

ENFOSTER project  
(ENFORcement STakeholders coopERation)  
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*A project for a stronger cooperation on posting of workers within the EU*



## **“Enfoster Brief no.1”**

**“Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation”**

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The ENFOSTER project has been coordinated by Istituto Guglielmo Tagliacarne and it has involved the following partner organizations:

- Arbeit und Leben e.V. Berlin
- CISL - Confederazione Italiana Sindacato Lavoratori
- CSC Transport and Communication,
- EFBWW - European Federation of Building and Woodworkers
- ISCOS-CISL
- Italian Ministry of Labour and Social Policies (DG Inspection Activities and DG for Policies and Services for Employment and Training)
- Romanian Labour Inspection.

Authors of this document are specified in each chapter. The work has been coordinated by Debora Giannini (Istituto Guglielmo Tagliacarne).



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## INTRODUCTION

(By Debora Giannini – “Istituto Guglielmo Tagliacarne” Foundation - Coordinator of the Enfoster Project)

### THE ENFOSTER PROJECT: A CONCRETE EXPERIENCE OF COOPERATION AMONG STAKEHOLDERS

This report has been prepared within the project “Enfoster - ENFORcement STakeholders coopERation”. The project has been funded with the financial support of the European Union (DG Employment, Social Affairs and Inclusion) within the “Progress Programme” (budget heading 04.04.01.03 “Posting of Workers: enhancing administrative cooperation and access to information”. The project has been carried out in the period November 2013-January 2015.

The aim of the “Enfoster project” has been to support the enforcement of Directive 96/71/EC and of Directive 2014/67/EC concerning the transnational posting of workers in the framework of the provision of services within the EU. An enforcement based on a stronger cooperation among stakeholders’ (social partners and control authorities). A stronger cooperation based on shared knowledge, competencies, practices and experiences for a fair and responsible posting of workers within the EU.

A specific focus of the project has been on the posting of workers in the building sector and in the road transport sector.

The Enfoster project has been carried out by a transnational partnership representing a “multi-stakeholder” and multidisciplinary consortium:

- Coordinator: Istituto Guglielmo Tagliacarne (Foundation of the Italian Union of the Chambers of Commerce) - Italy
- Arbeit und Leben e.V. – Germany
- CISL Confederazione Italiana Sindacato Lavoratori - Italy
- CSC Transport and Communication - Belgium
- EFBWW - European Federation of Building and Woodworkers
- Iscos CISL– Italy
- Italian Ministry of Labour and Social Policies - Italy
- Labour Inspection – Romania.

FIT CISL (CISL Transport - IT) and FILCA (CISL Building Sector - IT) have been associated partners (external supporting organizations).

The basic assumption behind the project is that the enforcement of the legislation on the transnational posting of workers is a process needing a ‘multi-stakeholder vision’ (actively involving workers’ organizations, employers’ associations, labour inspectorates, other control institutions) and a multi-disciplinary approach (the legislative, administrative, social-behavioural, ethical and regulatory dimension embedded in the enforcement process).

The research, training and information activities carried out by the project have been characterized by this multi-stakeholder vision: trying to analyze positive practices and critical issues, exchanging views and reflections from both perspectives, that of social partners and that of control authorities.

The main activities of the project have been:

- **An action-research on practices:** four action-research teams working at national level (one in Belgium, one in Germany, one in Italy, one in Romania), definition of shared guidelines, two transnational workshops in order to collect, analyze and exchange views about practices for a fair and responsible enforcement of EU posting legislation;
- **The ‘Stakeholder Academy’** : two advanced learning sessions on the posting of workers involving social partners and control authorities (6 days in total, involving 35 stakeholders);
- **Five Seminars at national level** in the involved countries (Belgium, Germany, Italy, Romania) to present and follow-up project’s results;
- **One pilot short training** for companies on basics and practices in the posting of workers;
- **A Final Transnational Conference in Brussels**, to capitalize the results of the project among a meaningful audience of social partners and institutions at EU level.

### THE KEY TOPICS IN THE “ENFOSTER BRIEFS”

The ENFOSTER project has produced three main short reports called “Enfoster Briefs” with the aim of summing up the main practices and reflections exchanged within the project:

- Brief no. 1 on : “Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation”, with concepts and examples of cooperation between workers’ organizations and employers’ organizations, and references to the implementation of IMI system within posting of workers;
- Brief no. 2 on “Responsible Posting of workers within the EU: actions by Unions, answers by control authorities” referring to examples of agreements for a social responsible posting and a section with suggestions by control authorities for a correct process of posting of workers;
- Brief no. 3 (a “Policy Brief”) on “Transnational Posting of Workers within the EU: emerging challenges and opportunities in the light of Directive 2014/67/EU: with analyses and reflections from control authorities and workers organizations about challenges and opportunities deriving from the so-called Enforcement “Directive”.

In line with the approach of the project, the “above mentioned “Enfoster Briefs” have been prepared thanks to the active participation by all the Enfoster partners with the aim of summing up information, experiences and reflections collected in their respective countries and institutions (Belgium, Germany, Italy, Romania, the EU level thanks to the partner EFBWW).

The preparation of the “Enfoster Briefs” was in itself an opportunity to concretely implement a participatory, multi-stakeholders and multi-disciplinary activity for the posting of workers.

All partners, with their different personal, institutional and national background, took part in the writing of the Briefs and also involved other stakeholders in their respective countries and institutions.

Each contribution in the preparation of the “Briefs” was, of course, based on a specific perspective and/or on a specific language-vocabulary, but all writers believed in the importance to merge the different perspectives in one shared effort. This shared effort enhanced mutual learning, trust and cooperation among them.

In line with the aim of the project, this “Brief” has been prepared within one of the Enfoster working groups with the aim of collecting experiences and reflections among institutions and social partners from Belgium, Germany, Italy and Romania.

This “Brief” specifically refers to aspects of paramount importance for an equal and fair posting of workers, such as *social dialogue* and *administrative cooperation*.

*Social dialogue*, in terms of exchange of information and cooperation between employers associations and trade unions.

**Chapter 1** refers to the action of social partners for the transnational protection of posted workers in the construction industry. The focus is on transnational bilateral agreements, conventions and principles of reciprocity between Building Funds.

