisions and national law in order to understand the legality of posting (some labour inspectors criticised the unclear definition of posting) and coordinate national positions towards the posting of non-EU workers. Based on EU law and court decisions (e.g. judgements C-113/89 Rush Portuguesa; C-43/93 Vander Elst), service providers should in principle be allowed to post non-EU workers (those having legal residence and work authorisation in the posting country) and not encounter administrative barriers to the exercise of mobility rights; although many states do not require a work permit for non-EU workers posted from another EU state, the particular requirements vary (see e.g. the CJEU ruling C-307/09-309/09 Vicoplus), and some countries require work permits or set other obligations (European Migration Network 2013: 30; Joklová et al. 2009; Lalanne 2011).

46. http://www.migrant.info.pl/Declaration_of_the_intention_to_entrust_a_job_to_a_foreigner.html.

47. Interview at the Polish National Labour Inspectorate, Warsaw, 28 September 2017.



Clearer positions towards the posting of non-EU workers have been missing, especially in countries for which the posting of non-EU workers has been a relatively new phenomenon. For example, the Polish National Labour Inspectorate came up with an interpretation of EU law and the CJEU judgments with regards to the posting of non-EU workers from Poland for the Polish Border Guard; one of the conclusions was that the particular conditions vary and depend on the country receiving posted workers⁴⁸. In the Czech context, it has taken almost two years for state agencies to agree on the conditions for the legality of employment and residence for posted Ukrainian workers; a leaflet for posted workers in Ukrainian was finalised only in October 2017. The leaflet contains the understanding of legal posting according to Czech authorities: prior employment in the posting country for at least two months, dependent employment in relation to the posting company, etc. (see box below for a particular case).

Case of re-posting of non-EU workers

A Hungarian company, with a director who is a Romanian national and lives in Romania, posted Romanians, and later Serbs, to Slovakia. Slovak colleagues at the labour inspectorate asked for information at the Hungarian Labour Inspectorate about the Hungarian company. The Hungarian Inspectorate could not provide most of the information because they could not find the Romanian director of the company. What they were able to do in this case is inspect whether the company had any kind of economic activity in Hungary, and if not, they could ask the court to remove the company from the Hungarian company register. The Hungarian Labour Inspectorate had no information as to whether the Slovak colleagues had also contacted the Romanian Labour Inspectorate in this specific case, because IMI does not provide any information on that. What they were able to find out was that the workers had fake A1 forms.⁴⁹

The challenges with labour enforcement in regard to posted non-EU workers stem from interactions and conflicts between labour and migration law (Costello 2016). The interactions between migration and labour law play out differently in local labour markets. For example, in Estonia, where immigration restrictions for non-EU workers are quite high and hired non-EU workers must be paid at least a national average wage⁵⁰, posting non-EU citizens through other EU countries can give considerable labour cost advantages to employers, as posted workers are only entitled to national minimum wage⁵¹. In Sweden, the migration control model based on the strict regulation of labour standards, by trade unions especially, has been undermined by the lower labour rights standards of the posted worker regime (Engblom 2014). In other contexts, migration control has been prioritised over labour regulation control (see the above section Manipulation of Wages and Underpayment).

The controls usually require the cooperation of multiple state agencies, most commonly labour inspectorates and the police. In some countries (e.g. CZ, EE, FI) police and the inspectorate also do joint visits when suspecting the presence of (posted) non-EU workers. For example, in Estonia, the police first establish the legal status of non-EU workers, and those without valid living and working permits will be taken to the police station. Alternatively, these (more conflictual) checks are carried out by a larger number of labour inspectors⁵². There is a tension for the labour inspectorates especially as concerns its relation towards migrant workers, who are in a precarious legal position (including those unauthorised to work or stay in the country) in the labour market. The labour inspectors do not usually (e.g. CZ, PL) give fines to the migrant workers themselves as they are aware of the more vulnerable position of workers vis-à-vis employers. On the other hand, there is no protection for migrant workers who approach the labour inspectors in the event of a labour rights violation; in case these workers do not have all their

48. Interview at the Polish National Labour Inspectorate, Warsaw, 28 September 2017.

49. Interview at the Department for Labour Safety and Labour, Government Office of Budapest, 11 October 2017.

50. <https://www.riigiteataja.ee/en/eli/ee/508092017001/consolide/current>
51. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

52. Focus group, Finnish Labour inspector, Helsinki, 24 May 2017.



papers in order, based on the current legislation and practice in the national contexts, they would usually be reported to the immigration authority (“If the worker is not working legally, we have to report it to the police without consideration [of the situation of the worker]. In other labour crimes there is always the consideration of whether to report it to the police”⁵³).

Revision of the Posted Workers Directive

As of this writing, the PWD is under revision. The Directive process of the EU starts by the Commission drafting a document, which, in the co-decision procedure applicable to the PWD, the Council and the Parliament consider and may amend. The amended versions can diverge, and these divergences must be reconciled so that both bodies can pass it. There is an agreement on a draft in the Council which will need to be reconciled with a version agreed on earlier by the Parliament.

The new draft aims to provide stricter rules for posting, including a time limit of 18 months. Significantly, the principle of equal treatment with local workers is explicitly applied to posted workers, which challenges the legal dynamics set out in the Laval quartet decisions based on sending country conditions – there, equal treatment applied only to mobility of firms, with unequal treatment a protected right of firms deriving from their mobility rights. All aspects of remuneration will now have to be equal to that of local workers. Road transport is currently temporarily outside the Directive, pending an agreement for the sector which will be agreed upon later. Other industries besides construction are now in the scope of the Directive; previously the decision to extend the PWD beyond construction was left to national governments. Clarity on the terms of employment required for posting to a particular state, and the employers’ ability to determine those in advance, is emphasized in the directive following the CJEU’s line in Laval and Rüffert.

Views on the Directive fall mostly along east/west lines, with net labour receiving countries mostly supportive and net labour sending countries mostly opposing, but political deals appear to have been made – in particular by French President Macron – in order to make possible a broader consensus. This split probably indicates that most actors see it as a tightening of conditions and improvement on posted worker labour protection. However, the European Trade Union Confederation nonetheless has expressed disappointment with aspects of the current draft in a press release, because it:

- Excludes road transport workers from the improvements in the revision until an agreement is reached on the Mobility Package for Road Transport;
- Contains insufficient safeguards for the effective payment of allowances;
- Does not include a legal base to make it an instrument for the protection of workers, as opposed to only single market law;
- Fails to recognize many types of collective agreements;
- Allows an unusually long 3-years for transposition of the revised Directive.⁵⁴

From this, we can conclude that the new PWD – assuming a resolution between the two versions can be found – will promote new rights but still leave substantial areas of unclarity. Moreover, the rights granted will not be any more enforceable than before, which means that the development of labour inspection will play an ever more important role. The situation may improve somewhat if aspects from the European Parliament’s version are adopted, such as the “double legal basis” which would make it based in both worker protection and free movement, rather than just free movement. This is important because many of the negative CJEU decisions have resulted from a purely free movement judicial interpretation of the PWD, which from the start subordinates workers’ rights to free movement.

53. Focus group, Finnish Labour inspector, Helsinki, 24 May 2017.

54. <https://www.etuc.org/press/revision-posting-workers-directive-justice-workers-now-depends-meps#.WfxtlWeGd44>

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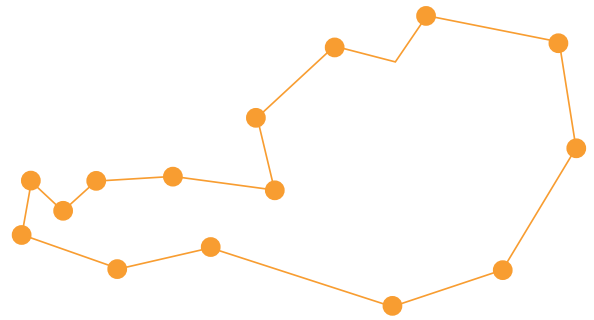
Published and disseminated by: SOLIDAR

We are grateful for the provision of information by all our interviewees in labour inspectorates, other enforcement agencies, state institutions as well as representatives of other institutions. We also want to thank the members of the PROMO and STRONGLAB projects and participants of the conference “Strengthening Trans/national Cooperation among Labour Standards Enforcement Agencies in Europe: Challenges and Opportunities” (24-25 November 2017, Prague) for their input on the paper in particular and the PROMO project in general. Special thanks to Arsenio Fernandez Rodriguez, Anu Ikonen and Frederic De Wispelaere who provided extensive feedback on this paper’s earlier version. Contact: kairit.kall@tlu.ee

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COUNTRY STUDY



AUSTRIA

Transnational Monitoring and Enforcement of Posted Work: The Case of Austria

Bettina Haidinger, FORBA



This report is mainly based on information derived from a group interview conducted on October 18th, 2017, with representatives from the Austrian Federal Ministry of Labour and Social Affairs, including the head of the Austrian Labour Inspectorate and of the Labour Inspectorate Department responsible for the construction sector, with the head of the Financial Police Vienna, with three representatives from the Construction Workers' Annual Leave and Severance Pay Fund including an inspector inspecting on-site, with representatives from the Vienna Regional Health Insurance Fund, and with a representative from the Chamber of Labour, Vienna. The group interview followed a thematic guideline, it was recorded and transcribed. It lasted three hours and 30 minutes. In addition, BUAK provided information about numbers of inspectors and inspections carried through on construction sites. The online-information tool "Entsendeplattform" (posting online platform) was consulted for information on rights, entitlements of posted workers in Austria, and legal provisions with respect to posting in general.



Mapping national enforcement capabilities

In contrast to generalist, centrally-organised labour inspectorate models (e.g. in the Czech Republic, France or Spain), where inspectorate's responsibilities can include the control of labour relations, occupational health and safety (OHS), social security administration, and legal and illegal work, Austria must be subsumed under the type of "specialist inspectorates". Its main responsibility lies in inspecting occupational health and safety issues and working time (Walters 2016).

When it comes to the inspection of posted workers, their remuneration, social insurance status and working conditions, a variety of authorities are in charge of executing the regulations stipulated in the Anti-Wage and Social Dumping Act (LSD-BG)¹ that implemented the Posting of Workers Directive in Austria. In Austria, not the Labour Inspectorate, but the Financial Police and the Construction Workers Leave and Severance Pay Fund - BUAK (for the construction sector) are the bodies for the inspecting and investigating posted workers' correct remuneration and the compliance of posting firms with the respective regulations; the Competence Center for Combating Wage and Social Dumping (run by the Vienna Regional Health Insurance Fund) validates suspicious cases investigated by BUAK or financial police). The labour inspectorate is in charge of the compliance with occupational health and safety and working time regulations.

Coordinated inspections among investigating authorities also take place. Principally, we have to differentiate between (1) authorities registering posted workers, inspecting posting firms and investigating suspicious cases and (2) enforcing/jurisdictional authorities mentioned in the Anti-Wage and Social Dumping Act (LSD-BG). The LSD-BG defines the tasks and responsibilities of these authorities.

The *registering/inspecting/investigating* authorities include

- a)** Financial police. This authority is responsible for the inspection of posted workers' payment and social insurance status. They are also the receiving authority of posted workers' registrations/notifications. In addition, they are also in charge of tax investigation, fraud, customs, and illegal employment of foreign workers. The financial police are subordinated to the Ministry of Finance. Currently (2017), the number of overall inspectors is at 450. According to the head of financial police Vienna, it would be necessary to stock up to 600 to fulfil effectively their tasks and responsibilities.
- b)** Construction Workers' Annual Leave and Severance Pay Fund (BUAK). This is a very important authority in the construction sector. They have the competence to check wages and other workers' entitlements at the construction site, including posted workers. All construction workers in Austria are eligible to special leave entitlements. This means that (also foreign) companies active in Austria with employees are being obliged to pay wage supplements to BUAK for the posting's duration. The supplements only concern annual leave and grant the employee a direct claim to payment of holiday pay against BUAK. Currently (2017), BUAK commands 37 inspectors, experiencing a significant increase from 2011 onwards when the number amounted only to 10 inspectors for whole Austria.
- c)** Labour inspectorate. This authority is primarily responsible for OSH and working time issues. They do not check wages of posted workers or the state of posted workers' social security status.
- d)** Competence Center for Combating Wage and Social Dumping, health insurance providers. These authorities validate suspicious cases investigated by BUAK or financial police.

1. Lohn- und Sozialdumping-Bekämpfungsgesetz, Version as of 04.07.2017, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555>, <http://www.entsendeplattform.at> (English) goo.gl/P5EgYQ



The *jurisdictional authorities* adjudicating and enforcing penalties include the district administration authorities in case of administrative penalties, and labour courts in case of infringements against labour law.

In Austria, collective agreements are binding, hence posting firms have to comply with the respective collective agreement and pay to posted workers what is paid to comparable workers that have their habitual workplace in Austria.

After the implementation of the ED, Austria has established a mandatory notification/ registration system for foreign service providers. In Austria, non-compliance with notification requirements carries along high penalties. Notifications also have to be kept updated. This updating is particularly relevant in the construction sector where the start of the construction works can be delayed due to various reasons. For example, posted workers are deployed later, or more or less workers are posted to the construction site. Authorities report that the selection of inspections on the basis of notification data is not ideal. BUAk estimates that 50% of their inspections of construction sites with posted workers are idle running. The financial police conversely reported that 60% of their inspections are driven by complaints, and resources are absorbed by many small single cases instead of dedicating them to cases based on a profound risk analysis. In addition, a 25% increase of personnel (to 600 inspectors) to the financial police would be needed to exercise their inspection mandate efficiently.

Transnational cooperation

The IMI coordination lies with the Federal Ministry of Science, Research and Economy. However, information requests are not centralized there. Also, the financial police, the competence centre, BUAk, district administration authorities, and specific courts do

have access to IMI. All in all, transnational cooperation with respect to exchange of information and intensify administrative assistance with respect to posting is said to be “rudimentary” and only in its beginnings. There are plans to intensify contacts and exchange with particular countries, especially with Poland.

Interview partners considered the IMI system as a helpful tool to communicate with authorities from countries where information is required. Partly good experiences with information requests, given mostly in time and with relevant answers on the information requested (e.g. economic activities of posting firms in the sending state; identification of employer via UID number, etc.) were reported. In addition, as one representative of the Competence Center for Wage and Social Dumping, highlighted, requests about suspicious companies from the receiving country (Austria, e.g.) can draw particular attention to the authorities from the sending country for this firm, and turn out as a relevant indication for the detection of letter-box companies.

At the same time, communication between Austrian authorities and social insurance funds from sending states (Poland and Slovenia were explicitly mentioned) were reported to be cumbersome. Simply providing (not requesting!) information about social insurance contributions to the social insurance funds abroad, calculated on the basis of the receiving state’s wage level, sometimes turned out to be difficult and tedious. As was explained by several interview partners (BUAk, financial police), it seems that foreign social insurance institutions are not interested in being notified about a posted workers’ actual assessment basis for their social insurance although the temporary (for the time of the posting) higher assessment base would bring higher employers’ contributions and income for the social insurance institutions of the sending state. Another main problem mentioned was the lacking feed-back of authorities (mostly in the sending states) that are executing fines to the authorities (mostly from the receiving countries) having imposed these fines.



Issues specific to the cross-border regulation of posting

Posting of workers to Austria - Data

In 2016, according to the Austrian Ministry of Finance², 67.279 posting notifications have been submitted. In 2017, this number has been exploding due to updated notifications from companies providing transport services (see below) to more than 500.000 posting notifications. It has to be taken into account that this number is just the total number of notifications and includes multiple countings (e.g. if the start of a construction site is postponed, data is inserted once again into the system). It is not possible to conclude from this data how many different workers per year have been posted to Austria. For comparison, statistical evidence of BUAK notably for the construction industry counted 13.586 persons per year in 2016 that have been posted to Austria.

Detecting fake posting

All authorities taking part in the group interview and the chamber of labour reported cases of fake posting, i.e. posted workers actually have their habitual workplace in Austria. One main problem is to verify if an alleged posted worker is in fact a posted worker as was raised by the financial police responsible for the inspection of posted workers' pay slips and social security status and the regional health insurance fund responsible for the validation of suspicious cases: Even if inspecting authorities document that the worker's habitual place has been in Austria (i.e. he/she is not a posted worker) it is almost impossible to overrule the binding character of the A1 form in the context of social insurance law (not of labour law!). This means, as long as the issuing authority (from the sending state) does not withdraw this document – often a long process – the worker is regarded from the perspective of social insurance law as a posted worker.

In addition, the Austrian financial police report the easy manipulation of the paper version of A1 form. Authorities should know for sure how and with which assessment basis the (posted) workers are registered in their countries of origin. The A1 form in its paper version should from the perspective of the Austrian authorities not be regarded as a sufficient proof. However, it is up until now. In this respect, the obligatory online documentation of the social insurance status of the driver would be incisive to be able to check immediately his status in his/her country of origin. Such a system is in place for the European-wide verification of VAT number validity (MIAS-System).

In case of fake posting, the WHOLE labour-law related statutes are then in place for these workers (as for a worker employed in Austria). Fake posting occurs for example when workers are employed by a company from abroad even though this company does not exist or just exists as a letter-box company. This practice is common in construction but also in road haulage.

Underpayment

In Austria, one representative of BUAK, investigating underpayment in construction, estimates that underpayment in suspected cases of the construction sector amount to 50% of the entitled remuneration. 44 out of 100 inspected cases are suspected of underpayment.

In many cases, however, the results of the investigating authorities do not hold before court because new relieving documents are brought forward by employers or posted workers withdraw their testimony. Nevertheless, in 2016 charges against underpayment turned out to be successful in 1.106 cases (all sectors), which ended in a final conviction of employers (551 domestic, 555 foreign employers) affecting 2.297 workers (877 domestic and 1.420 foreign workers³). Financial penalties amounted to 7.318.190 Euro.



2. https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_11126/imfname_626043.pdf
3. "Summary of the LSDB-statistics", https://www.wko.at/branchen/sbg/transport-verkehr/autobus/LSDB-Statistik_Zusammenfassung_20161130.pdf



Are transport workers posted workers?

Specific problematic constellations can be found in the transport sector when drivers provide cross-border services (Haidinger 2017). Europe-wide, different interpretations of the PWD with respect to “mobile workers” such as drivers, are applied. In Austria, all traffic, except of transit, is subject to the posting of workers’ regulations. Up until recently (2016/2017) road haulage cross-border services, including cabotage operations, were seldom regarded as “posted work”. Accompanying the revision of the Anti-Wage and Social Dumping Act (LSD-BG), the transport sector was explicitly mentioned as being subject to this law. An explanatory note was published by the ministry of social affairs because service providers did not consider the transport sector as being subject to the posting of workers’ regulations. Hence, this note explicitly explains cases of the posting of workers as defined in the LSD-BG for the transport sector. Only since the beginning of 2017, posting notifications of transport companies are identified, the numbers exploded: According to a written request for information by email, from Jan 2017 to Oct 2017, the financial police reported 500.000 notifications in the transport sector alone. This is a very high number; however, it does not say anything about the number of individual posted workers; it is just the total number of notifications and includes innumerable multiple counting.

Liability of contractors

In Austria, the Anti-Wage and Social Dumping Act foresees the liability of the direct contractor (and in specific cases also of the principal contractor) against withheld wages. This only applies for construction works and related cleaning works. Posted workers can assert their claims (in case the direct employer is not paying) to the applicable minimum wage in Austria against the client commissioning the construction/cleaning works. A claim can be asserted against the principal client in specific circumstances, i.e. if prior to commissioning the works the principal client was aware that this amount would not be paid.

To assert claims, the worker has to inform the Construction Workers’ Holiday and Severance Pay Fund (BUAK) of the pay claim by no later than eight weeks from when the pay was due. The BUAK investigates the details on which the pay claim is based and supports employees in calculating the amount of claimed wages and in identifying the client potentially liable for covering the claim. Finally, BUAK informs the client, the contractor and the employee of the results of the investigations. If the client does not, however, pay the amount specified by the BUAK, the employee must bring in a civil action against the client. From the perspective of BUAK and the Chamber of Labour, an institution supporting workers to claim labour rights, the period for stating the claims is unrealistically short. Hence, the abolition of this expiry period would be helpful for posted workers, according to the Chamber of Labour. In addition, as the representative of the Chamber of Labour states, the enforcement of liability claims is “illusionary”, if a posted worker does not receive institutional support or accompaniment in this procedure:

„It is unlikely that a construction worker coming from Romania to Austria knows what to do when his employer does not pay, or even that the possibility to claim the contractor exists, what steps he must take and when.”

In general, the experts’ group discussion considered it more efficient to limit the possibilities for subcontracting tasks beforehand than to claim for withheld entitlements from the contractor afterwards. This possibility exists in public procurement of construction works: The subcontracting of specific core tasks can be forbidden by the public procurer; in addition, all subcontracting entities have to be announced in the bid; firms can be excluded if they have a record of convictions of underpayment or the illegal employment of foreign workers.



Posted workers' awareness of rights and entitlements: information, counselling and enforcement

Main information for posted workers and for posting employers that summarises among other aspects Austrian minimum wage requirements and employment regulations and the steps required to ensure compliance with these laws, can be accessed on a multilingual website: http://www.entsendeplattform.at/cms/Z04/Z04_10/home. The website is well-frequented. Since beginning of 2017, 1.000 requests for information via email have been received (info of the Ministry of Social Affairs). One problem identified was that mainly employers are reached by the site. It is difficult to get workers draw information from written sources. It would be helpful to bring information directly to the workers. Experts stated the Anti-Wage and Social dumping Act itself (one of the "cruellest" in Europe due to its high fines and comprehensive paragraphs), the online information platform, a good networking between authorities and the legislative having prepared and revising the law if necessary, and the notification requirements for posting, are important measures of prevention of wage and social dumping in posting arrangements. Still poorly developed, however, is the direct contact and information of the posted workers.

Hence, the main problems identified to make the existing posting regulations work out for the posted workers themselves, were a) a lacking information policy to posted workers about their rights and entitlements that efficiently reaches them and b) the effective enforcement of entitlements.

First, inspection authorities in Austria (financial police, BUAK, Competence Center for Wage and Social Dumping) do not primarily have the mandate to actively inform posted workers about their rights and entitlements. BUAK generally informs posted workers about their entitlements and rights (in its office and

online) but does not actively accompany posted workers to pursue their claims in case of a suspicious underpayment⁴. As was mentioned by the BUAK representative, it would be crucial to reach posted workers personally. The online posting platform does give all the necessary and relevant information, however written and impersonal information is less accessible than information provided face-to-face.

Second, BUAK does not represent posted workers before court to claim their wages when underpayment has been detected. This is due to the different kind of law in place: Offences against occupational health and safety as well as underpayment of posted workers by their employers are subject to public law resulting in administrative penalties of the employer enforced by district administration authorities. Non-paid wages however have to be claimed individually, legal proceedings are subject to civil right. In Austria no collective complaint can be made for non-paid wages. The main problem is: at what point will a posted worker expose themselves and risk a legal action against his/her employer?

An important policy solution would be the possibility to claim wages collectively ("Verbandsklage") and to install an institution in charge for representing posted workers before court. In Austria, this could be the Chamber of Labour, the statutory representative body of employees having their habitual workplace in Austria. Since posted workers do not have their habitual workplace in Austria, they do not pay the compulsory membership fee and therefore are not covered by legal protection.

4. BUAK is a unique institution for the construction sector, in other sectors no particular sector-related information policy for posted workers by authorities exists.



The Enforcement Directive

In Austria, regulations stipulated in the Anti-Wage and Social Dumping Act (LSD-BG) intend to combat wage and social dumping, especially in cross-border constellations. It entered into effect as of 1 May 2011, and has been in force since then. It covers all workers who have an employment based on a contract under private law with an Austrian employer as well as workers who have their habitual place of work in Austria or are posted or hired out to Austria but are employed by a foreign employer. In January 2017, a revision of the LSD-BG became effective. It transposes the Enforcement Directive 2014/67/EU⁵ concerning the posting of workers in the framework of the provision of services into national law. Hence, the Act stipulates claims that can be made for entitlements based on labour law and measures to protect them specifically in case of posting and hiring-out of workers. The measures include:

- notification and reporting requirements: posted workers have to be notified with the financial police;
- keeping reporting, wage and salary documentation (A1 social security document, records of hour worked, pay documents, etc.);
- liability provisions especially for the construction sector, general contractor liability in case of public sector client;
- penal provisions, prohibition of services, payment freeze, security deposit; enforcement of fines in administrative penalty law: Fines amount between 500-50.000 Euro. Violations of reporting obligations and the obligation to keep documents readily available in cases can be penalised with fines between 1.000 and 20.000 Euro (in case of repetition). The Act foresees - to a certain extent- the possibility of forbearance of fines for the employer accused of underpayment if the employer acknowledge their faults and pay the missing wages to the respective employees (Nachsichtsregelung).

Complaints and fines following infringements against the LSDB-G – data and execution

Following the legal stipulations and controlling operations of the financial police, the financial police filed 1.244 complaints due to false or missing posting registrations. Fines applied amount to 3.975.154,00 Euro.

Between May 2011 and November 2016, 1.942 charges due to underpayment (963 against domestic and 979 against foreign employers) have been filed amounting to applied fines of 31.322.360 Euro. Of these charges 1.106 cases ended in a final conviction of employers (551 domestic, 555 foreign employers), affecting 2.297 workers (877 domestic and 1.420 foreign workers). Financial penalties amounted to 7.318.190 Euro. 28 final judgements have been imposed for the prohibition of services by the competent district administration authorities. Broken down by industries, construction and related services (630) dominated the convictions for underpayment, followed by catering, trade, and temporary agency. In transport and company cleaning 38, respectively 37 convictions have been spoken out⁶.

BUAK reports that around 53% of contributions to the BUAK are collectible. Executions in cross-border constellations are possible, but costly. Lawyers in the sending countries have to be hired, they are taking care of executing the collection of contributions. Penalties are only issued by administrative courts or district authorities.

5. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1440756056661&uri=CELEX:32014L0067>

6. 874 charges for underpayment in construction and related services. In transport and company cleaning 70, respectively 64 charges have been filed. Numbers retrieved from ‘Zusammenfassung der LSDB-Statistik’, https://www.wko.at/branchen/sbg/transport-verkehr/autobus/LSDB-Statistik_Zusammenfassung_20161130.pdf

The expert from the Ministry of Social Affairs in Austria asserted that the execution of cross-border fines has been implemented in the Anti-Wage and Social Dumping Act, the district administration authorities (who are executing fines) are being trained and sensitized about the respective provisions of the law. In 2018, the ministry together with the district administration authorities will examine how the implementation of the ED works in practice in selected countries sending workers. Dependent of the result of this examination, there will be an approach to the European Commission or the CJEU about the non-adherence of particular countries to the Enforcement directive. It would be crucial that the executing authorities are taking seriously the obligation to feed-back about the execution to the authorities that imposed the fine. Up until now, this obligation does not work systematically but only sporadically. Another principal problem identified by a representative of BUAK was the short lifespan of firms, especially in the construction sector, against the long duration of court proceedings: "Until a verdict is decided the penalty cannot be executed anymore because the firm has vanished or has gone bankrupt." Besides the cross-border execution of fines, the Austrian legislation foresees other measures of penalties: in case of the probable non-payment of fines tax authorities can be authorised to set and collect a provisional security deposit up to the maximum amount of the impending fine (Sicherheitsleistung). In cases of severe infringements, non-resident firms are prohibited of providing services in Austria.

Conclusions

To summarise, Austria has implemented the ED in the Anti-Wage and Social Dumping Act. It is regarded as one of the strictest implementation in Europe with high administrative penalties in case of infringements. Main problems were reported when it comes to effectively and extensively monitor the stipulations and when it comes to the enforcement of posted workers' rights and entitlements. Especially, transnational cooperation between national authorities of sending and receiving states and the enforcement of penalties in a cross-border setting must be improved.

From the point of workers' concerns about underpayment or non-payment of wages, they may be hesitant to contact the relevant state institutions. In Austria, neither labour inspectorates nor other public authorities are the contact points in charge for the enforcement of non-paid wages. They are the inspecting and investigating authorities for the enforcement of public law, i.e. law in place to combat wage and social dumping that penalises employers in case of infringement. Withheld wages must be claimed individually by the workers themselves via labour courts. Hence, it remains unclear and unknown if and to what extent posted workers, whose labour and social rights have been violated, can effectively claim their forgone rights and entitlements.



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This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe ([PROMO](#))”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains. The country reports are based mainly on local workshop(s) and/or interviews done in 2017 in which the knowledge and opinions of labour inspectors and other officials involved in monitoring and enforcing national rules related to the Posting of Workers Directive were solicited.

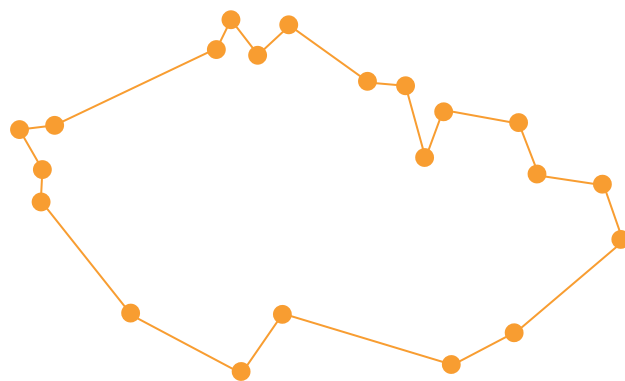
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COUNTRY
STUDY



CZECH REPUBLIC

Transnational Monitoring and Enforcement of Posted Work: The Case of Czech Republic

Marek Čaněk, Multicultural Center Prague



Mapping national enforcement capabilities

The State Labour Inspection Office (SLIO) is responsible for the inspections in the broad area of labour legislation, including rules of posting. It was set up in 2005 and has eight regional offices across Czechia. The SLIO is subordinated to the Ministry of Labour and Social Affairs, which includes the coordination of control priorities or the review of first instance decisions. In 2012 as part of the “fight” against illegal employment and migration it received new competence in the area of inspection of illegal work, which was transferred from the Labour Offices.

The SLIO is of a generalist, Latin American model of labour inspection (Teague 2009). First, it is the main institution responsible for most matters regarding enforcement of labour standards based on the provisions in the Labour Code and other legal documents. It has authority in the control of employment relations, working conditions, health and safety as well as inspections of illegal employment (see Table 1 below). Second, it is characterised by partnership with the employer (e.g. providing basic consultation service; preventive function), a relative decision-making autonomy of linear bureaucrats and the use of sanctions only in the last instance. There has been a growing deterring role of the sanctions and a partial reduction in the autonomy that the Labour Inspections’ employees have in determining the level of sanctions¹.

Table 1. Number of inspectors and inspections based on specialisation in 2016

	Employment relations	Illegal employment	Safety and health
Number of inspectors*	149	203	202
Number of inspections	6519	9308 + 324**	10469

Source: State Labour Inspection Office (2017).

* These are number of assigned positions within the structure of state authorities, which do not have to correspond to the factual number of inspectors as not all positions are occupied.

** Includes also controls of other issues than illegal employment related to the Act of Employment no. 435/2004, Coll.

In 2016 the SLIO carried out a total of 26 296 inspections whereas in 2014 they were 46 685 (see Table 2 below). The politics of numbers (to reach a high number of inspections), especially in the area of control of illegal employment was replaced by a more targeted approach to labour inspections. From 2015, the focus has been more on inspections of bigger sites (e.g. construction sites), high-risk sectors and special control actions (e.g. seasonal work) (SLIO 2017: 61). This is indicated by a decrease in the number of inspections. From 2016, the control of illegal work has become a regular part of the budget and activities of SLIO, which has – in opposition to previous financing from EU structural funds – meant a stabilisation of the workforce and a further integration of these tasks within the Czech labour inspection (SLIO 2016).