- **Chapter 2** presents the Counselling Office for Posted Workers by Arbeit und Leben e.V. Berlin. The Office, established in cooperation with the German Confederation of Trade Unions (DGB) and the Point of Single Contact of Berlin, is the first project specialised on issues arising from the posting of workers in Germany and it is well-known with its expertise all over Europe.
- **Chapter 3** sums up a case of collective action carried out by trade unions at national and transnational level on the labour contract and the legal position of posted workers employed in a low cost airline. It shows that wage dumping and a race to the bottom concerning labour rights can be successfully hindered.
- **Chapter 4** shortly sums up the experience of the Belgian project partner with the aviation transport sector, pointing out the possibilities of dealing with legal problems connected with the posting of workers for the purpose of temporary work.
- **Chapter 5** focus on the exchange of information and cooperation among control authorities, analyzed in terms of implementation of the Internal Market Information System (IMI). The national implementation of transnational communication regulations through the IMI system is presented by the Romanian Labour Inspection and the Italian Ministry of Labour, includes concrete numbers and figures and stresses practical problems concerning the handling of urgent requests.

## 1. THE SOCIAL PARTNERS FOR THE TRANSNATIONAL PROTECTION OF POSTED WORKERS IN THE CONSTRUCTION INDUSTRY

**Author: Francesco Lauria (CISL Nazionale, Italy)**

Following the judgments of the European Commission on the Viking, Laval, Ruffert and Luxembourg cases, a broad debate has developed also in Italy on the protection of the rights of posted workers and their implications.

This mainly juridical and administrative debate that accompanied the negotiation phases of the new "Enforcement" directive (Directive 2014/67/EU) on the posting of workers has been complemented by a parallel action of the social partners and, in particular, of the Unions.

The issue is quite complex. When it comes to the posting of workers, we are often faced with a classic "conflict of rights" in which the right to collective action in support of an equal treatment of workers is opposed to the principles of free movement.

Unfortunately, the dividing line between the labour market and the service sector is often very flimsy, especially if considered from the concerned workers' perspective and the increasingly strong "dematerialisation" processes occurring in a number of industries.

The construction industry is one of the production areas in which the posting of workers is used the most, but so is the undeclared and irregular work. It is also the industry with the highest number of fatal accidents at work, caused, most of the time, by irregular working conditions.

In the various Member States, the social partners have often committed themselves to fighting social dumping, which is also synonymous of irregularity and lack of security for workers.

Social dumping, in relation to the posting of workers, may put at risk the collective bargaining at national level and decades-old achievements that were believed well established, though subject to a system of industrial relations that varies from country to country within the EU-28.

For decades, the Italian trade unions representing construction workers have employed many tools to fight social dumping and undeclared work, often in bilateral actions involving also the business sector and the institutions.

Among these tools, we list the "DURC" (statement of correct fulfilment of welfare contribution obligations), which facilitates the dialogue between public organisations and social partners, through cross-checks, and aims at achieving a regular situation of welfare contributions for construction workers, with a consequently regular situation in health and safety obligations.

The studies promoted to introduce "fairness indexes" measuring the adequacy of the human resources employed and the extent of work foreseen in the contract, or the "joint and several liability" stating the responsibility of the "general contractor" towards all employees of the contracting company, are just some other examples.

These experiences led the Italian trade unions to promote a series of European and transnational agreements ensuring the mobility of workers and a fair competition between companies.

The agreements developed, from 2008, by bilateral organisations in the construction industry in Italy, Germany, Austria and France for the mutual recognition of their role in monitoring the compliance with contractual regulations and laws are a very important example of the union activity.

They demonstrate the need for the creation of a European system of bilateral bodies to certify the correct behaviour of businesses in the country of origin, in order to assure to posted workers the correct retribution in the countries of employment, avoiding overlapping and duplication of costs.

These agreements were established precisely when it became clear that the original regulatory objectives of Directive 96/71/EC, in its attempt to combine the auspicated removal of barriers within Europe and the needs of competing national schemes, were strongly questioned.

Indeed, the divergence between national laws on industrial relations raised a regulatory dilemma, when a "neutral" way was sought to define the principles of equal treatment and free and fair competition. Conflicts of interests between origin and host countries with different labour costs prevailed, and were worsened, since 2004, by the enlargement of the European Union.

The crisis confused even more the situation and sometimes provided astonishing examples (such as the case of the Iren company involving Italian and Portuguese workers posted to an oil platform in the North of England in 2009).

The European social partners representing the construction sector played a key role in influencing the decision-making process in the early 90s, issuing two important joint statements.

The one issued in 1993 focused on the general principles of equal treatment and the fight against a distortion of competition as a result of social dumping. The second joint statement advised countries experiencing frequent exchanges of workforce to establish bilateral agreements as a way to solve their many practical problems. Unions have since then continued their activities in this field.

Building on a research project on the practical implementation of the "Directive on the posting of workers", the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC) formulated a common position, stressing that all companies that post workers abroad must comply with the Directive. The observance of this principle can be verified only if, at the time of the posting and for all its duration, there is an employment relationship between the posting undertaking and the concerned worker. To monitor and verify the legality of the posting, the existence of an employment contract must be expressly stated when any transposition is attempted into national law. In addition, the two federations required the introduction of measures against the use of "letterbox" entities, i.e. companies that never performed substantial activities in their country of origin, and were created exclusively to provide "services" in the form of hiring-out of workers.

The social partners in the construction industry have also suggested to link social and wage dumping in each individual EU Member State with the fact that the existing price/wage structure in some vulnerable regions can be jeopardized by even a relatively small number of companies offering services



at very lower prices, triggering a downward spiral. Consequently, they mobilized against the country of origin principle established by the proposed Directive on services in 2004 (the so-called "Bolkestein Directive").

The social partners in the construction industry are faced with essentially two critical issues:

- to reaffirm the general principle of respect of the economic and contractual conditions laid down by the State in which work is carried out, in order to avoid any form social dumping, disruption of markets and unfair competition between companies;
- and to assess the procedures through which this general principle can be administered for undertakings from countries with similar social and contractual conditions, thus avoiding bureaucracy and duplication of costs, with no real benefits to posted workers.