Table 2. Number of inspectors and inspections in the Labour Inspectorate

Main figures	2014	2015	2016
Number of inspectors	515	524	554
Number of inspections	46685	29152	26620

Source: Dozpečnostní úřadnictví (2016), SLIO (2016, 2017).

Worksite controls focusing on illegal employment are carried out by at least two labour inspectors. Inspections tend to be announced in advance, but only if the focus is occupational safety or labour relations. On the one hand this makes it practical for the inspectors that the legal representative is at the workplace during the time of the inspection but on the other hand this complicates the carrying out of the control because the employer may have fulfilled his/her duties in the area of safety at work only for the control itself (cf. SLIO 2017: 177, Qubaiová et al. 2016: 12). The practice is different for controls of illegal employment.

These are not announced in advance as well as



1. The minimal sanction for illegal employment by a particular employer was 250 thousand CZK from 1 January 2012. Based on the amendment of the Employment Code (No. 203/2015, Coll.) the current minimal fine is 50 thousand CZK.

it is common that they are carried out especially in cooperation with the Foreign Police (due to the more conflictual nature of these controls) as well as other state bodies (e.g. Labour Office of the Czech Republic, Czech Social Security Administration). Information about potential breaches of law are then passed onto other institutions, too (SLIO 2017: 61-62). The level and quality of cooperation during the whole process of controls between the SLIO and the Foreign Police has been appreciated by the interviewed labour inspectors. The Police – focusing on the control of individuals (employees) – has learnt how to provide useful data for the controls of employers – the main focus on labour inspectors².

With the low union density (estimated at 13 per cent in 2014), low collective bargaining coverage (31.6 per cent covered by the prevailing company-level agreements) (Chmelař 2017) and the limited outreach of trade unions to workers in precarious contracts (Čaněk 2017), the following analysis applies even more so to Czechia: “The diminished ability of trade unions to act as joint regulators of the employment relationship alongside management, and the increasing complexity of supply chains, imply an increase in the potential for non-compliance and hence an even greater need for effective labour inspection services” (Rychly 2013: 250).

The SLIO has been in contact with trade union representatives, e.g. getting information about potential breaches (SLIO 2017: 10). As regards the non-union settings the SLIO has also cooperated with non-governmental organisations (NGOs) active in the field migrant and social rights. There exist particular cases where such cooperation proved to be functional especially where it has been based on developed informal regular contacts; such contacts with NGOs could help maintain a longer-term relation with migrant workers (Qubaiová et al. 2016). There is a tension for the SLIO as concerns its relation towards especially migrant workers who are in a precarious legal position (including those unauthorised to work or stay in Czechia) in the labour market. The labour inspectors mostly do not

give fines to the migrant workers themselves as they are aware of the more vulnerable position of workers vis-à-vis employers; SLIO 2016: 79), on the other hand there is no protection for those migrant workers who would approach the SLIO in case a labour rights violation and would not have all papers in order; they would be reported to the Foreign Police.

For the SLIO it is common to base an important part of inspections based on complaints received (e.g. 3 365 inspections out of 4 829 complaints in 2016 in the area of employment relations and working conditions; mostly about incorrect remuneration; SLIO 2017: 7). It may be expected that there is a lower rate of complaints to the SLIO by workers in precarious legal and employment settings as well as those not supported by unions or NGOs (c.f. Weil 2007: 136). On top of that the investigations by SLIO are time consuming and may not lead to the correction sought by the worker (e.g. back wages being paid). An alternative to the state enforcement of the labour law and/or the NGO support are private services provided by quasi-mafia structures who are efficient in providing unpaid wages for a commission (Trčka et al. 2018).

Transnational cooperation

The SLIO participates in transnational horizontal cooperation promoted by the European Commission in the field of labour enforcement with regards to posting (Hartlapp, Heidbreder 2017). It can be divided in three types of cooperation (adapted based on Hartlapp, Heidbreder 2017) a) direct “information sharing” among national labour inspections, b) mutual recognition of sanctions and fines; c) “organizational cooperation” that builds on existing networks (e.g. Senior Labour Inspectors’ Committee /SLIC/), new ones (e.g. European Platform tackling undeclared work) as well as bilateral cooperation.

First, as regards information sharing via IMI the SLIO has used it to send information requests (mostly to Poland) as well as reply to them (mostly – cca. 80 per cent – requests on social security issues but also e.g. French requests for information

2. Interview with labour inspectors, Central Bohemia Labour Inspection Office, Prague, 20 July 2017.

regarding wage slips of drivers). The liaison office is in the headquarters of SLIO. Some countries' labour inspections have used non-electronic communication in communication with the SLIO (e.g. Bulgaria, Romania). Emails are used when the communication does not concern a sensitive topic.

Table 3. IMI requests sent/received by SLIO (from 6 September 2016 to 8 November 2017)

IMI requests received	Austria 35, Belgium 6, Denmark 5, France 7, Italy 2, Luxembourg 1, the Netherlands 1, Slovakia 17, Spain 1; 75 in total
IMI requests sent	Belgium 1, Bulgaria 1, Germany 1, the Netherlands 1, Poland 66, Slovakia 8; 78 in total

Source: SLIO (2017).

The SLIO is the only body responsible for requests on posting within IMI in Czechia. This means both an advantage (as an intermediary it can provide valuable services to e.g. the Police sending requests to Poland) and a disadvantage (a burden of more work – it cannot forward directly a request sent via IMI to the responsible institution; some information cannot be forwarded to EU partners due to privacy concerns – e.g. about social security payments). As a substantial part of information requests (in-coming and outgoing) concern social security matters, the involvement of the Czech Social Security Administration (CSSA) has been crucial (regarding the kind of information that can be provided). As the CSSA has not joined the IMI, a delegated CSSA contact person was assigned to provide assistance with regards to IMI: both providing data needed to answer the incoming requests as well as submitting SLIO's outgoing requests to social security authorities in other Member States. The SLIO therefore does not include questions about specific cases of social security payments / A1 Forms in its outgoing information requests, and forwards them to the afore-mentioned CSSA contact person instead. The data obtained from CSSA is more reliable and precise but may take up to three months, which is the statutory period of the Social Insurance Administration in Poland for answering requests.

The cooperation and communication via IMI between the Czech and Polish labour inspections

has been enhanced thanks to a meeting in 2016 (SLIO 2017). As SLIO and other Czech authorities are concerned with mostly legality of posting of non-EU workers from Poland to Czechia most requests sent to Poland concern different aspects of "genuine posting" (finding information about the companies, workers' attachment to the company and the local labour market, existence of A1 forms, etc.); they have not concerned wage and working rights violations to a great extent (this may change with the new and better structuring of questions in IMI including those on wage and working rights).

Some more practical issues with IMI:

Finding the right partner in IMI – sometimes it is hard to find the partner to address within IMI, there is no available guide/map within IMI, or there is only one partner authority in the given Member State, which does not have competence in the respective matter.

Second, there has been little experience with the mutual recognition of fines and sanctions. One request was sent to Czechia from the Netherlands and was passed over to the Czech Customs Authority.

Third, as regards the organizational cooperation, the SLIO has been involved in the SLIC. There is no working group in SLIC on posting, however, there is e.g. currently a campaign on safety and health issues concerning temp agency employment and posted workers (coordinated by France; to be evaluated in 2018 or 2019). The SLIO has made use of the SLIC Knowledge Sharing Site where questions can be posed (the answers are provided within a 1-2 months range); it has been tolerated to ask questions also from other areas not involving safety and health. The SLIO has been also actively involved in the European Platform tackling undeclared work, which "could possibly develop into a body comparably robust as the SLIC" (Interview with the Liaison Officer, Opava, 9 June 2017).

The SLIO (or the Ministry of Labour and Social Affairs) has had cooperation agreements or memoranda of cooperation with the labour inspections from neighbouring countries (Slovakia, Poland, Germany) as well as a few others (e.g. the Netherlands). Most developed formal and informal contacts have been with Slovak and Polish labour inspections. For more detail on bilateral agreements and memoranda see Annex 1.



Issues specific to the cross-border regulation of posting

Czechia has stopped being just a labour exporter in respect to posting but also an importer. The 2014 data on A1 social security forms show that the country has even become a net importer with 17.2 thousand posted to Czechia and 10.4 thousand posted out of the country (Chmelař et al. 2016). For the SLIO the control of posting has been important for both migration directions, however, recently even more so with regards to posting to Czechia.

This part will concentrate on the perspective of labour import, which concerns the most important share of controls in the area of posting, namely that of Ukrainian workers via so-called “Polish visas” (Schengen or national D types of visas issued in Poland). Their numbers have risen from 2015 with on the one hand demand for temporary low-paid and “reliable” workers growing in the booming Czech economy and on the other hand migration restrictions for non-EU workers employed in low-skilled jobs. They usually come to work in cycles of three months to construction, manufacturing, services or work in other sectors. Within SLIO it

is mainly the inspectors specialising in control of illegal work and employment relations who have been involved in the controls of posting of non-EU workers in the Czech labour market. The safety and health inspectors have been involved to a lesser extent.

Out of the three types of posting enumerated in the 96/71/EC Directive on the posting of workers, the SLIO has been concerned with the “traditional” posting (art. 1 a) and temporary agency work (art 1 c) and not with intra-corporate posting (art 1 b) (cf. Cremers 2011). When inspecting the cases of posted Ukrainian workers mostly from Poland to Czechia the SLIO has found only very few which would fulfil a correct definition of posting and thus can be characterised as “fake” posting (Cremers 2011: 41). They are semi-legal arrangements most probably used to circumvent labour migration restrictions towards non-EU workers and diffuse legal responsibility for this kind of employment in subcontracting chains. They also allow making savings in social security and other payments. The Table 4 below summarises issues with posting of Ukrainian workers from Poland to Czechia from the point of view of the SLIO as well as workers’ rights.

Table 4. Summary of issues with posting of Ukrainian workers from Poland to Czechia

	Issues	Controls
Notification	There has been an obligation to notify the Labour Office of the Czech Republic about the beginning and the termination of posting (see the Annex 2 for the form to be filled by employers). It has to be done in writing (not necessarily electronically) and at the latest on the day of posting (par. 87 of the Employment Code 435/2004, Coll.).	The SLIO has the right to get this information from the Labour Office (par. 8a 1 o) of the Employment Act 435/2004, Coll.). The information provided, however, is not always accurate or precise including the address of the workplace.
Work and residence permit in relation to posting	Ukrainian workers arrive with visas issued by Poland (Schengen type C or D “national” visa) and a work permit or employer’s statement from Poland. There is not an obligation to have a work permit when a non-EU worker is posted from another EU Member State to Czechia (par. 98 k) of the Employment Code 435/2004, Coll.).	In order for the employment to be legal, it is required to be in agreement with the definition of posting (which is not very precise as the SLIO labour inspectors complained), which is often not the case (e.g. workers coming directly from Ukraine to Czechia, not having A1 forms, the employer being just formally established in Poland, being in a dependent relationship to the Czech employer operating as an unofficial temp agency with the given worker being sent around different employers in Czechia, etc.).

	Issues	Controls
Information about rights	A leaflet for Ukrainian posted workers was published in November 2017 by the Ministry of Interior of the Czech Republic[1]. Unclear definition of posting and differing positions of various state institutions to the conditions for legality of employment and residence have led to delays in the creation of such a leaflet. This shows the difficulties to coordinate the positions and practices of institutions in the national context (and not only in transnational one).	Many of the workers are most probably aware of the illegality (or semi-legality) of “Polish visas”, however, there has been little information provided to posted Ukrainian workers by the state authorities. Foreign Police issued expulsion orders for increasing numbers of Ukrainian citizens in recent years (including to those on “Polish visas”) – 2,045 in 2016 (a 64.5 % increase in comparison to the previous year) (Ministry of Labour and Social Affairs 2017)
Employment relationship	The workers have at their disposal various kinds of labour and civil contracts from Poland. With the civil variety, such as mandate agreements (service contract), there is no minimum wage set (they are not covered by the Polish Labour Code), nor are social security payments always obligatory. It is possible to have a Polish work permit with the mandate agreement[2].	In some cases, it appears that the SLIO has not accepted the mandate agreements as proper kind of contracts for posting because they are not employment contracts as can be seen from one of its cases investigated in construction: ‘The presented documents were supposed to create a fiction that the named persons were posted to the Czech Republic based on the par. 98 k) of the Employment Code No. 435/2004, Coll. This is not possible because the aforementioned par. 98 k) is clear in that “the employee was sent to the territory of the Czech Republic as part of the provision of services by an employer set up in a different Member State of the European Union” (in bold in the original).[3]
“Hidden” temp agency employment and labour-only subcontracting	The employment relationship is not always clear; this concerns especially labour-only subcontracting that has been growing in the Czech labour market (SLIO 2017). It is based on the use of trade or civil contracts between companies providing workforce. The contents of the contract is about a provision of a task. E.g. in manufacturing industry it is based on the leasing of a part of the factory to a subcontractor (Qubaiová et al. 2016: 4). It has also been taking form of a subcontractor set up in Poland by a Czech company (cf. Eurofound 2016: 17). It has also been common that workers on “Polish visas” in Czechia would be hired temporarily by different companies, in fact functioning as “hidden” temp agency employment if using the term of the SLIO. There tend to be chains of companies between the employer and the user, which in the view of the Foreign Police are used in order “not to be guilty of illegal employment” (Ministry of Labour and Social Affairs 2017).	The SLIO targets the “hidden” temp agency employment as one of its control priorities. It is, however, not common to directly target the user and successfully claim that the contract was in fact one between the employee and the user. The entity (e.g. in the chain of subcontractors) to which a sanction is imposed, is the one, to whom it is possible to prove successfully that “dependent work” was performed (which often is not the end user). Hence, the end users may often remain unpunished, which probably is the reason why some labour inspectors have been sceptical about the effects of their controls in which workers who were found to be working illegally at a particular worksite or with the same end user are soon replaced by new workers also working illegally. There has also been a rising use of attorneys (also already at the time of inspection) by employers. To clarify the chain of subcontractors/employers is time consuming and further complicated by the transnational setting.





	Issues	Controls
Social security expenses	Social security payments are lower in Poland (20,74 % paid by employer) than in Czechia (25 % paid by employer) but many of the workers remain uninsured in Poland (fake or no A1 forms)[4].	The involvement of the CSSA in the control of posting has been crucial. The main issue to overcome has been its absence in the IMI (see above).
Wages	Based on the experience of the SLIO, workers usually officially receive minimum wages (in Czechia for a period of up to 30 calendar days in a given year posted workers do not even need to receive min. wages)[5]. In reality workers often work long hours and receive higher wages.	The SLIO inspectors claimed that they were not able to find out what wages have been paid (or not) based on the trade or civil contract, which are signed between an end user (or its subcontractor) and the subcontractor employing the workers. In their opinion, that should be in the competence of the Polish labour inspection. However, this is not feasible, since very often these tend to be “letter-box” companies established in Poland. If the SLIO was successful in claiming that the “posted” employees were temp agency employees, these would have to receive remuneration comparable to their Czech colleagues in similar positions.
Working conditions	The workers find themselves in the vulnerable condition of deportability (De Genova 2002) as well as try to earn as much as possible during the limited three-months’ period of their legal stay. Thus they usually have no holidays and tend to work very long hours.	The priority for the SLIO has been the control of ill/legality. There is no “firewall” with regards to reporting to the Foreign Police in case of complaints raised by non-EU migrant workers (see above). There is also a lack of interpreters for better communication and building trust between the SLIO and migrant workers.