These two important issues were addressed by transnational bilateral agreements, conventions and principles of reciprocity between Building Funds.

The prior communication of the name of the worker's undertaking and place of work, together with a detailed list of posted workers, are important obligations to simplify the implementation of the Convention by the Building Funds, who received and, consequently, sent these communications exclusively through the national systems agreed in the examined agreements.

But social dialogue is not restricted to transnational and European issues.

At international level, through the support of the BWI - Building and Wood International, international framework agreements were negotiated with multinational companies, based primarily on the fundamental principles of human rights and extensible to many issues related to the transnational posting of workers as discussed in official documents such as the ILO Declaration on Fundamental Principles and Rights at Work or the OECD Guidelines on Multinational Enterprises, revised and expanded in 2011.

Also based on recent multilateral treaties between the European Union and the United States (TTIP, Transatlantic Trade and Investment Partnership), while agreeing on the freedom of companies in the provision of services, social partners must avoid to legalize, even implicitly, social dumping.

Companies must respect workers' rights and the key principles of collective bargaining, even in the case of posted workers and their specific implications. Workers' rights and protections must be globalised. In so doing, democracy and freedom will be guaranteed to all, as no legislative intervention can be fully effective without a constant and established discussion with social partners at all levels.

## 2. SERVICES PROVIDED FROM ARBEIT UND LEBEN .V. BERLIN: A PRACTICE OF COUNSELLING TO POSTED WORKERS<sup>1</sup>

**Author: Doritt Komitowski (Arbeit und Leben e.V. Berlin, Germany).**

Arbeit und Leben e.V. Berlin is a non-governmental organisation affiliated to the trade unions working in the field of political education<sup>2</sup> and supported by the German Trade Union Confederation (DGB). Both are responsible for the Counselling Office for posted workers in Berlin, which will be presented below as a meaningful practice of social dialogue and inter-institutional cooperation for the enforcement of posting legislation.

The Counselling office for Posted Workers was opened in May 2010 and has offered its guidance since August 2010. The counselling office was initially established as a pilot project against the background of the Directive on Services in the internal market 2006/123/EC and its implementation in Germany. Since the Directive regulates the establishment of so-called Points of Single Contact to advise companies that wish to operate in Germany, (posted) workers who work in Germany during the course of implementation of the Directive should also have access to free consultation. The project is based on a cooperation agreement with the Point of Single Contact Berlin, ensuring that fully comprehensive advice to employers and workers from abroad can be secured. The counselling office is financed by the Berlin Senate, the provider is the association “Working and Living Berlin”(Arbeit und Leben Berlin e.V.).

Counselling is provided in a total of six languages, including Polish, Bulgarian, Romanian and Russian. Target groups are posted employees, workers using their freedom of movement in the EU, the so-called "bogus self-employed" as well as employees with unclear work status. Information and support is provided on all aspects of posted work, including employment contracts, wages, health insurance, and recognition of foreign qualifications, coordination of social systems in Europe, contractual arrangements for temporary work and the employment of highly skilled workers.

The office focuses on problems such as legal conflicts in respect to employment in several EU countries, wage fraud, exploitation of labour, welfare fraud, false self-employment, unlawful dismissal, violations of the Working Hours Act, covert leasing of temporary workers, posting via shell companies, work without a work permit and lack of health insurance.

The project is currently renewed on an annual basis and the cooperation with the Point of Single Contact continues to expand. 1,000 people annually in approximately 400 cases receive advice and support. Advice seekers are mainly from Poland, Romania, Bulgaria, Moldova, Hungary and increasingly from Spain, Greece and Portugal. Additionally, more and more companies and employers from abroad contact the office to seek advice about the legal requirements in Germany prior to sending their workers. The Counselling Office answers questions concerning original rights and obligations of employees and refers employer-and business-specific questions in a further step to the project partner Point of Single Contact Berlin.

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<sup>1</sup>National Report Germany, Project Enfoster September 2014

<sup>2</sup> <http://www.berlin.arbeitundleben.de/>

In many cases the counsellors get in direct contact with the employers and try to help solving the problem addressed by the advice seekers. The counsellors support the employees in identifying the subcontracting chain in order to apply the prime contractor/chain liability in cases when the direct employer is not able or willing to pay the wages. In many cases the counselling office is supported by the trade unions and/or media seeking an effective way to fight against wage fraud and bogus self-employment. In this context the project is building a bridge between the migrant workers and the trade unions. Through the contact to the Counselling office and German Social Partners migrant workers find their way to the trade unions looking for long-term perspectives and integration in Germany.

It is worthwhile to mention two examples as positive practices within the project of the Counselling office.

First example: in December 2011 40 Hungarian electrician workers contacted the Counselling office looking for help and support. They had been working on a big construction site in Berlin (new Berlin airport) for months living in extraordinary inhuman conditions in former military barracks nearby Berlin. They hadn't been paid and left without accommodation just before Christmas. The Hungarian Embassy sent them to the Counselling office where in a first step the subcontracting chain was identified. Due to the intervention of the Counselling office one of the subcontractors in the chain paid 300 EUR per person so the workers were able to cover the travelling costs and return to their families. In a next step all of them became members of the responsible metal workers trade union (IG Metall) and the latter took over the negotiations with the prime contractors and filed an action against the unlawful dismissal of the workers. As the direct contractor registered insolvency the Federal Labour Agency paid in the end three monthly wages per person. The trade union supported the work of the Counselling office for two years in order to solve this case.

Second example: in another case the Counselling office was contacted by 52 polish workers who worked on a construction site run by a municipal organisation. They were paid only 190 EUR per week, the direct employer turned out to be bogus, and a so-called post box company in Poland who posted the workers to Germany and afterwards disappeared. The Counselling office contacted again the trade union (IG BAU) who organised a protest of the workers in front of the construction site and took over the negotiations with the prime contractor. The Counselling office and IG BAU succeeded in finding a broad support from the local population who supported the workers with food during the protest. After a week of hard negotiations the prime contractor agreed to pay 73.000 EUR wages for the workers.

These are two cases which provide good practice example characteristic for the everyday work of the Counselling office. Often the Counselling office is contacted directly by foreign companies who want to post workers to Germany. The counsellors advise in all questions of labour and social German - and European Law and redirect the advice seekers to the Single Point of Contact concerning questions of trade law and origin company issues.

A further focus of the Counselling office is prevention, through the dissemination of education and information prior to the posting, ideally in the country of origin of the employees.

The project works in close cooperation with the Embassies e.g. of Bulgaria, Romania, Hungary and Spain in Germany and with the Embassies of Germany in the sending countries. There migrant workers who are preparing to leave to work in Germany receive information about the situation of the German labour market and the contact of the Counselling office in Berlin. In some cases the office is contacted by workers who have been working in Germany, but are already back in their country and need support in solving problems with the former employers in Germany.

The Counselling Office has been involved in the creation of brochures and information booklets about posting of workers to Germany and the first steps on the German labour market. These brochures are also disseminated by the Embassies in the country of origin.

Finally, the office participates in external expert assessments, conferences and professional groups on work posting and migration. The counsellors are invited as experts in public hearings, hearings in the Federal and local parliament/senates for example concerning the new Directive for seasonal workers or problems of/with free movement of workers in practice.

### 3. HOW THE SOCIAL DIALOGUE HAS SOLVED A CRITICAL CASE FOR WORKERS IN THE AIR TRANSPORT SECTOR

**Author: Monika Fijarczyk (Arbeit und Leben e.V. Berlin, Germany).**

Since 2004 a low cost airline is offering flights to and from Germany. When the company established home bases in Germany, it also included Berlin Brandenburg.

Despite the factual establishment in Germany, the contractual agreement with pilots and other members of flight and cabin crew stated a UK airport as workplace. Hence the rule of British labour and social law had been contractually established for the staff entailing a number of approximately 350 workers. Subsequently, the workers were posted to Germany and through this legal contractual setting no social and tax charges had to be paid in Germany.

These conditions lasted several years. According to the Posted Workers Directive (PWD), the posting of workers is temporary, however, neither the German nor in European law specifically defines the duration of the period, and the point in time after which it is no longer temporary but permanent.

The company used this legal gap and, instead of regularly employing the labour in the country in which they established it, choose posting as a bypass mechanism. In this matter, the staff of the company has asked for advice from the Counselling Office for Posted Workers in Berlin. Due to the application of UK law the employees were experiencing various disadvantages, such as the lack of adequate health insurance and access to social benefits.

In 2009, the workers have approached the responsible “Ver.di” (“United Services Union”) Berlin Brandenburg in seek for assistance. The primary goal of the trade union was the establishment of a works’ council in order to interfere into the employment policy of the company.

The company initially wanted to prevent the works council elections at the location Berlin. According to the trade union, the company's attorney asked the orderly defined electoral board to lay down the mandate. Hence, the company denied the legitimate election of the works council, while perceived all the requirements as fulfilled.

The management of the company represented the legal opinion that the staff at Berlin airport was employed through an English contract with a British employer and, therefore by law, the “Ver.di” was not responsible for the staff but had to be represented by a British trade union.

However, the nationality of employment contracts is not decisive for council elections. It is more important that the employees worked from Germany and that the company had a base in Berlin-Schönefeld-thus the necessary preconditions for council elections were met. The “Ver.di” signed an agreement to cooperate with the British trade union Unite in collective bargaining for employees in Germany and informed the company about it. In consequence, the “Ver.di” was fully authorized to represent the workers.

Since 01.05.2010 the regulation on the coordination of social security law is laid down in Regulation 883/2004. In contrast to the old law (EEA Regulation 1408/71) it does not entail specific regulations for workers in international transport.

This often meant that flight and cabin crewmembers were subject to the social security system of the country in the airline had its headquarters, even if the workers had little reference to these countries.

With EC Regulation 465/2012 coming into effect, the legal situation of those affected could be significantly improved.

Based on the new regulations, flight and cabin crew member are now subject to the social security legislation of their own country of residence i.e. their home base. The term "home base" is defined in the EU Regulation 3922/91 as the place where the crew member's regular service begins and ends and where the freight carrier does provide for accommodation.

For example, a pilot who works for an airline in England, but who lives in Germany and has its home base in Germany, is not subject to the British social legislation but the German in accordance with this Regulation. This new Regulation 465/2012 redefines the applicable law of a certain Member State (the right related to “home base”) for flying personnel.

Transitory provisions based on in Art. 87a of the EC Regulation 883 /2004 have been determined for the flying personnel covered under provisions prior to the new Regulation 465/2012. For this group, legal provisions should apply if the situation remained unchanged but in any case no longer than ten years from the entry into force of Regulation 465/2012.

These persons were entitled to request that the transitional period no longer applies to them. The application must be submitted to the responsible institution of the Member State: in Germany, the German joint health insurance abroad (Deutsche Verbindungsstelle Krankenkasse Ausland DVKA).

With the support of “Ver.di” approximately 350 employees of the company now have submitted their requests for the application of German social security law at the DVKA and were approved.

The trade unions successfully argued with the stronger connection to Germany and necessary application of German labour law.

The workers had already positively voted in a ballot for strike but waived due to a new discussion offer from the company Board. The negotiations between the company and the “Ver.di” ran for more than ten months with two warn strikes.

After months of bargaining, the employees of the British low budget airline and the Executive Board reached an agreement: a collective agreement under German law was adopted and regulations on part-timework, retirement benefits or leave of absence in the company we established. In addition, reasonable wage increases above inflation were achieved.

In addition the staff also received employment contracts based on the rule of German law.

## 4. CSC-TRANSCOM DENOUNCES SOCIAL DUMPING IN AIRPORTS

**Author: Roberto Parrillo (CSC Transcom, Belgium)**

For some years now, CSC-Transcom has been fighting hard against unfair competition and social dumping. It is engaged in a long-haul battle demanding vigilance all the time. All the more so as the deregulation seen over the last few years in the transport and construction sectors is now infiltrating other sectors, such as airport logistics.