[1] See <http://www.mvcr.cz/clanek/problematika-vysilani-obcanu-tretich-statu-do-cr-k-poskytovani-sluzeb-v-ramci-eu.aspx>.

[2] http://www.migrant.info.pl/Civil_law_contracts.html, <http://www.prawopracy.org/content/view/133/16/>.

[3] Anonymised inspection protocol, Regional Labour Inspectorate for Central Bohemia, 13 June 2017.

[4] Reporting about posting of Ukrainian workers from Poland to other EU states M. Keryk wrote: “During the period of January-September 2017 ZUS issued 167 753 forms A1, from which 2309 were for third country nationals including 2078 for Ukrainians. In total 1682 Ukrainians received forms A1.” (Keryk 2018).

[5] This, however, is not the case in trans-national provision of services by a temporary employment agency, see <http://www.suip.cz/vysilani-pracovniku/>.



The Enforcement Directive

There was a late implementation of the Enforcement Directive (2014/67/EU) in force since 1 April 2017 (apart from parts on the liability scheme – since 1 July 2017), which means there has been limited experience with its effects. Amendments to several acts – on Employment, Labour Inspections, and Labour Code – were made. Notifications have already existed before but what is new is the obligation for the service provider to keep a proof of social security payments and employment contract translated into Czech. The liability scheme – valid for all sectors but only for a direct contractor – is administratively quite complicated and it is hard to imagine it could work in practice (based on three conditions - unpaid wage, enforceable penalty, contractor “knew” or “should have known”).

Conclusions

This report described Czechia as a case of a country that has been turning from a labour exporter to a mainly labour importer. This can be seen on the – mostly false –posting of Ukrainian citizens through Polish companies. Although the sanctioning deterrent role of the State Labour Inspection Authority has been growing in recent years, there has been a lack of sanctions in the legislature for the end users. Thus while the employees usually do not receive penalties from the labour inspectors and are thus recognised as the vulnerable party in the dependent employment relationship, the inspections focus on the legality of posting and thus wage and working conditions are currently not at the centre of attention. It, however, is very difficult to investigate the latter in the context of often “letter-box” posting workers to Czechia.



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Annex 1

The State Labour Inspection Office of the Czech Republic (SLIO) and bilateral agreements and memoranda

The SLIO is involved in the following cooperation memoranda/agreements:

Agreement of 29th June 2010 on cooperation between the National Labour Inspectorate (SK) and SLIO (CZ):

- cooperation in all aspects of occupational safety and health (OSH); provision of information and consultations regarding changes to OSH legislation and harmonisation with EU legislation, and provision of translations of foreign OSH legislation;
- elaboration and implementation of new forms of labour inspection in view of increased effectiveness / capacity in OSH inspections
- cooperation on elaboration and development of IT systems, sharing statistical data;
- assistance with inspections of causes and circumstances of occupational accidents / emergency situations / breakdowns of technical equipment;
- cooperation with corrective measures towards entities based in the other state who shirk from fulfilling their obligations;
- cooperation and mutual sharing of information on research activities and providing their results;
- education and training of inspectors;
- providing information on organizing expert events on OSH and labour relations issues;
- coordination of processes leading to enforcing common interests in the context of international cooperation;
- provision of reports on activities.

Agreement on co-operation between the National Labour Inspectorate of Poland and the SLIO (CZ):

- exchange of experts;
- exchange of information materials, issued by or in association with each of organizations;
- co-operation on district labour inspectorates level, including participation on exchange principle of inspectors in the routine work of district labour inspectorates in the corresponding country;
- organizing practical courses to be carried out in the centres of the corresponding countries, as well as participation in conferences, symposia, international meetings organized by the Contracting Parties;
- exchange of experience in connection with implementation of the EU directives concerning the scope of activities of the Parties.

Apart from the above agreements which the SLIO concluded by itself, the SLIO is also mentioned in the following two ministerial memoranda/agreements:

- Memorandum of understanding between the Ministry of Social Affairs and Employment of the Kingdom of the Netherlands and the Ministry of Labour and Social Affairs of the Czech Republic on data exchange and cross-border cooperation in combatting of fraud in transnational posting of workers and illegal labour
- Cooperation Protocol between the Ministry of Labour and Social Affairs of the Czech Republic and the Federal Ministry of Finance of the Federal Republic of Germany on cooperation in combatting illegal hiring of cross-border workers and the associated fraud of social security benefits and non-payment of premiums.



Annex 2
Registration form

1.

INFORMATION

about a person's starting work^{1/} – the posting of a person to perform tasks arising out of a contract entered into^{1/}

where the person is a citizen of the EU/EEA and Switzerland or the citizen's family member, or a foreigner who does not need an employment permit in the territory of the Czech Republic (Article 87 of Act No 435/2004 Coll., on Employment)

Surname:	
First name:	Nationality:
Date of birth:	Gender ^{2/} : male <input type="checkbox"/> female <input type="checkbox"/>
Personal identification number ^{3/} :	Place of birth:
Address in the country of permanent residence:	Travel document number:
Postal delivery address:	Name of the authority which has issued the travel document:
The highest educational achievement (according to the Classification of Basic Branches of Education) ^{4/} :	

EU citizen^{5/} , EEA citizen^{5/} , Swiss citizen^{5/} ,

EU, EEA, Swiss citizen's family member^{5/}

Foreigner according to^{2/} Art. 98 a) , Art. 98 b) , Art. 98 c) , Art. 98 d) ,

Art. 98 e) , Art. 98 j) , Art. 98 k) , Art. 98 l) , Art. 98 m) ,

Art. 98 n) , Art. 98 o) , Art. 98 p) , Art. 98 r) , Art. 98a

Employment^{1/} – the posting of the person to perform tasks arising out of a contract entered into^{1/}
from to ^{6/}
In a CZ-ISCO profession ^{7/} CZ-ISCO numerical code ^{7/}
Classification according to CZ-NACE ^{8/}
Education required for the occupation (Classification of Basic Branches of Education) ^{4/}

a) Employment relationship with an employer having its registered office in the Czech Republic^{9/}
Employer – name
Registered office (address – district, city/town, street, number, postcode)
ID No. Personal identification number ^{10/}
Contact person Telephone
Place of work (address)
b) Posting of the person to perform tasks^{9/}
- under a contract entered into ^{2/} <input type="checkbox"/>
- under temporary work ^{2/} <input type="checkbox"/>
The natural or legal entity for which the work in the territory of the Czech Republic is carried out (registered office name and address – district, city/town, street, number, postcode)
ID No. Personal identification number ^{10/}
Contact person Telephone
Place of work (address)
c) Employment relationship with an employer having its registered office outside the territory of the Czech Republic^{9/}
Employer – name
Registered office (address – country, district, city/town, street, number, postcode)
Contact worker Tel. fax/e-mail



Annex 2 Registration form

This is the first employment in the territory of the Czech Republic yes^{2/} no^{2/} 1.

Date:

Stamp:

Responsible person's signature:

A record by the regional office of the Public Employment Service of the Czech Republic in

Delivered on

Explanatory notes

- 1/ Indicate by ticking what applies.
- 2/ Indicate the correct option by a cross.
- 3/ To be filled in if the personal identification number has been assigned.
- 4/ CBBE – Classification of Basic Branches of Education (the classification overview available at "www.czso.cz - Classifications").
- 5/ Indicate the citizenship of the citizen (concrete EU/EEA state or Switzerland) whose family member is a foreigner.
- 6/ Only to be filled in if the length of employment is known – otherwise the employer notifies the termination of the performance of work to the appropriate regional office of the Public Employment Service of the Czech Republic, using a special form, within 10 calendar days following the termination of employment or posting.
- 7/ CZ-ISCO = Classification of Occupations – the name and numerical code of the profession pursued shall be specified (the classification overview available at "www.czso.cz - Classifications").
- 8/ CZ-NACE = Classification of Economic Activities (the classification overview available at "www.czso.cz - Classifications").
- 9/ - Section a) shall be filled in if a citizen of the EU/EEA or Switzerland or, where appropriate, a foreigner who does not need an employment permit, has entered into an employment contract with an employer having its registered office in the Czech Republic.
- Sections a) and b) shall be filled in if a citizen of the EU/EEA or Switzerland or, where appropriate, a foreigner who does not need an employment permit has entered into an employment contract with an employer having its registered office in the Czech Republic, and the employer has posted, under the contract entered into, or hired (if licensed to act as a recruitment agent) such a person to carry out work for a legal or natural entity having its registered office in the Czech Republic.
- Sections b) and c) shall be filled in if a citizen of the EU/EEA or Switzerland or, where appropriate, a foreigner who does not need an employment permit has been posted, under a contract entered into, or hired by an employer having its registered office outside the Czech Republic to carry out work for a legal or natural entity in the territory of the Czech Republic.
- 10/ Only to be filled in by a private individual.

Extracts and quotations from articles of Act No. 435/2004 Coll., on Employment

- Article 87, paragraph 1 If an EU citizen, the citizen's family member, the Czech citizen's family member stated in Article 3, paragraph 3, or the foreigner stated in Article 98 a) to e), j) and r) takes up work, the employer or the legal or natural entity who has entered into a contract with a foreign employer under which those people have been posted to the territory of the Czech Republic to perform tasks arising out of that contract is obliged to report that fact, in writing, to the relevant regional office of the Public Employment Service and to do so **within no later than the date on which those people start work.**
- Article 87, paragraph 2 An employer or a legal or natural entity who has entered into a contract with a foreign employer under which those people have been posted to the territory of the Czech Republic to perform tasks arising out of that contract is obliged to report any change to that data **within no later than 10 calendar days** following the date when the change occurred or when the above employer or entity became aware of it.
- Article 98 No employment permit, Employee Card or Blue Card is required from a foreigner
- a) who has obtained a permanent residence permit,
 - b) who is a family member of a member of a diplomatic mission, consular post, or a family member of an employee of an international governmental organisation with a registered office in the territory of the Czech Republic if reciprocity is granted by a promulgated international agreement ratified by Parliament and binding on the Czech Republic,
 - c) who has been granted asylum or subsidiary protection,
 - d) whose performance of work in the territory of the Czech Republic does not exceed 7 consecutive calendar days or a total of 30 days within a calendar year and the person is concurrently a performer, member of educational staff, academic of a higher education institution, a scientist, researcher or developer taking part in a scientific meeting, a pupil or student up to the age of 26, a sportsman/sportswoman, or a person who takes care of supplying goods or services in the Czech Republic or supplies such goods or carries out assembly work under a commercial contract or, where appropriate, carries out warranty work and repair work,
 - e) for whom this is laid down by a promulgated international agreement ratified by Parliament and binding on the Czech Republic,
 - j) who is systematically preparing for a future occupation in the territory of the Czech Republic,
 - k) who has been posted to the territory of the Czech Republic by an employer established in another Member State of the European Union as part of providing services,
 - l) who resides in the Czech Republic on the basis of a long-term residence permit issued for the purpose of a family reunification with a foreigner under letter a) or c), or with a foreigner residing in the Czech Republic on the basis of a valid long-term residency permit;
 - m) who resides in the Czech Republic on the basis of a long-term residency permit of a resident of another member state of the European Union,
 - n) who pursues continuous educational or scientific activities in the Czech Republic as educational staff or an academic of a higher education institution, or a scientist, researcher or developer in a public research institution or other research organisation under a specific rule,
 - o) who has obtained secondary or tertiary professional education or tertiary professional education in a conservatoire under the Education Act or obtained higher education under the Higher Education Act,
 - p) who resides in the Czech Republic on the basis of a long-term residence permit for the purpose of protection under the Act on the Residence of Foreigners in the Czech Republic,
 - r) who is a clergyman of a church registered in the Czech Republic or a religious society registered in the Czech Republic.
- Art. 98a A work permit, Employee Card or Blue Card is not required if the foreigner has been posted to the CR by his/her foreign employer on the basis of a contract with a Czech legal entity or natural person, exclusively for the purpose of increasing the skills and qualifications of this foreigner necessary to perform his/her work for this foreign employer outside of the CR – information about the posting of the foreigner is provided by the Czech legal entity or natural person to the relevant regional branch of the Labour Office (pursuant to Article 178b, paragraph 4 of Act No. 326/1999 Coll., as amended, the Government of the CR shall decide when the foreigner may be posted to the Czech legal entity or natural person – the foreigner's total stay shall not exceed 6 months).



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Published and disseminated by: SOLIDAR

This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe (**PROMO**)”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains. The country reports are based mainly on local workshop(s) and/or interviews done in 2017 in which the knowledge and opinions of labour inspectors and other officials involved in monitoring and enforcing national rules related to the Posting of Workers Directive were solicited.

The author of the Czech country report would like to thank for all the assistance and information provided by labour inspectors from the State Labour Inspection Office in Opava and the Regional Labour Inspectorate in Central Bohemia.

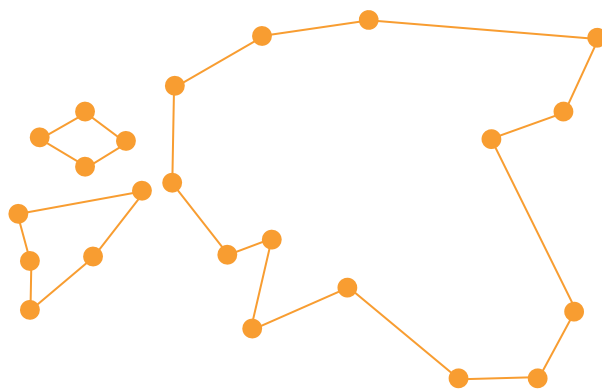
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COUNTRY
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ESTONIA

Transnational Monitoring and Enforcement of Posted Work: The Case of Estonia

Kairit Kall, Tallinn University & University of Jyväskylä



Mapping National Enforcement Capabilities

The Estonian Labour Inspectorate (ELI) falls under the area of governance of the Estonian Ministry of Social Affairs and conducts state supervision on both working environment (health and safety regulations) and labour relations, including over collective agreements. The Labour Inspectorate is also the implementing authority regarding the Posting of Workers Directive (PWD, 96/71/EC) and the Enforcement Directive (ED, 2014/67/EU; in Estonia regulated by the Working Conditions of Employees Posted to Estonia Act¹).

On the one hand, the number of employee positions in ELI has decreased gradually in recent years, being 132 in 2010 and 115,5 in 2016 (Work Environment 2017: 52). However, the number of inspectors has stayed at the same level and their salaries have increased, reaching close to national average in 2015 (Table 1).

Table 1: Number of employed persons in the labour market, number of inspectors, inspections and labour costs in the ELI

Main figures	2014	2015	2016
Number of employed persons in the labour market	624 900	640 900	644 600
Number of inspectors, (including inspector-lawyers)*	52	52	52
Average basic salary of a labour inspector** (percentage of national average wage***)	897 €	1,043 €	1,085 €
Number of enterprises subject to state supervision*	3235	3838	4436

Source: * Work Environment 2016; 2017; ** Ministry of Finance: <https://www.rahandusministeerium.ee/et/riigi-personalipoliitika/palgapoliitika>; *** Statistics Estonia: <https://www.stat.ee/database>

There are 46 occupational health and safety and labour relations inspectors and six work accident inspectors-investigators (Work Environment 2017: 53). On the other hand, the number of companies where state supervision was carried out has increased in recent years (Table 1), indicating that the work load of inspectors has also increased.

ELI's supervision activities are divided into four areas of which the largest volume is supervision over the work environment and safety (86% in 2016), which is also related to their main priority of reducing serious/fatal work accidents. 26% of all the occupational safety inspections were made in the construction sector (second was trade with 16%). Second largest activity is supervision over labour relations (9%), third joint supervision over work environment and labour relations (3%) and fourth supervision over work and rest time for drivers (2%) (Work Environment 2017: 23). In total ELI inspected 4436 enterprises in 2016 (out of 54 177 active enterprises in the labour market), which is 598 inspected enterprises more than in 2015. Violations were detected in 85% of the inspected cases (Work Environment 2017: 23-25).