Yannick Docquier, CSC-Transcom national union representative stated that,

*“in the course of June, our delegates saw ground handling companies at the airports in Liege and Brussels making use of Romanian workers under the working and pay conditions of their country of origin. We openly denounced this competition which is being carried out on the backs of workers, resolutely calling on those in charge at Liege Airport to put a stop to these practices which involve delegating part of the work to a company which in turn awards the work to a subcontractor using staff with East European contracts.*”

Let it be clear: CSC Transcom has no intention of excluding anyone from the right to work. But it also wants to see everyone benefiting from compliance with Belgian contractual requirements or at least from scrupulous respect of the PWD.

Yannick Docquier went on to say that *“in the case at hand, our intervention was successful, with the workers there now having Belgian contracts. However, we must remain on our toes all the time.”*

Apart from this vigilance, CSC is continuing to lobby in favour of harmonising social legislation in Europe. This is indispensable if one wants to prevent a price war which will end by bringing such major sectors as construction, transport or logistics to their knees.

### *The reaction of the ground handling company:*

“We, the undersigned, realize that the temporary use of Romanian workers within our company has caused a great stir among the workers at the Liege site.

...

To avoid any industrial dispute, we have therefore decided to desist from using Romanian workers, with immediate effect.

We have already hired two workers recruited from the stock of temporary workers. These workers are already trained in the operations and have been hired via a temp agency.

Further workers are going to be progressively hired to replace the Romanian workers and will also be trained by ....

We thus hope to have demonstrated that our company ..., despite the extremely hard times we are going through, has shown civic spirit in its effort to calm and improve the social climate. In return, we hope that the unions will help us in this new round of hiring, and also will show the same vigilance vis-à-vis our competitors.

Yours sincerely”.

### *Concluding observations*

Though we can be glad of the successful outcome of this case, the world is not that simple. There is a great risk now of the company in question losing a number of contracts associated with cleaning and de-icing planes at Zavetem, Charleroi and Liege airports.

Fair competition presupposes that all companies comply with the same rules. However, this might not be the case with the competing companies. It seems that a number of contracts have been lost by this company on account of the fact that the competing companies are hiring staff from other EU Member States on Belgian contracts for 20 hours a week, but that these are in reality working 40 hours or more a week, despite only being paid for 20 hours.

A few suggestions:

It is an absolute 'must' to have labour law and all Belgian and European regulations complied with. But this is not enough to stamp out social dumping and unfair competition. As a consequence, we need to tighten law enforcement at criminal level and to step up sanctions so that they act as a deterrent.

## 5. ADMINISTRATIVE COOPERATION ON POSTING OF WORKERS THROUGH THE IMI SYSTEM: THE EXPERIENCE OF THE ROMANIAN LABOUR INSPECTION AND OF THE ITALIAN MINISTRY OF LABOUR

*Authors: Iolanda Guttadauro (Italian Ministry of Labour and Social Policies, DG for Policies and Services for Employment and Training), Simona Iuliana NEACȘU and Cătălin ȚACU (Romanian Labour Inspection).*

### 5.1. Presentation of the IMI system

Article 4 of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (PWD) provides for the designation of one or more liaison offices in each Member State to enable cooperation as concerns supervising labour conditions and the hiring of posted workers.

The information exchange with other MS authorities is done via the Internal Market Information System (IMI).

This chapter sums up some overall information about the use of IMI, and some experiences collected in Italy and Romania. Some suggestions for improvement and reflections about the future use of the System are also provided at the end of the chapter.

In Italy, according to article 5 of Decree 25 February 2000, no. 72 on the “Implementation of Directive 96/71/EC on the posting of workers in the framework of the provision of services”, the General Direction of Active Policies, Employment Services and Training is the liaison office for Italy. On May 6, 2011, this General Direction was registered as “LIMIC” – National Coordinator for Italy in the legislation sector of the posting of workers according to Directive 96/71/EC. Moreover, according to Directive 96/71/EC and to Decree 25 February 2000, no. 7, all the Italian Territorial Labour Inspectorates (in Italian: “Direzioni Territoriali del Lavoro”) have been registered in the IMI system as “Competent Authorities”.

In Romania, according to Article 12 of the Law no. 344/2006 *on the posting of employees in the framework of the transnational provision of services*, the *Labour Inspection* is the public authority functioning as liaison office and performing the exchange of information with competent bodies in EU Member States or in the European Economic Area.

The *Romanian Liaison Office* is organised only at the central level of the *Labour Inspection*. The *Labour Inspection* has designated five labour inspectors (civil servants) as *users* of the IMI system.

The EU Directive 2014/67, the so called “Enforcement Directive” at para. 21 identifies the IMI system (Internal Market Information) as a key tool to ensure administrative cooperation between Member States in the context of the transnational posting of workers contained in Council Directive 96/71/ EC.

The IMI is a flexible and free software available to users via the Internet, created by the European Commission in collaboration with Member States, in order to simplify and facilitate administrative cooperation and the exchange of information across borders, providing, in addition, the respect of the processing of personal data in accordance with Directive 95/46/ EC and the principles of proportionality and necessity.

At the EU level, in addition to the ambit of posting, the IMI is used in other legal areas, such as: recognition of professional qualifications, services, Transport of Euro cash, SOLVIT, Patient Rights and



Electronic Commerce. The system is mainly financed by the European Commission programmes "IDABC" and "ISA" and is used by the authorities of the 28 EU Member States as well as those of Liechtenstein, Norway and Iceland (EEA).

In accordance with Directive 96/71/EC and the national implementing legislation, each Member State was required to register its competent authorities (central government, local authorities and bodies) in the IMI System.

As concerns the posting of workers, most of the questions formulated through the IMI System concern: individual work contracts for posted workers, the payment of a minimum wage, the payment of the posting allowance, working hours, rest periods, the payment of overtime and the payment of social securities.

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

Exchanges take place with competent authorities of other Member States, which are also registered in the IMI system. Thanks to IMI, the exchange of information is today faster and more effective than before, because it allows to easily find the competent authority in another Member State, to communicate with it via a standard list of questions and answers translated into all EU languages, and finally, to follow the progress of the request through a traceability process.

The following list sums up the main stages that an IMI request goes through:

- identify the partner authority in another Member State;
- create a request by selecting standard questions in your own language;
- send the request to the partner authority;
- the partner authority receives and accepts the request in its own language;
- the partner authority replies to the request in its own language;
- receive the reply from the partner authority in your own language;
- ask for additional information;
- accept and close the request.

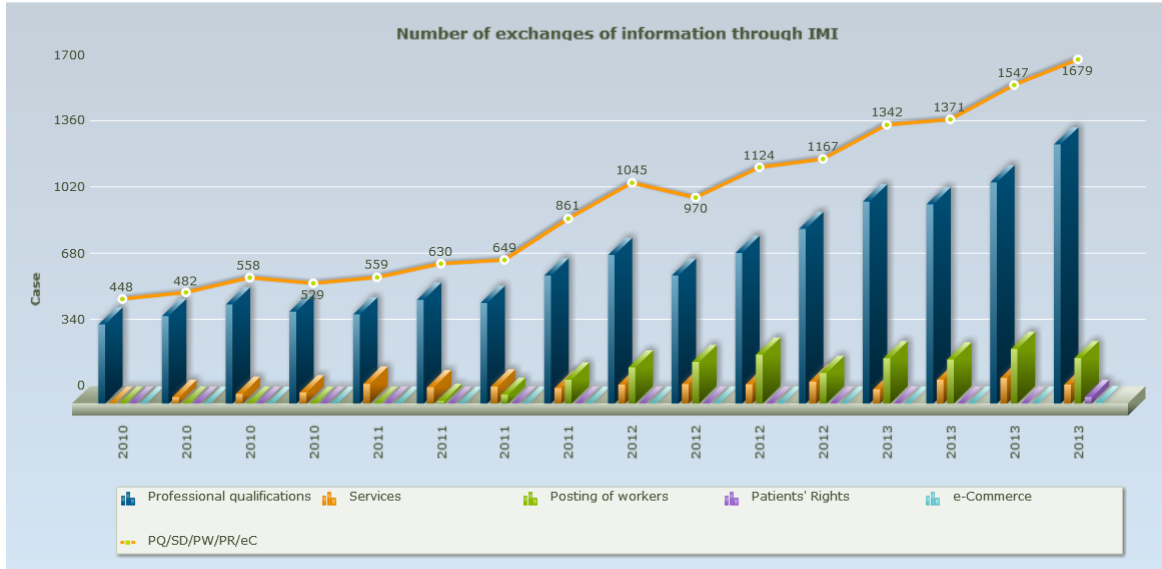
Some interesting data about the use of IMI, provided by European Commission<sup>3</sup> are summed up below.

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<sup>3</sup>[http://ec.europa.eu/internal\\_market/imi-net/imi-helpdesk@ec.europa.eu](http://ec.europa.eu/internal_market/imi-net/imi-helpdesk@ec.europa.eu)

Information exchanges in IMI

TOP ▲

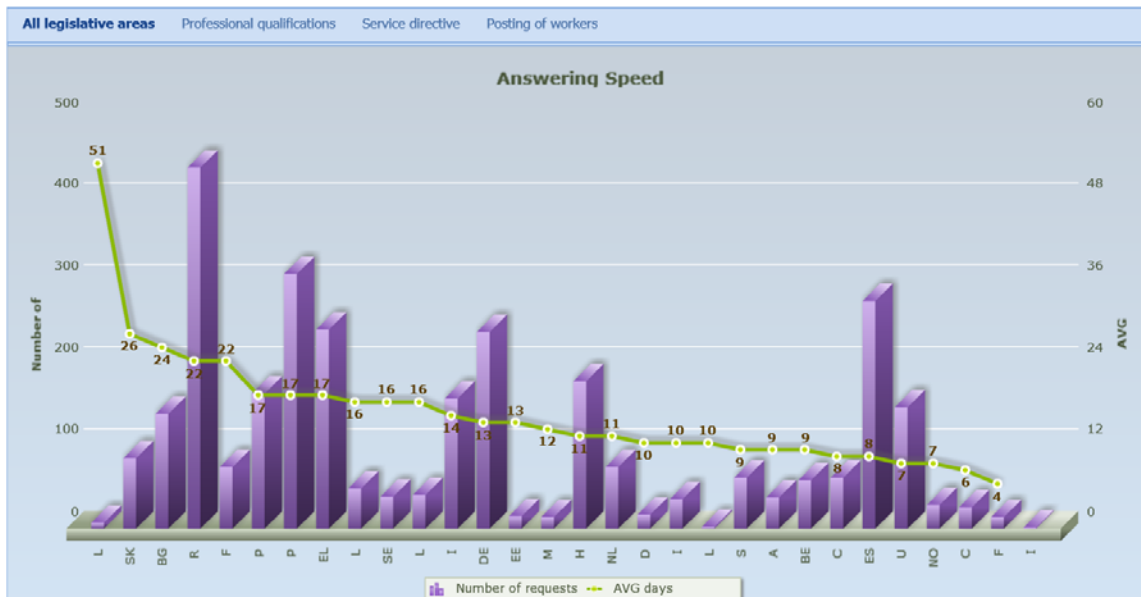


(Source: [http://ec.europa.eu/internal\\_market/imi-net/statistics/index\\_it.htm](http://ec.europa.eu/internal_market/imi-net/statistics/index_it.htm))