As regards posting of workers, Estonia is considered to be mainly a sending state. According to A1 portable documents issued in 2015, 0.7% of Estonian employed population was posted abroad and the share of workers posted to Estonia in national employment was 0.4% (Pacolet & De Wispelaere 2016: 29-31). Thus, workers posted to Estonia have not been high on the agenda for the ELI. On the other hand, based on the experience of labour inspectors, the number of workers posted to Estonia seems to be increasing² and controlling their employment situation sometimes also interacts with the control of illegal work, if posting of non-EU citizens is practiced.

1. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolidate>

2. Since 2017 it is easier to evaluate the number of workers posted to Estonia, as there is now a registration requirement for service providers using posted workers (see the section on the Enforcement Directive). The number of A1 forms alone provides often an inadequate picture of the phenomenon. The number of A1 forms issued in Estonia is available at: <http://www.sotsiaalkindlustusamet.ee/et/organisatsioon-kontaktid/statistika-ja-aruandlus>



Controlling of illegal work falls into the jurisdiction of the police. If there is a suspicion that a company/ construction site might have non-EU workers, then Labour Inspectorate has joint inspections with the police, where police firstly controls the living and working permits of non-EU workers³. An increasing number of posted workers in Estonia are posted to Estonia via Polish companies, including also third-country citizens, mainly Ukrainian workers with Polish D-visas (also involving Ukrainian and/ or Polish temporary work agencies). A new scheme where Belarusians were posted to Estonia through Lithuanian temporary work agency has also just emerged⁴. According to the Aliens Act when hiring third-country citizens, employer has to pay them at least the Estonian average wage⁵ (around 1200 EUR in 2017). If these workers are posted, however, this condition does not apply, and posted workers are entitled to the national minimum wage⁶ which in 2017 was 470 EUR (and in 2018 500 EUR).

ELI does also joint inspections with the Tax and Customer Board. In 2015 and 2016 the ELI, the Police and Border Guard Board and Tax and Customer Board had 18 joint visits to control the legality of employment. In 2015 these visits established 31 and in 2016 14 companies where people were working without legal ground and a written employment contract. There were also several cases where the employer who organised the work in Estonia claimed that the employees are posted workers, thus do not have to be registered in the employment register of Estonia. What follows, is that the Police has to first make sure if the person has a living and/or work permit applicable and the ELI has to confirm if this is indeed posted worker by making an inquiry to another member state through IMI (Work Environment 2017: 32). There have been several news reports that highlight the use of (posted) Ukrainian workers in Estonia whose employment conditions are poor, wages low and legal status often unclear. For example,

in September 2017 ELI had a joint inspection visit with the Police and Border Guard Board and the Tax and Customer Board to a construction site of the new courthouse in Tallinn. Main contractors did not have any construction workers on their payroll, all the construction work was outsourced through long subcontracting chains and in the end of the subcontracting chain were Ukrainian workers posted to Estonia through Polish TAW company (e.g. Kaukvere & Ilvest 2017).

The cooperation between ELI and different NGOs, including trade unions is rather poor (which might be related to the rather weak and underdeveloped civil society in Estonia). Although ELI meets the social partners at least once a year to discuss the priorities of state supervision and relevant problems, the construction sector, for example, where posting of workers mostly takes place, does not have an active trade union that would represent local workers, let alone posted workers. On the other hand, the Finnish Construction Trade Union Rakennusliitto has established their office in Tallinn (capital of Estonia) where they provide information and counselling to Estonian construction workers who are working or planning to work in Finland⁷.

3. Interview with the Estonian LI's representative, June 2015

4. Email exchange with Estonian LI's representative, September 2017

5. <https://www.riigiteataja.ee/en/eli/ee/508092017001/consolide/current>

6. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

7. <https://rakennusliitto.fi/et/>



Transnational Cooperation

ELI is also the liaison office for posting and administers the IMI requests (see Table 2). Regarding posting of workers, Estonia mainly cooperates and exchanges information with Finland and Poland. Estonians are mainly posted to the Finnish construction sector and Polish companies send workers to Estonia.

Estonian labour inspectorate uses both IMI and personal contacts between inspectors (email, phone, meetings) to share and ask for information regarding posting of workers. In the area of posting of workers, in 2016 Estonia sent out 12 and received 13 IMI requests⁸. Although IMI is a secure system for sharing information, using it might be sometimes too slow and insufficient. For example, although the answer should come within 25 working days, but there are cases when the answer has taken 60-70 days, depending on a bureaucracy of a country (in some countries the communication between state institutions is slow). If the information request is closed in IMI, but there is still information to be sent, then other less secure ways of communication are used (email, regular mail). Automatic language translation to Estonian is occasionally insufficient and it is not possible to understand the answer⁹.

Answering IMI requests is also considered difficult, as highlighted in the 2016 ELI's report:

A major problem in responding to IMI inquiries is the fact that we are not able to find the employer who posted their workers to the territory of another member state. Often, the company is fictitiously registered in Estonia; however, in reality, no business activity is carried out here. Another reason is that the enterprise has entered either false or incorrect information about their means of communication (such as phone, e-mail, is not located at the seat entered in the commercial register) in the official registries (register of employees, commercial register), which serve as the main sources of information to use. In addition, the management board members often fail to cooperate with the Labour Inspectorate. Nevertheless, in 2016, we responded to all inquiries received through IMI; this above all thanks to different databases and the cooperation with the Tax and Customs Board, Police and Border Guard Board and Estonian Academy of Security Sciences. (Work Environment 2017: 33)

Table 2: Developing mutual cooperation / „architecture“ of cooperation

IMI liaison office(s) for posting module	Other institutions involved in IMI posting module	IMI requests sent/received*	Transnational enforcement of sanctions	Bilateral agreements and joint inspections
Estonian Labour Inspectorate	Information exchange with other state institutions is sufficient.	In 2016 Estonia sent out 12 and received 13 requests; in 2017 Estonia sent out 12 and received 9 requests.	No cases yet.	Cooperation agreements with Southern Finland, Latvia, Lithuania and Poland. There have been joint inspections with Regional State Administrative Agency Southern Finland.

Source: Communication with the representatives of ELI; * http://ec.europa.eu/internal_market/imi-net/statistics/2016/12/index_en.htm#t_1_3

8. http://ec.europa.eu/internal_market/imi-net/statistics/2016/12/index_en.htm#t_1_3
9. Focus group interview, May 2017



A representative of the Estonian LI provided examples of successful transnational cooperation facilitated by existing contacts between Estonian and Finnish inspectorates: if employer is not cooperating in host country, then the inspectorate of home country might have useful information (e.g. correct contact information) about the company that helps the host country LI to inspect the company¹⁰. Contacts have been exchanged through different EU projects and bilateral agreements.

Currently Estonian Labour Inspectorate is taking part of the project “Promotion of Transnational Cooperation Among Stakeholders and Dissemination of Best Practices to Enhance the Enforcement of the European Legislation Regarding Posted Workers and Posting Issues”, together with labour inspectorates and social partners from the Baltic states and Poland and the Senior Labour Inspectors Committee’s (SLIC) information and enforcement oriented project “Safe and healthy work for temporary jobs” (2017-2019) that aims to promote occupational safety and health of temporary agency workers and cross-border workers¹¹. In addition, ELI has participated in projects like the INTEPF’s “Learning by Doing”, and working groups like the SLIC WG Cross-Border Enforcement working group (and other SLIC working groups), the European Commission’s expert committee on posted employees, and the European Commission’s working group “Transposition of the Enforcement Directive of the Posting of Workers Directive 2014/67/EU (TREND)” (Work Environment 2016).

Estonian Labour Inspectorate has transnational cooperation agreements with neighbouring countries and with countries from/to which posting is an important phenomenon (Finland, Latvia, Lithuania and Poland), thus interdependency of labour markets is the main reason for signing the agreements:

1. Bilateral agreement with the Regional State Administrative Agency Southern Finland. Two meetings annually, exchange of information about legislation, companies (focus on posting), exchange of inspectors, joint inspections.

2. Bilateral agreement with Poland (new, signed in 2017): one meeting per 2 years (focus on posting).

3. Trilateral agreement with Latvia and Lithuania: one meeting annually, discussing common problems in the labour market, exchanging information about legislation.

Currently ELI is also planning a cooperation agreement with Norway. The representative of Estonian Labour Inspectorate considered the agreements useful, as they provide personal contacts between inspectors that are sometimes more efficient way in gaining information about posting companies than IMI. In addition, sharing information about legislation/regulations in different countries was also considered important¹². One aspect that might increase the effectiveness of the agreements is the exchange of inspectors taking part of transnational cooperation, so that not always the same person would participate in transnational cooperation¹³.

Issues specific to the cross-border regulation of posting

Before the implementation of the Enforcement Directive in December 2016 there was no registration requirement for posted workers and inspectors considered it problematic. It was possible to find posted workers through general state supervision, targeted control, based on tips, or to try to locate them based on information received from A1 forms: all these ways proved to be insufficient¹⁴.

10. Focus group interview, May 2017

11. <https://www.european-temporary-work-campaign.eu/>

12. Focus group interview, May 2017

13. Focus group interview, May 2017

14. Focus group interview, May 2017; Interview with the Estonian LI’s representative, June 2015



It has also been difficult to identify the employers, especially in construction sites with long sub-contracting chains: posted workers often claim that they do not know who their employer is and employers who are present claim that they are not aware of who is the employer of those workers¹⁵. In 2014 Labour Inspectorate conducted the first control targeted to posted workers. This inspection revealed that the awareness about the laws and regulations concerning posted workers is rather limited in receiving firms (Work Environment 2015: 29). Estonian minimum wage (and other conditions stipulated in the PWD) also apply to posted workers. However, when it came to posted workers' employment conditions, before the implementation of the Enforcement Directive in the end of 2016, labour inspectors were able (and obliged) only to take action when health and safety regulations were violated, they could not sanction employers for the violations of employment conditions, except to point them out and inform sending country inspectors about the problems - when there are problems with employment relations¹⁶.

Related to the low awareness about posting regulations, in 2014 the Estonian Labour Inspectorate had a campaign about posted workers rights, including 15 information days across the country, comprehensive media coverage, information sharing in a ferry operating between Estonia and Finland; they also published an information material for posted workers, available in Estonian, Russian and in English¹⁷. Information about regulations applicable to posted workers is available on Labour Inspectorates' homepage¹⁸ in Estonian, English and in Russian, relevant legislation is translated into English. ELI officials continue to inform public about issues concerning posting of worker and currently they are also preparing information materials in Polish.

There are several cases where Estonian workers posted to other countries have turned to the Estonian Labour Dispute Committee and to Estonian courts when their labour rights have been violated. However, workers posted to Estonia have not used Estonian court system to claim their rights, although this was possible already before the implementation of the ED. Workers posted to Estonia also do not generally turn to the ELI for information and consultation.

stonian legislation distinguishes posted workers (as regulated by the posting of workers directive) and workers on a business trip (abroad). In Estonian, these terms are linguistically similar: "lähetatud töötaja" vs "lähetuses viibiv töötaja"). While in the former case host country wage and other conditions (as stated in Directive 96/71/EC) should apply, in the latter case home country (Estonian) norms are applicable. To be defined as a posted worker, the employee should have a service recipient to whom the worker is posted (Miidla-Vanatalu, Naaber-Kalm & Kaljula 2015). In practice the distinction between posted workers and workers having a business trip has not always been clear. For example, Haljasmäe et al. (2013) who analysed Estonian court cases found that in several instances court considered that workers were having a business trip, but evidence suggested that they were posted workers. The authors conclude that making distinction between the two cases is difficult for employees, employers, judges, and other actors involved, both due to the lack of awareness about the different regulations and because of the linguistically similar terminology (ibid.). The awareness has probably increased in recent years as there have been considerable public awareness raising campaigns on the topic.

15. Focus group interview, May 2017

16. Previous version of the Working Conditions of Employees Posted to Estonia Act: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013107/consolide>

17. https://www.ti.ee/fileadmin/user_upload/failid/dokumendid/Meedia_ja_statistik/Truuekised/Toolahetus_ENG.pdf

18. <http://www.ti.ee/est/avaleht/>

The Enforcement Directive

ED entered into force in Estonia on 17th of December 2016. Main changes are the following: First of all, there is now a registration requirement for service providers using posted workers. Employer has to send information (notification)¹⁹ about using posted workers, including information about the company and about posted workers to the labour inspectorate no later than on the day the posted employee starts working in Estonia (Table 3; see also Working Conditions of Employees Posted to Estonia Act²⁰ § 5¹).

In 2017 ELI received 329 posting notifications for 1220 posted workers. Main posting countries have been Latvia (40% of the posted workers), Poland (34%) and Lithuania (14%) and main sectors metal, arts & entertainment and construction²¹.

ELI also makes publicly available part of the information received through posting notifications: name of the service recipient; name of the employer of posted workers; field of activity of the service recipient and the posting company; home country of the posting company; number of posted workers; position and workplace of posted workers²².

Table 2: Developing mutual cooperation / „architecture“ of cooperation

Notification requirement	Information required	How it is used for controls	Issues
Notification has to be sent no later than on the day the posted employee starts working in Estonia to the ELI by email.	* Employer´s name, personal or business ID, sphere of activity, place of residence/location and data about the means of communication;	The sample of posting companies that will be targeted by the ELI is partly assembled based on the posting notifications.	Not all employers are complying with notification requirement; some give incorrect information.
	* Name of the representative or a contact person of the posted worker´s employer and data about his/her means of communication;		
	* Number of workers posted to Estonia, their names and personal identification numbers or dates of birth;		
	* Duration of the posting and the start and end date of the posting;		
	* Name of the service provider and/or the sole proprietor for whom the posted employee works in Estonia, his/her personal or business ID, sphere of activity, place of residence or location and data about the means of communication;		
	* Name of the representative or a contact person of the service provider and/or the sole proprietor for whom the posted employee works in Estonia and the data about the means of communication;		
	* The work the employee performs or will perform in Estonia and the address of the location where the work is/will be performed.		

Source: <http://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration/>

19. <http://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration/>

20. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

21. <http://www.ti.ee/est/organisatsioon-kontaktid/tooinspektsioon/lahetatud-tootajad/registreerimine/>

22. <http://www.ti.ee/est/organisatsioon-kontaktid/tooinspektsioon/lahetatud-tootajad/registreerimine/>



Secondly, after the implementation of the ED, posted workers have the right of recourse to a labour dispute resolution body of Estonia (in additions to the courts also to Labour Dispute Committee, as do local workers) for the protection of the rights guaranteed by Working Conditions of Employees Posted to Estonia Act (although these institutions might be too incompetent to solve all cases). Currently there has been only one case (4-1/752/17) where a worker, posted to Estonia through a Polish company, has turned to the Estonian Labour Dispute Committee to claim his back pay, and the claim was partially satisfied, so that the company was ordered to pay the worker his lawfully earned wage.

Thirdly, the revised act gives a possibility for the cross-border administrative penalties and fines (Working Conditions of Employees Posted to Estonia Act²³ § 7). Although before the implementation of the ED Labour Inspectorate also conducted state supervision on posted workers employment conditions, they did not have any means to sanction the foreign companies, as the previous version of the Working Conditions of Employees Posted to Estonia Act did not give such possibilities. They could only point out the problems and inform the LI of the foreign company's home state²⁴. To this point there are no cases of cross-border administrative penalties and fines.

Fourthly, the revised act establishes a contractual liability in the construction sector. Since the implementation of the ED on 17 December 2016 there is a liability regulation for unpaid wage in the construction sector. Working Conditions of Employees Posted to Estonia Act²⁵ § 5² states: If an employee posted to Estonia performs work in the construction sector and the employer does not pay the employee wages, the wages shall be paid by the person who ordered the service (simple direct contractual liability) from the employer of the posted employee. This claim, however, is limited to the minimum monthly wage (including income tax)

of Estonia. However, if the employer has exercised due diligence, the liability regulation does not apply (Working Conditions of Employees Posted to Estonia Act²⁶ § 5² (4)). Before the implementation of the ED liability regulations applied only to conditions stipulated in the Occupational Health and Safety Act²⁷.

Conclusions

Although Estonia has been mainly a sending country regarding posted workers, considering the smallness of Estonian labour market, a considerable numbers of workers – including third country citizens – are posted to Estonia as well. In recent years, the Estonian Labour Inspectorate has more and more put an emphasis on monitoring and enforcing the rights of posted workers, including developing transnational cooperation with other labour inspectorates and participating in multi-national projects aimed at protecting the rights of posted workers. Although ELI's resources are limited and finding posted workers and correct information about their working conditions and employers can still be difficult, implementation of the Enforcement Directive gave some new possibilities, like mandatory notification requirement for posting companies and a possibility to issue cross-border administrative penalties and fines, which effectiveness should be evaluated in the future.

23. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

24. Interview with the Estonian LI's representative, June 2015

25. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

26. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>

27. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/505052017007/consolide>



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This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe ([PROMO](#))”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains. The country reports are based mainly on local workshop(s) and/or interviews done in 2017 in which the knowledge and opinions of labour inspectors and other officials involved in monitoring and enforcing national rules related to the Posting of Workers Directive were solicited.

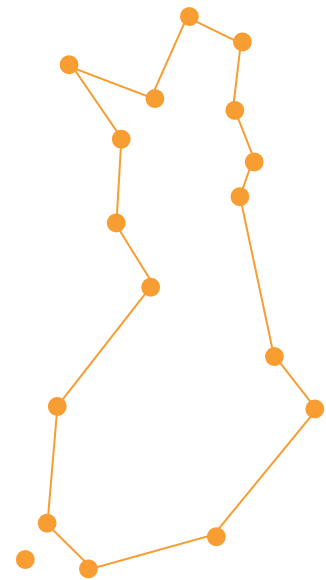
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COUNTRY STUDY



FINLAND

Transnational Monitoring and Enforcement of Posted Work: The Case of Finland

Rolle Alho, University of Helsinki



This report is based on an interview conducted 24 May 2017 with two representatives of the Finnish labour inspectorate who in their work focus on questions related to migrant workers -including posted workers. The interview was conducted within the Policy Workshop in the Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO) project. In addition, Kirsi Kykkö from the The Ministry of Social Affairs and Health provided assistance with the data on labour inspections. The report also makes use of literature covering labour inspections and enforcement.



Mapping National Enforcement Capabilities

Mapping national enforcement capabilities
In Finland, labour inspections are performed by inspectors from the Regional State Administrative Agencies¹. The agencies' mission is 'to promote regional equality by carrying out executive, steering and supervisory tasks laid down in the law'. In relation to that, the goal is to strengthen the implementation of legal protection, access to basic public services, environmental protection, public safety and to provide safe and healthy working and living environment (AVI 2015). The national labour inspectorate models can be categorised into 1) the 'generalist inspectorates' where they have a broad array of responsibilities such as working conditions, health and safety, legal and illegal work 2) 'specialist inspectorates' where their responsibilities include only health and safety/welfare at work (see Walters 2016: 13). The Finnish labour inspectorate belongs to the former category, i.e. the generalist inspectorate. In Finland the labour inspections goal is also to ensure the protection of the workers' representatives.

There are approximately 350 labour inspectors in Finland (Table 1). Furthermore, 'approximately 12' inspectors focus particularly on questions related to migrant workers² and one inspector focuses exclusively on posted workers. The number of inspectors focusing on migrant workers – including posted workers – has remained quite stable in the 2010s, however, the number of migrant workers has increased. The amount of workplace inspections has remained relatively constant during the last years. In 2016 the inspectors conducted approximately 28.000 inspections (Table 1). The Finnish labour inspectorate has resources that in a European comparison are high and the quality of protection at work is high according to the Director of The Regional State Administrative Agency for Southern Finland, Kaarina Myyri-Partanen. However, Myyri-Partanen admits that the fines posed to employers who are negligent about their workers' wellbeing are not necessarily high enough in order to have an effect on the employers' behaviour (Palkkatyöläinen 2015).

Table 1: Number of inspectors, inspections and labour costs in the Finnish Labour Inspectorate

Main figures	2014	2015	2016
Number of employed persons in the labour market*	2.447.000	2.437.000	2.448.000
Number of inspectors	n/a	n/a	Approximately 350
Average wage of a labour inspector (percentage of national average wage)	n/a	n/a	3.590 euros/month (115% of the national average wage for full time work)
Number of inspections (total)	26.644	28.732	28.325

Source: Email response 13 December 2017 from Kirsi Kykkö (The Ministry of Social Affairs and Health); *Statistics Finland.

1. The Agencies belong to The Ministry of Social Affairs and Health.

2. Email response 13 December 2017 from Anu Ikonen (OSH Division of the Regional State Administrative Agency of Southwestern Finland).

When encountering posted workers, the labour inspectors first check who their employer is and whether the workers have the legal right to work in Finland. In addition, the inspections include checking posted workers' salaries and working hours, and that the employer has fulfilled his/her legal duties of providing healthcare and a statutory accident insurance. The inspectors always try in the first place to reach a solution to the encountered problems by negotiations with the employers.

However, according to the law the inspectors are obliged to inform the police about certain crimes. If the inspectors, for example, encounter migrant workers –including posted workers– who do not have right to work in Finland they have to report them to the police without consideration. Some of the posted third country nationals in Finland, for example, do not have the legal right to work in the country. Accordingly, for such workers a contact with the labour inspectors can mean losing one's job. In addition, as long as they earn more money in Finland than in their homecountry –even if the salary is not according to the Finnish collective agreement– they do not have much motivation to make complaints. (Interview 2017)

In addition to the labour inspectors, trade unions are responsible for overseeing the generally binding collective agreements. Shop stewards play an important role in a vast number of Finnish workplaces. There is no national minimum wage defined by law in Finland; the wages are determined in generally binding collective agreements for each sector. (e.g. Alho 2015)

As regards migrant workers and posted workers, labour inspectors collect information on whether the minimum legal standards are met at the workplace. If there is negligence from the employers the inspectors give written advice or instructions to the employers. However, it is not in the inspectors' competency to claim unpaid wages in the case

the employer is unwilling to pay the agreed wages (Interview 2017). This means that the employee has to take personal legal action or contact his/her trade union if (s)he is a member. In such cases the inspectors can only assist in providing information to the employee. In the case the employer is financially unable (e.g. in the case of bankruptcy) to pay the wages the employee can turn to 'Palkkaturva', which is a state provided wage security-system.

The authorities are not particularly monitoring the use of posted workers as such, but migrant workers and all workers in general. According to the interviewed inspectors, posted workers can be found at almost every construction site in Southern Finland. There is also a considerable number of posted workers in the shipyards. According to one of the interviewed labour inspectors more and more Ukrainians are posted to Finland through companies established in a CEE country (like Estonia or Poland) –even if they do not always have the legal right to work as posted workers in Finland.

Transnational Cooperation

The Southern Regional State Administrative Agency / division of Occupational Safety and Health has signed an agreement with the Estonian Labour Inspectorate. This is due to Finland being the Estonians' main country of emigration and posting. There have also been inspector exchanges between Finland and Sweden and Finland and Germany. These exchanges have built up personal contacts. Another source of transnational contacts and information exchange between inspectors are different (EU-funded) projects. The Regional State Administrative Agency of Southwestern Finland, for example, has been involved in EURODETACHMENT project³.

3. <http://www.eurodetachment-travail.eu/Default.asp?rub=&lang=en>

As a critical remark, one of the interviewed Finnish inspectors pointed that the transnational contacts are limited to a very small number of inspectors and the concrete benefit of the transnational co-operation in terms of everyday work is not always clear. A key barrier for transnational co-operation according to the Finnish inspectors is that the authorities do not always know, which authorities are in charge of labour inspection issues in the other European countries. The Regional State Administrative Agency for Southwestern Finland is the Internal Market Information System (IMI) liaison office for the posting module and other regional divisions use IMI for posting purposes as well (Table 2).

The two Finnish labour inspectors we interviewed did not find the IMI a particularly useful tool in the exchange of information among authorities in the EU countries. The main problem according to the Finnish inspectors was that they have not received the information (e.g. data about the working hours or salaries) they have requested via the IMI. According to the inspectors they send only around 20 requests per year via the IMI. The posted workers' companies are very mobile and using the IMI for gathering information after the company in question has left the country is not a viable option.

Table 2: Developing mutual cooperation / „architecture“ of cooperation

IMI – Liaison office(s)	Other institutions involved in posting in IMI	- How many requests – sent/received	Mutual enforcement of sanctions (following the ED)	What are the bilateral agreements the labour inspectorate has? Are there any „ joint inspections “ (cross-border)?
Southwestern Regional State Administrative Agency	<p>All regional divisions of Occupational Safety and Health</p> <p>(IMI not used to send requests on social insurance matters. The authorities mentioned above do not handle social insurance issues)</p>	<p>Requests regarding posted workers:</p> <p>in 2016: sent: 15 received: 3</p> <p>in 2017: sent: 8 received: 13</p>	-	<p>The Southern Regional State Administrative Agency / division of Occupational Safety and Health has an agreement with the Estonian Labour Inspectorate on cooperation and information exchange. These authorities can perform inspections in own territory and exchange the information more efficiently. The Finnish Labour Inspectorate does not have any cross-border inspections on a regular basis but during an EU-project (European Project of "Enhancing administrative cooperation through coordinated transnational actions" 2016-2017) Finland participated with member states in joint inspections.</p>

Source: Anu Ikonen/ The Regional State Administrative Agency for Southwestern Finland / Division of Occupational Safety and Health, email response 13.12.2017.



Specific issues regarding cross-border regulation of posting

Although it is not difficult to find posted workers in Finland, according to the interviewed inspectors, the Finnish labour inspectors have difficulties in gaining correct information regarding the working conditions of the posted workers and reaching the representatives of posted workers. The companies and their employees are highly mobile and the inspectors' methods lag behind and resources are limited. The posted workers often tell the inspectors what their employers have said that they should say as regards wages and other working conditions. A common problem is that the posted workers are paid less than what their skill level would demand according to the collective agreements. There is sometimes a lack of trust towards the inspectors from the posted workers' side. Posted workers are often afraid of losing their jobs if they talk to the authorities about their work-related problems. The posted workers have little motivation to make complaints regarding their salaries as long as they are higher than in their country of origin –even in situations where their wages are lower than stipulated in the Finnish collective agreements. (Interview 2017)

State authorities and trade unions offer online information in most common foreign languages to migrant workers. The information covers a broad array of issues related to employment rights and social security issues. (Alho 2015) There is also a national website targeted to posted workers that is currently being improved (Interview 2017). It is however unclear to what extent this information reaches the workers, and to what extent they can make use of the information due to their weak bargaining position in relation to the employer. Previous research concerning the situation in 2011, for example, showed that information provided by the state authorities rarely reaches temporary migrant workers (Alho & Helander 2016). In the Finnish case, the problem of letter box companies

used for posting is visible especially in the case of companies established in Estonia (e.g. Alho 2015). The Finnish Construction Trade Union has the legal right to use boycotts against employers who do not respect Finnish collective agreements and has been active in boycotting Estonian and Polish companies that have entered the Finnish labour market (ibid.).

The Enforcement Directive

The Enforcement Directive was implemented in Finland in June 2016. However, it only applies to new postings after that time period, which the labour inspectors found complicated in terms of overseeing. Under the new act, every foreign company that posts workers to Finland must submit a notification before the work begins to the occupational safety and health authorities (Table 3). The obligation to submit an advance notification entered into force on 1 September 2017. Among other issues, the notification must contain the identification data, contact details and foreign tax ID of the undertaking that posts the workers, including the number of workers that are posted. As from 1 September 2017, the occupational safety and health authority can order an undertaking to pay a penalty fee if the notification has been neglected or is incomplete. Under the new Posted Workers Act (447/2016) the penalty fee shall be no less than EUR 1.000 and no more than EUR 10.000⁴. This is according the labour inspectors the main issue that will change.

4. <https://www.tilajavastuu.fi/en/rel/posting-workers-finland-duty-report/>

Table 3: Notification/registration system in Finland

Notification (when, to which institution, what form)	Information required	How it is used for controls
<p>An electronic form: https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker/reporting-duty/form</p>	<ul style="list-style-type: none"> •Identifying details of the company, contact information, foreign tax identification number and information on the responsible persons of the posting company in the country where the company is established. •Identifying details and contact information of the contractor •Identifying details of the company and the contact information of the builder and the main contractor for companies in the construction sector •Estimated number of posted workers •Identifying details and contact information of the postings company’s representative in Finland or information indicating why a representative must not be selected. •Starting date of the posting of workers and the estimated duration of the posting •Place where the work will be carried out •Branch in which the worker will work. 	<p>Used for selecting posting companies for inspections: used during special controls of posting in the last quarter of 2017</p>

Source: Anu Ikonen/the Administrative Agency Southwestern Finland / Division of Occupational Safety and Health, email response 13.12.2017.

15. Focus group interview, May 2017

16. Previous version of the Working Conditions of Employees Posted to Estonia Act: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013107/consolide>

17. https://www.ti.ee/fileadmin/user_upload/failid/dokumendid/Meedia_ja_statistik/Truекised/Toolahetus_ENG.pdf

18. <http://www.ti.ee/est/avaleht/>



Conclusions

In 2002 Wolfgang von Richthofen, in his book, Labour Inspection. A guide to the profession categorised Finland as a country with a high-performance inspection system. Despite this, it is reasonable to conclude that the labour inspectors and trade unions representatives encounter considerable problems in protecting the rights of the posted workers also in Finland. According to one of the interviewed inspectors' estimate the salaries of posted workers are in 'over 90 %' of the cases on a lower level that they should be according to the collective agreements. There is often a fear among the posted workers towards their employers, which hinders them from defending their rights. According to the Finnish inspectors there is an increasing demand for deeper transnational co-operation between the authorities as the current co-operation is far from effective enough in protecting working conditions. However, the Finnish (Southern Regional State Administrative Agency / Division of Occupational Safety and Health) and Estonian labour inspectors have established institutionalised cross-border contacts (official bilateral agreement) as there is considerable amount of cross-border mobility of workers and companies from Estonia to Finland.

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19. <http://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration/>
 20. <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017009/consolide>
 21. <http://www.ti.ee/est/organisatsioon-kontaktid/tooinspektsioon/lahetatud-tootajad/registreerimine/>
 22. <http://www.ti.ee/est/organisatsioon-kontaktid/tooinspektsioon/lahetatud-tootajad/registreerimine/>





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This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains. The country reports are based mainly on local workshop(s) and/or interviews done in 2017 in which the knowledge and opinions of labour inspectors and other officials involved in monitoring and enforcing national rules related to the Posting of Workers Directive were solicited.