Functioning of the network in Member States

TOP ▲

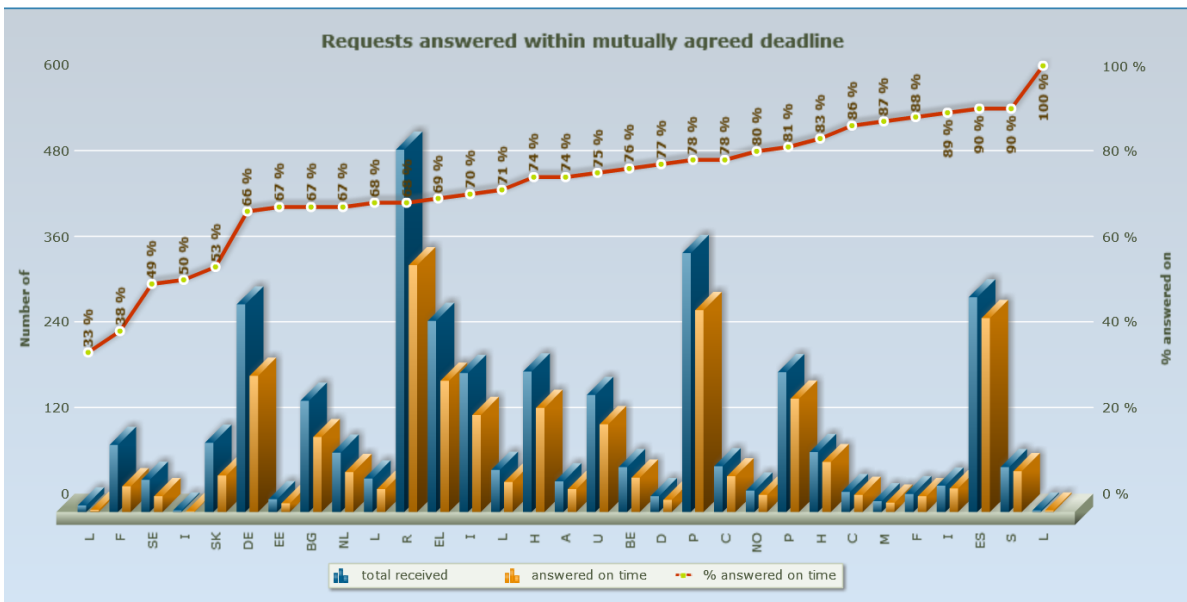
Reporting period: 01/01/2014 - 30/06/2014



(Source: [http://ec.europa.eu/internal\\_market/imi-net/statistics/index\\_it.htm](http://ec.europa.eu/internal_market/imi-net/statistics/index_it.htm))



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## 5.2 Experiences in Italy

A number of situations encountered by labour inspectors during their inspections gave rise to the necessity of dealing with the authorities of other Member States to verify the accuracy of the posting and the actual existence of the posting company: following the use of IMI, in some cases the existence of a regular hiring in a posting Member State has been confirmed, but not the existence of a posting procedure (i.e. the existence of a posting communication in the country of origin); other times both the existence of a regular hiring and a regular posting procedure have been confirmed. In both

hypotheses, thanks to the information acquired, labour inspectors were able to solve investigations and impose penalties.

As an example, the following two specific cases have been solved thanks to the help of the IMI system. The first case concerns the competent authority of Sassari that noted the high number of cases of award of work in the construction industry by Italian companies to other Member States' companies, often of Romanian nationality. Under those contracts, many companies post their workers in Italy to carry out the contract. In the course of inspections on construction sites, the presence of Romanian companies operating with Romanian workers has been found. Once taken the ID information of these workers, however, inspectors were not able to have proof of their regular employment in Romania, and also the "alleged" employer (whose status as legal representative of the Romanian company was not certain) had provided contradictory information that did not permit the reconstruction of the nature of the relationship between the Romanian company and these workers. Subsequently, the Romanian company did not provide feedback to the request for documentation.

There were some doubts about the regularity of the working relationship between the Romanian workers and the company.

A request for prompting to prove whether certain workers were regularly employed in Romania and to prove a legitimate posting of the same in Italy was sent through the IMI System. The competent authority of the other Member State was easily found, by inserting into the search engine only the name of the State where the posting company had its registered office, a period of thirty days was selected for the reply and pre-translated questions were also selected in order to answer at the best the inspection needs and to get documents (including the list of the IDs of workers, in order to know whether between the workers and the Romanian company there was a regular employment relationship and, in the positive, whether this had to be considered as posting).

The Romanian authorities answered to the request, stating that upon the examination of their databases and documentation it appeared with certainty that among the workers listed and the Romanian company there was no regular employment relationship and that there was, therefore, no right to a legitimate posting to Italy.

The response to the request was provided within the period of thirty days, as indicated at the time of the creation of the request by the competent authority of Sassari and it was decided to close the request.

Based on the information acquired (lack of regular employment in Romania) the evaluation on whether to fully implement the provisions of the Italian law and to require the regularization by the Romanian company of the workers identified during the Inspections is still under discussion, as the application of the maxi-penalty for illegal employment and related penalties and recoveries of contribution in Italy is being discussed.

Another possibility under discussion would be to consider as irrelevant the presence of the alleged employer and to consider the Romanian workers as direct employees of any pseudo-Italian client and therefore charge the latter with the maxi-penalty for illegal employment and recovery of contributions in Italy as well as to compulsory submit this Italian client qualified as substantial employer to perform all foreseen medical examinations. In any case, for the notification of the administrative offense, but also for the criminal charges (because, as workers are employed in construction sites they had to undergo medical examinations in accordance with the laws in force in Italy in the field of occupational health and safety at work) it was necessary to identify the legal representative of the company and

such information, as the company was Romanian, could not be obtained from Italian databases. A new request was, therefore, sent through the IMI system in order to know the details of the legal representative of the company, his personal data and residence.

Also this information was provided timely by the Romanian competent authorities through the IMI System, in view of an administrative cooperation between Member States, and this has given power to notify the charges of both administrative and criminal offense.

The second case reported by the competent authority of Turin focused on the findings against a body shop located in Turin, which employed a Polish worker, who had claimed to have been posted by a company established in Poland, but did not appear to be in possession of the A1 model, attesting to the legality of the posting. To get this information, a question was sent through the IMI system. A period of 20 days was fixed for the answer. The questions relating to the company concerned its activity and its registered office.

The competent authority of Poland promptly answered within the time specified confirming the actual existence of that company and communicating data relating to its legal and administrative headquarters, the number of registration in the Registrar of Trade, its activities, as well as the required data on the worker (contract number, job title and period of employment). The request was fulfilled and the competent Italian authorities closed it.

In Italy, the number of requests<sup>4</sup> received in the sector of the posting of workers have been 79, and those sent have been 159. In particular, most of these requests were sent to Romania (73), followed by Slovenia (47), Poland (6) and Germany (5).

The Competent Authorities who dealt with the requests are the Labour inspectorate of Trieste (53 requests), and those of Trento (24 requests), Turin (13), Sassari (10).