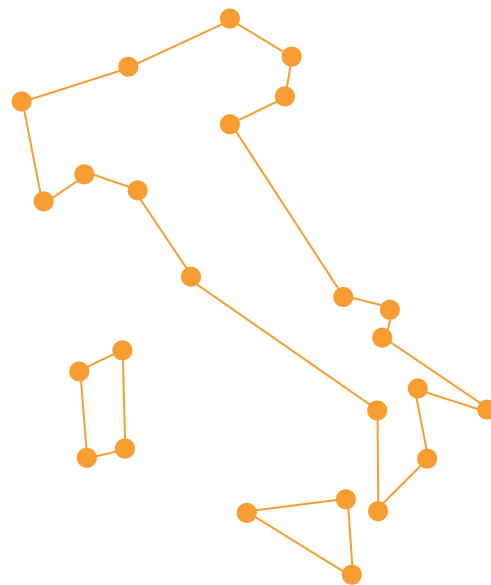
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ITALY

Transnational Monitoring and Enforcement of Posted Work: The Case of Italy

Francesco E. Iannuzzi, Devi Sacchetto, Francesca Alice Vianello and
Elinor Wahal, University of Padua



National enforcement capabilities

In Italy the administrative body responsible of controlling the application of the Directive on posted workers is the National Inspectorate of Labour which is subordinated to the Ministry of Labour and Social Affairs. However, there are no specific actions dedicated to secondment monitoring. The National Inspectorate of Labour carries out ordinary controls which do not specifically regard posted workers, but all workers employed by the firm inspected. Its functions are defined by the Legislative decree 149 (14/09/15): supervisory activities on work, contributions, compulsory insurance, social rules, health and security in workplaces, occupational diseases, work related injuries; training of inspectors; prevention and promotion activities of legality aimed at contrasting irregular work; in the road transport sector, realization and coordination of inspection activities on work relations; studies and analysis on irregular work. However, as some scholars highlight, labour inspection services are facing a major crisis in many countries (Liao, Chiang 2012; Weil 2008). Similarly, Italy is facing a long and deep crisis mainly due to the lack of financial and human resources affecting the quantity and the quality of inspection services.

The chronic lack of resources has pushed the executives of the labour inspectorate to rationalize inspection accesses by reducing the random monitoring and directing controls to those sectors that historically suffer a high level of labour irregularity according to the different territorial areas. The strategy of targeted controls is also demonstrated by the high level of irregularities found: According to the Italian National Labour Inspectorate (INL 2017¹) annual report, during 2016 there were about 191.000 firm inspections with a rate of irregularities about 60% (Table 1).

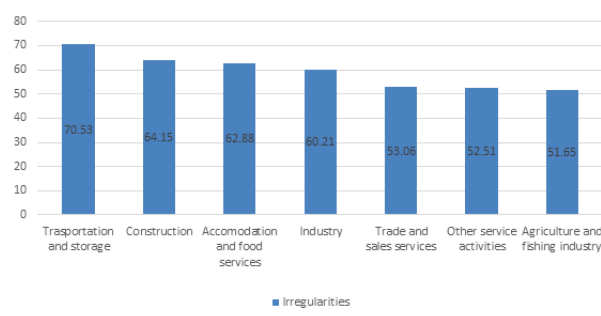
Table 1: Inspections and irregularities

Total companies inspected	Total irregular companies	Total irregular workers	Total undeclared workers
191.614	120.738	186.027	5.007

Source: Ispettorato Nazionale del Lavoro (2017) Rapporto annuale dell'attività di vigilanza in materia di lavoro e legislazione sociale anno 2016: <https://www.ispettorato.gov.it/it-it/studiestatistiche/Documents/Rapporti%20annuali/Rapporto-annuale2016.pdf>

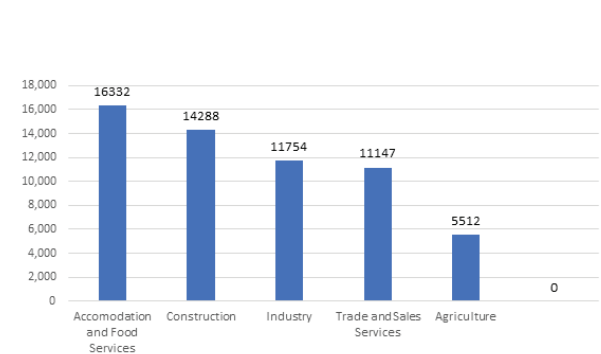
The majority of inspections were performed on the tertiary and service sectors (55%) followed by the construction sector (29%); industry (10%); and agriculture (6%), while the highest rate of the irregularities was found in the transportation and storage sector (Figure 1).

Figure 1: Irregularity rates and economic sectors



Source: INL (2017)

Figure 2: Irregular employment contract and economic sector



Source: INL (2017)

1. Ispettorato Nazionale del Lavoro (2017) Rapporto annuale dell'attività di vigilanza in materia di lavoro e legislazione sociale anno 2016: <https://www.ispettorato.gov.it/it-it/studiestatistiche/Documents/Rapporti%20annuali/Rapporto-annuale2016.pdf>

As emerged from interviews, the most relevant problem appears to be the labour inspectorate's lack of resources in terms of both financial resources and human resources. Concerning human resources, there is definitely a problem of shortage of inspectors, since the last hiring took place in 2006 (eleven years ago), and in that year they only hired 600 inspectors. But there is also a relevant problem connected to the age of inspectors, as the majority of them are in their 50's/60's or above. Now, the national staff is composed by 6,046 people, of whom 2 national executives and 88 sub-national managers. The wage increases according to position, experience and seniority. The base wage for new employee is circa 1,500€.

In addition to the lack of resources, the capabilities of the Italian system to enforce the Posting of Workers Directive are also limited because Italian inspection bodies are undergoing a complete reconfiguration, which started in January 2017. This reconfiguration has unified the labour inspectorate, the social security office (Inps) and the institution that manages the workplace accidents insurance (Inail). This could, of course, be beneficial in the long run, but at the moment this process is causing a lot of confusion (e.g. the new headquarters have still to be implemented).

Considering only the labour inspectorate before the unification of 2017, in 2016 operative inspectors were 2.538 (-77 units compared to 2015); technical inspectors were 280 (-12 compared to 2015) to which 343 police officers of the Italian Police for the labour protection were added (Carabinieri) (INL 2017). The Padua's case can explain the situation. The Padua's inspectorate staff is composed by 30 active inspectors, every inspector is able to carry out 60 procedures per year. This means that the office realizes between 1350 and 1600 inspections per year that cover less than the 5% of companies recorded in the province. Other inspectorates have an inspection capability even lower, around the 3%, because of the shortage of staff.

Another feature of the case of Italy that has to be taken into consideration is its regional divide. It is widely documented that Italy has two different economies and, understandably, this also affects the phenomenon of posting and its governance. For instance, while all the inspectors we interviewed in Northern and Central Italy were aware and affected by the posting of workers, in Naples they told us that in June 2017 they dealt with their first case of posting in the last five years (they were not even aware of the Enforcement Directive, and none of the inspectors wanted to take on the case, because it was seen as a big inconvenience).

Furthermore, Italy also seems to have a problem with its long processing times. The inspectors we talked to underlined that in the case of transport sector, it is particularly difficult to find unlawful conducts because the roadside inspections have to be executed by the police, and the cooperation between police and labour inspectorate is not always so smooth.

Another central element that has been highlighted is the linguistic problem, because, on the one hand, Italian inspectors and policemen do not always speak English, on the other hand, it often happens that foreign posted workers do not speak English themselves (or they pretend not to), so in many occasions it is impossible to go through with an inspection.



Transnational cooperation

According to the interviewed inspectors, transnational cooperation is poor, although recently strengthening administrative cooperation and information exchange has been implemented through the Internal Market Information (IMI) platform. The IMI platform is particularly important for verifying the company's operations and the number of requests across the platform is increasing. However, requests through IMI did not always run quickly and in some cases the information from abroad inspector is communicated even after the end of the posting. Moreover, an important element of transnational cooperation is that the Italian labor inspectorates usually do not deal with Italian workers that are posted in another European country, except of foreign colleagues' request.

Another form of collaboration of European inspectors is through the Committee of Senior Labor Inspectors (SLIC), which is a body set up within the DG Employment Committee and which brings together the heads of the inspectors of the all European countries. Once a year all European inspectors meet in a plenary session and twice annual other meetings on specific questions are organized.

For many inspectors, targeting posted workers is only a marginal aspect of the all inspections carried out. In the case of an important inspectorate for posted workers in northeast Italy, this is about 20 out of 1500 inspections carried out in one year. Inspectors point out that the argument of posted workers has been discussed mainly thanks to specific projects: Empower started in 2010 with the goal of monitoring the posting of the community; Transpo in 2011 was organized with Romania Inspectorate, concerning posted workers in the (road) transport sector. One general question emerged during interviews regarding the problems into transnational cooperation is the language, as many inspectors have basic knowledge only of English.

Box 1: A case of international cooperation

An interesting case of international cooperation highlighted by the labour inspectors of Padua's is that of a Chinese entrepreneur based in a neighbourhood in Padua who had posted workers in a construction site in Vienna. The Vienna inspectorate asked for information from colleagues in Padua through a document written in German that was informally translated thanks to the help of an inspector's daughter. In the document, the Vienna inspectorate asked for information about the company run by the Chinese entrepreneur because the inspection found an irregularity. However, when Austrian inspector returned to the construction site to notify the irregularity the company was no longer present, and therefore the Austrian inspectorate used the IMI platform to ask the Inspectorate of Padua to contact the firm and give them notice of this document. In fact, while in Italy it is necessary to report the posting in the 24 hours in advance of starting the job, in Austria, it must be communicated one week in advance. Moreover, while in Italy the penalty ranges from 500 to 1500 Euros in Austria the sanction is 4000 Euros. Before sanction the Chinese entrepreneur, the Austrian inspector gave 15 days to the Italian firm to justify.



Issues specific to the cross-border regulation of posting

The main issues concerning the cross-border regulation of posting take place in the transport and construction sectors, since they are the most affected by the posting of workers. According to the interviews with a representative of ANITA (National association of road transportation companies) and of ANCE (National association of construction companies) the cross-border problems regard the diversified transposition of the directive. Some examples are:

1. Austria wants all the paper translated in German;
2. Italy and France require the nomination of a representative in charge of keeping the documentation (e.g., employment contract, pay-slips, working hours details, employment offer letter, applicable social security details), while other countries do not want it;
3. In Italy the duration of certificate attesting employment contract, representative nomination and rules compliance is one week, while in France and Germany it is six months;
4. The A1 form is issued with different times, in Romania the office in charge takes six months, in Italy two months, in France one month and half;
5. Special Construction Workers' Funds exist only in some countries, so it is complicated to establish when employers must pay it in the destination country according to the rule of equal treatment of workers (to solve this problem there are some bilateral agreements between Italy-Austria, Italy-France, Italy-Germany).

The uneven application of the enforcement directive is particularly problematic for the road transport sector, given that it is based on the principle of the fast mobility. Workers are highly mobile and cross different countries, so companies must be able to deal with diverse legislations if they want to be regular.

The Enforcement Directive

The legislative decree no. 136/2016 transposed the Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers. One of the most important innovations introduced by the LD136 is the mandatory notification that must be sent by employers to the Ministry of Labour at least 24 hours before the secondment starts and any subsequent changes must be noted within five days of the event. This innovation is important for two reasons: first, it makes much more traceable and controllable the presence of posted workers; second, it makes available statistical data on posting in Italy (at the moment no data are available).

The situation following the Enforcement Directive is characterized by the political will to improve the controls. According to the official sources (INL 2017) in 2016 the controls on illicit externalizations of the labour process through subcontracts, secondment and supply contracts were increased. The general goal was the reduction of social dumping and the protection of workers. The result of the intensification of controls gave good results: inspections targeted 13,416 workers vs. 9,620 in 2015 (+39%).

The sectors more affected by illicit forms of externalizations were: services for the person or for the house (Ateco code S) with 1,325 violations (+276% in comparison with the previous year); transport and storage (Ateco code H), with 3,327 violations (+116%); manufacturing (Ateco code C) with 1,546 violations (+51%); constructions (Ateco code F) with 1,213 violations (+20%).

Moreover, the intention to increase the controls and their success in particular in the transport sector is confirmed by the agreement signed the 26th of February 2016, between the Ministry of Infrastructures and Transports and the Ministry of Interior aimed at improving the cooperation.



During 2016, inspection activities in the road haulage sector were particularly intensified due to some problematic issues, pointed out by local offices, related to cases of violation of labour and social security legislation and the irregular use of different employment contract forms. In this regard, the phenomena of posting and international temporary agency workers as well as the phenomenon of delocalization and subcontracting were subject to a specific inspection carried out in collaboration with other institutions responsible for supervising road transport, such as the Italian highway patrol.

The agreement among these different institutions provided the realization of a trial project based on joint inspections that were carried out between the 1st of September 2016 and the 30th of November 2016 in three regions: Veneto, Emilia Romagna e Puglia. Inspectors controlled 371 companies and 378 workers (25% foreigners): 57 drivers did not have the documentation concerning the work contract; 116 drivers (more than 30%) were under subcontracts and 12 (3%) were posted workers.

Padua was one of the Veneto counties selected for collaboration with other apparatus of the state. In this case the inspections were carried out along with police. The inspection concerned both the truck and the employee's employment relationship. The inspectorate had previously received reports that some Italian companies forced workers to resign and then the same workers were hired by a Romanian service agency continuing to carry out the same job for the Italian firm. However, during these inspections nothing has been noted. The audit verified that overall remuneration was adequate, while irregularities emerged as regards the hour of driving that were significantly higher than allowed by Italian legislation.

However, according to our interviews this period is also characterized by a high level of confusion on rules and their applications in the different EU countries. It seems that both labour inspectorates and employers are trying to understand how to fulfil the new legislation and in the meantime, there is a sort of interruption of controls. This happens in

particular in the road transport sector, since it is the most affected by innovations introduced by directive (especially for what concerns cabotage). Indeed, organizations like ANITA are developing advice services for their members and clients aimed at supporting them to comply with manifold rules on posted workers.



Conclusions

This report analysed the action of the Italian labour inspectorate in relation to the issue of transnational posting of workers, highlighting limits and potentialities in fighting against irregularities and abuses in labour relationships. The main points are summarised in Table 2.

Table 2: Main problems emerged in the Italian case of labour inspections and posting of workers

Normative, legal and cooperation issues:	Different timelines for transposing European directives by Member States; Different legislation of the European Member States; Overlap between the concepts of national and transnational posting; Chaos and delays due to the reorganization of the Italian National Labour Inspectorate; Long terms for checking the A1 model; Insufficiency of the A1 model and lack of integration with bilateral agreements between Member States;
Inspection problems	The lack of financial and human resources of labour Old age of inspectors; Territorial differences between North and South (posted workers are more present in Northern regions than Southern regions); Difficulties in widespread monitoring due to the Italian economic structure characterized by small and medium-sized companies; The large part of inspection regards big companies, but irregularities are more frequent in small businesses; Language barriers; No competence covering outgoing posted workers; No inspections on housing conditions; IMI system seems to be insufficiently able to share information and to check non-national firms;

On the one hand, the Italian case confirms the ILO's concerns about the frequent inability of labour inspectorate to carry out their functions mainly because of the inadequacy of financial and human resources (ILO 2006). On the other hand, this report points out the lack of administrative, legislative and technical tools as well as the weakness of international cooperation in addressing the abuses in the posting process. Although the recent growth of the posting of workers has been rather sustained, drawing the attention of European and Member States legislators, the phenomenon has not been considered a priority by the Italian labour inspectorate. Therefore, no ad hoc actions or specific monitoring arrangements have been implemented to deal with irregularities. Regional differences in the use of posting instruments and the widespread use of other contractual and labour irregularities seem to play a significant role in the selection process of labour inspectorate priorities.





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Published and disseminated by: SOLIDAR

This publication has been written for the project “Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)”, VS/2016/0222. It has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains. The country reports are based mainly on local workshop(s) and/or interviews done in 2017 in which the knowledge and opinions of labour inspectors and other officials involved in monitoring and enforcing national rules related to the Posting of Workers Directive were solicited.

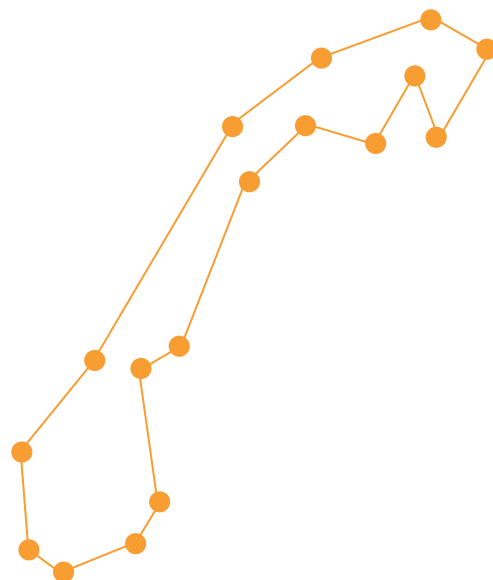
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NORWAY

Transnational Monitoring and Enforcement of Posted Work: The Case of Norway

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Mapping National Enforcement Capabilities

The Labour Inspection Authority in Norway consists of a central office - the Directorate, seven regional offices and 16 local offices throughout the country. The Norwegian labour market consists of approximately 2.7 million persons. As shown in Table 1, the number of inspections has declined from 2015 to 2016. According to the annual report from the Labour Inspectorate, the focus has shifted from “as many inspections as possible” to more long-termed work to reveal organized crime and shady networks within the labour market. The Labour Inspectorate receives tips and information from trade unions, enterprises and the public.

Table 1: Number of employees, inspections and labour costs in the Labour Inspection Authority

Main figures ¹	2014	2015	2016
Number of employees	631	642	662
Number of inspections (total)	17 434	17 939	15265
Labour costs per full-time equivalent (NOK)	679 776	696 381	707 552
Average labour cost per full time equivalent in Norway (NOK) ²	n/a	n/a	673 794

According to the annual report from the Labour Inspectorate the main inspection activity in 2016 was directed to high-risk branches as construction, hotels and restaurants, transport and cleaning. In total 5 803 inspections (more than one third of the total) were conducted in these branches and would include control with foreign workers (also posted workers). In additions, the statistics from 2016 show that further 2022 inspections are labelled “social dumping” and “work-life-crime”.

There is no general minimum wage in Norway. Wages are subject to collective agreements or if no such exist, agreement between the employer and the employee as part of the written employment contract. Although there is no general minimum wage in Norway, minimum rates of pay have been introduced in certain sectors (extension of collective agreements):

- Construction sites (for construction workers)
- The ship-building industry
- The agriculture and horticulture sectors
- Industrial and private cleaning
- Fish processing enterprises
- Electricians
- Freight transport by road
- Passenger transport by tour bus
- From 2018: Hotels and restaurants

The Labour Inspectorate is given the authority to check wages for employees within areas covered by extended collective agreements (minimum rates). All enterprises that carry out work on construction/building sites and provide cleaning services, including both Norwegian and foreign enterprises, are required to provide their employees with an HSE card (health and safety-card). The purpose of the HSE card is to identify the individual employee and state the person’s employer. In this way, the HSE card helps to provide a better overview of the organisations present on the workplace. The HSE card is not valid as an ordinary identification document. Furthermore, cleaning enterprises need to be approved by the Labour Inspectorate in order to operate, (from December 2012) and a separate register of enterprises that are publicly approved is established. The labour inspectors will, when visiting a work-place, check whether the firm is registered or not.

The Norwegian Labour Inspectorate controls health and safety regulations, HSE-cards in construction and cleaning, wage-slips in areas covered by extended collective agreements, working time and housing (when the employer is responsible for this). Giving guidance about working conditions and regulations is also a very important task for the inspectors. This is why they are very conscious about their role; i.e. not to be misjudged as a kind of police. This is sometimes a delicate balance between being “good cop and bad cop”. When they suspect illegalities outside their own jurisdiction, the inspectors provide information to other authorities: police (illegal employment), tax office (taxation). Otherwise, the inspectors are very conscious



1. Collected from the annual report (2016) from The Labour Inspectorate.
2. Calculation done by Fafo.

about informing workers about their rights and the functioning of the Norwegian labour market. The Inspectorate has translated important facts about different regulations in several languages. These leaflets are handed out at the workplaces and can also be accessed online.

In Norway there is a separate group of inspectors dedicated to “social dumping”. An important task for these inspectors is controlling working conditions for posted workers, but also for foreign workers employed by Norwegian companies or foreign companies established in Norway. Their work is concentrated to some risk-branches, like construction, cleaning, shipyards, transport and farming. During 2016 the group has also conducted several inspections in the public sector, related to the use of subcontractors and temporary agencies. The “social dumping”-inspectors have got special training, and they normally have in-depth knowledge about one of the risk-branch. In general, there are always two inspectors working together. This is partly to secure the inspectors’ safety, but also because the inspections have become more comprehensive. During the inspections, they talk to both the workers, safety inspectors and the employer. These inspections are always unannounced. In total, the numbers from 2016 show that 54 per cent of the inspections were unannounced. This is on level with inspections in 2015 (annual report from the Labour Inspectorate).

Ten years ago, the first Service Centre for Foreign Workers (SUA) was established in Oslo. After this additionally four centres have opened in different places in Norway. This is done in cooperation between the Labour Inspectorate, the Police, the Tax authorities and the Norwegian Directorate of Immigration (UDI). They work together towards foreigners arriving in Norway for employment purposes, with the aim of providing them appropriate guidance and a shortening of the time used for processing their applications. Those who can use the services at the offices are persons from EU/EEA-countries who come to work in Norway, with their family members, persons from

countries outside EU/EEA who are going to apply for residence permit in order to work in Norway, with their family members and employers.

Further, so-called labour crime-centres are established in seven cities around the country. These are practical cooperation- and investigation-centres between labour inspectors, police, tax-authorities, and the welfare authorities (NAV). Two of the centres were established in 2017, with a grant of NOK 25 million (approx. € 2.6 million) for this purpose. The centres conduct joint inspections, and might bring with them persons from the fire-department, custom service, the food safety authority, municipal treasurer and others. In 2016, 18 per cent of inspections from The Labour Inspectorate were done in cooperation with other authorities. A main challenge for these centres is the exchange of sensible information from one authority to another, due to sensitive personal data issues. All the authorities are now working to make the cooperation easier in the field of confidentiality.

Transnational Cooperation

The Labour Inspection Authority in Norway cooperates with Denmark and Sweden on a high level (not inspectors). Recently agreements were signed, also on high level, with Lithuania, Bulgaria and Poland. The plan is to get an agreement with Romania at the turn of the year. There are some contact and seminars between the “ground floor”, i.e. inspectors from different counties, also including a few common inspections. These activities are financed by EEA Grants³. The plan is to establish a new cooperation project with these countries that in the first phase will last for three years (from 2018), also financed by the EEA Grants. Some of the Norwegian inspectors point out that it is very important that information and better knowledge about the Working Environment Act and central regulations is a part of bilateral contacts.

3. The EEA Grants and Norway Grants represent the contribution of Iceland, Liechtenstein and Norway to reducing economic and social disparities and to strengthening bilateral relations with 15 EU countries in Central and Southern Europe and the Baltics.



In the area of posting of workers, in 2016 Norway sent out 9 and received 3 Internal Market Information System (IMI) requests⁴. Since 2017, all the region-offices are also able to use the IMI-system (Table 2), and this will probably increase the numbers substantially. Some of the inspectors complain about the fact that information exchange via IMI is sometimes very formal and gives little real knowledge about the firm or the relevant regulation in the other country. There have also been incidents where information could not be handed out because of confidentiality. On the other hand, this system makes it much easier to reveal letter box companies, and has given useful information also in other areas, for example information about the owners of the companies.

Table 2: Developing mutual cooperation / „architecture“ of cooperation

IMI liaison office(s) for posting module	Other institutions involved in IMI posting module	IMI requests sent/received in 2016	Transnational enforcement of sanctions	Bilateral agreements and joint inspections
The Labour Inspection Authority's seven regional offices	None	sent 9 received 3	No information	4 bilateral agreements and 3 joint inspections

Issues specific to the cross-border regulation of posting

It is obligatory to be registered to do business in Norway, in Brønnøysund Register Centre. There is little difference between temporary and permanent cross-border service provision in Norway. The procedures for temporary service provision in Norway are very similar to those for establishing a permanent business. A Norwegian organisation number would therefore generally be required in order to provide services in Norway. Foreign citizens without a Norwegian personal identity number must apply for a Norwegian D-number.

The duration of the business and the form of organization will help determine in which country the taxation should take place. The tax liability for posted firms and workers is handled by The Central Office for Foreign Tax Affairs (SFU). The Labour Inspectorate does not automatically get access to information concerning enterprises and workers

collected by the tax office, and they do not normally make use this register in order to decide which work-places to visit. This explains why inspectors do not follow any register to find the posted workers, and the inspections will therefore cover both posted workers and other employees. When arriving to a workplace, the inspectors hand over a form (see Appendix 1) for the workers to fill out, so that they can detect the employees' status. This form is translated to a whole range of languages.

Inspectors report that the workers often do not know whether they are posted or not. Some workers move between employers from one project to the other, and sometimes they might be registered as self-employed. The status of the employees is also changing from being posted to not being posted. For these workers, the change of status does not necessarily mean any change of their working situation.

There is some uncertainty about the numbers of service providers and posted workers, but calculations indicate that there were around 46 000 posted workers in Norway in 2016. The Labour Inspectorate has officially made a request to the Ministry of Labour and Social Affairs to get a similar register of posted workers as in Denmark (RUT). This was done in connection with the national implementation of the Enforcement Directive. The response of the Ministry was that this will be considered on a later stage.

Other main tasks when it comes to posted workers are problems related to covering of expenses to housing and board, payback of parts of the wages when returning to the home-country and bad housing-facilities. A problem for the inspectors is that the workers very often are loyal to their employer, usually because they fear to be returned home and lose their job if they talk to the authorities. This might also be explained by the fact that a lousy pay in the eyes of a Norwegian may still represent decent pay for a posted worker.

If a construction project lasts more than 30 days, pre-notification must be sent to the Labour Inspectorate. This will give inspectors an overview



4. http://ec.europa.eu/internal_market/imi-net/statistics/2016/12/index_en.htm#t_1_3

of the activity locally. Inspectors also do their own research by driving around detecting projects (especially in construction).

The normal reaction for breaches on the Working Environment Act and the General Application Act (extension of collective agreements) are instructions (decrees) to correct the wrongdoing. The employer is given a time-limit for this. In cases where the corrections are neglected, the inspectors can give a coercive fine. In cases with acute danger of health and safety, or if the workers fail to show their HSE-cards, the inspectors can close down/shut the work and/or the workplace.

From 2014, the labour inspectors can give penalties for serious or repeatedly violations of the regulations. The amount will be determined after a specific assessment in the individual case. The fine is maximum NOK 1,404,510 million (approx. € 1.4 million) (2017). It is hard, and often impossible, to collect fines from foreign employers. A last, but not least, reaction is petition for the police. The numbers of petitions has declined during the last years, probably due to a closer cooperation in daily life between labour inspectors and police officers. Some of the crimes centres have recruited former police-officers to work for them. The payments of the fines are made to the state. A suggested proposal has been made that when other countries 'authorities are helping out with the collection of the fines, they can keep the money.

The Enforcement Directive

The Enforcement Directive was implemented in the Working Environment Act from 1st of July 2017§ 1-7 (4). So far, there is therefore no practical experience with these regulations. The implementation implies that the Ministry may lay down rules on:

- necessary provisions to ensure compliance with the rules, including provisions for cooperation with authorities in other EEA countries.
- protection and compensation for retaliation from employer,
- criteria for deciding whether the posting is real,
- compensation for housing,
- requirements for documentation.

The regulation of posted workers has also been changed, meaning that at the work-places should be access to:

- pay slips, time-sheets indicating the beginning, end and duration of the daily working time;
- proof of payment of wages or copies of equivalent documents.

The Labour Inspectorate shall enforce and make the decisions necessary for the implementation of the provisions. There is a new regulation on mutual assistance in collection and notification of financial administrative sanctions:

- Decisions on financial administrative sanctions and fines imposed by the competent authority or court of another EEA State are binding in Norway.
- The Norwegian National Collection Agency may request the competent authorities of another EEA States to claim monetary requirements as provided for in the Working Environment Act.

The Ministry of Labour and Social Affairs has not proposed any new provisions regarding liability in subcontracting chains in connection with transposition of the Enforcement Directive. The reason is that there is already solid responsibility for wages in the areas covered by the general application of collective agreement. Chain liability was introduced in 2010, and it is based on the German system. This means that all contractors in the chain are liable to employees further down in the chain for unpaid wages and holiday pay. All employees are covered, not only posted workers. The scheme covers minimum wages, overtime pay and holiday pay. If the agreed wage is higher than the minimum wage, contractors will only be liable for the minimum wage. It is for the individual employee to decide whether he or she has a claim against the contractor. Employees making a claim might be assisted by trade unions or legal advisors, but the Labour Inspectorate cannot provide any help besides of guidance on the provision. They cannot impose payment of wages as this is deemed to be a matter of civil law.





Conclusions

The Labour Inspectorate in Norway has for many years been active in monitoring labour conditions and wages for foreign workers in Norway, especially in the construction sector. These inspections include posted workers, but this group is not subject to separate controls. The Inspectorate does not have automatic access to registers over posted workers coming to Norway. When it comes to the transnational monitoring and enforcement, this is still in the beginning, and it is so far limited experiences with the IMI-system.



Appendix 1:
FORM USED BY LABOUR INSPECTORS IN NORWAY – handed out to workers

Employee/Arbeidstaker

Self-employed person/Selvstendig næringsdrivende

Personal details – to be completed by all/ Personopplysninger – fylles ut av alle

First name/Fornavn:		Middle name/Mellomnavn:	Surname/Etternavn:
Mobile phone/Mobilnr:		Norwegian ID-no./ Norsk identitetsnummer:	
E-mail/E-post:		Address in Norway/Adresse i Norge:	Address abroad/Adresse i utlandet:
Date of birth/Fødselsdato			
Day/dag	Month/Måned		
Nationality/Statsborgerskap:			

To be completed if employee/ Fylles ut dersom arbeidstaker

Employer (Who pays your salary)/Arbeidsgiver (Hvem betaler lønn)		Do you have a written contract of employment/Har du skriftlig arbeidsavtale? Yes/Ja <input type="checkbox"/> No/Nei <input type="checkbox"/>
Name and mobile phone no. for immediate superior/Navn og mobilnr til nærmeste leder?		Employed from/Ansatt fra
Worked at this site from/ Arbeidet på dette arbeidsstedet fra	Contact person at this site/Kontaktperson på dette arbeidsstedet	
Average number of working hours per week/ Gj.snittlig antall timer per arbeidsuke	Working hours per day/Arbeidstid per dag	Do you get paid for all hours worked/Får du betalt for alle timene du arbeider: Yes/Ja <input type="checkbox"/> No/Nei <input type="checkbox"/>
Gross hourly wage/Brutto timelønn:	Gross weekly wage/Brutto lønn per uke:	Gross monthly wage/Brutto lønn per måned:
Does the employer provide accommodation/Holder arbeidsgiver bolig Yes/Ja <input type="checkbox"/> No/Nei <input type="checkbox"/>	Does the pay slip show tax withheld/Viser lønns slippen skattetrekk Yes/Ja <input type="checkbox"/> No/Nei <input type="checkbox"/> Vet ikke/Don't know <input type="checkbox"/>	How many times in a year do you come to Norway for work/Hvor mange ganger i året er du i Norge på arbeid

To be completed if self-employed/Fylles ut dersom selvstendig næringsdrivende

Name of enterprise/Navn på foretak:		Organization no./Organisasjonsnr
Principal/Oppdragsgiver		Do you use sub-contractor(s)/Bruker du underleverandør: Yes/Ja <input type="checkbox"/> No/Nei <input type="checkbox"/> How many?/Antall <input type="text"/>
Start-up date for this contract/ Startdato dette oppdraget	Estimated date of completion/Forventet oppdragtid	Number of employees on the contract/Antall ansatte på oppdraget



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