### 5.3. Experiences in Romania

The Romanian Labour Inspection (“Inspekția Muncii”) is an institution subordinated to the Ministry of Labour, Family, Social Protection and Elderly having the following responsibilities regarding the posting of workers:

- control the posting situations in terms of labour relations and occupational health and safety (workers posted to and from Romania);
- control the operation of temporary work agencies;
- receive written communications from employers - service providers - of other European Union (EU) member states (MS) regarding the posting of workers to Romania;
- act as liaison office - exchange of information with the competent authorities concerning the posting of workers;
- manage the general register of employees in electronic format;
- registration of employer level collective agreements and conciliation of collective labour conflicts.

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<sup>4</sup>Updated December 10th, 2014.

The flow of the IMI requests inside the Romanian Labour Inspection is summed up as follows.

1. Receiving the request through IMI system by IMI users
  - administrative procedures for registration and allocation of the request
  - early checking by managing unit of Labour Inspection regarding the employer
  - identity and registered office address (county - TLI area of competence)
  - elaboration, signing and sending the address to the competent TLI.
2. Sending the request to the TLI
3. Receiving and registering the request by TLI
  - administrative procedures for registration and allocation of the request
  - checking previous inspections (when performing mandatory demands).
4. The labour inspector receiving the paper shall
  - consult the information from employee register, Trade Register, inspection background.
5. The Labour inspector shall contact the employer by phone
  - the legal representative (the owner) is not in town (he is in the country where the workers are posted)
  - for the time being, the company doesn't have any construction site open in Romania
  - he will send the accountant with the papers to the inspectorate.
6. The Company accountant comes to TLI with the documents requested
  - the labour inspector does the necessary checking and evaluation
  - he shall draft the inspection documents
  - he shall made an appointment with the legal representative to discuss and sign the control papers.
7. Conclusion of the control and sanction documents
  - elaboration, drafting and signing of the documents.
8. Sending the answer of the TLI to the Labour Inspection
  - checking and refining the response by IMI representative within managing unit of Labour Inspection.
9. Sending the answer to the requesting authority through IMI.

*The Labour Inspection* is the only authority in the IMI ensuring the administrative cooperation on the posting of workers.

The designated users receive requests for information through IMI at the central level.

They transmit the requests to the Territorial Labour Inspectorates (TLI - organised in every county and in the capital - *Bucharest*) to obtain the information requested and provide an answer to the requesting authority.

Once obtained the information, the TLI sends it to IMI users, who respond to the requesting authority through IMI.

The main problems related to the exchange of information are summed up here below.

- Sometimes IMI users have difficulty in identifying the competent authorities to exchange information requests - some authorities do not have their competencies clearly defined in the IMI. Machine translation can only offer a rough idea of the translated text. The translation tool of the IMI system works with predefined and pre-translated questions and answers. However, for more complex cases it is necessary that the requesting authority provides further details in *free text*. For legal purposes, it is necessary to seek an official translation, depending on the context.
- Other Romanian competent authorities are still missing within the IMI (posting of workers module).
- There are requests, which contain a large number of questions and require a longer time to be answered, exceeding the expected 25 days.
- IMI users should provide a partial response to a request and then complete it after getting the necessary information.
- The IMI system does not take into account situations where two competent authorities who are in contact agree to extend the response deadline. (*In this respect, it would be preferable for the system to allow a modification of the initially agreed deadline.*)

#### 5.4. Reflections by Romania and Italy on how to improve the exchange of information through IMI

The following proposals have been shared between the Italian and Romanian team within the Enfoster Project (December 2014):

1. Improving the predefined and pre-translated questions. Some questions should be deleted and new ones should be added (for instance, questions related to health and safety at work).
2. Translation should be enhanced; IMI users should try, whenever possible, to use a language understood by the authority they are contacting.
3. Introduction of other National competent authorities in IMI. For instance, the *Ministry of Finance*, the *National House of Public Pensions*, the *State Inspectorate for Road Transport Control* could be taken into account. In Italy, INAIL (“Istituto nazionale per assicurazione contro gli infortuni” – the National institute for insurances against occupational accidents) and INPS (“Istituto Nazionale della Previdenza Sociale” – the National Institute for social security) that are competent, respectively, for the insurance of workers and social security.
4. If an IMI user is not competent to reply to a request or some questions in a request, she/he shall be able to forward it to the authority that is dealing with the issue.

5. To permanently provide training to the users involved in this administrative cooperation through IMI.

The development of the transnational posting of workers increased the use of IMI, as a trend observed in the period 2011-2014. The adoption of measures to strengthen administrative cooperation contained in Directive 2014/67 foreshadows an exponential increase in the requests for information addressed to Labour Inspectorates. Different competences of MS labour inspection authorities involve complex relationships of communication and transfer of information on the posting of workers.

In order to analyze the needs of cooperation and the ambits in which those are manifested more intensely, the Romanian Labour Inspection conducted a comparison of inquiries addressed with the size of posting workers phenomenon for each MS.

Data on administrative cooperation are those resulting from inquiries through the IMI. Data on the number of posted workers is based on the only relevant and accessible information regarding *A1 portable documents* issued by the *National House of Public Pensions*.

The comparison shows that the number of posted workers in a Member State does not influence the number of requests from the authorities of that State in relation to other MS. The national legal framework with the national character of the organization, powers and operating policies of the labour inspection authorities of the MS, determine the frequency, intensity and complexity of control situations about the posting of workers and the information requests through IMI.

In 2013, the Romanian Labour Inspection sent 13 requests via the IMI system to Hungary (2), Germany (2), France (2), Austria (1), Lithuania (1), Spain (1), Bulgaria (1), Portugal (1), Netherlands (1) and Sweden (1).

In 2014, the Romanian Labour Inspection sent 15 requests via the IMI system to Hungary (4), France (2), Germany (2), Austria (2), Belgium (1), Poland (1), Netherlands (1), Slovakia (1) and Italy (1).

Requests for assistance from competent authorities in another MS, can be followed by: easy checks, fast inspections or hard investigations.

Considering the number and the complexity of the IMI requests, it is a crucial responsibility to decide when to act and which action has to be taken.

In this managerial decision process, a number of factors must be taken into account:

- time management and strategic priorities;
- human resources and logistics;
- inspection plan and frequency of controls;
- responsibility for fair treatment within the control action (especially related to employer rights).